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UNITED STATES REPORTS

VOLUME 453

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1980

JUNE 25 THROUGH OCTOBER 2, 1981

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

END OF TERM

HENRY C. LIND

REPORTER OF DECISIONS

UNITED STATES
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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.[1]
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.
SANDRA DAY O'CONNOR, Associate Justice.[2]

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, Attorney General.
WADE H. McCREE, Jr., Solicitor General.[3]
REX E. LEE, Solicitor General.[4]
ALEXANDER L. STEVAS, Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

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*For notes, see p. IV.

NOTES

[1] JUSTICE STEWART retired effective July 3, 1981. See also *post,* p. VII.

[2] THE HONORABLE SANDRA DAY O'CONNOR, of Arizona, formerly a Judge of the Arizona Court of Appeals, was nominated by President Reagan on July 7, 1981, to be an Associate Justice of this Court; the nomination was confirmed by the Senate on September 21, 1981; she was commissioned on September 22, 1981; and she took the oaths and her seat on September 25, 1981. See also *post,* p. XI.

[3] Solicitor General McCree resigned effective June 30, 1981, on which date Deputy Solicitor General Lawrence G. Wallace became Acting Solicitor General.

[4] The Honorable Rex E. Lee, of Utah, was nominated by President Reagan on June 11, 1981, to be Solicitor General; the nomination was confirmed by the Senate on July 31, 1981; he was commissioned on August 1, 1981, and took the oath of office on August 6, 1981.

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.)
(For next subsequent allotment, see *post,* p. VI.)

*By order of July 2, 1981, the Court temporarily assigned JUSTICE WHITE to the Sixth Circuit. See *post,* p. 923.

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, effective *nunc pro tunc* October 1, 1981, *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, Byron R. White, Associate Justice.

For the Sixth Circuit, Sandra Day O'Connor, 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.

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

October 5, 1981.

RETIREMENT OF JUSTICE STEWART

SUPREME COURT OF THE UNITED STATES

THURSDAY, JULY 2, 1981

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

THE CHIEF JUSTICE said:

Before we turn to the regular business of the Court on today's calendar, we wish to take note of the retirement of Justice Stewart as a member of the Court. Our tribute to him as a colleague and friend is expressed in a letter to him signed by all other members of the Court. That letter and Justice Stewart's response will be made part of the journal of today's proceedings.

Justice Stewart's 23 years on this Court embrace a stirring period of major political, economic, and social changes in our country. As Lord Bryce and others observed many years ago, most of the problems of the changes in our society have a way of finding their way into this Court. This is not—as some observers erroneously suggest—that courts reach out for these problems. On the contrary, the problems are thrust upon the courts. This trend has shown a marked acceleration in recent years. As it increases, the mythology of the courts' seeking out controversies expands apace.

In this period Justice Stewart has sought constantly to maintain a balanced view of the role of the judiciary as one limited by precedent and tradition as well as by the Constitution itself. He has sought to preserve appropriate boundaries consistent with the constitutional duties placed on the

judiciary by Article III. His opinions particularly reflect his strong views on guarantees of individual liberty and freedom of expression and those views make up a substantial body of our jurisprudence of the past two decades.

Our letter to Justice Stewart is as follows:

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF THE CHIEF JUSTICE,
Washington, D. C., July 2, 1981.

DEAR POTTER:

Your decision to retire from the Court took most by surprise and even after several weeks we are not fully reconciled. We respect your view that "twenty-three years is enough" but you will be missed in the deliberations at the conference table where your close grasp of the cases decided during your long tenure—as well as those before—were a very valuable resource to the Court.

You have had a long tenure on the Court, but we know that longevity is but one measure of the contribution of a Justice. You have combined more than two decades here with more than a quarter of a century of judicial service in a period of significant changes in the law and your important contributions are a matter of record.

Apart from our work as colleagues, as friends we will miss these regular contacts with you on the bench and in conference. However, although it goes without saying, we firmly assert that we expect you to share our table as you have for 23 years at the Court. A long and close relationship such as we share here, is not to be changed on the personal level by the act of retirement.

All of us join in repeating to you and Andy our heartfelt wishes for continued good health and for many good years ahead.

Sincerely,

WARREN E. BURGER
WILLIAM J. BRENNAN, JR.
BYRON R. WHITE
THURGOOD MARSHALL
HARRY A. BLACKMUN
LEWIS F. POWELL, JR.
WILLIAM H. REHNQUIST
JOHN PAUL STEVENS

Justice Stewart's response is as follows:

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF JUSTICE POTTER STEWART,
Washington, D. C., July 2, 1981.

MY DEAR COLLEAGUES:

Your kind letter has greatly touched Andy and me. The decision to retire was not easy, but it would have been much harder without the knowledge that in my retirement our friendship will continue unaffected.

I shall greatly miss participating with you in the work of the Court. But, though no longer a professional colleague, I shall look forward with happiness to the personal companionship of each of you in the years ahead.

Best wishes to you all.

Sincerely yours,

POTTER STEWART

APPOINTMENT OF JUSTICE O'CONNOR

SUPREME COURT OF THE UNITED STATES

FRIDAY, SEPTEMBER 25, 1981

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

The judicial oath was administered by THE CHIEF JUSTICE in the Conference Room:

Judge O'Connor took the following oath:

I, Sandra Day O'Connor, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as Associate Justice of the Supreme Court of the United States, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States.

So Help me God.

SANDRA DAY O'CONNOR

Subscribed and sworn to before me this twenty-fifth day of September 1981.

WARREN E. BURGER,
Chief Justice

THE CHIEF JUSTICE said:

This special sitting of the Court is held to receive the commission of our newly appointed Associate Justice, Judge

Sandra Day O'Connor. On behalf of the Court, Mr. President, I extend to you and Mrs. Reagan a warm welcome.

The Court now recognizes the Attorney General of the United States, William French Smith.

Mr. Attorney General Smith said:

MR. CHIEF JUSTICE and may it please the Court:

I have the commission which has been issued to Judge Sandra Day O'Connor as an Associate Justice of this Court. It has been duly signed by the President of the United States and attested by me as Attorney General of the United States.

I move that the Clerk read the commission and that it be made a permanent record of this Court. Thank you.

THE CHIEF JUSTICE said:

Your motion is granted, Mr. Attorney General. Mr. Clerk, will you please read the commission?

The Clerk then read the commission as follows:

RONALD REAGAN,

PRESIDENT OF THE UNITED STATES OF AMERICA.

To all who shall see these Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Sandra Day O'Connor, of Arizona, I have nominated, and, by and with the advice and consent of the Senate, do appoint her an Associate Justice of the Supreme Court of the United States and do authorize and empower her to execute and fulfill the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Her, the said Sandra Day O'Connor, during her good behavior.

In testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the City of Washington this twenty-second day of September, in the year of our Lord one thousand nine hundred and eighty-one, and of the Independence of the United States of America the two hundred and sixth.

[SEAL] RONALD REAGAN

By the President:

WILLIAM FRENCH SMITH,
Attorney General

THE CHIEF JUSTICE said:

In the meantime, Judge O'Connor has been waiting, occupying the chair once occupied by John Marshall when he was Chief Justice of the United States and I now ask the Clerk to escort Judge O'Connor to the bench.

[Judge O'Connor was escorted by the Clerk to the bench and the oath of office was then administered by THE CHIEF JUSTICE.]

Judge O'Connor, are you prepared to take the oath?

On Judge O'Connor's acquiescence Judge O'Connor took the following oath:

I, Sandra Day O'Connor, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter.

So Help me God.

The Chief Deputy Marshal assisted JUSTICE O'CONNOR in robing and escorted her to her place on the bench.

THE CHIEF JUSTICE said:

JUSTICE O'CONNOR, on behalf of all the Members of the Court, and retired Justice Potter Stewart, it is a pleasure to extend to you a very warm welcome as an Associate Justice of this Court and to wish you a very long life and a long and happy career in our common calling.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1980

MIDDLESEX COUNTY SEWERAGE AUTHORITY ET AL. *v.* NATIONAL SEA CLAMMERS ASSOCIATION ET AL.

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

No. 79–1711. Argued February 24, 1981—Decided June 25, 1981*

Respondents (an organization whose members harvest fish and shellfish off the coast of New York and New Jersey and one individual member) brought suit in Federal District Court against petitioners (various governmental entities and officials from New York, New Jersey, and the Federal Government), alleging damage to fishing grounds caused by discharges and ocean dumping of sewage and other waste. Invoking a number of legal theories, respondents sought injunctive and declaratory relief and compensatory and punitive damages. The District Court granted summary judgment for petitioners. It rejected respondents' federal common-law nuisance claims on the ground that such a cause of action is not available to private parties. And as to claims based on alleged violations of the Federal Water Pollution Control Act (FWPCA) and the Marine Protection, Research, and Sanctuaries Act of 1972

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*Together with No. 79–1754, *Joint Meeting of Essex and Union Counties* v. *National Sea Clammers Association et al.;* No. 79–1760, *City of New York et al.* v. *National Sea Clammers Association et al;* and No. 80–12, *Environmental Protection Agency et al.* v. *National Sea Clammers Association et al.,* also on certiorari to the same court.

(MPRSA), the court refused to allow respondents to proceed with such claims independently of the provisions of the Acts, which authorize private citizens (defined as "persons having an interest which is or may be adversely affected") to sue for injunctions to enforce the Acts, because respondents had failed to give the notice to the Environmental Protection Agency, the States, and any alleged violators required for such citizen suits. The Court of Appeals reversed. With respect to the FWPCA and MPRSA, the court held that failure to comply with the notice provisions did not preclude suits under the Acts in addition to the authorized citizen suits. The court construed the citizen-suit provisions as intended to create a limited cause of action for "private attorneys general" ("non-injured" plaintiffs), as opposed to "injured" plaintiffs such as respondents, who have an alternative basis for suit under the saving clauses in the Acts preserving any right which any person may have under "any statute or common law" to enforce any standard or limitation or to seek any other relief. The court then concluded that respondents had an implied statutory right of action. With respect to the federal common-law nuisance claims, the court rejected the District Court's conclusion that private parties may not bring such claims.

Held:

1. There is no implied right of action under the FWPCA and MPRSA. Pp. 11–21.

(a) In view of the elaborate provisions in both Acts authorizing enforcement suits by government officials and private citizens, it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under the Acts. In the absence of strong indicia of a contrary congressional intent, it must be concluded that Congress provided precisely the remedies it considered appropriate. Pp. 13–15.

(b) The saving clauses are ambiguous as to Congress' intent to "preserve" remedies under the Acts. It is doubtful that the phrase "any statute" in those clauses includes the very statute in which the phrase is contained. Since it is clear that the citizen-suit provisions apply only to persons who can claim some sort of injury, there is no reason to infer the existence of a separate cause of action for "injured," as opposed to "non-injured" plaintiffs, as the Court of Appeals did. Pp. 15–17.

(c) The legislative history of the Acts does not lead to contrary conclusions with respect to implied remedies under either Act. Rather such history provides affirmative support for the view that Congress

intended the limitations imposed on citizen suits to apply to all private suits under the Acts. P. 17.

(d) The existence of the express remedies in both Acts demonstrates that Congress intended to supplant any remedy that otherwise might be available to respondents under 42 U. S. C. § 1983 (1976 ed., Supp. III) for violation of the Acts by any municipalities and sewerage boards among petitioners. Pp. 19–21.

2. The Federal common law of nuisance has been fully pre-empted in the area of water pollution by the FWPCA, *Milwaukee* v. *Illinois*, 451 U. S. 304, and, to the extent ocean waters not covered by the FWPCA are involved, by the MPRSA. Pp. 21–22.

616 F. 2d 1222, vacated and remanded.

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

Milton B. Conford argued the cause for petitioners in Nos. 79–1711, 79–1754, and 79–1760. With him on the brief for petitioners Middlesex County Sewerage Authority et al. in No. 79–1711 were *Marvin J. Brauth* and *Stephen J. Moses*. *Charles C. Carella* and *Jeffrey L. Miller* filed a brief for petitioners Passaic Valley Sewerage Authority et al. in No. 79–1711. *George J. Minish* filed a brief for petitioners in No. 79–1754. *Allen G. Schwartz, Leonard Koerner,* and *Stephen P. Kramer* filed briefs for petitioners in No. 79–1760.

Alan I. Horowitz argued the cause for petitioners in No. 80–12 and the federal respondents in Nos. 79–1711, 79–1754, 79–1760. With him on the brief were *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Claiborne, Raymond N. Zagone,* and *Jacques B. Gelin.*

Robert P. Corbin argued the cause for respondents National Sea Clammers Association et al. in all cases. With him on the brief were *Philip A. Ryan, Edward C. German,* and *Dean F. Murtagh.*

JUSTICE POWELL delivered the opinion of the Court.

In these cases, involving alleged damage to fishing grounds caused by discharges and ocean dumping of sewage and other waste, we are faced with questions concerning the availability of a damages remedy, based either on federal common law or on the provisions of two Acts—the Federal Water Pollution Control Act (FWPCA), 86 Stat. 816, as amended, 33 U. S. C. § 1251 *et seq.* (1976 ed. and Supp. III), and the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), 86 Stat. 1052, as amended, 33 U. S. C. § 1401 *et seq.* (1976 ed. and Supp. III).

I

Respondents are an organization whose members harvest fish and shellfish off the coast of New York and New Jersey, and one individual member of that organization. In 1977, they brought suit in the United States District Court for the District of New Jersey against petitioners—various governmental entities and officials from New York,[1] New Jersey,[2] and the Federal Government.[3] Their complaint alleged that sewage, sewage "sludge," and other waste materials were being discharged into New York Harbor and the Hudson

[1] The New York defendants were the New York Department of Environmental Conservation; Ogden R. Reid, individually and as Commissioner of that Department; the City of New York; Abraham Beame, Mayor of New York City; the West Long Beach Sewer District; the County of Westchester Department of Environmental Facilities; the city of Long Beach; and the city of Glen Cove.

[2] The New Jersey defendants were the New Jersey Department of Environmental Protection; David J. Bardin, individually and as Commissioner of that Department; the Bergen County Sewer Authority; the Joint Meeting of Essex and Union Counties; the Passaic Valley Sewerage Commissioners; the Middlesex County Sewerage Authority; the Linden-Roselle Sewerage Authority; and the Middletown Sewerage Authority.

[3] The federal defendants were the Environmental Protection Agency; Russell E. Train, individually and as EPA Administrator; the Army Corps of Engineers; and Martin R. Hoffman, individually and as Secretary of the Army.

River by some of the petitioners. In addition it complained of the dumping of such materials directly into the ocean from maritime vessels. The complaint alleged that, as a result of these activities, the Atlantic Ocean was becoming polluted, and it made special reference to a massive growth of algae said to have appeared offshore in 1976.[4] It then stated that this pollution was causing the "collapse of the fishing, clamming and lobster industries which operate in the waters of the Atlantic Ocean." [5]

Invoking a wide variety of legal theories,[6] respondents sought injunctive and declaratory relief, $250 million in compensatory damages, and $250 million in punitive damages. The District Court granted summary judgment to petitioners [7] on all counts of the complaint.[8]

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[4] The complaint alleged that this growth of algae was caused by the discharges of sewage and "covered an area of the Atlantic Ocean ranging from approximately the southwest portion of Long Island, New York to a point approximately due east of Cape May, New Jersey, and extending from a few miles offshore to more than 20 miles out to sea," Complaint ¶ 35, App. 25a. Respondents' brief in this Court states that when

"this massive algal bloom died, its residuals settled on the ocean floor, creating a condition of anoxia, or oxygen deficiency, in and about the water near the ocean's floor. This condition resulted in the death and destruction of an enormous amount of marine life, particularly with respect to the shellfish and other ocean-bottom dwellers and other marine life unable to escape the blighted area." Brief for Respondents 4.

[5] Complaint ¶ 39, App. 26a.

[6] Respondents based claims on the FWPCA; the MPRSA; federal common law; § 13 of the Rivers and Harbors Appropriation Act of 1899, 33 U. S. C. § 407; the National Environmental Policy Act of 1969, 42 U. S. C. § 4321 *et seq.;* New York and New Jersey environmental statutes; the Fifth, Ninth, and Fourteenth Amendments to the United States Constitution; 46 U. S. C. § 740; the Federal Tort Claims Act, 28 U. S. C. §§ 1346 (b), 2671 *et seq.;* and state tort law.

[7] The court previously had dismissed claims against the New York and New Jersey environmental protection agencies and their directors. These defendants are not among the petitioners in this Court.

[8] The court's judgment with respect to the pendent state-law claims was without prejudice.

In holdings relevant here, the District Court rejected respondents' nuisance claim under federal common law, see *Illinois* v. *Milwaukee,* 406 U. S. 91 (1972), on the ground that such a cause of action is not available to private parties. With respect to the claims based on alleged violations of the FWPCA, the court noted that respondents had failed to comply with the 60-day notice requirement of the "citizen suit" provision in § 505 (b)(1)(A) of the Act, 86 Stat. 888, 33 U. S. C. § 1365 (b)(1)(A). This provision allows suits under the Act by private citizens, but authorizes only prospective relief, and the citizen plaintiffs first must give notice to the EPA, the State, and any alleged violator. *Ibid.*[9] Be-

[9] Section 505, as set forth in 33 U. S. C. §1365, provides, in part:

"(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

"(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

"(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

"The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319 (d) of this title.

"(b) No action may be commenced—

"(1) under subsection (a)(1) of this section—

"(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

"(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States,

cause respondents did not give the requisite notice, the court refused to allow them to proceed with a claim under the Act independent of the citizen-suit provision and based on the general jurisdictional grant in 28 U. S. C. § 1331.[10] The court applied the same analysis to respondents' claims under the MPRSA, which contains similar citizen-suit and notice provisions. 33 U. S. C. § 1415 (g).[11] Finally, the court rejected a

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or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

"(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317 (a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation."

The Administrator may intervene in any citizen suit. § 505 (c)(2), 33 U. S. C. § 1365 (c)(2).

See n. 27, *infra* (legislative history emphasizing the limited forms of relief available under the Act).

In this opinion we refer to sections of the original FWPCA, added in the 1972 Amendments, with parallel citations to the United States Code.

[10] In so holding the court rejected an argument that the notice requirement is inapplicable because of the "saving clause" in § 505 (e), which states:

"Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." 33 U. S. C. § 1365 (e).

[11] The citizen-suit provision in the MPRSA provides in part:

"(g)(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any prohibition, limitation, criterion, or permit established or issued by or under this subchapter. . The district courts shall have jurisdiction, without regard to the

possible claim of maritime tort, both because respondents had failed to plead such claim explicitly and because they had failed to comply with the procedural requirements of the federal and state Tort Claims Acts.[12]

The United States Court of Appeals for the Third Circuit reversed as to the claims based on the FWPCA, the MPRSA, the federal common law of nuisance, and maritime tort. *Na-*

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amount in controversy or the citizenship of the parties, to enforce such prohibition, limitation, criterion, or permit, as the case may be.

"(2) No action may be commenced—

"(A) prior to sixty days after notice of the violation has been given to the Administrator or to the Secretary, and to any alleged violator of the prohibition, limitation, criterion, or permit; or

"(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States to require compliance with the prohibition, limitation, criterion, or permit; or

"(C) if the Administrator has commenced action to impose a penalty pursuant to subsection (a) of this section, or if the Administrator, or the Secretary, has initiated permit revocation or suspension proceedings under subsection (f) of this section; or

"(D) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of this subchapter." 33 U. S. C. §§ 1415 (g)(1), (2).

The United States may intervene in any citizen suit brought under the Act. 33 U. S. C. § 1415 (g)(3)(B).

Like the FWPCA, the MPRSA contains a "saving clause," which states:

"The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Administrator, the Secretary, or a State agency)." § 1415 (g)(5).

[12] See 28 U. S. C. §§ 1346 (b), 2671 *et seq.*; N. Y. Gen. Mun. Law §§ 50–e, 50–i (McKinney 1977 and Supp. 1980–1981); N. J. Stat. Ann. § 59:1–1 *et seq.* (West Supp. 1981–1982). The District Court noted that respondents had given timely notice to one defendant—New York City.

The petitions for certiorari in this Court raised questions concerning the applicability of state Tort Claims Acts and the Eleventh Amendment to tort suits in federal court. These questions are not, however, within the scope of the questions on which review was granted.

tional Sea Clammers Assn. v. *City of New York,* 616 F. 2d 1222 (1980). With respect to the FWPCA, the court held that failure to comply with the 60-day notice provision in § 505 (b)(1)(A), 33 U. S. C. § 1365 (b)(1)(A), does not preclude suits under the Act in addition to the specific "citizen suits" authorized in § 505. It based this conclusion on the saving clause in § 505 (e), 33 U. S. C. § 1365 (e), preserving "any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief." 616 F. 2d, at 1226–1228; see n. 10, *supra.* The Court of Appeals then went on to apply our precedents in the area of implied statutory rights of action,[13] and concluded that "Congress intended to permit the federal courts to entertain a private cause of action implied from the terms of the [FWPCA], preserved by the savings clause of the Act, on behalf of individuals or groups of individuals who have been or will be injured by pollution in violation of its terms." 616 F. 2d, at 1230–1231.

The court then applied this same analysis to the MPRSA, concluding again that the District Court had erred in dismissing respondents' claims under this Act. Although the court was not explicit on this question, it apparently concluded that suits for *damages,* as well as for injunctive relief, could be brought under the FWPCA and the MPRSA.[14]

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[13] *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U. S. 11 (1979); *Touche Ross & Co.* v. *Redington,* 442 U. S. 560 (1979); *Cannon* v. *University of Chicago,* 441 U. S. 677 (1979); *Cort* v. *Ash,* 422 U. S. 66 (1975).

[14] After holding that there is an implied right of action under the FWPCA, the court stated:

"Having so held, we reject the federal government defendants' sovereign immunity argument. The 1976 amendments to section 1331 of title 28 make clear that sovereign immunity has been waived in all suits by plaintiffs seeking injunctive relief against federal agencies or officers. Whether damages can be recovered from the federal government is a separate

With respect to the federal common-law nuisance claims, the Court of Appeals rejected the District Court's conclusion that private parties may not bring such claims. It also held, applying common-law principles, that respondents "alleged sufficient individual damage to permit them to recover damages for this essentially public nuisance." *Id.*, at 1234. It thus went considerably beyond *Illinois* v. *Milwaukee*, 406 U. S. 91 (1972), which involved purely prospective relief sought by a state plaintiff.[15]

Petitions for a writ of certiorari raising a variety of arguments were filed in this Court by a group of New Jersey sewerage authorities (No. 79–1711), by the Joint Meeting of Essex and Union Counties in New Jersey (No. 79–1754), by the City and Mayor of New York (No. 79–1760), and by all of the federal defendants named in this suit (No. 80–12).[16] We granted these petitions, limiting review to three questions: (i) whether FWPCA and MPRSA imply a private

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question to which the Federal Tort Claims Act speaks." 616 F. 2d, at 1231 (footnote omitted).

This passage suggests that, as a general matter, the court had concluded that the statutory rights of action it was recognizing included damages relief. An additional indication is the fact that, by the time of the Court of Appeals decision, any relief other than damages could not have been too important to respondents. The algal bloom about which respondents complain died in 1976. The Court of Appeals decision was not handed down until 1980. Under the MPRSA, 33 U. S. C. § 1412a (a) (1976 ed., Supp. III), the EPA is required to end all ocean dumping of sewage sludge by December 31, 1981.

[15] The court also held that respondents had offered allegations sufficient to make out a claim of maritime tort, cognizable under admiralty jurisdiction. 616 F. 2d, at 1236. It did not decide whether the Federal Tort Claims Act, with its various procedural requirements, 28 U. S. C. §§ 1346 (b), 2671 *et seq.*, applies to any of respondents' federal-law claims against federal defendants, 616 F. 2d, at 1237, although it did hold that the Act precluded a "money damage recovery against federal agencies based on state law," *id.*, at 1236.

[16] See n. 3, *supra*. Petitioners in Nos. 79–1711, 79–1754, and 80–12 also named the remaining petitioners as respondents, based on cross-claims filed in the District Court.

right of action independent of their citizen-suit provisions, (ii) whether all federal common-law nuisance actions concerning ocean pollution now are pre-empted by the legislative scheme contained in the FWPCA and the MPRSA, and (iii) if not, whether a private citizen has standing to sue for damages under the federal common law of nuisance. We hold that there is no implied right of action under these statutes and that the federal common law of nuisance has been fully pre-empted in the area of ocean pollution.[17]

II

The Federal Water Pollution Control Act was first enacted in 1948. Act of June 30, 1948, 62 Stat. 1155. It emphasized state enforcement of water quality standards. When this legislation proved ineffective, Congress passed the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92–500, 86 Stat. 816, 33 U. S. C. § 1251 *et seq.* The Amendments shifted the emphasis to "direct restrictions on discharges," *EPA* v. *California ex rel. State Water Resources Control Board,* 426 U. S. 200, 204 (1976), and made it "unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms," *id.,* at 205.[18] While still allowing for state administration and enforcement under federally approved state plans, §§ 402 (b), (c), 33 U. S. C. §§ 1342 (b), (c), the Amendments created various federal minimum effluent standards, §§ 301–307, 33 U. S. C. §§ 1311–1317.

The Marine Protection, Research, and Sanctuaries Act of

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[17] We therefore need not discuss the question whether the federal common law of nuisance could ever be the basis of a suit for damages by a private party.

[18] The Act applies to discharges of pollutants from any source into navigable waters, including the "territorial seas," 33 U. S. C. §§ 1362 (7), (12), and applies as well to discharges from sources "other than a vessel or other floating craft" into the "contiguous zone" and the high seas, §§ 1362 (9), (10), (12). See S. Rep. No. 92–414, p. 75 (1971).

1972, Pub. L. 92–532, 86 Stat. 1052, sought to create comprehensive federal regulation of the dumping of materials into ocean waters near the United States coastline. Section 101 (a) of the Act requires a permit for any dumping into ocean waters, when the material is transported from the United States or on an American vessel or aircraft. 33 U. S. C. § 1411 (a).[19] In addition, it requires a permit for the dumping of material transported from outside the United States into the territorial seas or in the zone extending 12 miles from the coastline, "to the extent that it may affect the territorial sea or the territory of the United States." § 1411 (b).

The exact nature of respondents' claims under these two Acts is not clear, but the claims appear to fall into two categories. The main contention is that the EPA and the Army Corps of Engineers have permitted the New Jersey and New York defendants to discharge and dump pollutants in amounts that are not permitted by the Acts. In addition, they seem to allege that the New York and New Jersey defendants have violated the terms of their permits. The question before us is whether respondents may raise either of these claims in a private suit for injunctive and monetary relief, where such a suit is not expressly authorized by either of these Acts.[20]

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[19] These permits are issued by the Administrator of the Environmental Protection Agency, 33 U. S. C. § 1412, except in the case of dredged materials, which may be dumped under a permit issued by the Secretary of the Army, § 1413.

[20] The Court of Appeals did state that the saving clause in § 505 (e) of the FWPCA "provides an independent remedy for injured parties unburdened by the notice requirements of section 505 (b)." 616 F. 2d, at 1227. But the court did not conclude that the saving clause is itself an express authorization of private damages suits. Instead, it held that the saving clause acted to preserve any existing right to enforce the Act, in addition to the explicit, citizen-suit remedy in § 505 (b). The court went on to apply an implied-right-of-action analysis before concluding that a private suit for damages is among the pre-existing remedies preserved by the saving clause.

A

It is unnecessary to discuss at length the principles set out in recent decisions concerning the recurring question whether Congress intended to create a private right of action under a federal statute without saying so explicitly.[21] The key to the inquiry is the intent of the Legislature. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 639 (1981); *California* v. *Sierra Club*, 451 U. S. 287, 293 (1981); *Universities Research Assn.* v. *Coutu*, 450 U. S. 754, 770 (1981); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 15 (1979); *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 568 (1979). We look first, of course, to the statutory language, particularly to the provisions made therein for enforcement and relief. Then we review the legislative history and other traditional aids of statutory interpretation to determine congressional intent.

These Acts contain unusually elaborate enforcement provisions, conferring authority to sue for this purpose both on government officials and private citizens. The FWPCA, for example, authorizes the EPA Administrator to respond to violations of the Act with compliance orders and civil suits. § 309, 33 U. S. C. § 1319.[22] He may seek a civil penalty of up to $10,000 per day, § 309 (d), 33 U. S. C. § 1319 (d), and criminal penalties also are available, § 309 (c), 33 U. S. C. § 1319 (c). States desiring to administer their own permit programs must demonstrate that state officials possess adequate authority to abate violations through civil or criminal penalties or other means of enforcement. § 402 (b)(7), 33 U. S. C. § 1342 (b)(7). In addition, under § 509 (b), 33 U. S. C. § 1369 (b), "any interested person" may seek judicial

[21] In recent years, the question has arisen with increased frequency. See *Cannon* v. *University of Chicago*, 441 U. S., at 741–742 (POWELL, J., dissenting).

[22] The Administrator is authorized to give the States an opportunity to take action before doing so himself. 33 U. S. C. § 1319 (a)(1).

review in the United States courts of appeals of various particular actions by the Administrator, including establishment of effluent standards and issuance of permits for discharge of pollutants.[23] Where review could have been obtained under this provision, the action at issue may not be challenged in any subsequent civil or criminal proceeding for enforcement. § 1369 (b)(2).

These enforcement mechanisms, most of which have their counterpart under the MPRSA,[24] are supplemented by the express citizen-suit provisions in § 505 (a) of the FWPCA, 33 U. S. C. § 1365 (a), and § 105 (g) of the MPRSA, 33 U. S. C. § 1415 (g). See nn. 9, 11, *supra*. These citizen-suit provisions authorize private persons to sue for injunctions to enforce these statutes.[25] Plaintiffs invoking these provisions first must comply with specified procedures—which respondents here ignored—including in most cases 60 days' prior notice to potential defendants.

In view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under MPRSA and FWPCA. As we stated in *Transamerica Mortgage Advisors, supra,* "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary

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[23] This review must be sought within 90 days. The review provisions of § 509 are open to "[a]ny person," S. Rep. No. 92–414, p. 85 (1971), and thus provide an additional procedure to "private attorneys general" seeking to enforce the Act, supplementing the citizen suits authorized in § 505. See W. Rodgers, Environmental Law 87–88 (1977).

[24] The MPRSA provides for assessment of civil penalties by the Administrator, 33 U. S. C. § 1415 (a), criminal penalties, § 1415 (b), suits for injunctive relief by the Attorney General, § 1415 (d), and permit suspensions or revocations, § 1415 (f).

[25] Under the FWPCA, civil penalties, payable to the Government, also may be ordered by the court. § 505 (a), 33 U. S. C. § 1365 (a).

of reading others into it." 444 U. S., at 19. See also *Touche Ross & Co.* v. *Redington, supra,* at 571–574. In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.

As noted above, the Court of Appeals avoided this inference. Discussing the FWPCA, it held that the existence of a citizen-suit provision in § 505 (a) does not rule out implied forms of private enforcement of the Act. It arrived at this conclusion by asserting that Congress intended in § 505 (a) to create a limited cause of action for "private attorneys general"—"non-injured member[s] of the public" suing to promote the general welfare rather than to redress an injury to their own welfare. 616 F. 2d, at 1227. It went on to conclude:

> "A private party who is *injured* by the alleged violation, as these plaintiffs allege they were, has an alternate basis for suit under section 505 (e), 33 U. S. C. § 1365 (e), and the general federal question jurisdiction of the Judicial Code, 28 U. S. C. § 1331 (1976). Section 505 (e) is a savings clause that preserves all rights to enforce the Act or seek relief against the Administrator. Coupled with the general federal question jurisdiction it permits this suit to be brought by these parties." *Ibid.* (footnotes omitted) (emphasis added).

There are at least three problems with this reasoning. First, the language of the saving clause on which the Court of Appeals relied, see n. 10, *supra,* is quite ambiguous concerning the intent of Congress to "preserve" remedies under the FWPCA itself. It merely states that nothing in the citizen-suit provision "shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief." It is doubtful that the phrase "any stat-

ute" includes the very statute in which this statement was contained.[26]

Moreover, the reasoning on which the Court of Appeals relied is flawed for another reason. It draws a distinction between "non-injured" plaintiffs who may bring citizen suits to enforce provisions of these Acts, and the "injured" plaintiffs in this litigation who claim a right to sue under the Acts, not by virtue of the citizen-suit provisions, but rather under the language of the saving clauses. In fact, it is clear that the citizen-suit provisions apply only to persons who can claim some sort of injury and there is, therefore, no reason to infer the existence of a separate right of action for "injured" plaintiffs. "Citizen" is defined in the citizen-suit section of the FWPCA as "a person or persons having an interest which is or may be adversely affected." § 505 (g), 33 U. S. C. § 1365 (g). It is clear from the Senate Conference Report that this phrase was intended by Congress to allow suits by all persons possessing standing under this Court's decision in *Sierra Club* v. *Morton,* 405 U. S. 727 (1972). See S. Conf. Rep. No. 92–1236, p. 146 (1972). This broad cate-

[26] In fact the Senate Report on the FWPCA Amendments of 1972 stated with respect to the saving clause:

"It should be noted, however, that the section would specifically preserve any rights or remedies under any *other* law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages." S. Rep. No. 92–414, p. 81 (1971) (emphasis added).

See also S. Rep. No. 92–451, pp. 23–24 (1971) (Report on the MPRSA) (the citizen-suit provision does not restrict or supersede "any other right to legal action which is afforded the potential litigant in any other statute or the common law").

It might be argued that the phrase "any effluent standard or limitation" in § 505 (e) necessarily is a reference to the terms of the FWPCA. We, however, are unpersuaded that Congress necessarily intended this meaning. The phrase also could refer to state statutory limitations, or to "effluent limitations" imposed as a result of court decrees under the common law of nuisance.

gory of potential plaintiffs necessarily includes both plaintiffs seeking to enforce these statutes as private attorneys general, whose injuries are "noneconomic" and probably noncompensable, and persons like respondents who assert that they have suffered tangible economic injuries because of statutory violations.

Finally, the Court of Appeals failed to take account of the rest of the enforcement scheme expressly provided by Congress—including the opportunity for "any interested person" to seek judicial review of a number of EPA actions within 90 days, § 509 (b), 33 U. S. C. § 1369 (b). See *supra,* at 13–14.

The Court of Appeals also applied its reasoning to the MPRSA. But here again we are persuaded that Congress evidenced no intent to authorize by implication private remedies under these Acts apart from the expressly authorized citizen suits. The relevant provisions in the MPRSA are in many respects almost identical to those of the FWPCA. 33 U. S. C. § 1415 (g). Although they do not expressly limit citizen suits to those who have suffered some injury from a violation of the Act, we are not persuaded by this fact alone that Congress affirmatively intended to imply the existence of a parallel private remedy, after setting out expressly the manner in which private citizens can seek to enjoin violations.

In *Cort* v. *Ash,* 422 U. S. 66, 78 (1975), the Court identified several factors that are relevant to the question of implied private remedies. These include the legislative history. See *ibid.* ("Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?"). This history does not lead to a contrary conclusion with respect to implied remedies under either Act. Indeed, the Report and debates provide affirmative support for the view that Congress intended the limitations imposed on citizen suits to apply to all private suits under these Acts.[27]

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[27] The Senate Reports on both Acts placed particular emphasis on the limited nature of the citizen suits being authorized. S. Rep. No. 92–451,

Thus, both the structure of the Acts and their legislative history lead us to conclude that Congress intended that private remedies in addition to those expressly provided should not be implied.[28] Where, as here, Congress has made clear that implied private actions are not contemplated, the courts are not authorized to ignore this legislative judgment.

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at 23; S. Rep. No. 92–414, at 81. In addition, the citizen-suit provision of the FWPCA was expressly modeled on the parallel provision of the Clean Air Act, 42 U. S. C. § 7604 (1976 ed., Supp. III). See S. Rep. No. 92–414, at 79. And the legislative history of the latter Act contains explicit indications that private enforcement suits were intended to be limited to the injunctive relief expressly provided for. Senator Hart, for example, stated:

"It has been argued, however, that conferring additional rights on the citizen may burden the courts unduly. I would argue that the citizen suit provision of S. 4358 has been carefully drafted to prevent this consequence from arising. First of all, it should be noted that the bill makes no provision for damages to the individual. It therefore provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated. It will be the rare, rather than the ordinary, person, I suspect, who, with no hope of financial gain and the very real prospect of financial loss, will initiate court action under this bill." 116 Cong. Rec. 33104 (1970).

Similarly, during the debates on the Clean Air Act, Senator Muskie, in response to concerns expressed by other Senators, contrasted the citizen-suit provision with the terms of S. 3201, a consumer protection bill that would have authorized private suits for damages:

"Senate bill 3201 provides damages and a remedy for recovery of fines and restitution, and other monetary damages. The pending bill is limited to seek [*sic*] abatement of violation of standards established administratively under the act, and expressly excludes damage actions." *Id.*, at 33102.

He placed in the Record a staff memorandum stating that the availability of damages "would encourage frivolous or harassing suits against industries and government agencies." *Id.*, at 33103. See also *City of Highland Park* v. *Train*, 519 F. 2d 681, 690–691 (CA7 1975), cert. denied, 424 U. S. 927 (1976).

[28] See generally *City of Evansville* v. *Kentucky Liquid Recycling, Inc.*, 604 F. 2d 1008 (CA7 1979), cert. denied, 444 U. S. 1025 (1980).

B

Although the parties have not suggested it, there remains a possible alternative source of *express* congressional authorization of private suits under these Acts. Last Term, in *Maine* v. *Thiboutot,* 448 U. S. 1 (1980), the Court construed 42 U. S. C. § 1983 as authorizing suits to redress violations by state officials of rights created by federal statutes. Accordingly, it could be argued that respondents may sue the municipalities and sewerage boards among the petitioners [29] under the FWPCA and MPRSA by virtue of a right of action created by § 1983.

It is appropriate to reach the question of the applicability of *Maine* v. *Thiboutot* to this setting, despite the failure of respondents to raise it here or below. This litigation began long before that decision. Moreover, if controlling, this argument would obviate the need to consider whether Congress intended to authorize private suits to enforce these particular federal statutes. The claim brought here arguably falls within the scope of *Maine* v. *Thiboutot* because it involves a suit by a private party claiming that a federal statute has been violated under color of state law, causing an injury. The Court, however, has recognized two exceptions to the application of § 1983 to statutory violations. In *Pennhurst State School and Hospital* v. *Halderman,* 451 U. S. 1 (1981), we remanded certain claims for a determination (i) whether Congress had foreclosed private enforcement of that statute in the enactment itself, and (ii) whether the statute at issue there was the kind that created enforceable "rights" under § 1983. *Id.,* at 28. In the present cases, because we find that Congress foreclosed a § 1983 remedy under these Acts, we need not reach the second question whether these Acts created "rights, privileges, or immunities" within the meaning of § 1983.

[29] These petitioners appear to fall within the category of municipal governmental entities suable as "persons" under our decision in *Monell* v. *New York City Dept. of Social Services,* 436 U. S. 658 (1978).

When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983. As JUSTICE STEWART, who later joined the majority in *Maine* v. *Thiboutot*, stated in *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600, 673, n. 2 (1979) (dissenting opinion), when "a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983." [30] As discussed above, the FWPCA and MPRSA do provide quite comprehensive enforcement mechanisms. It is hard to believe that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies, including the two citizen-suit provisions.[31] See *Chesapeake Bay Foundation* v. *Virginia State*

[30] See also *Meyerson* v. *Arizona*, 507 F. Supp. 859, 864 (Ariz. 1981) ("[T]he remedial provision of § 1983 cannot be used to circumvent the remedial provisions of the Revenue Sharing Act").

[31] JUSTICE STEVENS in dissent finds contrary indications of congressional intent in the saving clauses—§ 505 (e) of the FWPCA, 33 U. S. C. § 1365 (e), and § 105 (g) (5) of the MPRSA, 33 U. S. C. § 1415 (g) (5). The language of these clauses, see nn. 10, 11, *supra*, does not, however, support the view that Congress expressly preserved § 1983 remedies for violations of *these statutes*. As noted, *supra*, at 15–16, there is little reason to believe that Congress intended to do this when it made reference in § 505 (e) to "any right which any person . . . may have under any statute or common law or to seek . . . any other relief." The legislative history makes clear Congress' intent to allow further enforcement of anti-pollution standards arising under *other* statutes or state common law. See n. 26, *supra*. A suit for damages asserting a substantive violation of the FWPCA or the MPRSA is far different, even if the *remedy* asserted is based on the separate right of action created in § 1983. We are convinced that the saving clauses do not refer at all to a suit for redress of a violation of these statutes—regardless of the source of the right of action asserted.

Even if this were not the correct interpretation of the saving clauses, we recently held that the saving clause in the FWPCA relates only to the

Water Control Board, 501 F. Supp. 821 (ED Va. 1980) (rejecting a § 1983 action under the FWPCA against the Chairman of a State Water Board, with reasoning based on the comprehensiveness of the remedies provided and the federalism concerns raised). We therefore conclude that the existence of these express remedies demonstrates not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under § 1983. Cf. *Carlson* v. *Green,* 446 U. S. 14, 23 (1980).

III

The remaining two issues on which we granted certiorari relate to respondents' federal claims based on the federal common law of nuisance. The principal precedent on which these claims were based is *Illinois* v. *Milwaukee,* 406 U. S. 91 (1972), where the Court found that the federal courts have jurisdiction to consider the federal common-law issues raised by a suit for injunctive relief by the State of Illinois against various Wisconsin municipalities and public sewerage commissions, involving the discharge of sewage into Lake Michigan. In these cases, we need not decide whether a cause of action may be brought under federal common law by a private plaintiff, seeking damages. The Court has now held

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effect of the accompanying citizen-suit provision. *Milwaukee* v. *Illinois,* 451 U. S. 304, 329 (1981) (the section "means only that the provision of [a citizen] suit does not revoke other remedies"). The parallel provision of the MPRSA is equally limited. 33 U. S. C. § 1415 (g) (5) ("The *injunctive relief provided by this subsection* shall not restrict any right which any person . . . may have under any statute or common law") (emphasis added). We therefore are not persuaded that the saving clauses limit the effect of the overall remedial schemes provided expressly in the Acts. In sum, we think it clear that those express remedies preclude suits for damages under § 1983, and that the saving clauses do not require a contrary conclusion.

In so holding, we also note that, contrary to JUSTICE STEVENS' argument, *post,* at 27–28, n. 11, we do not suggest that the burden is on a plaintiff to demonstrate congressional intent to preserve § 1983 remedies.

that the federal common law of nuisance in the area of water pollution is entirely pre-empted by the more comprehensive scope of the FWPCA, which was completely revised soon after the decision in *Illinois* v. *Milwaukee*. See *Milwaukee* v. *Illinois*, 451 U. S. 304 (1981).

This decision disposes entirely of respondents' federal common-law claims, since there is no reason to suppose that the pre-emptive effect of the FWPCA is any less when pollution of coastal waters is at issue. To the extent that this litigation involves ocean waters not covered by the FWPCA, and regulated under the MPRSA, we see no cause for different treatment of the pre-emption question. The regulatory scheme of the MPRSA is no less comprehensive, with respect to ocean dumping, than are analogous provisions of the FWPCA.[32]

We therefore must dismiss the federal common-law claims because their underlying legal basis is now pre-empted by statute. As discussed above, we also dismiss the claims under the MPRSA and the FWPCA because respondents lack a right of action under those statutes. We vacate the judgment below with respect to these two claims, and remand for further proceedings.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, concurring in the judgment in part and dissenting in part.

When should a person injured by a violation of federal law be allowed to recover his damages in a federal court? This seemingly simple question has recently presented the Court with more difficulty than most substantive questions that

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[32] Indeed, as noted in n. 14, *supra*, the ocean dumping of sewage sludge must end altogether by December 31, 1981. To the extent that Congress allowed some continued dumping of sludge prior to that date, this represents a considered judgment that it made sense to allow entities like petitioners to adjust to the coming change.

come before us.[1] During most of our history, however, a simple presumption usually provided the answer. Although criminal laws and legislation enacted for the benefit of the public at large were expected to be enforced by public officials, a statute enacted for the benefit of a special class presumptively afforded a remedy for members of that class injured by violations of the statute. See *Texas & Pacific R. Co.* v. *Rigsby,* 241 U. S. 33, 39–40.[2] Applying that presump-

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[1] Indeed, in recent Terms a significant portion of our docket has been occupied by cases presenting this question with respect to a variety of federal statutes. See, *e. g., California* v. *Sierra Club,* 451 U. S. 287; *Universities Research Assn.* v. *Coutu,* 450 U. S. 754; *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U. S. 11; *Touche Ross & Co.* v. *Redington,* 442 U. S. 560; *Cannon* v. *University of Chicago,* 441 U. S. 677. Cf. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.,* 451 U. S. 630; *Northwest Airlines, Inc.* v. *Transport Workers,* 451 U. S. 77.

[2] In the unanimous decision in *Texas & Pacific R. Co.* v. *Rigsby,* this presumption was plainly stated:

"A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law . . . . This is but an application of the maxim, *Ubi jus ibi remedium.*" 241 U. S., at 39–40.

As the *Rigsby* Court noted, the presumption was firmly established at common law, see *California* v. *Sierra Club, supra,* at 299–300 (STEVENS, J., concurring), and it had been recognized on numerous prior occasions by this Court. See, *e. g., Marbury* v. *Madison,* 1 Cranch 137, 163 ("'[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded'"); *Kendall* v. *United States,* 12 Pet. 524, 623 ("[T]he power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist"); *Pollard* v. *Bailey,* 20 Wall. 520, 527 ("A general liability created by statute without a remedy may be enforced by an appropriate common-law action"); *Hayes* v. *Michigan Central R. Co.,* 111 U. S. 228, 240 ("[E]ach person specially injured by the breach of the obligation is entitled to his individual com-

tion, our truly conservative federal judges—men like Justice Harlan,[3] Justice Clark,[4] Justice Frankfurter,[5] and Judge Kirkpatrick[6]—readily concluded that it was appropriate to allow private parties who had been injured by a violation of a statute enacted for their special benefit to obtain judicial relief. For rules are meant to be obeyed, and those who violate them should be held responsible for their misdeeds. See *Rigsby, supra,* at 39. Since the earliest days of the common law, it has been the business of courts to fashion remedies for wrongs.[7]

In recent years, however, a Court that is properly concerned about the burdens imposed upon the federal judiciary, the

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pensation, and to an action for its recovery"); *De Lima* v. *Bidwell,* 182 U. S. 1, 176–177 ("If there be an admitted wrong, the courts will look far to supply an adequate remedy").

[3] See *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U. S. 388, 402 (concurring in judgment) ("[I]n suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute").

[4] See *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 433 ("[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose").

[5] See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U. S. 246, 261 (dissenting opinion) ("If civil liability is appropriate to effectuate the purposes of a statute, courts are not denied this traditional remedy because it is not specifically authorized").

[6] See *Kardon* v. *National Gypsum Co.,* 69 F. Supp. 512, 513–514 (ED Pa. 1946) ("The disregard of the command of a statute is a wrongful act and a tort. . . . [T]he right to recover damages arising by reason of violation of a statute . . . is so fundamental and so deeply ingrained in the law that where it is not expressly denied the intention to withhold it should appear very clearly and plainly").

[7] Although the federal courts do not possess the full common-law powers of their state counterparts, see, *e. g., Northwest Airlines, Inc., supra,* at 95, the cases cited in n. 2, *supra,* nonetheless indicate that the fashioning of remedies for wrongs has traditionally been a part of the business of the federal courts.

quality of the work product of Congress, and the sheer bulk of new federal legislation, has been more and more reluctant to open the courthouse door to the injured citizen. In 1975, in *Cort* v. *Ash,* 422 U. S. 66, the Court cut back on the simple common-law presumption by fashioning a four-factor formula that led to the denial of relief in that case.[8] Although multi-factor balancing tests generally tend to produce negative answers, more recently some Members of the Court have been inclined to deny relief with little more than a perfunctory nod to the *Cort* v. *Ash* factors. See, *e. g., California* v. *Sierra Club,* 451 U. S. 287, 302 (REHNQUIST, J., concurring in judgment). The touchstone now is congressional intent. See *ante,* at 13. Because legislative history is unlikely to reveal affirmative evidence of a congressional intent to authorize a specific procedure that the statute itself fails to mention,[9] that touchstone will further restrict the availability of private remedies.

Although I agree with the Court's disposition of the implied-private-right-of-action question in these cases, I write separately to emphasize that the Court's current approach to the judicial task of fashioning appropriate remedies for violations of federal statutes is out of step with the Court's own

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[8] The unanimous opinion in *Cort* v. *Ash* adopted the single-factor test of *Rigsby,* see n. 2, *supra,* and combined it with three additional inquiries:

"In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,'—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" 422 U. S., at 78 (citations omitted) (emphasis in original).

[9] See *Cannon, supra,* at 694; *Northwest Airlines, Inc., supra,* at 94.

history and tradition. More importantly, I believe that the Court's appraisal of the intent expressed by Congress in the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), 33 U. S. C. § 1251 *et seq.* (1976 ed. and Supp. III), and the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), 33 U. S. C. § 1401 *et seq.* (1976 ed. and Supp. III), with respect to the availability of private remedies under other federal statutes or the federal common law is palpably wrong.

In the present context of these cases, we of course know nothing about the ultimate merits of the claims asserted by respondents. As the cases come to us, however, we must make certain assumptions in analyzing the questions presented. First, we must assume that the complaint speaks the truth when it alleges that the petitioners have dumped large quantities of sewage and toxic waste in the Atlantic Ocean and its tributaries, and that these dumping operations have violated the substantive provisions of the Clean Water Act and the MPRSA. See *Northwest Airlines, Inc.* v. *Transport Workers,* 451 U. S. 77, 80, n. 3. Second, we must also assume that these illegal operations have caused an injury to respondents' commercial interests. Third, because some of the petitioners are "persons" who allegedly acted under color of state law, as the Court recognizes, see *ante,* at 19, and n. 29, we must assume that 42 U. S. C. § 1983 (1976 ed., Supp. III) [10] provides an express remedy for their violations of these two federal statutes, unless Congress has expressly withdrawn that remedy. See *Maine* v. *Thiboutot,* 448 U. S. 1. Finally,

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[10] Section 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, 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."

we must assume that, apart from these two statutes, the dumping operations of petitioners would constitute a common-law nuisance for which respondents would have a federal remedy. The net effect of the Court's analysis of the legislative intent is therefore a conclusion that Congress, by enacting the Clean Water Act and the MPRSA, deliberately deprived respondents of effective federal remedies that would otherwise have been available to them. In my judgment, the language of both statutes, as well as their legislative history, belies this improbable conclusion.

I

The Court's holding that Congress decided in the Clean Water Act and the MPRSA to withdraw the express remedy provided by 42 U. S. C. § 1983 (1976 ed., Supp. III) seems to rest on nothing more than the fact that these statutes provide other express remedies and do not mention § 1983. Because the enforcement mechanisms provided in the statutes are "quite comprehensive," the Court finds it "hard to believe that Congress intended to preserve the § 1983 right of action . . . ." *Ante,* at 20. There are at least two flaws in this reasoning. First, the question is not whether Congress "intended to preserve the § 1983 right of action," but rather whether Congress intended to withdraw that right of action.[11] Second, I find it

[11] This is more than merely a semantic dispute. As the Court formulates the inquiry, the burden is placed on the § 1983 plaintiff to show an explicit or implicit congressional intention that violations of the substantive statute at issue be redressed in private § 1983 actions. The correct formulation, however, places the burden on the defendant to show that Congress intended to foreclose access to the § 1983 remedy as a means of enforcing the substantive statute. Because the § 1983 plaintiff is invoking an express private remedy that is, on its face, applicable anytime a violation of a federal statute is alleged, see *Maine* v. *Thiboutot,* 448 U. S. 1, 4, the burden is properly placed on the defendant to show that Congress, in enacting the particular substantive statute at issue, intended an exception to the general rule of § 1983. A defendant may carry this burden by identifying express statutory language or legislative

not at all hard to believe that Congress intended to preserve, or, more precisely, did not intend to withdraw, the § 1983 remedy because Congress made this intention explicit in the language of both statutes and in the relevant legislative history.

I agree with the Court that the remedial provisions of the Clean Water Act and the MPRSA are "quite comprehensive." I cannot agree, however, with the Court's implicit conclusion that this determination ends the inquiry under *Maine* v. *Thiboutot, supra.* The question that must be answered in determining whether respondents may pursue their claims under § 1983 is whether Congress intended that the remedies provided in the substantive statutes be exclusive. See *Pennhurst State School and Hospital* v. *Halderman,* 451 U. S. 1, 28. Because Congress did not expressly address this question in the statutes, the Court looks elsewhere for an answer and finds it in the comprehensive character of the express statutory remedies. I have no quarrel as a general matter with the proposition that a comprehensive remedial scheme can evidence a congressional decision to preclude other remedies. Cf. *Northwest Airlines, Inc., supra,* at 93–94. However, we must not lose sight of the fact that our evaluation of a statute's express remedies is merely a tool used to discern congressional intent; it is not an end in itself. No matter how comprehensive we may consider a statute's remedial scheme to be, Congress is at liberty to leave other remedial avenues open. Express statutory language or clear references in the legislative history will rebut whatever presumption of exclusivity arises from comprehensive remedial provisions. In my judgment, in these cases we are presented with both express statutory language and clear references in the legislative history indicating that Congress did not intend the

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history revealing Congress' intent to foreclose the § 1983 remedy, or by establishing that Congress intended that the remedies provided in the substantive statute itself be exclusive. See *Pennhurst State School and Hospital* v. *Halderman,* 451 U. S. 1, 28.

express remedies in the Clean Water Act and the MPRSA to be exclusive.

Despite their comprehensive enforcement mechanisms, both statutes expressly preserve all legal remedies otherwise available. The statutes state in so many words that the authorization of an express remedy in the statute itself shall not give rise to an inference that Congress intended to foreclose other remedies. Thus, § 505 (e) of the Clean Water Act states:

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." 33 U. S. C. § 1365 (e).

And, § 105 (g)(5) of the MPRSA states:

> "The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Administrator, the Secretary, or a State agency)." 33 U. S. C. § 1415 (g)(5).

Respondents' right to proceed under § 1983 in light of these statutory provisions could have been made more plain only had Congress substituted the citation "42 U. S. C. § 1983" for the words "any statute" in the saving clauses.

The legislative history of both statutes makes it clear that the saving clauses were intended to mean what they say. The Senate Report on the Clean Water Act states:

> "It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a com-

> mon law action for pollution damages." S. Rep. No. 92–414, p. 81 (1971).

See also H. R. Rep. No. 92–911, p. 134 (1972). And the corresponding Report on the MPRSA similarly states that the authorization of citizen suits shall not restrict or supersede "any other right to legal action which is afforded the potential litigant in any other statute or the common law." S. Rep. No. 92–451, pp. 23–24 (1971). See also H. R. Rep. No. 92–361, p. 23 (1971).

The words "any other law" in the former Report and "any other statute" in the latter surely encompass 42 U. S. C. § 1983 (1976 ed., Supp. III), as do the words "any statute" in the saving clauses themselves. It therefore seems little short of remarkable that unambiguous expressions of legislative intent such as these can be read to express a purpose to withdraw the express statutory remedy provided by § 1983.

The Court, of course, discusses the saving clauses and this legislative history elsewhere in its opinion. See *ante,* at 15–17, and n. 26. In rejecting the Court of Appeals' conclusion, based in part on the saving clauses, that respondents may invoke implied rights of action under the Clean Water Act and the MPRSA, the Court finds it "doubtful" that the phrase "any statute" in the saving clauses refers to the very statutes in which the clauses appear. See *ante,* at 15–16. The Court's doubt is reinforced by use of the word "other" in the passages from the Senate Reports quoted above. See *ante,* at 16, n. 26. Thus, the Court holds that the statutory phrase "any statute" does not refer to the Clean Water Act or the MPRSA; the Court apparently also holds that it does not refer to § 1983, even though that statute clearly qualifies as "any *other* statute" or "any *other* law," within the meaning of the legislative history.[12]

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[12] In a remarkable departure from the "plain language" rule of statutory construction that has dominated our recent statutory decisions, the Court disregards the plain language not only of the two saving provisions, but

In my judgment, the Court has failed to uncover "a clear congressional mandate" [13] to withdraw the § 1983 remedy otherwise available to the respondents. Moreover, the statutory language and the legislative history reveal the exact opposite: a clear congressional mandate to preserve all existing remedies, including a private right of action under § 1983. I therefore respectfully dissent from this portion of the Court's decision.

II

The effect of the Court's holding in *Milwaukee* v. *Illinois,* 451 U. S. 304, was to make the city of Milwaukee's compliance with the requirements of the Clean Water Act a complete defense to a federal common-law nuisance action for pollution damage. It was, and still is, difficult for me to reconcile that holding with the excerpts from the statutes and the Senate Reports quoted above—particularly the statement:

> "Compliance with requirements under this Act would not be a defense to a common law action for pollution damages." S. Rep. No. 92–414, at 81.

Today, the Court pursues the pre-emption rationale of *Milwaukee* v. *Illinois* to its inexorable conclusion and holds that even noncompliance with the requirements of the Clean Water Act and the MPRSA is a defense to a federal common-law nuisance claim.[14] Because JUSTICE BLACKMUN has al-

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also of § 1983. Just last Term, we emphasized the plain language of that statute:

"The question before us is whether the phrase 'and laws,' as used in § 1983, means what it says, or whether it should be limited to some subset of laws. Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act." *Maine* v. *Thiboutot,* 448 U. S., at 4.

[13] *Carlson* v. *Green,* 446 U. S. 14, 23.

[14] I recognize, of course, that under the pre-emption rationale of *Milwaukee* v. *Illinois,* a defendant's compliance or noncompliance with the

ready exposed in detail the flaws in the Court's treatment of this issue, see *Milwaukee* v. *Illinois, supra,* at 333–347 (dissenting opinion), I merely note that the reasoning in his dissenting opinion in *Milwaukee* applies with special force in this case.[15]

III

Although I agree with the Court's holding that neither of these statutes implicitly authorizes a private damages remedy, I reach that conclusion by a different route. Under the traditional common-law analysis discussed *supra,* at 23–24, the primary question is whether the statute was enacted for the special benefit of a particular class of which the plaintiff is a member. See *Texas & Pacific R. Co.* v. *Rigsby,* 241 U. S., at 39–40. As we have held in the past, "[t]hat question is

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requirements of the Clean Water Act or the MPRSA is technically irrelevant. However, I point out that the petitioners in these cases allegedly failed to comply with the requirements of the statutes merely to emphasize the anomalous nature of the Court's holdings today and in *Milwaukee,* particularly in light of the statutory language and legislative history discussed in the text.

[15] In his brief for the federal parties, the Solicitor General notes:

"The plain language of the savings clause of the Clean Water Act, 33 U. S. C. 1365 (e), indicates Congress' intent to preserve all common law remedies, and the legislative history makes clear that Congress understood that the federal common law would be preserved as well." Brief for Federal Petitioners 37.

In support of this conclusion, the Solicitor General cites a statement in the legislative history by Congressman Dingell, one of the cosponsors of the Clean Water Act in the House, specifically referring to nuisance litigation under the federal common law. See 118 Cong. Rec. 33757 (1972), 1 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. 93–1, p. 252 (1973). In his statement, Congressman Dingell cited H. R. Rep. No. 92–1401, pp. 31–33 (1972), which quoted with approval from *Illinois* v. *Milwaukee,* 406 U. S. 91, and discussed two federal common-law nuisance actions then being pursued by the Department of Justice against alleged polluters. See also *Milwaukee* v. *Illinois,* 451 U. S., at 343–344 (BLACKMUN, J., dissenting).

answered by looking to the language of the statute itself." *Cannon* v. *University of Chicago,* 441 U. S. 677, 689.

The language of neither the Clean Water Act nor the MPRSA defines any such special class. Both the substantive provisions of these statutes and the breadth of their authorizations of citizen suits indicate that they were "enacted for the protection of the general public." *Cannon, supra,* at 690.[16] Thus, even under the more liberal approach to implied rights of action represented by *Rigsby* and its antecedents, respondents cannot invoke implied private remedies under these statutes. See generally *California* v. *Sierra Club,* 451 U. S., at 294–296.

The conclusion required by the statutory language is fortified by the legislative history on which the Court relies. I agree that the legislative deliberations about civil remedies under the Clean Air Act, see *ante,* at 17–18, n. 27, illuminate the meaning of the Clean Water Act and the MPRSA—since these statutes were enacted only a short time later and had similar environmental objectives—and that those deliberations reveal a conscious congressional choice not to authorize a new statutory damages remedy. Accordingly, I agree with the conclusion reached by the Court in Part II–A of its opinion, but I respectfully dissent from the remainder of its judgment.

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[16] Both statutes contain general statements of policy that indicate that they were enacted to serve a broad range of interests. Section 101 (a) of the Clean Water Act, as set forth in 33 U. S. C. § 1251 (a), provides, in part:

"The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Section 2 (b) of the MPRSA provides:

"The Congress declares that it is the policy of the United States to regulate the dumping of all types of materials into ocean waters and to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities." 33 U. S. C. § 1401 (b).

SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* GRAY PANTHERS

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

No. 80–756. Argued April 29, 1981—Decided June 25, 1981

The Medicaid program provides federal funds to States that pay for medical treatment for needy persons. Section 1902 (a)(17)(D) of the Social Security Act provides that, in calculating benefits, state Medicaid plans must not "take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse" or minor, blind, or disabled child. Section 1902 (a)(17)(B) requires participating States to grant benefits to eligible persons taking into account only such income and resources that are, "as determined in accordance with standards prescribed by the Secretary [of Health and Human Services], available to the applicant." The Secretary promulgated regulations describing the circumstances in which the income of one spouse may be "deemed" available to the other for purposes of determining eligibility for Medicaid benefits. In States participating in the program called Supplemental Security Income for the Aged, Blind, and Disabled (SSI), which substantially replaced the former state-run categorical need plans and enlarged eligibility for Medicaid benefits, the regulations provide that when the applicant and his spouse live in the same household, the spouse's income and resources always must be considered in determining eligibility whether or not they are actually contributed, and that when the applicant and spouse cease to share the same household, the spouse's income will be disregarded the next month unless both are eligible for assistance, in which case the income of both is considered for six months. Greater "deeming" is authorized in States which have exercised the option under § 209 (b) of the 1972 amendments to the Social Security Act of electing not to enlarge Medicaid eligibility to SSI levels. Respondent, an organization dedicated to helping the elderly, filed suit in Federal District Court attacking the regulations applicable in the § 209 (b) States on the ground that "deeming" impermissibly employs an "arbitrary formula" to impute a spouse's income to an institutionalized applicant and thus is inconsistent with § 1902 (a)(17)(B). Respondent claimed that before a State may take into account the spouse's income in calculating an institutionalized applicant's benefits, it must

make a factual determination that the spouse's income actually is contributed to that applicant. The District Court agreed and declared the regulations invalid. The Court of Appeals affirmed, but on the ground that the regulations were invalid because the Secretary in promulgating them had failed to consider the unfairness of treating separated spouses as a "single economic unit" and the disruption caused by the requirement of support from the applicant's spouse.

Held: The regulations at issue are consistent with the statutory scheme and are reasonable exercises of the authority delegated to the Secretary. Pp. 43–50.

(a) In view of the explicit delegation of substantive authority to the Secretary in § 1902 (a) (17) (B), his definition of the term "available" is entitled to "legislative effect" rather than mere deference or weight. Pp. 43–44.

(b) The language of § 1902 (a) (17) (D), which was enacted as part of the original Medicaid program, makes it clear that from the beginning of the program, Congress authorized States to presume spousal support. And this provision's legislative history is fully consistent with its language. By enacting § 209 (b), Congress in effect told States that wished to use the § 209 (b) option that they could retain virtually all of the Medicaid eligibility limitations, including "deeming," that were allowed under the original Act. Pp. 44–47.

(c) In treating spouses differently from most other relatives by explicitly authorizing state plans "to take into account the financial responsibility" of the spouse, Congress demonstrated that "deeming" is not antithetical to the general statutory requirement that Medicaid eligibility be based solely on resources "available" to the applicant. "Available" resources are different from those *in hand*. The requirement of availability refers to resources left to a *couple* after the spouse has deducted a sum on which to live, and does not require a State to consider only the resources actually paid by the spouse to the applicant. The administration of public assistance based on the use of a formula is not inherently arbitrary. To require individual factual determinations of need would dissipate in factfinding resources that could have been spent on the needy. Pp. 47–48.

203 U. S. App. D. C. 146, 629 F. 2d 180, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 50.

George W. Jones argued the cause *pro hac vice* for petitioners. With him on the briefs were *Solicitor General McCree, Deputy Solicitor General Geller,* and *Robert P. Jaye.*

Gill Deford argued the cause for respondent. With him on the brief were *Neal S. Dudovitz* and *Toby S. Edelman.**

JUSTICE POWELL delivered the opinion of the Court.

The Medicaid program provides federal funds to States that pay for medical treatment for the poor. An individual's entitlement to Medicaid benefits depends on the financial resources "available" to him. Some States determine eligibility by assuming—"deeming"—that a portion of the spouse's income is "available" to the applicant. "Deeming" thus has the effect of reducing both the number of eligible individuals and the amount of assistance paid to those who qualify. The question in this case is whether the federal regulations that permit States to "deem" income in this manner are arbitrary, capricious, or otherwise unlawful.

I

The Medicaid program, established in 1965 as Title XIX of the Social Security Act (Act), 79 Stat. 343, as amended, 42 U. S. C. § 1396 *et seq.* (1976 ed. and Supp. III), "provid[es] federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris* v. *McRae,* 448 U. S. 297, 301 (1980). Each participating State develops a plan containing "reasonable standards . . . for determining eligibility for and the extent of medical assistance." 42 U. S. C. § 1396a (a)(17). An individual is entitled to Medicaid if he fulfills the criteria established by

**Linley E. Pearson,* Attorney General, and *William E. Daily* and *Janis L. Summers,* Deputy Attorneys General, filed a brief for the State of Indiana as *amicus curiae* urging reversal.

Peter L. Cassady, William E. Marple, and *Thomas W. Jordan, Jr.,* filed a brief for John H. Foard et al. as *amici curiae* urging affirmance.

the State in which he lives. State Medicaid plans must comply with requirements imposed both by the Act itself and by the Secretary of Health and Human Services (Secretary). See § 1396a (1976 ed. and Supp. III).

A

As originally enacted, Medicaid required participating States to provide medical assistance to "categorically needy" individuals who received cash payments under one of four welfare programs established elsewhere in the Act. See § 1396a (a)(10) (1970 ed.). The categorically needy were persons whom Congress considered especially deserving of public assistance because of family circumstances, age, or disability.[1] States, if they wished, were permitted to offer assistance also to the "medically needy"—persons lacking the ability to pay for medical expenses, but with incomes too large to qualify for categorical assistance. In either case, the Act required the States to base assessments of financial need only on "such income and resources as are, as determined in accordance with standards prescribed by the Secretary, *available* to the applicant or recipient." § 1396a (a)(17)(B) (emphasis added). Specifically, eligibility decisions could "not take into account the financial responsibility of any individual for any applicant or recipient of assistance . . . unless such applicant or recipient is such individual's spouse" or minor, blind, or disabled child. § 1396a (a)(17)(D).

Believing it reasonable to expect an applicant's spouse to help pay medical expenses, some States adopted plans that considered the spouse's income in determining Medicaid eligibility and benefits.[2] These States calculated an amount

[1] The categorically needy were those entitled to assistance under four programs: Old Age Assistance, 42 U. S. C. § 301 *et seq.* (1970 ed.); Aid to Families with Dependent Children, § 601 *et seq.;* Aid to the Blind, § 1201 *et seq.;* and Aid to the Permanently and Totally Disabled, § 1351 *et seq.* See also 42 U. S. C. §§ 1381–1385 (1970 ed.).

[2] The Secretary approved these state plans.

considered necessary to pay the basic living expenses of the spouse and "deemed" any of the spouse's remaining income to be "available" to the applicant, even where the applicant was institutionalized and thus no longer living with the spouse.

B

In 1972, Congress replaced three of the four categorical assistance programs with a new program called Supplemental Security Income for the Aged, Blind, and Disabled (SSI), 42 U. S. C. § 1381 *et seq.*, Pub. L. 92–603, 86 Stat. 1465.[3] Under SSI, the Federal Government displaced the States by assuming responsibility for both funding payments and setting standards of need. In some States the number of individuals eligible for SSI assistance was significantly larger than the number eligible under the earlier, state-run categorical need programs.

The expansion of general welfare accomplished by SSI portended increased Medicaid obligations for some States because Congress retained the requirement that all recipients of categorical welfare assistance—now SSI—were entitled to Medicaid. Congress feared that these States would withdraw from the cooperative Medicaid program rather than expand their Medicaid coverage in a manner commensurate with the expansion of categorical assistance. "[I]n order not to impose a substantial fiscal burden on these States" or discourage them from participating, see S. Rep. No. 93–553, p. 56 (1973), Congress offered what has become known as the "§ 209 (b) option." [4] Under it, States could elect to provide Medicaid as-

[3] Thus, of the four state-administered categorical programs, only Aid to Families with Dependent Children survived the enactment of SSI.

[4] Section 209 (b) of the 1972 amendments, as amended, and as set forth in 42 U. S. C. § 1396a (f), provides, in pertinent part:

"Notwithstanding any other provision of this subchapter . . . no State not eligible to participate in the State plan program established under subchapter XVI of this chapter shall be required to provide medical assistance to any aged, blind, or disabled individual (within the meaning of subchapter XVI of this chapter) for any month unless such State would be

sistance only to those individuals who would have been eligible under the state Medicaid plan in effect on January 1, 1972.[5] States thus became either "SSI States" or "§ 209 (b) States" depending on the coverage that they offered.[6]

The Secretary promulgated regulations governing the administration of Medicaid benefits in both SSI States and § 209 (b) States. The regulations described the circumstances in which the income of one spouse may be "deemed" available to the other. In SSI States, "deeming" is conducted in the following manner: When the applicant and his spouse live in the same household, the spouse's income and resources always are considered in determining eligibility, "whether or not they are actually contributed." 42 CFR § 435.723 (b) (1980). When the applicant and spouse cease to share the

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(or would have been) required to provide medical assistance to such individual for such month had its plan for medical assistance approved under this subchapter and in effect on January 1, 1972, been in effect in such month, except that for this purpose any such individual shall be deemed eligible for medical assistance under such State plan if (in addition to meeting such other requirements as are or may be imposed under the State plan) the income of any such individual as determined in accordance with section 1396b (f) of this title (after deducting any supplemental security income payment and State supplementary payment made with respect to such individual, and incurred expenses for medical care as recognized under State law) is not in excess of the standard for medical assistance established under the State plan as in effect on January 1, 1972."

[5] States exercising the § 209 (b) option were required to adopt a "spend-down" provision. See *ibid.* Under it, an individual otherwise eligible for SSI but whose income exceeded the state standard could become eligible for Medicaid when that part of his income in excess of the standard was consumed by expenses for medical care. *Ibid.*

[6] Fifteen States now use the § 209 (b) option. They are: Connecticut, Hawaii, Illinois, Indiana, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Utah, and Virginia. (Guam, Puerto Rico, and the Virgin Islands are similarly situated with respect to Medicaid coverage because the SSI program never took effect there.) The Secretary permits States to change from "SSI-status" to "§ 209 (b)-status" at any time. New York has filed to become a § 209 (b) State. Pet. for Cert. 10, n. 11.

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same household, the spouse's income is disregarded the next month, § 435.723 (d), unless both are eligible for assistance. In the latter case, the income of both is considered for six months after their separation. § 435.723 (c).

Greater "deeming" is authorized in § 209 (b) States. The regulations require such States to "deem" income at least to the extent required in SSI States. § 435.734. And, if they choose, § 209 (b) States may "deem" to the full extent that they did before 1972. *Ibid.*[7]

II

Respondent, an organization dedicated to helping the Nation's elderly,[8] filed this suit in the District Court for the District of Columbia attacking some of the Secretary's regulations applicable in § 209 (b) States.[9] Respondent argued that "deeming" impermissibly employs an "arbitrary formula" to impute a spouse's income to an institutionalized Medicaid applicant. According to respondent, "deeming" is inconsistent with § 1902 (a)(17) of the Act, 42 U. S. C.

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[7] The regulation provides, in pertinent part, that "the agency must consider the income and resources of spouses and parents as available to the individual in the manner specified [for SSI States] or in a more extensive manner, but not more extensive than the requirements in effect under the Medicaid plan on January 1, 1972."

[8] The District Court correctly found that respondent had standing to sue because respondent alleged and proved that some of its members are persons adversely affected by the Secretary's regulations. Compare *Warth* v. *Seldin*, 422 U. S. 490, 511 (1975), with *Sierra Club* v. *Morton*, 405 U. S. 727, 735 (1972). Because this is a suit against the Secretary, the District Court had subject-matter jurisdiction under 28 U. S. C. § 1331 (a) without regard to the amount in controversy. Cf. *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600 (1979); *Weinberger* v. *Salfi*, 422 U. S. 749 (1975).

[9] The principal regulation at issue was 42 CFR § 435.734 (1980), quoted in n. 7, *supra*. Also challenged were "deeming" regulations applicable in Puerto Rico, Guam, and the Virgin Islands. 42 CFR §§ 436.602, 436.711, 436.821 (1980).

§ 1396a (a)(17), which provides that only income "available" to the applicant may be considered in establishing entitlement to and the amount of Medicaid benefits.[10] In respondent's view, before a State may take into account the income of a spouse in calculating the benefits of any institutionalized applicant, the State must make a factual determination that the spouse's income *actually is contributed* to that applicant.

The District Court agreed with respondent and declared the regulations invalid. *Gray Panthers* v. *Secretary, Dept. of HEW,* 461 F. Supp. 319 (1978).[11] The Court of Appeals for the District of Columbia Circuit affirmed, but under a different theory. *Gray Panthers* v. *Administrator, Health Care Financing Administration,* 203 U. S. App. D. C. 146, 629 F. 2d 180 (1980). Citing this Court's decision in *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402 (1971), the

[10] Subsection (17) provides that a state plan for medical assistance must—

"include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient . . . , (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child who is under age 21 or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter), is blind or permanently and totally disabled, or is blind or disabled as defined in section 1382c of this title (with respect to States which are not eligible to participate in such program); and provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the Secretary, the costs (whether in the form of insurance premiums or otherwise) incurred for medical care or for any other type of remedial care recognized under State law."

[11] The District Court thus did not need to reach respondent's alternative arguments that the regulations deprived its members of due process and equal protection.

court held that the regulations were invalid because the Secretary, in authorizing "deeming" of income between noncohabiting spouses, had failed to "tak[e] . . . into account" two "relevant factors." 203 U. S. App. D. C., at 149–150, 629 F. 2d, at 183–184. First, where spouses are separated they maintain two households rather than one. For those already put to this additional expense, it is unfair to continue to treat the couple as a "single economic unit" jointly responsible for the medical expenses of each. *Id.*, at 151, 629 F. 2d, at 185. Second, the requirement of support carries with it the potential to interject "disruptive forces" into people's lives. *Id.*, at 152, 629 F. 2d, at 186. The noninstitutionalized spouse is

> "faced with the 'choice' of reducing his or her standard of living to a point apparently set near the poverty line, or being responsible for the eviction of his or her spouse from the institution." *Ibid.*

One aspect of this "disruption," according to the court, was the fact that the "deeming" requirement creates an incentive for couples to divorce. *Id.*, at 152, n. 14, 629 F. 2d, at 186, n. 14. Because the court believed that the Secretary had not adequately considered these effects of "deeming," it affirmed the District Court's order invalidating the regulations and remanded to the Secretary for reconsideration.[12]

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[12] The Secretary has promulgated provisional regulations allowing § 209 (b) jurisdictions either to ignore the spouse's income or to consider it to the extent that it would be considered in an SSI State. See 45 Fed. Reg. 82254 (1980). At oral argument, counsel for the Secretary said that the new regulations probably would be rescinded if the Court of Appeals' decision were reversed. Tr. of Oral Arg. 4–7. The dissenting opinion, which would affirm the reasoning of the Court of Appeals, attaches significance to the fact that the preamble to the provisional regulations incorporates the sociological analysis of the Court of Appeals' opinion. *Post*, at 53–56. But this reflects no independent judgment of the Secretary, and is entitled to no weight. In issuing the provisional regulations, the Secretary simply was adhering to the lower court's reasoning and mandate. 45 Fed. Reg., at 82255 (the new regulations "are based on the Court of Appeals' decision in *Gray Panthers*").

We granted certiorari *sub nom. Harris* v. *Gray Panthers,* 449 U. S. 1123 (1981), to resolve disagreement among the Courts of Appeals over the validity of "deeming" income in determining Medicaid benefits.[13]

III

Congress explicitly delegated to the Secretary broad authority to promulgate regulations defining eligibility requirements for Medicaid. We find that the regulations at issue in this case are consistent with the statutory scheme and also are reasonable exercises of the delegated power. The Court of Appeals therefore was not justified in invalidating them, and we reverse.

A

The Social Security Act is among the most intricate ever drafted by Congress. Its Byzantine construction, as Judge Friendly has observed, makes the Act "almost unintelligible to the uninitiated." *Friedman* v. *Berger,* 547 F. 2d 724, 727, n. 7 (CA2 1976), cert. denied, 430 U. S. 984 (1977).[14] Perhaps appreciating the complexity of what it had wrought, Congress conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the Act. *Batterton* v. *Francis,* 432 U. S. 416, 425 (1977). Of special relevance in the present case is the delegation of authority in § 1902 (a)(17)(B) of the Act, 42 U. S. C. § 1396a (a)(17)(B), one of the provisions setting requirements for state Medicaid plans. Participating States must grant benefits to eligible persons "taking into account only such income

[13] See *Herweg* v. *Ray,* 619 F. 2d 1265 (CA8 1980) (en banc), cert. pending, No. 80–60; *Brown* v. *Stanton,* 617 F. 2d 1224 (CA7 1980), cert. pending, No. 79–1690; *Norman* v. *St. Clair,* 610 F. 2d 1228 (CA5 1980), cert. pending *sub nom. Schweiker* v. *Norman,* No. 80–498. Although we quote passages from these decisions in this opinion, we do not necessarily endorse other language in them.

[14] The District Court in the same case described the Medicaid statute as "an aggravated assault on the English language, resistant to attempts to understand it." 409 F. Supp. 1225, 1226 (SDNY 1976).

and resources as are, *as determined in accordance with standards prescribed by the Secretary,* available to the applicant" (emphasis added).

In view of this explicit delegation of substantive authority, the Secretary's definition of the term "available" is "entitled to more than mere deference or weight," *Batterton* v. *Francis,* 432 U. S., at 426. Rather, the Secretary's definition is entitled to "legislative effect" because, "[i]n a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term." *Id.,* at 425. Although we do not abdicate review in these circumstances, our task is the limited one of ensuring that the Secretary did not "excee[d] his statutory authority" and that the regulation is not arbitrary or capricious. *Id.,* at 426.

B

We do not think that the regulations at issue, insofar as they authorize some "deeming" of income between spouses, exceed the authority conferred on the Secretary by Congress. Section 1902 (a)(17)(D) of the Act, 42 U. S. C. § 1396a (a)(17)(D), enacted in 1965, provides that, in calculating benefits, state Medicaid plans must not

> "take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan *unless such applicant or recipient is such individual's spouse* or such individual's child who is under age 21 or [in certain circumstances] is blind or disabled . . . ." (Emphasis added.)

It thus is apparent that, from the beginning of the Medicaid program, Congress authorized States to presume spousal support. *Norman* v. *St. Clair,* 610 F. 2d 1228, 1236 (CA5 1980), cert. pending *sub nom. Schweiker* v. *Norman,* No. 80–498.

The legislative history of this provision is fully consistent with its language. The Senate and House Reports accompanying the 1965 amendments used virtually identical lan-

guage in endorsing the concept of "deeming" between spouses. The Senate Report states in pertinent part:

> "The committee believes it is proper to expect spouses to support each other and parents to be held accountable for the support of their minor children . . . . Such requirements for support may reasonably include the payment by such relative, if able, for medical care. Beyond such degree of relationship, however, requirements imposed are often destructive and harmful to the relationships among members of the family group. Thus, States may not include in their plans provisions for requiring contributions from relatives *other than a spouse or the parent of a minor child* . . . ." S. Rep. No. 404, 89th Cong., 1st Sess., 78 (1965) (emphasis added).

Accord, H. R. Rep. No. 213, 89th Cong., 1st Sess., 68 (1965). Senator Long, who headed the Senate's conference delegation, summarized the effect of subsection (17) as follows:

> "No income can be imputed to an individual unless actually available; and the financial responsibility of an individual for an applicant may be taken into account only if the applicant is the individual's spouse . . . ." 111 Cong. Rec. 18350 (1965).

This confirms our view that "Congress intended that income deemed from a spouse" could "be a part of the 'available' income which the state may consider in determining eligibility." *Norman* v. *St. Clair, supra,* at 1237.

If "deeming" were not permissible, subsection (17)(D) would be superfluous. Payments *actually received* by a Medicaid applicant—whether from a spouse or a more distant relative—are taken into account automatically. Thus, if there is to be content to subsection (17)(D)'s distinction between the responsibility of a spouse and that of a more distant relative, the subsection must envision that States can "deem" the income of the former but not the latter. See 610 F. 2d., at 1237.

Respondent is unable to offer a persuasive alternative explanation of subsection (17)(D). It suggests that Congress included the subsection simply to permit States to enforce their "relative responsibility laws" against a noncontributing spouse. In other words, respondent believes that Congress intended to prohibit States from automatically taking into account a spouse's income in computing benefits, but simultaneously to authorize States to sue any spouse who failed to contribute income to a Medicaid applicant. We find this argument unpersuasive. It is not

> "an answer to say that the state can take action against the spouse to recover that which the spouse was legally obligated to pay. [It is] unrealistic to think that the state will engage in a multiplicity of continuing individual lawsuits to recover the money that it should not have had to pay out in the first place. [Because States cannot practically do so, there would be] an open invitation for the spouse to decide that he or she does not wish to make the excess payment." *Brown* v. *Stanton,* 617 F. 2d 1224, 1234 (CA7 1980) (Pell, J., dissenting in part and concurring in part), cert. pending, No. 79–1690.[15]

Nothing in the 1972 amendments suggests that Congress intended to terminate the practice of "deeming" already contained in many state plans; rather, Congress appears to have ratified this practice implicitly. As noted above, the 1972 SSI program consolidated and set national standards for three of the four categorical grant programs. Traditionally, all recipients of categorical aid were entitled to Medicaid. Congress, however, did not want to force additional Medicaid obligations on States. It therefore enacted § 209

[15] Counsel for respondent acknowledged at oral argument that individual suits against spouses often would be useless, even if the State made the effort to bring them, because the court might not order the spouse to pay out of funds needed to maintain a reasonable standard of living. Tr. of Oral Arg. 37–39.

(b) to ensure that States that do not wish to do so would not have to enlarge Medicaid eligibility to SSI levels. States using the § 209 (b) option thus were told they could retain virtually all [16] of the Medicaid eligibility limitations—including "deeming"—that were allowed under the original Act.

C

Respondent nevertheless insists that the Secretary's regulation is inconsistent with provisions of the statute and also contrary to statements in the legislative history. The Act requires Medicaid determinations to be made only on the basis of the income "*available* to the applicant." 42 U. S. C. § 1396a (a)(17)(B) (emphasis added). According to respondent, the use of that term demonstrates that Medicaid entitlements must be determined on the basis of income "actually in the hands . . . of the institutionalized spouse," Tr. of Oral Arg. 30, not imputed on the basis of an "arbitrary formula." Respondent acknowledges the duty of spousal support as a general matter, *id.*, at 26–27, but argues that the Act nevertheless requires an individualized determination of availability in each case.

We take a different view. It is clear beyond doubt that Congress was wary of imputing the income of others to a Medicaid applicant.[17] Yet, as we noted above, Congress treated spouses differently from most other relatives by explicitly authorizing state plans to "take into account the financial responsibility" of the spouse. 42 U. S. C. § 1396a (a)(17)(D). Congress thus demonstrated that "deeming" is not

[16] States exercising the § 209 (b) option were obliged only to amend their Medicaid plans to include a "spend-down" provision. See n. 5, *supra.*

[17] See, *e. g.*, S. Rep. No. 404, 89th Cong., 1st Sess., 78 (1965) (States may "not assume the availability of income which may not, in fact, be available"); 111 Cong. Rec. 15804 (1965) (remarks of Sen. Ribicoff) ("only income and resources actually available to an applicant may be considered in determining need"); *id.*, at 7216 (remarks of Rep. Mills) ("[n]o income can be imputed to an individual unless actually available").

antithetical to the general statutory requirement that Medicaid eligibility be based solely on resources "available" to the applicant. "Available" resources are different from those *in hand.* We think that the requirement of availability refers to resources left to a *couple* after the spouse has deducted a sum on which to live. It does not, as respondent argues, permit the State only to consider the resources actually paid by the spouse to the applicant. See *Herweg* v. *Ray,* 619 F. 2d 1265, 1272 (CA8 1980) (en banc) (opinion of Ross, J.) (aff'g by an equally divided court 481 F. Supp. 914 (SD Iowa 1978)), cert. pending, No. 80–60.

Sound principles of administration confirm our view that Congress authorized "deeming" of income between spouses. The administration of public assistance based on the use of a formula is not inherently arbitrary. Cf. *Weinberger* v. *Salfi,* 422 U. S. 749, 781, 782, 784 (1975). There are limited resources to spend on welfare. To require individual determinations of need would mandate costly factfinding procedures that would dissipate resources that could have been spent on the needy. *Id.,* at 784. Sometimes, of course, Congress has required individualized findings of fact.[18] In this case, however, the Act and legislative history make clear that Congress approved some "deeming" of income between individuals and their spouses, at least where States had enacted rules to this effect before 1972.

IV

We are not without sympathy for those with minimal resources for medical care.[19] But our "sympathy is an insuffi-

[18] *E. g., Van Lare* v. *Hurley,* 421 U. S. 338 (1975) (Aid to Families with Dependent Children (AFDC) calculations under 42 U. S. C. § 606 (a)); *Shea* v. *Vialpando,* 416 U. S. 251 (1974) (AFDC calculations under 42 U. S. C. § 602 (a)(7)). See also *Lewis* v. *Martin,* 397 U. S. 552 (1970); *King* v. *Smith,* 392 U. S. 309 (1968).

[19] A brief *amicus curiae* paints a distressing picture of individuals forced to choose between abandoning an institutionalized spouse and living in

cient basis for approving a recovery" based on a theory inconsistent with law. *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U. S. 268, 284 (1980).[20] This suit is a direct attack on regulations authorizing the concept of "deeming" in the abstract. Hardships resulting from provisions in particular state plans that set aside inadequate sums for the contributing spouse, see n. 19, *supra*, are not at issue here.[21]

We hold that the Secretary properly exercised the authority delegated by Congress in promulgating regulations permitting "deeming" of income between spouses in § 209 (b)

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poverty. Brief for John H. Foard et al. as *Amici Curiae* 4–11. Yet, as the dissenting judge below pointed out, the principal "villain" in this case is not "deeming" *per se*, but inflation. 203 U. S. App. D. C., at 155, 629 F. 2d, at 189 (MacKinnon, J., dissenting). Many States have not recently reviewed the amount that the contributing spouse may set aside for his own living expenses and thereby exempt from "deeming." As the Secretary concedes, that amount even when first set was "near subsistence level." Brief for Petitioners 4. Over time, with inflation, that dollar amount in some States may have become inadequate to support the noninstitutionalized spouse.

[20] We note, in any event, that respondent's position would not eliminate difficult choices for the contributing spouse. This lawsuit seeks only to enjoin the "deeming" of income to an institutionalized spouse. *Supra*, at 40–41; App. 17a. Respondent thus concedes the legality of "deeming" where spouses cohabit. To adopt respondent's construction of the statute would create an incentive to shunt ailing spouses into nursing homes to circumvent the "deeming" that otherwise would occur.

[21] The dissenting opinion suggests that the *federal regulations* authorizing "deeming" are invalid because the provisions of some *state plans* "allo[w] a State to deem more income than [can] realistically be considered 'available.'" *Post*, at 56. We think the dissent addresses a problem not presently before the Court. This case presents the question whether any "deeming" is consistent with the "availability" requirement of subsection (17)(B). We hold that it is. We do not, however, decide whether state plans that set aside inadequate sums for the contributing spouse are consistent with other provisions of the statute, such as the requirement that States "reasonabl[y] evaluat[e] . . . income or resources." 42 U. S. C. § 1396a (a)(17)(C). In sum, whatever deficiencies may exist in specific state plans are not at issue in this case.

States. Cf. *Batterton* v. *Francis,* 432 U. S. 416 (1977).[22] Accordingly, we reverse the decision under review and remand for proceedings consistent with this opinion.[23]

It is so ordered.

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

The scope of the issue presented in this difficult case is confined to the situation in which a married applicant for Medicaid benefits is institutionalized. I believe that issue can be best understood by focusing our attention on an institutionalized applicant who is totally dependent for financial support on a spouse who is employed and who continues to live in what had been their joint home. Arguably the relevant statutory language [1] might authorize the eligibility deter-

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[22] The Court of Appeals thus erred in its reliance on *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402 (1971). The court believed that the Secretary had not "taken the relevant factors into account." 203 U. S. App. D. C., at 150, 629 F. 2d, at 184. The preceding discussion demonstrates, however, that Congress itself already had considered the "relevant factors" in authorizing "deeming" between spouses. *Supra,* at 44–48. In these circumstances, the Secretary need not do more. Cf. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.,* 435 U. S. 519, 548–549 (1978).

[23] By holding for respondent on statutory grounds, the lower courts pretermitted respondent's constitutional arguments. See n. 11, *supra.* These arguments are, of course, open to be litigated on remand. We express no view as to their merit.

[1] Section 1902 (a) (17) of the Social Security Act, 79 Stat. 346, as amended, and as set forth in 42 U. S. C. § 1396a (a) (17), provides:

"(a) A State plan for medical assistance must—

. . . . . .

"(17) include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, but only in the case of applicants or recipients of assistance under the plan who are not receiving aid or assistance under any plan of the State approved under subchapter I, X,

mination to be made in three ways: (1) none of the employed spouse's income should be deemed available to the institutionalized spouse unless it is actually contributed; (2) all of that income should be deemed available; (3) some, but not all, may be counted in determining the eligibility of the institutionalized spouse.

Respondent persuaded the District Court that the first reading was required by the word "available" in subpart (B) of § 1902 (a)(17), and by the legislative history's emphasis on preventing the States from assuming the "availability of

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XIV, or XVI, or part A of subchapter IV of this chapter, and with respect to whom supplemental security income benefits are not being paid under subchapter XVI of this chapter, based on the variations between shelter costs in urban areas and in rural areas) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient and (in the case of any applicant or recipient who would, except for income and resources, be eligible for aid or assistance in the form of money payments under any plan of the State approved under subchapter I, X, XIV, or XVI or part A of subchapter IV, or to have paid with respect to him supplemental security income benefits under subchapter XVI of this chapter) as would not be disregarded (or set aside for future needs) in determining his eligibility for such aid, assistance or benefits, (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child who is under age 21 or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter), is blind or permanently and totally disabled, or is blind or disabled as defined in section 1382c of this title (with respect to States which are not eligible to participate in such program); and provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the Secretary, the costs (whether in the form of insurance premiums or otherwise) incurred for medical care or for any other type of remedial care recognized under State law."

income which may not, in fact, be available." [2] For the reasons stated by the Court, I agree that this is not a correct reading of the statute.[3] The Court of Appeals decision, however, cannot be reversed on that basis. That court did not hold that deeming was never permissible; rather, it invalidated regulations which permitted virtually unlimited deeming. I am persuaded that the Court of Appeals was correct in its holding that the statute does place significant limits on the amount of income that may be deemed available to the institutionalized spouse.

The Court of Appeals set aside the Secretary's regulations because in promulgating those regulations the Secretary had failed to consider all relevant factors as required by *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402. Relying on the same legislative history as did the District Court, the Court of Appeals reasoned that the statutory scheme contemplated that cohabiting spouses would support each other but that Congress intended a flexible approach to apply in situations in which the basic assumption of cohabitation could not be made.[4] The court thus held that the Secretary should

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[2] "Another provision is included that requires States to take into account only such income and resources as . . . are *actually available to the applicant or recipient* . . . . Income and resources taken into account, furthermore, must be reasonably evaluated by the States. *These provisions are designed so that the States will not assume the availability of income which may not, in fact, be available* . . . ." S. Rep. No. 404, 89th Cong., 1st Sess., 78 (1965) (emphasis supplied); see H. R. Rep. No. 213, 89th Cong., 1st Sess., 67 (1965) (hereinafter 1965 House Report).

[3] See also *Norman* v. *St. Clair,* 610 F. 2d 1228, 1237–1238 (CA5 1980), cert. pending *sub nom. Schweiker* v. *Norman,* No. 80–498; *Brown* v. *Stanton,* 617 F. 2d 1224, 1233–1234 (CA7 1980) (Pell, J., dissenting in part and concurring in part), cert. pending, No. 79–1690.

[4] The court noted that the 1965 House Report indicated that deeming should not be employed unless the income is "in fact, available":

"These provisions are designed so that the States will not assume the availability of income which may not, in fact, be available or overevaluate income and resources which are available. Examples of income assumed

have taken into account the impact of institutionalization of one spouse on what previously constituted a single economic unit [5] and the potential disruption of the family caused by deeming.[6]

In revising her regulations after the Court of Appeals' decision, then Secretary Harris specifically considered the fac-

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include support orders from absent fathers, which have not been paid or contributions from relatives which are not in reality received by the needy individual." 1965 House Report, at 67.

Thus the legislative history recognizes that if the basic assumption underlying a support requirement is not correct, the income of the spouse or parent is not "actually available." Just as the premise that fathers should support their children should not apply when the father is absent, the premise that spouses pool income and resources to support each other should not apply when one spouse is institutionalized.

[5] The court stated:

"[T]he general rule of mutual support proceeds from the assumption that the spouses maintain a common household, 'sharing' income and expenses, *see* 42 Fed. Reg. 2685, 2686 (1977), and constituting a single economic unit. But where institutionalization has caused one spouse to be absent from the home, two households, not one, in effect must be maintained. Expenses can no longer fairly be characterized as jointly incurred, and 'deeming' no longer accurately reflects the economic norm. An important condition that makes 'deeming' ordinarily reasonable between spouses is thus not met." *Gray Panthers* v. *Administrator, Health Care Financing Administration,* 203 U. S. App. D. C. 146, 151, 629 F. 2d 180, 185.

[6] "The legislative history of Section 1396 (a)(17) recognizes that, especially in the context of the family structure, great care must be exercised to ensure that governmental regulation does not needlessly disrupt people's lives. In contrast with the ordinary situation of cohabiting spouses, institutionalized individuals and their husbands or wives are particularly vulnerable to the disruptive forces than can be exerted by governmental regulations. In most cases the individual's continued institutionalization depends upon his or her spouse's ability (or willingness) to pay the 'deemed' amount. The spouse is thus faced with the 'choice' of reducing his or her standard of living to a point apparently set near the poverty line, or being responsible for the eviction of his or her spouse from the institution. The institutionalized individual is often literally helpless to temper the harshness of this dilemma." *Id.,* at 152, 629 F. 2d, at 186 (footnotes omitted).

tors discussed by the Court of Appeals.[7] Although the Secretary was required by the Court of Appeals mandate to reconsider the regulation in light of the factors discussed by the court, the court's mandate did not specify the contents of the new regulations.[8] Nevertheless, the Secretary concluded that deeming in § 209 (b) States should be limited in both "duration and amount."[9] She cogently explained her conclusion that "deeming has several adverse impacts on beneficiaries":

> "The institutionalized spouse may lose medicaid eligibility if the deemed amount is large enough to bring his or her income level over the State's standards. If the deemed amount is not actually contributed but the State's payments to the facility nevertheless are reduced by that amount, the individual may be asked to leave the

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[7] The Secretary also considered "additional factors we believe important":

"(1) The extent to which deeming is consistent with the best interests of program beneficiaries;

"(2) The Federal-State nature of the Medicaid program;

"(3) The extent to which the regulations would be simple to administer; and

"(4) The fiscal effects of the regulations on Medicaid programs budgets." 45 Fed. Reg. 82254, 82256 (1980).

[8] In response to a comment arguing that the Court of Appeals decision prohibited any deeming, the Secretary responded:

"We disagree with the commenters' interpretation of the Court of Appeals' decision. The only issue before the Court was whether deeming is appropriate in section 1902 (f) States for spouses separated by institutionalization. Because the Court of Appeals ordered that we consider the factors relevant to deeming in its limited context, it authorized us to approve deeming if our consideration of the factors led to this result. We have concluded, through balancing these factors that limited deeming is appropriate in this context." *Id.*, at 82258.

[9] The new regulations apply the deeming rule currently in effect for SSI States, which permits deeming only until the month following institutionalization when only the institutionalized spouse is otherwise eligible for Medicaid and for six months when both spouses are eligible. See *ibid.*; 42 U. S. C. §§ 1381a, 1382 (a), 1382c (b), 1382c (f).

institution. With respect to the spouse in the community, the use of deeming may also be unfair. This occurs principally because, in section 1902 (f) States, the amounts that are protected for the noninstitutionalized spouse's maintenance may be set at 1972 levels. Those levels may be insufficient in light of the current cost of living. This may force the noninstitutionalized spouse either to refuse to pay the 'deemed' amount (possibly resulting in the institutionalized spouse being required to leave the facility), or to try to live at levels that are inadequate for subsistence.

"Moreover, when income is 'deemed,' the spouse has less of an incentive actually to contribute the amount than if relative responsibility laws are used, because deeming has an adverse effect on the institutionalized individual, whereas relative responsibility laws affect the spouse in the community by requiring him or her to make support payments. These potentially severe impacts lead us to conclude that deeming should be limited in both duration and amount." [10]

In my opinion, the Court of Appeals was correct in construing the statutory mandate that "only such income and

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[10] 45 Fed. Reg., at 82256. The Secretary further stated:

"We also believe that, although there is a general expectation that spouses should support one another, their ability to do so is substantially undermined when one spouse is institutionalized. The expectation for support is based, in part, on the assumption that spouses maintain a common household, will share income and expenses, and therefore constitute a single economic unit. However, that assumption is undercut when a spouse is institutionalized. In deciding what constituted a period of institutionalization long enough to overcome the assumption that the spouses are a household unit, we looked at the rules used in the SSI program and whether those rules were suitable for Medicaid.

"We believe that, in cases where only one spouse is eligible, the couple should no longer be viewed as maintaining a common household beginning with the month following the month of institutionalization." *Id.*, at 82256–82257.

resources as are . . . available to the applicant" may be taken into account in determining eligibility to require consideration of the impact of institutionalization of one spouse on what was previously a single economic unit. The Secretary's consideration of that factor led her to conclude that deeming "should be limited in both duration and amount." The regulations that had been in effect prior to the Court of Appeals decision permitted a State to deem, for an unlimited period, the wage earner's entire income except for an amount that might have been sufficient to supply basic living requirements in 1972. Because the wage earner and the institutionalized spouse were no longer living together and thereby sharing expenses, and because inflation in the intervening years increased the amount of those expenses, the regulations allowed a State to deem more income than could realistically be considered "available." [11] This consequence was attributable to the failure of the Secretary to give adequate consideration to the factors identified by the Court of Appeals.

I believe the Court of Appeals was correct in perceiving this defect in the regulations and in concluding that the Secretary failed to give consideration to a relevant factor required by the statute. I would therefore affirm the judgment of the Court of Appeals.

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[11] In his opinion concurring in part and dissenting in part from the Court of Appeals decision in this case, Judge MacKinnon stated:

"The only villain here is the level of need which has not been adjusted to reflect sky-rocketing costs of living. However well-intentioned, the court cannot through a remand to the Secretary affect the inflationary pressures which are particularly burdensome to people on fixed incomes." 203 U. S. App. D. C., at 155, 629 F. 2d, at 189.

I believe, however, that although the courts and the Secretary cannot affect inflation, the Secretary can and should, as was done here, consider the effects of inflation on a determination of what income is "available" to an institutionalized spouse.

Syllabus

ROSTKER, DIRECTOR OF SELECTIVE SERVICE *v.* GOLDBERG ET AL.

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

No. 80–251. Argued March 24, 1981—Decided June 25, 1981

The Military Selective Service Act (Act) authorizes the President to require the registration for possible military service of males but not females, the purpose of registration being to facilitate any eventual conscription under the Act. Registration for the draft was discontinued by Presidential Proclamation in 1975 (the Act was amended in 1973 to preclude conscription), but as the result of a crisis in Southwestern Asia, President Carter decided in 1980 that it was necessary to reactivate the registration process, and sought Congress' allocation of funds for that purpose. He also recommended that Congress amend the Act to permit the registration and conscription of women as well as men. Although agreeing that it was necessary to reactivate the registration process, Congress allocated only those funds necessary to register males and declined to amend the Act to permit the registration of women. Thereafter, the President ordered the registration of specified groups of young men. In a lawsuit brought by several men challenging the Act's constitutionality, a three-judge District Court ultimately held that the Act's gender-based discrimination violated the Due Process Clause of the Fifth Amendment and enjoined registration under the Act.

Held: The Act's registration provisions do not violate the Fifth Amendment. Congress acted well within its constitutional authority to raise and regulate armies and navies when it authorized the registration of men and not women. Pp. 64–83.

(a) The customary deference accorded Congress' judgments is particularly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality, and perhaps in no area has the Court accorded Congress greater deference than in the area of national defense and military affairs. While Congress is not free to disregard the Constitution when it acts in the area of military affairs, this Court must be particularly careful not to substitute its judgment of what is desirable for that of Congress, or its own evaluation of evidence for a reasonable evaluation by the Legislative Branch. Congress carefully considered whether to register only males for potential conscription or whether to register both sexes, and its broad constitutional authority

cannot be ignored in considering the constitutionality of its studied choice of one alternative in preference to the other. Pp. 64–72.

(b) The question of registering women was extensively considered by Congress in hearings held in response to the President's request for authorization to register women, and its decision to exempt women was not the accidental byproduct of a traditional way of thinking about women. Since Congress thoroughly reconsidered the question of exempting women from the Act in 1980, the Act's constitutionality need not be considered solely on the basis of the views expressed by Congress in 1948, when the Act was first enacted in its modern form. Congress' determination that any future draft would be characterized by a need for combat troops was sufficiently supported by testimony adduced at the hearings so that the courts are not free to make their own judgment on the question. And since women are excluded from combat service by statute or military policy, men and women are simply not similarly situated for purposes of a draft or registration for a draft, and Congress' decision to authorize the registration of only men, therefore, does not violate the Due Process Clause. The testimony of executive and military officials before Congress showed that the argument for registering women was based on considerations of equity, but Congress was entitled, in the exercise of its constitutional powers, to focus on the question of military need rather than "equity." The District Court, undertaking an independent evaluation of the evidence, exceeded its authority in ignoring Congress' conclusions that whatever the need for women for noncombat roles during mobilization, it could be met by volunteers, and that staffing noncombat positions with women during a mobilization would be positively detrimental to the important goal of military flexibility. Pp. 72–83.

509 F. Supp. 586, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and STEVENS, JJ., joined. WHITE, J., *post*, p. 83, and MARSHALL, J., *post*, p. 86, filed dissenting opinions, in which BRENNAN, J., joined.

Solicitor General McCree argued the cause for appellant. With him on the briefs were *Assistant Attorney General Daniel, Acting Assistant Attorney General Martin, Deputy Solicitor General Claiborne, Barbara E. Etkind, William Kanter,* and *Mark H. Gallant.*

Donald L. Weinberg argued the cause for appellees. With

him on the brief were *Harold E. Kohn, Stuart H. Savett, Isabelle Katz Pinzler, Bruce J. Ennis,* and *Laurence H. Tribe.**

JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented is whether the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.* (1976 ed. and Supp. III), violates the Fifth Amendment to the United States Constitution in authorizing the President to require the registration of males and not females.

I

Congress is given the power under the Constitution "To raise and support Armies," "To provide and maintain a Navy," and "To make Rules for the Government and Regulation of the land and naval Forces." Art. I, § 8, cls. 12–14. Pursuant to this grant of authority Congress has enacted the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.* (1976 ed. and Supp. III) (the MSSA or the Act). Section 3 of the Act, 62 Stat. 605, as amended, 50 U. S. C. App. § 453, empowers the President, by proclamation, to require the registration of "every male citizen" and male resident aliens between the ages of 18 and 26. The purpose of this registration is to facilitate any eventual conscription: pursuant to § 4 (a) of the Act, 62 Stat. 605, as amended, 50 U. S. C. App. § 454 (a), those persons required to register under § 3 are liable for

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*Briefs of *amici curiae* urging reversal were filed by *Dennis Rapps* and *A. David Stern* for the Orthodox Jewish Coalition on the Draft; and by *Nathan Lewin* for Stacy Acker et al.

Briefs of *amici curiae* urging affirmance were filed by *Daniel Marcus* for Congressman Robert W. Kastenmeier et al.; by *Paul Kenney* for Men's Rights, Inc.; by *Barbara A. Brown, Thomas J. Hart, Phyllis N. Segal,* and *Judith I. Avner* for the National Organization for Women; and by *Judith L. Lichtman* for the Women's Equity Action League Educational and Legal Defense Fund et al.

Daniel J. Popeo and *Paul D. Kamenar* filed a brief for Congressman Lawrence P. McDonald et al. as *amici curiae.*

training and service in the Armed Forces. The MSSA registration provision serves no other purpose beyond providing a pool for subsequent induction.

Registration for the draft under § 3 was discontinued in 1975. Presidential Proclamation No. 4360, 3 CFR 462 (1971–1975 Comp.), note following 50 U. S. C. App. § 453. In early 1980, President Carter determined that it was necessary to reactivate the draft registration process.[1] The immediate impetus for this decision was the Soviet armed invasion of Afghanistan. 16 Weekly Comp. of Pres. Doc. 198 (1980) (State of the Union Address). According to the administration's witnesses before the Senate Armed Services Committee, the resulting crisis in Southwestern Asia convinced the President that the "time has come" "to use his present authority to require registration . . . as a necessary step to preserving or enhancing our national security interests." Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S. 2294 before the Senate Committee on Armed Services, 96th Cong., 2d Sess., 1805 (1980) (hereafter Hearings on S. 2294) (joint statement of Dr. John P. White, Deputy Director, Office of Management and Budget, Dr. Bernard Rostker, Director, Selective Service System, and Richard Danzig, Principal Deputy Assistant Secretary of Defense). The Selective Service System had been inactive, however, and funds were needed before reactivating registration. The President therefore recommended that funds be transferred from the Department of Defense to the separate Selective Service System. H. R. Doc. No. 96–267, p. 2 (1980). He also recommended that Congress take action to amend the MSSA to permit the registration and conscription of women as well as men. See House Committee on Armed Services, Presidential Recom-

[1] The President did not seek conscription. Since the Act was amended to preclude conscription as of July 1, 1973, Pub. L. 92–129, 85 Stat. 353, 50 U. S. C. App. § 467 (c), any actual conscription would require further congressional action. See S. Rep. No. 96–826, p. 155 (1980).

mendations for Selective Service Reform—A Report to Congress Prepared Pursuant to Pub. L. 96–107, 96th Cong., 2d Sess., 20–23 (Comm. Print No. 19, 1980) (hereinafter Presidential Recommendations), App. 57–61.

Congress agreed that it was necessary to reactivate the registration process, and allocated funds for that purpose in a Joint Resolution which passed the House on April 22 and the Senate on June 12. H. J. Res. 521, Pub. L. 96–282, 94 Stat. 552. The Resolution did not allocate all the funds originally requested by the President, but only those necessary to register males. See S. Rep. No. 96–789, p. 1, n. 1, and p. 2 (1980); 126 Cong. Rec. 13895 (1980) (Sen. Nunn). Although Congress considered the question at great length, see *infra,* at 72–74, it declined to amend the MSSA to permit the registration of women.

On July 2, 1980, the President, by Proclamation, ordered the registration of specified groups of young men pursuant to the authority conferred by § 3 of the Act. Registration was to commence on July 21, 1980. Proclamation No. 4771, 3 CFR 82 (1980).

These events of last year breathed new life into a lawsuit which had been essentially dormant in the lower courts for nearly a decade. It began in 1971 when several men subject to registration for the draft and subsequent induction into the Armed Services filed a complaint in the United States District Court for the Eastern District of Pennsylvania challenging the MSSA on several grounds.[2] A three-judge Dis-

[2] Plaintiffs contended that the Act amounted to a taking of property without due process, imposed involuntary servitude, violated rights of free expression and assembly, was unlawfully implemented to advance an unconstitutional war, and impermissibly discriminated between males and females. The District Court denied plaintiffs' application to convene a three-judge District Court and dismissed the suit, *Rowland* v. *Tarr,* 341 F. Supp. 339 (1972). On appeal, the Court of Appeals for the Third Circuit affirmed the dismissal of all claims except the discrimination claim, and remanded the case to the District Court to determine if this claim

trict Court was convened in 1974 to consider the claim of unlawful gender-based discrimination which is now before us.[3] On July 1, 1974, the court declined to dismiss the case as moot, reasoning that although authority to induct registrants had lapsed, see n. 1, *supra,* plaintiffs were still under certain affirmative obligations in connection with registration. *Rowland* v. *Tarr,* 378 F. Supp. 766. Nothing more happened in the case for five years. Then, on June 6, 1979, the court Clerk, acting pursuant to a local rule governing inactive cases, proposed that the case be dismissed. Additional discovery thereupon ensued, and defendants moved to dismiss on various justiciability grounds. The court denied the motion to dismiss, ruling that it did not have before it an adequate record on the operation of the Selective Service System and what action would be necessary to reactivate it. *Goldberg* v. *Tarr,* 510 F. Supp. 292 (1980). On July 1, 1980, the court certified a plaintiff class of "all male persons who are registered or subject to registration under 50 U. S. C. App. § 453 or are liable for training and service in the armed forces of the United States under 50 U. S. C. App. §§ 454, 456 (h) and 467 (c)." 509 F. Supp. 586, 589.[4]

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was substantial enough to warrant the convening of a three-judge court under then-applicable 28 U. S. C. § 2282 (1970 ed.) and whether plaintiffs had standing to assert that claim. 480 F. 2d 545 (1973). On remand, the District Court answered both questions in the affirmative, resulting in the convening of the three-judge court which decided the case below. The Act authorizing three-judge courts to hear claims such as this was repealed in 1976, Pub. L. 94–381, §§ 1 and 2, 90 Stat. 1119, but remains applicable to suits filed before repeal, § 7, 90 Stat. 1120.

[3] As the Court stated in *Schlesinger* v. *Ballard,* 419 U. S. 498, 500, n. 3 (1975): "Although it contains no Equal Protection Clause as does the Fourteenth Amendment, the Fifth Amendment's Due Process Clause prohibits the Federal Government from engaging in discrimination that is 'so unjustifiable as to be violative of due process.' *Bolling* v. *Sharpe,* 347 U. S. 497, 499."

[4] When entering its judgment on July 18, the District Court redefined the class to include "[a]ll male persons who are registered under 50 U. S. C. App. § 453 or are liable for training and service in the armed forces of

On Friday, July 18, 1980, three days before registration was to commence, the District Court issued an opinion finding that the Act violated the Due Process Clause of the Fifth Amendment and permanently enjoined the Government from requiring registration under the Act. The court initially determined that the plaintiffs had standing and that the case was ripe, determinations which are not challenged here by the Government. Turning to the merits, the court rejected plaintiffs' suggestions that the equal protection claim should be tested under "strict scrutiny," and also rejected defendants' argument that the deference due Congress in the area of military affairs required application of the traditional "minimum scrutiny" test. Applying the "important government interest" test articulated in *Craig* v. *Boren,* 429 U. S. 190 (1976), the court struck down the MSSA. The court stressed that it was not deciding whether or to what extent women should serve in combat, but only the issue of registration, and felt that this "should dispel any concern that we are injecting ourselves in an inappropriate manner into military affairs." 509 F. Supp., at 597. See also *id.,* at 599, nn. 17 and 18. The court then proceeded to examine the testimony and hearing evidence presented to Congress by representatives of the military and the Executive Branch, and concluded on the basis of this testimony that "military opinion, backed by extensive study, is that the availability of women registrants would materially increase flexibility, not hamper it." *Id.,* at 603. It rejected Congress' contrary determination in part because of what it viewed as Congress' "inconsistent positions" in declining to register women yet spending funds to recruit them and expand their opportunities in the military. *Ibid.*

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the United States under 50 U. S. C. App. §§ 454, 456 (h) and 467 (c); and who are also either subject to registration under Presidential Proclamation No. 4771 (July 2, 1980) or are presently registered with the Selective Service System." 509 F. Supp., at 605.

The Director of Selective Service immediately filed a notice of appeal and the next day, Saturday, July 19, 1980, JUSTICE BRENNAN, acting in his capacity as Circuit Justice for the Third Circuit, stayed the District Court's order enjoining commencement of registration. 448 U. S. 1306. Registration began the next Monday. On December 1, 1980, we noted probable jurisdiction. 449 U. S. 1009.

II

Whenever called upon to judge the constitutionality of an Act of Congress—"the gravest and most delicate duty that this Court is called upon to perform," *Blodgett* v. *Holden,* 275 U. S. 142, 148 (1927) (Holmes, J.)—the Court accords "great weight to the decisions of Congress." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U. S. 94, 102 (1973). The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States. As Justice Frankfurter noted in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 164 (1951) (concurring opinion), we must have "due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government." The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality. See, *e. g.,* S. Rep. No. 96–826, pp. 159–161 (1980); 126 Cong. Rec. 13880–13882 (1980) (Sen. Warner); *id.,* at 13896 (Sen. Hatfield).

This is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has

the Court accorded Congress greater deference. In rejecting the registration of women, Congress explicitly relied upon its constitutional powers under Art. I, § 8, cls. 12–14. The "specific findings" section of the Report of the Senate Armed Services Committee, later adopted by both Houses of Congress, began by stating:

> "Article I, section 8 of the Constitution commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for Government and regulation of the land and naval forces, and pursuant to these powers it lies within the discretion of the Congress to determine the occasions for expansion of our Armed Forces, and the means best suited to such expansion should it prove necessary." S. Rep. No. 96–826, *supra,* at 160.

See also S. Rep. No. 96–226, p. 8 (1979). This Court has consistently recognized Congress' "broad constitutional power" to raise and regulate armies and navies, *Schlesinger* v. *Ballard,* 419 U. S. 498, 510 (1975). As the Court noted in considering a challenge to the selective service laws: "The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *United States* v. *O'Brien,* 391 U. S. 367, 377 (1968). See *Lichter* v. *United States,* 334 U. S. 742, 755 (1948).

Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked. In *Gilligan* v. *Morgan,* 413 U. S. 1, 10 (1973), the Court noted:

> "[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments,

> subject *always* to civilian control of the Legislative and Executive Branches."

See also *Orloff* v. *Willoughby,* 345 U. S. 83, 93–94 (1953).[5]

The operation of a healthy deference to legislative and executive judgments in the area of military affairs is evident in several recent decisions of this Court. In *Parker* v. *Levy,* 417 U. S. 733, 756, 758 (1974), the Court rejected both vagueness and overbreadth challenges to provisions of the Uniform Code of Military Justice, noting that "Congress is permitted to legislate both with greater breadth and with greater flexibility" when the statute governs military society, and that "[w]hile the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections." In *Middendorf* v. *Henry,* 425 U. S. 25 (1976), the Court noted that in considering due process claims in the context of a summary court-martial it "must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U. S. Const., Art. I, § 8," concerning what rights were available. *Id.,* at 43. See also *id.,* at 49–50 (POWELL, J., concurring). Deference to the judgment of other branches in the area of military affairs also played a major role in *Greer* v. *Spock,* 424 U. S. 828, 837–838 (1976), where the Court upheld a ban on political speeches by civilians on a military base, and *Brown* v. *Glines,* 444 U. S. 348 (1980), where the Court upheld regulations imposing a prior restraint on the right to petition of military personnel.

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[5] See also *Simmons* v. *United States,* 406 F. 2d 456, 459 (CA5), cert. denied, 395 U. S. 982 (1969) ("That this court is not competent or empowered to sit as a super-executive authority to review the decisions of the Executive and Legislative branches of government in regard to the necessity, method of selection, and composition of our defense forces is obvious and needs no further discussion").

See also *Burns* v. *Wilson,* 346 U. S. 137 (1953); *United States* v. *MacIntosh,* 283 U. S. 605, 622 (1931).

In *Schlesinger* v. *Ballard, supra,* the Court considered a due process challenge, brought by males, to the Navy policy of according females a longer period than males in which to attain promotions necessary to continued service. The Court distinguished previous gender-based discriminations held unlawful in *Reed* v. *Reed,* 404 U. S. 71 (1971), and *Frontiero* v. *Richardson,* 411 U. S. 677 (1973). In those cases, the classifications were based on "overbroad generalizations." See 419 U. S., at 506–507. In the case before it, however, the Court noted:

> "[T]he different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service. Appellee has not challenged the current restrictions on women officers' participation in combat and in most sea duty." *Id.,* at 508.

In light of the combat restrictions, women did not have the same opportunities for promotion as men, and therefore it was not unconstitutional for Congress to distinguish between them.

None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause, see *Ex parte Milligan,* 4 Wall. 2 (1866); *Hamilton* v. *Kentucky Distilleries & Warehouse Co.,* 251 U. S. 146, 156 (1919), but the tests and limitations to be applied may differ because of the military context. We of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice. See *Columbia Broadcasting System,*

Inc. v. *Democratic National Committee,* 412 U. S., at 103. In deciding the question before us we must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.

The District Court purported to recognize the appropriateness of deference to Congress when that body was exercising its constitutionally delegated authority over military affairs, 509 F. Supp., at 596, but it stressed that "[w]e are not here concerned with military operations or day-to-day conduct of the military into which we have no desire to intrude." *Ibid.* Appellees also stress that this case involves civilians, not the military, and that "the impact of registration on the military is only indirect and attenuated." Brief for Appellees 19 (emphasis omitted). We find these efforts to divorce registration from the military and national defense context, with all the deference called for in that context, singularly unpersuasive. *United States* v. *O'Brien,* 391 U. S. 367 (1968), recognized the broad deference due Congress in the selective service area before us in this case. Registration is not an end in itself in the civilian world but rather the first step in the induction process into the military one, and Congress specifically linked its consideration of registration to induction, see, *e. g.,* S. Rep. No. 96–826, pp. 156, 160 (1980). Congressional judgments concerning registration and the draft are based on judgments concerning military operations and needs, see, *e. g., id.,* at 157 ("the starting point for any discussion of the appropriateness of registering women for the draft is the question of the proper role of women in combat"), and the deference unquestionably due the latter judgments is necessarily required in assessing the former as well. Although the District Court stressed that it was not intruding on military questions, its opinion was based on assessments of military need and flexibility in a time of mobilization. See, *e. g.,* 509 F. Supp., at 600–605. It would be blinking reality to say that

our precedents requiring deference to Congress in military affairs are not implicated by the present case.[6]

The Solicitor General argues, largely on the basis of the foregoing cases emphasizing the deference due Congress in the area of military affairs and national security, that this Court should scrutinize the MSSA only to determine if the distinction drawn between men and women bears a rational relation to some legitimate Government purpose, see *U. S. Railroad Retirement Bd.* v. *Fritz,* 449 U. S. 166 (1980), and should not examine the Act under the heightened scrutiny with which we have approached gender-based discrimination, see *Michael M.* v. *Superior Court of Sonoma County,* 450 U. S. 464 (1981); *Craig* v. *Boren,* 429 U. S. 190 (1976); *Reed* v. *Reed, supra.*[7] We do not think that the substantive guarantee of due process or certainty in the law will be advanced by any further "refinement" in the applicable tests as suggested by the Government. Announced degrees of "deference" to legislative judgments, just as levels of "scrutiny"

[6] Congress recognized that its decision on registration involved judgments on military needs and operations, and that its decisions were entitled to particular deference: "The Supreme Court's most recent teachings in the field of equal protection cannot be read in isolation from its opinions giving great deference to the judgment of Congress and military commanders in dealing [with] the management of military forces and the requirements of military discipline. The Court has made it unmistakably clear that even our most fundamental constitutional rights must in some circumstances be modified in the light of military needs, and that Congress' judgment as to what is necessary to preserve our national security is entitled to great deference." S. Rep. No. 96–826, pp. 159–160 (1980).

Deference to Congress' judgment was a consistent and dominant theme in lower court decisions assessing the present claim. See, *e. g., United States* v. *Clinton,* 310 F. Supp. 333, 335 (ED La. 1970); *United States* v. *Offord,* 373 F. Supp. 1117, 1118 (ED Wis. 1974).

[7] It is clear that "[g]ender has never been rejected as an impermissible classification in all instances." *Kahn* v. *Shevin,* 416 U. S. 351, 356, n. 10 (1974). In making this observation the Court noted that "Congress has not so far drafted women into the Armed Services, 50 U. S. C. App. § 454." *Ibid.*

which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile abstractions used to justify a result. In this case the courts are called upon to decide whether Congress, acting under an explicit constitutional grant of authority, has by that action transgressed an explicit guarantee of individual rights which limits the authority so conferred. Simply labeling the legislative decision "military" on the one hand or "gender-based" on the other does not automatically guide a court to the correct constitutional result.

No one could deny that under the test of *Craig* v. *Boren, supra,* the Government's interest in raising and supporting armies is an "important governmental interest." Congress and its Committees carefully considered and debated two alternative means of furthering that interest: the first was to register only males for potential conscription, and the other was to register both sexes. Congress chose the former alternative. When that decision is challenged on equal protection grounds, the question a court must decide is not which alternative it would have chosen, had it been the primary decisionmaker, but whether that chosen by Congress denies equal protection of the laws.

Nor can it be denied that the imposing number of cases from this Court previously cited suggest that judicial deference to such congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged. As previously noted, *supra,* at 67, deference does not mean abdication. The reconciliation between the deference due Congress and our own constitutional responsibility is perhaps best instanced in *Schlesinger* v. *Ballard,* 419 U. S., at 510, where we stated:

> "This Court has recognized that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' [*U. S. ex rel.*] *Toth*

> v. *Quarles,* 350 U. S. 11, 17. See also *Orloff* v. *Willoughby,* 345 U. S. 83, 94. The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress, see U. S. Const., Art. I, § 8, cls. 12–14, and with the President. See U. S. Const., Art. II, § 2, cl. 1. We cannot say that, in exercising its broad constitutional power here, Congress has violated the Due Process Clause of the Fifth Amendment."

Or, as put a generation ago in a case not involving any claim of gender-based discrimination:

> "[J]udges are not given the task of running the Army. The responsibility for setting up channels through which . . . grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." *Orloff* v. *Willoughby,* 345 U. S., at 93–94.

Schlesinger v. *Ballard* did not purport to apply a different equal protection test because of the military context, but did stress the deference due congressional choices among alternatives in exercising the congressional authority to raise and support armies and make rules for their governance. In light of the floor debate and the Report of the Senate Armed Services Committee hereinafter discussed, it is apparent that Congress was fully aware not merely of the many facts and figures presented to it by witnesses who testified before its Committees, but of the current thinking as to the place of women in the Armed Services. In such a case, we cannot ignore Congress' broad authority conferred by the Constitution to raise and support armies when we are urged to declare

unconstitutional its studied choice of one alternative in preference to another for furthering that goal.

III

This case is quite different from several of the gender-based discrimination cases we have considered in that, despite appellees' assertions, Congress did not act "unthinkingly" or "reflexively and not for any considered reason." Brief for Appellees 35. The question of registering women for the draft not only received considerable national attention and was the subject of wide-ranging public debate, but also was extensively considered by Congress in hearings, floor debate, and in committee. Hearings held by both Houses of Congress in response to the President's request for authorization to register women adduced extensive testimony and evidence concerning the issue. See Hearings on S. 2294; Hearings on H. R. 6569, Registration of Women, before the Subcommittee on Military Personnel of the House Committee on Armed Services, 96th Cong., 2d Sess. (1980) (hereafter House Hearings). These hearings built on other hearings held the previous year addressed to the same question.[8]

The House declined to provide for the registration of women when it passed the Joint Resolution allocating funds for the Selective Service System. See 126 Cong. Rec. 8601–8602, 8620 (1980). When the Senate considered the Joint Resolution, it defeated, after extensive debate, an amendment which in effect would have authorized the registration of women. *Id.*, at 13876–13898.[9] As noted earlier, Congress in

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[8] See Reinstitution of Procedures for Registration Under the Military Selective Service Act: Hearing on S. 109 and S. 226 before the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Services, 96th Cong., 1st Sess. (1979) (Hearing on S. 109 and S. 226). Seven months before the President's call for the registration of women, the Senate Armed Services Committee rejected the idea, see S. Rep. No. 96-226, pp. 8–9 (1979).

[9] The amendment provided that no funds "shall be made available for

H. J. Res. 521 only authorized funds sufficient to cover the registration of males. The Report of the Senate Committee on Appropriations on H. J. Res. 521 noted that the amount authorized was below the President's request "due to the Committee's decision not to provide $8,500,000 to register women," and that "[t]he amount recommended by the Committee would allow for registration of young men only." S. Rep. No. 96–789, p. 2 (1980); see 126 Cong. Rec. 13895 (1980) (Sen. Nunn).

While proposals to register women were being rejected in the course of transferring funds to register males, Committees in both Houses which had conducted hearings on the issue were also rejecting the registration of women. The House Subcommittee on Military Personnel of the House Armed Services Committee tabled a bill which would have amended the MSSA to authorize registration of women, H. R. 6569, on March 6, 1980. Legislative Calendar, House Committee on Armed Services, 96th Cong., 2d Sess., 58 (1979–1980). The Senate Armed Services Committee rejected a proposal to register women, S. 2440, as it had one year before, see S. Rep. No. 96–226, pp. 8–9 (1979), and adopted specific findings supporting its action. See S. Rep. No. 96–826, pp. 156–161 (1980). These findings were stressed in debate in the Senate on Joint Resolution 521, see 126 Cong. Rec. 13893–13894 (1980) (Sen. Nunn); *id.*, at 13880–13881 (Sen. Warner). They were later specifically endorsed by House and Senate conferees considering the Fiscal Year 1981 Defense Authorization Bill. See S. Conf. Rep. No. 96–895, p. 100 (1980).[10]

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implementing a system of registration which does not include women." 126 Cong. Rec. 13876 (1980).

[10] The findings were before the conferees because the Senate Armed Services Committee had added a provision to the 1981 Defense Authorization Bill authorizing the transfer of funds to register young men as a stopgap measure should Joint Resolution 521 fail. See S. Conf. Rep. No. 96–895, at 100.

Later both Houses adopted the findings by passing the Report. 126 Cong. Rec. 23126, 23261 (1980). The Senate Report, therefore, is considerably more significant than a typical report of a single House, and its findings are in effect findings of the entire Congress.

The foregoing clearly establishes that the decision to exempt women from registration was not the " 'accidental by-product of a traditional way of thinking about females.' " *Califano* v. *Webster*, 430 U. S. 313, 320 (1977) (quoting *Califano* v. *Goldfarb*, 430 U. S. 199, 223 (1977) (STEVENS, J., concurring in judgment)). In *Michael M.*, 450 U. S., at 471, n. 6 (plurality opinion), we rejected a similar argument because of action by the California Legislature considering and rejecting proposals to make a statute challenged on discrimination grounds gender-neutral. The cause for rejecting the argument is considerably stronger here. The issue was considered at great length, and Congress clearly expressed its purpose and intent. Contrast *Califano* v. *Westcott*, 443 U. S. 76, 87 (1979) ("The gender qualification . . . escaped virtually unnoticed in the hearings and floor debates").[11]

For the same reasons we reject appellees' argument that we must consider the constitutionality of the MSSA solely on the basis of the views expressed by Congress in 1948, when the MSSA was first enacted in its modern form. Contrary to the suggestions of appellees and various *amici*, reliance on the legislative history of Joint Resolution 521 and the activity of the various Committees of the 96th Congress considering the registration of women does not violate sound principles that appropriations legislation should not be con-

[11] Nor can we agree with the characterization of the MSSA in the Brief for National Organization for Women as *Amicus Curiae* as a law which "coerce[s] or preclude[s] women as a class from performing tasks or jobs of which they are capable," or the suggestion that this case involves "[t]he exclusion of women from the military." *Id.*, at 19–20. Nothing in the MSSA restricts in any way the opportunities for women to volunteer for military service.

sidered as modifying substantive legislation. Congress did not change the MSSA in 1980, but it did thoroughly reconsider the question of exempting women from its provisions, and its basis for doing so. The 1980 legislative history is, therefore, highly relevant in assessing the constitutional validity of the exemption.

The MSSA established a plan for maintaining "adequate armed strength . . . to insure the security of [the] Nation." 50 U. S. C. App. § 451 (b). Registration is the first step "in a united and continuous process designed to raise an army speedily and efficiently," *Falbo* v. *United States,* 320 U. S. 549, 553 (1944), see *United States* v. *Nugent,* 346 U. S. 1, 9 (1953), and Congress provided for the reactivation of registration in order to "provid[e] the means for the early delivery of inductees in an emergency." S. Rep. No. 96–826, *supra,* at 156. Although the three-judge District Court often tried to sever its consideration of registration from the particulars of induction, see, *e. g.,* 509 F. Supp., at 604–605, Congress rather clearly linked the need for renewed registration with its views on the character of a subsequent draft. The Senate Report specifically found that "[a]n ability to mobilize rapidly is essential to the preservation of our national security. . . . A functioning registration system is a vital part of any mobilization plan." S. Rep. No. 96–826, *supra,* at 160. As Senator Warner put it, "I equate registration with the draft." Hearings on S. 2294, at 1197. See also *id.,* at 1195 (Sen. Jepsen), 1671 (Sen. Exon). Such an approach is certainly logical, since under the MSSA induction is interlocked with registration: only those registered may be drafted, and registration serves no purpose beyond providing a pool for the draft. Any assessment of the congressional purpose and its chosen means must therefore consider the registration scheme as a prelude to a draft in a time of national emergency. Any other approach would not be testing the Act in light of the purposes Congress sought to achieve.

Congress determined that any future draft, which would be facilitated by the registration scheme, would be characterized by a need for combat troops. The Senate Report explained, in a specific finding later adopted by both Houses, that "[i]f mobilization were to be ordered in a wartime scenario, the primary manpower need would be for combat replacements." S. Rep. No. 96–826, p. 160 (1980); see *id.*, at 158. This conclusion echoed one made a year before by the same Senate Committee, see S. Rep. No. 96–226, pp. 2–3, 6 (1979). As Senator Jepsen put it, "the shortage would be in the combat arms. That is why you have drafts." Hearings on S. 2294, at 1688. See also *id.*, at 1195 (Sen. Jepsen); 126 Cong. Rec. 8623 (1980) (Rep. Nelson). Congress' determination that the need would be for combat troops if a draft took place was sufficiently supported by testimony adduced at the hearings so that the courts are not free to make their own judgment on the question. See Hearings on S. 2294, at 1528–1529 (Marine Corps Lt. Gen. Bronars); 1395 (Principal Deputy Assistant Secretary of Army Clark); 1391 (Lt. Gen. Yerks); 748 (Gen. Meyer); House Hearings 17 (Assistant Secretary of Defense for Manpower Pirie). See also Hearing on S. 109 and S. 226, at 24, 54 (Gen. Rogers). The purpose of registration, therefore, was to prepare for a draft *of combat troops.*

Women as a group, however, unlike men as a group, are not eligible for combat. The restrictions on the participation of women in combat in the Navy and Air Force are statutory. Under 10 U. S. C. § 6015 (1976 ed., Supp. III), "women may not be assigned to duty on vessels or in aircraft that are engaged in combat missions," and under 10 U. S. C. § 8549 female members of the Air Force "may not be assigned to duty in aircraft engaged in combat missions." The Army and Marine Corps preclude the use of women in combat as a matter of established policy. See App. 86, 34, 58. Congress specifically recognized and endorsed the exclusion of women from

combat in exempting women from registration. In the words of the Senate Report:

> "The principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people. It is universally supported by military leaders who have testified before the Committee . . . . Current law and policy exclude women from being assigned to combat in our military forces, and the Committee reaffirms this policy." S. Rep. No. 96–826, *supra,* at 157.

The Senate Report specifically found that "[w]omen should not be intentionally or routinely placed in combat positions in our military services." *Id.,* at 160. See S. Rep. No. 96–226, *supra,* at 9.[12] The President expressed his intent to continue the current military policy precluding women from combat, see Presidential Recommendations 3, App. 34, and appellees present their argument concerning registration against the background of such restrictions on the use of women in combat.[13] Consistent with the approach of this Court in *Schlesinger* v. *Ballard,* 419 U. S. 498 (1975), we must examine appellees' constitutional claim concerning registration with these combat restrictions firmly in mind.

The existence of the combat restrictions clearly indicates the basis for Congress' decision to exempt women from registration. The purpose of registration was to prepare for a draft of combat troops. Since women are excluded from combat, Congress concluded that they would not be needed in the event of a draft, and therefore decided not to register them. Again turning to the Senate Report:

"In the Committee's view, the starting point for any

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[12] No major country has women in combat jobs in their standing army. See App. 143.

[13] See Brief for Appellees 1–2, n. 2 (denying any concession of the validity of combat restrictions, but submitting restrictions are irrelevant to the present case). See also App. 256.

> discussion of the appropriateness of registering women for the draft is the question of the proper role of women in combat. . . . The policy precluding the use of women in combat is, in the Committee's view, the most important reason for not including women in a registration system." S. Rep. No. 96–826, *supra,* at 157.[14]

The District Court stressed that the military need for women was irrelevant to the issue of their registration. As that court put it: "Congress could not constitutionally require registration under the MSSA of only black citizens or only white citizens, or single out any political or religious group simply because those groups contain sufficient persons to fill the needs of the Selective Service System." 509 F. Supp., at 596. This reasoning is beside the point. The reason women are exempt from registration is not because military needs can be met by drafting men. This is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups, such as would be the case with an all-black or all-white, or an all-Catholic or all-Lutheran, or an all-Republican or all-Democratic registration. Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft.

Congress' decision to authorize the registration of only men,

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[14] JUSTICE MARSHALL's suggestion that since Congress focused on the need for combat troops in authorizing male-only registration the Court could "be forced to declare the male-only registration program unconstitutional," *post,* at 96, in the event of a peacetime draft misreads our opinion. The perceived need for combat or combat-eligible troops in the event of a draft was not limited to a wartime draft. See, *e. g.,* S. Rep. No. 96–826, at 157 (considering problems associated with "[r]egistering women for assignment to combat *or assigning women to combat positions in peacetime*") (emphasis supplied); *id.,* at 158 (need for rotation between combat and noncombat positions "[i]n peace and war").

therefore, does not violate the Due Process Clause. The exemption of women from registration is not only sufficiently but also closely related to Congress' purpose in authorizing registration. See *Michael M.*, 450 U. S., at 472–473 (plurality opinion); *Craig* v. *Boren*, 429 U. S. 190 (1976); *Reed* v. *Reed*, 404 U. S. 71 (1971). The fact that Congress and the Executive have decided that women should not serve in combat fully justifies Congress in not authorizing their registration, since the purpose of registration is to develop a pool of potential combat troops. As was the case in *Schlesinger* v. *Ballard*, *supra*, "the gender classification is not individious, but rather realistically reflects the fact that the sexes are not similarly situated" in this case. *Michael M.*, *supra*, at 469 (plurality opinion). The Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality.

In holding the MSSA constitutionally invalid the District Court relied heavily on the President's decision to seek authority to register women and the testimony of members of the Executive Branch and the military in support of that decision. See, *e. g.*, 509 F. Supp., at 603–604, and n. 30. As stated by the administration's witnesses before Congress, however, the President's "decision to ask for authority to register women is based on equity." House Hearings 7 (statement of Assistant Secretary of Defense Pirie and Director of Selective Service System Rostker); see also Presidential Recommendations 3, 21, 22, App. 35, 59, 60; Hearings on S. 2294, at 1657 (statements of Executive Associate Director of Office of Management and Budget Wellford, Director of Selective Service System Rostker, and Principal Deputy Assistant Secretary of Defense Danzig). This was also the basis for the testimony by military officials. *Id.*, at 710 (Gen. Meyer), 1002 (Gen. Allen). The Senate Report, evaluating the testimony before the Committee, recognized that "[t]he argument for registration and induction of women . . . is not based on military

necessity, but on considerations of equity." S. Rep. No. 96–826, p. 158 (1980). Congress was certainly entitled, in the exercise of its constitutional powers to raise and regulate armies and navies, to focus on the question of military need rather than "equity."[15] As Senator Nunn of the Senate Armed Services Committee put it:

> "Our committee went into very great detail. We found that there was no military necessity cited by any witnesses for the registration of females.
>
> "The main point that those who favored the registration of females made was that they were in favor of this because of the equality issue, which is, of course, a legitimate view. But as far as military necessity, and that is what we are primarily, I hope, considering in the overall registration bill, there is no military necessity for this." 126 Cong. Rec. 13893 (1980).

See also House Hearings 20 (Rep. Holt) ("You are talking about equity. I am talking about military").[16]

Although the military experts who testified in favor of registering women uniformly opposed the actual drafting of

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[15] The grant of constitutional authority is, after all, to Congress and not to the Executive or military officials.

[16] The District Court also focused on what it termed Congress' "inconsistent positions" in encouraging women to volunteer for military service and expanding their opportunities in the service, on the one hand, and exempting them from registration and the draft on the other. 509 F. Supp., at 603–604. This reasoning fails to appreciate the different purposes served by encouraging women volunteers and registration for the draft. Women volunteers do not occupy combat positions, so encouraging women to volunteer is not related to concerns about the availability of combat troops. In the event of a draft, however, the need would be for combat troops or troops which could be rotated into combat. See *supra*, at 76. Congress' positions are clearly not inconsistent and in treating them as such the District Court failed to understand Congress' purpose behind registration as distinguished from its purpose in encouraging women volunteers.

women, see, *e. g.,* Hearing on S. 109 and S. 226, at 11 (Gen. Rogers), there was testimony that in the event of a draft of 650,000 the military could absorb some 80,000 female inductees. Hearings on S. 2294, at 1661, 1828. The 80,000 would be used to fill noncombat positions, freeing men to go to the front. In relying on this testimony in striking down the MSSA, the District Court palpably exceeded its authority when it ignored Congress' considered response to this line of reasoning.

In the first place, assuming that a small number of women could be drafted for noncombat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans. "It has been suggested that all women be registered, but only a handful actually be inducted in an emergency. The Committee finds this a confused and ultimately unsatisfactory solution." S. Rep. No. 96–826, *supra,* at 158. As the Senate Committee recognized a year before, "training would be needlessly burdened by women recruits who could not be used in combat." S. Rep. No. 96–226, p. 9 (1979). See also S. Rep. No. 96–826, *supra,* at 159 ("Other administrative problems such as housing and different treatment with regard to dependency, hardship and physical standards would also exist"). It is not for this Court to dismiss such problems as insignificant in the context of military preparedness and the exigencies of a future mobilization.

Congress also concluded that whatever the need for women for noncombat roles during mobilization, whether 80,000 or less, it could be met by volunteers. See *id.,* at 160; *id.,* at 158 ("Because of the combat restrictions, the need would be primarily for men, and women volunteers would fill the requirements for women"); House Hearings 19 (Rep. Holt). See also Hearings on S. 2294, at 1195 (Gen. Rogers).

Most significantly, Congress determined that staffing noncombat positions with women during a mobilization would

be positively detrimental to the important goal of military flexibility.

> ". . . [T]here are other military reasons that preclude very large numbers of women from serving. Military flexibility requires that a commander be able to move units or ships quickly. Units or ships not located at the front or not previously scheduled for the front nevertheless must be able to move into action if necessary. In peace and war, significant rotation of personnel is necessary. We should not divide the military into two groups—one in permanent combat and one in permanent support. Large numbers of non-combat positions must be available to which combat troops can return for duty before being redeployed." S. Rep. No. 96–826, *supra,* at 158.

The point was repeated in specific findings, *id.,* at 160; see also S. Rep. No. 96–226, *supra,* at 9. In sum, Congress carefully evaluated the testimony that 80,000 women conscripts could be usefully employed in the event of a draft and rejected it in the permissible exercise of its constitutional responsibility. See also Hearing on S. 109 and S. 226, at 16 (Gen. Rogers); [17] Hearings on S. 2294, at 1682. The District

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[17] General Rogers' testimony merits quotation:

"General Rogers. One thing which is often lost sight of, Senator, is that in an emergency during war, the Army has often had to reach back into the support base, into the supporting elements in the operating base, and pull forward soldiers to fill the ranks in an emergency; that is, to hand them a rifle or give them a tanker suit and put them in the front ranks.

"Senator Warner. General Patton did that at one time, I believe at the Battle of the Bulge.

"General Rogers. Absolutely.

"Now, if that support base and that operating base to the rear consists in large measure of women, then we don't have that opportunity to reach back and pull them forward, because women should not be placed in a forward fighting position or in a tank, in my opinion. So that, too, enters

Court was quite wrong in undertaking an independent evaluation of this evidence, rather than adopting an appropriately deferential examination of *Congress'* evaluation of that evidence.

In light of the foregoing, we conclude that Congress acted well within its constitutional authority when it authorized the registration of men, and not women, under the Military Selective Service Act. The decision of the District Court holding otherwise is accordingly

Reversed.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

I assume what has not been challenged in this case—that excluding women from combat positions does not offend the Constitution. Granting that, it is self-evident that if during mobilization for war, all noncombat military positions must be filled by combat-qualified personnel available to be moved into combat positions, there would be no occasion whatsoever to have any women in the Army, whether as volunteers or inductees. The Court appears to say, *ante,* at 76–77, that Congress concluded as much and that we should accept that judgment even though the serious view of the Executive Branch, including the responsible military services, is to the contrary. The Court's position in this regard is most unpersuasive. I perceive little, if any, indication that Congress itself concluded that every position in the military, no matter how far removed from combat, must be filled with combat-ready men. Common sense and experience in recent wars, where women volunteers were employed in substantial numbers, belie this view of reality. It should not be ascribed to Congress, particularly in the face of the testimony of military authorities, hereafter referred to, that there would be a sub-

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the equation when one considers the subject of the utility of women under contingency conditions."

stantial number of positions in the services that could be filled by women both in peacetime and during mobilization, even though they are ineligible for combat.

I would also have little difficulty agreeing to a reversal if all the women who could serve in wartime without adversely affecting combat readiness could predictably be obtained through volunteers. In that event, the equal protection component of the Fifth Amendment would not require the United States to go through, and a large segment of the population to be burdened with, the expensive and essentially useless procedure of registering women. But again I cannot agree with the Court, see *ante,* at 81, that Congress concluded or that the legislative record indicates that each of the services could rely on women volunteers to fill all the positions for which they might be eligible in the event of mobilization. On the contrary, the record as I understand it, supports the District Court's finding that the services would have to conscript at least 80,000 persons to fill positions for which combat-ready men would not be required. The consistent position of the Defense Department representatives was that their best estimate of the number of women draftees who could be used productively by the services in the event of a major mobilization would be approximately 80,000 over the first six months. See Hearings on S. 2294 before the Senate Committee on Armed Services, 96th Cong., 2d Sess., 1681, 1688 (1980); Hearings on H. R. 6569 before the Subcommittee on Military Personnel of the House Committee on Armed Services, 96th Cong., 2d Sess., 16 (1980). This number took into account the estimated number of women volunteers, see Deposition of Director of Selective Service Bernard Rostker 8; Deposition of Principal Deputy Assistant Secretary of Defense Richard Danzig, App. 276. Except for a single, unsupported, and ambiguous statement in the Senate Report to the effect that "women volunteers would fill the requirements for women," there is no indication that Congress rejected the

Defense Department's figures or relied upon an alternative set of figures.

Of course, the division among us indicates that the record in this respect means different things to different people, and I would be content to vacate the judgment below and remand for further hearings and findings on this crucial issue. Absent that, however, I cannot agree that the record supports the view that all positions for which women would be eligible in wartime could and would be filled by female volunteers.

The Court also submits that because the primary purpose of registration and conscription is to supply combat troops and because the great majority of noncombat positions must be filled by combat-trained men ready to be rotated into combat, the absolute number of positions for which women would be eligible is so small as to be *de minimis* and of no moment for equal protection purposes, especially in light of the administrative burdens involved in registering all women of suitable age. There is some sense to this; but at least on the record before us, the number of women who could be used in the military without sacrificing combat readiness is not at all small or insubstantial, and administrative convenience has not been sufficient justification for the kind of outright gender-based discrimination involved in registering and conscripting men but no women at all.

As I understand the record, then, in order to secure the personnel it needs during mobilization, the Government cannot rely on volunteers and must register and draft not only to fill combat positions and those noncombat positions that must be filled by combat-trained men, but also to secure the personnel needed for jobs that can be performed by persons ineligible for combat without diminishing military effectiveness. The claim is that in providing for the latter category of positions, Congress is free to register and draft only men. I discern no adequate justification for this kind of discrimi-

nation between men and women. Accordingly, with all due respect, I dissent.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The Court today places its imprimatur on one of the most potent remaining public expressions of "ancient canards about the proper role of women," *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542, 545 (1971) (MARSHALL, J., concurring). It upholds a statute that requires males but not females to register for the draft, and which thereby categorically excludes women from a fundamental civic obligation. Because I believe the Court's decision is inconsistent with the Constitution's guarantee of equal protection of the laws, I dissent.

I

A

The background to this litigation is set out in the opinion of the Court, *ante,* at 59–64, and I will not repeat that discussion here. It bears emphasis, however, that the only question presented by this case is whether the exclusion of women from registration under the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.* (1976 ed. and Supp. III) (MSSA), contravenes the equal protection component of the Due Process Clause of the Fifth Amendment. Although the purpose of registration is to assist preparations for drafting civilians into the military, *we are not asked to rule on the constitutionality of a statute governing conscription.*[1] With the advent of the All-Volunteer Armed Forces, the MSSA was specifically amended to preclude conscription as of July 1, 1973, Pub. L. 92–129, § 101 (a)(35), 85 Stat. 353, 50 U. S. C. App. § 467 (c), and reactivation of the draft would therefore re-

[1] Given the Court's lengthy discourse on the background to this litigation, it is interesting that the Court chooses to bury its sole reference to this fact in a footnote. See *ante,* at 60, n. 1.

quire a legislative amendment. See S. Rep. No. 96–826, p. 155 (1980). Consequently, we are not called upon to decide whether either men or women can be drafted at all, whether they must be drafted in equal numbers, in what order they should be drafted, or, once inducted, how they are to be trained for their respective functions. In addition, this case does not involve a challenge to the statutes or policies that prohibit female members of the Armed Forces from serving in combat.[2] It is with this understanding that I turn to the task at hand.

B

By now it should be clear that statutes like the MSSA, which discriminate on the basis of gender, must be examined under the "heightened" scrutiny mandated by *Craig* v. *Boren,* 429 U. S. 190 (1976).[3] Under this test, a gender-based classification cannot withstand constitutional challenge unless the classification is substantially related to the achievement of an important governmental objective. *Kirchberg* v. *Feenstra,* 450 U. S. 455, 459, 459–460 (1981); *Wengler* v. *Druggist Mutual Ins. Co.,* 446 U. S. 142, 150 (1980); *Califano* v. *Westcott,* 443 U. S. 76, 84 (1979); *Orr* v. *Orr,* 440 U. S. 268, 278 (1979); *Craig* v. *Boren, supra,* at 197. This test applies whether the

[2] By statute, female members of the Air Force and the Navy may not be assigned to vessels or aircraft engaged in combat missions. See 10 U. S. C. § 6015 (1976 ed., Supp III), § 8549. Although there are no statutory restrictions on the assignment of women to combat in the Army and the Marine Corps, both services have established policies that preclude such assignment.

Appellees do not concede the constitutional validity of these restrictions on women in combat, but they have taken the position that their validity is irrelevant for purposes of this case.

[3] I join the Court, see *ante,* at 69, in rejecting the Solicitor General's suggestion that the gender-based classification employed by the MSSA should be scrutinized under the "rational relationship" test used in reviewing challenges to certain types of social and economic legislation. See, *e. g., Schweiker* v. *Wilson,* 450 U. S. 221 (1981); *U. S. Railroad Retirement Bd.* v. *Fritz,* 449 U. S. 166 (1980).

classification discriminates against males or females. *Caban* v. *Mohammed,* 441 U. S. 380, 391 (1979); *Orr* v. *Orr, supra,* at 278–279; *Craig* v. *Boren, supra,* at 204.[4] The party defending the challenged classification carries the burden of demonstrating both the importance of the governmental objective it serves and the substantial relationship between the discriminatory means and the asserted end. See *Wengler* v. *Druggist Mutual Ins. Co., supra,* at 151; *Caban* v. *Mohammed, supra,* at 393; *Craig* v. *Boren, supra,* at 204. Consequently before we can sustain the MSSA, the Government must demonstrate that the gender-based classification it employs bears "a close and substantial relationship to [the achievement of] important governmental objectives," *Personnel Administrator of Massachusetts* v. *Feeney,* 442 U. S. 256, 273 (1979).

C

The MSSA states that "an adequate armed strength must be achieved and maintained to insure the security of this Nation." 50 U. S. C. App. § 451 (b). I agree with the majority, *ante,* at 70, that "[n]o one could deny that . . . the Government's interest in raising and supporting armies is an 'important governmental interest.' " Consequently, the first part of the *Craig* v. *Boren* test is satisfied. But the question remains whether the discriminatory means employed itself substantially serves the statutory end. In concluding that it does, the Court correctly notes that Congress enacted (and reactivated) the MSSA pursuant to its constitutional authority to raise and maintain armies.[5] The majority also notes,

[4] Consequently, it is of no moment that the constitutional challenge in this case is pressed by men who claim that the MSSA's gender classification discriminates against them.

[5] The Constitution grants Congress the power "To raise and support Armies," "To Provide and maintain a Navy," and "To make Rules for the Government and Regulation of the land and naval Forces." U. S. Const., Art. I, § 8, cls. 12–14.

ante, at 64, that "the Court accords 'great weight to the decisions of Congress,' " quoting *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U. S. 94, 102 (1973), and that the Court has accorded particular deference to decisions arising in the context of Congress' authority over military affairs. I have no particular quarrel with these sentiments in the majority opinion. I simply add that even in the area of military affairs, deference to congressional judgments cannot be allowed to shade into an abdication of this Court's ultimate responsibility to decide constitutional questions. As the Court has pointed out:

> "[T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.' " *United States* v. *Robel,* 389 U. S. 258, 263–264 (1967), quoting *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 426 (1934).

See *United States* v. *L. Cohen Grocery Co.,* 255 U. S. 81, 88–89 (1921); *Hamilton* v. *Kentucky Distilleries & Warehouse Co.,* 251 U. S. 146, 156 (1919); *Ex parte Milligan,* 4 Wall. 2, 121–127 (1866).

One such "safeguar[d] [of] essential liberties" is the Fifth Amendment's guarantee of equal protection of the laws.[6] When, as here, a federal law that classifies on the basis of gender is challenged as violating this constitutional guarantee, it is ultimately for this Court, not Congress, to decide whether there exists the constitutionally required "close and

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[6] Although the Fifth Amendment contains no Equal Protection Clause, this Court has held that "the Fifth Amendment's Due Process Clause prohibits the Federal Government from engaging in discrimination that is 'so unjustifiable as to be violative of due process.' " *Schlesinger* v. *Ballard,* 419 U. S. 498, 500, n. 3 (1975), quoting *Bolling* v. *Sharpe,* 347 U. S. 497, 499 (1954).

substantial relationship" between the discriminatory means employed and the asserted governmental objective. See *Powell* v. *McCormack*, 395 U. S. 486, 549 (1969); *Baker* v. *Carr*, 369 U. S. 186, 211 (1962). In my judgment, there simply is no basis for concluding in this case that excluding women from registration is substantially related to the achievement of a concededly important governmental interest in maintaining an effective defense. The Court reaches a contrary conclusion only by using an "[a]nnounced degre[e] of 'deference' to legislative judgmen[t]" as a "facile abstractio[n] . . . to justify a result." *Ante*, at 69, 70.

II

A

The Government does not defend the exclusion of women from registration on the ground that preventing women from serving in the military is substantially related to the effectiveness of the Armed Forces. Indeed, the successful experience of women serving in all branches of the Armed Services would belie any such claim. Some 150,000 women volunteers are presently on active service in the military,[7] and their number is expected to increase to over 250,000 by 1985. See Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S. 2294 before the Senate Committee on Armed Services, 96th Cong., 2d Sess., 1657, 1683 (1980) (1980 Senate Hearings); Women in the Military: Hearings before the Military Personnel Subcommittee of the House Committee on Armed Services, 96th Cong., 1st

[7] With the repeal in 1967 of a statute limiting the number of female members of the Armed Forces to 2% of total enlisted strength, the number of women in the military has risen steadily both in absolute terms and as a percentage of total active military personnel. The percentage has risen from 0.78% in 1966, to over 5% in 1976, and is expected to rise to 12% by 1985. See U. S. Dept. of Defense, Use of Women in the Military 5–6 (2d ed. 1978), reprinted at App. 98, 111–113; M. Binkin & S. Bach, Women and the Military 13–21 (1977).

and 2d Sess., 13–23 (1979 and 1980) (Women in the Military Hearings). At the congressional hearings, representatives of both the Department of Defense and the Armed Services testified that the participation of women in the All-Volunteer Armed Forces has contributed substantially to military effectiveness. See, *e. g.*, 1980 Senate Hearings, at 1389 (Lt. Gen. Yerks), 1682 (Principal Deputy Assistant Secretary of Defense Danzig); Women in the Military Hearings, at 13–23 (Assistant Secretary of Defense Pirie). Congress has never disagreed with the judgment of the military experts that women have made significant contributions to the effectiveness of the military. On the contrary, Congress has repeatedly praised the performance of female members of the Armed Forces, and has approved efforts by the Armed Services to expand their role. Just last year, the Senate Armed Services Committee declared:

> "Women now volunteer for military service and are assigned to most military specialties. These volunteers now make an important contribution to our Armed Forces. The number of women in the military has increased significantly in the past few years and is expected to continue to increase." S. Rep. No. 96–826, p. 157 (1980).

Accord, S. Rep. No. 96–226, p. 8 (1979).[8] These statements thus make clear that Congress' decision to exclude women from registration—and therefore from a draft drawing on the pool of registrants—cannot rest on a supposed need to prevent women from serving in the Armed Forces. The justification for the MSSA's gender-based discrimination must

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[8] In summarizing the testimony presented at the congressional hearings, Senator Cohen stated:

"[B]asically the evidence has come before this committee that participation of women in the All-Volunteer Force has worked well, has been praised by every military officer who has testified before the committee, and that the jobs are being performed with the same, if not in some cases, with superior skill." 1980 Senate Hearings, at 1678.

therefore be found in considerations that are peculiar to the objectives of registration.

The most authoritative discussion of Congress' reasons for declining to require registration of women is contained in the Report prepared by the Senate Armed Services Committee on the Fiscal Year 1981 Defense Authorization Bill. S. Rep. No. 96–826, *supra,* at 156–161. The Report's findings were endorsed by the House-Senate Conferees on the Authorization Bill. See S. Conf. Rep. No. 96–895, p. 100 (1980). Both Houses of Congress subsequently adopted the findings by passing the Conference Report. 126 Cong. Rec. 23126, 23261 (1980). As the majority notes, *ante,* at 74, the Report's "findings are in effect findings of the entire Congress." The Senate Report sets out the objectives Congress sought to accomplish by excluding women from registration, see S. Rep. No. 96–826, *supra,* at 157–161, and this Court may appropriately look to the Report in evaluating the justification for the discrimination.

B

According to the Senate Report, "[t]he policy precluding the use of women in combat is . . . the most important reason for not including women in a registration system." S. Rep. No. 96–826, *supra,* at 157; see also S. Rep. No. 96–226, *supra,* at 9. In reaffirming the combat restrictions, the Report declared:

> "Registering women for assignment to combat or assigning women to combat positions in peacetime then would leave the actual performance of sexually mixed units as an experiment to be conducted in war with unknown risk—a risk that the committee finds militarily unwarranted and dangerous. Moreover, the committee feels that any attempt to assign women to combat positions could affect the national resolve at the time of mobilization, a time of great strain on all aspects of the Nation's resources." S. Rep. No. 96–826, *supra,* at 157.

Had appellees raised a constitutional challenge to the prohibition against assignment of women to combat, this discussion in the Senate Report might well provide persuasive reasons for upholding the restrictions. But the validity of the combat restrictions is not an issue we need decide in this case.[9] Moreover, since the combat restrictions on women have already been accomplished through statutes and policies that remain in force whether or not women are required to register or to be drafted, including women in registration and draft plans will not result in their being assigned to combat roles. Thus, even assuming that precluding the use of women in combat is an important governmental interest in its own right, there can be no suggestion that the exclusion of women from registration and a draft is substantially related to the achievement of this goal.

The Court's opinion offers a different though related explanation of the relationship between the combat restrictions and Congress' decision not to require registration of women. The majority states that "Congress . . . clearly linked the need for renewed registration with its views of the character of a subsequent draft." *Ante,* at 75. The Court also states that "Congress determined that any future draft, which would be facilitated by the registration scheme, would be characterized by a need for combat troops." *Ante,* at 76. The Court then reasons that since women are not eligible for assignment to combat, Congress' decision to exclude them from registration is not unconstitutional discrimination inasmuch as "[m]en and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft." *Ante,* at 78. There is a certain logic to this reasoning, but the Court's approach is fundamentally flawed.

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[9] As noted, see n. 2, *supra,* appellees elected not to challenge the constitutionality of the combat restrictions.

In the first place, although the Court purports to apply the *Craig* v. *Boren* test, the "similarly situated" analysis the Court employs is in fact significantly different from the *Craig* v. *Boren* approach. Compare *Kirchberg* v. *Feenstra*, 450 U. S., at 459–460 (employing *Craig* v. *Boren* test), with *id.*, at 463 (STEWART, J., concurring in result) (employing "similarly situated" analysis). The Court essentially reasons that the gender classification employed by the MSSA is constitutionally permissible because nondiscrimination is not necessary to achieve the purpose of registration to prepare for a draft of combat troops. In other words, the majority concludes that women may be excluded from registration because they will not be needed in the event of a draft.[10]

This analysis, however, focuses on the wrong question. The relevant inquiry under the *Craig* v. *Boren* test is not whether a *gender-neutral* classification would substantially advance important governmental interests. Rather, the question is whether the gender-based classification is itself substantially related to the achievement of the asserted governmental interest. Thus, the Government's task in this case is to demonstrate that excluding women from registration substantially furthers the goal of preparing for a draft of combat troops. Or to put it another way, the Government must show that registering women would substantially impede its efforts to prepare for such a draft. Under our precedents, the Government cannot meet this burden without showing that a gender-neutral statute would be a less effective means of attaining this end. See *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U. S., at 151. As the Court explained in *Orr* v. *Orr*, 440 U. S., at 283 (emphasis added):

> "Legislative classifications which distribute benefits and burdens on the basis of gender *carry the inherent risk of*

[10] I would have thought the logical conclusion from this reasoning is that there is in fact no discrimination against women, in which case one must wonder why the Court feels compelled to pledge its purported fealty to the *Craig* v. *Boren* test.

> *reinforcing sexual stereotypes about the 'proper place' of women and their need for special protection.* . . . Where, as here, the [Government's] . . . 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 [Government] cannot be permitted to classify on the basis of sex."

In this case, the Government makes no claim that preparing for a draft of combat troops cannot be accomplished just as effectively by *registering* both men and women but *drafting* only men if only men turn out to be needed.[11] Nor can the Government argue that this alternative entails the additional cost and administrative inconvenience of registering women. This Court has repeatedly stated that the administrative convenience of employing a gender classification is not an adequate constitutional justification under the *Craig* v. *Boren* test. See, *e. g., Craig* v. *Boren,* 429 U. S., at 198; *Frontiero* v. *Richardson,* 411 U. S. 677, 690–691 (1973).

The fact that registering women in no way obstructs the governmental interest in preparing for a draft of combat troops points up a second flaw in the Court's analysis. The Court essentially reduces the question of the constitutionality of male-only *registration* to the validity of a hypothetical program for *conscripting* only men. The Court posits a draft in which *all* conscripts are either assigned to those specific combat posts presently closed to women or must be available for rotation into such positions. By so doing, the Court is able to conclude that registering women would be no more than a "gestur[e] of superficial equality," *ante,* at 79, since women are necessarily ineligible for every position to be filled in its hypothetical draft. If it could indeed be guaranteed

[11] Alternatively, the Government could employ a classification that is related to the statutory objective but is not based on gender, for example, combat eligibility. Under the current scheme, large subgroups of the male population who are ineligible for combat because of physical handicaps or conscientious objector status are nonetheless required to register.

in advance that conscription would be reimposed by Congress only in circumstances where, and in a form under which, all conscripts would have to be trained for and assigned to combat or combat rotation positions from which women are categorically excluded, then it could be argued that registration of women would be pointless.

But of course, no such guarantee is possible. Certainly, nothing about the MSSA limits Congress to reinstituting the draft only in such circumstances. For example, Congress may decide that the All-Volunteer Armed Forces are inadequate to meet the Nation's defense needs even in times of peace and reinstitute peacetime conscription. In that event, the hypothetical draft the Court relied on to sustain the MSSA's gender-based classification would presumably be of little relevance, and the Court could then be forced to declare the male-only registration program unconstitutional. This difficulty comes about because both Congress [12] and the Court have lost sight of the important distinction between *registration* and *conscription*. Registration provides "an inventory of what the available strength is within the military qualified pool in this country." Reinstitution of Procedures for Registration Under the Military Selective Service Act: Hearing before the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee, 96th Cong., 1st Sess., 10 (1979) (Selective Service Hearings) (statement of Gen. Rogers). Conscription supplies the military with the personnel needed to respond to a particular exigency. The fact that registration is a first step in the conscription process does not

[12] The Court quotes Senator Warner's comment: " 'I equate registration with the draft,' " *ante*, at 75. The whole of Senator Warner's statement merits quotation because it explains why Congress refused to acknowledge the distinction between registration and the draft. Senator Warner stated: "Frankly I equate registration with the draft because there is no way you can establish a registration law on a coequal basis and then turn right around and establish a draft law on a nonequal basis. I think the court would knock that down right away." 1980 Senate Hearings, at 1197.

mean that a registration law expressly discriminating between men and women may be justified by a valid conscription program which would, in retrospect, make the current discrimination appear functionally related to the program that emerged.

But even addressing the Court's reasoning on its own terms, its analysis is flawed because the entire argument rests on a premise that is demonstrably false. As noted, the majority simply assumes that registration prepares for a draft in which *every* draftee must be available for assignment to combat. But the majority's draft scenario finds no support in either the testimony before Congress, or more importantly, in the findings of the Senate Report. Indeed, the scenario appears to exist only in the Court's imagination, for even the Government represents only that "in the event of mobilization, *approximately two-thirds* of the demand on the induction system would be for *combat skills.*" Brief for Appellant 29 (emphasis added). For my part, rather than join the Court in imagining hypothetical drafts, I prefer to examine the findings in the Senate Report and the testimony presented to Congress.

C

Nothing in the Senate Report supports the Court's intimation that women must be excluded from registration because combat eligibility is a prerequisite for *all* the positions that would need to be filled in the event of a draft. The Senate Report concluded only that "[i]f mobilization were to be ordered in a wartime scenario, the *primary* manpower need would be for combat replacements." S. Rep. No. 96–826, p. 160 (1980) (emphasis added). This conclusion was in keeping with the testimony presented at the congressional hearings. The Department of Defense indicated that in the event of a mobilization requiring reinstitution of the draft, the primary manpower requirement would be for combat troops and support personnel who can readily be deployed into combat. See 1980 Senate Hearings, at 1395 (Principal

Deputy Assistant Secretary of the Army Clark), 1390 (Lt. Gen. Yerks). But the Department indicated that conscripts would also be needed to staff a variety of support positions having no prerequisite of combat eligibility, and which therefore could be filled by women. Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) Pirie explained:

> "Not only will we need to expand combat arms, and as I said, that is the most pressing need, but we also will need to expand the support establishment at the same time to allow the combat arms to carry out their function successfully. The support establishment now uses women very effectively, and in wartime I think the same would be true." Registration of Women: Hearing on H. R. 6569 before the Subcommittee on Military Personnel of the House Committee on Armed Services, 96th Cong., 2d Sess., 17 (1980) (1980 House Hearings).

In testifying about the Defense Department's reasons for concluding that women should be included in registration plans, Pirie stated:

> "It is in the interest of national security that, in an emergency requiring the conscription for military service of the Nation's youth, the best qualified people for a wide variety of tasks in our Armed Forces be available. The performance of women in our Armed Forces today strongly supports the conclusion that many of the best qualified people for some military jobs in the 18–26 age category will be women." *Id.*, at 7.

See 1980 Senate Hearings, at 171 (Secretary of the Army Alexander), 182 (Secretary of the Navy Claytor).[13] The De-

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[13] Pirie explained the reasoning behind the Defense Department's conclusion in these terms:

"Large numbers of military women work in occupations such as electronics, communications, navigation, radar repair, jet engine mechanics, drafting,

fense Department also concluded that there are no military reasons that would justify excluding women from registration. The Department's position was described to Congress in these terms:

> "Our conclusion is that there are good reasons for registering [women]. Our conclusion is *even more strongly that there are not good reasons for refusing to register them.*" *Id.*, at 1667–1668 (Principal Deputy Assistant Secretary of Defense Danzig) (emphasis added).

All four Service Chiefs agreed that there are no military reasons for refusing to register women, and uniformly advocated requiring registration of women. The military's position on the issue was summarized by then Army Chief of Staff General Rogers: "[W]omen should be required to register for the reason that [Marine Corps Commandant] General Wilson mentioned, which is in order for us to have an inventory of what the available strength is within the military qualified pool in this country." Selective Service Hearings, at 10; see *id.*, at 10–11 (Adm. Hayward, Chief of Naval Operations; Gen. Allen, Air Force Chief of Staff; Gen. Wilson, Commandant, Marine Corps).

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surveying, ordnance, transportation and meteorology and do so very effectively, as has been shown by numerous DOD studies and tests. The work women in the Armed Forces do today is essential to the readiness and capability of the forces. In case of war that would still be true, and the number of women doing similar work would inevitably expand beyond our peacetime number of 250,000.

"Women have traditionally held the vast majority of jobs in fields such as administrative/clerical and health care/medical. An advantage of registration for women is that a pool of trained personnel in these traditionally female jobs would exist in the event that sufficient volunteers were not available. It would make far greater sense to include women in a draft call and thereby gain many of these skills than to draft only males who would not only require training in these fields but would be drafted for employment in jobs traditionally held by females. A further advantage would be to release males currently holding noncombatant jobs for reassignment to combat jobs." 1980 House Hearings, at 6.

Against this background, the testimony at the congressional hearings focused on projections of manpower needs in the event of an emergency requiring reinstitution of the draft, and, in particular, on the role of women in such a draft. To make the discussion concrete, the testimony examined a draft scenario dealing with personnel requirements during the first six months of mobilization in response to a major war in Europe. The Defense Department indicated three constraints on the maximum number of women the Armed Services could use in the event of such a mobilization:

> "(1) legislative prohibitions against the use of women in certain military positions, (2) the policy to reserve certain assignments, such as ground combat roles, for men only, and (3) the need to reserve a substantial number of noncombat positions for men in order to provide a pool of ready replacements for ground combat positions." 1980 House Hearings, at 6 (Assistant Secretary Pirie).

After allowing for these constraints, the Defense Department reached the following conclusion about the number of female draftees that could be absorbed:

> "If we had a mobilization, our present best projection is that we could use women in some 80,000 of the jobs that we would be inducting 650,000 people for. The reason for that is because some 80,000 of those jobs, indeed more than 80,000 of those jobs are support related and not combat related.
>
> "We think women could fill those jobs quite well." 1980 Senate Hearings, at 1688 (Principal Deputy Assistant Secretary of Defense Danzig).

See *id.*, at 1661, 1665, 1828; 1980 House Hearings, at 6, 16–17 (Assistant Secretary of Defense Pirie).[14] Finally, the De-

[14] The Defense Department arrived at this number after it "surveyed the military services, and asked them how many women they could use

partment of Defense acknowledged that amending the MSSA to authorize registration and induction of women did not necessarily mean that women would be drafted in the same numbers as men. Assistant Secretary Pirie explained:

> "If women were subject to the draft, the Department of Defense would determine the maximum number of women that could be used in the Armed Forces, subject to existing constraints and the needs of the Military Services to provide close combat fillers and replacements quickly. We estimate that this might require at least 80,000 additional women over the first six months. If there were not enough women volunteers, a separate draft call for women would be issued." *Id.*, at 6.

See 1980 Senate Hearings, at 1661 (Principal Deputy Assistant Secretary of Defense Danzig).

This review of the findings contained in the Senate Report and the testimony presented at the congressional hearings demonstrates that there is no basis for the Court's representation that women are ineligible for *all* the positions that would need to be filled in the event of a draft. Testimony about personnel requirements in the event of a draft established that women could fill at least 80,000 of the 650,000 positions for which conscripts would be inducted. Thus, with respect to these 80,000 or more positions, the statutes and policies barring women from combat do not provide a reason for distinguishing between male and female potential conscripts; the two groups are, in the majority's parlance, "similarly situated." As such, the combat restrictions cannot by themselves supply the constitutionally required justification for the MSSA's gender-based classification. Since the classification precludes women from being drafted to fill positions for which they would be qualified and useful, the Govern-

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[in the event of a mobilization of] 650,000, and received answers suggesting that they could use about 80,000." 1980 Senate Hearings, at 1665 (Principal Deputy Assistant Secretary of Defense Danzig).

ment must demonstrate that excluding women from those positions is substantially related to the achievement of an important governmental objective.

III

The Government argues, however, that the "consistent testimony before Congress was to the effect that there is *no military need* to draft women." Brief for Appellant 31 (emphasis in original). And the Government points to a statement in the Senate Report that "[b]oth the civilian and military leadership agreed that there was no military need to draft women. . . . The argument for registration and induction of women . . . is not based on military necessity, but on considerations of equity." S. Rep. No. 96–826, p. 158 (1980). In accepting the Government's contention, the Court asserts that the President's decision to seek authority to register women was based on "equity," and concludes that "Congress was certainly entitled, in the exercise of its constitutional powers to raise and regulate armies and navies, to focus on the question of military need rather than 'equity.' " *Ante,* at 80. In my view, a more careful examination of the concepts of "equity" and "military need" is required.

As previously noted, the Defense Department's recommendation that women be included in registration plans was based on its conclusion that drafting a limited number of women is consistent with, and could contribute to, military effectiveness. See *supra,* at 97–102. It was against this background that the military experts concluded that "equity" favored registration of women. Assistant Secretary Pirie explained:

> "Since women have proven that they can serve successfully as volunteers in the Armed Forces, equity suggests that they be liable to serve as draftees if conscription is reinstated." 1980 House Hearings, at 7.

By "considerations of equity," the military experts acknowledged that female conscripts can perform as well as male con-

scripts in certain positions, and that there is therefore no reason why one group should be totally excluded from registration and a draft. Thus, what the majority so blithely dismisses as "equity" is nothing less than the Fifth Amendment's guarantee of equal protection of the laws which "requires that Congress treat similarly situated persons similarly," *ante,* at 79. Moreover, whether Congress could subsume this constitutional requirement to "military need," in part depends on precisely what the Senate Report meant by "military need."

The Report stated that "[b]oth the civilian and military leadership agreed that there was no military need to draft women." S. Rep. No. 96–826, *supra,* at 158. An examination of what the "civilian and military leadership" meant by "military need" should therefore provide an insight into the Report's use of the term. Several witnesses testified that because personnel requirements in the event of a mobilization could be met by drafting men, including women in draft plans is not a military necessity. For example, Assistant Secretary of Defense Pirie stated:

> "It is doubtful that a female draft can be justified on the argument that wartime personnel requirements cannot be met without them. The pool of draft eligible men . . . is sufficiently large to meet projected wartime requirements." 1980 House Hearings, at 6.

See 1980 Senate Hearings, at 1665 (Principal Deputy Assistant Secretary of Defense Danzig). Similarly, Army Chief of Staff General Meyer testified:

> "I do not believe there is a need to draft women in peacetime. In wartime, because there are such large numbers of young men available, approximately 2 million males in each year group of the draft age population, there would be no military necessity to draft females except, possibly, doctors, and other health pro-

fessionals if there are insufficient volunteers from people with those skills." *Id.*, at 749.

To be sure, there is no "military need" to draft women in the sense that a war could be waged without their participation.[15] This fact is, however, irrelevant to resolving the constitutional issue.[16] As previously noted, see *supra*, at 94–95, it is not appellees' burden to prove that registration of women substantially furthers the objectives of the MSSA.[17] Rather,

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[15] A colloquy between Senator Jepsen and Principal Deputy Assistant Secretary of Defense Danzig reveals that some Members of Congress understood "military need" in this sense.

"Mr. DANZIG. . . .

"We surveyed the military services, and asked them how many women they could use among those 650,000, and received answers suggesting that they could use 80,000.

"Let me indicate when I say they could use[,] I do not mean to imply that they would have to use women. Our Department of Defense view is that women would be useful in a mobilization scenario. If women were not available, I do not think the republic would crumble. Men could be used instead.

"Senator JEPSEN. So there is no explicit military requirement involved?

. . . . . .

"Mr. DANZIG. My problem, Senator, and I don't mean to be semantic about it, is with the use of the words, 'explicit requirement.' If you said to me, for example, does the military require people with brown eyes to serve, I would tell you no, because people with blue eyes, et cetera, could do the job.

"On the other hand, I wouldn't deny that they could do the job and that we would find them useful." 1980 Senate Hearings, at 1665; see *id.*, at 1853–1856.

[16] Deputy Assistant Attorney General Simms explained as much to Congress in his testimony at the hearings. He stated:

"[T]he question of military necessity for drafting women is irrelevant to the constitutional issue, which is whether or not there is sufficient justification by whatever test the courts may apply for not registering women." *Id.*, at 1667.

[17] If we were to assign appellees this burden, then all of the Court's prior "mid-level" scrutiny equal protection decisions would be drawn into question. For the Court would be announcing a new approach under

because eligibility for combat is not a requirement for some of the positions to be filled in the event of a draft, it is incumbent on the Government to show that excluding women from a draft to fill those positions substantially furthers an important governmental objective.

It may be, however, that the Senate Report's allusion to "military need" is meant to convey Congress' expectation that women volunteers will make it unnecessary to draft any women. The majority apparently accepts this meaning when it states: "Congress also concluded that whatever the need for women for noncombat roles during mobilization, whether 80,000 or less, it could be met by volunteers." *Ante,* at 81. But since the purpose of registration is to protect against unanticipated shortages of volunteers, it is difficult to see how excluding women from registration can be justified by conjectures about the expected number of female volunteers.[18] I fail to see why the exclusion of a pool of persons who would be conscripted only *if needed* can be justified by reference to the current supply of volunteers. In any event, the Defense Department's best estimate is that in the event of a mobilization requiring reinstitution of the draft, there will not be

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which the party challenging a gender-based classification has the burden of showing that *elimination* of the classification substantially furthers an important governmental interest.

[18] As Assistant Secretary of Defense Pirie explained:

"Perhaps sufficient women volunteers would come forward to meet this need, perhaps not. Having our young women register in advance would put us in a position to call women if they do not volunteer in sufficient numbers," quoted at 126 Cong. Rec. 13885–13886 (1980).

See 1980 Senate Hearings, at 1828 (Principal Deputy Assistant Secretary of Defense Danzig).

Past wartime recruitment experience does not bear out the Court's sanguine view. With the advent of the Korean War, an unsuccessful effort was made to recruit some 100,000 women to meet the rapidly expanding manpower requirements. See Use of Women in the Military, *supra* n. 7, at 5, App. 111.

enough women volunteers to fill the positions for which women would be eligible. The Department told Congress:

> "If we had a mobilization, our present best projection is that we could use women in some 80,000 of the jobs we would be *inducting* 650,000 people for." 1980 Senate Hearings, at 1688 (Principal Deputy Assistant Secretary of Defense Danzig) (emphasis added).[19]

Thus, however the "military need" statement in the Senate Report is understood, it does not provide the constitutionally required justification for the total exclusion of women from registration and draft plans.

IV

Recognizing the need to go beyond the "military need" argument, the Court asserts that "Congress determined that staffing noncombat positions with women during a mobilization would be positively detrimental to the important goal of military flexibility." *Ante,* at 81–82. None would deny that preserving "military flexibility" is an important governmental interest. But to justify the exclusion of women from registration and the draft on this ground, there must be a further showing that staffing even a limited number of noncombat positions with women would impede military flexibility. I find nothing in the Senate Report to provide any basis

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[19] A colloquy between Representative Hillis and Assistant Secretary of Defense Pirie at the House Hearings makes clear that the 80,000 number is in addition to the number of women serving in the All-Volunteer Armed Forces.

"Mr. PIRIE. Mr. Hillis, we estimate that we would need 650,000 individuals to be inducted over the first six months.

"Mr. HILLIS. How many of those would be women?

"Mr. PIRIE. At least 80,000 of these individuals would be women, Mr. Hillis.

"Mr. HILLIS. That is even if we had the 250,000 [women in active service expected by 1985], you are talking about another 80,000, which projects into about 330,000.

"Mr. PIRIE. Yes, sir." 1980 House Hearings, at 22.

for the Court's representation that Congress believed this to be the case.

The Senate Report concluded that "military reasons . . . preclude *very large numbers* of women from serving." S. Rep. No. 96–826, p. 158 (1980) (emphasis added). The Report went on to explain:

> "Military flexibility requires that a commander be able to move units or ships quickly. Units or ships not located at the front or not previously scheduled for the front nevertheless must be able to move into action if necessary. In peace and war, significant rotation of personnel is necessary. We should not divide the military into two groups—one in permanent combat and one in permanent support. Large numbers of non-combat positions must be available to which combat troops can return for duty before being redeployed." *Ibid.*

This discussion confirms the Report's conclusion that drafting *"very large numbers* of women" would hinder military flexibility. The discussion does not, however, address the different question whether drafting only a *limited* number of women would similarly impede military flexibility. The testimony on this issue at the congressional hearings was that drafting a limited number of women is quite compatible with the military's need for flexibility. In concluding that the Armed Services could usefully employ at least 80,000 women conscripts out of a total of 650,000 draftees that would be needed in the event of a major European war, the Defense Department took into account both the need for rotation of combat personnel and the possibility that some support personnel might have to be sent into combat. As Assistant Secretary Pirie testified:

> "If women were subject to the draft, the Department of Defense would determine the maximum number of women that could be used in the Armed Forces, *subject to existing constraints and the needs of the Military*

> *Services to provide close combat fillers and replacements quickly.* We estimate that this might require at least 80,000 additional women over the first 6 months." 1980 House Hearings, at 6 (emphasis added).

See App. 278 (deposition of Principal Deputy Assistant Secretary of Defense Danzig).[20]

Similarly, there is no reason why induction of a limited number of female draftees should any more divide the military into "permanent combat" and "permanent support" groups than is presently the case with the All-Volunteer Armed Forces. The combat restrictions that would prevent a female draftee from serving in a combat or combat rotation position also apply to the 150,000–250,000 women volunteers in the Armed Services. If the presence of increasing but controlled numbers of female volunteers has not unacceptably "divide[d] the military into two groups," it is difficult to see how the induction of a similarly limited additional number of women could accomplish this result. In these circumstances, I cannot agree with the Court's attempt to "interpret" the Senate Report's conclusion that drafting *very large numbers* of women would impair military flexibility, as proof that Congress reached the entirely different conclusion that drafting a limited number of women would adversely affect military flexibility.

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[20] Senator Warner questioned the Service Chiefs about the "impact on your service as a consequence of a draft, *which would be based on a total provision of equality between male and female.*" Selective Service Hearings, at 15 (emphasis added). Two of the Service Chiefs answered Senator Warner's question about the effect of a draft of equal numbers of men and women. Their answers merit quotation.

"General ALLEN [Air Force]. It would not have any unfavorable effect on the Air Force. We would have no objection to such a draft." *Ibid.*

"General WILSON [Marine Corps]. . . .

. . . . . .

". . . [W]e would be perfectly happy to have women drafted. That is up to the 5 percent goal which I believe we can handle in the Marine Corps." *Ibid.*

V

The Senate Report itself recognized that the "military flexibility" objective speaks only to the question whether "very large numbers" of women should be drafted. For the Report went on to state:

> "It has been suggested that all women be registered, but only a handful actually be inducted in an emergency. The committee finds this a confused and ultimately unsatisfactory solution." S. Rep. No. 96–826, p. 158 (1980).

The Report found the proposal "confused" and "unsatisfactory" for two reasons.

> "First, the President's proposal [to require registration of women] does not include any change in section 5 (a) (1) of the [MSSA], which requires that the draft be conducted impartially among those eligible. Administration witnesses admitted that the current language of the law probably precludes induction of women and men on any but a random basis, which should produce roughly equal numbers of men and women. Second, it is conceivable that the courts, faced with a congressional decision to *register* men and women equally because of equity considerations, will find insufficient justification for then *inducting* only a token number of women into the Services in an emergency." *Id.*, at 158–159 (emphasis in original).

The Report thus assumed that if women are registered, any subsequent draft would require simultaneous induction of equal numbers of male and female conscripts. The Report concluded that such a draft would be unacceptable:

> "It would create monumental strains on the training system, would clog the personnel administration and support systems needlessly, and would impede our defense preparations at a time of great national need.
>
> "Other administrative problems such as housing and

different treatment with regard to dependency, hardship and physical standards would also exist." *Id.*, at 159.[21]

See also S. Rep. No. 96–226, p. 9 (1979). Relying on these statements, the majority asserts that even "assuming that a small number of women could be drafted for noncombat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans." *Ante,* at 81. In actual fact, the conclusion the Senate Report reached is significantly different from the one the Court seeks to attribute to it.

The specific finding by the Senate Report was that "[i]f the law required women to be drafted *in equal numbers* with men, mobilization would be severely impaired because of strains on training facilities and administrative systems." S. Rep. No. 96–826, *supra,* at 160 (emphasis added). There was, however, no suggestion at the congressional hearings that simultaneous induction of *equal* numbers of males and female conscripts was either necessary or desirable. The Defense Department recommended that women be included in registration and draft plans, with the number of female draftees and the timing of their induction to be determined by the military's personnel requirements. See *supra,* at 100–101.[22] In endorsing this plan, the Department gave no indication that such a draft would place any strains on training and administrative facilities. Moreover, the Director of the Selective Service System testified that a registration and induction

[21] The Report further explained:

"If the Congress were to mandate equal registration of men and women, therefore, we might well be faced with a situation in which the combat replacements needed in the first 60 days—say 100,000 men—would have to be accompanied by 100,000 women. Faced with this hypothetical, the military witnesses stated that such a situation would be intolerable." S. Rep. No. 96–826, at 159.

[22] As stated in the Senate Report, "Selective Service Plans provide[d] for drafting only men during the first 60 days, and only a small number of women would be included in the total drafted for the first 180 days." *Id.*, at 158.

process including both males and females would present no administrative problems. See 1980 Senate Hearings, at 1679 (Bernard Rostker); App. 247–248 (deposition of Bernard Rostker).

The Senate Report simply failed to consider the possibility that a limited number of women could be drafted because of its conclusion that § 5 (a)(1) of the MSSA does not authorize drafting different numbers of men and women and its speculation on judicial reaction to a decision to register women. But since Congress was free to amend § 5 (a)(1), and indeed would have to undertake new legislation to authorize any draft, the matter cannot end there. Furthermore, the Senate Report's speculation that a statute authorizing differential induction of male and female draftees would be vulnerable to constitutional challenge is unfounded. The unchallenged restrictions on the assignment of women to combat, the need to preserve military flexibility, and the other factors discussed in the Senate Report provide more than ample grounds for concluding that the discriminatory means employed by such a statute would be substantially related to the achievement of important governmental objectives. Since Congress could have amended § 5 (a)(1) to authorize differential induction of men and women based on the military's personnel requirements, the Senate Report's discussion about "added burdens" that would result from drafting equal numbers of male and female draftees provides no basis for concluding that the total exclusion of women from registration and draft plans is substantially related to the achievement of important governmental objectives.

In sum, neither the Senate Report itself nor the testimony presented at the congressional hearings provides any support for the conclusion the Court seeks to attribute to the Report—that drafting a limited number of women, with the number and the timing of their induction and training determined by the military's personnel requirements, would burden training and administrative facilities.

VI

After reviewing the discussion and findings contained in the Senate Report, the most I am able to say of the Report is that it demonstrates that drafting *very large numbers* of women would frustrate the achievement of a number of important governmental objectives that relate to the ultimate goal of maintaining "an adequate armed strength . . . to insure the security of this Nation," 50 U. S. C. App. § 451 (b). Or to put it another way, the Senate Report establishes that induction of a large number of men but only a limited number of women, as determined by the military's personnel requirements, would be substantially related to important governmental interests. But the discussion and findings in the Senate Report do not enable the Government to carry its burden of demonstrating that *completely* excluding women from the draft by excluding them from registration substantially furthers important governmental objectives.

In concluding that the Government has carried its burden in this case, the Court adopts "an appropriately deferential examination of *Congress'* evaluation of [the] evidence," *ante,* at 83 (emphasis in original). The majority then proceeds to supplement Congress' actual findings with those the Court apparently believes Congress could (and should) have made. Beyond that, the Court substitutes hollow shibboleths about "deference to legislative decisions" for constitutional analysis. It is as if the majority has lost sight of the fact that "it is the responsibility of this Court to act as the ultimate interpreter of the Constitution." *Powell* v. *McCormack,* 395 U. S., at 549. See *Baker* v. *Carr,* 369 U. S., at 211. Congressional enactments in the area of military affairs must, like all other laws, be *judged* by the standards of the Constitution. For the Constitution is the supreme law of the land, and *all* legislation must conform to the principles it lays down. As the Court has pointed out, "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of

congressional power which can be brought within its ambit." *United States* v. *Robel,* 389 U. S., at 263–264.

Furthermore, "[w]hen it appears that an Act of Congress conflicts with [a constitutional] provisio[n], we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation." *Trop* v. *Dulles,* 356 U. S. 86, 104 (1958) (plurality opinion). In some 106 instances since this Court was established it has determined that congressional action exceeded the bounds of the Constitution. I believe the same is true of this statute. In an attempt to avoid its constitutional obligation, the Court today "pushes back the limits of the Constitution" to accommodate an Act of Congress.

I would affirm the judgment of the District Court.

UNITED STATES POSTAL SERVICE *v.* COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 80–608. Argued April 21, 1981—Decided June 25, 1981

Title 18 U. S. C. § 1725 prohibits the deposit of unstamped "mailable matter" in a letterbox approved by the United States Postal Service, and violations are subject to a fine. The local Postmaster notified appellee civic association that its practice of delivering messages to residents by placing unstamped notices in the letterboxes of private homes violated § 1725, and advised it that if it and other members of appellee council of civic associations continued such practice it could result in a fine. Appellees then brought suit in Federal District Court against the Postal Service for declaratory and injunctive relief, contending that the enforcement of § 1725 would inhibit their communications with local residents and would thereby deny them the freedom of speech and press secured by the First Amendment. The District Court ultimately declared § 1725 unconstitutional as applied to appellees and the council's member associations and enjoined the Postal Service from enforcing it as to them.

Held: Section 1725 does not unconstitutionally abridge appellees' First Amendment rights, inasmuch as neither the enactment nor the enforcement of § 1725 is geared in any way to the content of the message sought to be placed in the letterbox. Pp. 120–134.

(a) When a letterbox is designated an "authorized depository" of the mail by the Postal Service, it becomes an essential part of the nationwide system for the delivery and receipt of mail. In effect, the postal customer, although he pays for the physical components of the "authorized depository," agrees to abide by the Postal Service's regulations in exchange for the Postal Service agreeing to deliver and pick up his mail. A letterbox, once designated an "authorized depository," does not at the same time transform itself into a "public forum" of some limited nature to which the First Amendment guarantees access to all comers. Just because it may be somewhat more efficient for appellees to place their messages in letterboxes does not mean that there is a First Amendment right to do so. The First Amendment does not guarantee access to property simply because it is owned or controlled by the Government. Pp. 126–131.

(b) Congress, in exercising its constitutional authority to develop and operate a national postal system, may properly legislate with the generality of cases in mind, and should not be put to the test of defending in one township after another the constitutionality of a statute under the traditional "time, place, and manner" analysis. If Congress and the Postal Service are to operate as efficiently as possible an extensive system for the delivery of mail, they must adopt regulations of a general character having uniform applicability throughout the Nation. In this case, Congress was legislating to promote what it considered to be the efficiency of the Postal Service, and was not laying down a generalized prohibition against the distribution of leaflets or the discussion of issues in traditional public forums. Pp. 132–133.

(c) While Congress may not by its own *ipse dixit* destroy the "public forum" status of streets and parks, a letterbox may not properly be analogized to streets and parks. Pp. 133–134.

490 F. Supp. 157, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and POWELL, JJ., joined. BRENNAN, J., *post,* p. 134, and WHITE, J., *post,* p. 141, filed opinions concurring in the judgment. MARSHALL, J., *post,* p. 142, and STEVENS, J., *post,* p. 152, filed dissenting opinions.

Edwin S. Kneedler argued the cause for appellant. On the briefs were *Solicitor General McCree, Acting Assistant Attorney General Martin, Deputy Solicitor General Geller, Peter Buscemi, William Kanter,* and *John C. Hoyle.*

Jon H. Hammer argued the cause for appellees. With him on the briefs was *E. Payson Clark, Jr.**

JUSTICE REHNQUIST delivered the opinion of the Court.

We noted probable jurisdiction to decide whether the United States District Court for the Southern District of

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**Samuel J. Cohen* filed a brief for the National Association of Letter Carriers, AFL–CIO, as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Adam Yarmolinsky* and *Stephen T. Owen* for Independent Sector et al.; and by *John R. Myer, David A. Webster, Virginia S. Taylor, E. Richard Larson,* and *Bruce J. Ennis* for the Piedmont Heights Civil Club, Inc., et al.

New York correctly determined that 18 U. S. C. § 1725, which prohibits the deposit of unstamped "mailable matter" in a letterbox approved by the United States Postal Service, unconstitutionally abridges the First Amendment rights of certain civic associations in Westchester County, N. Y. 449 U. S. 1076 (1981). Jurisdiction of this Court rests on 28 U. S. C. § 1252.

I

Appellee Council of Greenburgh Civic Associations (Council) is an umbrella organization for a number of civic groups in Westchester County, N. Y. Appellee Saw Mill Valley Civic Association is one of the Council's member groups. In June 1976, the Postmaster in White Plains, N. Y., notified the Chairman of the Saw Mill Valley Civic Association that the association's practice of delivering messages to local residents by placing unstamped notices and pamphlets in the letterboxes of private homes was in violation of 18 U. S. C. § 1725, which provides:

> "Whoever knowingly and willfully deposits any mailable matter such as statements of accounts, circulars, sale bills, or other like matter, on which no postage has been paid, in any letter box established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon, shall for each such offense be fined not more than $300."

Saw Mill Valley Civic Association and other Council members were advised that if they continued their practice of placing unstamped notices in the letterboxes of private homes it could result in a fine not to exceed $300.

In February 1977, appellees filed this suit in the District Court for declaratory and injunctive relief from the Postal Service's threatened enforcement of § 1725. Appellees contended that the enforcement of § 1725 would inhibit their

communication with residents of the town of Greenburgh and would thereby deny them the freedom of speech and freedom of the press secured by the First Amendment.

The District Court initially dismissed the complaint for failure to state a claim on which relief could be granted. 448 F. Supp. 159 (SDNY 1978). On appeal, however, the Court of Appeals for the Second Circuit reversed and remanded the case to the District Court to give the parties "an opportunity to submit proof as to the extent of the handicap to communication caused by enforcement of the statute in the area involved, on the one hand, and the need for the restriction for protection of the mails, on the other." 586 F. 2d 935, 936 (1978). In light of this language, it was not unreasonable for the District Court to conclude that it had been instructed to "try" the statute, much as more traditional issues of fact are tried by a court, and that is what the District Court proceeded to do.

In the proceedings on remand, the Postal Service offered three general justifications for § 1725: (1) that § 1725 protects mail revenues; (2) that it facilitates the efficient and secure delivery of the mails; and (3) that it promotes the privacy of mail patrons. More specifically, the Postal Service argued that elimination of § 1725 could cause the overcrowding of mailboxes due to the deposit of civic association notices. Such overcrowding would in turn constitute an impediment to the delivery of the mails. Testimony was offered that § 1725 aided the investigation of mail theft by restricting access to letterboxes, thereby enabling postal investigators to assume that anyone other than a postal carrier or a householder who opens a mailbox may be engaged in the violation of the law. On this point, a postal inspector testified that 10% of the arrests made under the external mail theft statute, 18 U. S. C. § 1708, resulted from surveillance-type operations which benefit from enforcement of § 1725. Testimony was also introduced that § 1725 has been

particularly helpful in the investigation of thefts of government benefit checks from letterboxes.[1]

The Postal Service introduced testimony that it would incur additional expense if § 1725 were either eliminated or held to be inapplicable to civic association materials. If delivery in mailboxes were expanded to permit civic association circulars—but not other types of nonmailable matter such as commercial materials—mail carriers would be obliged to remove and examine individual unstamped items found in letterboxes to determine if their deposit there was lawful. Carriers would also be confronted with a larger amount of unstamped mailable matter which they would be obliged to separate from outgoing mail. The extra time resulting from these additional activities, when computed on a nationwide basis, would add substantially to the daily cost of mail delivery.

The final justification offered by the Postal Service for § 1725 was that the statute provided significant protection for the privacy interests of postal customers. Section 1725 provides postal customers the means to send and receive mails without fear of their correspondence becoming known to members of the community.

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[1] On this point, a postal investigator testified that the Postal Service tries to engage in physical surveillance on the one or two days a month that large numbers of government checks are delivered. The investigator testified that without § 1725 "we would have many more people having access to the mailboxes or being in the vicinity of the mailboxes. This type of activity could hinder our surveillances in that we would not be sure if a person we see approaching a mailbox is a subject or has a legitimate reason for being there." App. 160. The investigator also stated that the Postal Service receives "many phone calls from concerned citizens who may report that someone has been seen in the area of their mailboxes. We try to respond to that area if at all possible to determine who that individual may be." *Ibid.* The Postal Service also receives assistance from local police who may be doing a similar type of surveillance and who would have "a difficult time identifying who it is exactly going into mailboxes . . . ." *Id.*, at 161.

The Postal Service also argued at trial that the enforcement of § 1725 left appellees with ample alternative means of delivering their message. The appellees can deliver their messages either by paying postage, by hanging their notices on doorknobs, by placing their notices under doors or under a doormat, by using newspaper or nonpostal boxes affixed to houses or mailbox posts, by telephoning their constituents, by engaging in person-to-person delivery in public areas, by tacking or taping their notices on a door post or letterbox post, or by placing advertisements in local newspapers. A survey was introduced comparing the effectiveness of certain of these alternatives which arguably demonstrated that between 70–75% of the materials placed under doors or doormats or hung from doorknobs were found by the homeowner whereas approximately 82% of the items placed in letterboxes were found. This incidental difference, it was argued, cannot be of constitutional significance.

The District Court found the above arguments of the Postal Service insufficient to sustain the constitutionality of § 1725 at least as applied to these appellees. 490 F. Supp. 157 (1980). Relying on the earlier opinion of the Court of Appeals, the District Court noted that the legal standard it was to apply would give the appellees relief if the curtailment of their interest in free expression resulting from enforcement of § 1725 substantially outweighed the Government's interests in the effective delivery and protection of the mails. The District Court concluded that the appellees had satisfied this standard.

The District Court based its decision on several findings. The court initially concluded that because civic associations generally have small cash reserves and cannot afford the applicable postage rates, mailing of the appellees' message would be financially burdensome. Similarly, because of the relatively slow pace of the mail, use of the mails at certain times would impede the appellees' ability to communicate quickly with their constituents. Given the widespread aware-

ness of the high cost and limited celerity of the mails, the court probably could have taken judicial notice of both of these findings.

The court also found that none of the alternative means of delivery suggested by the Postal Service were "nearly as effective as placing civic association flyers in approved mailboxes; so that restriction on the [appellees'] delivery methods to such alternatives also constitutes a serious burden on [appellees'] ability to communicate with their constituents." 490 F. Supp., at 160.[2] Accordingly, the District Court declared § 1725 unconstitutional as applied to appellees and the Council's member associations and enjoined the Postal Service from enforcing it as to them.

II

The present case is a good example of Justice Holmes' aphorism that "a page of history is worth a volume of logic."

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[2] The District Court reasoned that the alternative methods suggested by the Postal Service were inadequate because they can result in the civic notices either being lost or damaged as a result of wind, rain, or snow. Weatherstripping on doors may prevent the flyers from being placed under the door. Use of plastic bags for protection of the civic notices is both time consuming and "relatively expensive for a small volunteer organization . . . ." 490 F. Supp., at 160. Deposit of materials outside may cause litter problems as well as arouse resentment among residents because it informs burglars that no one is home. Alternative methods which depend on reaching the occupant personally are less effective because their success depends on the mere chance that the person called or visited will be home at any given time. The court also found that enforcement of § 1725 against civic associations "does not appear so necessary or contributive to enforcement of the anti-theft, anti-fraud or Private Express statutes that this interest outweighs the [appellees'] substantial interest in expedient and economical communication with their constituents." *Id.*, at 163. Based on the above, the District Court concluded that "the cost to free expression of imposing this burden on [appellees] outweighs the showing made by the Postal Service of its need to enforce the statute to promote effective delivery and protection of the mails." *Id.*, at 162.

New York Trust Co. v. *Eisner,* 256 U. S. 345, 349 (1921). For only by review of the history of the postal system and its present statutory and regulatory scheme can the constitutional challenge to § 1725 be placed in its proper context.

By the early 18th century, the posts were made a sovereign function in almost all nations because they were considered a sovereign necessity. Government without communication is impossible, and until the invention of the telephone and telegraph, the mails were the principal means of communication. Kappel Commission, Toward Postal Excellence, Report of the President's Commission on Postal Organization 47 (Comm. Print 1968). Little progress was made in developing a postal system in Colonial America until the appointment of Benjamin Franklin, formerly Postmaster at Philadelphia, as Deputy Postmaster General for the American Colonies in 1753. In 1775, Franklin was named the first Postmaster General by the Continental Congress, and, because of the trend toward war, the Continental Congress undertook its first serious effort to establish a secure mail delivery organization in order to maintain communication between the States and to supply revenue for the Army. D. Adie, An Evaluation of Postal Service Wage Rates 2 (American Enterprise Institute, 1977).

Given the importance of the post to our early Nation, it is not surprising that when the United States Constitution was ratified in 1789, Art. I, § 8, provided Congress the power "To establish Post Offices and post Roads" and "To make all Laws which shall be necessary and proper" for executing this task. The Post Office played a vital yet largely unappreciated role in the development of our new Nation. Stagecoach trails which were improved by the Government to become post roads quickly became arteries of commerce. Mail contracts were of great assistance to the early development of new means of transportation such as canals, railroads, and eventually airlines. Kappel Commission, To-

ward Postal Excellence, *supra,* at 46. During this developing stage, the Post Office was to many citizens situated across the country the most visible symbol of national unity. *Ibid.*

The growth of postal service over the past 200 years has been remarkable. Annual revenues increased from less than $40 million in 1790 to close to $200 million in 1829 when the Postmaster General first became a member of the Cabinet. However, expenditures began exceeding revenues as early as the 1820's as the postal structure struggled to keep pace with the rapid growth of the country westward. Because of this expansion, delivery costs to the South and West raised average postal costs nationally. To prevent competition from private express services, Congress passed the Postal Act of 1845, which prohibited competition in letter mail and established what is today referred to as the "postal monopoly."

More recently, to deal with the problems of increasing deficits and shortcomings in the overall management and efficiency of the Post Office, Congress passed the Postal Reorganization Act of 1970. This Act transformed the Post Office Department into a Government-owned corporation called the United States Postal Service. The Postal Service today is among the largest employers in the world, with a work force nearing 700,000 processing 106.3 billion pieces of mail each year. Ann. Rep. of the Postmaster General 2, 11 (1980). The Postal Service is the Nation's largest user of floor space, and the Nation's largest nonmilitary purchaser of transport, operating more than 200,000 vehicles. Its rural carriers alone travel over 21 million miles each day and its city carriers walk or drive another million miles a day. D. Adie, An Evaluation of Postal Service Wage Rates, *supra,* at 1. Its operating budget in fiscal 1980 exceeded $17 billion. Ann. Rep. of the Postmaster General, *supra,* at 2.

Not surprisingly, Congress has established a detailed statutory and regulatory scheme to govern this country's vast postal system. See 39 U. S. C. § 401 *et seq.* and the Domestic Mail Manual (DMM), which has been incorporated by

reference in the Code of Federal Regulations, 39 CFR pt. 3 (1980). Under 39 U. S. C. § 403 (a), the Postal Service is directed to "plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees." Section 403 (b)(1) similarly directs the Postal Service "to maintain an efficient system of collection, sorting, and delivery of the mail nationwide," and under 39 U. S. C. § 401 the Postal Service is broadly empowered to adopt rules and regulations designed to accomplish the above directives.

Acting under this authority, the Postal Service has provided by regulation that both urban and rural postal customers must provide appropriate mail receptacles meeting detailed specifications concerning size, shape, and dimensions. DMM 155.41, 155.43, 156.311, 156.51, and 156.54. By regulation, the Postal Service has also provided that "[e]very letter box or other receptacle intended or used for the receipt or delivery of mail on any city delivery route, rural delivery route, highway contract route, or other mail route is designated an authorized depository for mail within the meaning of 18 U. S. C. [§] 1725." DMM 151.1. A letterbox provided by a postal customer which meets the Postal Service's specifications not only becomes part of the Postal Service's nationwide system for the receipt and delivery of mail, but is also afforded the protection of the federal statutes prohibiting the damaging or destruction of mail deposited therein. See 18 U. S. C. §§ 1702, 1705, and 1708.

It is not without irony that this elaborate system of regulation, coupled with the historic dependence of the Nation on the Postal Service, has been the causal factor which led to this litigation. For it is because of the very fact that virtually every householder wishes to have a mailing address and a receptacle in which mail sent to that address will be deposited by the Postal Service that the letterbox or other mail receptacle is attractive to those who wish to convey messages within a locality but do not wish to purchase the stamp or pay such other fee as would permit them to be trans-

mitted by the Postal Service. To the extent that the "alternative means" eschewed by the appellees and found to be inadequate alternatives by the District Court are in fact so, it is in no small part attributable to the fact that the typical mail patron first looks for written communications from the "outside world" not under his doormat, or inside the screen of his front door, but in his letterbox. Notwithstanding the increasing frequency of complaints about the rising cost of using the Postal Service, and the uncertainty of the time which passes between mailing and delivery, written communication making use of the Postal Service is so much a fact of our daily lives that the mail patron watching for the mail-truck, or the jobholder returning from work looking in his letterbox before he enters his house, are commonplaces of our society. Indeed, according to the appellees the receptacles for mailable matter are so superior to alternative efforts to communicate printed matter that all other alternatives for deposit of such matter are inadequate substitutes for postal letterboxes.

Postal Service regulations, however, provide that letterboxes and other receptacles designated for the delivery of mail "shall be used exclusively for matter which bears postage." DMM 151.2.[3] Section 1725 merely reinforces this

[3] There appear to be at least two minor exceptions to this regulation. DMM 156.58 provides that "publishers of newspapers regularly mailed as second-class mail may, *on Sundays and national holidays only*, place copies of the Sunday or holiday issues in the rural and highway contract route boxes of subscribers, with the understanding that copies will be removed from the boxes before the next day on which mail deliveries are scheduled." This particular exception is designed to protect mail revenues by encouraging newpapers to use second-class mail for delivery of their papers. The exception allows distributors to deliver their papers in letterboxes only under certain conditions and on certain days when mail service is unavailable. A second exception to the requirement that only mail which bears postage may be placed in letterboxes is contained in DMM 156.4, which authorizes rural postal customers to leave unstamped mail in letterboxes when they also leave money for postage.

regulation by prohibiting, under pain of criminal sanctions, the deposit into a letterbox of any mailable matter on which postage has not been paid. The specific prohibition contained in § 1725 is also repeated in the Postal Service regulations at DMM 146.21.

Section 1725 was enacted in 1934 "to curb the practice of depositing statements of account, circulars, sale bills, etc., in letter boxes established and approved by the Postmaster General for the receipt or delivery of mail matter without payment of postage thereon by making this a criminal offense." H. R. Rep. No. 709, 73d Cong., 2d Sess., 1 (1934). Both the Senate and House Committees on Post Offices and Post Roads explained the principal motivation for § 1725 as follows:

> "Business concerns, particularly utility companies, have within the last few years adopted the practice of having their circulars, statements of account, etc., delivered by private messenger, and have used as receptacles the letter boxes erected for the purpose of holding mail matter and approved by the Post Office Department for such purpose. This practice is depriving the Post Office Department of considerable revenue on matter which would otherwise go through the mails, and at the same time is resulting in the stuffing of letter boxes with extraneous matter." *Ibid.;* S. Rep. No. 742, 73d Cong., 2d Sess., 1 (1934).

Nothing in any of the legislation or regulations recited above requires any person to become a postal customer. Anyone is free to live in any part of the country without having letters or packages delivered or received by the Postal Service by simply failing to provide the receptacle for those letters and packages which the statutes and regulations require. Indeed, the provision for "General Delivery" in most post offices enables a person to take advantage of the facil-

ities of the Postal Service without ever having provided a receptacle at or near his premises conforming to the regulations of the Postal Service. What the legislation and regulations do require is that those persons who *do* wish to receive and deposit their mail at their home or business do so under the direction and control of the Postal Service.

III

As early as the last century, this Court recognized the broad power of Congress to act in matters concerning the posts:

> "The power vested in Congress 'to establish post-offices and post-roads' has been practically construed, since the foundation of the government, to authorize not merely the designation of the routes over which the mail shall be carried, and the offices where letters and other documents shall be received to be distributed or forwarded, but the carriage of the mail, and all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents. The validity of legislation describing what should be carried, and its weight and form, and the charges to which it should be subjected, has never been questioned. . . . The power possessed by Congress embraces the regulation of the entire Postal System of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded." *Ex parte Jackson,* 96 U. S. 727, 732 (1878).

However broad the postal power conferred by Art. I may be, it may not of course be exercised by Congress in a manner that abridges the freedom of speech or of the press protected by the First Amendment to the Constitution. In this case we are confronted with the appellees' assertion that the First Amendment guarantees them the right to deposit, without payment of postage, their notices, circulars, and flyers in

letterboxes which have been accepted as authorized depositories of mail by the Postal Service.[4]

In addressing appellees' claim, we note that we are not here confronted with a regulation which in any way prohibits individuals from going door-to-door to distribute their message or which vests unbridled discretion in a governmental official to decide whether or not to permit the distribution to occur. We are likewise not confronted with a regulation which in any way restricts the appellees' right to use the mails. The appellees may mail their civic notices in the ordinary fashion, and the Postal Service will treat such notices identically with all other mail without regard to content. There is no claim that the Postal Service treats civic notices, because of their content, any differently from the way it treats any of the other mail it processes. Admittedly, if appellees do choose to mail their notices, they will be required to pay postage in a manner identical to other Postal Service patrons, but appellees do not challenge the imposition of a fee for the services provided by the Postal Service.[5]

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[4] We reject appellees' additional assertion raised below that 18 U. S. C. § 1725 cannot be applied to them because it was intended to bar the deposit of commercial materials only. The statute on its face bars the deposit of "*any* mailable matter" (emphasis added) without proper postage, and, as more fully explained by the District Court in its initial opinion rejecting this contention, the legislative history makes clear that both Congress and the Postal Service understood the statute would apply to noncommercial as well as commercial materials. 448 F. Supp., at 160–162.

[5] JUSTICE BRENNAN, concurring in the result, quotes the oft repeated aphorism of Justice Holmes, dissenting, in *United States ex rel. Milwaukee Social Democratic Pub. Co.* v. *Burleson*, 255 U. S. 407, 437 (1921), that "[t]he United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues, and it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man." JUSTICE BRENNAN also quoted this aphorism in his opinion for the Court in *Blount* v. *Rizzi*, 400 U. S. 410, 416 (1971), a case dealing with the Postmaster General's authority to prevent distribu-

What is at issue in this case is solely the constitutionality of an Act of Congress which makes it unlawful for persons to use, without payment of a fee, a letterbox which has been designated an "authorized depository" of the mail by the Postal Service. As has been previously explained, when a letterbox is so designated, it becomes an essential part of the Postal Service's nationwide system for the delivery and receipt of mail. In effect, the postal customer, although he pays for the physical components of the "authorized depository," agrees to abide by the Postal Service's regulations in exchange for the Postal Service agreeing to deliver and pick up his mail.

Appellees' claim is undermined by the fact that a letterbox, once designated an "authorized depository," does not at the same time undergo a transformation into a "public forum" of some limited nature to which the First Amendment guarantees access to all comers. There is neither historical nor constitutional support for the characterization of a letterbox as a public forum. Letterboxes are an essential part of the nationwide system for the delivery and receipt of

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tions of obscene matter, which has little if any relation to the present case because no one contends that appellees' circulars are obscene. JUSTICE BRENNAN, however, does not refer to the dissenting opinion of Justice Brandeis in *Burleson* (with respect to which Justice Holmes said "I agree in substance with his view." 255 U. S., at 436). There, Justice Brandeis goes into a more detailed analysis of the relationship of the mails to the prohibitions of the First Amendment, and states:

"The Government might, of course, decline altogether to distribute newspapers; or it might decline to carry any at less than the cost of service; and it would not thereby abridge the freedom of the press, since to all papers other means of transportation would be left open." *Id.*, at 431.

It seems to us that that is just what the Postal Service here has done: it has by no means declined to distribute the leaflets which appellees seek to have deposited in mailboxes, but has simply insisted that the appellees pay the same postage that any other circular in its class would have to bear. Thus, neither the dissent of Justice Brandeis nor of Justice Holmes in *Burleson* supports JUSTICE BRENNAN's position.

mail, and since 1934 access to them has been unlawful except under the terms and conditions specified by Congress and the Postal Service. As such, it is difficult to accept appellees' assertion that because it may be somewhat more efficient to place their messages in letterboxes there is a First Amendment right to do so. The underlying rationale of appellees' argument would seem to foreclose Congress or the Postal Service from requiring in the future that all letterboxes contain locks with keys being available only to the homeowner and the mail carrier. Such letterboxes are presently found in many apartment buildings, and we do not think their presence offends the First Amendment to the United States Constitution. Letterboxes which lock, however, have the same effect on civic associations that wish access to them as does the enforcement of § 1725. Such letterboxes also accomplish the same purpose—that is, they protect mail revenues while at the same time facilitating the secure and efficient delivery of the mails. We do not think the First Amendment prohibits Congress from choosing to accomplish these purposes through legislation as opposed to lock and key.

Indeed, it is difficult to conceive of any reason why this Court should treat a letterbox differently for First Amendment access purposes than it has in the past treated the military base in *Greer* v. *Spock,* 424 U. S. 828 (1976), the jail or prison in *Adderley* v. *Florida,* 385 U. S. 39 (1966), and *Jones* v. *North Carolina Prisoners' Union,* 433 U. S. 119 (1977), or the advertising space made available in city rapid transit cars in *Lehman* v. *City of Shaker Heights,* 418 U. S. 298 (1974). In all these cases, this Court recognized that the First Amendment does not guarantee access to property simply because it is owned or controlled by the government. In *Greer* v. *Spock, supra,* the Court cited approvingly from its earlier opinion in *Adderley* v. *Florida, supra,* wherein it explained that " '[t]he State, no less than a private owner of

property, has power to preserve the property under its control for the use to which it is lawfully dedicated.' " 424 U. S., at 836.[6]

This Court has not hesitated in the past to hold invalid

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[6] JUSTICE BRENNAN argues that a letterbox is a public forum because "the mere deposit of mailable matter without postage is not 'basically incompatible' with the 'normal activity' for which a letterbox is used, *i. e.*, deposit of mailable matter with proper postage or mail delivery by the Postal Service. On the contrary, the mails and the letterbox are specifically used for the communication of information and ideas, and thus surely constitute a public forum appropriate for the exercise of First Amendment rights subject to reasonable time, place, and manner restrictions such as those embodied in § 1725 . . . ." *Post*, at 137–138.

JUSTICE BRENNAN's analysis assumes that simply because an instrumentality "is used for the communication of ideas or information," it thereby becomes a public forum. Our cases provide no support for such a sweeping proposition. Certainly, a bulletin board in a cafeteria at Fort Dix is "specifically used for the communication of information and ideas," but such a bulletin board is no more a "public forum" than are the street corners and parking lots found not to be so at the same military base. *Greer* v. *Spock*, 424 U. S. 828 (1976). Likewise, the advertising space made available in public transportation in the city of Shaker Heights is "specifically used for the communication of information and ideas," but that fact alone was not sufficient to transform that space into a "public forum" for First Amendment purposes. *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (1974). In fact, JUSTICE BLACKMUN recognized in *Lehman* that:

"Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require." *Id.*, at 304.

For the reasons we have stated at length in our opinion, we think the appellees' First Amendment activities are wholly incompatible with the maintenance of a nationwide system for the safe and efficient delivery of mail. The history of the postal system and the role the letterbox serves within that system supports this conclusion, and even JUSTICE BRENNAN acknowledges that a "significant governmental interest" is advanced by the restriction imposed by § 1725. *Post*, at 135.

laws which it concluded granted too much discretion to public officials as to who might and who might not solicit individual homeowners, or which too broadly inhibited the access of persons to traditional First Amendment forums such as the public streets and parks. See, *e. g., Village of Schaumburg* v. *Citizens for a Better Environment,* 444 U. S. 620 (1980); *Hague* v. *CIO,* 307 U. S. 496 (1939); *Schneider* v. *State,* 308 U. S. 147 (1939); *Martin* v. *City of Struthers,* 319 U. S. 141 (1943); *Lovell* v. *City of Griffin,* 303 U. S. 444 (1938); and *Police Department of Chicago* v. *Mosley,* 408 U. S. 92 (1972). But it is a giant leap from the traditional "soapbox" to the letterbox designated as an authorized depository of the United States mails, and we do not believe the First Amendment requires us to make that leap.[7]

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[7] JUSTICE MARSHALL in his dissent, *post,* at 143, states that he disagrees "with the Court's assumption that if no public forum is involved, the only First Amendment challenges to be considered are whether the regulation is content-based . . . and reasonable . . . ." The First Amendment prohibits Congress from "abridging freedom of speech, or of the press," and its ramifications are not confined to the "public forum" first noted in *Hague* v. *CIO,* 307 U. S. 496 (1939). What we hold is the principle reiterated by cases such as *Adderley* v. *Florida,* 385 U. S. 39 (1966), and *Greer* v. *Spock, supra,* that property owned or controlled by the government which is *not* a public forum may be subject to a prohibition of speech, leafleting, picketing, or other forms of communication without running afoul of the First Amendment. Admittedly, the government must act reasonably in imposing such restrictions, *Jones* v. *North Carolina Prisoners' Union,* 433 U. S. 119, 130–131 (1977), and the prohibition must be content-neutral. But, for the reasons stated in our opinion, we think it cannot be questioned that § 1725 is both a reasonable and content-neutral regulation.

Even JUSTICE MARSHALL's dissent recognizes that the Government may defend the regulation here on a ground other than simply a "time, place, and manner" basis. For example, he says in dissent, *post,* at 143: "The question, then, is whether this statute burdens any First Amendment rights enjoyed by appellees. If so, it must be determined whether this burden is justified by a significant governmental interest substantially advanced by the statute." We think § 1725 satisfies even the test articulated by JUSTICE MARSHALL.

IV

It is thus unnecessary for us to examine § 1725 in the context of a "time, place, and manner" restriction on the use of the traditional "public forums" referred to above. This Court has long recognized the validity of reasonable time, place, and manner regulations on such a forum so long as the regulation is content-neutral, serves a significant governmental interest, and leaves open adequate alternative channels for communication. See, *e. g., Consolidated Edison Co.* v. *Public Service Comm'n,* 447 U. S. 530, 535–536 (1980); *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 93 (1977); *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748, 771 (1976); *Grayned* v. *City of Rockford,* 408 U. S. 104 (1972); *Cox* v. *New Hampshire,* 312 U. S. 569 (1941). But since a letterbox is not traditionally such a "public forum," the elaborate analysis engaged in by the District Court was, we think, unnecessary. To be sure, if a governmental regulation is based on the content of the speech or the message, that action must be scrutinized more carefully to ensure that communication has not been prohibited " 'merely because public officials disapprove the speaker's view.' " *Consolidated Edison Co.* v. *Public Service Comm'n, supra,* at 536, quoting *Niemotko* v. *Maryland,* 340 U. S. 268, 282 (1951) (Frankfurter, J., concurring in result). But in this case there simply is no question that § 1725 does not regulate speech on the basis of content. While the analytical line between a regulation of the "time, place, and manner" in which First Amendment rights may be exercised in a traditional public forum, and the question of whether a particular piece of personal or real property owned or controlled by the government is in fact a "public forum" may blur at the edges, we think the line is nonetheless a workable one. We likewise think that Congress may, in exercising its authority to develop and operate a national postal system, properly legislate with the generality of cases in mind, and

should not be put to the test of defending in one township after another the constitutionality of a statute under the traditional "time, place, and manner" analysis. This Court has previously acknowledged that the "guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.' " *Greer* v. *Spock,* 424 U. S., at 836, quoting *Adderley* v. *Florida,* 385 U. S., at 48. If Congress and the Postal Service are to operate as efficiently as possible a system for the delivery of mail which serves a Nation extending from the Atlantic Ocean to the Pacific Ocean, from the Canadian boundary on the north to the Mexican boundary on the south, it must obviously adopt regulations of general character having uniform applicability throughout the more than three million square miles which the United States embraces. In so doing, the Postal Service's authority to impose regulations cannot be made to depend on all of the variations of climate, population, density, and other factors that may vary significantly within a distance of less than 100 miles.

V

From the time of the issuance of the first postage stamp in this country at Brattleboro, Vt., in the fifth decade of the last century, through the days of the governmentally subsidized "Pony Express" immediately before the Civil War, and through the less admirable era of the Star Route Mail Frauds in the latter part of that century, Congress has actively exercised the authority conferred upon it by the Constitution "to establish Post Offices and Post Roads" and "to make all laws which shall be necessary and proper" for executing this task. While Congress, no more than a suburban township, may not by its own *ipse dixit* destroy the "public forum" status of streets and parks which have historically been public forums, we think that for the reasons stated a letterbox may not properly be analogized to streets and parks.

It is enough for our purposes that neither the enactment nor the enforcement of § 1725 was geared in any way to the content of the message sought to be placed in the letterbox. The judgment of the District Court is accordingly

Reversed.

JUSTICE BRENNAN, concurring in the judgment.

I concur in the judgment, but not in the Court's opinion. I believe the Court errs in not determining whether § 1725 is a reasonable time, place, and manner restriction on appellees' exercise of their First Amendment rights, as urged by the Government, and in resting its judgment instead on the conclusion that a letterbox is not a public forum. In my view, this conclusion rests on an improper application of the Court's precedents and ignores the historic role of the mails as a national medium of communication.

I

Section 1725 provides:

> "Whoever knowingly and willfully deposits any mailable matter such as statements of accounts, circulars, sale bills, or other like matter, on which no postage has been paid, in any letter box established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon, shall for each such offense be fined not more than $300." 18 U. S. C. § 1725.

Unquestionably, § 1725 burdens in some measure the First Amendment rights of appellees who seek to "communicate ideas, positions on local issues, and civic information to their constituents," through delivery of circulars door-to-door. 490 F. Supp. 157, 162 (1980). See *Martin* v. *City of Struthers,* 319 U. S. 141, 146–147 (1943). The statute requires appellees either to pay postage to obtain access to the postal system, which they assert they are unable to do, or to deposit

their materials in places other than the letterbox, which they contend is less effective than deposit in the letterbox.

Despite the burden on appellees' rights, I conclude that the statute is constitutional because it is a reasonable time, place, and manner regulation. See *Schad* v. *Mount Ephraim,* 452 U. S. 61, 74–77 (1981); *Consolidated Edison Co.* v. *Public Service Comm'n,* 447 U. S. 530, 535–536 (1980); *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 93 (1977); *Grayned* v. *City of Rockford,* 408 U. S. 104, 115–116 (1972). First, § 1725 is content-neutral because it is not directed at the content of the message appellees seek to convey, but applies equally to all mailable matter. See *Consolidated Edison Co.* v. *Public Service Comm'n, supra,* at 536; *Erznoznik* v. *City of Jacksonville,* 422 U. S. 205, 209–211 (1975); *Police Department of Chicago* v. *Mosley,* 408 U. S. 92, 95 (1972).

Second, the burden on expression advances a significant governmental interest—preventing loss of mail revenues. The District Court's finding that the "failure to enforce the statute as to [appellees] would [not] result in a *substantial* loss of revenue" may be true, 490 F. Supp. 157, 163 (emphasis added), but that conclusion overlooks the obvious cumulative effect that the District Court's ruling would have if applied across the country. Surely, the Government is correct when it argues that the Postal Service "is not required to make a case-by-case showing of a compelling need for the incremental revenue to be realized from charging postage to each organization or individual who desires to use the postal system to engage in expression protected by the First Amendment." Reply Brief for Appellant 8.

Third, there are "ample alternative channels for communication." *Consolidated Edison Co.* v. *Public Service Comm'n,* 447 U. S., at 535. Appellees may, for example, place their circulars under doors or attach them to doorknobs. Simply because recipients may find 82% of materials left in the letterbox, but only 70–75% of materials otherwise left at the residence, is not a sufficient reason to conclude that alterna-

tive means of delivery are not "ample." *Ibid.;* see *ante,* at 120, and n. 2.

II

The Court declines to analyze § 1725 as a time, place, and manner restriction. Instead, it concludes that a letterbox is not a public forum. *Ante,* at 128. Thus the Court states that

> "it is difficult to conceive of any reason why this Court should treat a letterbox differently for First Amendment access purposes than it has in the past treated the military base in *Greer* v. *Spock,* 424 U. S. 828 (1976), the jail or prison in *Adderley* v. *Florida,* 385 U. S. 39 (1966), and *Jones* v. *North Carolina Prisoners' Union,* 433 U. S. 119 (1977), or the advertising space made available in city rapid transit cars in *Lehman* v. *City of Shaker Heights,* 418 U. S. 298 (1974)." *Ante,* at 129.

I believe that the Court's conclusion ignores the proper method of analysis in determining whether property owned or directly controlled by the Government is a public forum. Moreover, even if the Court were correct that a letterbox is not a public forum, the First Amendment would still require the Court to determine whether the burden on appellees' exercise of their First Amendment rights is supportable as a reasonable time, place, and manner restriction.

A

For public forum analysis, "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned* v. *City of Rockford, supra,* at 116. We have often quoted Justice Holmes' observation that the " 'United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues . . . .' " *Blount* v. *Rizzi,* 400 U. S. 410, 416 (1971), and *Lamont* v. *Postmaster General,* 381 U. S. 301, 305 (1965), quoting *United States ex*

rel. Milwaukee Social Democratic Pub. Co. v. *Burleson,* 255 U. S. 407, 437 (1921) (Holmes, J., dissenting).[1] Our cases have recognized generally that public properties are appropriate fora for exercise of First Amendment rights. See, *e. g., Tinker* v. *Des Moines School District,* 393 U. S. 503, 512 (1969); *Brown* v. *Louisiana,* 383 U. S. 131, 139–140, 142 (1966) (plurality opinion); *Cox* v. *Louisiana,* 379 U. S. 536, 543 (1965); *Edwards* v. *South Carolina,* 372 U. S. 229 (1963).[2] While First Amendment rights exercised on public property may be subject to reasonable time, place, and manner restrictions, that is very different from saying that government-controlled property, such as a letterbox, does not constitute a public forum. Only where the exercise of First Amendment rights is incompatible with the normal activity occurring on public property have we held that the property is not a public forum. See *Greer* v. *Spock,* 424 U. S. 828 (1976); *Jones* v. *North Carolina Prisoners' Union,* 433 U. S. 119 (1977); *Adderley* v. *Florida,* 385 U. S. 39 (1966). Thus, in answering "[t]he crucial question . . . whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time," *Grayned* v. *City of Rockford, supra,* at 116, I believe that the mere deposit of mailable matter without postage is not "basically incompatible" with the "normal activity" for which a letterbox is used, *i. e.,* deposit of mailable matter with proper postage or mail delivery by the Postal Service. On the contrary, the mails and the letterbox are specifically used for the communication of information and ideas, and thus surely constitute a public

[1] It would make no sense to conclude that the "mails" are a vital medium of expression, but that letterboxes are not. Inasmuch as the Postal Service, by regulation, requires postal customers to provide appropriate mail receptacles conforming to specified dimensions, the letterbox is an indispensable component of the mail system.

[2] Of course, the postal power must be exercised in a manner consistent with the First Amendment. See *Blount* v. *Rizzi,* 400 U. S. 410, 416 (1971); *Lamont* v. *Postmaster General,* 381 U. S. 301, 305–306 (1965).

forum appropriate for the exercise of First Amendment rights subject to reasonable time, place, and manner restrictions such as those embodied in § 1725 or in the requirement that postage be affixed to mailable matter to obtain access to the postal system.

The history of the mails as a vital national medium of expression confirms this conclusion. Just as "streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," *Hague* v. *CIO,* 307 U. S. 496, 515 (1939),[3] so too the mails from the early days of the Republic have played a crucial role in communication. The Court itself acknowledges the importance of the mails as a forum for communication:

> "Government without communication is impossible, and until the invention of the telephone and telegraph, *the mails were the principal means of communication.* . . . In 1775, Franklin was named the first Postmaster General by the Continental Congress, and, because of the trend toward war, the Continental Congress undertook its first serious effort to establish a secure mail delivery organization in order to maintain communication between the States and to supply revenue for the Army." *Ante,* at 121 (emphasis added).

The Court further points out that "[t]he Post Office played a *vital* . . . role in the development of our new Nation," *ibid.* (emphasis added), and currently processes "106.3 billion pieces of mail each year," *ante,* at 122. The variety of communication transported by the Postal Service ranges from the sublime to the ridiculous, and includes newspapers, magazines, books, films, and almost any type and form of expression imaginable. See Kappel Commission, Toward Postal Excel-

[3] See generally Gibbons, Hague *v.* CIO: A Retrospective, 52 N. Y. U. L. Rev. 731 (1977).

lence, Report of the President's Commission on Postal Organization 47–48 (Comm. Print 1968). Given "the historic dependence of the Nation on the Postal Service," *ante,* at 123, it is extraordinary that the Court reaches the conclusion that the letterbox, a critical link in the mail system, is not a public forum.

Not only does the Court misapprehend the historic role that the mails have played in national communication, but it relies on inapposite cases to reach its result. *Greer* v. *Spock,*[4] *Adderley* v. *Florida,*[5] and *Jones* v. *North Carolina Prisoners' Union,*[6] all rested on the inherent incompatibility between the

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[4] In *Greer* v. *Spock,* 424 U. S. 828 (1976), pursuant to base regulations political candidates were denied permission to distribute campaign literature and to hold a political meeting on a military base. In upholding the challenged regulations, the Court specifically relied on the unique function of military installations "to train soldiers, not to provide a public forum," *id.,* at 838, and the historic power of a commanding officer " 'to exclude civilians from the area of his command.' " *Ibid.,* quoting *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 893 (1961).

[5] In *Adderley* v. *Florida,* 385 U. S. 39 (1966), the Court upheld trespass convictions of students who were demonstrating on jailhouse property, relying principally on the purpose of jails, "built for security purposes," *id.,* at 41, which unlike "state capitol grounds," are not open to the public. *Ibid.*

[6] In *Jones* v. *North Carolina Prisoners' Union,* 433 U. S. 119 (1977), prisoners challenged the constitutionality of prison regulations prohibiting prisoners from soliciting other inmates to join a prisoners' labor union and barring union meetings and bulk mailings concerning the union from outside sources. The Court upheld the regulations in the face of a First Amendment challenge on the basis that the First Amendment activity was incompatible with "reasonable considerations of penal management." *Id.,* at 132. The Court also rejected the prisoners' equal protection challenge. The Court analogized a prison to a military base, stating that a "prison may be no more easily converted into a public forum than a military base," *id.,* at 134, and concluded that prison officials could treat the union differently from other organizations such as the Jaycees and Alcoholics Anonymous for meetings and for bulk mailing purposes, because the "chartered purpose of the Union . . . was illegal under North Carolina law." *Id.,* at 135–136.

rights sought to be exercised and the physical location in which the exercise was to occur. *Lehman* v. *City of Shaker Heights*[7] rested in large measure on the captive audience doctrine, 418 U. S., at 304, and in part on the transportation purpose of the city bus system, *id.*, at 303. These cases, therefore, provide no support for the Court's conclusion that a letterbox is not a public forum.

B

Having determined that a letterbox is not a public forum, the Court inexplicably terminates its analysis. Surely, however, the mere fact that property is not a public forum does not free government to impose unwarranted restrictions on First Amendment rights. The Court itself acknowledges that the postal power "may not . . . be exercised by Congress in a manner that abridges the freedom of speech or of the press protected by the First Amendment to the Constitution." *Ante*, at 126. Even where property does not constitute a public forum, government regulation that is content-neutral must still be reasonable as to time, place, and manner. See, *e. g.*, *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 63, n. 18 (1976). Cf. *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S., at 92–93; *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976). The

[7] In *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (1974), the Court upheld a ban on political advertising in buses, but only four Justices concluded that advertising space in a city transit system is not a First Amendment forum. They reached that result because the transit system sought, by its limitation on political speech, "to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience." *Id.*, at 304. Justice Douglas concurred in the judgment on the narrow ground that petitioner had no constitutional right to force his message upon a captive audience. Joined by JUSTICES STEWART, MARSHALL, and POWELL, I dissented on the ground that "the city created a forum for the dissemination of information and expression of ideas when it accepted and displayed commercial and public service advertisements on its rapid transit vehicles." *Id.*, at 310.

restriction in § 1725 could have such an effect on First Amendment rights—and does for JUSTICE MARSHALL—that it should be struck down. The Court, therefore, cannot avoid analyzing § 1725 as a time, place, and manner restriction.[8]

III

I would conclude, contrary to the Court, that a letterbox is a public forum, but, nevertheless, concur in the judgment because I conclude that 18 U. S. C. § 1725 is a reasonable time, place, and manner restriction on appellees' exercise of their First Amendment rights.

JUSTICE WHITE, concurring in the judgment.

There is no doubt that the postal system is a massive, Government-operated communications facility open to all forms of written expression protected by the First Amendment. No one questions, however, that the Government, the operator of the system, may impose a fee on those who would use the system, even though the user fee measurably reduces the ability of various persons or organizations to communicate with others. Appellees do not argue that they may use the mail for home delivery free of charge. A self-evident justification for postage is that the Government may insist that those who use the mails contribute to the expense of maintaining and operating the facility.

No different answer is required in this case because appellees do not insist on free home delivery and desire to use only a part of the system, the mailbox. The Government's interest in defraying its operating expenses remains, and it is clear

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[8] Even if the letterbox were characterized as purely private property that is being regulated by the Government, rather than property which has become incorporated into the "Postal Service's nationwide system for the receipt and delivery of mail," *ante*, at 123, § 1725 would still be subject to time, place, and manner analysis. See, *e. g.*, *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 63, n. 18 (1976).

that stuffing the mailbox with unstamped materials is a burden on the system.

This justification would suffice even in those situations where insisting on the fee will totally prevent the putative user from communicating with his intended correspondents, *i. e.*, there would be no adequate alternative means available to reach the intended recipients. For this reason, if for no other, I do not find it appropriate to inquire whether the restriction at issue here is a reasonable time, place or manner regulation. Besides that, however, it is apparent that the validity of user fees does not necessarily depend on satisfying typical time, place or manner requirements.

Equally bootless is the inquiry whether the postal system is a public forum. For all who will pay the fee, it obviously is, and the only question is whether a user fee may be charged, as a general proposition and in the circumstances of this case. Because I am quite sure that the fee is a valid charge, I concur in the judgment.

JUSTICE MARSHALL, dissenting.

When the Framers of the Constitution granted Congress the authority "[t]o establish Post Offices and Post Roads," Art. I, § 8, cl. 7, they placed the powers of the Federal Government behind a national communication service. Protecting the economic viability and efficiency of that service remains a legitimate and important congressional objective. This case involves a statute defended on that ground, but I believe it is unnecessary for achieving that purpose and inconsistent with the underlying commitment to communication.

The challenged statute, 18 U. S. C. § 1725, prohibits anyone from knowingly placing unstamped "mailable matter" in any box approved by the United States Postal Service for receiving or depositing material carried by the Postal Service. Violators may be punished with fines of up to $300 for each offense. In this case, appellee civic associations claimed, and

the District Court agreed, that this criminal statute unreasonable restricts their First Amendment right of free expression.

The Court today upholds the statute on the theory that its focus—the letterbox situated on residential property—is not a public forum to which the First Amendment guarantees access. I take exception to the result, the analysis, and the premise that private persons lose their prerogatives over the letterboxes they own and supply for mail service.

First, I disagree with the Court's assumption that if no public forum is involved, the only First Amendment challenges to be considered are whether the regulation is content-based, see *ante,* at 132–133, and reasonable, *ante,* at 131, n. 7. Even if the Postal Service were not a public forum, which, as I later suggest, I do not accept, the statute advanced in its aid is a law challenged as an abridgment of free expression. Appellees seek to carry their own circulars and to deposit them in letterboxes owned by private persons who use them to receive mail, and challenge the criminal statute forbidding this use of private letterboxes. The question, then, is whether this statute burdens any First Amendment rights enjoyed by appellees. If so, it must be determined whether this burden is justified by a significant governmental interest substantially advanced by the statute. See *Consolidated Edison Co.* v. *Public Service Comm'n,* 447 U. S. 530, 540 (1980); *Grayned* v. *City of Rockford,* 408 U. S. 104, 115 (1972); *Cameron* v. *Johnson,* 390 U. S. 611, 616–617 (1968); *Thornhill* v. *Alabama,* 310 U. S. 88, 96, 104–105 (1940).

That appellee civic associations enjoy the First Amendment right of free expression cannot be doubted; both their purposes and their practices fall within the core of the First Amendment's protections. We have long recognized the constitutional rights of groups which seek, as appellees do, to "communicate ideas, positions on local issues, and civic information to their constituents" [1] through written handouts

[1] 490 F. Supp. 157, 162 (1980).

and thereby to promote the free discussion of governmental affairs so central to our democracy. See, *e. g., Martin* v. *City of Struthers,* 319 U. S. 141, 146–147 (1943); *Schneider* v. *State,* 308 U. S. 147 (1939); *Lovell* v. *Griffin,* 303 U. S. 444 (1938). By traveling door to door to hand-deliver their messages to the homes of community members, appellees employ the method of written expression most accessible to those who are not powerful, established, or well financed. "Door to door distribution of circulars is essential to the poorly financed causes of little people." *Martin* v. *City of Struthers, supra,* at 146. See *Schneider* v. *State, supra,* at 164. Moreover, "[f]reedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." *Murdock* v. *Pennsylvania,* 319 U. S. 105, 111 (1943). And such freedoms depend on liberty to circulate; " 'indeed, without circulation, the publication would be of little value.' " *Talley* v. *California,* 362 U. S. 60, 64 (1960), quoting *Lovell* v. *Griffin, supra,* at 452.

Countervailing public interests, such as protection against fraud and preservation of privacy, may warrant some limitation on door-to-door solicitation and canvassing. But we have consistently held that any such restrictions, to be valid, must be narrowly drawn " 'in such a manner as not to intrude upon the rights of free speech.' " *Hynes* v. *Mayor and Council of Borough of Oradell,* 425 U. S. 610, 616 (1976), quoting *Thomas* v. *Collins,* 323 U. S. 516, 540–541 (1945). Consequently, I cannot agree with the Court's conclusion, *ante,* at 132–133, that we need not ask whether the ban against placing such messages in letterboxes is a restriction on appellees' free expression rights. Once appellees are at the doorstep, only § 1725 restricts them from placing their circulars in the box provided by the resident. The District Court determined after an evidentiary hearing that only by placing their circulars in the letterboxes may appellees be certain that their messages will be secure from wind, rain, or snow, and at the same time will alert the attention of the residents without

notifying would-be burglars that no one has returned home to remove items from doorways or stoops. 490 F. Supp. 157, 160–163 (1980). The court concluded that the costs and delays of mail service put the mails out of appellees' reach, and that other alternatives, such as placing their circulars in doorways, are "much less satisfactory." *Id.*, at 160.[2] We have in the past similarly recognized the burden placed on First Amendment rights when the alternative channels of communication involve more cost, less autonomy, and reduced likelihood of reaching the intended audience. *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 93 (1977).

I see no ground to disturb these factual determinations of the trier of fact. And, given these facts, the Postal Service bears a heavy burden to show that its interests are legitimate and substantially served by the restriction of appellees' freedom of expression. See, *e. g., Hynes* v. *Mayor and Council of the Borough of Oradell, supra,* at 617–618; *Konigsberg* v. *State Bar of California,* 366 U. S. 36, 49–51 (1961); *Marsh* v. *Alabama,* 326 U. S. 501, 509 (1946). Although the majority does not rule that the trial court's findings were clearly erroneous, as would be required to set them aside, the Court finds persuasive the interests asserted by the Postal Service in defense of the statute. Those interests—"protect[ing] mail revenues while at the same time facilitating the secure and efficient delivery of the mails," *ante,* at 129—are indeed both legitimate and important. But mere assertion of an important, legitimate interest does not satisfy the requirement that the challenged restriction specifically and precisely serve that end. See *Hynes* v. *Mayor and Council of the Borough of*

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[2] Indeed, the record in this litigation indicates that appellees circulated less information when inhibited from using the letterboxes. Plaintiffs' Answer to Written Interrogatories, Record, Doc. No. 23, ¶ 8, pp. 6–7. The practical effect of applying the statute in residential communities would preclude Girl Scouts, Boy Scouts, charities, neighbors, and others from leaving invitations or notes in the place residents most likely check for messages.

Oradell, supra. See also *Cox* v. *Louisiana,* 379 U. S. 536, 557–558 (1965) (restriction must be applied uniformly and nondiscriminatorily).

Here, the District Court concluded that the Postal Service "has not shown that failure to enforce the statute as to [appellees] would result in a substantial loss of revenue, or a significant reduction in the government's ability to protect the mails by investigating and prosecuting mail theft, mail fraud, or unauthorized private mail delivery service." 490 F. Supp., at 163.[3] In light of this failure of proof, I cannot join the Court's conclusion that the Federal Government may thus curtail appellees' ability to inform community residents about local civic matters. That decision, I fear, threatens a departure from this Court's belief that free expression, as "the matrix, the indispensable condition, of nearly every other form of freedom," *Palko* v. *Connecticut,* 302 U. S. 319, 327 (1937), must not yield unnecessarily before such governmental interests as economy or efficiency. Certainly, free expression should not have to yield here, where the intruding statute has seldom been enforced.[4] As the exceptions created

[3] The Government's interest in ensuring the security of the mails is advanced more directly by 18 U. S. C. §§ 1341, 1708. To the extent that the security and efficiency problems are attributed to overcrowding in letterboxes, the problem could be resolved simply by requiring larger boxes.

As for protection of mail revenues, it is significant that the District Court found the cost of using the mails prohibitive, given appellees' budgets, and the delays in mail delivery too great to make it useful for appellees' needs. 490 F. Supp., at 160. Apparently, appellees' compliance with 18 U. S. C. § 1725 would not increase mail revenues. Although protection of the Postal Service obviously must take the form of national regulation, having broad application, a statute's nondiscriminatory terms may not save it where infringement of speech is demonstrated. *Murdock* v. *Pennsylvania,* 319 U. S. 105, 115 (1943).

[4] Appellant conceded at oral argument that the Postal Service knew of no convictions and only one attempted prosecution under the statute. Tr. of Oral Arg. 15. That unsuccessful prosecution was dismissed because the District Court found impermissibly vague the prohibition on depositing

by the Postal Service itself demonstrate,[5] the statute's asserted purposes easily could be advanced by less intrusive alternatives, such as a nondiscriminatory permit requirement for depositing unstamped circulars in letterboxes.[6] Therefore, I would find 18 U. S. C. § 1725 constitutionally defective.

Even apart from the result in this case, I must differ with the Court's use of the public forum concept to avoid application of the First Amendment. Rather than a threshold barrier that must be surmounted before reaching the terrain of the First Amendment, the concept of a public forum has more properly been used to open varied governmental locations to equal public access for free expression, subject to the constraints on time, place, or manner necessary to preserve the governmental function. *E. g., Grayned* v. *City of Rockford,* 408 U. S., at 115–117 (area around public school); *Chicago Area Military Project* v. *Chicago,* 508 F. 2d 921 (CA7) (city airport), cert. denied, 421 U. S. 992 (1975); *Albany Welfare Rights Organization* v. *Wyman,* 493 F. 2d 1319 (CA2) (welfare office waiting room), cert. denied *sub nom. Lavine* v. *Albany Welfare Rights Organization,* 419 U. S. 838 (1974);

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unstamped "mailable matter such as statements of account, circulars, sales bills, or *other like matter.*" *United States* v. *Rogers,* Cr. No. 72–87 (MD La. Feb. 16, 1973) (emphasis added). Apparently, no prosecutions have since been attempted, although the statute may be used to support the efforts of local postal offices in collecting unpaid postage. Tr. of Oral Arg. 15.

[5] The Postal Service has interpreted the statute to exempt mailslots, *id.,* at 8, and to provide exception for certain kinds of deliveries, Domestic Mail Manual (DMM) 156.58 (newspapers, normally mailed but delivered on Sunday or holidays); 39 CFR § 310.6 (1979) (letters dispatched within 50 miles of destination and same-day delivery). And by applying only to "mailable matter," the statute excludes pornography and other items not lawfully carried by the Postal Service. The Service thus has itself acknowledged that the statute sweeps more broadly than necessary.

[6] Such a permit requirement could accomplish the central purpose of the statute—to restrain commercial enterprises from avoiding postal fees by employing their own delivery services. See *ante,* at 125.

Wolin v. *Port of New York Authority,* 392 F. 2d 83 (CA2) (port authority), cert. denied, 393 U. S. 940 (1968); *Reilly* v. *Noel,* 384 F. Supp. 741 (RI 1974) (rotunda of courthouse). See generally *Lehman* v. *City of Shaker Heights,* 418 U. S. 298, 303 (1974); Stone, Fora Americana: Speech in Public Places, S. Ct. Rev. 233, 251–252 (1974). These decisions apply the public forum concept to secure the First Amendment's commitment to expression unfettered by governmental designation of its proper scope, audience, or occasion.

I believe these precedents support my conclusion that appellees should prevail in their First Amendment claim. The traditional function of the mails led this Court to embrace Justice Holmes' statement that "'[t]he United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is as much a part of free speech as the right to use our tongues . . . .'" *Lamont* v. *Postmaster General,* 381 U. S. 301, 305 (1965), quoting *United States ex rel. Milwaukee Social Democratic Pub. Co.* v. *Burleson,* 255 U. S. 407, 437 (1921) (Holmes, J., dissenting). Given its pervasive and traditional use as purveyor of written communication, the Postal Service, I believe, may properly be viewed as a public forum. The Court relies on easily distinguishable cases in reaching the contrary conclusion. For the Postal Service's very purpose is to facilitate communication, which surely differentiates it from the military bases, jails, and mass transportation discussed in cases relied on by the Court, *ante,* at 129–130.[7] Cf. *Tinker* v. *Des Moines Independent School*

[7] Rather than supporting the conclusion that the Postal Service letterbox is not a public forum, the cases cited by the majority, *ante,* at 129–130, in fact point in the other direction. The Court resolved two First Amendment issues in *Jones* v. *North Carolina Prisoners' Union,* 433 U. S. 119 (1977): the scope of associational rights retained by convicted prisoners, and their right, if any, to bulk mail rates. The Court analyzed both issues under the principle that while in prison, "an inmate does not retain those First Amendment rights that are 'inconsistent with his status as a prisoner or with the legitimate penological objectives of the correc-

Dist., 393 U. S. 503, 512 (1969). Drawing from the exceptional cases, where speech has been limited for special reasons, does not strike me as commendable analysis.

The inquiry in our public forum cases has instead asked whether "the manner of expression is basically incompatible

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tions system.'" *Id.*, at 129, quoting *Pell* v. *Procunier*, 417 U. S. 817, 822 (1974). No such principle applies to appellees. Furthermore, the public forum analysis in *Jones* asked whether exercise of the First Amendment rights would be incompatible with the purposes of the governmental facility, a question answerable in the negative in this case.

In *Greer* v. *Spock*, 424 U. S. 828, 838 (1976), the Court concluded that Fort Dix was not a public forum due to its military purpose and the power of "'the commanding officer summarily to exclude civilians from the area of his command'" (quoting *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 893 (1961)). At the same time, the Court emphasized that political campaign literature could still be distributed at the base unless it posed a clear danger to troop discipline and loyalty, 424 U. S., at 840. Thus, the base remained a "public forum" at least for written communication. A plurality of the Court in *Lehman* v. *City of Shaker Heights*, 418 U. S. 298, 303–304 (1974), found the city transit system not a public forum because its advertising space was incidental to its primary commercial transportation purpose. The plurality nevertheless recognized that the state action present necessitated a balancing analysis of the First Amendment interests of those seeking advertising space and the interests of the government and the users of the transit system. Further, both the plurality and Justice Douglas, in his separate opinion concurring in the result, relied on an analogy to the mass media which has no obligation under the First Amendment to broadcast or print any particular story or advertisement. *Id.*, at 303 (opinion of BLACKMUN, J.); *id.*, at 306 (opinion of Douglas, J.). In contrast, the Postal Service is obliged to accept all mailable matter. Finally, in *Adderley* v. *Florida*, 385 U. S. 39 (1966), the security needs of the jail were critical to the Court's conclusion that trespassers on the jail grounds could properly be prosecuted. *Adderley* itself noted that spaces more traditionally used by the public would more likely be public forums, *id.*, at 41–42, and this treatment is appropriate here, given the traditional public use of the Postal Service. The determinative question in each of these cases was not whether the government owned or controlled the property, but whether the nature of the governmental interests warranted the restrictions on expression. That is the question properly asked in this case.

with the normal activity of a particular place at a particular time." *Grayned* v. *City of Rockford*, 408 U. S., at 116. Compare *Grayned* v. *City of Rockford* (restriction on speech permissible near school while in session) with *Tinker* v. *Des Moines Independent School Dist., supra* (symbolic speech protected even during school hours); *Cameron* v. *Johnson*, 390 U. S. 611 (1968) (restriction on picketing permitted where limited to entrance of courthouse), with *Brown* v. *Louisiana*, 383 U. S. 131 (1966) (silent protest in library protected); *Adderley* v. *Florida*, 385 U. S. 39 (1966) (protest near jailyard inconsistent with jail purposes), with *Edwards* v. *South Carolina*, 372 U. S. 229 (1963) (protest permitted on state capitol grounds). Assuming for the moment that the letterboxes, as "authorized depositories," are under governmental control and thus part of the governmental enterprise, their purpose is hardly incompatible with appellees' use. For the letterboxes are intended to receive written communication directed to the residents and to protect such materials from the weather or the intruding eyes of would-be burglars.

Reluctance to treat the letterboxes as public forums might stem not from the Postal Service's approval of their form but instead from the fact that their ownership and use remain in the hands of private individuals.[8] Even that hesitation, I should think, would be misguided, for those owners necessarily retain the right to receive information as a counterpart of the right of speakers to speak. *Kleindienst* v. *Mandel*, 408 U. S. 753, 762–765 (1972); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 389–390 (1969); *Lamont* v. *Postmaster General, supra*, at 307; *Martin* v. *City of Struthers*, 319 U. S., at 143. Cf. *Procunier* v. *Martinez*, 416 U. S. 396, 408 (1974) (communication by letter depends on receipt by addressee). On that basis alone, I would doubt the validity of 18 U. S. C. § 1725, for it deprives residents of the informa-

[8] But see *Marsh* v. *Alabama*, 326 U. S. 501 (1946).

tion which civic groups or individuals may wish to deliver to these private receptacles.[9]

I remain troubled by the Court's effort to transform the letterboxes entirely into components of the governmental enterprise despite their private ownership. Under the Court's reasoning, the Postal Service could decline to deliver mail unless the recipients agreed to open their doors to the letter carrier—and then the doorway, or even the room inside could fall within Postal Service control.[10] Instead of starting with the scope of governmental control, I would adhere to our usual analysis which looks to whether the exercise of a First Amendment right is burdened by the challenged governmental action, and then upholds that action only where it is necessary to advance a substantial and legitimate governmental interest. In my view, the statute criminalizing the placement of hand-delivered civic association notices in letterboxes fails this test. The brute force of the criminal sanction and other powers of the Government, I believe, may be

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[9] The Court announced the First Amendment rights of recipients in *Lamont* v. *Postmaster General*, 381 U. S. 301 (1965). There, the Court struck down a postal regulation denying delivery of Communist propaganda sent from outside the country, even though the regulation permitted such delivery to recipients who notified the Postal Service in writing that they wished to receive the material. Untenable, in the Court's view, was the fact that under the regulatory scheme, "[t]he addressee carries an affirmative obligation which we do not think the Government may impose on him." *Id.*, at 307. The concern for the addressee's First Amendment rights should govern here.

[10] Appellant suggests no First Amendment problem is presented because residents would not erect letterboxes but for the Postal Service, and the First Amendment did not compel the creation of the Service. Brief for Appellant 18–19. This argument obviously proves too much, because the First Amendment did not ordain the establishment of schools or libraries, and yet we have held that once established, these public facilities must be managed consistently with the First Amendment. *Tinker* v. *Des Moines Independent School Dist.*, 393 U. S. 503 (1969); *Brown* v. *Louisiana*, 383 U. S. 131 (1966).

deployed to restrict free expression only with greater justification. I dissent.

JUSTICE STEVENS, dissenting.

JUSTICE MARSHALL has persuaded me that this statute is unconstitutional, but I do not subscribe to all of his reasoning. He is surely correct in concluding that content-neutral restrictions on the use of private letterboxes do not automatically comply with the First Amendment simply because such boxes are a part of the Postal Service. Like libraries and schools, once these facilities have come into existence, the Government's regulation of them must comply with the Constitution. See *ante,* at 151, n. 10. I cannot, however, accept the proposition that these private receptacles are the functional equivalent of public fora.

My disagreement with the Court and with JUSTICE MARSHALL can best be illustrated by looking at this case from the point of view of the owner of the mailbox. The mailbox is private property; it is not a public forum to which the owner must grant access. If the owner does not want to receive any written communications other than stamped mail, he should be permitted to post the equivalent of a "no trespassing" sign on his mailbox. A statute that protects his privacy by prohibiting unsolicited and unwanted deposits on his property would surely be valid. The Court, however, upholds a statute that interferes with the owner's receipt of information that he may want to receive. If the owner welcomes messages from his neighbors, from the local community organization, or even from the newly arrived entrepreneur passing out free coupons, it is presumptively unreasonable to interfere with his ability to receive such communications. The nationwide criminal statute at issue here deprives millions of homeowners of the legal right to make a simple decision affecting their ability to receive communications from others.

The Government seeks to justify the prohibition on three grounds: avoiding the loss of federal revenues, preventing theft from the mails, and maintaining the efficiency of the Postal Service.[1] In my judgment the first ground is frivolous and the other two, though valid, are insufficient to overcome the presumption that this impediment to communication is invalid.

If a private party—by using volunteer workers or by operating more efficiently—can deliver written communications for less than the cost of postage, the public interest would be well served by transferring that portion of the mail delivery business out of the public domain. I see no reason to prohibit competition simply to prevent any reduction in the size of a subsidized monopoly. In my opinion, that purpose cannot justify any restriction on the interests in free communication that are protected by the First Amendment.

To the extent that the statute aids in the prevention of theft, that incidental benefit was not a factor that motivated Congress.[2] The District Court noted that the testimony indicated that § 1725 "was marginally useful" in the enforcement of the statutes relating to theft of mail. 490 F. Supp. 157, 161–162 (1980). It concluded, however, that the Government had failed to introduce evidence sufficient to justify

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[1] Although the Government also advances the privacy interests of the mailbox owner, those interests would of course be protected by allowing the individual owner to make the choice whether he wanted to receive unstamped mail.

[2] The Government, see Brief for Appellant 4, n. 4, cites legislative history indicating that the "principal motivation for the statute" was the protection of postal revenues and prevention of overstuffing of mailboxes. The Government later notes that "[a]lthough Congress' primary purpose in enacting Section 1725 was the protection of mail revenues, the statute also plays a role in the investigation of mail theft." *Id.*, at 7. Because this justification, unlike the other two, was formulated after the statute was enacted, it is not entitled to the same weight as the purposes that actually motivated Congress.

the interference with First Amendment interests.[3] The Court does not quarrel with any of the District Court's findings of fact, and I would not disturb the conclusion derived from those findings.

Mailboxes cluttered with large quantities of written matter would impede the efficient performance of the mail carrier's duties. Sorting through papers for mail to be picked up or having no space in which to leave mail that should be delivered can unquestionably consume valuable time. Without the statute that has been in place for decades, what may now appear to be merely a minor or occasional problem might grow like the proverbial beanstalk. Rather than take that risk, Congress has decided that the wiser course is a total prohibition that will protect the free flow of mail.

But as JUSTICE MARSHALL has noted, the problem is susceptible of a much less drastic solution. See *ante,* at 146, n. 3. There are probably many overstuffed mailboxes now—and if this statute were repealed there would be many more—but the record indicates that the relatively empty boxes far outnumber the crowded ones. If the statute allowed the homeowner to decide whether or not to receive unstamped communications—and to have his option plainly indicated on the exterior of the mailbox—a simple requirement that overstuffed boxes be replaced with larger ones should provide the answer to most of the Government's concern.[4]

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[3] The District Court held that "enforcement of § 1725 against civic associations does not appear so necessary or contributive to enforcement of the anti-theft, anti-fraud or Private Express statutes that this interest outweighs the plaintiffs' substantial interest in expedient and economical communication with their constituents." 490 F. Supp., at 163.

[4] To the extent that the efficiency of the Postal Service would be impeded by the effort required for mail carriers to sort through papers for outgoing mail, the solution is again in the hands of the individual owner of the mailbox. If he wants to use this method of sending letters and wants also to receive unstamped communications, he runs the risk that his outgoing mail will not be seen by the mail carrier.

I am fully aware that it is one thing to sit in judicial chambers and opine that a postal regulation is not really necessary and quite another to run a mammoth and complex operation like the Postal Service. Conceivably, the invalidation of this law would unleash a flow of communication that would sink the mail service in a sea of paper. But were that to happen, it would merely demonstrate that this law is a much greater impediment to the free flow of communication than is presently assumed. To the extent that the law prevents mailbox clutter, it also impedes the delivery of written messages that would otherwise take place.

Finally, we should not ignore the fact that nobody has ever been convicted of violating this middle-aged nationwide statute. It must have been violated literally millions of times. Apparently the threat of enforcement has enabled the Government to collect some postage from time to time or to cause a few violators to discontinue their unlawful practices, but I have the impression that the general public is at best only dimly aware of the law and that numerous otherwise law-abiding citizens regularly violate it with impunity. This impression supports the conclusion that the statute is indeed much broader than is necessary to serve its limited purpose. Because, as JUSTICE MARSHALL has demonstrated, it does unquestionably abridge the free exchange of written expression, I agree with his conclusion that it violates the First Amendment.

I respectfully dissent.

LEHMAN, SECRETARY OF THE NAVY *v.* NAKSHIAN

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

No. 80–242. Argued March 31, 1981—Decided June 26, 1981

The Age Discrimination in Employment Act of 1967 (ADEA or Act) was amended in 1974 to extend to federal employees the Act's protection of older workers against discrimination in the workplace based on age. Section 15 (c) of the Act provides that any aggrieved federal employee "may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes" of the Act. Respondent federal employee brought suit in Federal District Court against the Secretary of the Navy under § 15 (c), alleging violations of the Act and demanding a jury trial. The District Court ruled, over the Secretary's objection, that respondent was entitled to a jury trial. On an interlocutory appeal, the Court of Appeals affirmed.

Held: Respondent was not entitled to a jury trial. Pp. 160–169.

(a) Where Congress waives the Government's immunity from suit, as it has in the ADEA, the plaintiff has a right to a trial by jury only where Congress has affirmatively and unambiguously granted that right by statute. Pp. 160–161.

(b) Congress has not done so here. Neither the provision in § 15 (c) for federal employer cases to be brought in federal district courts rather than the Court of Claims, nor the use of the word "legal" in that section, evinces a congressional intent that ADEA plaintiffs who proceed to trial against the Federal Government may do so before a jury. *Lorillard* v. *Pons*, 434 U. S. 575, distinguished. Section 15 (c) contrasts with § 7 (c) of the Act, which expressly provides for jury trials in actions against private employers and state and local governments. Moreover, in extending the Act to cover federal employees, Congress based the provision not on the Fair Labor Standards Act as was § 7, but on Title VII of the Civil Rights Act of 1964, where, unlike the FLSA, there was no right to trial by jury. Pp. 162–165.

(c) The legislative history no more supports a holding that respondent has a right to a jury trial than does the statutory language itself. Pp. 165–168.

202 U. S. App. D. C. 59, 628 F. 2d 59, reversed.

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

a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 169.

Edwin S. Kneedler argued the cause for petitioner. With him on the briefs were *Solicitor General McCree, Acting Assistant Attorney General Martin, Deputy Solicitor General Geller, Robert E. Kopp,* and *Michael Jay Singer.*

Patricia J. Barry argued the cause and filed a brief for respondent.*

JUSTICE STEWART delivered the opinion of the Court.

The question presented by this case is whether a plaintiff in an action against the United States under § 15 (c) of the Age Discrimination in Employment Act is entitled to trial by jury.

I

The 1974 amendments to the Age Discrimination in Employment Act of 1967 [1] added a new § 15,[2] which brought the Federal Government within the scope of the Act for the first time. Section 15 (a) [3] prohibits the Federal Government from discrimination based on age in most of its civilian employment decisions concerning persons over 40 years of age. Section 15 (b) [4] provides that enforcement of § 15 (a)

*Briefs of *amici curiae* urging affirmance were filed by *Mary E. Jacksteit* for the American Federation of Government Employees (AFL–CIO); and by *Congressman Claude Pepper, pro se,* and *Edward F. Howard* for Mr. Pepper et al.

[1] 81 Stat. 602, as amended, 29 U. S. C. §§ 621–634 (1976 ed. and Supp. III).

[2] 29 U. S. C. § 633a.

[3] Section 15 (a), as amended in 1978, provides in pertinent part:

"All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . in military departments [and other enumerated Government agencies] shall be made free from any discrimination based on age. 29 U. S. C. § 633a (a) (1976 ed., Supp. III).

[4] 29 U. S. C. § 633a (b) (1976 ed. and Supp. III).

in most agencies, including military departments, is the responsibility of the Equal Employment Opportunity Commission. The Commission is directed to "issue such rules, regulations, orders and instructions as [the Commission] deems necessary and appropriate" to carry out that responsibility. Section 15 (c) [5] provides:

> "Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act." 88 Stat. 75.

In 1978, respondent Alice Nakshian, who was then a 62-year-old civilian employee of the United States Department of the Navy, brought an age discrimination suit against the Navy under § 15 (c). She requested a jury trial. The defendant moved to strike the request, and the District Court denied the motion. *Nakshian* v. *Claytor,* 481 F. Supp. 159 (DC). The court stressed that the "legal or equitable relief" language used by Congress to establish a right to sue the Federal Government for age discrimination was identical to the language Congress had previously used in § 7 (c) of the Act [6] to authorize private ADEA suits. That language,

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[5] 29 U. S. C. § 633a (c).

[6] Section 7 (c), as amended in 1978 and as set forth in 29 U. S. C. § 626 (c) (1976 ed., Supp. III), provides:

"(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter; *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the Commission to enforce the right of such employee under this chapter.

"(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action."

With the exception of the express right to jury trial conferred by § 7 (c) (2) and of the proviso in § 7 (c) (1), § 7 (c) is identical to § 15 (c). Section 7 (c) (2) was added by the 1978 amendments of the ADEA.

the District Court said, was an important basis for this Court's holding in *Lorillard* v. *Pons,* 434 U. S. 575, that § 7 (c) permits jury trials in private suits under the Act. The court stated that "if Congress had intended its consent to ADEA suits [against the Government] to be limited to non-jury trials, it could have easily said as much." 481 F. Supp., at 161. Recognizing that as a result of 1978 amendments to the ADEA § 7 (c)(2) expressly confers a right to jury trial, whereas no such language exists in § 15,[7] 481 F. Supp., at 161, the court found no "explicit refusal" by Congress to grant the right to jury trial against the Government, and noted that the legislative history of the 1978 amendments spoke in general terms about a right to jury trial in ADEA suits.

On interlocutory appeal under 28 U. S. C. § 1292 (b), a divided panel of the Court of Appeals affirmed. *Nakshian* v. *Claytor,* 202 U. S. App. D. C. 59, 628 F. 2d 59. The appellate court rejected the Secretary's argument that a plaintiff is entitled to trial by jury in a suit against the United States only when such a trial has been expressly authorized. Instead, the court viewed the question as "an ordinary question of statutory interpretation," and found sufficient evidence of legislative intent to provide for trial by jury in cases such as this. Noting that Congress had conferred jurisdiction over ADEA suits upon the federal district courts, rather than the Court of Claims, the Court of Appeals concluded that " 'absent a provision as to the method of trial, a grant of jurisdiction to a district court as a court of law carries with it a right of jury trial.' " *Id.,* at 63, 628 F. 2d, at 63 (quoting 5 J. Moore, J. Lucas, & J. Wicker, Moore's Federal Practice ¶ 38.32 [2], p. 38–236 (1979) (footnotes omitted)). The Court of Appeals also adopted the District Court's view of the "legal . . . relief" language in § 15 (c). Further, it was the court's view that the existence of the explicit statutory right to jury trial in suits against private employers does not

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

negate the existence of a right to jury trial in suits against the Government, since the provision for jury trials in private suits was added only to resolve a conflict in the Courts of Appeals on that issue and to confirm the correctness of this Court's decision in the *Lorillard* case.

We granted certiorari to consider the issue presented. *Sub nom. Hildalgo* v. *Nakshian,* 449 U. S. 1009.

II

It has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government. In *Galloway* v. *United States,* 319 U. S. 372, 388–389, the Court observed (footnotes omitted):

> "The suit is one to enforce a monetary claim against the United States. It hardly can be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign. Whatever force the Amendment has therefore is derived because Congress, in the legislation cited, has made it applicable."

See also *Glidden Co.* v. *Zdanok,* 370 U. S. 530, 572; *McElrath* v. *United States,* 102 U. S. 426, 440. Moreover, the Court has recognized the general principle that "the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.' " *United States* v. *Testan,* 424 U. S. 392, 399, quoting *United States* v. *Sherwood,* 312 U. S. 584, 586. See also *United States* v. *Mitchell,* 445 U. S. 535, 538. Thus, if Congress waives the Government's immunity from suit, as it has in the ADEA, 29 U. S. C. § 633a (1976 ed. and Supp. III), the plaintiff has a right to a trial by jury only where that right is one of "the terms of [the Government's] consent to be sued." *Testan, supra,* at 399. Like a waiver of immunity itself, which must be "unequivocally expressed," *United States* v. *Mitchell,*

supra, at 538, quoting *United States* v. *King,* 395 U. S. 1, 4, "this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Soriano* v. *United States,* 352 U. S. 270, 276. See also *United States* v. *Kubrick,* 444 U. S. 111, 117–118; *United States* v. *Sherwood, supra,* at 590–591.

When Congress has waived the sovereign immunity of the United States, it has almost always conditioned that waiver upon a plaintiff's relinquishing any claim to a jury trial. Jury trials, for example, have not been made available in the Court of Claims for the broad range of cases within its jurisdiction under 28 U. S. C. § 1491—*i. e.,* all claims against the United States "founded either upon the Constitution, or any Act of Congress, . . . or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." See *Glidden Co., supra.* And there is no jury trial right in this same range of cases when the federal district courts have concurrent jurisdiction. See 28 U. S. C. §§ 1346 (a)(2) and 2402. Finally, in tort actions against the United States, see 28 U. S. C. § 1346 (b), Congress has similarly provided that trials shall be to the court without a jury. 28 U. S. C. § 2402.[8]

[8] It is not difficult to appreciate Congress' reluctance to provide for jury trials against the United States. When fashioning a narrow exception to permit jury trials in tax refund cases in federal district courts under 28 U. S. C. § 1346 (a)(1), in legislation that Congress recognized established a "wholly new precedent," H. R. Rep. No. 659, 83d Cong., 1st Sess., 3 (1953), Congress expressed its concern that juries "might tend to be overly generous because of the virtually unlimited ability of the Government to pay the verdict." *Ibid.* Indeed, because of their firm opposition to breaking with precedent, the House conferees took almost a year before acceding to passage of the bill containing that exception. Only after much debate, and after the conferees became convinced that there would be no danger of excessive verdicts as a result of jury trials in that unique context—because recoveries would be limited to the amount

The appropriate inquiry, therefore, is whether Congress clearly and unequivocally departed from its usual practice in this area, and granted a right to trial by jury when it amended the ADEA.[9]

A

Section 15 of the ADEA, 29 U. S. C. § 633a (1976 ed. and Supp. III), prohibits age discrimination in federal employment. Section 15 (c) provides the means for judicial enforcement of this guarantee: any person aggrieved "may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes" of the Act. Section 15 contrasts with § 7 (c) of the Act, 29 U. S. C. § 626 (c) (1976 ed., Supp. III), which authorizes civil actions against private employers and state and local governments, and which *expressly* provides for jury trials. Congress accordingly demonstrated that it knew how to provide a statutory right to a jury trial when it wished to do so elsewhere in the very "legislation cited," *Galloway, supra,* at 389. But in § 15 it failed explicitly to do so.[10] See

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of taxes illegally or erroneously collected—was the bill passed. See H. R. Conf. Rep. No. 2276, 83d Cong., 2d Sess., 2 (1954).

[9] The respondent argues that the strong presumption against the waiver of sovereign immunity has no relevance to the question of a right to trial by jury. But it is clear that the doctrine of sovereign immunity and its attendant presumptions must inform the Court's decision in this case. The reason that the Seventh Amendment presumption in favor of jury trials does not apply in actions at law against the United States is that the United States is immune from suit, and the Seventh Amendment right to a jury trial, therefore, never existed with respect to a suit against the United States. Since there is no generally applicable jury trial right that attaches when the United States consents to suit, the accepted principles of sovereign immunity require that a jury trial right be clearly provided in the legislation creating the cause of action.

[10] The dissenters contend that this argument can only be made at the expense of overruling the *Lorillard* decision. But, as hereafter indicated, *Lorillard* has little relevance here. And, of course, the position taken in the dissent totally loses its force in view of the 1978 amendments to the

Fedorenko v. *United States,* 449 U. S. 490, 512–513; cf. *Monroe* v. *Standard Oil Co.,* 452 U. S. 549, 561.

The respondent infers statutory intent from the language in § 15 (c) providing for the award of "legal or equitable relief," relying on *Lorillard* v. *Pons,* 434 U. S. 575, for the proposition that the authorization of "legal" relief supports a statutory jury trial right. But *Lorillard* has no application in this context. In the first place, the word "legal" cannot be deemed to be what the *Lorillard* Court described as "a term of art" with respect to the availability of jury trials in cases where the defendant is the Federal Government. In *Lorillard,* the authorization for the award of "legal" relief was significant largely because of the presence of a constitutional question. The Court observed that where legal relief is granted in litigation between private parties, the Seventh Amendment guarantees the right to a jury, and reasoned that Congress must have been aware of the significance of the word "legal" in that context. But the Seventh Amendment has no application in actions at law against the Government, as Congress and this Court have always recognized. Thus no particular significance can be attributed to the word "legal" in § 15 (c).

Moreover, another basis of the decision in *Lorillard* was that when Congress chose to incorporate the enforcement scheme of the Fair Labor Standards Act (FLSA) into § 7 of the ADEA, it adopted in ADEA the FLSA practice of making jury trials available. 434 U. S., at 580–583. Again, that reasoning has no relevance to this case, because Congress did not incorporate the FLSA enforcement scheme into § 15. See 29 U. S. C. § 633a (f) (1976 ed., Supp. III). Rather, §§ 15 (a) and (b) are patterned after §§ 717 (a) and (b) of the Civil Rights Act of 1964, as amended in March 1972, see Pub. L. 92–261, 86 Stat. 111–112, which extend the protection of

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ADEA, see *infra,* at 167–168, where Congress expressly extended a jury trial right in § 7 (c) but not in § 15 (c).

Title VII to federal employees. 42 U. S. C. §§ 2000e–16 (a) and (b). See 118 Cong. Rec. 24397 (1972) (remarks of Sen. Bentsen, principal sponsor of § 15 of ADEA). And, of course, in contrast to the FLSA,[11] there is no right to trial by jury in cases arising under Title VII. See *Lorillard, supra,* at 583–584; *Great American Federal Savings & Loan Assn.* v. *Novotny,* 442 U. S. 366, 375, and n. 19.

The respondent also infers a right to trial by jury from the fact that Congress conferred jurisdiction over ADEA suits upon the federal district courts, where jury trials are ordinarily available, rather than upon the Court of Claims, where they are not. Not only is there little logical support for this inference, but the legislative history offers no support for it either.[12] Moreover, Rule 38 (a) of the Federal Rules of Civil Procedure provides that the right to a jury trial "as declared by the Seventh Amendment to the Constitution or as *given*

[11] The decisions cited by the Court in *Lorillard,* 434 U. S., at 580, n. 7, for the proposition that there is a right to a jury trial in FLSA actions all appear to have rested on the Seventh Amendment, not the FLSA itself. Thus, for the same reason that the Seventh Amendment does not apply in suits against the Federal Government, there would be no comparable right to trial by jury in FLSA suits against the Federal Government under 29 U. S. C. § 216 (b). Accordingly, even if Congress intended to incorporate the FLSA enforcement scheme into § 15 of the ADEA, there would be no basis for inferring a right to a jury trial in ADEA cases where the employer is the Federal Government.

[12] There are a number of reasons why Congress may have chosen to limit jurisdiction to the federal district courts. They, along with state courts, already had jurisdiction of private-sector ADEA cases under § 7 (c). Congress may have decided to follow the same course in federal sector cases, but confined jurisdiction to federal district courts so that there would not be trials in state courts of actions against the Federal Government. Exclusive district court jurisdiction is also consistent with the jurisdictional references in Title VII of the Civil Rights Act of 1964. See 42 U. S. C. §§ 2000e–5 (f)(3) and 2000e–16 (c). Congress may also have believed it appropriate to have trials in federal district courts because they, unlike the Court of Claims, are accustomed to awarding equitable relief of the sort authorized by § 15 (c).

by a statute of the United States shall be preserved to the parties inviolate" (emphasis added). This language hardly states a general rule that jury trials are to be presumed whenever Congress provides for cases to be brought in federal district courts.[13] Indeed, Rule 38 (a) requires an affirmative statutory grant of the right where, as in this case, the Seventh Amendment does not apply.

B

As already indicated, it is unnecessary to go beyond the language of the statute itself to conclude that Congress did not intend to confer a right to trial by jury on ADEA plaintiffs proceeding against the Federal Government. But it is helpful briefly to explore the legislative history, if only to demonstrate that it no more supports the holding of the Court of Appeals than does the statutory language itself.

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[13] The respondent relies on *United States* v. *Pfitsch*, 256 U. S. 547. But the language relied on in *Pfitsch* is dicta, since the parties in that case agreed to trial by the court sitting without a jury, *id.*, at 549, and the jury trial issue was therefore not directly before the Court. In any event, *Pfitsch* is plainly distinguishable. There Congress specifically rejected a proposal, "presented to its attention in a most precise form," *id.*, at 552, to confer concurrent jurisdiction on the district courts and Court of Claims under the Tucker Act and instead conferred a new and exclusive jurisdiction on the district courts. Given the particular legislative history in that case, the Court found it "difficult to conceive of any rational ground" for conferring exclusive jurisdiction on the district courts *except* to provide for jury trials. *Ibid.* That, of course, is not true here. See n. 12, *supra*. Moreover, *Pfitsch* arose before Rule 38 (a) of the Federal Rules of Civil Procedure. Rule 38 (a) made it clear that there is no general right to trial by jury in civil actions in federal district courts. The Rule establishes a mechanism for determining when there is such a right—*i. e.*, when the Seventh Amendment applies, or if not, when a statute provides it.

The respondent also relies on *Law* v. *United States*, 266 U. S. 494. The statement in *Law* regarding jury trials, which in fact does no more than cite *Pfitsch*, is also dictum, and of virtually no relevance in this context.

The respondent cannot point to a single reference in the legislative history to the subject of jury trials in cases brought against the Federal Government. There is none. And there is nothing to indicate that Congress did not mean what it plainly indicated when it expressly provided for jury trials in § 7 (c) cases but not in § 15 (c) cases. In fact, the few inferences that may be drawn from the legislative history are inconsistent with the respondent's position.

The ADEA originally applied only to actions against private employers. Section 7 incorporated the enforcement scheme used in employee actions against private employers under the FLSA. In *Lorillard,* the Court found that the incorporation of the FLSA scheme into § 7 indicated that the FLSA right to trial by jury should also be incorporated. The *Lorillard* holding was codified in 1978 when § 7 (c) was amended to provide expressly for jury trials in actions brought under that section.

Congress expanded the scope of ADEA in 1974 to include state and local government and Federal Government employers. State and local governments were added as potential defendants by a simple expansion of the term "employer" in the ADEA. The existing substantive and procedural provisions of the Act, including § 7 (c), were thereby extended to cover state and local government employees. In contrast, Congress added an entirely new section, § 15, to address the problems of age discrimination in federal employment. Here Congress deliberately prescribed a distinct statutory scheme applicable only to the federal sector,[14] and one based not on

[14] A bill introduced by Senator Bentsen on March 9, 1972, S. 3318, 92d Cong., 2d Sess., 118 Cong. Rec. 7745 (1972), represented the first attempt to prohibit age discrimination in federal employment. This bill would have simply amended the definition of "employer" in the Act to include the Federal Government, as well as state and local governments. The result would presumably have been to bring federal employees under the procedural provisions in § 7. But Senator Bentsen subsequently sub-

the FLSA but, as already indicated, on Title VII,[15] where, unlike the FLSA, there was no right to trial by jury.[16]

Finally, in a 1978 amendment to ADEA, Congress declined an opportunity to extend a right to trial by jury to federal employee plaintiffs. Before the announcement of *Lorillard*, the Senate, but not the House, had included an amendment to § 7 (c) to provide for jury trials in a pending bill to revise ADEA. After *Lorillard*, the Conference Committee recommended and Congress enacted the present § 7 (c)(2), closely resembling the jury trial amendment passed by the Senate. But the Conference did not recommend, and Congress did not enact, any corresponding amendment of § 15 (c) to provide for jury trials in cases against the Federal Government. In-

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mitted a revised version of his bill in the form of an amendment to pending FLSA amendments. See 118 Cong. Rec. 15894 (1972). In contrast to Senator Bentsen's original bill, this amendment to the ADEA proposed the expansion of the definition of the term "employer" only with respect to state and local governments; ADEA coverage of federal employees was to be accomplished by the addition of an entirely new and separate section to the Act (presently § 15). Senator Bentsen's amendment was included in the FLSA bill reported by the Committee on Labor and Public Welfare, S. Rep. No. 92–842, pp. 93–94 (1972), and it remained in this form when the bill was enacted into law in 1974.

[15] Sections 15 (a) and 15 (b) of the ADEA, as offered by Senator Bentsen and as finally enacted, are patterned directly after §§ 717 (a) and (b) of the Civil Rights Act of 1964, as amended in March 1972, see Pub. L. 92–261, 86 Stat. 111–112, which extend Title VII protections to federal employees. Senator Bentsen acknowledged that "[t]he measures used to protect Federal employees [from age discrimination] would be substantially similar to those incorporated" in recently enacted amendments to Title VII. 118 Cong. Rec. 24397 (1972).

[16] In fact, during floor consideration of the 1972 amendments to Title VII, the Senate rejected an amendment that would have conferred a statutory right to trial by jury in Title VII cases. *Id*, at 4919–4920. Senator Javits, in opposing the amendment, observed that it would impose "what would be a special requirement in these cases, as distinguished from the antidiscrimination field generally, of jury trial." *Id.*, at 4920.

deed, the conferees recommended and Congress enacted a new § 15 (f), 29 U. S. C. § 633a (f) (1976 ed., Supp. III), providing that federal personnel actions covered by § 15 are not subject to any other section of ADEA, with one exception not relevant here. See H. R. Conf. Rep. No. 95–950, p. 11 (1978). See also H. R. Rep. No. 95–527, p. 11 (1977) ("Section 15 . . . is complete in itself"). Since the new subsection (f) clearly emphasized that § 15 was self-contained and unaffected by other sections, including those governing procedures applicable in actions against private employers, Judge Tamm, dissenting in the Court of Appeals, was surely correct when he concluded that "[i]n amending both sections as it did, Congress could not have overlooked the need to amend [§ 15 (c)] to allow jury trials for government employees if it had so wished." 202 U. S. App. D. C., at 69, n. 8, 628 F. 2d, at 69, n. 8.

C

But even if the legislative history were ambiguous, that would not affect the proper resolution of this case, because the plaintiff in an action against the United States has a right to trial by jury only where Congress has affirmatively and unambiguously granted that right by statute. Congress has most obviously not done so here. Neither the provision for federal employer cases to be brought in district courts rather than the Court of Claims, nor the use of the word "legal" in that section, evinces a congressional intent that ADEA plaintiffs who proceed to trial against the Federal Government may do so before a jury. Congress expressly provided for jury trials in the section of the Act applicable to private-sector employers, and to state and local governmental entities. It did not do so in the section applicable to the Federal Government as an employer, and indeed, patterned that section after provisions in another Act under which there is no right to trial by jury. The conclusion is inescapable that Congress did not depart from its normal practice of not providing a

right to trial by jury when it waived the sovereign immunity of the United States.

For these reasons, the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

In *Lorillard* v. *Pons,* 434 U. S. 575 (1978), this Court held that an employee who brings an action against his private employer under § 7 (c) of the Age Discrimination in Employment Act (ADEA or Act), 29 U. S. C. § 626 (c), is entitled to trial by jury. The question presented in this case is whether a plaintiff has a right to trial by jury in an action against the Federal Government under § 15 (c) of the ADEA, 29 U. S. C. § 633a (c). The Court today holds that a jury trial is not available in such actions. Because I believe that Congress unmistakably manifested its intention to accord a jury trial right, I dissent.

I

Respondent brought this lawsuit in the United States District Court for the District of Columbia against the Secretary of the Navy, alleging violations of the ADEA. She demanded a jury trial, and the Secretary moved to strike that demand. The District Court denied the motion to strike, but certified for interlocutory appeal the question whether a jury trial is available in an ADEA action against the Federal Government. See 28 U. S. C. § 1292 (b). The Court of Appeals granted the Secretary's petition for interlocutory review and affirmed the ruling of the District Court that respondent is entitled to a jury trial. *Nakshian* v. *Claytor,* 202 U. S. App. D. C. 59, 628 F. 2d 59 (1980). Relying principally on the fact that Congress vested jurisdiction over ADEA suits against the Federal Government in the federal district courts rather than in the Court of Claims and on the authorization in § 15

(c) of the Act for the award of "legal and equitable relief," the Court of Appeals construed the statute to accord a jury trial.

II

It is well settled that the "United States, as sovereign, 'is immune from suit save as it consents to be sued.'" *United States* v. *Testan,* 424 U. S. 392, 399 (1976), quoting *United States* v. *Sherwood,* 312 U. S. 584, 586 (1941). Consent to suit by the United States must be "unequivocally expressed." *United States* v. *Mitchell,* 445 U. S. 535, 538 (1980); *United States* v. *King,* 395 U. S. 1, 4 (1969). In the ADEA, the United States has expressly waived its immunity, 29 U. S. C. § 633a (1976 ed. and Supp. III), so that there can be no doubt of its consent to be sued. The requirement that a waiver of immunity be unequivocally expressed, however, does not, as the Court suggests, carry with it a presumption against jury trial in cases where the United States has waived its immunity. Indeed, we have previously declined to adopt such a presumption. See *Law* v. *United States,* 266 U. S. 494 (1925); *United States* v. *Pfitsch,* 256 U. S. 547 (1921).[1]

[1] As the Court of Appeals correctly noted:

"Since sovereign immunity bars *all* actions against the Government—actions tried to the court as well as those tried to a jury—it is difficult to see why this doctrine should create a presumption against any particular method of trial. . . . [O]nce Congress has waived the Government's immunity, and where it has not explicitly specified the trial procedure to be followed, sovereign immunity drops out of the picture. Courts must then scrutinize the available indicia of legislative intent to see what trial procedure Congress authorized." *Nakshian* v. *Claytor,* 202 U. S. App. D. C. 59, 63, n. 4, 628 F. 2d 59, 63, n. 4 (1980).

The Court's reliance on *Soriano* v. *United States,* 352 U. S. 270 (1957), is misplaced. See *ante,* at 160–161. There, the Court held that the statute of limitations prescribed by Congress barred petitioner's claim against the United States, because the "disability" asserted by petitioner to toll the limitations period was not one of the disabilities enumerated in the statute. In this context, the Court, therefore, concluded that "limitations and conditions upon which the Government consents to be sued must be strictly

Moreover, the Court's view that there is a presumption against jury trials in suits against the Federal Government is belied by the very statutes that it cites to indicate that Congress has often "conditioned [the] waiver [of immunity] upon a plaintiff's relinquishing any claim to a jury trial." *Ante,* at 161. The fact that Congress has found it necessary to state *expressly* that there is *no* jury trial right in a broad range of cases against the Government, see 28 U. S. C. §§ 1346, 2402, demonstrates that Congress does not legislate against the backdrop of any presumption against a jury trial right in suits against the United States. I believe, therefore, that once the Government unequivocally waives its immunity from suit, the plaintiff's right to jury trial is a question of statutory construction.[2] The proper inquiry is whether the statute expressly or by fair implication provides for a jury trial.[3] See *Law* v. *United States, supra; United States* v.

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observed and exceptions thereto are not to be implied." 352 U. S., at 276. That is, where Congress has expressly provided for limitations on the waiver of immunity, "exceptions [to the limitations] are not to be implied." *Ibid.* That is not this case.

[2] There is of course no Seventh Amendment right to a jury trial against the Federal Government. *Galloway* v. *United States,* 319 U. S. 372, 388–389 (1943); *McElrath* v. *United States,* 102 U. S. 426, 440 (1880).

[3] Rule 38 (a) of the Federal Rules of Civil Procedure is not to the contrary. It provides that "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." There is no requirement in Rule 38 that Congress make its intent to authorize jury trials express, provided Congress otherwise makes its intent known. Indeed, Rule 38 was fully applicable at the time of *Lorillard* v. *Pons,* where this Court found a jury trial right even though the words "trial by jury," did not appear in the statute. The Court does not argue otherwise in stating that Rule 38 requires "an affirmative statutory grant" of the jury trial right. *Ante,* at 165. The Court does not argue that Rule 38 requires a jury trial right to be *express.* Obviously, that argument would be frivolous since *Lorillard* found a jury trial right in the absence of an express provision conferring the right. Either Rule 38 does not require that the grant

Pfitsch, supra; 5 J. Moore, J. Lucas, & J. Wicker, Moore's Federal Practice ¶ 38–31 [2], p. 38–237 (1981); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2314, p. 69 (1971). I turn, therefore, to the statute itself.

Congress passed the ADEA in 1967 to protect older workers against discrimination in the workplace on the basis of age. See 29 U. S. C. §§ 621 (b), 623; *Oscar Mayer & Co.* v. *Evans,* 441 U. S. 750, 756 (1979); *Lorillard* v. *Pons,* 434 U. S., at 577. See generally Note, Age Discrimination in Employment, 50 N. Y. U. L. Rev. 924, 945 (1975). The Act's protection was originally limited to employees in the private sector, see Pub. L. 90–202, § 11, 81 Stat. 605, 29 U. S. C. § 630 (b) (1970 ed.),[4] but Congress amended the Act in 1974 by adding § 15, which extended protection to federal employees as well. 29 U. S. C. § 633a. Section 15 (a) provides that personnel actions affecting federal employees "shall be made free from any discrimination based on age," while § 15 (b) grants the Equal Employment Opportunity Commission authority to enforce the statutory provisions.[5] Although there

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be express, as I suggest, or the unanimous holding of the Court in *Lorillard* was wrong.

Still, the Court misapprehends the thrust of my argument when it states that Rule 38 "hardly states a general rule that jury trials are to be presumed whenever Congress provides for cases to be brought in federal district courts." *Ante,* at 165. I have simply argued that conferral of jurisdiction on the district courts raises an inference of a jury trial right in suits against the United States, because the Court of Claims, where there is no jury trial right, is an available alternative forum for such cases. Here, Congress chose for § 15 (c) cases the federal district courts, not the Court of Claims, as the appropriate forum.

[4] As originally passed, the definition of the term "employer" expressly excluded the United States, States, and political subdivisions from ADEA coverage. Pub. L. 90–202, § 11, 81 Stat. 605, 29 U. S. C. § 630 (b) (1970 ed.).

[5] The Equal Employment Opportunity Commission assumed enforcement authority from the Civil Service Commission in 1978 pursuant to Reorganization Plan No. 1 of 1978, § 2. 3 CFR 321 (1979), 5 U. S. C. App. p. 354 (1976 ed., Supp. III).

is no provision which expressly grants or precludes a jury trial, Congress provided in § 15 (c), 88 Stat. 75, that "[a]ny [federal employee] aggrieved may bring a civil action in any *Federal district court* of competent jurisdiction for such *legal* or equitable relief as will effectuate the purposes of this Act." 29 U. S. C. § 633a (c) (emphasis added). It is this provision that I believe demonstrates congressional intent to allow a jury trial in ADEA suits against the Federal Government.

In *Lorillard* v. *Pons, supra,* the Court construed § 7 (b) and § 7 (c) [6]—a provision identical to § 15 (c) in all relevant respects—to afford age discrimination plaintiffs the right to a jury trial against private employers.[7] The Court reached this result for two reasons. First, the Court found that the language in § 7 (b), 29 U. S. C. § 626 (b), that "[t]he provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures" of certain provisions of the Fair Labor Standards Act (FLSA), suggested that Congress intended to grant a jury trial right because "[l]ong before Congress enacted the ADEA, it was well established that there was a right to a jury trial in private actions pursuant to the FLSA." 434 U. S., at 580. Second, and more significant for this case, the Court found that § 7 (c)'s authorization of the courts to grant and individuals to seek *"legal* or equitable relief," 29 U. S. C. § 626 (c) (emphasis added), strongly suggested that Congress intended to grant a jury trial right. 434 U. S., at 583. Thus, the Court held, as a

[6] Section 7(c) of the ADEA, 29 U. S. C. § 626 (c), as it read when *Lorillard* was decided, stated in full:

"Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter."

[7] By construing the statute to allow a jury trial, the Court did not have to decide whether "the Seventh Amendment requires that in a private action for lost wages under the ADEA, the parties must be given the option of having the case heard by a jury." 434 U. S., at 577.

matter of statutory construction, that the ADEA allows jury trials in actions against private employers.

In the instant case, Congress similarly authorized aggrieved persons to seek and district courts to grant "such *legal* or equitable relief as will effectuate the purposes of this chapter," 29 U. S. C. § 633a (c) (emphasis added), thereby suggesting that federal employees are entitled to a jury trial under the ADEA. As a unanimous Court emphasized in *Lorillard:*

> "The word 'legal' is a term of art: In cases in which legal relief is available and legal rights are determined, the Seventh Amendment provides a right to jury trial. See *Curtis* v. *Loether,* 415 U. S. 189, 195–196 (1974). '[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.' *Standard Oil* v. *United States,* 221 U. S. 1, 59 (1911). See *Gilbert* v. *United States,* 370 U. S. 650, 655 (1962); *Montclair* v. *Ramsdell,* 107 U. S. 147, 152 (1883). We can infer, therefore, that by providing specifically for 'legal' relief, Congress knew the significance of the term 'legal,' and intended that there would be a jury trial on demand . . . ." 434 U. S., at 583.[8]

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[8] The Court's statement that "[i]n *Lorillard,* the authorization for the award of 'legal' relief was significant largely because of the presence of a constitutional question" is not correct. *Ante,* at 163. To be sure, a constitutional question was present in *Lorillard,* but the Court specifically declined to ground its decision on the Seventh Amendment. See n. 7, *supra.* Rather, it construed the language "legal or equitable relief" in § 7 (c) of the ADEA. The Court concluded that when Congress used the words "legal . . . relief," which are equally present in § 15 (c), it intended that a jury trial right be available. That Congress used the words "legal . . . relief" in § 7 (c) differently from the way it used the same words in § 15 (c) is implausible.

Moreover, the Court erroneously suggests that §§ 15 (a) and (b) are identical to §§ 717 (a) and (b) of Title VII of the Civil Rights Act of

Although the Seventh Amendment right to trial by jury in suits at common law does not extend to civil actions against the Federal Government, Congress may extend the jury trial right by legislation. See *Galloway* v. *United States*, 319 U. S. 372, 388–389 (1943). Congress' provision for *"legal* and equitable relief" suggests, therefore, that it intended to allow jury trials in ADEA actions against the Federal Government.

This strong inference that Congress intended to legislate a jury trial right is reinforced by Congress' decision to vest jurisdiction in the District Courts, rather than the Court of Claims, to decide ADEA suits brought against the Federal Government. This Court has previously observed that vesting jurisdiction in the district courts rather than the Court of Claims supports an inference of a right to jury trial. In *United States* v. *Pfitsch*, the Court stated that "the right to a jury trial is an incident" of the grant of "exclusive jurisdiction in the District Courts." 256 U. S., at 552. Similarly, in *Law* v. *United States*, the Court held that the District Court erred in denying a right to a jury trial under the War Risk Insurance Act, when the court concluded that its jurisdiction "was the exceptional jurisdiction concurrent with the Court of Claims," rather than that "exercised in accordance with the laws governing the usual procedure of the court in actions at law for money compensation." 266 U. S., at 496.[9]

1964, *ante*, at 163–164, for it fails to note that Title VII does not authorize the courts to award "legal relief," as § 15 (c) does.

[9] In *United States* v. *Pfitsch*, the Court construed § 10 of the Lever Act which conferred exclusive jurisdiction in the district courts to hear lawsuits brought by persons dissatisfied with the President's award of compensation for supplies requisitioned by the Federal Government. In deciding that a judgment rendered under § 10 is not reviewable in this Court by direct writ of error, the Court stated that Congress "had the issue clearly drawn between granting for the adjudication of cases arising under [§ 10] concurrent jurisdiction in the Court of Claims and the District Courts without a trial by jury, *or of establishing an exclusive*

Congress' vesting of jurisdiction in the federal district courts under § 15 (c) of the ADEA suggests, therefore, that it intended to provide a jury trial right to federal ADEA plaintiffs.[10]

The legislative history of the 1974 ADEA amendments, extending protection to federal employees, is consistent with

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jurisdiction in the District Courts of which the right to a jury trial is an incident." 256 U. S., at 552 (emphasis added).

That Congress did not, so far as the legislative history indicates, expressly debate vesting concurrent jurisdiction in the Court of Claims over ADEA suits against the Federal Government does not weaken the force of *United States* v. *Pfitsch*, despite the Court's protestations to the contrary. Indeed, in *Law* v. *United States*, an important case that the Court virtually ignores, see *ante*, at 165, n. 13, it was of no significance whether Congress specifically considered vesting jurisdiction in the Court of Claims in order to conclude that the War Risk Insurance Act authorized a jury trial in a suit against the Federal Government. What is significant in the instant case is that, in allowing suits against the Government under the ADEA, Congress expressly opted for jurisdiction in the district courts and not the Court of Claims, which in lawsuits against the Government is a self-evident, alternative forum of which Congress was undoubtedly aware.

[10] One leading commentator has concluded:

"Congress may confer jurisdiction of *actions against the United States* upon a district court sitting as a court at law (or equity), as a court of claims, and as a court of admiralty. And the particular grant of jurisdiction will determine the method of trial, court or jury, in the absence of some express provision dealing with the method of trial. *Thus, absent a provision as to the method of trial, a grant of jurisdiction to a district court as a court at law carries with it a right of jury trial.*" 5 J. Moore, J. Lucas, & J. Wicker, Moore's Federal Practice ¶ 38.31 [2], p. 38–239 (1981) (emphasis added; footnotes omitted).

The Court rejects the force of the statute's language. It suggests that, because of similarities between § 15 and Title VII of the Civil Rights Act of 1964, Congress may simply have wished to provide for federal-court jurisdiction because Title VII had. It argues further that Congress may also have thought that district court jurisdiction was appropriate since the statute provided for grant of equitable as well as legal relief, and that district courts, unlike the Court of Claims, are accustomed to awarding equitable relief. *Ante*, at 164, n. 12. These explanations are purely speculative. There is no basis in the legislative history for them and they are counter to the logical inferences from the language of the statute.

the conclusion that Congress intended to allow jury trials. Congress' failure to include federal employees under the ADEA when the Act was first passed

> "did not represent a conscious decision by the Congress to limit the ADEA to employment in the private sector. It reflects the fact, that in 1967, when ADEA was enacted, most government employees were outside the scope of the FLSA and the Wage Hour and Public Contracts Divisions of the Department of Labor, which enforces the Fair Labor Standards Act, were assigned responsibility for enforcing the Age Discrimination in Employment Act." S. Rep. No. 93–690, p. 55 (1974).

When the Act was amended in 1974, Congress intended that "Government employees . . . be subject to the *same protections* against arbitrary employment based on age as are employees in the private sector." 120 Cong. Rec. 8768 (1974) (remarks of Sen. Bentsen, principal proponent of ADEA extension to federal employees) (emphasis added).[11] To be sure, Congress did not provide for identical enforcement schemes for private-sector and federal-sector age discrimination complaints. But when Congress departed from the "same protections" for federal employees, *ibid.*, that it had granted private-sector employees, it did so expressly. Not only did Congress in § 15 not expressly disallow jury trials where the Federal Government is the defendant, but Congress used the same language in § 15 (c) that it had used in § 7 (c) in authorizing suits in the district courts for legal or equitable relief against private parties. This strongly sug-

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[11] Senator Bentsen also stated:

"There is no reason why private enterprise should be subject to restrictions that are not applicable to the Federal Government.

. . . . . .

"What this legislation does is to give these workers coverage under the age discrimination law and to give them a procedure to pursue their complaints." 120 Cong. Rec. 5741 (1974).

gests that it intended to make the jury trial right it approved against private employers equally applicable to ADEA suits against the Federal Government.

The strong manifestation of congressional intent from both the language and the legislative history of the 1974 amendments is enhanced by the total absence of any persuasive evidence of a contrary legislative intent. The Court argues, nonetheless, that Congress' decision in 1978 to amend the ADEA to provide explicitly for jury trials in private employer cases brought under § 7,[12] without also amending § 15 (c), demonstrates an intention to preclude jury trials against the Government. I am completely unpersuaded.

The bill which led to codification of a jury trial right in § 7 (c)(2) was introduced by Senator Kennedy *before* this

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[12] Section 7 (c) of the ADEA, 29 U. S. C. § 626 (c) (1976 ed., Supp. III), now provides:

"(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

"(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action."

The Court contends that the presence of express language granting a jury trial right in § 7 (c) in contrast to the absence of such express language in § 15 demonstrates that Congress "knew how to provide a statutory right to a jury trial when it wished to do so." *Ante,* at 162. I find this argument hard to fathom. The Court recognizes, as it must, that there was no such express language in § 7 (c) when this Court decided in *Lorillard* that Congress intended ADEA actions against private employers to include a jury trial right, and that the express language relied on by the Court was added two months *after Lorillard* was decided and four years *after* the identical language which was construed in *Lorillard* was added to the ADEA in § 15 (c). Therefore, unless the Court is suggesting that the unanimous holding in *Lorillard* was wrong, the Court is bound to apply the same analysis to this case.

Court decided *Lorillard*. In order to settle a conflict among the Courts of Appeals over the availability of jury trials in ADEA suits against private employers,[13] Senator Kennedy proposed an amendment to the ADEA which would state *in haec verba* that jury trials are allowed. 123 Cong. Rec. 34317–34318 (1977).[14] Senator Kennedy's amendment was adopted by the Senate without debate. *Lorillard* was subsequently decided. Thereafter, Congress passed the Kennedy amendment, with a modification proposed by the House at Conference extending the jury trial right beyond that proposed by Senator Kennedy and passed by the Senate to include claims for liquidated damages. I can discern no congressional intent to preclude the right to a jury trial in ADEA actions against the Federal Government from this sequence of events. The more plausible explanation, and the one with textual support in the relevant legislative history, H. R. Conf. Rep. No. 95–950, pp. 13–14 (1978), is that Congress understood from the *Lorillard* opinion that conferring the power to award legal relief suggested a jury trial right[15] and that the reason Congress proceeded with the Kennedy amendment was to make clear not only that suits for wages

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[13] Compare *Rogers* v. *Exxon Research & Engineering Co.*, 550 F. 2d 834 (CA3 1977) (right to jury trial), cert. denied, 434 U. S. 1022 (1978), and *Pons* v. *Lorillard*, 549 F. 2d 950 (CA4 1977) (same), aff'd, 434 U. S. 575 (1978), with *Morelock* v. *NCR Corp.*, 546 F. 2d 682 (CA6 1976) (no right to jury trial), vacated and remanded, 435 U. S. 911 (1978).

[14] Senator Kennedy further explained: "[J]uries are more likely to be open to the issues which have been raised by the plaintiffs. Sometimes, a judge may be slightly callous, perhaps because he himself is protected by life tenure, or because he is somewhat removed from the usual employer-employee relationship. The jury may be more neutral in such circumstances." 123 Cong. Rec. 34318 (1977).

[15] Indeed, the Conference Report specifically noted that the Court had recently decided *Lorillard* v. *Pons*, and went on to state: "Because liquidated damages are in the nature of *legal relief*, it is manifest that a party is entitled to have the factual issues underlying such a claim decided by *jury*." H. R. Conf. Rep. No. 95–950, p. 14 (1978).

could be tried before a jury, but also that suits for liquidated damages could be tried before a jury, an issue explicitly left unresolved in *Lorillard*, 434 U. S., at 577, n. 2.[16] Moreover, that Congress did not add the same provision to § 15 that it added to § 7 is not indicative of an intent to prohibit jury trials for the additional reason that it was the conflict in the Courts of Appeals over whether employees could have a jury trial against *private employers* which prompted Senator Kennedy to introduce his bill. There had been no parallel development in the courts interpreting § 15. This legislative history, therefore, does not support the conclusion that the Court seeks to draw from it.

The Court also argues that the absence of any reference in § 15 to the FLSA "powers, remedies, and procedures" to which § 7 refers and upon which *Lorillard* partially relied suggests that Congress did not intend to allow jury trials against the Federal Government. But our decision in *Lorillard* rested equally on the provision in § 7 (c) for "legal or equitable relief" as a strong and independent indication of congressional intent to allow jury trials. In addition, the more likely explanation for the absence of any reference in § 15 to the FLSA sections referred to in § 7 (b) is that Congress intended to use existing administrative procedures "to enforce the provisions of [§ 15 (a)] through appropriate remedies, including reinstatement or hiring of employees with or without backpay." 29 U. S. C. § 633a (b) (1976 ed., Supp. III). Prior to the 1974 amendments extending ADEA coverage to federal employees, employment discrimination complaints by federal employees were processed by the Civil Service Commission, so that it is not surprising that Congress decided to use existing administrative machinery in § 15 (b) to enforce ADEA provisions protecting federal employees.

[16] "The Supreme Court recently ruled that a plaintiff is entitled to a jury trial in ADEA actions for lost wages, but it did not decide whether there is a right to jury trial on a claim for liquidated damages." *Id.*, at 13.

See 39 Fed. Reg. 24351 (1974), reprinted as amended at 29 CFR §§ 1613.501–1613.521 (1980).[17] The failure to refer to FLSA procedures in § 15 apparently derives, not from a desire to limit jury trials, but from an intention to employ different *administrative* procedures for age discrimination complaints brought against the Federal Government.[18] Seen in this light, the Court's strained interpretation of the failure to refer to FLSA procedures in § 15 is totally unpersuasive.

III

Based on the language of § 15 (c) and on the legislative history, which is consistent with my interpretation of that language, I would hold that Congress intended to allow jury trials in ADEA suits against the Federal Government.

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[17] The Court further suggests that, because the ADEA was patterned in significant respects after Title VII, and since Title VII has been held by lower federal courts not to allow a jury trial right, it follows that § 15 does not contemplate such a right. I find this argument unpersuasive, as the Court did in *Lorillard*. The Court has previously said that, despite important similarities between Title VII and the ADEA, "it is the remedial and procedural provisions of the two laws that are crucial and there we find significant differences." *Lorillard* v. *Pons*, 434 U. S., at 584. "Congress specifically provided for both 'legal or equitable relief' in the ADEA, but did not authorize 'legal' relief in so many words under Title VII." *Ibid.*

[18] This interpretation is supported by Congress' extension of ADEA protection to employees of state and local governments, which occurred at the same time that Congress extended coverage to federal employees. Because the definitional section of the Act was amended to include state and local governments within the definition of "employer," 29 U. S. C. § 630 (b), age discrimination complaints against state and local governments can be tried to a jury for the same reason that complaints against private entities can be. Nowhere in the legislative history did Congress evince a desire to allow state and local government employees a jury trial right, while withholding the same right from federal employees. Rather, federal employees were covered in a separate section of the Act, apparently so that existing administrative machinery could be used.

CALIFORNIA MEDICAL ASSOCIATION ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.

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

No. 79–1952. Argued January 19, 1981—Decided June 26, 1981

One provision of the Federal Election Campaign Act of 1971 (Act), 2 U. S. C. § 441a (a)(1)(C), prohibits individuals and unincorporated associations from contributing more than $5,000 per calendar year to any multicandidate political committee. A related provision, § 441a (f), makes it unlawful for political committees knowingly to accept contributions exceeding the $5,000 limit. Appellant California Medical Association (CMA) is a not-for-profit unincorporated association of doctors, and appellant California Medical Political Action Committee (CALPAC) is a political committee formed by CMA and registered with appellee Federal Election Commission (FEC). When CMA and CALPAC were notified of an impending enforcement proceeding by the FEC for alleged violations of §§ 441a (a)(1)(C) and 441a (f), they, together with individual members, filed a declaratory judgment action in Federal District Court challenging the constitutionality of these provisions. Subsequently, the FEC filed its enforcement proceeding in the same District Court, and CMA and CALPAC pleaded as affirmative defenses the same constitutional claims raised in their declaratory judgment action. Pursuant to the special expedited review provisions of the Act, § 437h (a), the District Court, while the enforcement proceeding was still pending, certified the constitutional questions raised in the declaratory judgment action to the Court of Appeals, which rejected the constitutional claims and upheld the challenged $5,000 limit on annual contributions. Appellants sought review on direct appeal in this Court pursuant to § 437h (b).

Held: The judgment is affirmed. Pp. 187–201; 201–204.

641 F. 2d 619, affirmed.

JUSTICE MARSHALL delivered the opinion of the Court with respect to Parts I, II, and IV, concluding that:

1. This Court has jurisdiction over the appeal. There is no merit to the FEC's contention that in view of the overlapping provisions of the Act for judicial review of declaratory judgment actions, § 437h (a), and enforcement proceedings, § 437g (a)(10), and because Congress

failed to provide any mechanism for coordinating cases in which the same constitutional issues are raised by the same parties in both a declaratory judgment action and an enforcement proceeding, as here, a direct appeal to this Court under § 437h (b) should be limited to situations in which no enforcement proceedings are pending, since otherwise litigants, like appellants here, could disrupt and delay enforcement proceedings and undermine the functioning of the federal courts. Neither the statutory language nor legislative history of §§ 437g and 437h indicates that Congress intended such a limitation. Pp. 187–192.

2. Section 441a (a)(1)(C) does not violate the equal protection component of the Fifth Amendment on the ground, alleged by appellants, that because a corporation's or labor union's contributions to a segregated political fund are unlimited under the Act, an unincorporated association's contribution to a multicandidate political committee cannot be limited without violating equal protection. Appellants' contention ignores the fact that the Act as a whole imposes far *fewer* restrictions on individuals and unincorporated associations than it does on corporations and unions. The differing restrictions placed on individuals and unincorporated associations, on the one hand, and on corporations and unions, on the other, reflect a congressional judgment that these entities have differing structures and purposes and that they therefore may require different forms of regulation in order to protect the integrity of the political process. Pp. 200–201.

JUSTICE MARSHALL, joined by JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE STEVENS, concluded in Part III that § 441a (a)(1)(C) does not violate the First Amendment. Nothing in § 441a (a)(1)(C) limits the amount CMA or any of its members may independently expend in order to advocate political views; rather, the provision restrains only the amount CMA may contribute to CALPAC. The "speech by proxy" that CMA seeks to achieve through its contributions to CALPAC is not the sort of political advocacy that this Court in *Buckley* v. *Valeo*, 424 U. S. 1, found entitled to full First Amendment protection. Since CALPAC receives contributions from more than 50 persons a year, appellants' claim that CALPAC is merely the mouthpiece of CMA is untenable. CALPAC instead is a separate legal entity that receives funds from multiple sources and engages in independent political advocacy. If the First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute to a campaign organization which advocates the views and candidacy of a particular candidate, *Buckley* v. *Valeo, supra,* the rights of a contributor are similarly not impaired by limits on the amount he may give to a multicandidate political committee, such as CALPAC, which advocates the

views and candidacies of a number of candidates. Moreover, the challenged contribution restriction, contrary to appellants' claim, is an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld in *Buckley* v. *Valeo*. Pp. 193–199.

JUSTICE BLACKMUN concluded that the challenged contribution limitation does not violate the First Amendment because it is no broader than necessary to achieve the governmental interest in preventing actual or potential corruption. Pp. 201–204.

MARSHALL, J., announced the Court's judgment and delivered the opinion of the Court with respect to Parts I, II, and IV, in which BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined, and an opinion with respect to Part III, in which BRENNAN, WHITE, and STEVENS, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 201. STEWART, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, *post*, p. 204.

Rick C. Zimmerman argued the cause for appellants. With him on the briefs was *David E. Willett.*

Charles N. Steele argued the cause for appellees. With him on the brief was *Kathleen Imig Perkins.**

JUSTICE MARSHALL delivered the opinion of the Court with respect to Parts I, II, and IV, and delivered an opinion with respect to Part III, in which JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE STEVENS joined.

In this case we consider whether provisions of the Federal Election Campaign Act of 1971, 86 Stat. 11, as amended, 2 U. S. C. § 431 *et seq.* (1976 ed. and Supp. III), limiting the amount an unincorporated association may contribute to a multicandidate political committee violate the First Amendment or the equal protection component of the Fifth Amendment. Concluding that these contribution limits are consti-

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**Bruce J. Ennis, Jr.*, filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

Louis R. Cohen, A. Stephen Hut, Jr., Roger M. Witten, Kenneth J. Guido, Jr., and *Ellen G. Block* filed a brief for Common Cause as *amicus curiae* urging affirmance.

tutional, we affirm the judgment of the Court of Appeals for the Ninth Circuit.

I

The California Medical Association (CMA) is a not-for-profit unincorporated association of approximately 25,000 doctors residing in California. In 1976, CMA formed the California Medical Political Action Committee (CALPAC). CALPAC is registered as a political committee with the Federal Election Commission, and is subject to the provisions of the Federal Election Campaign Act relating to multicandidate political committees.[1] One such provision, 2 U. S. C. § 441a (a)(1)(C), prohibits individuals and unincorporated associations such as CMA from contributing more than $5,000 per calendar year to any multicandidate political committee such as CALPAC.[2] A related provision of the Act, 2 U. S. C. § 441a (f), makes it unlawful for political committees such as CALPAC knowingly to accept contributions exceeding this limit.[3]

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[1] Under the Act, a political committee is defined to include "any committee . . . which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U. S. C. § 431 (4) (1976 ed., Supp. III). A "multicandidate political committee" is defined as a "political committee which has been registered under section 433 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and . . . has made contributions to 5 or more candidates for Federal Office." 2 U. S. C. § 441a (a)(4).

[2] Section 441a (a)(1)(C) provides in pertinent part that "[n]o person shall make contributions . . . to any other political committee in any calendar year which, in the aggregate, exceed $5,000." The Act defines the term "person" to include "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons." 2 U. S. C. § 431 (11) (1976 ed., Supp. III). Corporations and labor organizations, however, are prohibited by 2 U. S. C. § 441b (a) from making any contributions to political committees other than the special segregated funds authorized by § 441b (b)(2)(C), and hence these entities are not governed by § 441a (a)(1)(C).

[3] This section provides that "[n]o . . . political committee shall know-

In October 1978, the Federal Election Commission found "reason to believe" that CMA had violated the Act by making annual contributions to CALPAC in excess of $5,000, and that CALPAC had unlawfully accepted such contributions. When informal conciliation efforts failed, the Commission in April 1979 authorized its staff to institute a civil enforcement action against CMA and CALPAC to secure compliance with the contribution limitations of the Act. In early May 1979, after receiving formal notification of the Commission's impending enforcement action, CMA and CALPAC, together with two individual members of these organizations, filed this declaratory judgment action in the United States District Court for the Northern District of California challenging the constitutionality of the statutory contribution limitations upon which the Commission's enforcement action was to be based. Several weeks later, the Commission filed its enforcement action in the same District Court. In this second suit, CMA and CALPAC pleaded as affirmative defenses the same constitutional claims raised in their declaratory judgment action.

On May 17, 1979, pursuant to the special expedited review provisions of the Act set forth in 2 U. S. C. § 437h (1976 ed. and Supp. III),[4] the District Court certified the constitutional questions raised in appellants' declaratory judgment action to the Court of Appeals for the Ninth Circuit. In the meantime, pretrial discovery and preparation in the Commission's enforcement action continued in the District Court. In May 1980, a divided Court of Appeals, sitting en banc, rejected appellants' constitutional claims and upheld the $5,000 limit on annual contributions by unincorporated associations to multicandidate political committees. 641 F. 2d 619. Appellants sought review of that determination in this Court, again pursuant to the special jurisdictional provisions of 2 U. S. C.

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ingly accept any contribution or make any expenditure in violation of the provisions of this section."

[4] See *infra*, at 188–189.

§ 437h (1976 ed. and Supp. III). The Commission subsequently moved to dismiss the appeal, and we postponed a ruling on our jurisdiction over this case pending a hearing on the merits. 449 U. S. 817 (1980).[5]

II

Because the Commission vigorously contends that this Court does not have jurisdiction over this appeal, we first consider the complex judicial review provisions of the Federal Election Campaign Act.[6] The Act provides two routes by which questions involving its constitutionality may reach this Court. First, such questions may arise in the course of an enforcement proceeding brought by the Commission under 2 U. S. C. § 437g (1976 ed. and Supp. III). Such actions are filed by the Commission in the federal district courts, where they are to be accorded expedited treatment. §§ 437g (a)

[5] In the meantime, the District Court has entered judgment in favor of the Commission in its enforcement action against CMA and CALPAC. *Federal Election Comm'n* v. *California Medical Assn.*, 502 F. Supp. 196 (1980).

[6] Initially, we reject the Commission's suggestion that appellants may lack standing to raise the claims involved here. The grant of standing under § 437h, which this Court has held to be limited only by the constraints of Art. III of the Constitution, *Buckley* v. *Valeo*, 424 U. S. 1, 11 (1976) (*per curiam*), authorizes actions to be brought by the Commission, the national committee of a political party, and individuals eligible to vote in federal elections. The individual appellants in this case fall within this last category, and, as members and officers of CMA and CALPAC, have a sufficiently concrete stake in this controversy to establish standing to raise the constitutional claims at issue here. Accordingly, we do not address the question whether parties not enumerated in § 437h's grant of standing, such as CMA and CALPAC, may nonetheless raise constitutional claims pursuant to that section. *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 264, n. 9 (1977). Compare *Martin Tractor Co.* v. *Federal Election Comm'n*, 460 F. Supp. 1017 (DC 1978), aff'd, 200 U. S. App. D. C. 322, 627 F. 2d 375, cert. denied *sub nom. National Chamber Alliance for Politics* v. *Federal Election Comm'n*, 449 U. S. 954 (1980), with *Bread Political Action Committee* v. *Federal Election Comm'n*, 591 F. 2d 29 (CA7 1979), appeal pending, No. 80–1481.

(6)(A) and (10) (1976 ed., Supp. III). The judgments of the district courts in such cases are appealable to the courts of appeals, with final review in this Court available upon certiorari or certification. § 437g (a)(9).

However, because Congress was concerned that its extensive amendments to the Act in 1974 might raise important constitutional questions requiring quick resolution,[7] it provided an alternative method for obtaining expedited review of constitutional challenges to the Act. This procedure, outlined in 2 U. S. C. § 437h (1976 ed. and Supp. III), provides in part:

> "The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." § 437h (a).

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[7] Senator Buckley introduced the amendment incorporating § 437h into the Act, and noted:

"It merely provides for expeditious review of the constitutional questions I have raised. I am sure we will all agree that if, in fact, there is a serious question as to the constitutionality of this legislation, it is in the interest of everyone to have the question determined by the Supreme Court at the earliest possible time." 120 Cong. Rec. 10562 (1974).

The sole explanation of this provision in the House was by Representative Frenzel, who stated:

"I believe within this conference report there are at least 100 items questionable from a constitutional standpoint. . . .

"I do call . . . attention . . . to the fact that any individual under this bill has a direct method to raise these questions and to have those considered as quickly as possible by the Supreme Court." *Id.*, at 35140.

The statute further provides that decisions of the courts of appeals on such certified questions may be reviewed in this Court on direct appeal, § 437h (b), and it directs both the courts of appeals and this Court to expedite the disposition of such cases, § 437h (c).

Although Congress thus established two avenues for judicial review of constitutional questions arising under the Act, it failed to provide any mechanism for coordinating cases in which the same constitutional issues are raised by the same parties in both a § 437h declaratory judgment action and a § 437g enforcement proceeding. The Commission contends that this legislative oversight has allowed litigants, like appellants here, to disrupt and delay enforcement proceedings brought by the Commission under § 437g by instituting separate § 437h declaratory judgment actions in which the constitutional defenses to enforcement are asserted as affirmative claims. The Commission further argues that § 437h declaratory judgment actions may seriously undermine the functioning of the federal courts because of the special treatment that these courts are required to accord such cases. To alleviate these potential problems, the Commission urges this Court to construe the overlapping judicial review provisions of the Act narrowly so as to preclude the use of § 437h actions to litigate constitutional challenges to the Act that have been or might be raised as defenses to ongoing or contemplated Commission enforcement proceedings.[8] Under this proposed reading of § 437g and § 437h, the District Court in

[8] Although the Commission now contends that § 437h actions may not be maintained simultaneously with § 437g proceedings raising the same constitutional claims, it has in the past argued that the two review provisions are independent of each other and that § 437h actions could be brought by defendants in a § 437g proceeding to adjudicate any constitutional claims arising during the course of such proceedings. *Federal Election Comm'n* v. *Lance,* 635 F. 2d 1132, 1137, n. 3 (CA5 1981); *Federal Election Comm'n* v. *Central Long Island Tax Reform Immediately Committee,* 616 F. 2d 45, 48–49 (CA2 1980).

this case should have declined to certify appellants' constitutional claims to the Court of Appeals in light of the Commission's pending enforcement action against CMA and CALPAC. On this basis, we are urged by the Commission to dismiss the appeal in this case for want of jurisdiction.

Although we agree with the Commission that the judicial review provisions of the Act are scarcely a blueprint for efficient litigation, we decline to construe § 437h in the manner suggested by the Commission.[9] There is no suggestion in the language or legislative history of § 437h indicating that Congress intended to limit the use of this provision to situations in which no § 437g enforcement proceedings are contemplated or underway.[10] Section 437h expressly requires a district court to "immediately . . . certify *all* questions of the constitutionality of this Act" to the court of appeals. (Emphasis supplied.) We do not believe that Congress would have used such all-encompassing language had it intended to restrict § 437h in the manner proposed by the Commission.[11] Indeed, the cramped construction of the

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[9] Even if the Commission's proposed construction of the statute were accepted, it remains unclear whether we would be required to dismiss this appeal. The only defendants in the Commission's § 437g enforcement proceeding are CMA and CALPAC. However, the plaintiffs in the § 437h action include, along with CALPAC and CMA, two individual doctors. These individuals have standing to bring this action, see n. 6, *supra*, and the Commission apparently does not contend that such parties, who are not involved in a pending or ongoing enforcement proceeding, are barred from invoking the § 437h procedure.

[10] The legislative history of the 1974 Amendments is silent on the interaction of the two provisions. However, the brief discussion in Congress of § 437h indicates that it was intended to cover all serious constitutional challenges to the Act. See n. 7, *supra*.

[11] The Commission suggests that the language of § 437h, authorizing eligible plaintiffs to "institute such actions . . . , including actions for declaratory judgments, as may be appropriate to construe the constitutionality of any provision of the Act," confers on the district court discretion to dismiss as "inappropriate" § 437h suits raising constitutional

statute proposed by the Commission would directly undermine the very purpose of Congress in enacting § 437h. It is undisputed that this provision was included in the 1974 Amendments to the Act to provide a mechanism for the rapid resolution of constitutional challenges to the Act. These questions may arise regardless of whether a Commission enforcement proceeding is contemplated. Yet under the Commission's approach, even the most fundamental and meritorious constitutional challenge to the Act could not be reviewed pursuant to § 437h, but instead could be considered only pursuant to the more limited procedure set forth in § 437g,[12] if this question also happened to be raised in a Commission enforcement action. If Congress had intended to remove a whole category of constitutional challenges from the purview of § 437h, thereby significantly limiting the usefulness of that provision, it surely would have made such a limitation explicit.

In addition, the language of § 437g itself undercuts the Commission's contention that § 437h actions must be held in abeyance if the same parties are or may be involved in § 437g enforcement actions brought by the Commission. The statute expressly provides that § 437g enforcement actions

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claims that are also presented in § 437g proceedings. We do not agree that the word "appropriate" embodies the broad substantive limitation proposed by the Commission. As the reference to declaratory judgment actions in the preceding clause makes clear, the concept of an "appropriate" action refers only to the form in which the litigation is cast. Thus, for example, a suit for damages would not be an "appropriate" action for testing the facial validity of the Act. In any event, whatever ambiguity surrounds the meaning of the word "appropriate" in § 437h is dispelled by the section's command that the district court "immediately . . . certify *all* questions of constitutionality" to the court of appeals. (Emphasis added.)

[12] The judgments of the courts of appeals in § 437g cases are reviewable in this Court only upon certification or writ of certiorari. § 437g (a)(9). In contrast, the judgments of the courts of appeals in § 437h proceedings may be directly appealed to this Court. § 437h(b).

filed by the Commission in the district court are to be "put ahead of all other actions (other than other actions brought under this subsection *or under section 437h of this title*)." § 437g (a)(10) (emphasis added). If Congress had intended to coordinate § 437g and § 437h in the manner now proposed by the Commission, it is inconceivable that it would have chosen the above language. Instead, the wording of the statute plainly implies that actions brought under both sections may proceed in the district court at the same time. See *Bread Political Action Committee* v. *Federal Election Comm'n,* 591 F. 2d 29, 33 (CA7 1979), appeal pending, No. 80–1481. In sum, although Congress might have been wiser to orchestrate § 437g and § 437h in the manner proposed by the Commission, the statutory language and history belie any such intention.[13] We therefore conclude that we have jurisdiction over this appeal.[14]

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[13] In reaching a contrary conclusion, the dissent today engages in a most unusual method of statutory interpretation. Although § 437h expressly requires a district court to "immediately . . . certify *all* questions of the constitutionality" of the Act to the court of appeals and although the legislative history of that provision clearly indicates Congress' intent to have constitutional challenges to the Act resolved through the § 437h procedure, the dissent blithely concludes that "neither the language of the Act nor its legislative history directly addresses the issue" before the Court today. *Post,* at 205. Having so neatly swept aside the relevant statutory language and history, the dissent proceeds to rewrite the statute in a manner it perceives as necessary to insure the "proper enforcement of the Act and . . . the sound functioning of the federal courts . . . ." *Ibid.* Under this reconstruction, § 437h may not be invoked by a party who has been "formally notified of a § 437g proceeding"; indeed, that provision may not even be used by those with an "identity of . . . interests" with a party who has been so notified. *Post,* at 208. While the concepts of "formal notification" and "identity of interests" which the dissent seeks to engraft on § 437h might well benefit the Commission in its effort to enforce the Act and might relieve the courts of appeals of the burden of some § 437h actions, the task before us is not to improve the statute but to construe it. We have already acknowledged that the

[*Footnote 14 is on p. 193*]

III

Appellants' First Amendment claim is based largely on this Court's decision in *Buckley* v. *Valeo*, 424 U. S. 1 (1976) (*per*

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statute, as we interpret it today, is subject to the criticisms raised by the dissent. *Supra*, at 190. The remedy, however, lies with Congress.

Moreover, in its effort to justify rewriting § 437h, the dissent exaggerates the burden § 437h actions have placed on the federal courts. To date, there have been only a handful of cases certified to the Courts of Appeals under this procedure. *Anderson* v. *Federal Election Comm'n*, 634 F. 2d 3 (CA1 1980); *Federal Election Comm'n* v. *Central Long Island Tax Reform Immediately Committee*, 616 F. 2d 45 (CA2 1980); *Republican National Committee* v. *Federal Election Comm'n*, 616 F. 2d 1 (CA2 1979), summarily aff'd, 445 U. S. 955 (1980); *Federal Election Comm'n* v. *Lance*, 635 F. 2d 1132 (CA5 1981); *Bread Political Action Committee* v. *Federal Election Comm'n*, 591 F. 2d 29 (CA7 1979), appeal pending, No. 80–1481; *Buckley* v. *Valeo*, 171 U. S. App. D. C. 172, 519 F. 2d 821 (1975), aff'd in part and rev'd in part, 424 U. S. 1 (1976); *Clark* v. *Valeo*, 182 U. S. App. D. C. 21, 559 F. 2d 642 (1972), summarily aff'd *sub nom. Clark* v. *Kimmitt*, 431 U. S. 950 (1977); *Martin Tractor Co.* v. *Federal Election Comm'n*, 200 U. S. App. D. C. 322, 627 F. 2d 375, cert. denied *sub nom. National Chamber Alliance for Politics* v. *Federal Election Comm'n*, 449 U. S. 954 (1980). Moreover, the Federal Election Campaign Act is not an unlimited fountain of constitutional questions, and it is thus reasonable to assume that resort to § 437h will decrease in the future. Under these circumstances, we do not believe that § 437h poses any significant threat to the effective functioning of the federal courts.

[14] While we thus decline to adopt the Commission's view, we believe that its concerns about the potential abuse of § 437h are in large part answered by the other restrictions on the use of that section. The unusual procedures embodied in this section are, at the very least, circumscribed by the constitutional limitations on the jurisdiction of the federal courts. *Buckley* v. *Valeo*, 424 U. S., at 11. A party seeking to invoke § 437h must have standing to raise the constitutional claim. *Ibid.* Furthermore, § 437h cannot properly be used to compel federal courts to decide constitutional challenges in cases where the resolution of unsettled questions of statutory interpretation may remove the need for constitutional adjudication. *Federal Election Comm'n* v. *Central Long Island Tax Reform Immediately Committee*, *supra*, at 51–53. See *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 438 (1977); *Thorpe* v. *Housing Authority*, 393 U. S. 268, 283–284 (1969); *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). Moreover, we do not construe § 437h to require

curiam). That case involved a broad challenge to the constitutionality of the 1974 Amendments to the Federal Election Campaign Act. We held, *inter alia*, that the limitations placed by the Act on campaign expenditures violated the First Amendment in that they directly restrained the rights of citizens, candidates, and associations to engage in protected political speech. *Id.*, at 39–59. Nonetheless, we upheld the various ceilings the Act placed on the contributions individuals and multicandidate political committees could make to candidates and their political committees, and the maximum aggregate amount any individual could contribute in any calendar year.[15] We reasoned that such contribution

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certification of constitutional claims that are frivolous, see, *e. g.*, *Gifford* v. *Congress*, 452 F. Supp. 802 (ED Cal. 1978); cf. *California Water Service Co.* v. *City of Redding*, 304 U. S. 252, 254–255 (1938) (*per curiam*), or that involve purely hypothetical applications of the statute. See, *e. g.*, *Clark* v. *Valeo*, *supra*; *Martin Tractor Co.* v. *Federal Election Comm'n*, *supra*; 627 F. 2d, at 384–386, 388–390. Finally, as a practical matter, immediate adjudication of constitutional claims through a § 437h proceeding would be improper in cases where the resolution of such questions required a fully developed factual record. See, *e. g.*, *Anderson* v. *Federal Election Comm'n*, *supra*; *Martin Tractor Co.* v. *Federal Election Comm'n*, *supra*, at 325, 627 F. 2d, at 378; *Mott* v. *Federal Election Comm'n*, 494 F. Supp. 131, 135 (DC 1980). These restrictions, in our view, enable a district court to prevent the abuses of § 437h envisioned by the Commission.

None of these considerations, however, pertain to this case. At least the individual appellants have standing to bring this challenge. See n. 6, *supra*. Additionally, appellants here expressly challenge the statute on its face, and there is no suggestion that the statute is susceptible to an interpretation that would remove the need for resolving the constitutional questions raised by appellants. Finally, as evidenced by the divided en banc court below, the issues here are neither insubstantial nor settled. We therefore conclude that this case is properly before us pursuant to § 437h.

[15] Specifically, this Court upheld the $1,000 limit on the amount a person could contribute to a candidate or his authorized political committees, 2 U. S. C. § 441a (a)(1)(A), the $5,000 limit on the contributions by a multicandidate political committee to a candidate or his authorized political committee, 2 U. S. C. § 441a (a)(2)(A), and the overall $25,000 annual ceiling on individual contributions, 2 U. S. C. § 441a (a)(3).

restrictions did not directly infringe on the ability of contributors to express their own political views, and that such limitations served the important governmental interests in preventing the corruption or appearance of corruption of the political process that might result if such contributions were not restrained. *Id.*, at 23–38.

Although the $5,000 annual limit imposed by § 441a (a)(1)(C) on the amount that individuals and unincorporated associations may contribute to political committees is, strictly speaking, a contribution limitation, appellants seek to bring their challenge to this provision within the reasoning of *Buckley*. First, they contend that § 441a (a)(1)(C) is akin to an unconstitutional expenditure limitation because it restricts the ability of CMA to engage in political speech through a political committee, CALPAC. Appellants further contend that even if the challenged provision is viewed as a contribution limitation, it is qualitatively different from the contribution restrictions we upheld in *Buckley*. Specifically, appellants assert that because the contributions here flow to a political committee, rather than to a candidate, the danger of actual or apparent corruption of the political process recognized by this Court in *Buckley* as a sufficient justification for contribution restrictions is not present in this case.

While these contentions have some surface appeal, they are in the end unpersuasive. The type of expenditures that this Court in *Buckley* considered constitutionally protected were those made *independently* by a candidate, individual, or group in order to engage directly in political speech. *Id.*, at 44–48. Nothing in § 441a (a)(1)(C) limits the amount CMA or any of its members may independently expend in order to advocate political views; rather, the statute restrains only the amount that CMA may contribute to CALPAC. Appellants nonetheless insist that CMA's contributions to CALPAC should receive the same constitutional protection as independent expenditures because, according to appellants,

this is the manner in which CMA has chosen to engage in political speech.

We would naturally be hesitant to conclude that CMA's determination to fund CALPAC rather than to engage directly in political advocacy is entirely unprotected by the First Amendment.[16] Nonetheless, the "speech by proxy" that CMA seeks to achieve through its contributions to CALPAC is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection. CALPAC, as a multicandidate political committee, receives contributions from more than 50 persons during a calendar year. 2 U. S. C. § 441a (a)(4). Thus, appellants' claim that CALPAC is merely the mouthpiece of CMA is untenable. CALPAC instead is a separate legal entity that receives funds from multiple sources and that engages in independent political advocacy. Of course, CMA would probably not contribute to CALPAC unless it agreed with the views espoused by CALPAC, but this sympathy of interests alone does not convert CALPAC's speech into that of CMA.

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[16] In *Buckley*, this Court concluded that the act of contribution involved some limited element of protected speech.

"A contribution serves as a general expression of support for a candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues." 424 U. S., at 21 (footnote omitted).

Under this analysis, CMA's contributions to CALPAC symbolize CMA's general approval of CALPAC's role in the political process. However, this attenuated form of speech does not resemble the direct political advocacy to which this Court in *Buckley* accorded substantial constitutional protection.

Our decision in *Buckley* precludes any argument to the contrary. In that case, the limitations on the amount individuals could contribute to candidates and campaign organizations were challenged on the ground that they limited the ability of the contributor to express his political views, albeit through the speech of another. The Court, in dismissing the claim, noted:

> "While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate *involves speech by someone other than the contributor.*" 424 U. S., at 21 (emphasis added).

This analysis controls the instant case. If the First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute to a campaign organization which advocates the views and candidacy of a particular candidate, the rights of a contributor are similarly not impaired by limits on the amount he may give to a multicandidate political committee, such as CALPAC, which advocates the views and candidacies of a number of candidates.[17]

We also disagree with appellants' claim that the contribution restriction challenged here does not further the governmental interest in preventing the actual or apparent corruption of the political process. Congress enacted § 441a (a)(1)(C) in part to prevent circumvention of the very limitations

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[17] *Amicus* American Civil Liberties Union suggests that § 441a (a)(1)(C) would violate the First Amendment if construed to limit the amount individuals could jointly expend to express their political views. We need not consider this hypothetical application of the Act. The case before us involves the constitutionality of § 441a (a)(1)(C) as it applies to contributions to multicandidate political committees. Under the statute, these committees are distinct legal entities that annually receive contributions from over 50 persons and make contributions to 5 or more candidates for federal office. 2 U. S. C. § 441a (a)(4). Contributions to such committees are therefore distinguishable from expenditures made jointly by groups of individuals in order to express common political views.

on contributions that this Court upheld in *Buckley*.[18] Under the Act, individuals and unincorporated associations such as CMA may not contribute more than $1,000 to any single candidate in any calendar year. 2 U. S. C. § 441a (a)(1)(A). Moreover, individuals may not make more than $25,000 in aggregate annual political contributions. 2 U. S. C. § 441a (a)(3). If appellants' position—that Congress cannot prohibit individuals and unincorporated associations from making unlimited contributions to multicandidate political committees—is accepted, then both these contribution limitations could be easily evaded. Since multicandidate political committees may contribute up to $5,000 per year to any candidate, 2 U. S. C. § 441a (a)(2)(A), an individual or association seeking to evade the $1,000 limit on contributions to candidates could do so by channelling funds through a multicandidate political committee. Similarly, individuals could evade the $25,000 limit on aggregate annual contributions to candidates if they were allowed to give unlimited sums to multicandidate political committees, since such committees are not limited in the aggregate amount they may contribute in any year.[19] These concerns prompted

[18] The Conference Report on the provision in the 1976 amendments to the Act that became § 441a (a)(1)(C) specifically notes:

"The conferees' decision to impose more precisely defined limitations on the amount an individual may contribute to a political committee, other than a candidate's committees, and to impose new limits on the amount a person or multicandidate committee may contribute to a political committee, other than candidates' committees, is predicated on the following considerations: first, these limits restrict the opportunity to circumvent the $1,000 and $5,000 limits on contributions to a candidate; second, these limits serve to assure that candidates' reports reveal the root source of the contributions the candidate has received; and third, these limitations minimize the adverse impact on the statutory scheme caused by political committees that appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign." H. R. Conf. Rep. No. 94–1057, pp. 57–58 (1976).

[19] Appellants suggest that their First Amendment concerns would be satisfied if this Court declared § 441a (a)(1)(C) unconstitutional to the

Congress to enact § 441a (a)(1)(C), and it is clear that this provision is an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in *Buckley*.[20]

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extent that it restricts CMA's right to contribute administrative support to CALPAC. The Act defines "contribution" broadly to include

"any gift, subscription, loan, advance, or deposit of money or anything of value . . . or . . . the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." 2 U. S. C. §§ 431 (8)(A)(i), (ii) (1976 ed., Supp. III).

Thus, contributions for administrative support clearly fall within the sorts of donations limited by § 441a (a)(1)(C). Appellants contend, however, that because these contributions are earmarked for administrative support, they lack any potential for corrupting the political process. We disagree. If unlimited contributions for administrative support are permissible, individuals and groups like CMA could completely dominate the operations and contribution policies of independent political committees such as CALPAC. Moreover, if an individual or association was permitted to fund the entire operation of a political committee, all moneys solicited by that committee could be converted into contributions, the use of which might well be dictated by the committee's main supporter. In this manner, political committees would be able to influence the electoral process to an extent disproportionate to their public support and far greater than the individual or group that finances the committee's operations would be able to do acting alone. In so doing, they could corrupt the political process in a manner that Congress, through its contribution restrictions, has sought to prohibit. We therefore conclude that § 441a (a)(1)(C) applies equally to all forms of contributions specified in § 431 (8)(A), and assess appellants' constitutional claims from that perspective.

[20] We also reject appellants' contention that even if § 441a (a)(1)(C) is a valid means by which Congress could seek to prevent circumvention of the other contribution limitations embodied in the Act, it is superfluous and therefore constitutionally defective because other antifraud provisions in the Act adequately serve this end. See, *e. g.*, 2 U. S. C. §§ 441a (a)(7), 441a (a)(8). Because we conclude that the challenged limitation does not restrict the ability of individuals to engage in protected political advocacy, Congress was not required to select the least restrictive means of protecting the integrity of its legislative scheme. Instead, Congress

IV

Appellants also challenge the restrictions on contributions to political committees on the ground that they violate the equal protection component of the Fifth Amendment. Under the statute, corporations and labor unions may pay for the establishment, administration, and solicitation expenses of a "separate segregated fund to be utilized for political purposes." 2 U. S. C. § 441b (b)(2)(C). Contributions by these groups to such funds are not limited by the statute. 2 U. S. C. § 431 (8)(B)(vi) (1976 ed., Supp. III). Appellants assert that a corporation's or a union's contribution to its segregated political fund is directly analogous to an unincorporated association's contributions to a multicandidate political committee. Thus, they conclude that because contributions are unlimited in the former situation, they cannot be limited in the latter without violating equal protection.

We have already concluded that § 441a (a)(1)(C) does not offend the First Amendment. In order to conclude that it nonetheless violates the equal protection component of the Fifth Amendment, we would have to find that because of this provision the Act burdens the First Amendment rights of persons subject to § 441a (a)(1)(C) to a greater extent than it burdens the same rights of corporations and unions, and that such differential treatment is not justified. We need not consider this second question—whether the discrimination alleged by appellants is justified—because we find no such discrimination. Appellants' claim of unfair treatment ignores the plain fact that the statute as a whole imposes far *fewer* restrictions on individuals and unincorporated associations than it does on corporations and unions. Persons subject to the restrictions of § 441a (a)(1)(C) may make unlimited expenditures on political speech; corpora-

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could reasonably have concluded § 441a (a)(1)(C) was a useful supplement to the other antifraud provisions of the Act. Cf. *Buckley* v. *Valeo*, 424 U. S., at 27–28 (rejecting contention that effective bribery and disclosure statutes eliminated need for contribution limitations).

tions and unions, however, may make only the limited contributions authorized by § 441b (b)(2). Furthermore, individuals and unincorporated associations may contribute to candidates, to candidates' committees, to national party committees, and to all other political committees while corporations and unions are absolutely barred from making any such contributions. In addition, multicandidate political committees are generally unrestricted in the manner and scope of their solicitations; the segregated funds that unions and corporations may establish pursuant to § 441b (b)(2)(C) are carefully limited in this regard. §§ 441b (b)(3), 441b (b)(4). The differing restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process. Appellants do not challenge any of the restrictions on the corporate and union political activity, yet these restrictions entirely undermine appellants' claim that because of § 441a (a)(1)(C), the Act discriminates against individuals and unincorporated associations in the exercise of their First Amendment rights. Cf. *Buckley,* 424 U. S., at 95–99.

Accordingly, we conclude that the $5,000 limitation on the amount that persons may contribute to multicandidate political committees violates neither the First nor the Fifth Amendment. The judgment of the Court of Appeals is therefore affirmed.

So ordered.

JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

I join Parts I, II, and IV of JUSTICE MARSHALL's opinion which, to that extent, becomes an opinion for the Court.

I write separately, however, to note my view of appellants' First Amendment claims. Part III of the opinion appears to

rest on the premise that the First Amendment test to be applied to contribution limitations is different from the test applicable to expenditure limitations. I do not agree with that proposition. Although I dissented in part in *Buckley* v. *Valeo,* 424 U. S. 1, 290 (1976), I am willing to accept as binding the Court's judgment in that case that the contribution limitations challenged there were constitutional. *Id.,* at 23–38. But it does not follow that I must concur in the plurality conclusion today, *ante,* at 196, that political contributions are not entitled to full First Amendment protection. It is true that there is language in *Buckley* that might suggest that conclusion, see, *e. g.,* 424 U. S., at 20–23, and it was to such language that I referred when I suggested in my dissent that the Court had failed to make a principled constitutional distinction between expenditure and contribution limitations. *Id.,* at 290. At the same time, however, *Buckley* states that "contribution and expenditure limitations both implicate fundamental First Amendment interests," *id.,* at 23, and that "governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny,' " *id.,* at 25, quoting *NAACP* v. *Alabama,* 357 U. S. 449, 460–461 (1958). Thus, contribution limitations can be upheld only "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." 424 U. S., at 25. See Note, The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments, 86 Yale L. J. 953, 961–962 (1977).

Unlike the plurality, I would apply this "rigorous standard of review," 424 U. S., at 29, to the instant case, rather than relying on what I believe to be a mistaken view that contributions are "not the sort of political advocacy . . . entitled to full First Amendment protection." *Ante,* at 196. Appellees claim that 2 U. S. C. § 441a (a)(1)(C) is justified by the gov-

ernmental interest in preventing apparent or actual political corruption. That this interest is important cannot be doubted. It is a closer question, however, whether the statute is narrowly drawn to advance that interest. Nonetheless, I conclude that contributions to multicandidate political committees may be limited to $5,000 per year as a means of preventing evasion of the limitations on contributions to a candidate or his authorized campaign committee upheld in *Buckley*. The statute challenged here is thus analogous to the $25,000 limitation on total contributions in a given year that *Buckley* held to be constitutional. 424 U. S., at 38.

I stress, however, that this analysis suggests that a different result would follow if § 441a (a)(1)(C) were applied to contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates. By definition, a multicandidate political committee like CALPAC makes contributions to five or more candidates for federal office. § 441a (a)(4). Multicandidate political committees are therefore essentially conduits for contributions to candidates, and as such they pose a perceived threat of actual or potential corruption. In contrast, contributions to a committee that makes only independent expenditures pose no such threat. The Court repeatedly has recognized that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ." *NAACP* v. *Alabama,* 357 U. S., at 460. By pooling their resources, adherents of an association amplify their own voices, see *Buckley* v. *Valeo,* 424 U. S., at 22; the association "is but the medium through which its individual members seek to make more effective the expression of their own views." *NAACP* v. *Alabama,* 357 U. S., at 459. Accordingly, I believe that contributions to political committees can be limited only if those contributions implicate the governmental interest in preventing actual or potential corruption, and if the limitation is no broader than necessary to achieve that interest. Because this narrow test

is satisfied here, I concur in the result reached in Part III of JUSTICE MARSHALL's opinion.

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

In § 313 of the Federal Election Campaign Act of 1971, 2 U. S. C. § 437g (1976 ed., Supp. III), Congress created an elaborate system for the enforcement of the Act. That system may be summarized as follows:

If the Commission becomes aware of a possible violation of the Act, it must notify the person responsible for the violation (who is referred to in the Act as the respondent). 2 U. S. C. § 437g (a)(2) (1976 ed., Supp. III). After investigating the possible violation, the Commission must notify the respondent of any recommendation made by the Commission's General Counsel that the Commission decide whether there is probable cause to believe that the respondent has violated, or is about to violate, the Act. If the Commission determines that there is probable cause, it must attempt, for at least 30 but not more than 90 days, "to correct or prevent such violation by informal methods of conference, conciliation, and persuasion . . . ." § 437g (a)(4)(A)(i). (If the probable-cause determination is made within 45 days before an election, the Commission need seek conciliation for only 15 days. § 437g (a)(4)(A)(ii).) If conciliation fails, the Commission may institute a civil action for relief in an appropriate United States district court. § 437g (a)(6)(A) (1976 ed. and Supp. III). Any judgment of that court may be appealed to the appropriate court of appeals, and the judgment of the court of appeals is subject to review by this Court upon certiorari or certification. § 437g (a)(9). Section 437g (a)(10) provides that "[a]ny action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other actions (other than other actions brought under this subsection or under section 437h of this title)."

A number of Members of Congress believed that the Act raised significant constitutional issues, and Congress concluded that such issues ought to be expeditiously resolved. Consequently, Congress authorized "such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act." 2 U. S. C. § 437h (a) (1976 ed., Supp. III). To assure quick and authoritative resolution of these constitutional issues, Congress established two extraordinary procedures. First, "[t]he district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." *Ibid.* Second, "any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States." § 437h (b). These procedures are to be accomplished with special promptness: "It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section." § 437h (c).

The Court today holds that a person who has received formal notification of an impending § 437g enforcement proceeding may nevertheless bring an action under § 437h raising precisely the same constitutional issues presented in the § 437g proceeding. This holding interferes, I think, with the proper enforcement of the Act and with the sound functioning of the federal courts in ways that Congress cannot have intended.

Although neither the language of the Act nor its legislative history directly addresses the issue resolved by the Court's holding, the structure of the Act itself expresses Congress' intent that § 437h is not to be available as a means of thwarting a § 437g enforcement proceeding. The Act provides for two separate kinds of proceedings with two separate pur-

poses. The first proceeding serves to prevent violations of the Act. The second makes possible prompt challenges to the constitutionality of the Act, more or less in the abstract.

Because the proceedings serve different purposes, Congress instituted separate sets of procedures tailored to the purposes of each proceeding. Thus Representative Hays—the chairman of the House Committee responsible for the bill—stated during debate: "The delicately balanced scheme of procedures and remedies set out in the act is intended to be the exclusive means for vindicating the rights and declaring the duties stated therein." 120 Cong. Rec. 35134 (1974). In particular, in § 437g Congress balanced in extensive detail the public's interest in an expeditious resolution of any § 437g question against the respondent's interest in fair procedures. Congress accordingly (1) specified the periods of time in which § 437g proceedings must be accomplished, (2) directed that § 437g cases need only be heard by ordinarily constituted panels in the courts of appeals, and (3) limited access to this Court to those cases certified to the Court and those cases which the Court chooses to review.

Under the Court's holding today, Congress' assessment of each of the cautiously limited rights contained in § 437g can easily be upset, to the detriment of the strong interest in a prompt resolution of a § 437g proceeding. First, Congress' requirement of a timely resolution of an enforcement proceeding can be disrupted by a respondent's decision to engraft a § 437h proceeding onto a § 437g action. If, in response to such a graft, the § 437g action is stayed pending the outcome of the § 437h proceeding, delay will obviously result. If the § 437g action is not stayed, delay may often be caused by the necessity of redoing work in light of the decision reached by the § 437h courts. Nor will the fact that an appeal has already been had on the abstract constitutional principle make up for some of that lost time, since an appeal on the question of whether the constitutional principle was correctly applied will still be available under § 437g.

Second, by invoking § 437h, a § 437g respondent will be able to arrogate to himself the extraordinary—perhaps unique—right to an immediate hearing by a court of appeals sitting en banc. (Under Rule 35 of the Federal Rules of Appellate Procedure, a case is ordinarily heard en banc only after a three-judge panel has heard it and after a majority of the circuit judges in active service have decided that consideration by the full court is necessary to assure the uniformity of the circuit's decisions or that the proceeding involves a question of exceptional importance.) Third, by invoking § 437h, the § 437g respondent can similarly arrogate to himself the unusual right of direct appeal to this Court.

Not only will Congress' careful balancing of interests thus be undone by today's holding, but what Representative Hays referred to as the Act's "comprehensive system of civil enforcement," 120 Cong. Rec. 35134 (1974), is likely to be impaired by the strain placed on the Federal Election Commission by the necessity of carrying on two lines of litigation where the Act envisions but one. I see no indication that by adopting § 437h—which its author, Senator Buckley, said "merely provides for the expeditious review of the constitutional questions I have raised," 120 Cong. Rec. 10562 (1974)—Congress intended either to expand the rights of § 437g respondents or to contract the Government's ability to stop violations of the Act promptly.*

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*The Court's opinion suggests that any approach other than its own would "remove a whole category of constitutional challenges from the purview of § 437h, thereby significantly limiting the usefulness of that provision." *Ante*, at 191. However, that "whole category" consists only of those few challenges raised by § 437g respondents who did not raise the challenge before the § 437g proceeding began. Any such challenge, of course, will not go unresolved, but will be promptly handled according to the method Congress provided under § 437g for Federal Election Campaign Act issues raised after proceedings have begun.

The Court's opinion also suggests that the fact that § 437g proceedings are to be put ahead of all other actions except "other actions brought

In addition, I think the Court errs in construing with such liberality the jurisdictional scope of an Act that places uncommonly heavy burdens on the federal court system. Litigants who can invoke both § 437g and § 437h can impose on the courts piecemeal adjudication, with all its dangers and disadvantages: Section 437h litigation will often occur without the firm basis in a specific controversy and without the fully developed record which should characterize all litigation and which will generally characterize § 437g proceedings. And § 437h litigation is all too likely to decide questions of constitutional law which might have been avoided by a decision on a narrower ground in a § 437g proceeding.

I cannot believe that Congress intended to require every federal court of appeals to hear en banc every constitutional issue arising in a § 437g proceeding. En banc hearings drain large amounts of judicial time, and since they require the summoning together in the larger federal appellate courts of some two dozen circuit judges, they are cumbersome as well. As the Court of Appeals said in the instant case, "if mandatory en banc hearings were multiplied, the effect on the calendars of this court as to such matters and as to all other business might be severe and disruptive." 641 F. 2d 619, 632. I would hold that, where a respondent has been formally notified of a § 437g enforcement proceeding, the respondent may not use the issues raised in that enforcement proceeding as a basis for an action under § 437h. I would also hold that the individual members of the respondent associations in the instant case fall within the same bar, given the identity of the interests of the associations and their

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under this subsection or under section 437h" somehow supports its holding. There is no evidence that this provision of the statute contemplates more than that a court might have a wholly separate § 437h case on its docket at the time that a § 437g action is filed, and there is no evidence that Congress intended "other actions brought . . . under section 437h" to include a § 437h action which is in practical effect the same case as the § 437g action.

members. Consequently, I would hold that the District Court should not have certified this case to the Court of Appeals, and that the Court of Appeals was without jurisdiction to decide it.

Accordingly, I would dismiss this appeal for want of jurisdiction.

McCARTY *v.* McCARTY

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 80–5. Argued March 2, 1981—Decided June 26, 1981

A regular commissioned officer of the United States Army who retires after 20 years of service is entitled to retired pay. Retired pay terminates with the officer's death, although he may designate a beneficiary to receive any arrearages that remain unpaid at death. In addition there are statutory plans that allow the officer to set aside a portion of his retired pay for his survivors. Appellant, a Regular Army Colonel, filed a petition in California Superior Court for dissolution of his marriage to appellee. At the time, he had served approximately 18 of the 20 years required for retirement with pay. Under California law, each spouse, upon dissolution of a marriage, has an equal and absolute right to a half interest in all community and quasi-community property, but retains his or her separate property. In his petition, appellant requested, *inter alia,* that his military retirement benefits be confirmed to him as his separate property. The Superior Court held, however, that such benefits were subject to division as quasi-community property, and accordingly ordered appellant to pay to appellee a specified portion of the benefits upon retirement. Subsequently, appellant retired and began receiving retired pay; under the dissolution decree, appellee was entitled to approximately 45% of the retired pay. On review of this award, the California Court of Appeal affirmed, rejecting appellant's contention that because the federal scheme of military retirement benefits pre-empts state community property law, the Supremacy Clause precluded the trial court from awarding appellee a portion of his retired pay.

Held: Federal law precludes a state court from dividing military retired pay pursuant to state community property laws. Pp. 220–236.

(a) There is a conflict between the terms of the federal military retirement statutes and the community property right asserted by appellee. The military retirement system confers no entitlement to retired pay upon the retired member's spouse, and does not embody even a limited "community property concept." Rather, the language, structure, and history of the statutes make it clear that retired pay continues to be the personal entitlement of the retiree. Pp. 221–232.

(b) Moreover, the application of community property principles to military retired pay threatens grave harm to "clear and substantial"

federal interests. Thus, the community property division of retired pay, by reducing the amounts that Congress has determined are necessary for the retired member, has the potential to frustrate the congressional objective of providing for the retired service member. In addition, such a division has the potential to interfere with the congressional goals of having the military retirement system serve as an inducement for enlistment and re-enlistment and as an encouragement to orderly promotion and a youthful military. Pp. 232–235.

Reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BRENNAN and STEWART, JJ., joined, *post*, p. 236.

Mattaniah Eytan argued the cause and filed briefs for appellant.

Walter T. Winter argued the cause for appellee. With him on the brief was *Barbara R. Dornan.**

JUSTICE BLACKMUN delivered the opinion of the Court.

A regular or reserve commissioned officer of the United States Army who retires after 20 years of service is entitled to retired pay. 10 U. S. C. §§ 3911 and 3929. The question presented by this case is whether, upon the dissolution of a marriage, federal law precludes a state court from dividing military nondisability retired pay pursuant to state community property laws.

I

Although *disability* pensions have been provided to military veterans from the Revolutionary War period to the

**Herbert N. Harmon* filed a brief for the Non-Commissioned Officers Association of the United States of America et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *William H. Allen* for John L. Burton et al.; and by *Gertrude D. Chern, Judith I. Avner, Gill Deford,* and *Neal Dudovitz* for the National Organization for Women Legal Defense and Education Fund et al.

present,[1] it was not until the War Between the States that Congress enacted the first comprehensive *nondisability* military retirement legislation. See Preliminary Review of Military Retirement Systems: Hearings before the Military Compensation Subcommittee of the House Committee on Armed Services, 95th Cong., 1st and 2d Sess., 5 (1977–1978) (Military Retirement Hearings) (statement of Col. Leon S. Hirsh, Jr., USAF, Director of Compensation, Office of the Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics); Subcommittee on Retirement Income and Employment, House Select Committee on Aging, Women and Retirement Income Programs: Current Issues of Equity and Adequacy, 96th Cong., 1st Sess., 15 (Comm. Print 1979) (Women and Retirement). Sections 15 and 21 of the Act of Aug. 3, 1861, 12 Stat. 289, 290, provided that any Army, Navy, or Marine Corps officer with 40 years of service could apply to the President to be retired with pay; in addition, §§ 16 and 22 of that Act authorized the involuntary retirement with pay of any officer "incapable of performing the duties of his office." 12 Stat. 289, 290.

The impetus for this legislation was the need to encourage or force the retirement of officers who were not fit for wartime duty.[2] Women and Retirement, at 15. Thus, from

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[1] See Rombauer, Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey, 52 Wash. L. Rev. 227, 228–229 (1977). The current military disability provisions are 10 U. S. C. § 1201 *et seq.* (1976 ed. and Supp. IV).

[2] See Cong. Globe, 37th Cong., 1st Sess., 16 (1861) (remarks of Sen. Grimes) ("some of the commanders of regiments in the regular service are utterly incapacitated for the performance of their duty, and they ought to be retired upon some terms, and efficient men placed in their stead"); *id.*, at 159 (remarks of Sen. Wilson) ("We have colonels, lieutenant colonels, and majors in the Army, old men, worn out by exposure in the service, who cannot perform their duties; men who ought to be honorably retired, and receive the compensation provided for in this measure").

its inception,[3] the military nondisability retirement system has been "as much a personnel management tool as an income maintenance method," *id.*, at 16; the system was and is designed not only to provide for retired officers, but also to ensure a "young and vigorous" military force, to create an orderly pattern of promotion, and to serve as a recruiting and re-enlistment inducement. Military Retirement Hearings, at 4–6, 13 (statement of Col. Hirsh).

Under current law, there are three basic forms of military retirement: nondisability retirement; disability retirement; and reserve retirement. See *id.*, at 4. For our present purposes, only the first of these three forms is relevant.[4] Since each of the military services has substantially the same nondisability retirement system, see *id.*, at 5, the Army's system may be taken as typical.[5] An Army officer who has 20 years of service, at least 10 of which have been active service as a commissioned officer, may request that the Secretary of the

[3] For a survey of subsequent military nondisability legislation, see U. S. Dept. of Defense, Military Compensation Background Papers, Third Quadrennial Review of Military Compensation 183–202 (1976); Military Retirement Hearings, at 12–13.

[4] For an overview of the disability and reserve retirement systems, see Subcommittee on Investigations, House Committee on Post Office and Civil Service, Dual Compensation Paid to Retired Uniformed Services' Personnel in Federal Civilian Positions, 95th Cong., 2d Sess., 18–20 (Comm. Print 1978).

[5] The voluntary nondisability retirement systems of the various services are codified as follows: 10 U. S. C., ch. 367, § 3911 *et seq.* (1976 ed. and Supp. IV) (Army); ch. 571, § 6321 *et seq.* (1976 ed. and Supp. IV) (Navy and Marine Corps); ch. 867, § 8911 *et seq.* (Air Force). The nondisability retirement system was recently amended by the Defense Officer Personnel Management Act, Pub. L. 96–513, 94 Stat. 2835. Under § 111 of that Act, *id.*, at 2875, 10 U. S. C. § 1251 (1976 ed., Supp. IV), regular commissioned officers in all the military services are required, with some exceptions, to retire at age 62; the Act also amended various provisions dealing with involuntary nondisability retirement for length of service. The Act, however, did not affect the particular voluntary nondisability retirement provisions at issue here.

Army retire him. 10 U. S. C. § 3911.[6] An officer who requests such retirement is entitled to "retired pay." This is calculated on the basis of the number of years served and rank achieved. §§ 3929 and 3991.[7] An officer who serves for less than 20 years is not entitled to retired pay.

The nondisability retirement system is noncontributory in that neither the service member nor the Federal Government makes periodic contributions to any fund during the period of active service; instead, retired pay is funded by annual appropriations. Military Retirement Hearings, at 5. In contrast, since 1957, military personnel have been required to contribute to the Social Security System. Pub. L. 84–881, 70 Stat. 870. See 42 U. S. C. §§ 410 (*l*) and (m). Upon satisfying the necessary age requirements, the Army retiree, the

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[6] An enlisted member of the Army may be retired upon his request after 30 years of service. 10 U. S. C. § 3917. See also § 3914, as amended by the Military Personnel and Compensation Amendments of 1980, Pub. L. 96–343, § 9 (a)(1), 94 Stat. 1128, 10 U. S. C. § 3914 (1976 ed., Supp. IV) (voluntary retirement after 20 years followed by service in Army Reserve). A retired enlisted member is also entitled to retired pay. 10 U. S. C. §§ 3929 and 3991.

[7] The amount of retired pay is calculated according to formula: (basic pay of the retired grade of the member) × (2½%) × (the number of years of creditable service). Thus, a retiree is eligible for at least 50% (2½% × 20 years of service) of his or her basic pay, which does not include special pay and allowances. There is, however, an upper limit of 75% of basic pay—the percentage attained upon retirement after completion of 30 years of service (30 years × 2½%)—regardless of the number of years actually served. See 10 U. S. C. § 3991. See generally Women and Retirement, at 16. The amount of retired pay is adjusted for any increase in the Consumer Price Index. § 1401a.

Since the initiation of this suit, § 3991 has been amended twice. See the Department of Defense Authorization Act, 1981, Pub. L. 96–342, § 813 (c), 94 Stat. 1104, and the Defense Officer Personnel Management Act, Pub. L. 96–513, § 502 (21), 94 Stat. 2910. Neither amendment has any bearing here.

Under the Internal Revenue Code of 1954, retired pay is taxable as ordinary income when received. 26 U. S. C. § 61 (a)(11); 26 CFR § 1.61–11 (1980).

spouse, an ex-spouse who was married to the retiree for at least 10 years, and any dependent children are entitled to Social Security benefits. See 42 U. S. C. §§ 402 (a) to (f) (1976 ed. and Supp. IV).

Military retired pay terminates with the retired service member's death, and does not pass to the member's heirs. The member, however, may designate a beneficiary to receive any arrearages that remain unpaid at death. 10 U. S. C. § 2771. In addition, there are statutory schemes that allow a service member to set aside a portion of the member's retired pay for his or her survivors. The first such scheme, now known as the Retired Serviceman's Family Protection Plan (RSFPP), was established in 1953. Act of Aug. 8, 1953, 67 Stat. 501, current version at 10 U. S. C. §§ 1431–1446 (1976 ed. and Supp. IV). Under the RSFPP, the military member could elect to reduce his or her retired pay in order to provide, at death, an annuity for a surviving spouse or child. Participation in the RSFPP was voluntary, and the participating member, prior to receiving retired pay, could revoke the election in order "to reflect a change in the marital or dependency status of the member or his family that is caused by death, divorce, annulment, remarriage, or acquisition of a child . . . ." § 1431 (c). Further, deductions from retired pay automatically cease upon the death or divorce of the service member's spouse. § 1434 (c).

Because the RSFPP was self-financing, it required the deduction of a substantial portion of the service member's retired pay; consequently, only about 15% of eligible military retirees participated in the plan. See H. R. Rep. No. 92–481, pp. 4–5 (1971); S. Rep. No. 92–1089, p. 11 (1972). In order to remedy this situation, Congress enacted the Survivor Benefit Plan (SBP) in 1972. Pub. L. 92–425, 86 Stat. 706, codified, as amended, at 10 U. S. C. §§ 1447–1455 (1976 ed. and Supp. IV). Participation in this plan is automatic unless the service member chooses to opt out. § 1448 (a).

The SBP is not entirely self-financing; instead, the Government contributes to the plan, thereby rendering participation in the SBP less expensive for the service member than participation in the RSFPP. Participants in the RSFPP were given the option of continuing under that plan or of enrolling in the SBP. Pub. L. 92–425, § 3, 86 Stat. 711, as amended by Pub. L. 93–155, § 804, 87 Stat. 615.

II

Appellant Richard John McCarty and appellee Patricia Ann McCarty were married in Portland, Ore., on March 23, 1957, while appellant was in his second year in medical school at the University of Oregon. During his fourth year in medical school, appellant commenced active duty in the United States Army. Upon graduation, he was assigned to successive tours of duty in Pennsylvania, Hawaii, Washington, D. C., California, and Texas. After completing his duty in Texas, appellant was assigned to Letterman Hospital on the Presidio Military Reservation in San Francisco, where he became Chief of Cardiology. At the time this suit was instituted in 1976, appellant held the rank of Colonel and had served approximately 18 of the 20 years required under 10 U. S. C. § 3911 for retirement with pay.

Appellant and appellee separated on October 31, 1976. On December 1 of that year, appellant filed a petition in the Superior Court of California in and for the City and County of San Francisco requesting dissolution of the marriage. Under California law, a court granting dissolution of a marriage must divide "the community property and the quasi-community property of the parties." Cal. Civ. Code Ann. § 4800 (a) (West Supp. 1981). Like seven other States, California treats all property earned by either spouse during the marriage as community property; each spouse is deemed to make an equal contribution to the marital enterprise, and therefore each is entitled to share equally in its assets. See

Hisquierdo v. *Hisquierdo,* 439 U. S. 572, 577–578 (1979). "Quasi-community property" is defined as

> "all real or personal property, wherever situated heretofore or hereafter acquired . . . [b]y either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in [California] at the time of its acquisition." Cal. Civ. Code Ann. § 4803 (West Supp. 1981).

Upon dissolution of a marriage, each spouse has an equal and absolute right to a half interest in all community and quasi-community property; in contrast, each spouse retains his or her separate property, which includes assets the spouse owned before marriage or acquired separately during marriage through gift. See *Hisquierdo,* 439 U. S., at 578.

In his dissolution petition, appellant requested that all listed assets, including "[a]ll military retirement benefits," be confirmed to him as his separate property. App. 2. In her response, appellee also requested dissolution of the marriage, but contended that appellant had no separate property and that therefore his military retirement benefits were "subject to disposition by the court in this proceeding." [8] *Id.,* at 8–9. On November 23, 1977, the Superior Court entered findings of fact and conclusions of law holding that appellant was entitled to an interlocutory judgment dissolv-

[8] At the time the interlocutory judgment of dissolution was entered, appellant had not begun to receive retired pay, since he had not yet completed 20 years of active service. Under California law, however, "pension rights" may be divided as community property even if they have not "vested." See *In re Brown,* 15 Cal. 3d 838, 544 P. 2d 561 (1976). A California trial court may divide the present value of such rights, which value must take into account the possibility that death or termination of employment may destroy them before they vest. *Id.,* at 848, 544 P. 2d, at 567. Alternatively, the court may maintain continuing jurisdiction, and award each spouse an appropriate portion of each pension payment as it is made. *Ibid.* The trial court here apparently elected the latter alternative.

ing the marriage. *Id.*, at 39, 44. Appellant was awarded custody of the couple's three minor children; appellee was awarded spousal support. The court found that the community property of the parties consisted of two automobiles, cash, the cash value of life insurance policies, and an uncollected debt. *Id.*, at 42. It allocated this property between the parties. *Id.*, at 45. In addition, the court held that appellant's "military pension and retirement rights" were subject to division as quasi-community property. *Ibid.* Accordingly, the court ordered appellant to pay to appellee, so long as she lives,

> "that portion of his total monthly pension or retirement payment which equals one-half (½) of the ratio of the total time between marriage and separation during which [appellant] was in the United States Army to the total number of years he has served with the . . . Army at the time of retirement." *Id.*, at 43–44.

The court retained jurisdiction "to make such determination at that time and to supervise distribution . . . ." *Ibid.* On September 30, 1978, appellant retired from the Army after 20 years of active duty and began receiving retired pay; under the decree of dissolution, appellee was entitled to approximately 45% of that retired pay.

Appellant sought review of the portion of the Superior Court's decree that awarded appellee an interest in the retired pay. The California Court of Appeal, First Appellate District, however, affirmed the award. App. to Juris. Statement 32. In so ruling, the court declined to accept appellant's contention that because the federal scheme of military retirement benefits pre-empts state community property laws, the Supremacy Clause, U. S. Const., Art. VI, cl. 2, precluded the trial court from awarding appellee a portion of his retired pay.[9] The court noted that this precise contention had

[9] The Court of Appeal also held that since appellant had invoked the jurisdiction of the California courts over both his marital and property

been rejected in *In re Fithian,* 10 Cal. 3d 592, 517 P. 2d 449, cert. denied, 419 U. S. 825 (1974).[10] Furthermore, the court concluded that the result in *Fithian* had not been called into question by this Court's subsequent decision in *Hisquierdo* v. *Hisquierdo, supra,* where it was held that benefits payable under the federal Railroad Retirement Act of 1974 could not be divided under state community property law. See also *Gorman* v. *Gorman,* 90 Cal. App. 3d 454, 153 Cal. Rptr. 479 (1979).[11]

The California Supreme Court denied appellant's petition for hearing. App. to Juris. Statement 83.

We postponed jurisdiction. 449 U. S. 917 (1980). We have now concluded that this case properly falls within our appellate jurisdiction,[12] and we therefore proceed to the merits.

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rights, he was estopped from arguing that California community property law did not apply to him because he was an Oregon domiciliary. App. to Juris. Statement 50–54. Appellant has not renewed this argument before us.

[10] In *Fithian,* the Supreme Court of California concluded that there was "no evidence that the application of California community property law interferes in any way with the administration or goals of the federal military retirement pay system. . . ." 10 Cal. 3d, at 604, 517 P. 2d, at 457.

[11] In *Gorman,* the California Court of Appeal held that *Hisquierdo* was based on the unique history and language of the Railroad Retirement Act of 1974; the court therefore considered itself bound to follow *Fithian* "pending further consideration of the issue by the California Supreme Court." 90 Cal. App. 3d, at 462, 153 Cal. Rptr., at 483. The California Supreme Court has since reaffirmed *Fithian* in *In re Milhan,* 27 Cal. 3d 765, 613 P. 2d 812 (1980), cert. pending *sub nom. Milhan* v. *Milhan,* No. 80–578.

[12] Appellee contends that this is not a proper appeal because appellant did not call the constitutionality of any statute into question in the California courts. Our review of the record, however, leads us to conclude otherwise. The Court of Appeal stated that appellant "also contends that the federal scheme of military retirement benefits pre-empts all state community property laws with respect thereto, and that California courts are accordingly precluded by the Supremacy Clause from dividing such benefits . . . ." App. to Juris. Statement 57. The court

III

This Court repeatedly has recognized that "'[t]he whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States.'" *Hisquierdo,* 439 U. S., at 581, quoting *In re Burrus,* 136 U. S. 586, 593–594 (1890). Thus, "[s]tate family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden." *Hisquierdo,* 439 U. S., at 581, with references to *United States* v. *Yazell,* 382 U. S. 341, 352 (1966). See also *Alessi* v. *Raybestos-Manhattan, Inc.,* 451 U. S. 504, 522 (1981). In *Hisquierdo,* we concluded that California's application of community property principles to Railroad Retirement Act benefits worked such an injury to federal interests. The "critical terms" of the federal statute relied upon in reaching that conclusion included provisions establishing "a specified beneficiary protected by a flat prohibition against attachment and anticipation," see 45 U. S. C. § 231m, and a limited community property concept that terminated upon divorce, see 45 U. S. C. § 231d. 439 U. S., at 582–585. Appellee argues that no such provisions are to be found in the statute presently under consideration, and that therefore *Hisquierdo* is inapposite. But *Hisquierdo* did not hold that only the particular statutory terms there considered would justify a find-

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flatly rejected this argument, *id.,* at 57–59, and appellant then renewed it in his petition for hearing, p. 1, before the California Supreme Court. The present case thus closely resembles *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282 (1921), where a state statute was challenged as being in conflict with the Commerce Clause. The Court held that the appeal was proper, since the appellant "did not simply claim a right or immunity under the Constitution of the United States, but distinctly insisted that as to the transaction in question the . . . statute was void, and therefore unenforceable, because in conflict with the commerce clause . . . ." *Id.,* at 288–289. Accordingly, we conclude on the authority of *Dahnke-Walker* that this is a proper appeal. See also *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U. S. 434, 440–441 (1979).

ing of pre-emption; rather, it held that "[t]he pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition." *Id.,* at 583. It is to that twofold inquiry that we now turn.

A

Appellant argues that California's application of community property concepts to military retired pay conflicts with federal law in two distinct ways. He contends, first, that the California court's conclusion that retired pay is "awarded in return for services previously rendered," see *Fithian,* 10 Cal. 3d, at 604, 517 P. 2d, at 457, ignores clear federal law to the contrary. The community property division of military retired pay rests on the premise that that pay, like a typical pension, represents deferred compensation for services performed during the marriage. *Id.,* at 596, 517 P. 2d, at 451. But, appellant asserts, military retired pay in fact is current compensation for reduced, but currently rendered, services; accordingly, even under California law, that pay may not be treated as community property to the extent that it is earned after the dissolution of the marital community, since the earnings of a spouse while living "separate and apart" are separate property. Cal. Civ. Code Ann. §§ 5118, 5119 (West 1970 and Supp. 1981).

Appellant correctly notes that military retired pay differs in some significant respects from a typical pension or retirement plan. The retired officer remains a member of the Army, see *United States* v. *Tyler,* 105 U. S. 244 (1882),[13] and

[13] In *Tyler,* the Court held that a retired officer was entitled to the benefit of a statute that increased the pay of "commissioned officers." The Court reasoned:

"It is impossible to hold that men who are by statute declared to be part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified

continues to be subject to the Uniform Code of Military Justice, see 10 U. S. C. § 802 (4). See also *Hooper* v. *United States,* 164 Ct. Cl. 151, 326 F. 2d 982, cert. denied, 377 U. S. 977 (1964). In addition, he may forfeit all or part of his retired pay if he engages in certain activities.[14] Finally, the retired officer remains subject to recall to active duty by the Secretary of the Army "at any time." Pub. L. 96–513, § 106, 94 Stat. 2868. These factors have led several courts, including this one, to conclude that military retired pay is reduced compensation for reduced current services. In *United States* v. *Tyler,* 105 U. S., at 245, the Court stated that retired pay is "compensation . . . continued at a reduced rate, and the connection is continued, with a retirement from active service only." [15]

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duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still *not* in the military service." 105 U. S., at 246. (Emphasis in original.)

See also *Kahn* v. *Anderson,* 255 U. S. 1, 6–7 (1921); *Puglisi* v. *United States,* 215 Ct. Cl. 86, 97, 564 F. 2d 403, 410 (1977), cert. denied, 435 U. S. 968 (1978).

[14] A retired officer may lose part of his retired pay if he takes Federal Civil Service employment. See 5 U. S. C. § 5531 *et seq.* (1976 ed. and Supp. IV). He may lose all his pay if he gives up United States citizenship, see 58 Comp. Gen. 566, 568–569 (1979); accepts employment by a foreign government, U. S. Const., Art. I, § 9, cl. 8, but see Pub. L. 95–105, § 509, 91 Stat. 859 (granting congressional permission to engage in such employment with approval of the Secretary concerned and the Secretary of State); or sells supplies to an agency of the Department of Defense, or other designated agencies. 37 U. S. C. § 801. See also Pub. L. 87–849, § 2, 76 Stat. 1126 (retired officer may not represent any person in sale of anything to Government through department in whose service he holds retired status). The officer also may forfeit his retired pay if court-martialed. See *Hooper* v. *United States,* cited in the text.

[15] Relying upon *Tyler,* the Ninth Circuit recently rejected the argument that Congress' alteration of the method by which retired pay is calculated deprived retired military personnel of property without due

Having said all this, we need not decide today whether federal law prohibits a State from characterizing retired pay as deferred compensation, since we agree with appellant's alternative argument that the application of community property law conflicts with the federal military retirement scheme regardless of whether retired pay is defined as current or as deferred compensation.[16] The statutory language is straight-

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process of law. *Costello* v. *United States,* 587 F. 2d 424, 426 (1978), cert. denied, 442 U. S. 929 (1979). The court held that since "retirement pay does not differ from active duty pay in its character as pay for continuing military service," 587 F. 2d, at 427, its method of calculation could be prospectively altered under the precedent of *United States* v. *Larionoff,* 431 U. S. 864, 879 (1977). See also *Abbott* v. *United States,* 200 Ct. Cl. 384, cert. denied, 414 U. S. 1024 (1973); *Lemly* v. *United States,* 109 Ct. Cl. 760, 763, 75 F. Supp. 248, 249 (1948); *Watson* v. *Watson,* 424 F. Supp. 866 (EDNC 1976).

Some state courts also have concluded that military retired pay is not "property" within the meaning of their state divorce statutes because it does not have any "cash surrender value; loan value; redemption value; . . . [or] value realizable after death." *Ellis* v. *Ellis,* 191 Colo. 317, 319, 552 P. 2d 506, 507 (1976). See *Fenney* v. *Fenney,* 259 Ark. 858, 537 S. W. 2d 367 (1976).

[16] A number of state courts have held that military retired pay is deferred compensation, not current compensation for reduced services. See, *e. g., In re Fithian,* 10 Cal. 3d, at 604, 517 P. 2d, at 456; *In re Miller,* — Mont. —, 609 P. 2d 1185 (1980), cert. pending *sub nom. Miller* v. *Miller,* No. 80–291; *Kruger* v. *Kruger,* 73 N. J. 464, 375 A. 2d 659 (1977). It is true that retired pay bears some of the features of deferred compensation. See W. Glasson, Federal Military Pensions in the United States 99 (1918). The amount of retired pay a service member receives is calculated not on the basis of the continuing duties he actually performs, but on the basis of years served on active duty and the rank obtained prior to retirement. See n. 7, *supra.* Furthermore, should the service member actually be recalled to duty, he receives additional compensation according to the active duty pay scale, and his rate of retired pay is also increased thereafter. 10 U. S. C. § 1402, as amended by Pub. L. 96–342, § 813 (b)(2), 94 Stat. 1102, and by Pub. L. 96–513, § 511 (50), 94 Stat. 2924.

Nonetheless, the fact remains that the retired officer faces not only significant restrictions upon his activities, but also a real risk of recall. At

forward: "A member of the Army retired under this chapter is entitled to retired pay . . . ." 10 U. S. C. § 3929. In *Hisquierdo,* 439 U. S., at 584, we emphasized that under the Railroad Retirement Act a spouse of a retired railroad worker was entitled to a separate annuity that terminated upon divorce, see 45 U. S. C. § 231d (c)(3); in contrast, the military retirement system confers no entitlement to retired pay upon the retired service member's spouse. Thus, unlike the Railroad Retirement Act, the military retirement system does not embody even a limited "community property concept." Indeed, Congress has explicitly stated: "Historically, military retired pay has been a *personal entitlement* payable to the retired member himself as long as he lives." S. Rep. No. 1480, 90th Cong., 2d Sess., 6 (1968) (emphasis added).

Appellee argues that Congress' use of the term "personal entitlement" in this context signifies only that retired pay ceases upon the death of the service member. But several features of the statutory schemes governing military pay demonstrate that Congress did not use the term in so limited a fashion. First, the service member may designate a beneficiary to receive any unpaid arrearages in retired pay upon his death. 10 U. S. C. § 2771.[17] The service member is free

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the least, then, the possibility that Congress intended military retired pay to be in part current compensation for those risks and restrictions suggests that States must tread with caution in this area, lest they disrupt the federal scheme. See *Hooper* v. *United States,* 164 Ct. Cl., at 159, 326 F. 2d, at 987 ("the salary he received was not solely recompense for past services, but a means devised by Congress to assure his availability and preparedness in future contingencies"). Cf. Cong. Globe, 37th Cong., 1st Sess., 158 (1861) (remark of Sen. Grimes) (object of first nondisability retirement statute was "to retire gentlemen who have served the country faithfully and well for forty years, voluntarily if they see fit, (but subject, however, to be called into the service of the country at any moment that the President of the United States may ask for their services,) . . .").

[17] Section 2771 provides in relevant part:

"(a) In the settlement of the accounts of a deceased member of the armed forces . . . an amount due from the armed force of which he was a member

to designate someone other than his spouse or ex-spouse as the beneficiary; further, the statute expressly provides that "[a] payment under this section bars recovery by any other person of the amount paid." § 2771 (d). In *Wissner* v. *Wissner,* 338 U. S. 655 (1950), this Court considered an analogous statutory scheme. Under the National Service Life Insurance Act, an insured service member had the right to designate the beneficiary of his policy. *Id.,* at 658. *Wissner* held that California could not award a service member's widow half the proceeds of a life insurance policy, even though the source of the premiums—the member's Army pay—was characterized as community property under California law. The Court reserved the question whether California is "entitled to call army pay community property," *id.,* at 657, n. 2, since it found that Congress had "spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." *Id.,* at 658. In the present context, Congress has stated with "force and clarity" that a beneficiary under § 2771 claims an interest in the re-

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shall be paid to the person highest on the following list living on the date of death:

"(1) Beneficiary designated by him in writing to receive such an amount . . . .

"(2) Surviving spouse.

"(3) Children and their descendants, by representation.

"(4) Father and mother in equal parts or, if either is dead, the survivor.

"(5) Legal representative.

"(6) Person entitled under the law of the domicile of the deceased member."

Section 2771 was designed to "permit the soldier himself to designate a beneficiary for his final pay." H. R. Rep. No. 833, 84th Cong., 1st Sess., 2 (1955). While this statute gives a service member the power of testamentary disposition over any amount owed by the Government, we do not decide today whether California may treat active duty pay as community property. Cf. *Wissner* v. *Wissner,* 338 U. S. 655, 657, n. 2 (1950). We hold only that § 2771, in combination with other features of the military retirement system, indicates that Congress intended retired pay to be a "personal entitlement."

tired pay itself, not simply in proceeds from a policy purchased with that pay. One commentator has noted: "If retired pay were community property, the retiree could not thus summarily deprive his wife of her interest in the arrearage." Goldberg, Is Armed Services Retired Pay Really Community Property?, 48 Cal. Bar J. 12, 17 (1973).

Second, the language, structure, and legislative history of the RSFPP and the SBP also demonstrate that retired pay is a "personal entitlement." While retired pay ceases upon the death of the service member, the RSFPP and the SBP allow the service member to reduce his or her retired pay in order to provide an annuity for the surviving spouse or children. Under both plans, however, the service member is free to elect to provide no annuity at all, or to provide an annuity payable only to the surviving children, and not to the spouse. See 10 U. S. C. § 1434 (1976 ed. and Supp. IV) (RSFPP); § 1450 (1976 ed. and Supp. IV) (SBP). Here again, it is clear that if retired pay were community property, the service member could not so deprive the spouse of his or her interest in the property.[18] But we need not rely on this implicit conflict alone, for both the language of the statutes[19] and their legislative history make it clear that the

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[18] An annuity under either plan is not "assignable or subject to execution, levy, attachment, garnishment, or other legal process." 10 U. S. C. § 1440 and § 1450 (i). Clearly, then, a spouse cannot claim an interest in an annuity not payable to him or her on the ground that it was purchased with community assets. See *Wissner,* 338 U. S., at 659. Cf. *Hisquierdo,* 439 U. S., at 584.

[19] The RSFPP provides in relevant part:

"To provide an annuity under section 1434 of this title, a [service member] may elect to receive a reduced amount of the retired pay or retainer pay *to which he may become entitled* as a result of service in his armed force." 10 U. S. C. § 1431 (b) (emphasis added).

The SBP states in relevant part:

"The Plan applies—

"(A) to a person who is eligible to participate in the Plan . . . and who is married or has a dependent child *when he becomes entitled to*

decision whether to leave an annuity is the service member's decision alone *because* retired pay is his or her personal entitlement. It has been stated in Congress that "[t]he rights in retirement pay accrue to the retiree and, ultimately, the decision is his as to whether or not to leave part of that retirement pay as an annuity to his survivors." H. R. Rep. No. 92–481, p. 9 (1971).[20] California's community property division of retired pay is simply inconsistent with this explicit expression of congressional intent that retired pay accrue to the retiree.

Moreover, such a division would have the anomalous effect of placing an ex-spouse in a better position than that of a widower or a widow under the RSFPP and the SBP.[21] Ap-

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retired or retainer pay, unless he elects not to participate in the Plan before the first day for which he is eligible for that pay . . . ." 10 U. S. C. § 1448 (a)(2) (1976 ed., Supp. IV) (emphasis added).

[20] The SBP provides: "If a person who is married elects not to participate in the Plan at the maximum level or elects to provide an annuity for a dependent child but not for his spouse, that person's spouse shall be notified of the decision." 10 U. S. C. § 1448 (a). But, as both the language of this section and the legislative history make clear, the spouse only receives notice; the decision is the service member's alone. See H. R. Rep. No. 92–481, at 8–9. An election not to participate in the SBP is in most cases irrevocable if not revoked before the date on which the service member first becomes entitled to retired pay. § 1448 (a).

[21] In *Fithian,* 10 Cal. 3d, at 600, 517 P. 2d, at 454, the California Supreme Court observed and acknowledged: "Because federal military retirement pay carries with it no right of survivorship, the characterization of benefits as community property places the serviceman's ex-wife in a somewhat better position than that of his widow."

This is so for several reasons. If the service member does not elect to participate in the RSFPP or SBP, his widow will receive nothing. In contrast, if an ex-spouse has received an offsetting award of presently available community property to compensate her for her interest in the expected value of the retired pay, see n. 8, *supra,* she continues to be provided for even if the service member dies prematurely. See *Hisquierdo,* 439 U. S., at 588–589. Furthermore, whereas an SBP annuity payable to a surviving spouse terminates if he or she remarries prior to age 60,

pellee argues that "Congress' concern for the welfare of soldiers' widows sheds little light on Congress' attitude toward the community treatment of retirement benefits," quoting *Fithian,* 10 Cal. 3d, at 600, 517 P. 2d, at 454. But this argument fails to recognize that Congress deliberately has chosen to favor the widower or widow over the ex-spouse. An ex-spouse is not an eligible beneficiary of an annuity under either plan. 10 U. S. C. § 1434 (a) (RSFPP); §§ 1447 (3) and 1450 (a) (SBP). In addition, under the RSFPP, deductions from retired pay for a spouse's annuity automatically cease upon divorce, § 1434 (c), so as "[t]o safeguard the participants' future retired pay when . . . divorce occurs . . . ." S. Rep. No. 1480, 90th Cong., 2d Sess., 13 (1968). While the SBP does not expressly provide that annuity deductions cease upon divorce, the legislative history indicates that Congress' policy remained unchanged. The SBP, which was referred to as the "widow's equity bill," 118 Cong. Rec. 29811 (1972) (statement of Sen. Beall), was enacted because of Congress' concern over the number of widows left without support through low participation in the RSFPP, not out of concern for ex-spouses. See H. R. Rep. No. 92–481, pp. 4–5 (1971); S. Rep. No. 92–1089, p. 11 (1972).

Third, and finally, it is clear that Congress intended that military retired pay "actually reach the beneficiary." See *Hisquierdo,* 439 U. S., at 584. Retired pay cannot be attached to satisfy a property settlement incident to the dissolution of a marriage.[22] In enacting the SBP, Congress re-

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see 10 U. S. C. § 1450 (b), the ex-spouse's community awards against the retired service member continue despite remarriage. Lastly, annuity payments are subject to Social Security offsets, see 10 U. S. C. § 1451, whereas community property awards are not. It is inconceivable that Congress intended these anomalous results. See Goldberg, Is Armed Services Retired Pay Really Community Property?, 48 Cal. Bar J. 89 (1973).

[22] In addition, an Army enlisted man may not assign his pay. 37 U. S. C. § 701 (c). While an Army officer may transfer or assign his pay account "[u]nder regulations prescribed by the Secretary of the

jected a provision in the House bill, H. R. 10670, that would have allowed attachment of up to 50% of military retired pay to comply with a court order in favor of a spouse, former spouse, or child. See H. R. Rep. No. 92–481, at 1; S. Rep. No. 92–1089, at 25. The House Report accompanying H. R. 10670 noted that under *Buchanan* v. *Alexander,* 4 How. 20 (1845), and *Applegate* v. *Applegate,* 39 F. Supp. 887 (ED Va. 1941), military pay could not be attached so long as it was in the Government's hands; [23] thus, this clause of H. R. 10670 represented a "drastic departure" from current law, but one that the House Committee on Armed Services believed to be necessitated by the difficulty of enforcing support orders. H. R. Rep. No. 92–481, at 17–18. Although this provision passed the House, it was not included in the Senate version of the bill. See S. Rep. No. 92–1089, at 25. Thereafter, the House acceded to the Senate's view that the attachment provision would unfairly "single out military retirees for a form of enforcement of court orders imposed on no other employees or retired employees of the Federal Government." 118 Cong. Rec. 30151 (1972) (remarks of Rep. Pike); S. Rep. No. 92–

Army," he may do so only when the account is "due and payable." § 701 (a). This limitation would appear to serve the same purpose as the prohibition against "anticipation" discussed in *Hisquierdo,* 439 U. S., at 588–589. Cf. *Smith* v. *Commanding Officer, Air Force Accounting and Finance Center,* 555 F. 2d 234, 235 (CA9 1977). But even if there were no explicit prohibition against "anticipation" here, it is clear that the injunction against attachment is not to be circumvented by the simple expedient of an offsetting award. See *Hisquierdo,* 439 U. S., at 588. Cf. *Free* v. *Bland,* 369 U. S. 663, 669 (1962).

[23] Appellee contends, mistakenly in our view, that the doctrine of nonattachability set forth in *Buchanan* simply "restate[s] the Government's sovereign immunity from burdensome garnishment suits . . . ." See *Hisquierdo,* 439 U. S., at 586. Rather than resting on the grounds that garnishment would be administratively burdensome, *Buchanan* pointed out: "The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended." 4 How., at 20. See also H. R. Rep. No. 92–481, at 17.

1089, at 25. Instead, Congress determined that the problem of the attachment of military retired pay should be considered in the context of "legislation that might require all Federal pays to be subject to attachment." *Ibid.;* 118 Cong. Rec. 30151 (1972) (remarks of Rep. Pike).

Subsequently, comprehensive legislation was enacted. In 1975, Congress amended the Social Security Act to provide that all federal benefits, including those payable to members of the Armed Services, may be subject to legal process to enforce child support or alimony obligations. Pub. L. 93–647, § 101 (a), 88 Stat. 2357, 42 U. S. C. § 659. In 1977, however, Congress added a new definitional section (§ 462 (c)) providing that the term "alimony" in § 659 (a) "does not include any payment or transfer of property . . . in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." Pub. L. 95–30, § 501 (d), 91 Stat. 159, 42 U. S. C. § 662 (c) (1976 ed., Supp. IV). As we noted in *Hisquierdo,* it is "logical to conclude that Congress, in adopting § 462 (c), thought that a family's need for support could justify garnishment, even though it deflected other federal benefits from their intended goals, but that community property claims, which are not based on need, could not do so." 439 U. S., at 587.

Hisquierdo also pointed out that Congress might conclude that this distinction between support and community property claims is "undesirable." *Id.,* at 590. Indeed, Congress recently enacted legislation that requires that Civil Service retirement benefits be paid to an ex-spouse to the extent provided for in "the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation." Pub. L. 95–366, § 1 (a), 92 Stat. 600, 5 U. S. C. § 8345 (j)(1) (1976 ed., Supp. IV). In an even more extreme recent step, Congress amended the Foreign Service retirement legislation to provide that, as a matter of federal law, an ex-spouse is en-

titled to a pro rata share of Foreign Service retirement benefits.[24] Thus, the Civil Service amendments require the United States to recognize the community property division of Civil Service retirement benefits by a state court, while the Foreign Service amendments establish a limited federal community property concept. Significantly, however, while similar legislation affecting military retired pay was introduced in the 96th Congress, none of those bills was reported out of committee.[25] Thus, in striking contrast to its amend-

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[24] Under § 814 of the Foreign Service Act of 1980, Pub. L. 96–465, 94 Stat. 2113, a former spouse who was married to a Foreign Service member for at least 10 years of creditable service is entitled to a pro rata share of up to 50% of the member's retirement benefits, unless otherwise provided by spousal agreement or court order; the former spouse also may claim a pro rata share of the survivor's annuity provided for the member's widow. Moreover, the member cannot elect not to provide a survivor's annuity without the consent of his spouse or former spouse.

The Committee Reports commented upon the radical nature of this legislation. See H. R. Rep. No. 96–992, pt. 1, pp. 70–71 (1980); S. Rep. No. 96–913, pp. 66–68 (1980); H. R. Conf. Rep. No. 96–1432, p. 116 (1980). During the floor debates Representative Schroeder pointed out: "Whereas social security provides automatic benefits for spouses and former spouses, married at least 10 years, Federal retirement law has previously not recognized the contribution of the nonworking spouse or former spouse." 126 Cong. Rec. 28659 (1980). Representative Schroeder also noted that Congress had "thus far" failed to enact legislation that would extend to the military the "equitable treatment of spouses" afforded under the Civil Service and Foreign Service retirement systems. *Id.*, at 28660.

[25] Like the Foreign Service amendments, H. R. 2817, 96th Cong., 1st Sess. (1979), would have entitled a former spouse to a pro rata share of the retired pay and of the annuity provided to the surviving spouse; similarly, the bill would have required the service member to obtain the consent of his spouse and ex-spouse before electing not to provide a survivor's annuity. This bill was referred to the House Committee on Armed Services along with two other bills, H. R. 3677, 96th Cong., 1st Sess. (1979), and H. R. 6270, 96th Cong., 2d Sess. (1980). Whereas H. R. 2817 would have amended Title 10 to bring it into conformity with the Foreign Service model, these other two bills paralleled the Civil Service legislation, and would have authorized the United States to comply with the terms of a court decree or property settlement in connection with

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ment of the Foreign Service and Civil Service retirement systems, Congress has neither authorized nor required the community property division of military retired pay. On the contrary, that pay continues to be the personal entitlement of the retiree.

B

We conclude, therefore, that there is a conflict between the terms of the federal retirement statutes and the community property right asserted by appellee here. But "[a] mere conflict in words is not sufficient"; the question remains whether the "consequences [of that community property right] sufficiently injure the objectives of the federal program to require nonrecognition." *Hisquierdo,* 439 U. S., at 581–583. This inquiry, however, need be only a brief one, for it is manifest that the application of community property principles to military retired pay threatens grave harm to "clear and substantial" federal interests. See *United States* v. *Yazell,* 382 U. S., at 352. Under the Constitution, Congress has the power "[t]o raise and support Armies," "[t]o provide and maintain a Navy," and "[t]o makes Rules for the Government and Regulation of the land and naval Forces." U. S. Const., Art. I, § 8, cls. 12, 13, and 14. See generally *Rostker* v. *Goldberg, ante,* at 59. Pursuant to this grant of authority, Congress has enacted a military retirement system designed to accomplish two major goals: to provide for the retired service member, and to meet the personnel manage-

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the divorce of a service member receiving retired pay. After extensive hearings, all three bills died in committee. See Hearing on H. R. 2817, H. R. 3677, and H. R. 6270 before the Military Compensation Subcommittee of the House Committee on Armed Services, 96th Cong., 2d Sess. (1980).

Legislation has been introduced in the 97th Congress that would require the pro rata division of military retired pay. See H. R. 3039, 97th Cong., 1st Sess. (1981), and S. 888, 97th Cong., 1st Sess. (1981). See also H. R. 3040, 97th Cong., 1st Sess. (1981) (pro rata division of retirement benefits of any federal employee).

ment needs of the active military forces. The community property division of retired pay has the potential to frustrate each of these objectives.

In the first place, the community property interest appellee seeks "promises to diminish that portion of the benefit Congress has said should go to the retired [service member] alone." See *Hisquierdo,* 439 U. S., at 590. State courts are not free to reduce the amounts that Congress has determined are necessary for the retired member. Furthermore, the community property division of retired pay may disrupt the carefully balanced scheme Congress has devised to encourage a service member to set aside a portion of his or her retired pay as an annuity for a surviving spouse or dependent children. By diminishing the amount available to the retiree, a community property division makes it less likely that the retired service member will choose to reduce his or her retired pay still further by purchasing an annuity for the surviving spouse, if any, or children. In *McCune* v. *Essig,* 199 U. S. 382 (1905), the Court held that federal law, which permitted a widow to patent federal land entered by her husband, prevailed over the interest in the patent asserted by the daughter under state inheritance law; the Court noted that the daughter's contention "reverses the order of the statute and gives the children an interest paramount to that of the widow through the laws of the State." *Id.,* at 389. So here, the right appellee asserts "reverses the order of the statute" by giving the ex-spouse an interest paramount to that of the surviving spouse and children of the service member; indeed, at least one court (in a noncommunity property State) has gone so far as to hold that the heirs of the ex-spouse may even inherit her interest in military retired pay. See *In re Miller,* —— Mont. ——, 609 P. 2d 1185 (1980), cert. pending *sub nom. Miller* v. *Miller,* No. 80–291. Clearly, "[t]he law of the State is not competent to do this." *McCune* v. *Essig,* 199 U. S., at 389.

The potential for disruption of military personnel management is equally clear. As has been noted above, the military retirement system is designed to serve as an inducement for enlistment and re-enlistment, to create an orderly career path, and to ensure "youthful and vigorous" military forces.[26] While conceding that there is a substantial interest in attracting and retaining personnel for the military forces, appellee argues that this interest will not be impaired by allowing a State to apply its community property laws to retired military personnel in the same manner that it applies those laws to civilians. Yet this argument ignores two essential characteristics of military service: the military forces are national in operation; and their members, unlike civilian employees, cf. *Hisquierdo,* are not free to choose their place of residence. Appellant, for instance, served tours of duty in four States and the District of Columbia. The value of retired pay as an inducement for enlistment or re-enlistment is obviously diminished to the extent that the service member recognizes that he or she may be involuntarily transferred to a State that will divide that pay upon divorce. In *Free* v. *Bland,*

[26] A recent Presidential Commission has questioned the extent to which the military retirement system actually accomplishes these goals. See Report of the President's Commission on Military Compensation 49–56 (1978). Moreover, the Department of Defense has taken the position that service members are legally bound to comply with financial settlements ordered by state divorce courts; but while the Department did not oppose the legislation introduced in the 96th Congress that would have required the United States to honor community property divisions of military retired pay by state courts, it did express its concern over the dissimilar treatment afforded service members depending on whether or not they are stationed in community property States. See Hearing on H. R. 2817, H. R. 3677, and H. R. 6270 before the Military Compensation Subcommittee of the House Committee on Armed Services, 96th Cong., 2d Sess., 55, 58, 63 (1980) (statement of Deputy Assistant Secretary Tice). Of course, the questions whether the retirement system should be amended so as better to accomplish its personnel management goals, and whether those goals should be subordinated to the protection of the service member's ex-spouse, are policy issues for Congress to decide.

369 U. S. 663 (1962), the Court held that state community property law could not override the survivorship provision of a federal savings bond, since it was "[o]ne of the inducements selected," *id.*, at 669, to make purchase of such bonds attractive; similarly, retired pay is one of the inducements selected to make military service attractive, and the application of state community property law thus "interfere[s] directly with a legitimate exercise of the power of the Federal Government." *Ibid.*

The interference with the goals of encouraging orderly promotion and a youthful military is no less direct. Here, as in the Railroad Retirement Act context, "Congress has fixed an amount thought appropriate to support an employee's old age and to encourage the employee to retire." See *Hisquierdo,* 439 U. S., at 585. But the reduction of retired pay by a community property award not only discourages retirement by reducing the retired pay available to the service member, but gives him a positive incentive to keep working, since current income after divorce is not divisible as community property. See Cal. Civ. Code Ann. §§ 5118, 5119 (West 1970 and Supp. 1981). Congress has determined that a youthful military is essential to the national defense; it is not for States to interfere with that goal by lessening the incentive to retire created by the military retirement system.

IV

We recognize that the plight of an ex-spouse of a retired service member is often a serious one. See Hearing on H. R. 2817, H. R. 3677, and H. R. 6270 before the Military Compensation Subcommittee of the House Committee on Armed Services, 96th Cong., 2d Sess. (1980). That plight may be mitigated to some extent by the ex-spouse's right to claim Social Security benefits, cf. *Hisquierdo,* 439 U. S., at 590, and to garnish military retired pay for the purposes of support. Nonetheless, Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection

should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone. We very recently have re-emphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs. See *Rostker* v. *Goldberg, ante,* at 64–65. Thus, the conclusion that we reached in *Hisquierdo* follows *a fortiori* here: Congress has weighed the matter, and "[i]t is not the province of state courts to strike a balance different from the one Congress has struck." 439 U. S., at 590.

The judgment of the California Court of Appeal is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE REHNQUIST, with whom JUSTICE BRENNAN and JUSTICE STEWART join, dissenting.

The Court's opinion is curious in at least two salient respects. For all its purported reliance on *Hisquierdo* v. *Hisquierdo,* 439 U. S. 572 (1979), the Court fails either to quote or cite the test for pre-emption which *Hisquierdo* established. In that case the Court began its analysis, after noting that States "lay on the guiding hand" in marriage law questions, by stating:

> "On the rare occasion where state family law has come into conflict with the federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted. *Wetmore* v. *Markoe,* 196 U. S. 68, 77 (1904)." *Id.,* at 581.

The reason for the omission of this seemingly critical sentence from the Court's opinion today is of course quite clear: the Court cannot, even to its satisfaction, plausibly maintain that Congress has "positively required by direct enactment" that California's community property law be pre-empted by the

provisions governing military retired pay. The most that the Court can advance are vague implications from tangentially related enactments or Congress' *failure* to act. The test announced in *Hisquierdo* established that this was not enough and so the critical language from that case must be swept under the rug.

The other curious aspect of the Court's opinion, related to the first, is the diverting analysis it provides of laws and legislative history having little if anything to do with the case at bar. The opinion, for example, analyzes at great length Congress' actions concerning the attachability of federal pay to enforce alimony and child support awards, *ante,* at 228–230. However interesting this subject might be, this case concerns community property rights, which are quite distinct from rights to alimony or child support, and there has in fact been no effort by appellee to attach appellant's retired pay. To take another example, we learn all about the provisions governing Foreign Service and Civil Service retirement pay, *ante,* at 230–232. Whatever may be said of these provisions, it cannot be said that they are "direct enactments" on the question whether *military* retired pay may be treated as community property. The conclusion is inescapable that the Court has no solid support for the conclusion it reaches—certainly no support of the sort required by *Hisquierdo*—and accordingly I dissent.

I

Both family law and property law have been recognized as matters of peculiarly local concern and therefore governed by state and not federal law. *In re Burrus,* 136 U. S. 586, 593–594 (1890); *United States* v. *Yazell,* 382 U. S. 341, 349, 353 (1966). Questions concerning the appropriate disposition of property upon the dissolution of marriage, therefore, such as the question in this case, are particularly within the control of the States, and the authority of the States should not be displaced except pursuant to the clearest direction from Con-

gress. Only in five previous cases has this Court found preemption of community property law. An examination of those cases clearly establishes that there is no precedent supporting admission of this case to the exclusive club.

The first such case was *McCune* v. *Essig*, 199 U. S. 382 (1905). McCune's father, a homesteader, died before completing the necessary conditions to obtain title to the land. McCune claimed that under the community property laws of the State of Washington she was entitled to a half interest in her father's land. Congress in the Homestead Act, however, had "positively required by direct enactment," *Hisquierdo, supra,* at 581, that in the case of a homesteader's death the *widow* would succeed to the homesteader's interest in the land. Indeed, the Act set forth an explicit schedule of succession which specifically provided for a homesteader's daughter such as McCune. She succeeded to rights and fee under the statute only in the case of the death of both her father and mother. In the words of Justice McKenna:

> "It requires an exercise of ingenuity to establish uncertainty in these provisions. . . . The words of the statute are clear, and express who in turn shall be its beneficiaries. The contention of appellant reverses the order of the statute and gives the children an interest paramount to that of the widow through the laws of the state." 199 U. S., at 389.

There is, of course, nothing remotely approaching this situation in the case at bar. Congress has not enacted a schedule governing rights of ex-spouses to military retired pay and appellee's claim does not go against any such schedule.[1]

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[1] The Court maintains that the present case is like *McCune*: "[s]o here, the right appellee asserts 'reverses the order of the statute' by giving the ex-spouse an interest paramount to that of the surviving spouse and children of the service member . . . ." *Ante,* at 233. With all respect, I do not understand the statute to establish *any* ordered list of those with interests in *retired pay*. The Court's argument is apparently that rec-

The next case from this Court finding pre-emption of community property law did not arise until 45 years later. In *Wissner* v. *Wissner*, 338 U. S. 655 (1950), the deceased serviceman's estranged wife claimed she was entitled to one-half of the proceeds of a National Service Life Insurance policy, the premiums of which were paid out of the serviceman's pay accrued while he was married, even though decedent had designated his parents as the beneficiaries. The Act in question specifically provided that the serviceman shall have " 'the right to designate the beneficiary or beneficiaries of the insurance [within a designated class], . . . and shall . . . at all times have the right to change the beneficiary or beneficiaries.' " *Id.*, at 658 (quoting 38 U. S. C. § 802 (g) (1946 ed.)). As the Court interpreted this, "Congress has spoken with force and clarity in directing that the proceeds belonged to the named beneficiary and no other." 338 U. S., at 658. That is not at all the case here. Congress has provided that the serviceman receive retired pay in 10 U. S. C. § 3929, to be sure, but that is simply the general provision permitting payment—it hardly evinces the "deliberate purpose of Congress" concerning the question before us, as was the case with the designation of a life insurance policy beneficiary in *Wissner*. 338 U. S., at 659.

The Court in *Wissner* also noted that the statute provided that "[p]ayments to the named beneficiary 'shall be exempt

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ognizing the ex-spouse's interest in retired pay would burden the serviceman's decision to fund an annuity for his current spouse out of retired pay. This is of course a far cry from the situation in *McCune*, where the statute accorded the surviving widow and daughter specific places and the daughter sought to switch the order by invoking community property law. Even if the Court is correct that there is a conflict between California's community property law and the decision of the serviceman to fund an annuity out of retired pay, the answer is not to pre-empt community property treatment across the board, but only to the extent of the conflict, *i. e.*, permit community property treatment of retired pay less any amounts which are used to fund an annuity. See *infra*, at 245.

from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.'" *Ibid.* (quoting 38 U. S. C. § 816 (1946 ed.)). The wife's claim was thus in "flat conflict" with the terms of the statute. 338 U. S., at 659. This forceful and unambiguous language protecting the rights of the designated beneficiary has no parallel so far as military retired pay is concerned.

It is important to recognize that the Court's analysis, while purporting to rely on *Wissner*, actually is contrary to the analysis in that case. As will be explored in greater detail below, the Court focuses on two provisions in concluding that military retired pay cannot be treated as community property: the provision permitting a serviceman to designate who shall receive any arrearages in pay after his death, and the provision permitting a retired serviceman to fund an annuity for someone other than the ex-spouse out of retired pay. The Court's theory is that since the serviceman can dispose of part of the retired pay without participation of the ex-spouse—either the arrearages or the premiums to fund the annuity—the retired pay cannot be treated as community property. This, however, is *precisely* the analysis the *Wissner* court *declined* to adopt in concluding that the proceeds of an insurance policy, purchased with military pay, could not be treated as community property. The *Wissner* court simply concluded that the wife could not pursue her community property claim *to the proceeds*, even though purchased with community property funds. This is comparable to ruling in this case that appellee cannot obtain half of any annuity funded out of retired pay pursuant to the statute, or half of the arrearages, when the serviceman has designated someone else to receive them. The *Wissner* court specifically left open the question whether the whole from which the premiums were taken—the military pay—could be treated as community property. *Id.*, at 657, n. 2. That is, however, the analytic jump the Court takes today, in ruling that retired pay cannot

be treated as community property simply because parts of it, or proceeds of parts of it—arrearages and the annuity—cannot be.[2]

The next two cases, *Free* v. *Bland,* 369 U. S. 663 (1962), and *Yiatchos* v. *Yiatchos,* 376 U. S. 306 (1964), involved the same provisions. Plaintiffs sought community property rights in United States Savings Bonds, even though duly issued Treasury Regulations provided that designated co-owners would, upon the death of the other co-owner, be "the sole and absolute owner" of the bonds. No such language is involved in this case.

The most recent case is, of course, *Hisquierdo,* in which the Court held that Congress in the Railroad Retirement Act pre-empted community property laws so that a railroad worker's pension could not be treated as community property. It bears noting that this case is not *Hisquierdo* revisited. In *Hisquierdo* there was a specific statutory provision which satisfied the requirement that Congress " 'positively requir[e] by direct enactment' that state law be pre-empted." 439 U. S., at 581 (quoting *Wetmore* v. *Markoe,* 196 U. S. 68, 77 (1904)). Section 14 of the Railroad Retirement Act of 1974, carrying forward the provisions of § 12 of the Act of 1937, provided:

> "Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated." 45 U. S. C. § 231m.

[2] The error in the Court's logic is perhaps most apparent when it is recognized that the arrearages provision applies to *regular* military pay as well as retired pay. The Court's logic would compel the conclusion that regular pay is thus not subject to community property treatment, an untenable position which the Court itself shies away from without explanation, *ante,* at 224–225, n. 17.

The *Hisquierdo* Court viewed this provision as playing "a most important role in the statutory scheme," 439 U. S., at 583–584. The Court stressed the language "[n]otwithstanding any other law . . . of any State," *id.*, at 584, and noted that § 14 "pre-empts all state law that stands in its way." *Ibid.*

With all the emphasis placed on § 14 in *Hisquierdo,* one would have expected the counterpart in the military retired pay scheme to figure prominently in the Court's opinion today. There is, however, nothing approaching § 14 in the military retired pay scheme. The closest analogue, 37 U. S. C. § 701 (a), is buried in footnote 22 of the Court's opinion. It simply provides:

> "Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, a commissioned officer of the Army or the Air Force may transfer or assign his pay account, when due and payable."

The contrast with the provision in *Hisquierdo* is stark. Section 14 *forbids* assignment; § 701 (a) *permits* it. Section 14 contains a "flat prohibition against attachment and anticipation," 439 U. S., at 582; all that can be gleaned from § 701 (a) is a negative implication prohibiting *voluntary* assignments prior to the time pay is due and payable. Such a limit is of course a far cry from the *Hisquierdo* provision requiring that the retired pay may not be subject to "legal process under any circumstances whatsoever" and that it shall not "be anticipated." It is no wonder § 701 (a) is buried in a footnote in the Court's opinion.[3]

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[3] The Court states that "[r]etired pay cannot be attached to satisfy a property settlement incident to the dissolution of a marriage," *ante,* at 228. The sources for this are not statutory but rather a common-law doctrine, *Buchanan* v. *Alexander,* 4 How. 20 (1845), and a House Report explaining a decision not to enact a bill, see *ante,* at 228–230. The Court cannot of course justify either source as Congress "positively requir[ing] by direct

In addition to § 14 the *Hisquierdo* Court also relied on the fact that the Railroad Retirement Act provided a separate spousal entitlement, "embod[ying] a community concept to an extent." 439 U. S., at 584. Under the Railroad Retirement Act, 45 U. S. C. § 231d (c), a spouse is entitled to a separate benefit, which terminates upon divorce. § 231d (c)(3). Congress explicitly considered extending the spousal benefit to a divorced spouse but declined to do so. 439 U. S., at 585. The *Hisquierdo* Court found support in this not to permit California to expand the community property concept beyond its limited use by Congress in the Act. No similar separate spousal entitlement, terminable on divorce, exists in the statutes governing military retired pay. The "this far and no further" implication in *Hisquierdo,* therefore, cannot be made here.

II

The foregoing demonstrates that today's decision is not simply a logical extension of prior precedent. That does not, to be sure, mean that it is necessarily wrong—there has to be a first time for everything. But examination of the analysis in the Court's opinion convinces me that it is both unprecedented and wrong.

In its analysis the Court contrasts the statute involved in *Hisquierdo,* noting that there spouses received an annuity which terminated upon divorce. Here there is no such provision. As the Court states its conclusion: "Thus, unlike the Railroad Retirement Act, the military retirement system does not embody even a limited 'community property concept.' " *Ante,* at 224. This analysis, however, is the exact opposite

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enactment" that state law be pre-empted. See *Hisquierdo,* 439 U. S., at 581. Thus even accepting the rule, it does not, as § 14 of the Railroad Retirement Act did in *Hisquierdo,* evince the strong *congressional intent* that military retired pay "actually reach the beneficiary." And congressional intent is all the prohibition on attachment is relevant to, since appellee seeks neither anticipation of pay nor attachment from the Government.

of the analysis employed in *Hisquierdo*. As we have seen, there the Court's point was that Congress had provided *some* community property rights and made a conscious decision to provide *no more:*

> "Congress carefully targeted the benefits created by the Railroad Retirement Act. It even embodied a community concept to an extent. . . . Congress purposefully abandoned that theory, however, in allocating benefits upon absolute divorce. . . . The choice was deliberate." 439 U. S., at 584–585.

Now we are told that pre-emption of community property law is suggested in this case because there is *no* community property concept *at all* in the statutory scheme. Under *Hisquierdo,* this absence would have been thought to suggest that there was no pre-emption, since the argument could not be made, as it was in *Hisquierdo,* that Congress had addressed the question and drawn the line. See *In re Milhan,* 27 Cal. 3d 765, 775–776, 613 P. 2d 812, 817 (1980), cert. pending *sub nom. Milhan* v. *Milhan,* No. 80–578. I am not certain whether the analysis was wrong in *Hisquierdo* or in this case, but it is clear that both cannot be correct. One is led to inquire where this moving target will next appear.

The Court also relies on "several features of the statutory scheme" as evidence that Congress intended military retired pay to be the "personal entitlement" of the serviceman. The Court first focuses on 10 U. S. C. § 2771, which permits a serviceman to select the beneficiary of unpaid arrearages. As we have seen, *supra,* at 240–241, the Court's reliance on *Wissner* in this context establishes, at most, only that *unpaid arrearages* cannot be treated as community property, not that retired pay in general cannot be. A provision permitting a serviceman to tell the Government where to mail his last paycheck after his death hardly supports the inference of a congressional intent to pre-empt state law governing disposition of military retired pay in general.

The Court next relies on the statutory provisions permitting a retired serviceman to fund an annuity for his potential widow and/or dependent children out of retired pay. Even granting the Court its premise that the annuity is not subject to community property treatment, the conclusion that military retired pay is not subject to community property treatment simply does not follow. If California's community property law conflicts with permitting a retired serviceman to fund an annuity out of retired pay, then by all means override California's law—*to the extent of the conflict.* Even if Congress did intentionally intrude on community property law to the extent of permitting a serviceman to fund an annuity, that hardly supports an intent to intrude on all community property law. Nothing in the Court's analysis shows any reason why appellee should not be entitled to one-half of appellant's retired pay *less amounts he uses to fund an annuity*, should he decide to do so.

The Court resists the recognition of any rights to retired pay in the ex-spouse because of a policy judgment that it would be "anomalous" to place the ex-spouse in a better position than a widow receiving benefits under an annuity. *Ante,* at 227. The Court, however, is comparing apples and oranges in two respects. The ex-spouse's rights are to retired pay, and *cease* when the serviceman dies. The widow's rights are to an annuity which *begins* when the serviceman dies. The fact that Congress "deliberately has chosen to favor the widower or widow over the ex-spouse" so far as the annuity is concerned, *ante,* at 228, simply has no relevance to the rights of the ex-spouse to the retired pay itself. Second, the ex-spouse has contributed to the earning of the retired pay to the same degree as the serviceman, according to state law. The widow may have done nothing at all to "earn" her annuity, as would be the case, for example, if appellant remarried and funded an annuity for his widow out of retired pay. In view of this, I see nothing "anomalous" in providing the ex-spouse with rights in retired pay. In any event, such pol-

icy questions are for Congress to decide, not the Court, and the Court fails in its efforts to show *Congress* has found California's system anomalous.

The third argument advanced by the Court is the weakest of all: the Court argues that an ex-spouse in a community property State cannot obtain half of the military retired pay, by attachment or otherwise, because she *can* obtain alimony and child support by attachment. This is pre-emption by negative implication—not the "positive requirement" and "direct enactment" which *Hisquierdo* indicated were required. And since appellee does not seek to attach anything, even the negative implication is not directly relevant.

The Court also stresses the recognition of community property rights in varying degrees in the Foreign Service and Civil Service laws. Again, this hardly meets the *Hisquierdo* test. Both the Foreign Service and Civil Service laws are quite different from the military retired pay laws. The former contain strong anti-attachment provisions like § 14 of the Railroad Retirement Act considered in *Hisquierdo,* see 5 U. S. C. § 8346; 22 U. S. C. § 1104, so Congress could well have thought explicit legislation was necessary in these areas.

III

The very most that the Court establishes, therefore, is that the provisions governing arrearages and annuities pre-empt California's community property law. There is no support for the leap from this narrow pre-emption to the conclusion that the community property laws are pre-empted so far as military retired pay in general is concerned. Such a jump is wholly inconsistent with this Court's previous pronouncements concerning a State's power to determine laws concerning marriage and property in the absence of Congress' "direct enactment" to the contrary, and I therefore dissent.

Syllabus

CITY OF NEWPORT ET AL. *v.* FACT CONCERTS, INC., ET AL.

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

No. 80–396. Argued March 31, 1981—Decided June 26, 1981

Respondents (an organization licensed by petitioner city to present certain musical concerts, and a promoter of the concerts) brought suit in Federal District Court against the city and city officials. Alleging, *inter alia,* that the city's cancellation of the license amounted to a violation of their constitutional rights under color of state law, respondents sought compensatory and punitive damages under 42 U. S. C. § 1983. Without objection, the court gave an instruction authorizing the jury to award punitive damages against each defendant, including the city. Verdicts were returned for respondents, which in addition to awarding compensatory damages also awarded punitive damages against both the individual officials and the city. The city moved for a new trial, arguing for the first time that punitive damages could not be awarded against a municipality under § 1983. Although noting that the challenge to the instruction was untimely under Federal Rule of Civil Procedure 51, the District Court considered and rejected the city's substantive legal arguments on their merits. The Court of Appeals affirmed, finding that the city's failure to object to the charge at trial, as required by Rule 51, could not be overlooked on the theory that the charge itself was plain error. The court also expressed a belief that the challenged instruction might not have been error at all, and identified the "distinct possibility" that municipalities could be liable for punitive damages under § 1983 in the proper circumstances.

Held:

1. The city's failure to object to the charge at trial does not foreclose this Court from reviewing the punitive damages issue. Because the District Court adjudicated the merits, and the Court of Appeals did not disagree with that adjudication, no interests in fair and effective trial administration advanced by Rule 51 would be served if this Court refused to reach the merits. Nor should review here be limited to the restrictive "plain error" standard. The contours of municipal liability under § 1983 are currently in a state of evolving definition and uncertainty, and the very novelty of the legal issue at stake counsels unconstricted review. In addition to being novel, the punitive damages ques-

tion is also important and appears likely to recur in § 1983 litigation against municipalities. Pp. 255–257.

2. A municipality is immune from punitive damages under § 1983. Pp. 258–271.

(a) In order to conclude that Congress meant to incorporate a particular immunity as an affirmative defense in § 1983 litigation, a court must undertake careful inquiry into considerations of both history and public policy. Pp. 258–259.

(b) In 1871, when Congress enacted what is now § 1983, it was generally understood that a municipality was to be treated as a natural person subject to suit for a wide range of tortious activity, but this understanding did not extend to the award of punitive damages at common law. Indeed, common-law courts consistently and expressly declined to award punitive damages against municipalities. Nothing in the legislative history suggests that, in enacting § 1 of the Civil Rights Act of 1871, Congress intended to abolish the doctrine of municipal immunity from punitive damages. If anything, the relevant history suggests the opposite. Pp. 259–266.

(c) Considerations of public policy do not support exposing a municipality to punitive damages for the malicious or reckless conduct of its officials. Neither the retributive nor the deterrence objectives of punitive damages and of § 1983 would be significantly advanced by holding municipalities liable for such damages. Pp. 266–271.

626 F. 2d 1060, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 271.

Guy J. Wells argued the cause and filed briefs for petitioners.

Leonard Decof argued the cause and filed a brief for respondents.*

*Briefs of *amici curiae* urging reversal were filed by *John Dekker, James B. Brennan, Henry W. Underhill, Jr., Benjamin L. Brown, Aaron A. Wilson, J. Lamar Shelley, John W. Witt, George F. Knox, Jr., Max P. Zall, Allen G. Schwartz, Lee E. Holt, Burt Pines, Walter M. Powell, Roger F. Cutler, Conrad B. Mattox, Jr., Charles S. Rhyne,* and *William S. Rhyne* for the National Institute of Municipal Law Officers; and by *Edward Cooper* and *James J. Clancy* for the City of Santa Ana.

Briefs of *amici curiae* were filed for the ACLU Foundation, Southern

JUSTICE BLACKMUN delivered the opinion of the Court.

In *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), this Court for the first time held that a local government was subject to suit as a "person" within the meaning of 42 U. S. C. § 1983. Aside from concluding that a municipal body was not wholly immune from civil liability, the Court had no occasion to explore the nature or scope of any particular municipal immunity under the statute. 436 U. S., at 701. The question presented by this case is whether a municipality may be held liable for punitive damages under § 1983.

I

A

Respondent Fact Concerts, Inc., is a Rhode Island corporation organized for the purpose of promoting musical concerts.[1] In 1975, it received permission from the Rhode Island Depart-

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California, et al. by *Fred Okrand* and *Lynette Labinger;* and for the State of Washington et al. by *Kenneth O. Eikenberry,* Attorney General of Washington, *Malachy R. Murphy,* Deputy Attorney General, and *Thomas R. Bjorgen,* Assistant Attorney General; *Charles A. Graddick,* Attorney General of Alabama; *Wilson L. Condon,* Attorney General of Alaska; *Robert K. Corbin,* Attorney General of Arizona; *Carl R. Ajello,* Attorney General of Connecticut; *Tany S. Hong,* Attorney General of Hawaii; *Linley E. Pearson,* Attorney General of Indiana; *Warren R. Spannaus,* Attorney General of Minnesota; *Michael T. Greely,* Attorney General of Montana; *Rufus L. Edmisten,* Attorney General of North Carolina; *Leroy S. Zimmerman,* Attorney General of Pennsylvania; *Dennis J. Roberts II,* Attorney General of Rhode Island; *Mark V. Meierhenry,* Attorney General of South Dakota; *Mark White,* Attorney General of Texas; *John J. Easton,* Attorney General of Vermont; *Chauncey H. Browning,* Attorney General of West Virginia; *John D. Troughton,* Attorney General of Wyoming; *Edward Thompson, Jr.;* and *Ross D. Davis.*

[1] Fact Concerts, Inc., entered into a joint venture with respondent Marvin Lerman, a promoter, to produce the jazz concerts that gave rise to this lawsuit. For convenience, we refer to the corporation as the respondent.

ment of Natural Resources to present several summer concerts at Fort Adams, a state park located in the city of Newport. In securing approval for the final concerts, to be held August 30 and 31, respondent sought and obtained an entertainment license from petitioner city of Newport.[2] Under their written contract, respondent retained control over the choice of performers and the type of music to be played while the city reserved the right to cancel the license without liability if "in the opinion of the City the interests of public safety demand." App. 27.

Respondent engaged a number of well-known jazz music acts to perform during the final August concerts. Shortly before the dates specified, the group Blood, Sweat and Tears was hired as a replacement for a previously engaged performer who was unable to appear. Members of the Newport City Council, including the Mayor, became concerned that Blood, Sweat and Tears, which they characterized as a rock group rather than as a jazz band, would attract a rowdy and undesirable audience to Newport. 2 Record Appendix (R. A.) 265, 316–317, 325.[3] Based on this concern, the Council attempted to have Blood, Sweat and Tears removed from the program.

On Monday, August 25, Mayor Donnelly informed respondent by telephone that he considered Blood, Sweat and Tears to be a rock group, and that they would not be permitted to perform because the city had experienced crowd disturbances at previous rock concerts. *Id.*, at 195. Officials of respondent appeared before the City Council at a special meeting the next day, and explained that Blood, Sweat and Tears in fact were a jazz band that had performed at Carnegie Hall in New York City and at similar symphony hall facilities

[2] The individual petitioners are the Mayor of Newport and the other six members of the City Council. Because their claims are not before us, we refer to the city as petitioner. See n. 7, *infra*.

[3] Contemporary press accounts attributed to the Council members a "fear of attracting 'long-haired hangers-on.'" 1 R. A. 87–A.

throughout the world. Speaking for the Council, the Mayor reiterated that the city did not condone rock festivals. Without attempting to investigate either the nature of the group's music or the representations made by respondent, the Council voted to cancel the license for both days unless Blood, Sweat and Tears were removed from the program. *Id.*, at 267–269. The vote received considerable publicity, and this adversely affected ticket sales. *Id.*, at 248–G.

Later in the same week, respondent was informed by the City Solicitor that the Council had changed its position and would allow Blood, Sweat and Tears to perform if they did not play rock music. On Thursday, August 28, respondent agreed to attend a second special Council meeting the following day.

The second Council session convened on the afternoon of August 29, the day before the first scheduled performance. Mayor Donnelly informed the Council members that the city had two options—it could either allow Blood, Sweat and Tears to perform subject to the prohibition against rock music, or cancel the concert altogether. Although the City Solicitor advocated the first alternative and advised that cancellation would be unlawful, 3 R. A. 478, the Council did not offer the first option to respondent. Instead, one of the Council members inquired whether all provisions of the contract had been fulfilled. The City Manager, who had just returned from the concert site, reported that the wiring together of the spectator seats was not fully completed by 3 p. m., and that the auxiliary electric generator was not in place. Under the contract, respondent had agreed to fulfill these two conditions as part of the overall safety procedures. App. 28.[4] The

[4] Testimony at the trial indicated that in fact substantial compliance had been achieved. *Id.*, at 101–102; 2 R. A. 136–137, 141–142, 201. The Director of the Rhode Island Department of Natural Resources, who also visited the site on Friday afternoon, stated that respondent's preparations were satisfactory for health and safety purposes. *Id.*, at 159. He said that he informed the City Manager that the criticisms offered were

Council then voted to cancel the contract because respondent had not "lived up to all phases" of the agreement. 4 R. A. 10. The Council offered respondent a new contract for the same dates, specifically excluding Blood, Sweat and Tears. Respondent, however, indicated that it would take legal action if the original contract was not honored. 1 R. A. 96; 2 R. A. 202; 4 R. A. 11. After the meeting adjourned at 9:30 p.m., the decision to revoke respondent's license was broadcast extensively over the local media. 1 R. A. 97; 2 R. A. 204.

On Saturday morning, August 30, respondent obtained in state court a restraining order enjoining the Mayor, the City Council, and the city from interfering with the performance of the concerts. The 2-day event, including the appearance of Blood, Sweat and Tears, took place without incident. Fewer than half the available tickets were sold.

B

Respondent instituted the present action in the United States District Court for the District of Rhode Island, naming the city, its Mayor, and the six other Council members as defendants. Alleging, *inter alia,* that the license cancellation amounted to content-based censorship, and that its constitutional rights to free expression and due process had been violated under color of state law, respondent sought compensatory and punitive damages against the city and its officials under 42 U. S. C. § 1983 and under two pendent state-law counts, including tortious interference with contractual relationships. App. 8. At the conclusion of six days of trial, the District Court charged the jury with respect to the § 1983 and tortious interference counts. Included in its charge was

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"picayune," *id.,* at 157 (although this characterization, upon objection, was stricken by the trial judge, *ibid.*), and "frivolous," *id.,* at 179. The Director offered to attend the second Council meeting to assist in any way possible, but was told by the Mayor and the City Manager that he was not needed. *Id.,* at 158.

an instruction, given without objection, that authorized the jury to award punitive damages against each defendant individually, "based on the degree of culpability of the individual defendant." App. 62.[5] The jury returned verdicts for respondent on both counts, awarding compensatory damages of $72,910 and punitive damages of $275,000; of the punitive damages, $75,000 was spread among the seven individual officials and $200,000 was awarded against the city.[6]

Petitioner moved for a new trial, arguing that punitive damages cannot be awarded under § 1983 against a municipality, and that even if they can, the award was excessive.[7] Because petitioner challenged the punitive damages instruction to which it had not objected at trial, the District Court noted that the challenge was untimely under Federal Rule of Civil Procedure 51. But the court was determined not to "rest its decision on this procedural ground alone." App. to Pet. for Cert. B–3. Reasoning that "a careful resolution of this novel question is critical to a just verdict in this case,"

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[5] See App. 57–58 (instructing on basis for award of punitive damages). Compensatory damages were to be awarded as a single sum against all defendants found liable. *Id.*, at 62.

[6] The jury assessed 75% of the punitive damages upon the § 1983 claim and 25% upon the state-law claim. 3 R. A. 594–595. We do not address the propriety of the punitive damages awarded against petitioner under Rhode Island law.

[7] In addition to challenging the punitive damages award against the city, the defendants sought review of all aspects of the jury verdict as well as numerous rulings made by the District Judge during the trial. Both the District Court and the Court of Appeals determined that respondent had stated valid claims for relief under federal and state law, that the individual defendants were entitled only to qualified good-faith immunity, that respondent had proved its case against each individual defendant, and that objections to the cross-examination of one of the Council members were without merit. Although petitioner sought certiorari on some of these issues, we granted the writ to consider only the question of the availability of punitive damages against a municipality under § 1983. Thus, in all other respects, the findings and conclusions of the lower courts are left undisturbed.

id., at B–7, the court proceeded to consider petitioner's substantive legal arguments on their merits.

The District Court recognized, *ibid.*, that *Monell* had left undecided the question whether municipalities may be held liable for punitive damages. 436 U. S., at 701. The court observed, however, that punitive damages often had been awarded against individual officials in § 1983 actions, and it found no clear basis for distinguishing between individuals and municipalities in this regard. Emphasizing the general deterrent purpose served by punitive damages awards, the court reasoned that a municipality's payment of such an award would focus taxpayer and voter attention upon the entity's malicious conduct, and that this in turn might promote accountability at the next election. App. to Pet. for Cert. B–9. Although noting that the burden imposed upon taxpaying citizens warranted judicial caution in this area, the court concluded that in appropriate circumstances municipalities could be held liable for punitive damages in a § 1983 action.[8]

The United States Court of Appeals for the First Circuit affirmed. 626 F. 2d 1060 (1980). That court noted, as an initial matter, that the challenge to the punitive damages award was flawed due to petitioner's failure to object to the charge at trial. The court observed that such a failure should be overlooked "only where the error is plain and 'has seriously affected the fairness, integrity or public reputation of a judicial proceeding.'" *Id.*, at 1067. The court found none of these factors present, because the law concerning municipal liability under § 1983 was in a state of flux, and no appellate decision had barred punitive damages awards against a municipality.

The Court of Appeals also expressed a belief that the

[8] The court, however, went on to rule that the $200,000 award against petitioner was excessive and unjust. App. to Pet. for Cert. B–12 to B–13. It ordered a remittitur, reducing the punitive damages award to $75,000. Respondent accepted the remittitur without objection. App. 68.

challenged instruction might well not have been error at all. 626 F. 2d, at 1067. Citing its own prior holdings to the effect that punitive damages are available against § 1983 defendants, and this Court's recent determination in *Monell* that a municipality is a "person" within the meaning of § 1983, the court identified the "distinct possibility that municipalities, like all other persons subject to suit under § 1983, may be liable for punitive damages in the proper circumstances." 626 F. 2d, at 1067.

Because of the importance of the issue, we granted certiorari. 449 U. S. 1060 (1980).

II

At the outset, respondent asserts that the punitive damages issue was not properly preserved for review before this Court. Brief for Respondents 7–9. In light of Rule 51's uncompromising language [9] and the policies of fairness and judicial efficiency incorporated therein, respondent claims that petitioner's failure to object to the charge at trial should foreclose any further challenge to that instruction. The problem with respondent's argument is that the District Court in the first instance declined to accept it. Although the punitive damages question perhaps could have been avoided simply by a reliance, under Rule 51, upon petitioner's procedural default,[10] the judge concluded that the interests of justice required careful consideration of this "novel question" of federal law.[11]

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[9] Rule 51 reads in pertinent part:

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

[10] See 5A J. Moore & J. Lucas, Moore's Federal Practice ¶ 51.04, n. 3 (1980); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2553 (1971).

[11] The District Judge, after observing that the city had failed to object in timely fashion to the punitive damages instruction, stated: "Despite

Because the District Court reached and fully adjudicated the merits, and the Court of Appeals did not disagree with that adjudication, no interests in fair and effective trial administration advanced by Rule 51 would be served if we refused now to reach the merits ourselves.[12]

Nor are we persuaded that our review should be limited to determining whether "plain error" has been committed, an exception to Rule 51 that is invoked on occasion by the Courts of Appeals absent timely objection in the trial court.[13] No "right" to a specific standard of review exists in this setting, any more than a "right" to review existed at all once petitioner failed to except to the charge at trial. But given the special circumstances of this case, limiting our review to a restrictive "plain error" standard would be peculiarly inapt.

"Plain error" review under Rule 51 is suited to correcting obvious instances of injustice or misapplied law. A court's interpretation of the contours of municipal liability under § 1983, as both courts below recognized, hardly could give rise to plain judicial error since those contours are currently in a state of evolving definition and uncertainty. See *Owen* v. *City of Independence,* 445 U. S. 622 (1980); *Monell.* See

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[petitioner's] tardiness, a careful resolution of this novel question is critical to a just verdict in this case." App. to Pet. for Cert. B–7. This statement makes clear that that court did not reach the merits merely as an alternative ground for decision or out of an abundance of caution. The dissent's suggestion to the contrary, *post,* at 273, 276, is simply mistaken.

[12] The District Court may have been influenced by the unusual nature of the instant situation. Ordinarily, an error in the charge is difficult, if not impossible, to correct without retrial, in light of the jury's general verdict. In this case, however, we deal with a wholly separable issue of law, on which the jury rendered a special verdict susceptible of rectification without further jury proceedings.

[13] See, *e. g., Morris* v. *Travisono,* 528 F. 2d 856, 859 (CA1 1976); *Williams* v. *City of New York,* 508 F. 2d 356, 362 (CA2 1974); *Troupe* v. *Chicago D. & G. Bay Transit Co.,* 234 F. 2d 253, 259–260 (CA2 1956). But cf. *Moore* v. *Telfon Communications Corp.,* 589 F. 2d 959, 966 (CA9 1978).

also *Maine* v. *Thiboutot,* 448 U. S. 1 (1980); *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn., ante,* p. 1. We undertake review here in order to resolve one element of the uncertainty, that is, the availability of punitive damages, and it would scarcely be appropriate or just to confine our review to determining whether any error that might exist is sufficiently egregious to qualify under Rule 51. The very novelty of the legal issue at stake counsels unconstricted review.

In addition to being novel, the punitive damages question is important and appears likely to recur in § 1983 litigation against municipalities.[14] And here the question was squarely presented and decided on a complete trial record by the court of first resort, was argued by both sides to the Court of Appeals, and has been fully briefed before this Court. In light of all these factors, we conclude that restricting our review to the plain-error standard would serve neither to promote the interests of justice nor to advance efficient judicial administration.[15] We therefore turn to the merits of petitioner's claim.[16]

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[14] The issue already has arisen on several occasions. Compare *Hild* v. *Bruner,* 496 F. Supp. 93, 99–100 (NJ 1980), and *Flores* v. *Hartford Police Dept.,* 25 FEP Cases 180, 193 (Conn. 1981), with *Edmonds* v. *Dillin,* 485 F. Supp. 722, 729–730 (ND Ohio 1980). See also *Valcourt* v. *Hyland,* 503 F. Supp. 630, 638–640 (Mass. 1980).

[15] The Court's exercise of power in these circumstances is no more broad than its notice of plain error not presented by the parties, see this Court's Rule 34.1 (a); *Washington* v. *Davis,* 426 U. S. 229, 238 (1976); *Silber* v. *United States,* 370 U. S. 717, 718 (1962), or its deciding a question not raised in the lower federal courts, see *Carlson* v. *Green,* 446 U. S. 14, 17, n. 2 (1980), or its review of an issue neither decided below nor presented by the parties, see *Wood* v. *Georgia,* 450 U. S. 261, 265, n. 5 (1981); *Youakim* v. *Miller,* 425 U. S. 231, 234 (1976).

[16] Accordingly, we find it unnecessary to determine whether the Court of Appeals relied exclusively on the plain-error doctrine in affirming the District Court's judgment. While concluding that in this unusual case, the interest of justice warrants our plenary consideration, see 28 U. S. C. § 2106, we express no view regarding the application of the plain-error doctrine by the Courts of Appeals.

III

It is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum. In the Civil Rights Act of 1871, Congress created a federal remedy against a person who, acting under color of state law, deprives another of constitutional rights. See *Monroe* v. *Pape,* 365 U. S. 167, 172 (1961). Congress, however, expressed no intention to do away with the immunities afforded state officials at common law, and the Court consistently has declined to construe the general language of § 1983 [17] as automatically abolishing such traditional immunities by implication. *Procunier* v. *Navarette,* 434 U. S. 555, 561 (1978); *Imbler* v. *Pachtman,* 424 U. S. 409, 417 (1976); *Pierson* v. *Ray,* 386 U. S. 547, 554–555 (1967); *Tenney* v. *Brandhove,* 341 U. S. 367, 376 (1951). Instead, the Court has recognized immunities of varying scope applicable to different officials sued under the statute.[18] One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.

At the same time, the Court's willingness to recognize certain traditional immunities as affirmative defenses has not led it to conclude that Congress incorporated *all* immunities exist-

[17] "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." Rev. Stat. § 1979, 42 U. S. C. § 1983.

[18] *E. g., Imbler* v. *Pachtman,* 424 U. S. 409 (1976) (state prosecutor); *Scheuer* v. *Rhodes,* 416 U. S. 232 (1974) (state executive); *Pierson* v. *Ray,* 386 U. S. 547 (1967) (state judge); *Tenney* v. *Brandhove,* 341 U. S. 367 (1951) (state legislator).

ing at common law. See *Scheuer* v. *Rhodes,* 416 U. S. 232, 243 (1974). Indeed, because the 1871 Act was designed to expose state and local officials to a new form of liability, it would defeat the promise of the statute to recognize any pre-existing immunity without determining both the policies that it serves and its compatibility with the purposes of § 1983. See *Imbler* v. *Pachtman,* 424 U. S., at 424; *id.,* at 434 (opinion concurring in judgment); *Owen* v. *City of Independence,* 445 U. S., at 638. Only after careful inquiry into considerations of both history and policy has the Court construed § 1983 to incorporate a particular immunity defense.

Since *Monell* was decided three years ago, the Court has applied this two-part approach when scrutinizing a claim of immunity proffered by a municipality. In *Owen* v. *City of Independence,* the Court held that neither history nor policy supported a construction of § 1983 that would allow a municipality to assert the good faith of its officers or agents as a defense to liability for damages. 445 U. S., at 638, 657. *Owen,* however, concerned only compensatory damages, and petitioner contends that with respect to a municipality's liability for punitive damages, an examination of the common-law background and policy considerations yields a very different result.

A

By the time Congress enacted what is now § 1983, the immunity of a municipal corporation from punitive damages at common law was not open to serious question. It was generally understood by 1871 that a municipality, like a private corporation, was to be treated as a natural person subject to suit for a wide range of tortious activity,[19] but this understand-

[19] Local units of government initially were shielded from tort liability by the doctrine of sovereign immunity. *Russell* v. *Men of Devon,* 2 T. R. 667, 100 Eng. Rep. 359 (K. B. 1788). See F. Burdick, Law of Torts § 21 (4th ed. 1926). Subsequently, the municipal entity was bifurcated, for purposes of immunity, into sovereign and proprietary spheres of conduct. *Bailey* v. *Mayor of New York,* 3 Hill 531 (N. Y. Sup. Ct. 1842), aff'd, 2

ing did not extend to the award of punitive or exemplary damages. Indeed, the courts that had considered the issue prior to 1871 were virtually unanimous in denying such damages against a municipal corporation. *E. g., Woodman* v. *Nottingham,* 49 N. H. 387 (1870); *City of Chicago* v. *Langlass,* 52 Ill. 256 (1869); *City Council of Montgomery* v. *Gilmer & Taylor,* 33 Ala. 116 (1858); *Order of Hermits of St. Augustine* v. *County of Philadelphia,* 4 Clark 120, Brightly N. P. 116 (Pa. 1847); *McGary* v. *President & Council of the City of Lafayette,* 12 Rob. 668, 674 (La. 1846).[20] Judicial disinclination to award punitive damages against a municipality has persisted to the present day in the vast majority of jurisdictions.[21] See generally 18 E. McQuillin, Municipal Corporations § 53.18a (3d rev. ed. 1977); F. Burdick, Law of Torts 245–246 (4th ed.

Denio 433 (1845). See W. Williams, Liability of Municipal Corporations for Tort § 4 (1901). See generally *Owen,* 445 U. S., at 640–650; *Monell,* 436 U. S., at 687–689.

[20] Although occasionally courts have suggested in dictum that punitive damages might be awarded in appropriate circumstances, see *Wallace* v. *Mayor, etc., of New York,* 18 How. 169, 176 (N. Y. Com. Pl. 1859); *Herfurth* v. *Corporation of Washington,* 6 D. C. 288, 293 (1868), we have been directed to only one reported decision prior to 1871 in which an award of punitive damages against a municipality was upheld, and that decision was expressly overruled in 1870. *Whipple* v. *Walpole,* 10 N. H. 130, 132–133 (1839), overruled by *Woodman* v. *Nottingham,* 49 N. H. 387, 394 (1870).

[21] *E. g., Lauer* v. *Young Men's Christian Assn. of Honolulu,* 57 Haw. 390, 557 P. 2d 1334 (1976); *Ranells* v. *City of Cleveland,* 41 Ohio St. 2d 1, 321 N. E. 2d 885 (1975); *Smith* v. *District of Columbia,* 336 A. 2d 831 (D. C. App. 1975); *Fisher* v. *City of Miami,* 172 So. 2d 455 (Fla. 1965); *Brown* v. *Village of Deming,* 56 N. M. 302, 243 P. 2d 609 (1952); *Town of Newton* v. *Wilson,* 128 Miss. 726, 91 So. 419 (1922); *Willett* v. *Village of St. Albans,* 69 Vt. 330, 38 A. 72 (1897). See Annot., 19 A. L. R. 2d 903–920 (1951); 57 Am. Jur. 2d, Municipal, School, and State Tort Liability §§ 318, 319 (1971). The general rule today is that no punitive damages are allowed unless expressly authorized by statute. 18 E. McQuillin, Municipal Corporations § 53.18a (3d rev. ed. 1977); Hines, Municipal Liability for Exemplary Damages, 15 Clev.-Mar. L. Rev. 304 (1966).

1926); 4 J. Dillon, Law of Municipal Corporations § 1712 (5th ed. 1911); G. Field, Law of Damages § 80 (1876).

The language of the opinions themselves is instructive as to the reasons behind this common-law tradition. In *McGary*, for example, the Louisiana Supreme Court refused to allow punitive damages against the city of Lafayette despite the malicious acts of its municipal officers, who had violated an injunction by ordering the demolition of plaintiff's house. Reasoning that the officials' malice should not be attributed to the taxpaying citizens of the community, the court explained its holding:

> "Those who violate the laws of their country, disregard the authority of courts of justice, and wantonly inflict injuries, certainly become thereby obnoxious to vindictive damages. These, however, can never be allowed against the innocent. Those which the plaintiff has recovered in the present case . . . , being evidently vindictive, cannot, in our opinion, be sanctioned by this court, as they are to be borne by widows, orphans, aged men and women, and strangers, who, admitting that they must repair the injury inflicted by the Mayor on the plaintiff, cannot be bound beyond that amount, which will be sufficient for her indemnification." 12 Rob., at 677.

Similarly, in *Hunt* v. *City of Boonville*, 65 Mo. 620 (1877), the Missouri Supreme Court held that a municipality could not be found liable for treble damages under a trespass statute, notwithstanding the statute's authorization of such damages against "any person." After noting the existence of "respectable authority" to the effect that municipal corporations "can not, as such, do a criminal act or a willful and malicious wrong and they cannot therefore be made liable for exemplary damages," *id.*, at 624, the court continued:

> "[T]he relation which the officers of a municipal corporation sustain toward the citizens thereof for whom they act, is not in all respects identical with that existing be-

> tween the stockholders of a private corporation and their agents; and there is not the same reason for holding municipal corporations, engaged in the performance of acts for the public benefit, liable for the willful or malicious acts of its officers, as there is in the case of private corporations." *Id.*, at 625.

Of particular relevance to our current inquiry is *Order of Hermits of St. Augustine* v. *County of Philadelphia, supra,* which involved a Pennsylvania statute that authorized property owners within the county to bring damages actions against it for the destruction of their property by mob violence.[22] The court observed that the "persons" against whom the statute authorized recovery included the county corporation, and it held that plaintiffs were entitled to compensatory damages as part of the county's duty to make reparation to its citizens for injuries sustained as a result of lawless violence. While noting that punitive damages would have been available against the rioters themselves, the court nonetheless held that such exemplary damages were not recoverable against the county.

The rationale of these decisions was reiterated in numerous other common-law jurisdictions. *E. g., Wilson* v. *City of Wheeling,* 19 W. Va. 323, 350 (1882) ("The city is not a spoliator and should not be visited by vindictive or punitive damages"); *City of Chicago* v. *Langlass,* 52 Ill., at 259 ("But in fixing the compensation the jury have no right to give vindictive or punitive damages, against a municipal corporation. Against such a body they should only be compensatory, and not by way of punishment"); *City Council of Montgomery* v. *Gilmer & Taylor,* 33 Ala., at 132 ("The [municipal] corporation can not, upon any principle known

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[22] This statute is strikingly similar to the Sherman amendment to the Civil Rights Act of 1871, discussed *infra.* See Cong. Globe, 42d Cong., 1st Sess., 663, 749, 755 (1871) (Globe). The Pennsylvania statute was cited as a model during the legislative debates. *Id.,* at 777 (Sen. Frelinghuysen).

to us, be responsible for the malice of its officers towards the plaintiffs"). In general, courts viewed punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised. The courts readily distinguished between liability to compensate for injuries inflicted by a municipality's officers and agents, and vindictive damages appropriate as punishment for the bad-faith conduct of those same officers and agents. Compensation was an obligation properly shared by the municipality itself, whereas punishment properly applied only to the actual wrongdoers. The courts thus protected the public from unjust punishment, and the municipalities from undue fiscal constraints.[23]

Given that municipal immunity from punitive damages was well established at common law by 1871, we proceed on the familiar assumption that "Congress would have specifically so provided had it wished to abolish the doctrine." *Pierson* v. *Ray,* 386 U. S., at 555. Nothing in the legislative debates suggests that, in enacting § 1 of the Civil Rights Act,

[23] In the face of this history, respondent acknowledged at oral argument that in 1871 the common law did not contemplate the imposition of punitive damages against municipalities, but contended that the functional equivalent was achieved through the *respondeat superior* liability to which municipalities were, and still are, exposed. Tr. of Oral Arg. 29. Apparently, respondent argues that because municipalities were liable for the conduct of their agents, including conduct over which their executive officials had no actual responsibility or knowledge, it would have been unnecessary to expose them to punitive damages with regard to the same conduct. This argument, however, does not alter the persuasiveness of the prevalent common-law immunity; if anything, it goes to the soundness of the common-law defense at that time and now. Moreover, the *respondeat superior* doctrine did not cover all instances in which the municipality could assert immunity in its own capacity. *E. g., City Council of Montgomery* v. *Gilmer & Taylor; McGary* v. *President & Council of Lafayette.* See G. Field, Law of Damages § 80 (1876) ("[Municipal corporations] cannot, as such, be supposed capable of doing a criminal act, or a willful and malicious wrong, and therefore cannot be liable for exemplary damages . . .").

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the 42d Congress intended any such abolition. Indeed, the limited legislative history relevant to this issue suggests the opposite.

Because there was virtually no debate on § 1 of the Act, the Court has looked to Congress' treatment of the amendment to the Act introduced by Senator Sherman as indicative of congressional attitudes toward the nature and scope of municipal liability. *Monell,* 436 U. S., at 692, n. 57.[24] Initially, it is significant that the Sherman amendment as proposed contemplated the award of no more than compensatory damages for injuries inflicted by mob violence. The amendment would not have exposed municipal governments to punitive damages; rather, it proposed that municipalities "shall be liable *to pay full compensation* to the person or persons damnified" by mob violence. Globe, at 749, 755 (emphasis added).[25]

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[24] The legislative background of § 1983 is exhaustively addressed in *Monell,* 436 U. S., at 664–695. Briefly, the Sherman amendment was a proposed addition to the statute, and was defended by its sponsor as an attempt to enlist the aid of persons of property in suppressing the lawless violence of the Ku Klux Klan. See Globe, at 760–761. In its initial form, the amendment imposed liability on any inhabitant of a municipality for damage inflicted by persons "riotously and tumultuously assembled." *Id.,* at 663. That version was passed by the Senate but overwhelmingly rejected by the House. *Id.,* at 704–705, 725. A first conference substitute was then proposed. *Id.,* at 749, 755. The substitute version placed liability directly on the local government, regardless of whether the municipality had had notice of the impending riot, had made reasonable efforts to stop it, or was even authorized under state law to exercise police power. See *Monell,* 436 U. S., at 668. The conference substitute also created a lien which ran against "all moneys in the treasury," thus permitting execution against public property such as jails and courthouses. It was generally understood that the extent of the proposed public liability went beyond what was contemplated under § 1. After much debate, the amendment passed the Senate but was again rejected by the House. Globe, at 779, 800–801. It is from the debate over the first conference substitute that we glean "clue[s]" as to Congress' views on municipal liability. *Monell,* 436 U. S., at 692, n. 57.

[25] The same language appears in the original version of the amendment,

That the exclusion of punitive damages was no oversight was confirmed by Representative Butler, one of the amendment's chief supporters, when he responded to a critical inquiry on the floor of the House:

> "The invalidity of the gentleman's argument is that he looks upon [the amendment] as a punishment for the county. Now, we do not look upon it as a punishment at all. It is a mutual insurance. We are there a community, and if there is any wrong done by our community, or by the inhabitants of our community, we will indemnify the injured party for that wrong . . . ." *Id.*, at 792.

We doubt that a Congress having no intention of permitting punitive awards against municipalities in the explicit context of the Sherman amendment would have meant to expose municipal bodies to such novel liability *sub silentio* under § 1 of the Act.

Notwithstanding the compensatory focus of the amendment, its proposed extension of municipal liability met substantial resistance in Congress, resulting in its defeat on two separate occasions.[26] In addition to the constitutional reservations broached by legislators, which the Court has discussed at some length in *Monell,* 436 U. S., at 669–683, Members of both Chambers also expressed more practical objections. Notably, supporters as well as opponents of § 1 voiced concern that this extension of public liability might place an unmanageable financial burden on local governments.[27] Legislators

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Globe, at 663, although there it was the inhabitants and not the government that were made liable. See n. 24, *supra.*

[26] See *ibid.* In its final version, the amendment abandoned all specific references to municipal liability. Globe, at 804. See *Monell,* 436 U. S., at 668–669. See generally, Avins, The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment, 11 St. Louis U. L. J. 331, 368–376 (1967).

[27] Representative Blair, a strong proponent of § 1, argued that the obligations imposed by the amendment might "utterly destroy the munic-

also expressed apprehension that innocent taxpayers would be unfairly punished for the deeds of persons over whom they had neither knowledge nor control.[28] Admittedly, both these objections were raised with particular reference to the threat of the expansive municipal liability embodied in the Sherman amendment. The two concerns are not without relevance to the present inquiry, however, in that they reflect policy considerations similar to those relied upon by the common-law courts in rejecting punitive damages awards. We see no reason to believe that Congress' opposition to punishing innocent taxpayers and bankrupting local governments would have been less applicable with regard to the novel specter of punitive damages against municipalities.

B

Finding no evidence that Congress intended to disturb the settled common-law immunity, we now must determine whether considerations of public policy dictate a contrary result. In doing so, we examine the objectives underlying punitive damages in general, and their relationship to the goals of § 1983.

Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor

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ipality." Globe, at 795. Representative Bingham, who had drafted § 1 of the Fourteenth Amendment, feared that the burden upon the local treasury under the Sherman amendment would "deprive the county of the means of administering justice." *Id.*, at 798. See also *id.*, at 762 (Sen. Stevenson); *id.*, at 763–764 (Sen. Casserly); *id.*, at 772 (Sen. Thurman); *id.*, at 789 (Rep. Kerr).

[28] Senator Stevenson declared that the amendment "undertakes to create a corporate liability for personal injury which no prudence or foresight could have prevented." *Id.*, at 762. Senator Frelinghuysen objected to the proposed liability, observing that "the town or the county has committed no crime." *Id.*, at 777. Representatives Poland and Willard also referred to the injustice of such liability, *id.*, at 791 (Rep. Willard); *id.*, at 794 (Rep. Poland). See also *id.*, at 771 (Sen. Thurman); *id.*, at 775 (Sen. Bayard); *id.*, at 788 (Rep. Kerr).

whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct. See Restatement (Second) of Torts § 908 (1979); W. Prosser, Law of Torts 9–10 (4th ed. 1971). Regarding retribution, it remains true that an award of punitive damages against a municipality "punishes" only the taxpayers, who took no part in the commission of the tort. These damages are assessed over and above the amount necessary to compensate the injured party. Thus, there is no question here of equitably distributing the losses resulting from official misconduct. Cf. *Owen* v. *City of Independence,* 445 U. S., at 657. Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.[29]

Under ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct. If a government official acts knowingly and maliciously to deprive others of their civil rights, he may become the appropriate object of the community's vindictive sentiments. See generally *Silver* v. *Cormier,* 529 F. 2d 161, 163 (CA10 1976); *Bucher* v. *Krause,* 200 F. 2d 576, 586–588 (CA7 1952), cert. denied, 345 U. S. 997 (1953). A municipality, however, can have no malice independent of the malice of its officials. Damages awarded for *punitive* purposes, therefore, are not sensibly assessed against the governmental entity itself.

To the extent that the purposes of § 1983 have any bearing on this punitive rationale, they do not alter our analysis. The Court previously has indicated that punitive damages

[29] It is perhaps possible to imagine an extreme situation where the taxpayers are directly responsible for perpetrating an outrageous abuse of constitutional rights. Nothing of that kind is presented by this case. Moreover, such an occurrence is sufficiently unlikely that we need not anticipate it here.

might be awarded in appropriate circumstances in order to punish violations of constitutional rights, *Carey* v. *Piphus,* 435 U. S. 247, 257, n. 11 (1978), but it never has suggested that punishment is as prominent a purpose under the statute as are compensation and deterrence. See, *e. g., Owen* v. *City of Independence,* 445 U. S., at 651; *Robertson* v. *Wegmann,* 436 U. S. 584, 590–591 (1978); *Carey* v. *Piphus,* 435 U. S., at 256–257. Whatever its weight, the retributive purpose is not significantly advanced, if it is advanced at all, by exposing municipalities to punitive damages.

The other major objective of punitive damages awards is to prevent future misconduct. Respondent argues vigorously that deterrence is a primary purpose of § 1983, and that because punitive awards against municipalities for the malicious conduct of their policymaking officials will induce voters to condemn official misconduct through the electoral process, the threat of such awards will deter future constitutional violations. Brief for Respondents 9–11. Respondent is correct in asserting that the deterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983. *Owen* v. *City of Independence,* 445 U. S., at 651; *Robertson* v. *Wegmann,* 436 U. S., at 591. It is in this context that the Court's prior statements contemplating punitive damages "in 'a proper' § 1983 action" should be understood. *Carlson* v. *Green,* 446 U. S. 14, 22 (1980); *Carey* v. *Piphus,* 435 U. S., at 257, n. 11. For several reasons, however, we conclude that the deterrence rationale of § 1983 does not justify making punitive damages available against municipalities.

First, it is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality. Indemnification may not be available to the municipality under local law, and even if it were, officials likely will not be able themselves to pay such sizable awards. Thus, assum-

ing, *arguendo,* that the responsible official is not impervious to shame and humiliation, the impact on the individual tortfeasor of this deterrence in the air is at best uncertain.

There also is no reason to suppose that corrective action, such as the discharge of offending officials who were appointed and the public excoriation of those who were elected, will not occur unless punitive damages are awarded against the municipality. The Court recently observed in a related context: "The more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity." *Carlson* v. *Green,* 446 U. S., at 21. This assumption is no less applicable to the electorate at large. And if additional protection is needed, the compensatory damages that are available against a municipality may themselves induce the public to vote the wrongdoers out of office.

Moreover, there is available a more effective means of deterrence. By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations.[30] In our view, this provides sufficient protection against the prospect that a public official may

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[30] A number of state statutes requiring municipal corporations to indemnify their employees for adverse judgments rendered as a result of performance of governmental duties specifically exclude indemnification for malicious or willful misconduct by the employees. *E. g.,* N. Y. Gen. Mun. Law § 50–k (3) (McKinney Supp. 1980–1981); Pa. Stat. Ann., Tit. 42, § 8550 (Purdon Supp. 1981); Cal. Gov't Code Ann. § 825 (West 1980); Conn. Gen. Stat. § 7–465 (1981); Nev. Rev. Stat. § 41.0349 (1979). See *Karas* v. *Snell,* 11 Ill. 2d 233, 142 N. E. 2d 46 (1957). See generally *Messersmith* v. *American Fidelity Co.,* 232 N. Y. 161, 165, 133 N. E. 432, 433 (1921) (Cardozo, J.) ("[N]o one shall be permitted to take advantage of his own wrong . . ."). Commentators have encouraged this development. See G. Calabresi, The Costs of Accidents 269–270 (student ed. 1970); Project, Suing the Police in Federal Court, 88 Yale L. J. 780, 818 (1979).

commit recurrent constitutional violations by reason of his office. The Court previously has found, with respect to such violations, that a damages remedy recoverable against individuals is more effective as a deterrent than the threat of damages against a government employer. *Carlson* v. *Green,* 446 U. S., at 21. We see no reason to depart from that conclusion here, especially since the imposition of additional penalties would most likely fall upon the citizen-taxpayer.

Finally, although the benefits associated with awarding punitive damages against municipalities under § 1983 are of doubtful character, the costs may be very real. In light of the Court's decision last Term in *Maine* v. *Thiboutot,* 448 U. S. 1 (1980), the § 1983 damages remedy may now be available for violations of federal statutory as well as constitutional law. But cf. *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn., ante,* p. 1. Under this expanded liability, municipalities and other units of state and local government face the possibility of having to assure compensation for persons harmed by abuses of governmental authority covering a large range of activity in everyday life. To add the burden of exposure for the malicious conduct of individual government employees may create a serious risk to the financial integrity of these governmental entities.

The Court has remarked elsewhere on the broad discretion traditionally accorded to juries in assessing the amount of punitive damages. *Electrical Workers* v. *Foust,* 442 U. S. 42, 50–51 (1979); *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323, 349–350 (1974). Because evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded,[31] the unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award. The impact of such a windfall recovery is likely to be both un-

[31] See Restatement (Second) of Torts § 908 (2) (1979); D. Dobbs, Law of Remedies § 3.9, pp. 218–219 (1973).

predictable and, at times, substantial, and we are sensitive to the possible strain on local treasuries and therefore on services available to the public at large.[32] Absent a compelling reason for approving such an award, not present here, we deem it unwise to inflict the risk.

IV

In sum, we find that considerations of history and policy do not support exposing a municipality to punitive damages for the bad-faith actions of its officials. Because absolute immunity from such damages obtained at common law and was undisturbed by the 42d Congress, and because that immunity is compatible with both the purposes of § 1983 and general principles of public policy, we hold that a municipality is immune from punitive damages under 42 U. S. C. § 1983. Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

The Court today considers and decides a challenge to the District Court's jury instructions, even though petitioners failed to object to the instructions in a timely manner, as required by Rule 51 of the Federal Rules of Civil Procedure. Because this departure from Rule 51 is unprecedented and unwarranted, I respectfully dissent.

Respondents filed suit against petitioners in Federal District Court under 42 U. S. C. § 1983, alleging violations of their

[32] The case at bar appears to be an example of undue and substantial impact, since the jury award of $200,000 was more than twice the total amount of punitive damages assessed against all the defendant city officials individually. In reducing the award, the District Judge said that this verdict "is excessive, against the weight of the evidence, and fails to comport with substantial justice," and that it "was both unreasonable and devoid of firm support in the record." App. to Pet. for Cert. B–10.

First Amendment rights. In their complaint and amended complaint, respondents prayed for punitive damages, as well as other relief. App. 11, 12, 13, 24, 25, 26. Respondents submitted a pretrial memorandum on the issue of punitive damages and, during trial, submitted an additional memorandum on the availability of punitive damages against a municipal corporation, in response to the court's request to both parties. Brief in Opposition 8. At the close of the evidence, the court instructed the jury explicitly and in detail that it could impose punitive damages against petitioners if they had acted maliciously, wantonly, or oppressively. App. 57–58. After giving the instruction, the Court summoned the attorneys to the side bar, inviting objections or suggestions concerning the instructions. Record Appendix (R. A.) 591–A to 591–B. For reasons not revealed in the record, counsel for petitioners expressly declined to make any such objection or suggestion.[1] *Id.*, at 591–B. The jury returned a verdict in favor of respondents, and awarded substantial punitive damages against each of the petitioners, including the city of Newport.

Petitioners moved for judgment notwithstanding the verdict, and for a new trial, arguing, *inter alia,* that punitive damages may not be imposed against a municipality under § 1983. The court denied the motion, stating:

> "None of these legal arguments were ever raised at trial. In fact, the defendants failed to request that any of their current legal interpretations be inserted into the jury instructions and never objected to any aspect of that charge before or after the jury retired. . . . Therefore, defendants' untimely objections are not the proper basis for this post-trial motion." App. to Pet. for Cert. B–2 to B–3 (citing Fed. Rule Civ. Proc. 51).

Petitioners' failure to object to the punitive damages instruc-

[1] In contrast, counsel for respondents made two objections to the instructions, which the Court indicated it would consider before the jury retired. R. A. 591–A to 591–B.

tion thus precluded them from raising the issue on post-trial motions. Not content to "rest its decision on this procedural ground *alone*," *id.*, at B–3 (emphasis added), however, the court also held, in the alternative, that its punitive damages instruction was correct on the merits. *Id.*, at B–7 to B–10.

On appeal to the Court of Appeals for the First Circuit, the court stated that petitioners' allegation of error in the punitive damages instruction

> "is flawed by the failure to object to the charge at trial. *See* Fed. R. Civ. P. 51. We may overlook a failure of this nature, but only where the error is plain and 'has seriously affected the fairness, integrity or public reputation of a judicial proceeding.'" 626 F. 2d 1060, 1067 (1980), quoting *Morris* v. *Travisono,* 528 F. 2d 856, 859 (CA1 1976) (footnote and citation omitted).

The Court of Appeals then briefly canvassed the relevant precedents, stated that the law concerning punitive damages against municipalities under § 1983 is in a "state of flux," 626 F. 2d, at 1067, and concluded: "[W]e would be hard-pressed to say that the trial judge's punitive damages instruction was plain error. Nor is this a case containing such 'peculiar circumstances [to warrant, noticing error] to prevent a clear miscarriage of justice.'" *Id.*, at 1067–1068, quoting *Nimrod* v. *Sylvester,* 369 F. 2d 870, 873 (CA1 1966) (citation omitted; brackets in original).

Respondents argue before this Court that the decision of the Court of Appeals should be affirmed, because petitioners failed to object to the punitive damages instruction.[2] They

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[2] Respondents also argue, on the merits, that the punitive damages instruction was correct. Because I conclude that the Court of Appeals should be affirmed on a procedural ground, I need not consider this additional argument, except to observe that the Court's treatment of it may well reflect the absence of full consideration of the punitive damages question by the court below.

The Court thus relies on 19th-century case law for the proposition that municipalities may not be held liable for punitive damages, without dis-

rely on Federal Rule of Civil Procedure 51, which states in relevant part: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict."

Rule 51 could not be expressed more clearly. Cases too numerous to list have held that failure to object to proposed jury instructions in a timely manner in accordance with Rule 51 precludes appellate review.[3] Rule 51 serves an important function in ensuring orderly judicial administration and fairness to the parties. The trial judge is thereby informed in precise terms of any objections to proposed instructions, and thus is given "an opportunity upon second thought, and before it is too late, to correct any inadvertent or erroneous failure to charge." *Marshall* v. *Nugent,* 222 F. 2d 604, 615 (CA1 1955). Moreover, the Rule prevents litigants from making the tactical decision not to object to instructions at trial in order to preserve a ground for appeal. In light of the significant purposes and "uncompromising language," *ante,* at 255, of Rule 51, courts should not depart lightly from its strictures.

Nevertheless, like other procedural rules, Rule 51 is susceptible to flexible interpretation when strictly necessary to

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tinguishing between the common situation in which municipal liability is predicated on a theory of *respondeat superior,* and the more unusual situation in which the violation is committed in accordance with official governmental policy. See *ante,* at 259–263. Only in the latter situation have we held that a municipality may be sued under § 1983, *Monell* v. *New York City Dept. of Social Services,* 436 U. S. 658, 690–691 (1978). It is in the latter context that the Court's cited precedent is least relevant, and that its concern for "blameless or unknowing taxpayers," *ante,* at 267, is least compelling. Indeed, when the elected representatives of the people adopt a municipal policy that violates the Constitution, it seems perfectly reasonable to impose punitive damages on those ultimately responsible for the policy—the citizens.

[3] See, *e. g.,* cases cited in 5A J. Moore & J. Lucas, Moore's Federal Practice ¶ 51.04, pp. 51–9 to 51–18, n. 3 (1980); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2553, p. 639, nn. 51–52 (1971).

avoid a clear miscarriage of justice. Cf. *Wood* v. *Georgia*, 450 U. S. 261, 265, n. 5 (1981); *Carlson* v. *Green*, 446 U. S. 14, 17, n. 2 (1980); *Hormel* v. *Helvering*, 312 U. S. 552, 557 (1941).[4] Accordingly, the Courts of Appeals have developed a "plain error" doctrine to deal with certain unchallenged jury instructions so contrary to law as to be manifestly unjust. Whatever the proper scope of such a doctrine,[5] courts and commentators uniformly agree that it should be applied only in exceptional circumstances. As the Court of Appeals for the First Circuit has noted: " 'If there is to be a plain error exception to Rule 51 at all, it should be confined to the exceptional case where the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings.' " *Morris* v. *Travisono, supra,* at 859, quoting 9 C. Wright & A. Miller, Federal Practice and Procedure § 2558, p. 675 (1971). This was the standard applied by the Court of Appeals below. 626 F. 2d, at 1067.

The Court states that the "problem with" respondents' argument that petitioners are barred from raising the punitive damages issue "is that the District Court in the first in-

[4] This Court has considered issues not raised in the courts below only in "exceptional cases or particular circumstances . . . where injustice might otherwise result." *Hormel* v. *Helvering*, 312 U. S., at 557. Thus, in *Wood* v. *Georgia* the issue of attorney conflict-of-interest could scarcely have been raised by the attorney whose conflict was under challenge. 450 U. S., at 265, n. 5. In *Carlson* v. *Green*, both parties consented to waiver of the procedural default, and the issue was closely related to the other main question in the case. Thus, fairness to the parties and sound judicial administration were promoted by the Court's decision to reach the issue. 446 U. S., at 17, n. 2.

[5] The Court declines to express any opinion on the plain-error doctrine as it has been applied by the Court of Appeals. *Ante,* at 257, n. 16. It is difficult to understand how the Court can purport to avoid this question, when it vacates a judgment predicated squarely on that doctrine. Nevertheless, I will join with the Court in leaving open the issue of the scope of exceptions to Rule 51, if any, to another day. For the purpose of this opinion, it is sufficient to conclude that exceptions to Rule 51 are no broader than those recognized by the Court of Appeals.

stance declined to accept it." *Ante,* at 255. But the District Court did not reject respondents' argument; on the contrary, it expressly held that petitioners' objections to the jury instructions were "untimely" under Rule 51, and therefore were "not the proper basis" for post-trial challenge. App. to Pet. for Cert. B–3. Its prudential decision to discuss the merits as well does not detract from this holding.[6] As the Court of Appeals held, this procedural ground is sufficient to compel affirmance in the absence of a finding of plain error constituting manifest injustice. Petitioners themselves admit that the punitive damages question may be reviewed only under a plain-error standard. Brief for Petitioners 27.

The Court today frankly admits that the instruction was not plain error, noting that the governing principles of law are "currently in a state of evolving definition and uncertainty." *Ante,* at 256. Nevertheless, it vacates the Court of Appeals' judgment. Such a vacating *necessarily implies* that the Court of Appeals' treatment of the procedural question was in error, but the Court provides not a hint as to what standard the Court of Appeals should have applied.[7] Indeed, the Court

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[6] It is not uncommon for courts to reach the merits as an alternative ground for decision on an issue otherwise unreviewable under Rule 51, either out of an excess of caution or as part of a plain-error inquiry. See, *e. g., Kropp* v. *Ziebarth,* 601 F. 2d 1348, 1355–1356 (CA8 1979); *Mid-America Food Service, Inc.* v. *ARA Services, Inc.,* 578 F. 2d 691, 695–700 (CA8 1978); *Bilancia* v. *General Motors Corp.,* 538 F. 2d 621, 623 (CA4 1976). Surely the Court does not mean to suggest that a party may obtain appellate review of an unchallenged jury instruction merely because the court offered such alternative grounds for decision.

[7] In effect, without defining or explaining it, the Court has carved out an expansive exception to the requirements of Rule 51. I suspect that the Court has not considered the broad repercussions of its treatment of the procedural default in this case, or the incongruity of its result in light of parallel procedural requirements in the criminal area. The Federal Rules of Criminal Procedure, which contain a provision—similar to Rule 51—that "[n]o party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider

does not even state in so many words that the Court of Appeals erred, much less explain why.

The Court does assert that under the "special circumstances of this case" it would be "peculiarly inapt" to confine our review to the plain-error standard employed below. It explains that the issue in this case is "novel," and that it "appears likely to recur." *Ante,* at 256, 257. But *most* of the issues before this Court are novel and likely to recur: that is why they are considered worthy of certiorari. And to the extent issues are novel, it behooves us to grant certiorari in cases where there has been full consideration of the issues by the courts below, rather than cursory treatment under a plain-error standard.

The Court also suggests that this case is somehow "special" because the issue "was squarely presented and decided on a complete record by the court of first resort, was argued by both sides to the Court of Appeals, and has been fully briefed before this Court." *Ante,* at 257. But these factors are present whenever the District Court reconsiders unchallenged jury instructions on the merits as an alternative holding, the

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its verdict," Fed. Rule Crim. Proc. 30, also contain another provision: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. Rule Crim. Proc. 52 (b). The absence of a similar provision in the Civil Rules suggests that review of unchallenged jury instructions is intended to be more restrictive under the Civil than under the Criminal Rules. The Court's conclusion that petitioners' claim in this civil case should be heard despite the absence of plain error thus inverts the Rules, in violation of their spirit as well as their letter.

Similarly, certain procedural defaults in state and federal criminal trials preclude federal habeas relief in the absence of "cause" and "prejudice." See *Wainwright* v. *Sykes,* 433 U. S. 72, 90–91 (1977); *Davis* v. *United States,* 411 U. S. 233, 242–245 (1973). The Court's conclusion that petitioners' claim should be heard despite the absence of any claim of "cause" and "prejudice" thus suggests that the courts should be stricter in enforcing procedural rules against prisoners facing incarceration than against civil defendants facing money judgments. The Court's priorities seem backwards to me.

Court of Appeals affirms on a plain-error standard, and this Court grants certiorari. See n. 6, *supra*. In short, I see the circumstances of this case as anything but "special."

Applying settled principles, I conclude that the Court of Appeals was correct to affirm the District Court in this case. The jury instruction, as the Court admits, did not constitute "plain error." Moreover, as the Court of Appeals held, failure to review the instruction would not cause a clear miscarriage of justice, any more than would failure to review any other unchallenged jury instruction. There is no reason to treat punitive damages instructions differently from other instructions for Rule 51 purposes. See *Whiting* v. *Jackson State University*, 616 F. 2d 116, 126–127 (CA5 1980) (no timely objection having been made, court's failure to give punitive damages instruction upheld except in exceptional cases); *Mid-America Food Service, Inc.* v. *ARA Services, Inc.*, 578 F. 2d 691 (CA8 1978) (no timely objection having been made, punitive damages instruction upheld in absence of plain error). Nor is the city of Newport entitled to special treatment by virtue of its governmental status. Cf. *Morris* v. *Travisono*, 528 F. 2d, at 859 (failure of state correctional officers in § 1983 suit to object to jury instructions not excused, even though the instructions directed the jury to apply a harsher constitutional standard than had been established by precedent).

Indeed, I consider this a peculiarly *inapt* case to disregard petitioners' procedural default. There would be no injustice whatsoever in adhering to the Rule in this case. Petitioners were given clear notice that punitive damages would be an issue in the case; the jury instructions were unambiguous; petitioners had ample opportunity to object; they failed to do so, without offering any reason or excuse.[8] Whether their

[8] Petitioners have apparently abandoned their argument that the lack of a developed legal doctrine on municipal liability under § 1983 "mitigates the error" of their trial counsel. Pet. for Cert. 9.

default was negligent or tactical, they have no cause now to complain. If these petitioners' default is to be excused, whose should not? If Rule 51 is to be disregarded in this case, when should it be enforced?

I dissent.

HAIG, SECRETARY OF STATE *v.* AGEE

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

No. 80–83. Argued January 14, 1981—Decided June 29, 1981

Respondent, an American citizen and a former employee of the Central Intelligence Agency, announced a campaign "to expose CIA officers and agents and to take the measures necessary to drive them out of the countries where they are operating." He then engaged in activities abroad that have resulted in identifications of alleged undercover CIA agents and intelligence sources in foreign countries. Because of these activities the Secretary of State revoked respondent's passport, explaining that the revocation was based on a regulation authorizing revocation of a passport where the Secretary determines that an American citizen's activities abroad "are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." The notice also advised respondent of his right to an administrative hearing. Respondent filed suit against the Secretary in Federal District Court, seeking declaratory and injunctive relief and alleging that the regulation invoked by the Secretary has not been authorized by Congress and is impermissibly overbroad; that the passport revocation violated respondent's freedom to travel and his First Amendment right to criticize Government policies; and that the failure to accord him a prerevocation hearing violated his Fifth Amendment right to procedural due process. Granting summary judgment for respondent and ordering the Secretary to restore respondent's passport, the District Court held that the regulation exceeded the Secretary's power under the Passport Act of 1926, which authorizes the Secretary to "grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States . . . under such rules as the President shall designate and prescribe . . . ." The Court of Appeals affirmed, holding that the Secretary was required to show that Congress had authorized the regulation either by an express delegation or by implied approval of a "substantial and consistent" administrative practice, and that no such authority had been shown.

Held: The 1926 Act authorizes the revocation of respondent's passport pursuant to the policy announced by the challenged regulation, such

policy being "sufficiently substantial and consistent" to compel the conclusion that Congress has approved it; and the regulation is constitutional as applied. Pp. 289–310.

(a) Although the Act does not in express terms authorize the Secretary to revoke a passport or deny a passport application, neither does it expressly limit those powers. It is beyond dispute that he has the power to deny a passport for reasons not specified in the statutes, and, as respondent concedes, if the Secretary may deny a passport application for a certain reason, he may revoke a passport on the same ground. Pp. 289–291.

(b) In light of the broad rulemaking authority granted in the Act, the consistent administrative construction of it must be followed by the courts, absent compelling indications that such construction is wrong. This is especially so in light of the fact that the statute deals with foreign policy and national security, where congressional silence is not to be equated with disapproval. Pp. 291–292.

(c) Absent evidence of any legislative intent to repudiate the consistent administrative construction of the prior and similar 1856 Passport Act as preserving the nonstatutory authority of the President and Secretary to withhold passports on national security and foreign policy grounds, it must be concluded that Congress in enacting the 1926 Act adopted such construction. Moreover, the Executive has consistently construed the 1926 Act to work no change in prior practice. Pp. 292–300.

(d) A 1978 statute making it unlawful to travel abroad without a passport even in peacetime and a 1978 amendment to the 1926 Act providing that "[u]nless authorized by law," in the absence of war, armed hostilities, or imminent danger to travelers, a passport may not be geographically restricted, are weighty evidence of congressional approval of the Secretary's interpretation of his authority to revoke passports, particularly as set forth in the challenged regulation. Pp. 300–301.

(e) An administrative policy or practice may be consistent even though the occasions for invoking it are limited. Although a pattern of actual enforcement is one indicator of Executive policy, it suffices that the Executive has openly asserted the power at issue. *Kent* v. *Dulles*, 357 U. S. 116, distinguished. Pp. 301–303.

(f) The protection accorded beliefs standing alone is very different from the protection accorded conduct. Here, beliefs and speech are only part of respondent's campaign, which presents a serious danger to American officials abroad and to the national security. Pp. 304–306.

(g) In light of the express language in the challenged regulation,

which permits revocation of a passport only in cases involving likelihood of "serious damage" to national security or foreign policy, respondent's constitutional claims are without merit. The right to hold a passport is subordinate to national security and foreign policy considerations, and is subject to reasonable governmental regulation. Assuming, *arguendo,* that First Amendment protections reach beyond our national boundaries, respondent's First Amendment claim is without foundation. See *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 716. To the extent the revocation of respondent's passport operates to inhibit him, it is an inhibition of *action,* rather than of speech. And on the record of this case, the Government is not required to hold a prerevocation hearing, since where there is a substantial likelihood of "serious damage" to national security or foreign policy as the result of a passport holder's activities abroad, the Government may take action to ensure that the holder may not exploit the United States' sponsorship of his travels. The Constitution's due process guarantees call for no more than what was accorded here: a statement of reasons and an opportunity for a prompt postrevocation hearing. Pp. 306–310.

203 U. S. App. D. C. 46, 629 F. 2d 80, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post,* p. 310. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. 310.

Solicitor General McCree argued the cause for petitioner. With him on the briefs were *Assistant Attorney General Daniel, Deputy Solicitor General Geller, Andrew J. Levander, Leonard Schaitman, Michael F. Hertz,* and *William T. Lake.*

Melvin L. Wulf argued the cause and filed a brief for respondent.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented is whether the President, acting through the Secretary of State, has authority to revoke a passport on the ground that the holder's activities in foreign countries are causing or are likely to cause serious damage to the national security or foreign policy of the United States.

I

A

Philip Agee, an American citizen, currently resides in West Germany.[1] From 1957 to 1968, he was employed by the Central Intelligence Agency. He held key positions in the division of the Agency that is responsible for covert intelligence gathering in foreign countries. In the course of his duties at the Agency, Agee received training in clandestine operations, including the methods used to protect the identities of intelligence employees and sources of the United States overseas. He served in undercover assignments abroad and came to know many Government employees and other persons supplying information to the United States. The relationships of many of these people to our Government are highly confidential; many are still engaged in intelligence gathering.

In 1974, Agee called a press conference in London to announce his "campaign to fight the United States CIA wherever it is operating." He declared his intent "to expose CIA officers and agents and to take the measures necessary to drive them out of the countries where they are operating." [2]

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[1] Agee has been deported from Great Britain, France, and the Netherlands. Dirty Work: The CIA in Western Europe 286–300 (P. Agee & L. Wolf eds. 1978).

[2] The 1974 London statement was as follows:

"Today, I announced a new campaign to fight the United States CIA wherever it is operating. This campaign will have two main functions: First, to expose CIA officers and agents and to take the measures necessary to drive them out of the countries where they are operating; secondly, to seek within the United States to have the CIA abolished.

"The effort to identify CIA people in foreign countries has been going on for some time. . . . (Today's) list was compiled by a small group of Mexican comrades whom I trained to follow the comings and goings of CIA people before I left Mexico City.

"Similar lists of CIA people in other countries are already being com-

Since 1974, Agee has, by his own assertion, devoted consistent effort to that program, and he has traveled extensively in other countries in order to carry it out. To identify CIA personnel in a particular country, Agee goes to the target country and consults sources in local diplomatic circles whom he knows from his prior service in the United States Government. He recruits collaborators and trains them in clandestine techniques designed to expose the "cover" of CIA employees and sources. Agee and his collaborators have repeatedly and publicly identified individuals and organizations located in foreign countries as undercover CIA agents, employees, or sources.[3] The record reveals that the identifications divulge classified information,[4] violate Agee's express contract not to make any public statements about Agency matters without prior clearance by the Agency,[5] have prej-

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piled and will be announced when appropriate. We invite participation in this campaign from all those who strive for social justice and national dignity." App. to Pet. for Cert. 107a.

See also P. Agee, Exposing the CIA, App. in No. 80–1125 (CADC), pp. 76–79 (hereinafter CA App.).

[3] In a series of incidents between 1974 and 1978, and in two books published in the same period, Agee has identified hundreds of persons as CIA personnel. See App. to Pet. for Cert. 108a–111a; see generally P. Agee, Inside the Company: CIA Diary (1975); Dirty Work: The CIA in Western Europe 17–43 (P. Agee & L. Wolf eds. 1978), CA App. 66–79. See also P. Agee, Introduction, in Dirty Work 2: The CIA in Africa (E. Ray, W. Schapp, K. Van Meter, & L. Wolf eds. 1979). The latter two books contain "Who's Where" sections listing the names of alleged CIA employees on a country-by-country basis and "Who's Who" sections containing detailed biographical information on all such persons.

[4] See Affidavits of CIA Deputy Director for Operations, App. to Pet. for Cert. 112a, 114a; see also n. 5, *infra*.

[5] As a condition for his employment by the Agency, Agee contracted that "[i]n consideration of my employment by CIA I undertake not to publish or to participate in the publication of any information or material relating to the Agency, its activities or intelligence activities generally,

udiced the ability of the United States to obtain intelligence,[6] and have been followed by episodes of violence against the persons and organizations identified.[7]

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either during or after the term of my employment by the Agency without specific prior approval by the Agency." CA App. 65.

This language is identical to the clause which we construed in *Snepp* v. *United States,* 444 U. S. 507, 508 (1980).

In a separate lawsuit wherein the Government sought to enforce Agee's agreement, the District Court held that "Agee has shown a flagrant disregard for the requirements of the Secrecy Agreement." The court noted: "There is no dispute that Agee has openly flouted his refusal to submit writings and speeches to the CIA for prior approval, and has expressed a clear intention to reveal classified information and bring harm to the agency and its personnel." *Agee* v. *Central Intelligence Agency,* 500 F. Supp. 506, 509 (DC 1980) (footnote omitted).

[6] Affidavit of CIA Deputy Director for Operations, App. to Pet. for Cert. 112a.

[7] In December 1975, Richard Welch was murdered in Greece after the publication of an article in an English-language newspaper in Athens naming Welch as CIA Chief of Station. CA App. 92. In July 1980, two days after a Jamaica press conference at which Agee's principal collaborator identified Richard Kinsman as CIA Chief of Station in Jamaica, Kinsman's house was strafed with automatic gunfire. Four days after the same press conference, three men approached the Jamacia home of another man similarly identified as an Agency officer. Police challenged the men and gunfire was exchanged. Affidavit of United States Ambassador to Jamaica, App. to Pet. for Cert. 125a–127a. In January 1981, two American officials of the American Institute for Free Labor Development, previously identified as a CIA front by Agee and discussed extensively in Agee's book Inside the Company: CIA Diary, were assassinated in El Salvador. N. Y. Times, Jan. 15, 1981, p. A10, cols. 4–5; *id.,* Jan. 5, 1981, p. A1, col. 6, p. A10, cols. 3–6.

The Secretary does not assert that Agee has specifically incited anyone to commit murder. However, affidavits of the CIA's Deputy Director for Operations set out and support his judgment that Agee's purported identifications are "thinly-veiled invitations to violence," that "Agee's actions could, in today's circumstances, result in someone's death," and that Agee's conduct has "markedly increased the likelihood of individuals so identified being the victims of violence." App. to Pet. for Cert. 111a, 116a–118a. One of those affidavits also shows that the ultimate effectiveness of Agee's program depends on activities of hostile foreign

In December 1979, the Secretary of State revoked Agee's passport and delivered an explanatory notice to Agee in West Germany. The notice states in part:

> "The Department's action is predicated upon a determination made by the Secretary under the provisions of [22 CFR] Section 51.70 (b)(4) that your activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States. The reasons for the Secretary's determination are, in summary, as follows: Since the early 1970's it has been your stated intention to conduct a continuous campaign to disrupt the intelligence operations of the United States. In carrying out that campaign you have travelled in various countries (including, among others, Mexico, the United Kingdom, Denmark, Jamaica, Cuba, and Germany), and your activities in those countries have caused serious damage to the national security and foreign policy of the United States. Your stated intention to continue such activities threatens additional damage of the same kind." [8]

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groups, and that such groups can be expected to engage in physical surveillance, harassment, kidnaping, and, in extreme cases, murder of United States officials abroad. *Id.*, at 116a–117a.

[8] *Id.*, at 120a. Both the District Court and the Court of Appeals suggested that the immediate impetus for the passport revocation may have been that Agee's activities took on special significance in light of the crisis following the seizure of the American Embassy in Iran on November 4, 1979. *Agee* v. *Vance*, 483 F. Supp. 729 (DC 1980); *Agee* v. *Muskie*, 203 U. S. App. D. C. 46, 47, 629 F. 2d 80, 81 (1980). The captors held more than 50 United States citizens, many of whom were diplomats and some of whom the captors alleged to be CIA agents. Government affidavits show that Agee made contact with the captors, urged them to demand certain CIA documents, and offered to travel to Iran to analyze the documents. App. to Pet. for Cert. 117a; N. Y. Times, Dec. 24, 1979, p. 6, col. 5. A Government affidavit also mentions, but does not vouch for the accuracy of, an earlier report that Agee had been invited to travel to Iran in order to participate in a "Revolutionary Tribunal" to pass judgment on those hostages. App. to Pet. for Cert. 116a–117a.

The notice also advised Agee of his right to an administrative hearing [9] and offered to hold such a hearing in West Germany on 5 days' notice.

Agee at once filed suit against the Secretary.[10] He alleged that the regulation invoked by the Secretary, 22 CFR § 51.70 (b)(4) (1980), has not been authorized by Congress and is invalid; that the regulation is impermissibly overbroad; that the revocation prior to a hearing violated his Fifth Amendment right to procedural due process; and that the revocation violated a Fifth Amendment liberty interest in a right to travel and a First Amendment right to criticize Government policies. He sought declaratory and injunctive relief, and he moved for summary judgment on the question of the authority to promulgate the regulation and on the constitutional claims. For purposes of that motion, Agee conceded the Secretary's factual averments [11] and his claim that Agee's activities were causing or were likely to cause serious damage to the national security or foreign policy of the United States.[12] The District Court held that the regulation exceeded the statutory powers of the Secretary under the Passport Act of 1926, 22 U. S. C. § 211a,[13] granted summary

[9] See 22 CFR §§ 51.80–51.89 (1980).

[10] Agee made no effort to exhaust administrative remedies. The Secretary initially defended on this ground. Tr. 5–6 (Jan. 3, 1980). However, after Agee conceded that his activities are causing or are likely to cause serious damage to the national security (see n. 11, *infra*), the Secretary did not continue to rely on failure to exhaust available administrative remedies. Tr. 17 (Jan. 3, 1980).

[11] Agee's counsel certified that "[t]here aren't any factual disputes in the case" and stated that for the purposes of the motion "I would concede any charge [the Government] want[s] to make against him." *Id.*, at 2, 13. See also Secretary's Statement of Undisputed Material Facts, CA App. 35. The Secretary made clear that the Government's affidavits were "an effort to establish the kinds of things which would have been established through the administrative process if Mr. Agee had proceeded in that direction . . . ." Tr. 8 (Jan. 29, 1980).

[12] 483 F. Supp., at 730.

[13] This statute is set out *infra,* at 290.

judgment for Agee, and ordered the Secretary to restore his passport. *Agee* v. *Vance,* 483 F. Supp. 729 (DC 1980).

B

A divided panel of the Court of Appeals affirmed. *Agee* v. *Muskie,* 203 U. S. App. D. C. 46, 629 F. 2d 80 (1980). It held that the Secretary was required to show that Congress had authorized the regulation either by an express delegation or by implied approval of a "substantial and consistent" administrative practice, *Zemel* v. *Rusk,* 381 U. S. 1, 12 (1965). The court found no express statutory authority for the revocation. It perceived only one other case of actual passport revocation under the regulation since it was promulgated and only five other instances prior to that in which passports were actually denied "even arguably for national security or foreign policy reasons." 203 U. S. App. D. C., at 51–52, 629 F. 2d, at 85–86. The Court of Appeals took note of the Secretary's reliance on "a series of statutes, regulations, proclamations, orders and advisory opinions dating back to 1856," but declined to consider those authorities, reasoning that "the criterion for establishing congressional assent by inaction is the actual imposition of sanctions and not the mere assertion of power." *Id.,* at 52–53, 629 F. 2d, at 86–87. The Court of Appeals held that its was not sufficient that "Agee's conduct may be considered by some to border on treason," since "[w]e are bound by the law as we find it." *Id.,* at 53, 629 F. 2d, at 87. The court also regarded it as material that most of the Secretary's authorities dealt with powers of the Executive Branch "during time of war or national emergency" [14]

[14] On November 14, 1979, in response to the seizure of the American Embassy in Iran (n. 8, *supra*), President Carter declared a national emergency. Exec. Order No. 12170, 3 CFR 457 (1980). The President's Order contains an express finding, pursuant to the International Emergency Economic Powers Act, 50 U. S. C. §§ 1701–1706 (1976 ed., Supp. III), "that the situation in Iran constitutes an unusual and extraordinary threat to the national security, foreign policy and economy of the United States." The

or with respect to persons "engaged in criminal conduct." [15] *Id.*, at 52, 629 F. 2d, at 86.

We granted certiorari *sub nom. Muskie* v. *Agee,* 449 U. S. 818 (1980), and stayed the judgment of the Court of Appeals until our disposition of the case on the grant of certiorari.[16]

II

The principal question before us is whether the statute authorizes the action of the Secretary pursuant to the policy announced by the challenged regulation.[17]

A

1

Although the historical background that we develop later

Secretary has never relied upon that Order to justify the passport revocation in the present case. General restrictions on travel to Iran under American passports apparently did not go into effect until several months after Agee's passport was revoked. See Exec. Order No. 12211, 3 CFR 253 (1980). Accordingly, our decision in this case does not depend on the declaration of national emergency.

[15] The Court of Appeals stressed that Agee had not been indicted. In dicta, the court expressed approval of 22 CFR § 51.70 (a)(1) (1980), which provides for withholding of a passport if the applicant is the subject of an outstanding federal felony warrant. 203 U. S. App. D. C., at 53, n. 10, 629 F. 2d, at 87, n. 10, citing *Kent* v. *Dulles,* 357 U. S. 116, 127–128 (1958).

[16] The Secretary represents that Agee's passport has been canceled and that the Secretary has provided Agee with identification papers permitting him to return to the United States. Tr. of Oral Arg. 11. The regulations at issue contain an exception for "direct return to the United States." 22 CFR § 51.70 (a) (1980).

[17] In light of our decision on this issue, we have no occasion in this case to determine the scope of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." See *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. 304, 319–320 (1936).

is important, we begin with the language of the statute. See, *e. g., Universities Research Assn.* v. *Coutu,* 450 U. S. 754, 771 (1981); *Zemel, supra,* at 7–8. The Passport Act of 1926 provides in pertinent part:

> "The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports." 22 U. S. C. § 211a (1976 ed., Supp. IV).

This language is unchanged since its original enactment in 1926.[18]

The Passport Act does not in so many words confer upon the Secretary a power to revoke a passport. Nor, for that matter, does it expressly authorize denials of passport applications.[19] Neither, however, does any statute expressly limit those powers. It is beyond dispute that the Secretary has the power to deny a passport for reasons not specified in the statutes. For example, in *Kent* v. *Dulles,* 357 U. S. 116 (1958), the Court recognized congressional acquiescence in Executive policies of refusing passports to applicants "participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States." *Id.,* at 127. In *Zemel,* the Court held that "the weightiest

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[18] In fact, the pertinent language has not been changed since 1874. See n. 26, *infra.* The sole amendment to the 1926 provision, enacted in 1978, limits the power of the Executive to impose geographic restrictions on the use of United States passports in the absence of war, armed hostilities, or imminent danger to travelers. See *infra,* at 300, and n. 48.

[19] However, by statute originally enacted in 1856, passports may not be issued to persons who do not owe allegiance to the United States. 22 U. S. C. § 212; *Kent, supra,* at 127. This provision in no way diminishes the Secretary's discretion as to eligible persons.

considerations of national security" authorized the Secretary to restrict travel to Cuba at the time of the Cuban missile crisis. 381 U. S., at 16. Agee concedes that if the Secretary may deny a passport application for a certain reason, he may revoke a passport on the same ground.[20]

2

Particularly in light of the "broad rule-making authority granted in the [1926] Act," *Zemel,* 381 U. S., at 12, a consistent administrative construction of that statute must be followed by the courts " 'unless there are compelling indications that it is wrong.' " *E. I. du Pont de Nemours & Co.* v. *Collins,* 432 U. S. 46, 55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 381 (1969); see *Zemel, supra,* at 11. This is especially so in the areas of foreign policy and national security, where congressional silence is not to be equated with congressional disapproval.[21] In *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. 304 (1936), the volatile nature of problems confronting the Executive in foreign policy and national defense was underscored:

> "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. . . . As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.' " *Id.,* at 319.

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[20] Tr. of Oral Arg. 33. That has been the Secretary's consistent construction of the statute. See 22 CFR § 51.71 (a) (1980), which provides, *inter alia,* that the grounds for denying passports set out in § 51.70 are also grounds for revoking, restricting, or limiting passports.

[21] This case does not involve a criminal prosecution; accordingly, strict construction against the Government is not required.

Applying these considerations to statutory construction, the *Zemel* Court observed:

> "[B]ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, *Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.*" 381 U. S., at 17 (emphasis supplied).

Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention. In *Harisiades* v. *Shaughnessy,* 342 U. S. 580 (1952), the Court observed that matters relating "to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Id.,* at 589; accord, *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.,* 333 U. S. 103, 111 (1948).

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A passport is, in a sense, a letter of introduction in which the issuing sovereign vouches for the bearer and requests other sovereigns to aid the bearer. 3 G. Hackworth, Digest of International Law § 268, p. 499 (1942). Very early, the Court observed:

> "[A passport] is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognised, in foreign countries, as an American citizen; and

which, by usage and the law of nations, is received as evidence of the fact." *Urtetiqui* v. *D'Arcy*, 9 Pet. 692, 698 (1835).

With the enactment of travel control legislation making a passport generally a requirement for travel abroad,[22] a passport took on certain added characteristics. Most important for present purposes, the only means by which an American can lawfully leave the country or return to it—absent a Presidentially granted exception—is with a passport. See 8 U. S. C. § 1185 (b) (1976 ed., Supp. IV). As a travel control document, a passport is both proof of identity and proof of allegiance to the United States. Even under a travel control statute, however, a passport remains in a sense a document by which the Government vouches for the bearer and for his conduct.

The history of passport controls since the earliest days of the Republic shows congressional recognition of Executive authority to withhold passports on the basis of substantial reasons of national security and foreign policy. Prior to 1856, when there was no statute on the subject, the common perception was that the issuance of a passport was committed to the sole discretion of the Executive and that the Executive would exercise this power in the interests of the national security and foreign policy of the United States.[23] This derived from the generally accepted view that foreign policy

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[22] With exceptions during the War of 1812 and the Civil War, see *infra*, at 294, n. 25, and 295, passports were not mandatory until 1918. See *infra*, at 296–297. It was not until 1978 that passports were required by statute in nonemergency peacetime. See n. 47, *infra*.

[23] In *Urtetiqui* v. *D'Arcy*, 9 Pet. 692, 699 (1835), the Court observed:

"There is no law of the United States, in any manner regulating the issuing of passports, or directing upon what evidence it may be done, or declaring their legal effect. It is understood, as matter of practice, that some evidence of citizenship is required, by the Secretary of State, before issuing a passport. This, however, is entirely discretionary with him."

was the province and responsibility of the Executive.[24] From the outset, Congress endorsed not only the underlying premise of Executive authority in the areas of foreign policy and national security, but also its specific application to the subject of passports. Early Congresses enacted statutes expressly recognizing the Executive authority with respect to passports.[25]

The first Passport Act, adopted in 1856, provided that the Secretary of State "shall be authorized to grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States . . . ." § 23, 11 Stat. 60.[26] This broad and permissive language worked no change in the power of the Executive to issue passports; nor was it intended to do so. The Act was passed to centralize passport authority in the Federal Government[27] and specifically in the Secretary of State.[28] In all other respects, the 1856 Act

"merely confirmed an authority already possessed and

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[24] See, *e. g., United States* v. *Curtiss-Wright Export Corp.,* 299 U. S., at 320–321; The Federalist No. 64, pp. 392–396 (Mentor ed. 1961).

[25] For example, the Act of Feb. 26, 1803, ch. 9, § 8, 2 Stat. 205, prohibited State Department representatives abroad from knowingly issuing passports to aliens, and the Act of Feb. 4, 1815, ch. 31, § 10, 3 Stat. 199, prohibited travel to or from enemy territory "without a passport first obtained from the Secretary of State, the Secretary of War, or other officer . . . authorized by the President of the United States, to grant the same."

[26] An 1874 amendment replaced the phrase "shall be authorized to" with "may." Rev. Stat. § 4075. We are aware of no legislative history pertinent to that change. To the extent that amendment is relevant, it supports the Secretary's position in this case; "may" expressly recognizes substantial discretion. See 23 Op. Atty. Gen. 509, 511 (1901).

[27] The main impetus for the 1856 statute was the confusion caused by state and local officials issuing passports, a relic of the colonial period. See U. S. Dept. of State, The American Passport 36–42 (1898).

[28] Senator Mason, sponsor of the bill that became the 1856 statute, stated: "[I]t was the intention of the bill to leave, all that pertains to the diplomatic service of the country . . . exclusively to the Executive, where

> exercised by the Secretary of State. This authority was ancillary to his broader authority to protect American citizens in foreign countries and was necessarily incident to his general authority to conduct the foreign affairs of the United States under the Chief Executive." Senate Committee on Government Operations, Reorganization of the Passport Functions of the Department of State, 86th Cong., 2d Sess., 13 (Comm. Print 1960).

The President and the Secretary of State consistently construed the 1856 Act to preserve their authority to withhold passports on national security and foreign policy grounds. Thus, as an emergency measure in 1861, the Secretary issued orders prohibiting persons from going abroad or entering the country without passports; denying passports to citizens who were subject to military service unless they were bonded; and absolutely denying passports to persons "on errands hostile and injurious to the peace of the country and dangerous to the Union." 3 J. Moore, A Digest of International Law 920 (1906); U. S. Dept. of State, The American Passport 49–54 (1898).[29] An 1869 opinion of Attorney General Hoar held that the granting of a passport was not "obligatory in any case." 13 Op. Atty. Gen. 89, 92. This was elaborated in 1901 in an opinion of Attorney General Knox, in which he stated:

> "Substantial reasons exist for the use by Congress of the word 'may' in connection with authority to issue passports. Circumstances are conceivable which would make it most inexpedient for the public interests for this

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we consider the Constitution has placed it." Cong. Globe, 34th Cong., 1st Sess., 1798 (1856).

[29] Despite this widely publicized Executive policy restricting passport eligibility on national security grounds, the only congressional action arguably in response to it was a statute in 1866 which re-enacted an 1856 prohibition against issuing passports to noncitizens. Act of May 30, 1866, ch. 102, 14 Stat. 54.

country to grant a passport to a citizen of the United States." 23 Op. Atty. Gen. 509, 511.

In 1903, President Theodore Roosevelt promulgated a rule providing that "[t]he Secretary of State has the right in his discretion to refuse to issue a passport, and will exercise this right towards anyone who, he has reason to believe, desires a passport to further an unlawful or improper purpose." [30] Subsequent Executive Orders issued between 1907 and 1917 cast no doubt on this position.[31] This policy was enforced in peacetime years to deny passports to citizens whose conduct abroad was "likely to embarrass the United States" [32] or who were "disturbing, or endeavoring to disturb, the relations of this country with the representatives of foreign countries." [33]

By enactment of the first travel control statute in 1918,[34]

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[30] Rules Governing the Granting and Issuing of Passports in the United States, Sept. 12, 1903, § 16, quoted in 3 J. Moore, A Digest of International Law 902 (1906).

[31] See Exec. Order No. 654 (1907); Exec. Order No. 2119–A (1915); Exec. Order No. 2362–A (1916); Exec. Order No. 2519–A (1917).

[32] 3 G. Hackworth, Digest of International Law § 268, pp. 498–499 (1942), discussing refusal of a passport to an American citizen residing in China whose promotion of "gambling and immoral houses" had developed into a scandal.

[33] 2 Papers Relating to Foreign Relations of the United States—1907, p. 1082, discussing refusal of a passport to an American citizen residing in Egypt who was slandering foreign diplomats.

[34] Act of May 22, 1918, ch. 81, §§ 1–2, 40 Stat. 559. This statute provided in pertinent part that, upon Presidential wartime proclamation, "it shall, except as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States unless he bears a valid passport."

Unlike the 1815 statute, n. 25, *supra*, which was limited in application to the then-current hostilities, the 1918 Act applied "when the United States is at war" and the President issued a proclamation. § 1, 40 Stat. 559.

Congress made clear its expectation that the Executive would curtail or prevent international travel by American citizens if it was contrary to the national security. The legislative history reveals that the principal reason for the 1918 statute was fear that "renegade Americans" would travel abroad and engage in "transference of important military information" to persons not entitled to it.[35] The 1918 statute left the power to make exceptions exclusively in the hands of the Executive, without articulating specific standards. Unless the Secretary had power to apply national security criteria in passport decisions, the purpose of the Travel Control Act would plainly have been frustrated.

Against this background, and while the 1918 provisions were still in effect, Congress enacted the Passport Act of 1926. The legislative history of the statute is sparse. However, Congress used language which is identical in pertinent part to that in the 1856 statute (*supra,* at 294), as amended,[36] and the legislative history clearly shows congressional awareness of the Executive policy.[37] There is no evidence of any intent to repudiate the longstanding administrative construction.[38] Absent such evidence, we conclude that Congress, in

[35] H. R. Rep. No. 485, 65th Cong., 2d Sess., 2 (1918). Congress focused on the case of "a United States citizen who recently returned from Europe after having, to the knowledge of our Government, done work in a neutral country for the German Government. There was strong suspicion that he came to the United States for no proper purpose. Nevertheless not only was it impossible to exclude him but it would now be impossible to prevent him from leaving the country if he saw fit to do so. The known facts in his case are not sufficient to warrant the institution of a criminal prosecution, and in any event the difficulty of securing legal evidence from the place of his activities in Europe may easily be imagined." *Id.*, at 3.

[36] See n. 26, *supra.*

[37] See Validity of Passports: Hearings on H. R. 11947 before the House Committee on Foreign Affairs, 69th Cong., 1st Sess., 5, 8, 10–11 (1926) (1926 Hearings).

[38] Besides incorporating the 1856 provision, the 1926 Act added other provisions concerning fees and maximum terms for passports. See *id.*, at

1926, adopted the longstanding administrative construction of the 1856 statute. See *Lorillard* v. *Pons*, 434 U. S. 575, 580–581 (1978).

The Executive construed the 1926 Act to work no change in prior practice and specifically interpreted it to authorize denial of a passport on grounds of national security or foreign policy. Indeed, by an unbroken line of Executive Orders,[39] regulations,[40] instructions to consular officials,[41] and notices to passport holders,[42] the President and the Department of State left no doubt that likelihood of damage to national security or foreign policy of the United States was the single most important criterion in passport decisions. The regulations are instructive. The 1952 version authorized denial of passports to citizens engaged in activities which would violate laws designed to protect the security of the United States "[i]n order to promote the national interest by assuring that the conduct of foreign relations shall be free

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2. Assistant Secretary of State Carr, whom the House Committee regarded as "more familiar than anyone else with the entire subject," explained that the only change in existing law worked by the pertinent section of the 1926 Act was to recognize authority of the Secretary of State to empower consuls, in addition to diplomatic officers, to issue passports in foreign countries. *Id.*, at 1, 11.

[39] See Exec. Order No. 4800 (1928); Exec. Order No. 5860 (1932); Exec. Order No. 7856, 3 Fed. Reg. 681 (1938).

[40] See 6 Fed. Reg. 5821, 6069–6070, 6349 (1941); 17 Fed. Reg. 8013 (1952); 22 CFR § 51.136 (1958).

[41] See, *e. g.*, U. S. Dept. of State, Abstract of Passport Laws and Precedents, Passport Office Instructions, Code No. 7.21 (Nov. 1, 1955), excluding "[p]ersons whose travel would . . . be inimical to the best interests of the United States," and "[p]ersons whose travel would endanger the security of the United States."

[42] From 1948 to 1955, the Department notified all bearers of passports that "interfere[nce] in the political affairs of foreign countries" would be taken as a ground for refusing passports and for refusing protection. U. S. Dept. of State, Information for Bearers of Passports (Jan. 1, 1948, through Jan. 15, 1955, eds.).

from unlawful interference." 17 Fed. Reg. 8013 (1952). The 1956 amendment to this regulation provided that a passport should be denied to any person whose

> "activities abroad would: (a) Violate the laws of the United States; (b) be prejudicial to the orderly conduct of foreign relations; or (c) otherwise be prejudicial to the interests of the United States." 22 CFR § 51.136 (1958).

This regulation remained in effect continuously until 1966.

This history of administrative construction was repeatedly communicated to Congress, not only by routine promulgation of Executive Orders and regulations, but also by specific presentations, including 1957 and 1966 reports by the Department of State explaining the 1956 regulation [43] and a 1960 Senate Staff Report which concluded that "the authority to issue or withhold passports has, by precedent and law, been vested in the Secretary of State as a part of his responsibility to protect American citizens traveling abroad, and what he considered to be the best interests of the Nation." [44]

In 1966, the Secretary of State [45] promulgated the regulations at issue in this case. 22 CFR §§ 51.70 (b)(4), 51.71 (a) (1980). Closely paralleling the 1956 regulation, these provisions authorize revocation of a passport where "[t]he Secretary determines that the national's activities abroad are

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[43] See Hearing on Right to Travel before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 1st Sess., pt. 2, pp. 59–61 (1957); Proposed Travel Controls, Hearings on S. 3243 before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., 72 (1966).

[44] Senate Committee on Government Operations, Reorganization of the Passport Functions of the Department of State, 86th Cong., 2d Sess., 13 (Comm. Print 1960).

[45] Pursuant to the general delegation statute, 3 U. S. C. § 301, the power of the President to prescribe passport regulations has been delegated to the Secretary. Exec. Order No. 11295, 3 CFR 570 (1966–1970 Comp.).

causing or are likely to cause serious damage to the national security or the foreign policy of the United States." [46]

2

Zemel recognized that congressional acquiescence may sometimes be found from nothing more than silence in the face of an administrative policy. 381 U. S., at 11; see *Udall* v. *Tallman,* 380 U. S. 1, 16–18 (1965); *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 313 (1933); *Costanzo* v. *Tillinghast,* 287 U. S. 341, 345 (1932). Here, however, the inference of congressional approval "is supported by more than mere congressional inaction." *Zemel,* 381 U. S., at 11–12. Twelve years after the promulgation of the regulations at issue and 22 years after promulgation of the similar 1956 regulation, Congress enacted the statute making it unlawful to travel abroad without a passport even in peacetime. 8 U. S. C. § 1185 (b) (1976 ed., Supp. IV).[47] Simultaneously, Congress amended the Passport Act of 1926 to provide that "[u]nless authorized by law," in the absence of war, armed hostilities, or imminent danger to travelers, a passport may not be geographically restricted.[48] Title 8 U. S. C. § 1185 (b) (1976 ed., Supp. IV) must be read *in pari materia* with the

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[46] Section 51.70 (b)(4) authorizes denial of a passport for this reason. Section 51.71 (a), setting out grounds for revoking, restricting, or limiting passports, incorporates § 51.70 by reference. There have been no pertinent changes in these regulations since 1966.

[47] Act of Oct. 7, 1978, § 707 (b), 92 Stat. 993. This statute provides:

"Except as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe, it shall be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

This provision amended § 215 of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1185. Under the 1952 version, passports were required only in wartime or when the President had declared an emergency.

[48] Act of Oct. 7, 1978, § 124, 92 Stat. 971, 22 U. S. C. § 211a (1976 ed.,

Passport Act. *Zemel, supra,* at 11–12; see 2A C. Sands, Sutherland on Statutory Construction § 51.03, p. 299 (4th ed. 1973); cf. *Erlenbaugh* v. *United States,* 409 U. S. 239, 243–244 (1972).[49]

The 1978 amendments are weighty evidence of congressional approval of the Secretary's interpretation, particularly that in the 1966 regulations. Despite the longstanding and officially promulgated view that the Executive had the power to withhold passports for reasons of national security and foreign policy, Congress in 1978, "though it once again enacted legislation relating to passports, left completely untouched the broad rule-making authority granted in the earlier Act." *Zemel, supra,* at 12; accord, *NLRB* v. *Bell Aerospace Co.,* 416 U. S. 267, 274–275 (1974).[50]

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Agee argues that the only way the Executive can establish implicit congressional approval is by proof of longstanding and consistent *enforcement* of the claimed power: that is, by showing that many passports were revoked on national

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Supp. IV). This amendment added the following language to the Passport Act:

"Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers."

The statute provides that the purpose of this amendment is "achieving greater United States compliance with the provisions of the Final Act of the Conference on Security and Cooperation in Europe (signed at Helsinki on August 1, 1975)." 92 Stat. 971.

[49] See also S. Rep. No. 94–1168, pp. 32–33 (1976).

[50] Indeed, the inference of congressional approval is stronger here than in *Zemel,* where the Court relied on amendments to the Travel Control Act. 381 U. S., at 11–12. Here, the amendment was to the Passport Act itself. Congress is therefore presumed to have adopted the administrative construction. *Lorillard* v. *Pons,* 434 U. S. 575, 580 (1978).

security and foreign policy grounds. For this proposition, he relies on *Kent,* 357 U. S., at 127–128.[51]

A necessary premise for Agee's contention is that there were frequent occasions for revocation and that the claimed Executive power was exercised in only a few of those cases. However, if there were no occasions—or few—to call the Secretary's authority into play, the absence of frequent instances of enforcement is wholly irrelevant. The exercise of a power emerges only in relation to a factual situation, and the continued validity of the power is not diluted simply because there is no need to use it.

The history is clear that there have been few situations involving substantial likelihood of serious damage to the national security or foreign policy of the United States as a result of a passport holder's activities abroad, and that in the cases which have arisen, the Secretary has consistently exercised his power to withhold passports. Perhaps the most notable example of enforcement of the administrative policy, which surely could not have escaped the attention of Congress, was the 1948 denial of a passport to a Member of Congress who sought to go abroad to support a movement in Greece to overthrow the existing government.[52] Another example was the 1954 revocation of a passport held by a man who was supplying arms to groups abroad whose interests were contrary to positions taken by the United States.[53] In 1970, the Secretary revoked passports of two persons who sought to travel to the site of an international airplane hijacking.[54] See also Note, 61 Yale L. J. 170, 174–176 (1952).

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[51] The Court of Appeals accepted this argument. See 203 U. S. App. D. C., at 53, 629 F. 2d, at 87, quoted *supra,* at 288.

[52] See N. Y. Times, Apr. 11, 1948, p. E9.

[53] Brief for Petitioner 39; see Developments in the Law—The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1150–1151, n. 76 (1972).

[54] See *Sirhan* v. *Rogers,* No. 70 Civ. 3965 (SDNY, Sept. 11, 1970),

The Secretary has construed and applied his regulations consistently, and it would be anomalous to fault the Government because there were so few occasions to exercise the announced policy and practice. Although a pattern of actual enforcement is one indicator of Executive policy, it suffices that the Executive has "openly asserted" the power at issue. *Zemel,* 381 U. S., at 9; see *id.,* at 10.

Kent is not to the contrary. There, it was shown that the claimed governmental policy had not been enforced consistently. The Court stressed that "as respects Communists these are scattered rulings and not consistently of one pattern." 357 U. S., at 128. In other words, the Executive had allowed passports to some Communists, but sought to deny one to Kent. The Court had serious doubts as to whether there was in reality any definite policy in which Congress could have acquiesced. Here, by contrast, there is no basis for a claim that the Executive has failed to enforce the policy against others engaged in conduct likely to cause serious damage to our national security or foreign policy. It would turn *Kent* on its head to say that simply because we have had only a few situations involving conduct such as that in this record, the Executive lacks the authority to deal with the problem when it is encountered.[55]

Agee also contends that the statements of Executive policy are entitled to diminished weight because many of them concern the powers of the Executive in wartime. However, the statute provides no support for this argument. History eloquently attests that grave problems of national security and foreign policy are by no means limited to times of formally declared war.[56]

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appeal dism'd, No. 35364 (CA2, Sept. 11, 1970) (denying plaintiff's request for injunctive relief).

[55] Congress considered, but did not enact, proposals to spell out passport standards in the 1926 Act. See 1926 Hearings, at 4–5.

[56] Congress itself has from time to time deemed it necessary to enact peacetime passport restrictions, and those measures recognize considerable

Relying on the statement of the Court in *Kent* that "illegal conduct" and problems of allegiance were, "so far as relevant here, . . . the only [grounds] which it could fairly be argued were adopted by Congress in light of prior administrative practice," *id.,* at 127–128, Agee argues that this enumeration was exclusive and is controlling here. This is not correct.

The *Kent* Court had no occasion to consider whether the Executive had the power to revoke the passport of an individual whose *conduct* is damaging the national security and foreign policy of the United States. *Kent* involved denials of passports solely on the basis of political beliefs entitled to First Amendment protection. See *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964). Although finding it unnecessary to reach the merits of that constitutional problem, the *Kent* Court emphasized the fact that "[w]e deal with *beliefs,* with *associations,* with *ideological* matters." 357 U. S., at 130 (emphasis supplied). In particular, the Court noted that the applicants were

> "being denied their freedom of movement solely because of their refusal to be subjected to inquiry into their beliefs and associations. They do not seek to escape the law nor to violate it. They may or may not be Communists. But assuming they are, the only law which Congress has passed expressly curtailing the movement of Communists across our borders has not yet become effective. It would therefore be strange to infer that pending the effectiveness of that law, the Secretary has been silently granted by Congress the larger, the more pervasive power to curtail in his discretion the free movement of citizens in order to satisfy himself about their beliefs or associations." *Ibid.* (footnote omitted).

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discretion in the Executive. *E. g.,* Act of Oct. 7, 1978 (n. 47, *supra*); Act of May 30, 1866 (nn. 19, 29, *supra*).

The protection accorded beliefs standing alone is very different from the protection accorded conduct. Thus, in *Aptheker* v. *Secretary of State, supra,* the Court held that a statute which, like the policy at issue in *Kent,* denied passports to Communists solely on the basis of political beliefs unconstitutionally "establishes an irrebuttable presumption that individuals who are members of the specified organizations will, if given passports, engage in activities inimical to the security of the United States." 378 U. S., at 511. The Court recognized that the legitimacy of the objective of safeguarding our national security is "obvious and unarguable." *Id.,* at 509. The Court explained that the statute at issue was not the least restrictive alternative available: "The prohibition against travel is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe." *Id.,* at 514.

Beliefs and speech are only part of Agee's "campaign to fight the United States CIA." In that sense, this case contrasts markedly with the facts in *Kent* and *Aptheker.*[57] No presumptions, rebuttable or otherwise, are involved, for Agee's

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[57] The same is true of *Dayton* v. *Dulles,* 357 U. S. 144 (1958), the companion case to *Kent.* In *Dayton,* the Secretary refused to issue a passport to a physicist who sought to go to India to engage in experimental research. The Secretary relied on the applicant's " 'connection with the Science for Victory Committee and his association at that time with various communists,' " and on his " 'association with persons suspected of being part of the Rosenberg espionage ring and his alleged presence at an apartment in New York which was allegedly used for microfilming material obtained for the use of a foreign government.' " *Id.,* at 146. Although reserving the question of "[w]hether there are undisclosed grounds adequate to sustain the Secretary's action," this Court held that the Secretary's "Decision and Findings" showed "only a denial of a passport for reasons which we have today held to be impermissible," citing *Kent.* 357 U. S., at 150. The "Decision and Findings," set out in the Appendix to the Court's opinion, *id.,* at 150–154, does not cite a single instance of Dayton's *conduct,* as distinguished from mere support for "the Communist movement" or association with known Communists.

conduct in foreign countries presents a serious danger to American officials abroad and serious danger to the national security.[58]

We hold that the policy announced in the challenged regulations is "sufficiently substantial and consistent" to compel the conclusion that Congress has approved it. See *Zemel,* 381 U. S., at 12.

III

Agee also attacks the Secretary's action on three constitutional grounds: first, that the revocation of his passport impermissibly burdens his freedom to travel; second, that the action was intended to penalize his exercise of free speech and deter his criticism of Government policies and practices; and third, that failure to accord him a prerevocation hearing violated his Fifth Amendment right to procedural due process.

In light of the express language of the passport regulations, which permits their application only in cases involving likelihood of "serious damage" to national security or foreign policy, these claims are without merit.

Revocation of a passport undeniably curtails travel, but the freedom to travel abroad with a "letter of introduction" in the form of a passport issued by the sovereign is subordinate to national security and foreign policy considerations; as such, it is subject to reasonable governmental regulation. The Court has made it plain that the *freedom* to travel outside the United States must be distinguished from the *right* to travel within the United States. This was underscored in *Califano* v. *Aznavorian,* 439 U. S. 170, 176 (1978):

> "Aznavorian urges that the freedom of international travel is basically equivalent to the constitutional right to interstate travel, recognized by this Court for over 100 years. *Edwards* v. *California,* 314 U. S. 160; *Twining* v. *New Jersey,* 211 U. S. 78, 97; *Williams* v. *Fears,* 179

[58] See *supra,* at 283–287, and nn. 1–8.

U. S. 270, 274; *Crandall* v. *Nevada,* 6 Wall. 35, 43–44; *Passenger Cases,* 7 How. 283, 492 (Taney, C. J., dissenting). But this Court has often pointed out the crucial difference between the freedom to travel internationally and the right of interstate travel.

"'The constitutional right of interstate travel is virtually unqualified, *United States* v. *Guest,* 383 U. S. 745, 757–758 (1966); *Griffin* v. *Breckenridge,* 403 U. S. 88, 105–106 (1971). By contrast the "right" of international travel has been considered to be no more than an aspect of the "liberty" protected by the Due Process Clause of the Fifth Amendment. As such this "right," the Court has held, can be regulated within the bounds of due process.' (Citations omitted.) *Califano* v. *Torres,* 435 U. S. 1, 4 n. 6."

It is "obvious and unarguable" that no governmental interest is more compelling than the security of the Nation. *Aptheker* v. *Secretary of State,* 378 U. S., at 509; accord *Cole* v. *Young,* 351 U. S. 536, 546 (1956); see *Zemel, supra,* at 13–17. Protection of the foreign policy of the United States is a governmental interest of great importance, since foreign policy and national security considerations cannot neatly be compartmentalized.

Measures to protect the secrecy of our Government's foreign intelligence operations plainly serve these interests. Thus, in *Snepp* v. *United States,* 444 U. S. 507, 509, n. 3 (1980), we held that "[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." See also *id.,* at 511–513. The Court in *United States* v. *Curtiss-Wright Export Corp.* properly emphasized:

"[The President] has his confidential sources of information. He has his agents in the form of diplomatic,

> consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results." 299 U. S., at 320.

Accord, *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U. S., at 111; The Federalist No. 64, pp. 392–393 (Mentor ed. 1961).

Not only has Agee jeopardized the security of the United States, but he has also endangered the interests of countries other than the United States [59]—thereby creating serious problems for American foreign relations and foreign policy. Restricting Agee's foreign travel, although perhaps not certain to prevent all of Agee's harmful activities, is the only avenue open to the Government to limit these activities.[60]

Assuming, *arguendo,* that First Amendment protections reach beyond our national boundaries, Agee's First Amendment claim has no foundation. The revocation of Agee's passport rests in part on the content of his speech: specifically, his repeated disclosures of intelligence operations and names of intelligence personnel. Long ago, however, this Court recognized that "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 716 (1931), citing Z. Chafee, Freedom of Speech 10 (1920). Agee's disclosures, among other

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[59] Agee's deportation from Great Britain was expressly grounded, *inter alia,* on Agee's "disseminating information harmful to the security of the United Kingdom," and his "aid[ing] and counsel[ing] others in obtaining for publication information which could be harmful to the security of the United Kingdom." P. Agee & L. Wolf, *supra* n. 1, at 289.

[60] Agee argues that the Government should be limited to an injunction ordering him to comply with his secrecy agreement. Tr. of Oral Arg. 36–39. This argument ignores the governmental interests at stake. As Agee concedes, such an injunction would not be enforceable outside of the United States. *Id.,* at 39.

things, have the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel. They are clearly not protected by the Constitution. The mere fact that Agee is also engaged in criticism of the Government does not render his conduct beyond the reach of the law.

To the extent the revocation of his passport operates to inhibit Agee, "it is an inhibition of *action,*" rather than of speech. *Zemel,* 381 U. S., at 16–17 (emphasis supplied). Agee is as free to criticize the United States Government as he was when he held a passport—always subject, of course, to express limits on certain rights by virtue of his contract with the Government.[61] See *Snepp* v. *United States, supra.*

On this record, the Government is not required to hold a prerevocation hearing. In *Cole* v. *Young, supra,* we held that federal employees who hold "sensitive" positions "where they could bring about any discernible adverse effects on the Nation's security" may be suspended without a presuspension hearing. 351 U. S., at 546–547. For the same reasons, when there is a substantial likelihood of "serious damage" to national security or foreign policy as a result of a passport holder's activities in foreign countries, the Government may take action to ensure that the holder may not exploit the sponsorship of his travels by the United States. "[W]hile the Constitution protects against invasions of individual rights, it is not

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[61] The District Court held that since Agee's conduct falls within the core of the regulation, Agee lacks standing to contend that the regulation is vague and overbroad. Tr. 11–12 (Jan. 3, 1980). We agree. See *Parker* v. *Levy,* 417 U. S. 733, 755–756 (1974).

In any event, there is no basis for a claim that the regulation is being used as a subterfuge to punish criticism of the Government. As evidenced in this case, the Government's interpretation of the terms "serious damage" and "national security" shows proper regard for constitutional rights and is precisely in accord with our holdings on the subject. *E. g., Cole* v. *Young,* 351 U. S. 536 (1956). Nor is there any basis for a claim of discriminatory enforcement. The Government is entitled to concentrate its scarce legal resources on cases involving the most serious damage to national security and foreign policy.

a suicide pact." *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 160 (1963). The Constitution's due process guarantees call for no more than what has been accorded here: a statement of reasons and an opportunity for a prompt postrevocation hearing.[62]

We reverse the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion.

Reversed and remanded.

JUSTICE BLACKMUN, concurring.

There is some force, I feel, in JUSTICE BRENNAN's observations, *post,* at 312–318, that today's decision cannot be reconciled fully with all the reasoning of *Zemel* v. *Rusk,* 381 U. S. 1 (1965), and, particularly, of *Kent* v. *Dulles,* 357 U. S. 116 (1958), and that the Court is cutting back somewhat upon the opinions in those cases *sub silentio.* I would have preferred to have the Court disavow forthrightly the aspects of *Zemel* and *Kent* that may suggest that evidence of a longstanding Executive policy or construction in this area is not probative of the issue of congressional authorization. Nonetheless, believing this is what the Court in effect has done, I join its opinion.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Today the Court purports to rely on prior decisions of this Court to support the revocation of a passport by the Secretary of State. Because I believe that such reliance is fundamentally misplaced, and that the Court instead has departed from the express holdings of those decisions, I dissent.

I

Respondent Philip Agee, a United States citizen residing in West Germany, is a former employee and current critic of

[62] We do not decide that these procedures are constitutionally required.

the Central Intelligence Agency (CIA). Respondent writes and speaks out extensively on United States clandestine intelligence operations, with the stated goal of disrupting the CIA. Part of his activity apparently involves the identification of United States undercover personnel situated throughout the world.

On December 23, 1979, the United States Consul General in Hamburg, West Germany, delivered a letter [1] to respondent notifying him that his passport had been revoked pursuant to 22 CFR § 51.70 (b)(4) (1980). That regulation, in combination with 22 CFR § 51.71 (a) (1980), permits revocation of a passport when "[t]he Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." [2]

Agee declined to follow administrative procedures available to attack the revocation and instead brought this action in the District Court for the District of Columbia for declara-

[1] The letter stated in pertinent part:

"The Department's action is predicated upon a determination made by the Secretary under the provisions of Section 51.70 (b)(4) that your activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States. The reasons for the Secretary's determination are, in summary, as follows: Since the early 1970's, it has been your stated intention to conduct a continuous campaign to disrupt the intelligence operations of the United States. In carrying out that campaign, you have travelled in various countries (including, among others, Mexico, the United Kingdom, Denmark, Jamaica, Cuba and Germany), and your activities in those countries have caused serious damage to the national security and the foreign policy of the United States. Your stated intention to continue such activities threatens additional damage of the same kind." Quoted in *Agee* v. *Muskie,* 203 U. S. App. D. C. 46, 48, 629 F. 2d 80, 82 (1980).

[2] Title 22 CFR § 51.71 (a) (1980) allows revocation, restriction, or limitation of a passport where the national would not be entitled to issuance of a new passport pursuant to 22 CFR § 51.70 (1980). For purposes of this case, denial and revocation of a passport are treated identically.

tory and injunctive relief against the Secretary of State. For purposes of cross-motions for summary judgment on the facial validity of the regulations, respondent conceded that he was causing or was likely to cause serious damage to national security or foreign policy, and, therefore, fell within the coverage of the regulations. *Agee* v. *Muskie,* 203 U. S. App. D. C. 46, 48, 629 F. 2d 80, 82 (1980); App. 11. He argued, *inter alia,* that Congress had not given the Secretary of State authority to promulgate the regulations under which his passport was revoked. Both the District Court, *Agee* v. *Vance,* 483 F. Supp. 729 (1980), and the Court of Appeals for the District of Columbia Circuit accepted this argument and granted respondent the relief requested.

II

This is not a complicated case. The Court has twice articulated the proper mode of analysis for determining whether Congress has delegated to the Executive Branch the authority to deny a passport under the Passport Act of 1926. *Zemel* v. *Rusk,* 381 U. S. 1 (1965); *Kent* v. *Dulles,* 357 U. S. 116 (1958). The analysis is hardly confusing, and I expect that had the Court faithfully applied it, today's judgment would affirm the decision below.

In *Kent* v. *Dulles, supra,* the Court reviewed a challenge to a regulation of the Secretary denying passports to applicants because of their alleged Communist beliefs and associations and their refusals to file affidavits concerning present or past membership in the Communist Party. Observing that the right to travel into and out of this country is an important personal right included within the "liberty" guaranteed by the Fifth Amendment, *id.,* at 125–127, the Court stated that any infringement of that liberty can only "be pursuant to the law-making functions of the Congress," and that delegations to the Executive Branch that curtail that liberty must be construed narrowly, *id.,* at 129. Because the Passport Act of 1926—the same statute at issue here—did not expressly

authorize the denial of passports to alleged Communists, the Court examined cases of actual passport refusals by the Secretary to determine whether "it could be fairly argued" that this category of passport refusals was "adopted by Congress in light of prior administrative practice." *Id.*, at 128. The Court was unable to find such prior administrative practice, and therefore held that the regulation was unauthorized.

In *Zemel* v. *Rusk, supra,* the issue was whether the Secretary could restrict travel for all citizens to Cuba. In holding that he could, the Court expressly approved the holding in *Kent:*

> "We have held, *Kent* v. *Dulles, supra,* and reaffirm today, that the 1926 Act must take its content from history: it authorizes only those passport refusals and restrictions 'which it could fairly be argued were adopted by Congress in light of prior administrative practice.' *Kent* v. *Dulles, supra,* at 128. So limited, the Act does not constitute an invalid delegation." 381 U. S., at 17–18.

In reaching its decision, the Court in *Zemel* relied upon numerous occasions when the State Department had restricted travel to certain international areas: Belgium in 1915; Ethiopia in 1935; Spain in 1936; China in 1937; Yugoslavia in the late 1940's; Hungary in 1949; Czechoslovakia in 1951; Albania, Bulgaria, Communist China, Czechoslovakia, Hungary, Poland, Rumania, and the Soviet Union in 1952; Albania, Bulgaria, and portions of China, Korea, and Vietnam in 1955; and Egypt, Israel, Jordan, and Syria in 1956.

As in *Kent* and *Zemel,* there is no dispute here that the Passport Act of 1926 does not *expressly* authorize the Secretary to revoke Agee's passport. *Ante,* at 290.[3] Therefore, the

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[3] The Passport Act of 1926, 22 U. S. C. § 211a (1976 ed., Supp. IV), states in pertinent part:

"The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic

sole remaining inquiry is whether there exists "with regard to the sort of passport [revocation] involved [here], an administrative *practice* sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved it." *Zemel* v. *Rusk, supra,* at 12 (emphasis added). The Court today, citing to this same page in *Zemel,* applies a test markedly different from that of *Zemel* and *Kent* and in fact expressly disavowed by the latter. The Court states: "We hold that the *policy* announced in the challenged regulations is 'sufficiently substantial and consistent' to compel the conclusion that Congress has approved it. See *Zemel,* 381 U. S., at 12." *Ante,* at 306 (emphasis added). The Court also observes that "a consistent administrative *construction* of [the Passport Act] must be followed by the courts ' "unless there are compelling indications that it is wrong." ' " *Ante,* at 291 (emphasis added).

But clearly neither *Zemel* nor *Kent* holds that a longstanding Executive *policy* or *construction* is sufficient proof that Congress has implicitly authorized the Secretary's action. The cases hold that an administrative *practice* must be demonstrated; in fact *Kent* unequivocally states that mere *construction* by the Executive—no matter how longstanding and consistent—is *not* sufficient.[4] The passage in *Kent* is worthy of full quotation:

> "Under the 1926 Act and its predecessor a large body of precedents grew up which repeat over and again that the issuance of passports is 'a discretionary act' on the part of the Secretary of State. The scholars, the courts,

representatives of the United States . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports."

[4] The lower courts have had no trouble understanding and following the holdings of *Kent* and *Zemel.* See, *e. g., Lynd* v. *Rusk,* 128 U. S. App. D. C. 399, 404–405, 389 F. 2d 940, 945–946 (1967); *Woodward* v. *Rogers,* 344 F. Supp. 974, 985 (DC 1972), summarily aff'd, 159 U. S. App. D. C. 57, 486 F. 2d 1317 (1973).

> the Chief Executive, and the Attorneys General, all so said. This long-continued *executive construction* should be enough, it is said, to warrant the inference that Congress adopted it. See *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 544–545; *United States* v. *Allen-Bradley Co.*, 352 U. S. 306, 310. But the key to that problem, as we shall see, is in the manner in which the Secretary's discretion was *exercised*, not in the *bare fact that he had discretion.*" 357 U. S., at 124–125 (footnotes omitted) (emphasis added).

The Court's requirement in *Kent* of evidence of the Executive's *exercise* of discretion as opposed to its possession of discretion may best be understood as a preference for the strongest proof that Congress knew of and acquiesced in that authority. The presence of sensitive constitutional questions in the passport revocation context cautions against applying the normal rule that administrative constructions in cases of statutory construction are to be given great weight. Cf. *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965). Only when Congress had maintained its silence in the face of a consistent and substantial pattern of actual passport denials or revocations—where the parties will presumably object loudly, perhaps through legal action, to the Secretary's exercise of discretion—can this Court be sure that Congress is aware of the Secretary's actions and has implicitly approved that exercise of discretion. Moreover, broad statements by the Executive Branch relating to its discretion in the passport area lack the precision of definition that would follow from concrete applications of that discretion in specific cases.[5] Although Con-

[5] For instance, the petitioner cites a rule promulgated by the Executive Branch in 1903 providing that "[t]he Secretary of State has the right in his discretion to refuse to issue a passport, and will exercise this right towards anyone who, he has reason to believe, desires a passport to further an unlawful or improper purpose." 3 J. Moore, A Digest of International Law 902 (1906); Brief for Petitioner 28. This statement can hardly

gress might register general approval of the Executive's overall policy, it still might disapprove of the Executive's pattern of applying that broad rule in specific categories of cases.

Not only does the Court ignore the *Kent-Zemel* requirement that Executive discretion be supported by a consistent administrative practice, but it also relies on the very Executive construction and policy deemed irrelevant in *Kent*. Thus, noting that "[t]he President and the Secretary of State consistently construed the 1856 [Passport] Act to preserve their authority to withhold passports on national security and foreign policy grounds," *ante,* at 295, the Court reaches out to hold that "Congress, in 1926, adopted the longstanding administrative construction of the 1856 statute," *ante,* at 297–298. The Court quotes from 1869 and 1901 opinions of the Attorneys General. But *Kent* expressly cited both of these opinions as examples of Executive constructions *not* relevant to the determination whether Congress had implicitly approved the Secretary's exercise of authority. Compare *ante,* at 295–296, with *Kent* v. *Dulles,* 357 U. S., at 125, n. 11. The Court similarly relies on four Executive Orders issued between 1907 and 1917 to buttress its position, even though *Kent* expressly cited the same four Orders as examples of Executive constructions inapposite to the proper inquiry. Compare *ante,* at 296, n. 31, with *Kent* v. *Dulles, supra,* at 124, n. 10.[6] Where the Court in *Kent* discounted the constructions of the Act made by "[t]he scholars, the courts, the Chief Executive, and the Attorneys General," today's Court decides this case on the basis of constructions evident from "an unbroken line of

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be thought to communicate to Congress the contours of the Executive's discretion; indeed it is little more than embellishment on the passport legislation itself.

[6] In contrast with the *Kent* Court, today's Court relies on Executive Orders promulgated after passage of the Passport Act of 1926. Compare *ante,* at 298, n. 39, with *Kent* v. *Dulles,* 357 U. S., at 124, n. 10.

Executive Orders, regulations, instructions to consular officials, and notices to passport holders." Compare *ante,* at 298, with *Kent* v. *Dulles, supra,* at 124 (footnotes omitted).[7]

The Court's reliance on material expressly abjured in *Kent* becomes understandable only when one appreciates the paucity of recorded administrative practice—the only evidence upon which *Kent* and *Zemel* permit reliance—with respect to passport denials or revocations based on foreign policy or national security considerations relating to an individual. The Court itself identifies only three occasions over the past 33 years when the Secretary has revoked passports for such reasons. *Ante,* at 302.[8] And only one of these cases involved

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[7] Even if the Court were correct to use administrative constructions of passport legislation, it is by no means certain that the Executive *did* construe the Acts to give it the discretion alleged here, since it sometimes referred to the unqualified rights of citizens to passports. See, *e. g.,* 15 Op. Atty. Gen. 114, 117 (1876); 13 Op. Atty. Gen. 397, 398 (1871). Indeed the State Department has sought legislation from Congress to provide the sort of authority exercised in this case. See S. 4110, § 103 (6), 85th Cong., 2d Sess. (1958); Hearings on S. 2770, S. 3998, S. 4110, and S. 4137 before the Senate Committee on Foreign Relations, 85th Cong., 2d Sess., 1, 4 (1958); see also H. R. 14895, § 205 (e), 89th Cong., 2d Sess. (1966). This hardly suggests that the Executive thought it had such authority.

[8] The Court of Appeals below identified a total of six denials or revocations that were arguably for foreign policy or national security reasons. 203 U. S. App. D. C., at 51, 629 F. 2d, at 86. Two of the six occurred prior to passage of the Passport Act of 1926, three during the 1950's, and one over the past 12 years. Judge MacKinnon's dissenting opinion below and the petitioner's brief identify only a few more cases. However, as the petitioner readily admits:

"Because passport files are maintained by name rather than by category of applicant or reason for disposition, it is virtually impossible to compile comprehensive statistical data regarding passport denials on national security or foreign policy grounds." Brief for Petitioner 29, n. 22.

One wonders, then, how the petitioner can argue that *Congress* was aware of any administrative practice, when the data is unavailable even to the

a revocation pursuant to the regulations challenged in this case. Yet, in 1979 alone, there were 7,835,000 Americans traveling abroad. U. S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 253 (101st ed., 1980).

In light of this record, the Court, somewhat defensively, comments: "The Secretary has construed and applied his regulations consistently, and it would be anomalous to fault the Government because there were so few occasions to exercise the announced policy and practice. . . . It would turn *Kent* on its head to say that simply because we have had only a few situations involving conduct such as that in this record, the Executive lacks the authority to deal with the problem when it is encountered." *Ante,* at 303. Of course, no one is "faulting" the Government because there are only few occasions when it has seen fit to deny or revoke passports for foreign policy or national security reasons. The point that *Kent* and *Zemel* make, and that today's opinion should make, is that the Executive's authority to revoke passports touches an area fraught with important constitutional rights, and that the Court should therefore "construe narrowly all delegated powers that curtail or dilute them." *Kent* v. *Dulles, supra,* at 129. The presumption is that Congress must expressly delegate authority to the Secretary to deny or revoke passports for foreign policy or national security reasons before he may exercise such authority. To overcome the presumption against an implied delegation, the Government must show "an administrative practice sufficiently substantial and consistent." *Zemel* v. *Rusk,* 381 U. S., at 12. Only in this way can the Court satisfy itself that Congress has implicitly approved such exercise of authority by the Secretary.

Executive. In any event, the slim practice that Judge MacKinnon and the petitioner cite could hardly be termed a sufficiently consistent and substantial administrative practice to pass the *Kent-Zemel* test.

III

I suspect that this case is a prime example of the adage that "bad facts make bad law." Philip Agee is hardly a model representative of our Nation. And the Executive Branch has attempted to use one of the only means at its disposal, revocation of a passport, to stop respondent's damaging statements. But just as the Constitution protects both popular and unpopular speech, it likewise protects both popular and unpopular travelers. And it is important to remember that this decision applies not only to Philip Agee, whose activities could be perceived as harming the national security, but also to other citizens who may merely disagree with Government foreign policy and express their views.[9]

The Constitution allocates the lawmaking function to Congress, and I fear that today's decision has handed over too much of that function to the Executive. In permitting the Secretary to stop this unpopular traveler and critic of the CIA, the Court professes to rely on, but in fact departs from, the two precedents in the passport regulation area, *Zemel* and *Kent*. Of course it is always easier to fit oneself within the safe haven of *stare decisis* than boldly to overrule precedents

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[9] An excerpt from the petitioner's portion of the oral argument is particularly revealing:

"QUESTION: General McCree, supposing a person right now were to apply for a passport to go to Salvador, and when asked the purpose of his journey, to say, to denounce the United States policy in Salvador in supporting the junta. And the Secretary of State says, I just will not issue a passport for that purpose. Do you think that he can consistently do that in the light of our previous cases?

"MR. McCREE: I would say, yes, he can. Because we have to vest these—The President of the United States and the Secretary of State working under him are charged with conducting the foreign policy of the Nation, and the freedom of speech that we enjoy domestically may be different from that that we can exercise in this context." Tr. of Oral Arg. 20.

The reach of the Secretary's discretion is potentially staggering.

of several decades' standing. Because I find myself unable to reconcile those cases with the decision in this case, however, and because I disagree with the Court's *sub silentio* overruling of those cases, I dissent.[10]

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[10] Because I conclude that the regulation is invalid as an unlawful exercise of authority by the Secretary under the Passport Act of 1926, I need not decide the important constitutional issues presented in this case. However, several parts of the Court's whirlwind treatment of Agee's constitutional claims merit comment, either because they are extreme oversimplifications of constitutional doctrine or mistaken views of the law and facts of this case.

First, the Court states:

"To the extent the revocation of his passport operates to inhibit Agee, 'it is an inhibition of *action*,' rather than of speech. . . . Agee is as free to criticize the United States Government as he was when he held a passport—always subject, of course, to express limits on certain rights by virtue of his contract with the Government." *Ante,* at 309 (footnote omitted).

Under the Court's rationale, I would suppose that a 40-year prison sentence imposed upon a person who criticized the Government's food stamp policy would represent only an "inhibition of action." After all, the individual would remain free to criticize the United States Government, albeit from a jail cell.

Respondent argues that the revocation of his passport "was intended to harass, penalize, and deter his criticism of United States policies and practices, in violation of the First Amendment." Brief for Respondent 112. The Court answers:

"Agee's disclosures, among other things, have the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel. They are clearly not protected by the Constitution." *Ante,* at 308–309.

The Court seems to misunderstand the prior precedents of this Court, for Agee's speech is undoubtedly protected by the Constitution. However, it may be that respondent's First Amendment right to speak is outweighed by the Government's interest in national security. The point respondent makes, and one that is worthy of plenary consideration, is that revocation of his passport obviously does implicate First Amendment rights by chilling his right to speak, and therefore the Court's responsibility must be to balance that infringement against the asserted governmental interests to determine whether the revocation contravenes the First

Amendment. I add that *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697 (1931), is hardly a relevant or convincing precedent to sustain the Secretary's action here. Only when there is proof that the activity "must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea" does the *Near* exception apply. *New York Times Co.* v. *United States,* 403 U. S. 713, 726–727 (1971) (BRENNAN, J., concurring). Agee's concession in the trial court below was only for the purpose of challenging the facial validity of the regulation, not its application to his case. Therefore, until the facts are known, the majority no less than I can have no idea whether Agee's conduct actually would fall within the extreme factual category presented by *Near.*

Second, the Court purports to agree with the District Court's holding that Agee lacks standing to contend that the regulation is vague and overbroad because his conduct falls within the core of the regulation. *Ante,* at 309, n. 61. I find this an untenable conclusion on the record before us and the precedents of this Court. The District Court nowhere held that respondent lacked standing to contend vagueness and overbreadth. At most, on the pages cited by the Court, Judge Gesell stated: "Your client, you would be conceding, falls within the core of the objective of the regulation and the fact that it may be over-broad as to somebody else isn't very persuasive to me." Tr. 11 (Jan. 3, 1980). Not only is this obviously not a holding, and not only did Judge Gesell never mention vagueness, but further portions of the transcript clearly establish that Judge Gesell expressly declined to reach Agee's overbreadth claim for purposes of this summary judgment motion, and that this claim was reserved for future consideration. *Id.,* at 16. In any event, it is strange indeed to suggest that an individual whose activities admittedly fall within the core of the challenged regulation does not have standing to argue overbreadth. After all, the purpose of the overbreadth doctrine in First Amendment cases is precisely to permit a person who falls within the legislation nevertheless to challenge the wide sweep of the legislation as it affects another's protected activity. See, *e. g., Gooding* v. *Wilson,* 405 U. S. 518, 520–521 (1972). And nothing in *Parker* v. *Levy,* 417 U. S. 733 (1974), the case cited by the Court, detracts from that doctrine.

Because the Court concludes that Agee has no standing to raise vagueness and overbreadth claims, it does not decide the question whether the challenged regulation is constitutionally infirm under those doctrines. I can only say that, for me, these are substantial issues highlighted particularly by the Solicitor General's comments at oral argument as to the reach of the regulations. See n. 9, *supra.*

NATIONAL LABOR RELATIONS BOARD *v.* AMAX COAL CO., A DIVISION OF AMAX, INC., ET AL.

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

No. 80–692. Argued April 28, 1981—Decided June 29, 1981*

Amax Coal Co. owns several deep-shaft coal mines in the Midwest, with respect to which it is a member of the Bituminous Coal Operators Association (BCOA), a national multiemployer group that bargains with the union representing Amax's employees. Under a collective-bargaining contract with the union, Amax, along with other members of the BCOA, agreed to contribute to the union's national pension and welfare trust funds, which were established under § 302 (c)(5) of the Labor Management Relations Act (LMRA). In accord with § 302 (c)(5)(B), the trust funds are administered by three trustees, one selected by the union, one by members of the BCOA, and one by the other two. When Amax opened a surface mine in Wyoming, with respect to which it did not join the BCOA, Amax and the union negotiated a separate collective-bargaining contract under which Amax contributed specified amounts of money to the national trust funds to benefit the employees at the surface mine. When this contract ended, the union struck the surface mine and others, in an attempt to compel the mine owners to establish a multiemployer bargaining unit and to agree to a new contract under which the members of the new employer unit would contribute to the national trust funds. When subsequent separate negotiations between the union and Amax came to an impasse and the strike continued at the surface mine, Amax filed with the National Labor Relations Board (NLRB) unfair labor practice charges against the union. Amax claimed that any management-appointed trustee of the § 302 (c)(5) trust fund was a collective-bargaining "representative" of the employer within the meaning of § 8 (b)(1)(B) of the National Labor Relations Act—which makes it an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances"—and that therefore, since the management trustee of the national trust funds had

*Together with No. 80–289, *United Mine Workers of America, Local No. 1854, et al.* v. *National Labor Relations Board et al.*, also on certiorari to the same court.

already been selected by the BCOA, the union's insistence that it participate in the national trust funds with regard to the surface mine employees constituted illegal coercion under § 8 (b) (1) (B). The NLRB held that the union had not violated § 8 (b) (1) (B). The Court of Appeals reversed, holding that management-appointed trustees of a § 302 (c) (5) trust fund act as both fiduciaries of the employee beneficiaries and as agents of the appointing employers, and, insofar as is consistent with their fiduciary obligations, are expected to administer the trusts in such a way as to advance the employer's interests. The court accordingly concluded that the union had violated § 8 (b) (1) (B) in exerting its economic power to induce Amax to participate in the national trust funds with respect to the surface mine employees.

Held: Employer-selected trustees of a § 302 (c) (5) trust fund are not "representatives" of the employer "for the purposes of collective bargaining or the adjustment of grievances" within the meaning of § 8 (b) (1) (B). Pp. 328–338.

(a) The duty of the management-appointed trustee of a § 302 (c) (5) fund is inconsistent with that of an agent of the appointing party. Given the established rule of the law of trusts that a trustee has an unwavering duty of complete loyalty to the beneficiary of a trust, to the exclusion of the interests of all other parties, and the use in § 302 (c) (5) of such terms as "held in trust" and "for the sole and exclusive benefit of the employees . . . and their families and dependents," it must be inferred that Congress intended to incorporate the law of trusts, unless it has unequivocally expressed a contrary intent. Nothing in § 302 (c) (5)'s language reveals any intent that a trustee should or may administer a trust fund in the interest of the party that appointed him, or that an employer may direct or supervise the decisions of the trustee he has appointed. And the LMRA's legislative history confirms that § 302 (c) (5) was designed to reinforce, not to alter, a trustee's established duty. Pp. 328–332.

(b) Whatever may have been implicit in Congress' view of a trustee of a § 302 (c) (5) fund became explicit when Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA), which essentially codified the strict fiduciary standards that a § 302 (c) (5) trustee must meet. And the ERISA's legislative history confirms that Congress intended to prevent such a trustee from being put in a position where he has dual loyalty. Pp. 332–334.

(c) Section 8 (b) (1) (B) was primarily enacted to prevent unions from forcing employers to join multiemployer bargaining units, or to dictate the identity of those who would represent employers in collective-bargaining negotiations or settlement of employee grievances. A union's

power to strike or bargain to impasse to induce an employer to contribute to a multiemployer trust fund does not pose the danger Congress thereby sought to prevent. Moreover, union pressure to force an employer to contribute to an established trust fund does not amount to dictating to an employer who shall represent him in collective bargaining and the adjustment of grievances, because the trustees of a § 302 (c)(5) trust fund simply do not, as such, engage in these activities. Pp. 334–338.

614 F. 2d 872, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 339.

Harrison Combs argued the cause for petitioners in No. 80–289. With him on the briefs were *J. Craig Kuhn, Melvin P. Stein,* and *James C. Kuhn III.*

Harlon L. Dalton argued the cause for the National Labor Relations Board in both cases. On the briefs were *Solicitor General McCree, Andrew J. Levander, Robert E. Allen, Norton J. Come, Linda Sher,* and *Richard B. Bader.*

Daniel F. Gruender argued the cause for respondent Amax Coal Co., a Division of Amax, Inc., in both cases. With him on the brief was *Raymond K. Denworth, Jr.*†

JUSTICE STEWART delivered the opinion of the Court.

This litigation concerns the relationship between two important provisions of the Labor Management Relations Act, 1947 (LMRA).[1] Section 8 (b)(1)(B) of the National Labor Relations Act, as amended by § 101 of the LMRA, 61 Stat.

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†Briefs of *amici curiae* urging reversal were filed by *Robert J. Fenlon, Julia Penny Clark, J. Albert Woll, Laurence Gold,* and *David R. Boyd,* for the American Federation of Labor and Congress of Industrial Organizations et al.; by *Charles P. O'Connor* and *Harry A. Rissetto* for the Bituminous Coal Operators' Association, Inc.; and by *E. Calvin Golumbic* for the Board of Trustees of the United Mine Workers of America Health and Retirement Funds.

[1] 29 U. S. C. § 141 *et seq.*

141, makes it an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances . . . ." [2] Section 302 (c)(5) of the LMRA, 61 Stat. 157, permits employers and unions to create employer-financed trust funds for the benefit of employees, so long as employees and employers are equally represented by the trustees of the funds.[3] The question at issue is whether the employer-selected trustees of a trust fund created under § 302 (c)(5) are "representatives" of the employer "for the purposes of collective bargaining or the adjustment of grievances" within the meaning of § 8 (b)(1)(B).

I

The Amax Coal Co. owns several deep-shaft bituminous coal mines, most of them in the Midwestern United States. The United Mine Workers of America (the union) represents Amax's employees, and, with respect to the midwestern mines, Amax is a member of the Bituminous Coal Operators Association (BCOA), a national multiemployer group that bargains with the union. Through its collective-bargaining contract with the union, Amax, along with the other members of the BCOA, agreed to contribute to the union's national pension and welfare trust funds. These funds, established under § 302 (c)(5) of the Act, provide comprehensive health and retirement benefits to coal miners and their families. In accord with § 302 (c)(5)(B), the trust funds are administered by three trustees, one selected by the union, one by the members of BOCA, and one by the other two.[4]

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[2] 29 U. S. C. § 158 (b)(1)(B).

[3] 29 U. S. C. § 186 (c)(5).

[4] The trust agreement sets out the health and retirement benefits provided to employees and their dependents, defines the terms and the responsibilities of the trustees, describes the method of administration of the trust, and provides for periodic audits, reports, and notices. The agree-

In 1972, Amax opened the Belle Ayr Mine in Wyoming, the company's first sub-bituminous surface mine. Although Amax did not join the BCOA with respect to that mine, Amax and the union negotiated a collective-bargaining contract for Belle Ayr which resembled the BCOA national contract, and under which Amax contributed specified amounts of money to the national trust funds to benefit the employees at Belle Ayr. In January 1975, when the collectively bargained contract covering the Belle Ayr Mine ended, the union struck Belle Ayr and other western mines, attempting to compel the mine owners to establish a multiemployer bargaining unit and to agree to a new collective contract proposed by the union, under which the members of the new employer unit would contribute to the national trust funds. Amax resisted, and the union, threatened with a complaint from the National Labor Relations Board Regional Counsel for illegally attempting to coerce the employer into a multiemployer bargaining unit, soon began separate negotiations with Amax. Those negotiations came to an impasse, and the union continued its strike at the Belle Ayr Mine. Amax then filed with the Board unfair labor practice charges against the union.

The matter of pension and welfare benefits had been a major barrier to agreement between Amax and the union, and formed an important part of Amax's charges before the Board. Amax had proposed its own benefit and pension trust plan, outside the purview of § 302 (c)(5), but the union, claiming that such a plan would not be sufficiently portable to or reciprocal with the national trust funds, had rejected this proposal. Rather, the union had insisted that Amax, even as a separately bargaining employer, continue to contribute to the national trust funds for the Belle Ayr em-

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ment also fixes the employers' contributions to the trust, requiring a specified number of cents per ton of coal produced, with the one exception that the trustees themselves retain the power to fix the rate for coal salvaged from slurry, sludge, or other refuse.

ployees. Amax, of course, as a member of BCOA, had participated in selecting the management-appointed trustee of the national trust funds, but it now wanted to appoint its own trustee for any trust fund covering the employees of the Belle Ayr Mine. Amax took the view that any management-appointed trustee of a § 302 (c)(5) trust fund was a collective-bargaining "representative" of the employer within the meaning of § 8 (b)(1)(B); therefore, since the management trustee of the national trust fund had already been selected by BCOA, Amax contended that the union's insistence that it participate in the national trust funds with regard to Belle Ayr employees constituted illegal coercion under § 8 (b)(1)(B) of the Act. Amax also charged the union with refusing to bargain in good faith in violation of § 8 (b)(3) of the Act.[5]

The National Labor Relations Board unanimously concluded that the union had acted legally in bargaining to impasse and striking to obtain Amax's participation in the national trust funds for the Belle Ayr employees.[6] The Board noted that the purpose of § 8 (b)(1)(B) was to ensure that an employer can bargain through a freely chosen representative completely faithful to his interests under the principles of agency law, while the trustee of a joint trust fund, though he may appropriately consider the recommendations of the party who appoints him, is a fiduciary owing undivided loyalty to the interest of the beneficiaries in ad-

[5] 29 U. S. C. § 158 (b)(3).

[6] On other claims by Amax, the Board found that the union had not bargained in bad faith in violation of § 8 (b)(3), but that the union had acted illegally in attempting to coerce Amax to join the multiemployer bargaining unit for the western mines, in failing to notify the Federal Mediation and Conciliation Service of its dispute with Amax before striking, and by insisting to impasse on certain contract proposals that would have violated § 8 (e) of the Act, 29 U. S. C. § 158 (e). The Court of Appeals affirmed all these rulings, and they are not before this Court.

ministering the trust.[7] Accordingly, the Board concluded that the union had not violated § 8 (b)(1)(B).

On cross-petitions by the parties, the Court of Appeals for the Third Circuit, relying on its earlier decision in *Associated Contractors of Essex County, Inc.* v. *Laborers International Union,* 559 F. 2d 222, 227–228, held that management-appointed trustees of a § 302 (c)(5) trust fund act as both fiduciaries of the employee-beneficiaries and as agents of the appointing employers, and, insofar as is consistent with their fiduciary obligations, are expected to administer the trusts in such a way as to advance the employer's interests. 614 F. 2d 872, 881–882. The court therefore concluded that the union had acted in violation of § 8 (b)(1)(B) in exerting its economic power to induce Amax to participate in the national trust funds with respect to employees of the Belle Ayr Mine, and reversed the Board's ruling to the contrary. We granted certiorari to consider the important question of federal labor law these cases present. 449 U. S. 1110.

II

Although § 302 (a) of the Act[8] generally prohibits an employer from making payments to any representative of his employees, § 302 (c)(5) allows an employer to contribute to an employee benefit trust fund that satisfies certain statutory requirements. To ensure that the funds in such a trust are not used as a union "war chest," *Arroyo* v. *United States,* 359 U. S. 419, 426, the Act provides that the funds may be used only for specified benefits for employees and their dependents, and that the basis for these payments be laid out in a detailed written agreement between the union and the employer.[9] The fund must be subject to an annual audit, and

[7] The Board relied on its earlier resolution of this same issue in *Sheet Metal Workers' International Assn. and Edward J. Carlough (Central Florida Sheetmetal Contractors Assn., Inc.),* 234 N. L. R. B. 1238 (1978).

[8] 29 U. S. C. § 186 (a).

[9] Trust funds may pay only "for medical or hospital care, pensions on

the results of the audit must be made available to all interested persons.[10] Furthermore, pension or annuity funds must be kept in a trust separate from other union welfare funds.[11] Finally, § 302 (c)(5)(B) requires that "employees and employers [be] equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon . . . ." [12]

Congress directed that union welfare funds be established as written formal trusts, and that the assets of the funds be "held in trust," and be administered "for the sole and exclusive benefit of the employees . . . and their families and dependents . . . ." 29 U. S. C. § 186 (c)(5). Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms. See *Perrin* v. *United States,* 444 U. S. 37, 42–43. Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. Restatement (Second) of Trusts § 170 (1) (1957); 2 A. Scott, Law of Trusts § 170 (1967). To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against

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retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance." 29 U. S. C. § 186 (c)(5)(A).

[10] 29 U. S. C. § 186 (c)(5)(B).

[11] 29 U. S. C. § 186 (c)(5)(C).

[12] If the trustees deadlock over a matter of trust administration, the statute further provides that the trustees may select a neutral arbiter, or "in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office . . . ." 29 U. S. C. § 186 (c)(5)(B).

a trustee dividing his loyalties must be enforced with "uncompromising rigidity." *Meinhard* v. *Salmon,* 249 N. Y. 458, 464, 164 N. E. 545, 546 (Cardozo, C. J.). A fiduciary cannot contend "that, although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one." *Woods* v. *City National Bank & Trust Co.,* 312 U. S. 262, 269.

Given this established rule against dual loyalties and Congress' use of terms long established in the courts of chancery, we must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary. See *Owen* v. *City of Independence,* 445 U. S. 622, 637. However, although § 302 (c)(5)(B) requires an equal balance between trustees appointed by the union and those appointed by the employer, nothing in the language of § 302 (c)(5) reveals any congressional intent that a trustee should or may administer a trust fund in the interest of the party that appointed him, or that an employer may direct or supervise the decisions of a trustee he has appointed.[13] And the legislative history of the

[13] The use of the word "representatives" in § 302 (c)(5)(B) in no way suggests that Congress did not intend to incorporate the equitable principles of fiduciary duty. The requirement that employer and employee be equally represented among the trustees of an employee benefit fund prevents any misuse of those funds by union officers who would otherwise have sole control of vast amounts of money contributed by the employer. See *Arroyo* v. *United States,* 359 U. S. 419, 425–426. The management-appointed trustee "represents" the employer only in the sense that he ensures that the union-appointed trustee does not abuse his trust with respect to the funds contributed by the employer. Nowhere in the debates over § 302 (c)(5) did any Member of either House of Congress suggest that the employer "representative" as a trustee of a benefit fund created under this statute could or should advance the interest of the employer in administering the fund. In fact, some opponents of the provision objected that the requirement of equal management-union representation imposed onerous administrative duties on the employers. *E. g.,* 93 Cong. Rec. 4749 (1947) (Sen. Murray).

LMRA confirms that § 302 (c)(5) was designed to reinforce, not to alter, the long-established duties of a trustee.

As explained by Senator Ball, one of the two sponsors of the provision, the "sole purpose" of § 302 (c)(5) is to ensure that employee benefit trust funds "are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them . . . ." 93 Cong. Rec. 4678 (1947). Senator Ball stated that "all we seek to do by [§ 302 (c)(5)] is to make sure that the employees whose labor builds this fund and are really entitled to benefits under it shall receive the benefits; that it is a trust fund, and that, if necessary, they can go into court and obtain the benefits to which they are entitled." *Id.*, at 4753; see H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 66–67 (1947), 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947, p. 570 (1948) (Leg. Hist. LMRA). The debates on § 302 (c)(5) further reveal Congress' intent to cast employee benefit plans in traditional trust form precisely because fiduciary standards long established in equity would best protect employee beneficiaries. For example, one opponent of the bill suggested that § 305 (c)(5) was unnecessary because even without that provision, the "officials who administer [the fund] thereby become trustees, subject to all of the common law and State safeguards against misuse of funds by trustees." 93 Cong. Rec. 4751 (1947) (Sen. Morse). Senator Taft, the primary author of the entire Act, answered that many existing funds were not created expressly as trusts, and that § 302 (c)(5)'s requirement that each fund be an express and enforceable trust would ensure that the future operations of all such funds would be subject to supervision by a court of chancery. 93 Cong. Rec. 4753 (1947). See also *id.*, at 4678 (Sen. Ball); *id.*, at 3564–3565 (Rep. Case, author of House bill on which § 302 (c)(5) was patterned). In sum, the duty of the management-appointed trustee of an employee benefit fund under

§ 302 (c)(5) is directly antithetical to that of an agent of the appointing party.[14]

Whatever may have remained implicit in Congress' view of the employee benefit fund trustee under the Act became explicit when Congress passed the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829. ERISA essentially codified the strict fiduciary standards that a § 302 (c)(5) trustee must meet. See 29 U. S. C. §§ 1002 (1) and (2); H. R. Conf. Rep. No. 93–1280, pp. 296, 307 (1974). Section 404 (a)(1) of ERISA requires a trustee to "discharge his duties . . . solely in the interest of the participants and beneficiaries . . . ." 29 U. S. C. § 1104 (a)(1).[15] Section

[14] The legislative history of § 302 (c)(5) also bears directly on the actual question underlying the statutory issue in this litigation: whether Congress intended to prohibit union demands for employer participation in established multiemployer trust funds. One of the events that greatly influenced the legislative efforts culminating in the Act was the demand of John L. Lewis, then head of the United Mine Workers, that all mine owners contribute 10 cents per ton of coal produced into a central welfare fund established by the union itself. *United States* v. *Ryan*, 350 U. S. 299, 304–305; S. Rep. No. 105, 80th Cong., 1st Sess., pt. 1, p. 52 (1947), 1 Leg. Hist. LMRA, at 458. The debates and Reports reveal that despite considerable congressional opposition to Lewis' demands, *ibid.*; 93 Cong. Rec. 3423, 3516–3517, 3564–3565 (1947) (remarks of Reps. Hartley, Fisher, and Case); *id.*, at 4678, 4746–4748 (Sens. Byrd and Taft), Congress specifically rejected proposals that would have rendered those demands illegal either by providing that union proposals concerning pension welfare benefits were not mandatory subjects of bargaining, or by prohibiting all such funds even indirectly established or managed by a union. See H. R. 3020, 80th Cong., 1st Sess., §§ 2 (11), 8 (a)(2)(C)(ii) (1947), 1 Leg. Hist. LMRA, at 39–40, 51; H. R. Rep. No. 245, 80th Cong., 1st Sess., 14–17 (1947), 2 Leg. Hist. LMRA, at 305–308.

[15] A "participant" is "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan . . . , or whose beneficiaries may be eligible to receive any such benefit." 29 U. S. C. § 1002 (7). A "beneficiary" is "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U. S. C. § 1002 (8).

406 (b)(2) declares that a trustee may not "act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U. S. C. § 1106 (b)(2). Section 405 (a) imposes on each trustee an affirmative duty to prevent every other trustee of the same fund from breaching fiduciary duties, including the duty to act solely on behalf of the beneficiaries. 29 U. S. C. § 1105 (a).

Moreover, the fiduciary requirements of ERISA specifically insulate the trust from the employer's interest. Except in circumstances involving excess contributions or termination of the trust, "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." § 403 (c)(1), 29 U. S. C. § 1103 (c)(1). Finally, § 406 (a)(1)(E) prohibits any transaction between the trust and a "party in interest," including an employer, and § 407 carefully limits the amount and types of employer-owned property and securities that the trustees may obtain for the trust. 29 U. S. C. §§ 1106 (a)(1)(E), 1107.[16] In sum, ERISA vests the "exclusive authority and discretion to manage and control the assets of the plan" in the trustees alone, and not the employer or the union. 29 U. S. C. § 1103 (a).

The legislative history of ERISA confirms that Congress intended in particular to prevent trustees "from engaging in actions where there would be a conflict of interest with the

[16] Although § 408 (c)(3) of ERISA permits a trustee of an employee benefit fund to serve as an agent or representative of the union or employer, that provision in no way limits the duty of such a person to follow the law's fiduciary standards while he is performing his responsibilities as trustee.

fund, such as representing any party dealing with the fund." S. Rep. No. 93–383, pp. 31, 32 (1973). In short, the fiduciary provisions of ERISA were designed to prevent a trustee "from being put into a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries." H. R. Conf. Rep. No. 93–1280, *supra,* at 309.[17]

III

The language and legislative history of § 302 (c)(5) and ERISA therefore demonstrate that an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him. Thus, the statutes defining the duties of a management-appointed trustee make it virtually self-evident that welfare fund trustees are not "representatives for the purposes of collective bargaining or the adjustment of grievances" within the meaning of § 8 (b)(1)(B). But close examination of the latter provision makes it even clearer that it does not limit the freedom of a union to try to induce an employer to select a particular § 302 (c)(5) trustee.[18]

Congress enacted § 8 (b)(1)(B) largely to prevent unions

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[17] In 1980, Congress amended ERISA to impose new responsibilities upon the trustees of multiemployer trust funds, passing the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96–364, 94 Stat. 1209, which reaffirmed that the trustees must act solely in the interest of the trust beneficiaries, see H. R. Rep. No. 96–869, pt. 1, p. 67 (1980).

[18] Neither statutory provision refers to the other, and though the same congressional Committees considered the issues of employee benefit trust funds and multiemployer bargaining, the legislative history nowhere suggests that Congress intended that the restrictions on union activity created by § 8 (b)(1)(B) were relevant to the selection of § 302 (c)(5) trustees. Indeed, though faced with a United Mine Workers demand that owners contribute a fixed percentage of their coal receipts to a multiemployer trust fund created by the union, Congress rejected several proposals that would have denied the union the power to make such demands. See n. 14, *supra.*

from forcing employers to join multiemployer bargaining units, or to dictate the identity of those who would represent employers in collective-bargaining negotiations or the settlement of employee grievances. See *American Broadcasting Cos.* v. *Writers Guild,* 437 U. S. 411, 422–423, 429–431, 435–436; *Florida Power & Light Co.* v. *Electrical Workers,* 417 U. S. 790, 803; S. Rep. No. 105, 80th Cong., 1st Sess., pt. 1, p. 21, (1947), 1 Leg. Hist. LMRA, at 427; 93 Cong. Rec. 4143 (1947) (Sen. Ellender).[19] The legislative history reveals the concern of some Senators that if unions could strike or bargain to impasse to compel employers to join industrywide bargaining units, the large unions might exercise monopoly power over wages or call strikes threatening large portions of the national economy. S. Rep. No. 105, pt. 1, *supra,* at 51, 1 Leg. Hist. LMRA, at 457; 93 Cong. Rec. 4582–4588 (1947) (Sen. Taft). However, the power of a union to strike or bargain to impasse to induce an employer to contribute to a multiemployer trust fund does not pose the danger Congress sought to prevent. Congress treated the issues of multiemployer bargaining units and multiemployer trust funds quite distinctly. It is permissible under the law, and may be in the interest of the public, for an employer to bargain separately with a union, independently of any industrywide employer association, while the union exerts economic pressure to obtain protection for the employees through the medium of a multiemployer benefit fund.

Moreover, union pressure to force an employer to contribute to an established employee trust fund does not amount to dictating to an employer who shall represent him in collective bargaining and the adjustment of grievances, because the trustees of a § 302 (c)(5) trust fund simply do not, as

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[19] Another concern of § 8 (b)(1)(B), of no relevance here, was to prevent a union from striking to force an employer to fire a supervisor who, in the union's view, was too stern in his treatment of employees. 93 Cong. Rec. 3837–3838 (1947) (Sen. Taft).

such, engage in these activities. The term "collective bargaining" in § 8 (b)(1)(B) of the Act is defined by § 8 (d):

> "[T]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ." 29 U. S. C. § 158 (d).

Under this definition, the collective-bargaining representatives of an employer and a union attempt to reach an agreement by negotiation, and, failing agreement, are free to settle their differences by resort to such economic weapons as strikes and lockouts, without any compulsion to reach agreement. See *Carbon Fuel Co.* v. *Mine Workers,* 444 U. S. 212, 219; *NLRB* v. *Insurance Agents,* 361 U. S. 477, 495.

The atmosphere in which employee benefit trust fund fiduciaries must operate, as mandated by § 302 (c)(5) and ERISA, is wholly inconsistent with this process of compromise and economic pressure. The management-appointed and union-appointed trustees do not bargain with each other to set the terms of the employer-employee contract; they can neither require employer contributions not required by the original collectively bargained contract, nor compromise the claims of the union or the employer with regard to the latter's contributions. Rather, the trustees operate under a detailed written agreement, 29 U. S. C. § 186 (c)(5)(B), which is itself the product of bargaining between the representatives of the employees and those of the employer.[20] In-

[20] The sole and minor exception under the agreement governing the national trust funds in this litigation is the authority of the trustees to fix

deed, the trustees have an obligation to *enforce* the terms of the collective-bargaining agreement regarding employee fund contributions against the employer "for the sole benefit of the beneficiaries of the fund." *United States* v. *Carter,* 353 U. S. 210, 220. Finally, disputes between benefit fund trustees over the administration of the trust cannot, as can disputes between parties in collective bargaining, lead to strikes, lockouts, or other exercises of economic power. Rather, whereas Congress has expressly rejected compulsory arbitration as a means of resolving collective-bargaining disputes, § 302 (c)(5) explicitly provides for the compulsory resolution of any deadlocks among welfare fund trustees by a neutral umpire. Compare 29 U. S. C. § 158 (d) with 29 U. S. C. § 186 (c)(5); see. n. 12, *supra.*[21]

Like collective bargaining, the adjustment of grievances concerns the relationship between employer and employee. See 29 U. S. C. § 159 (a). The trustees' concern, however,

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the number of cents per ton of salvage coal produced which a mine operator must contribute to the funds. See n. 4, *supra.*

[21] If the administration of § 302 (c)(5) trust funds were "collective bargaining" within the meaning of federal labor law, as it would be under the Court of Appeals' view, the NLRB would have to review the discretionary actions of the trustees according to the statutory duty of good-faith bargaining. 29 U. S. C. §§ 158 (a)(5), (b)(3), (d). The Board would thereby be thrust "into a new area of regulation which Congress [has] not committed to it," *NLRB* v. *Insurance Agents,* 361 U. S. 477, 499. Moreover, under the Court of Appeals' view, a trustee would be subject to simultaneous regulation by the Board, the Secretary of Labor, and the courts, and might be torn between conflicting duties imposed by the National Labor Relations Act and ERISA. For example, ERISA requires a trustee to prevent any other trustee from breaching his fiduciary responsibilities to the trust beneficiaries. 29 U. S. C. §§ 1105 (a)(3), (b)(1)(A). On the other hand, § 8 (b)(1)(B) bars a union representative from interfering with the employer's collective-bargaining agent's performance of his duties in accordance with the employer's instructions. *American Broadcasting Cos.* v. *Writers Guild,* 437 U. S. 411, 436. Therefore, if trust fund administration is collective bargaining, a trustee could be charged with an unfair labor practice by carrying out his duties under ERISA.

is the relationship between the beneficiaries and the fund. The only "grievances" it may adjust are those concerning the eligibility of employees or their dependents for participation in the benefits of the fund. See *Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 164–171. And whereas Congress has adopted the principle of voluntary settlement, free of governmental compulsion, in the adjustment of employee grievances against the employer, § 203 (d) of the Act, 29 U. S. C. § 173 (d), a trustee deadlock over eligibility matters, like any other deadlock, must be submitted to the compulsory resolution procedure established by § 302 (c)(5).

"Both the language and the legislative history of § 8 (b)(1)(B) reflect a clearly focused congressional concern with the protection of employers in the selection of representatives to engage in two particular and explicitly stated activities, namely collective bargaining and the adjustment of grievances." *Florida Power & Light Co.* v. *Electrical Workers*, 417 U. S., at 803. The duties of an employer-appointed trustee of an employee benefit trust fund, under § 302 (c)(5) of the Act, under principles long ago developed in the courts of chancery, and under the specific provisions of ERISA, are totally alien to both of these activities. The Court of Appeals, therefore, was mistaken in believing that the conduct of the union in this case violated the provisions of § 8 (b)(1)(B).[22]

[22] The view of the Court of Appeals that the union could not seek to compel the employer to join an established employee trust fund conflicts with recent legislation concerning multiemployer pension plans. In this litigation, Amax claimed complete power under § 8 (b)(1)(B), unaffected by union economic pressure, to select the sole trustee, or all the trustees, of the trust fund benefiting the Belle Ayr Mine employees. Since, by definition, it is impossible for every employer participating in a multiemployer trust fund to exercise such power, the Court of Appeals' decision upholding Amax's claim would effectively preclude a union from resorting to economic pressure to cause an employer to participate in a multiemployer trust fund. Congress amended ERISA in 1980 to strengthen the funding requirements and enhance the financial stability of

For the reasons stated, the judgment of the Court of Appeals is reversed, and the cases are remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, dissenting.

The key to this case, in my judgment, is the distinction between the process by which a person is appointed to office and the manner in which he performs that office after he has been appointed. Congress has provided that labor and management shall each appoint the same number of representatives to serve as trustees of jointly administered employee pension and welfare funds.[1] Giving each side of the bar-

multiemployer pension plans. In these amendments, Congress sought to foster "the maintenance and growth of multiemployer pension plans . . . [and] to provide reasonable protection for the interests of the participants and beneficiaries of financially distressed multiemployer pension plans." §§ 3 (c) (2) and (c) (3) of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96–364, 94 Stat. 1209–1210. Section 3(a) (4) (A) of the 1980 Act states that "withdrawals of contributing employers from a multiemployer pension . . . adversely [affect] the plan, its participants and beneficiaries, and labor-management relations. . . ." 94 Stat. 1209. The Court of Appeals' decision therefore runs afoul of express congressional policy favoring multiemployer trusts.

[1] Section 302 (a) of the Labor Management Relations Act, 1947, generally prohibits payments by employers to representatives of their employees. 29 U. S. C. § 186 (a). Section 302 (c) (5) creates an exception to this general prohibition for payments to certain trust funds established for the sole benefit of employees. 29 U. S. C. § 186 (c) (5). The statute contains detailed requirements that trust funds must satisfy to qualify for the exception:

"The provisions of this section shall not be applicable . . . with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families

gaining table exclusive control of the appointment of half of the trustees does not compromise in any way the fiduciary obligations of the trustees after they assume office. Conversely, the imposition of fiduciary responsibilities on the trustees after they have been appointed surely does not lend any support to the Court's quixotic notion that a union may interfere—by a strike if necessary—with management's selection of its representatives.

Three quite different theories might provide a basis for deciding this case in favor of the United Mine Workers (the union). First, the Court might conclude that the union was merely trying to induce Amax to agree to contribute to the national multiemployer trust funds and that it had no interest in the identity of the management trustees of those

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and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the District Court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities . . . ." 29 U. S. C. § 186 (c)(5).

funds. Second, the Court might conclude that because Amax, as a member of the Bituminous Coal Operators Association, actually participated in the selection of the management trustees of the union's national trust funds, there is no basis for its claim that the union was interfering with that prerogative of management. Third, the Court might conclude that it is permissible for a union to restrain or to coerce an employer in the selection of its representatives for the purpose of administering joint employee pension and welfare funds.

If the Court relied on either of the first two rationales, or if its opinion could be read as resting on a blend of all three, this case would not be particularly significant. I believe, however, that the Court's opinion will be read as holding that it is not an unfair labor practice for a union to attempt to exercise an economic veto over an employer's selection of the management trustees of a jointly administered employee benefit fund.[2] In my opinion, that holding is foreclosed by rather plain statutory language and is flagrantly at odds with the intent of Congress.

I

The equal representation requirement of § 302 (c)(5) is one of a number of restrictions employed by Congress to prevent the mismanagement or misuse of employee benefit funds by union officials. See, *e. g., Arroyo* v. *United States,* 359 U. S. 419, 426; *Associated Contractors, Inc.* v. *Laborers International Union,* 559 F. 2d 222, 226 (CA3 1977).[3] Equal

[2] The Court states that "close examination of the latter provision [§ 8(b)(1)(B)] makes it even clearer that it does not limit the freedom of a union to try to induce an employer to select a particular § 302 (c)(5) trustee." *Ante,* at 334.

[3] In addition to containing numerous specific references to John L. Lewis and the United Mine Workers central fund, see, *e. g.,* S. Rep. No. 105, 80th Cong., 1st Sess., 52 (1947), reprinted in 1 Legislative History of the Labor Management Relations Act, 1947, 458 (Leg. Hist. LMRA); 93 Cong. Rec. 3564–3569, A1910 (1947); *id.,* at 4678, 4746–4748, 5015; the legislative history is replete with general expressions of concern about union misman-

representation was required, not to satisfy employer demands for a voice in benefit fund administration,[4] but to insure that money paid for the welfare of employees actually was used for that purpose. As Senator Taft explained:

> "Certainly unless we impose some restrictions we shall find that the welfare fund will become merely a war chest for the particular union, and that the employees for whose benefit it is supposed to be established, for certain definite welfare purposes, will have no legal rights and will not receive the kind of benefits to which they are entitled after such deductions from their wages.
>
> . . . . .
>
> "This amendment is, in effect, a provision to prevent the abuse of the right to establish such funds by collective bargaining, pending further study of the whole problem. Otherwise I think we shall find that the welfare fund will become a racket. In many unions it is very easy for it to become a racket." 93 Cong. Rec. 4747 (1947).

The requirement of equal labor-management representation is a central factor in the congressional formula to prevent

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agement and misuse of employee benefit funds. See, *e. g.*, S. Rep. No. 105, 80th Cong., 1st Sess., 52 (1947), 1 Leg. Hist. LMRA 458; 93 Cong. Rec. 3569 (1947); *id.*, at 4678, 4746–4747, 4752–4753. The equal representation requirement was a direct response to these concerns. As Senator Ball explained:

"In other words, when the union has complete control of this fund, when there is no detailed provision in the agreement creating the fund respecting the benefits which are to go to employees, the union and its leadership will always come first in the administration of the fund, and the benefits to which the employees supposedly are entitled will come second." *Id.*, at 4753.

See also S. Rep. No. 105, 80th Cong., 1st Sess., 52 (1947), 1 Leg. Hist. LMRA 458; 93 Cong. Rec. 3564 (1947); *id.*, at 4678, 4746.

[4] Indeed, opponents of the bill that became § 302 argued that many employers wanted absolutely nothing to do with the administration of employee benefit funds. See, *e. g.*, *id.*, at 4749, 4751–4752.

such abuse. See, *e. g., Associated Contractors, Inc., supra,* at 227; *Toensing* v. *Brown,* 374 F. Supp. 191, 195 (ND Cal. 1974), aff'd, 528 F. 2d 69 (CA9 1975).

Although the Court repeatedly uses the word "trustee" to identify the persons who administer pension and welfare funds established in compliance with § 302 (c)(5), Congress used the word "representative." See 29 U. S. C. § 186 (c)(5). Congress' use of this term does not, of course, qualify the fiduciary responsibilities of those persons.[5] It is nevertheless important for two reasons. First, it is a reminder that one of the means selected by Congress for insuring neutrality in the administration of a trust fund was to give each side of the bargaining table an equal voice in the selection of trustees. Second, it is a recognition of the fact that the administration of a trust fund often gives rise to questions over which representatives of management and representatives of labor may have legitimate differences of opinion that are entirely consistent with their fiduciary duties.

The Court's extended discussion of the fiduciary responsibilities of employee benefit fund trustees has, in my judgment, little bearing on the question presented in this case. It is undisputed that such trustees are fiduciaries whose primary loyalty must be to the beneficiaries of the funds. The question with which we are confronted here is whether this fiduciary duty is necessarily wholly inconsistent with "representative" status. The Court answers this question in the affirmative by citing traditional principles of trust law and their federal statutory counterparts. This approach leads the Court into error because it ignores the purpose under-

[5] However, the fact that Congress used the term "representative" rather than "trustee" is significant in light of the Court's reliance on the principle that "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Ante,* at 329.

lying § 302 (c)(5) and the carefully designed means chosen by Congress to achieve that purpose.

The trustees of employee benefit funds often exercise broad discretion on policy matters with respect to which management and labor representatives may reasonably have different views. Besides describing the trustees as "representatives," Congress expressly recognized in § 302 (c)(5) that such differences would arise, for it provided a procedure to resolve such differences in the event of a deadlock between "the employer and employee groups." Nothing in the statute or the legislative history suggests that differences along labor-management lines are in any way inconsistent with the trustees' fiduciary duty to the trust beneficiaries. Indeed, it is precisely because management and the union can have legitimate differences with respect to matters of trust administration that the equal representation requirement serves as an effective safeguard. Although the Court seems to ignore this principle in its decision today, it has been recognized in the past by other federal courts [6] and by the commentators.[7]

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[6] In *Associated Contractors, Inc.* v. *Laborers International Union*, 559 F. 2d 222 (CA3 1977), the decision on which the Court of Appeals relied in this case, the court recognized that the inevitable conflict between the views of labor and the views of management with respect to the administration of employee benefit funds was an essential feature of the statutory protection designed by Congress:

"The starting point for analysis must be the candid recognition that the relationship between employer and employee trustees of an employee benefit trust fund is quasi-adversarial in nature. Naturally, the trustees of such a trust fund function as fiduciaries for the funds' beneficiaries but they also serve as representatives of the parties who appoint them. Insofar as it is consistent with their fiduciary obligations, employer trustees are expected to advance the interests of the employer while employee trustees are expected to further the concerns of the union in the ongoing collective bargaining process between them. . . . The trustees' efforts to improve the position of the parties they represent are completely legitimate—indeed, they are essential to the operation of section 302 (c)(5).

[*Footnote 7 is on p. 345*]

The trust agreement at issue in this case allows ample room for such labor-management differences. For example, it authorizes the trustees to determine how much money each operator shall contribute to the fund on account of the production of salvaged coal. See App. 98k–98*l*. That kind of detail could be covered in the basic collective-bargaining agreement or left to the trustees for resolution in the light of changing circumstances. When the trustees resolve such an issue, one surely could not charge a management representative with a breach of trust merely for favoring a lower rate than the union representatives suggest.

The Court states that the trustees may never "compromise the claims of the union or the employer with regard to the

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Congress envisioned the conflict of views of employer and employee as a distilling process which would provide safeguards against trust fund corruption." *Id.*, at 227–228 (citations omitted).

See also *Ader* v. *Hughes*, 570 F. 2d 303, 308 (CA10 1978); *Lamb* v. *Carey*, 162 U. S. App. D. C. 247, 251, 498 F. 2d 789, 793 (1974), cert. denied *sub nom. Carey* v. *Davis*, 419 U. S. 869; *Toensing* v. *Brown*, 374 F. Supp. 191, 195 (ND Cal. 1974), aff'd, 528 F. 2d 69 (CA9 1975).

[7] One commentator described the statutory scheme, as follows:

"The governing trust agreement separately entered into by the parties to the collective bargaining agreement may specify general categories of benefits, but it normally delegates to the trustees broad discretion to determine specific benefit levels and eligibility requirements, to modify the benefit plan, and to administer the plan.

"Exercise of this discretionary power may involve important questions of policy or judgment on which union and employer trustees may well differ. This potential divergence of interests was the underlying reason for the statutory requirement of equal representation. Employer representatives were intended to act as a check on the untrammeled discretion of the union. The possibility of adverse interests leading to dispute is recognized by the statutory provision for breaking deadlocks through appointment of an impartial umpire." Goetz, Developing Federal Labor Law of Welfare and Pension Plans, 55 Cornell L. Rev. 911, 922–923 (1970) (footnote omitted).

See also Goetz, Employee Benefit Trusts Under Section 302 of Labor Management Relations Act, 59 Nw. U. L. Rev. 719, 748 (1965).

latter's contributions" to the fund. *Ante,* at 336. But what if one contributor to a multiemployer fund is unable to pay its bills currently? Do trustees have no power to enter into temporary arrangements or compromises?[8] In making decisions regarding the investment of the assets of the fund, legitimate differences among faithful trustees certainly may arise. Conceivably, management representatives may favor conservative investment policies that are best designed to guarantee the long-range solvency of the fund while labor representatives may favor investments with higher yields that will support a demand for more liberal benefits at the next bargaining session. No written trust agreement can entirely eliminate the need for discretionary decisions by trustees nor make it impermissible for the trustees to give consideration to the interests that they represent when confronting day-to-day administrative problems.

Some of the issues the trustees must resolve in processing applications for benefits are almost identical to those that arise in grievance proceedings. Rights to pension benefits and to seniority are measured, in part, by the employee's length of service. Either in the adjustment of a grievance over seniority or in the trustees' approval or disapproval of a claim for retirement benefits, it may be necessary to resolve a dispute over how to measure the period of employment. Bargaining units tend to develop an unwritten "law of the shop" to resolve such recurring minor disputes; it seems to me equally permissible for trustees to develop a similar common law of their own and for representatives of the two sides of the bargaining table to reflect different points of view as that law develops. The guarantee of impartiality in making

[8] The trust agreement in this record suggests the contrary:

"The Trustees shall take such action as they deem appropriate to collect any such delinquencies, and shall advise the International Union and the appropriate Districts and Locals of the Union, on at least a monthly basis, of such delinquencies, as long as such delinquencies continue." App. 98p.

decisions of this kind is not a total divorce of every trustee from the interests that he represents; rather, neutrality is guaranteed by having an equal number of "representatives" of the two conflicting interests make the decisions, subject always to their basic obligation as fiduciaries. That this is the scheme of the statute is perfectly clear from its terms.[9]

It is equally clear that this scheme will be compromised if the employer's selection of his representatives is now to be a subject of collective bargaining. The danger to the legislative scheme is not mitigated by the fact that the employer need not agree with the union's demand that a particular person be named a management trustee. The employer may consider it less costly to give the union a veto over the selection of the management trustees than to grant a wage increase.[10] Any bargaining over the identity of a trustee inevi-

[9] As noted above, the word "trustee" does not appear in § 302 (c) of the LMRA. That section does require that "employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute . . . ." 29 U. S. C. § 186 (c)(5)(B). It seems to me that this statutory language is quite inconsistent with the Court's view that the trustees are essentially fungible once they have been appointed.

[10] Because the equal representation requirement primarily benefits the fund's beneficiaries rather than the employer, it is unlikely that an employer would be willing to risk a strike or other economic pressure on the part of the union in order to preserve its right to choose its own representatives to the employee benefit fund. As the legislative history suggests, see n. 4, *supra,* many employers probably view the equal representation requirement as an unwelcome burden at best, rather than as an essential right worth defending at the risk of extended labor strife. Cf. Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harv. L. Rev. 274, 290, 314 (1948) ("The provisions dealing with employer contributions to union trust funds set the employer up as watchdog, although it has no interest in the fund").

tably will destroy the precise balance that Congress intended by directing that each side shall select its own representatives. As JUSTICE BLACKMUN aptly stated while a member of the Court of Appeals for the Eighth Circuit:

> "[T]o permit the union in any degree to participate in the choice of employer representatives does violence to the statutory standard of equal representation." *Blassie* v. *Kroger Co.*, 345 F. 2d 58, 72 (1965).[11]

In my opinion, the Court today "does violence to the statutory standard" because it misapprehends the safeguard established by Congress in § 302 (c)(5), and instead applies to this case principles of trust law and statutory provisions that have little, if any, relevance to the precise question presented.

II

In addition to arguing that there is an inherent inconsistency between the duties of a "trustee" and the duties of a "representative"—and therefore that the trustees of an employee benefit fund cannot be representatives even though they are so named by Congress—the Court suggests that in any event these representatives are not selected "for the purposes of collective bargaining or the adjustment of grievances" within the meaning of § 8 (b)(1)(B), 29 U. S. C. § 158 (b)(1)(B).[12] The Court seems to read this provision as a narrow, precisely defined prohibition against interference with the selection of a relatively small number of representatives

[11] See also *Associated Contractors, Inc.*, 559 F. 2d, at 227; *Quad City Builders Assn.* v. *Tri City Bricklayers Union*, 431 F. 2d 999, 1003 (CA8 1970).

[12] Section 8 (b) of the National Labor Relations Act provides, in pertinent part:

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances . . ." 29 U. S. C. § 158 (b)(1)(B).

whose primary function is to represent the employer in collective-bargaining negotiations or in the adjustment of grievances. Once again, the Court overlooks the distinction between interfering with the selection process and interfering with the performance of a supervisor's duties after he has been selected. I believe the Court's narrow construction was not intended by Congress, and that the statute prohibits union interference with management's selection of all personnel who have any, however minor, collective-bargaining or grievance-adjustment responsibilities. When § 8 (b)(1)(B) is read in light of its purpose and legislative history, it is plain that the prohibition applies to the selection of the employer's representatives in the administration of joint benefit funds.

The Court's narrow view of § 8 (b)(1)(B) has its source in *Florida Power & Light Co.* v. *Electrical Workers,* 417 U. S. 790—a case that did not involve any direct interference with the employer's selection of supervisors. In that case, we held that "a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8 (b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer." *Id.,* at 804–805. Thus, to make out a violation of the statute in such a case, it is not enough to show that the union disciplined a supervisor who had some collective-bargaining or grievance-adjustment responsibilities; the discipline itself must relate directly to the supervisor's performance of those duties. See also *American Broadcasting Cos.* v. *Writers Guild,* 437 U. S. 411, 429–430. This direct relationship is an appropriate element of a § 8 (b)(1)(B) violation in a case involving union discipline of a supervisor because such discipline only indirectly affects the "selection" of management representatives, the primary focus of the statute. However, whenever the union conduct has a direct impact on the employer's selection of a representative,

it is not necessary that that conduct bear a direct relationship to the representative's collective-bargaining or grievance-adjustment duties; it is sufficient that the union attempt to coerce or to restrain management in the selection of a representative who will have such duties, even if they will constitute only a small portion of his overall responsibilities.

The legislative history of § 8 (b)(1)(B) supports a broad reading of the prohibition against union conduct aimed directly at the actual selection of employer representatives. Section 8 (b)(1)(B) was intended to protect the basic management prerogative of selecting foremen and more senior executives who exercise supervisory authority over employees and represent the company in its relationship with employees and their collective-bargaining agent. The sparse comments on the provision in the legislative history persuade me that Congress intended the description of "representatives for the purposes of collective bargaining or the adjustment of grievances" to refer to a category of employer representatives whose selection was exclusively a matter of management prerogative.

Thus, Senator Taft explained the provision by using the example of an unpopular foreman who may well have had no specific responsibility for either collective bargaining or adjusting grievances. He said:

> "This unfair labor practice referred to is not perhaps of tremendous importance, but employees cannot say to their employer, 'We do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y.' That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work.'" 93 Cong. Rec. 3837 (1947).

A few days later, in a brief discussion of provisions in the bill intended to deal with "strikes invading the prerogatives

of management," Senator Ellender identified § 8 (b)(1) as covering the coercion of an employer "either in the selection of his bargaining representative or in the selection of a personnel director or foreman, or other supervisory official." 93 Cong. Rec. 4143 (1947). His description of the provision surely supports a broad reading of the prohibition against strikes invading the prerogatives of management, rather than a narrowly restricted reference to a precisely defined category of representatives principally involved in collective bargaining and grievance adjustment.[13]

Therefore, to sustain its position in this case, it seems to me that the Court must establish that no part of the duties of an employee benefit fund trustee involve collective-bargaining or grievance-adjustment activities. But even if one gives the narrowest literal reading to the term "collective bargaining," it is clear that employee benefit trust agreements generally, and the trust agreement involved in this case in particular, authorize the two groups of representatives to engage in collective-bargaining activity. The statute broadly defines collective bargaining to encompass any conference with respect to "the negotiation of an agreement, or any question

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[13] Senator Ellender's full statement on this point reads as follows:

"I shall now deal briefly with strikes invading the prerogatives of management.

"The bill prevents a union from dictating to an employer on the question of bargaining with union representatives through an employer association. The bill, in subsection 8 (b)(1) on page 14, makes it an unfair labor practice for a union to attempt to coerce an employer either in the selection of his bargaining representative or in the selection of a personnel director or foreman, or other supervisory official. Senators who heard me discuss the issue early in the afternoon will recall that quite a few unions forced employers to change foremen. They have been taking it upon themselves to say that management should not appoint any representative who is too strict with the membership of the union. This amendment seeks to prescribe a remedy in order to prevent such interferences." 93 Cong. Rec. 4143 (1947).

arising thereunder." 29 U. S. C. § 158 (d).[14] Such negotiation is manifestly a part of a trustee's duties.[15]

In addition to the provision delegating to the trustees the power to fix the contribution rate for salvaged coal production, see *supra,* at 345, the agreement in this case provides that the trustee representing the union and the trustee representing the employers shall select the neutral trustee.[16] When the trustee representing the union and the trustee representing the employers select the neutral trustee, they surely are resolving a question arising under the agreement. It is there-

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[14] In pertinent part, § 8 (d) of the National Labor Relations Act reads:

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ." 29 U. S. C. § 158 (d).

[15] The wall between collective-bargaining activities and the duties of welfare fund trustees on which the Court's opinion is based simply does not exist. As one commentator has observed:

"[T]he subjects about which the trustees confer are within the scope of mandatory collective bargaining under the Act.

. . . . . .

"Despite the unusual setting, the deliberations of trustees of these funds may be looked upon as an extension of the collective bargaining process within contractual and statutory limits." Goetz, *supra* n. 7, 55 Cornell L. Rev., at 922, 923.

See also *Toensing* v. *Brown,* 374 F. Supp., at 195–196.

[16] The agreement provides:

"*Section (e)* Responsibilities and Duties of Trustees

"(1) Each Trust shall be administered by a Board of three Trustees, one of whom shall be appointed by the Employers; one of whom shall be appointed by the Union; and one of whom shall be a neutral party, *selected by the other two.*" App. 98n (emphasis added).

fore perfectly clear that they are literally engaged in collective bargaining as that term is defined in the Act. Indeed, whenever they confer about various questions that arise in connection with the administration of the trust agreement, they inevitably are engaged in that activity as defined in the statute. The fact that differences between labor and management trustees in the administration of the fund are to be resolved through the neutral umpire procedure established in § 302 (c)(5), rather than through strikes or lockouts, does not in any way change the character of the trustees' function.

In this case, there is no need to decide when, or indeed if ever, the refusal of one trustee to confer with another might constitute a refusal to bargain in good faith and therefore an unfair labor practice. It may well be true that the fiduciary obligations imposed by the Employee Retirement Income Security Act, 29 U. S. C. § 1001 *et seq.*, or by other provisions of the LMRA, may make a different remedy appropriate for a violation of the trustee's statutory duties. In this case, however, we are merely confronted with the question whether the employer's right to designate its representative to the board of a jointly administered trust fund is a matter for negotiation with the union or is strictly a matter of management prerogative. The language of the statute, its structure, its purpose, and the history of administration of trust funds pursuant to the Act since it was passed, all support the conclusion that this is a matter of management prerogative over which the union has no right to strike.[17] In my opin-

[17] This conclusion is in no way inconsistent with the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 94 Stat. 1209, the Court's statement to the contrary notwithstanding. See *ante*, at 338–339, n. 22. While Congress sought, in that Act, to enhance the stability of multiemployer plans, it did not address the question presented in this case, nor did it prohibit the withdrawal of employers from such plans. Rather, Congress provided that withdrawing employers must fund a proportional share of a plan's unfunded vested benefits. MPPAA § 104, 94

ion, the Court of Appeals' judgment should be affirmed. I therefore respectfully dissent.

Stat. 1217. Thus, the general expressions of concern in the legislative history of this Act must be read in light of the action Congress actually took to allay those concerns.

CALIFORNIA *v.* PRYSOCK

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

No. 80–1846. Decided June 29, 1981

Held: There is no rigid rule requiring that the content of the warnings to an accused prior to police interrogation required by *Miranda* v. *Arizona,* 384 U. S. 436, be a virtual incantation of the precise language contained in the *Miranda* opinion. Thus, the California Court of Appeal erred in holding that *Miranda* warnings were inadequate simply because of the order in which they were given to respondent (a minor), where after he was told that he had "the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning," he was informed that he had the right to have his parents present, and then was informed that he had "the right to have a lawyer appointed to represent you at no cost to yourself." These warnings adequately conveyed to respondent his right to have a lawyer appointed if he could not afford one prior to and during interrogation, and the Court of Appeal erred in concluding otherwise.

Certiorari granted; reversed and remanded.

PER CURIAM.

This case presents the question whether the warnings given to respondent prior to a recorded conversation with a police officer satisfied the requirements of *Miranda* v. *Arizona,* 384 U. S. 436 (1966). Although ordinarily this Court would not be inclined to review a case involving application of that precedent to a particular set of facts, see *Fare* v. *Michael C.,* 439 U. S. 1310, 1314 (1978) (REHNQUIST, J., in chambers, opinion of Court at 442 U. S. 707 (1979)), the opinion of the California Court of Appeal essentially laid down a flat rule requiring that the content of *Miranda* warnings be a virtual incantation of the precise language contained in the *Miranda* opinion. Because such a rigid rule was not mandated by *Miranda* or any other decision of this Court, and is not required to serve the purposes of *Miranda,* we grant the motion

of respondent for leave to proceed *in forma pauperis* and the petition for certiorari and reverse.

On January 30, 1978, Mrs. Donna Iris Erickson was brutally murdered. Later that evening respondent and a codefendant were apprehended for commission of the offense. Respondent was brought to a substation of the Tulare County Sheriff's Department and advised of his *Miranda* rights. He declined to talk and, since he was a minor, his parents were notified. Respondent's parents arrived and after meeting with them respondent decided to answer police questions. An officer questioned respondent, on tape, with respondent's parents present. The tape reflects that the following warnings were given prior to any questioning:

> "Sgt. Byrd: . . . Mr. Randall James Prysock, earlier today I advised you of your legal rights and at that time you advised me you did not wish to talk to me, is that correct?
>
> "Randall P.: Yeh.
>
> "Sgt. Byrd: And, uh, during, at the first interview your folks were not present, they are now present. I want to go through your legal rights again with you and after each legal right I would like for you to answer whether you understand it or not. . . . Your legal rights, Mr. Prysock, is [*sic*] follows: Number One, you have the right to remain silent. This means you don't have to talk to me at all unless you so desire. Do you understand this?
>
> "Randall P.: Yeh.
>
> "Sgt. Byrd: If you give up your right to remain silent, anything you say can and will be used as evidence against you in a court of law. Do you understand this?
>
> "Randall P.: Yes.
>
> "Sgt. Byrd: You have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning. Do you understand this?

"Randall P.: Yes.

"Sgt. Byrd: You also, being a juvenile, you have the right to have your parents present, which they are. Do you understand this?

"Randall P.: Yes.

"Sgt. Byrd: Even if they weren't here, you'd have this right. Do you understand this?

"Randall P.: Yes.

"Sgt. Byrd: You all, uh,—if,—you have the right to have a lawyer appointed to represent you at no cost to yourself. Do you understand this?

"Randall P.: Yes.

"Sgt. Byrd: Now, having all these legal rights in mind, do you wish to talk to me at this time?

"Randall P.: Yes." App. A to Pet. for Cert. i–iii.

At this point, at the request of Mrs. Prysock, a conversation took place with the tape recorder turned off. According to Sgt. Byrd, Mrs. Prysock asked if respondent could still have an attorney at a later time if he gave a statement now without one. Sgt. Byrd assured Mrs. Prysock that respondent would have an attorney when he went to court and that "he could have one at this time if he wished one." *Id.*, at 11.[1]

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[1] The tape reflects the following concerning the off-the-record discussion:

"Sgt. Byrd: . . . Okay, Mrs. Prysock, you asked to get off the tape . . . . During that time you asked, decided you wanted some time to think about getting, whether to hire a lawyer or not.

"Mrs. P.: 'Cause I didn't understand it.

"Sgt. Byrd: And you have decided now that you want to go ahead and you do not wish a lawyer present at this time?

"Mrs. P.: That's right.

"Sgt. Byrd: And I have not persuaded you in any way, is that correct?

"Mrs. P.: No, you have not.

"Sgt. Byrd: And, Mr. Prysock is that correct that I have done nothing to persuade you not to, to hire a lawyer or to go on with this?

"Mr. P.: That's right.

[*Footnote 1 is continued on p. 358*]

At trial in the Superior Court of Tulare County the court denied respondent's motion to suppress the taped statement. Respondent was convicted by a jury of first-degree murder with two special circumstances—torture and robbery. Cal. Penal Code Ann. §§ 187, 190.2, 12022 (b) (West Supp. 1981). He was also convicted of robbery with the use of a dangerous weapon, §§ 211, 12022 (b), burglary with the use of a deadly weapon, §§ 459, 12022 (b), automobile theft, Cal. Veh. Code Ann. § 10851 (West Supp. 1981), escape from a youth facility, Cal. Welf. & Inst. Code Ann. § 871 (West 1972), and destruction of evidence, Cal. Penal Code Ann. § 135 (West 1970).

The Court of Appeal for the Fifth Appellate District reversed respondent's convictions and ordered a new trial because of what it thought to be error under *Miranda*. App. A to Pet. for Cert. 4. The Court of Appeal ruled that respondent's recorded incriminating statements, given with his parents present, had to be excluded from consideration by the jury because respondent was not properly advised of his right to the services of a free attorney before and during interrogation. Although respondent was indisputably informed that he had "the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning," and further informed that he had "the right to have a lawyer appointed to represent you at no cost to yourself," the Court of Appeal ruled that these warnings were inadequate because respondent

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"Sgt. Byrd: Okay, everything we're doing here is strictly in accordance with Randall and yourselves, is that correct?

"Mr. P.: That is correct.

"Sgt. Byrd: Okay. Uh, all right, Randy, I can't remember where I left off, I think I asked you, uh, with your legal rights in mind, do you wish to talk to me at this time? This is with everything I told you, all your legal rights, your right to an attorney, your right, and your right to remain silent, and all these, I mean do you wish to talk to me at this time about the case?

"Randall P.: Yes." App. A to Pet. for Cert. iii–iv.

was not explicitly informed of his right to have an attorney appointed before further questioning. The Court of Appeal stated that "[o]ne of [*Miranda*'s] virtues is its precise requirements which are so easily met," and quoted from *Harryman* v. *Estelle,* 616 F. 2d 870, 873–874 (CA5), cert. denied, 449 U. S. 860 (1980), that " 'the rigidity of the *Miranda* rules and the way in which they are to be applied was conceived of and continues to be recognized as the decision's greatest strength.' " App. A to Pet. for Cert. 12. Relying on two previous decisions of the California Court of Appeal, *People* v. *Bolinski,* 260 Cal. App. 2d 705, 67 Cal. Rptr. 347 (1968), and *People* v. *Stewart,* 267 Cal. App. 2d 366, 73 Cal. Rptr. 484 (1968), the court ruled that the requirements of *Miranda* were not met in this case.[2] The California Supreme Court denied a petition for hearing, with two justices dissenting. App. D to Pet. for Cert.

This Court has never indicated that the "rigidity" of *Miranda* extends to the precise formulation of the warnings given a criminal defendant. See, *e. g., United States* v. *Lamia,* 429 F. 2d 373, 375–376 (CA2), cert. denied, 400 U. S. 907 (1970). This Court and others *have* stressed as one virtue of *Miranda* the fact that the giving of the warnings obviates the need for a case-by-case inquiry into the actual voluntariness of the admissions of the accused. See *Fare* v. *Michael C.,* 442 U. S., at 718; *Harryman* v. *Estelle, supra.* Nothing in these observations suggests any desirable rigidity in the *form* of the required warnings.

Quite the contrary, *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures. The Court in that case stated that "[t]he warnings required and the waiver necessary in accordance with our opinion today

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[2] Contrary to respondent's suggestion, it is clear that the decision below was based on federal law. The Court of Appeal stated that it was reversing and ordering a new trial "because of *Miranda* error." *Id.,* at 4.

are, *in the absence of a fully effective equivalent,* prerequisites to the admissibility of any statement made by a defendant." 384 U. S., at 476 (emphasis supplied). See also *id.,* at 479. Just last Term in considering when *Miranda* applied we noted that that decision announced procedural safeguards including "the now familiar *Miranda* warnings . . . *or their equivalent.*" *Rhode Island* v. *Innis,* 446 U. S. 291, 297 (1980) (emphasis supplied).

Other courts considering the precise question presented by this case—whether a criminal defendant was adequately informed of his right to the presence of appointed counsel prior to and during interrogation—have not required a verbatim recital of the words of the *Miranda* opinion but rather have examined the warnings given to determine if the reference to the right to appointed counsel was linked with some future point in time after the police interrogation. In *United States* v. *Garcia,* 431 F. 2d 134 (CA9 1970) (*per curiam*), for example, the court found inadequate advice to the defendant that she could "have an attorney appointed to represent you when you first appear before the U. S. Commissioner or the Court." *People* v. *Bolinski, supra,* relied upon by the court below, is a case of this type. Two separate sets of warnings were ruled inadequate. In the first, the defendant was advised that *"if he was charged* . . . he would be appointed counsel." 260 Cal. App. 2d, at 718, 67 Cal. Rptr., at 355 (emphasis supplied). In the second, the defendant, then in Illinois and about to be moved to California, was advised that " 'the court would appoint [an attorney] *in Riverside County* [, California].' " *Id.,* at 723, 67 Cal. Rptr., at 359 (emphasis supplied). In both instances the reference to appointed counsel was linked to a future point in time after police interrogation, and therefore did not fully advise the suspect of his right to appointed counsel before such interrogation.

Here, in contrast, nothing in the warnings given respondent suggested any limitation on the right to the presence of

appointed counsel different from the clearly conveyed rights to a lawyer in general, including the right "to a lawyer before you are questioned, . . . while you are being questioned, and all during the questioning." App. A to Pet. for Cert. 9–10; ii. Like *United States* v. *Noa,* 443 F. 2d 144 (CA9 1971), where the warnings given were substantially similar to those given here and defendant's argument was the same as that adopted by the Court of Appeal, "[t]his is not a case in which the defendant was not informed of his right to the presence of an attorney during questioning . . . or in which the offer of an appointed attorney was associated with a future time in court . . . ." *Id.,* at 146.

It is clear that the police in this case fully conveyed to respondent his rights as required by *Miranda.* He was told of his right to have a lawyer present prior to and during interrogation, and his right to have a lawyer appointed at no cost if he could not afford one. These warnings conveyed to respondent his right to have a lawyer appointed if he could not afford one prior to and during interrogation. The Court of Appeal erred in holding that the warnings were inadequate simply because of the order in which they were given.[3]

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[3] The dissent, arguing that the Court of Appeal opinion is unfairly criticized as requiring mimicking of *Miranda, post,* at 365–366, ignores substantial portions of the opinion below and substitutes arguments of its own for those articulated by the Court of Appeal. For example, the dissent makes no mention of the lower court's stress on the "precise requirements" of *Miranda* or its "rigidity" in this area, and ignores the portion of the opinion in which the court quotes from *Miranda* and then criticizes the officer for not repeating the exact language in advising respondent of his rights. See App. A to Pet. for Cert. 12–14. The Court of Appeal did conclude that respondent was not advised of his right to appointed counsel prior to and during interrogation, but this was *because* the officer did not parrot the language of *Miranda.* The more substantive reasons suggested by the dissent are implausible. The reference to "appointed" counsel has never been considered as suggesting that the availability of counsel was postponed, and Mrs. Prysock's off-the-record conversation was occasioned by her fear that waiving the right to counsel at interrogation

Because respondent was given the warnings required by *Miranda,* the decision of the California Court of Appeal to the contrary is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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

A juvenile informed by police that he has a right to counsel may understand that right to include one or more of three options: (1) that he has a right to have a lawyer represent him if he or his parents are able and willing to hire one; (2) that, if he cannot afford to hire an attorney, he has a right to have a lawyer represent him without charge *at trial,* even if his parents are unwilling to spend money on his behalf; or (3) that, if he is unable to afford an attorney, he has a right to consult a lawyer without charge before he decides whether to talk to the police, even if his parents decline to pay for such legal representation.[1] All three of these options are encompassed within the right to counsel possessed by a juvenile charged with a crime. In this case, the first two options were explained to respondent, but the third was not.

In *Miranda* v. *Arizona,* 384 U. S. 436, this Court held that in order to protect an accused's privilege against self-incrimination, certain procedural safeguards must be employed.

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would occasion a waiver of the right to counsel later in court, App. A to Pet. for Cert. 11, clearly indicating that the officer conveyed the right to counsel at interrogation.

[1] In his dissenting opinion in *Miranda* v. *Arizona,* 384 U. S. 436, 504, Justice Harlan accurately summarized the four essential elements of the warning that must be given a person in custody before he is questioned, "namely, that he has a right to remain silent, that anything he says may be used against him, that he has a right to have present an attorney during the questioning, and that if indigent he has a right to a lawyer without charge."

In particular, an individual taken into police custody and subjected to questioning must be given the *Miranda* warnings:

> "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.*, at 479.

See also *Rhode Island* v. *Innis*, 446 U. S. 291, 297. This formulation makes it clear beyond any doubt that an indigent accused has the right to the presence of an attorney and the right to have that attorney appointed to represent him prior to any questioning. While it is certainly true, as the Court emphasizes today, that the Federal Constitution does not require a "talismanic incantation" of the language of the *Miranda* opinion, *ante*, at 359, it is also indisputable that it requires that an accused be adequately informed of his right to have counsel appointed prior to any police questioning.

The California Court of Appeal in this case analyzed the warning given respondent, quoted *ante*, at 356–357, and concluded that he had not been adequately informed of this crucial right. The police sergeant informed respondent that he had the right to have counsel present during questioning and, after a brief interlude, informed him that he had the right to appointed counsel. See *ibid.* The Court of Appeal concluded that this warning was constitutionally inadequate, not because it deviated from the precise language of *Miranda*, but because

> "[u]nfortunately, the minor was not given the crucial information that the services of the free attorney were available *prior to the impending questioning.*" App. A to Pet. for Cert. 15 (emphasis in original).[2]

[2] According to the Court of Appeal, the principal defect in the warning was that the police sergeant, in a "needless excursion," inserted a dis-

There can be no question that *Miranda* requires, as a matter of federal constitutional law, that an accused effectively be provided with this "crucial information" in some form. The Court's demonstration that the Constitution does not require that the precise language of *Miranda* be recited to an accused simply fails to come to terms with the express finding of the California Court of Appeal that respondent was not given this information. The warning recited by the police sergeant is sufficiently ambiguous on its face to provide adequate support for the California court's finding. That court's conclusion is at least reasonable, and is clearly not so patently erroneous as to warrant summary reversal.

The ambiguity in the warning given respondent is further demonstrated by the colloquy between the police sergeant and respondent's parents that occurred *after* respondent was told that he had the "right to have a lawyer appointed to represent you at no cost to yourself." Because lawyers are normally "appointed" by judges, and not by law enforcement officers, the reference to appointed counsel could reasonably have been understood to refer to trial counsel.[3] That is what

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cussion of respondent's right to have his parents present between the description of the right to have counsel present during questioning and the description of the right of an indigent to have counsel appointed to represent him. See App. A to Pet. for Cert. 14–15. The subsequent untaped conversation "obfuscated, rather than clarified" the matter. *Id.*, at 15. The warnings given respondent were defective, not because "the officer did not parrot the language of *Miranda*," *ante*, at 361, n. 3, but because, in the form in which the warnings were given, they failed to convey the essential information required by *Miranda*.

[3] The fact that the reference also might have been understood to refer to the appointment of counsel prior to questioning does not undercut the Court of Appeal's conclusion. *Miranda* requires "meaningful advice to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act." *Coyote* v. *United States*, 380 F. 2d 305, 308 (CA10 1967), cert. denied, 389 U. S. 992. Such meaningful advice is not provided by a warning which requires that an accused choose among

respondent's parents must have assumed, because their ensuing colloquy with the sergeant related to their option "to *hire* a lawyer." [4]

The judges on the California Court of Appeal and on the California Supreme Court, all of whom are presumably more familiar with the procedures followed by California police officers than we are, concluded that respondent was not adequately informed of his right to have a lawyer present without charge during the questioning. This Court is not at all fair to those judges when it construes their conscientious appraisal of a somewhat ambiguous record as requiring "a virtual incantation of the precise language contained in the

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several reasonable interpretations of the language employed by a police officer in a custodial situation.

[4] The Court simply ignores the significance of the references to hiring a lawyer in the colloquy which it quotes *ante*, at 357–358, n. 1. The colloquy bears repeating:

"Sgt. Byrd: . . . Okay, Mrs. Prysock, you asked to get off the tape . . . . During that time you asked, decided you wanted some time to think about getting, *whether to hire a lawyer or not.*

"Mrs. P.: 'Cause I didn't understand it.

"Sgt. Byrd: And you have decided now that you want to go ahead and you do not wish a lawyer present at this time?

"Mrs. P.: That's right.

"Sgt. Byrd: And I have not persuaded you in any way, is that correct?

"Mrs. P.: No, you have not.

"Sgt. Byrd: And, Mr. Prysock is that correct that I have done nothing to persuade you *not to, to hire a lawyer* or to go on with this?

"Mr. P.: That's right.

"Sgt. Byrd: Okay, everything we're doing here is strictly in accordance with Randall and yourselves, is that correct?

"Mr. P.: That is correct.

"Sgt. Byrd: Okay. Uh, all right, Randy, I can't remember where I left off, I think I asked you, uh, with your legal rights in mind, do you wish to talk to me at this time? This is with everything I told you, all your legal rights, your right to an attorney, your right, and your right to remain silent, and all these, I mean do you wish to talk to me at this time about the case?

"Randall P.: Yes." App. A to Pet. for Cert. iii–iv (emphasis added).

Miranda opinion." *Ante,* at 355. It seems clear to me that it is this Court, rather than the state courts, that is guilty of attaching greater importance to the form of the *Miranda* ritual than to the substance of the message it is intended to convey.

I respectfully dissent.

Syllabus

CBS, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.

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

No. 80–207. Argued March 3, 1981—Decided July 1, 1981*

Section 312 (a)(7) of the Communications Act of 1934, as added by Title I of the Federal Election Campaign Act of 1971, authorizes the Federal Communications Commission (FCC) to revoke any broadcasting station license "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." On October 11, 1979, the Carter-Mondale Presidential Committee (Committee) requested each of the three major television networks (petitioners) to provide time for a 30-minute program between 8 p. m. and 10:30 p. m. on any day from the 4th through the 7th of December 1979. The Committee intended to present, in conjunction with President Carter's formal announcement of his candidacy, a documentary outlining the record of his administration. The petitioners refused to make the requested time available. CBS emphasized the large number of candidates for the Presidential nominations and the potential disruption of regular programming to accommodate requests for equal treatment, but offered to sell a 5-minute segment at 10:55 p. m. on December 8 and a 5-minute segment in the daytime; American Broadcasting Cos. replied that it had not yet decided when it would begin selling political time for the 1980 Presidential campaign, but later indicated that it would allow such sales in January 1980; and National Broadcasting Co., noting the number of potential requests for time from Presidential candidates, stated that it was not prepared to sell time for political programs as early as December 1979. The Committee then filed a complaint with the FCC, charging that the networks had violated their obligation to provide "reasonable access" under § 312 (a)(7). The FCC ruled that the networks had violated the statute, concluding that their reasons for refusing to sell the time requested were "deficient" under the FCC's standards

*Together with No. 80–213, *American Broadcasting Cos., Inc.* v. *Federal Communications Commission et al.*, and No. 80–214, *National Broadcasting Co., Inc.* v. *Federal Communications Commission et al.*, also on certiorari to the same court.

of reasonableness, and directing the networks to indicate by a specified date how they intended to fulfill their statutory obligations. On the networks' petition for review, the Court of Appeals affirmed the FCC's orders, holding that the statute created a new, affirmative right of access to the broadcast media for individual candidates for federal elective office and that the FCC has the authority to independently evaluate whether a campaign has begun for purposes of the statute. The court approved the FCC's insistence that in responding to a candidate's request for time broadcasters must weigh certain factors, including the individual needs of the candidate (as expressed by the candidate); the amount of time previously provided to the candidate; potential disruption of regular programming; the number of other candidates likely to invoke equal opportunity rights if the broadcaster granted the request before it; and the timing of the request. The court determined that the record supported the FCC's conclusion that the networks failed to apply the proper standards and had thus violated the statute's "reasonable access" requirement. The court also rejected petitioners' First Amendment challenge to § 312 (a) (7) as applied.

Held:

1. Section 312 (a) (7) created an affirmative, promptly enforceable right of reasonable access to the use of broadcast stations for individual candidates seeking federal elective office. It went beyond merely codifying prior FCC policies developed under the public interest standard. Pp. 376–386.

(a) It is clear on the face of the statute that Congress did not prescribe simply a general duty to afford some measure of political programming, which the public interest obligation of broadcasters already provided for. Rather, § 312 (a) (7) focuses on the individual "legally qualified candidate" seeking air time to advocate "*his* candidacy," and guarantees him "reasonable access" enforceable by specific governmental sanction. Further, the sanction may be imposed for either "willful or repeated" failure to afford reasonable access. Pp. 377–379.

(b) The legislative history confirms that § 312 (a) (7) created a right of access that enlarged the political broadcasting responsibilities of licensees. Pp. 379–382.

(c) Since the enactment of § 312 (a) (7), the FCC has consistently construed the statute as extending beyond the prior public interest policy and as imposing the additional requirement that reasonable access and purchase of reasonable amounts of time be afforded candidates for federal office. This repeated construction of the statute comports with its language and legislative history and has received congressional review, so that departure from that construction is unwarranted. Pp. 382–385.

(d) The qualified observation in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U. S. 94, 113–114, n. 12, relied on by petitioners, that § 312 (a)(7) "essentially codified" existing FCC practice was not a conclusion that the statute was in all respects coextensive with that practice and imposed no additional duties on broadcasters. That case did not purport to rule on the precise contours of the responsibilities created by § 312 (a)(7) since that issue was not before the Court. Pp. 385–386.

2. Contrary to petitioners' contentions, certain of the FCC's standards to effectuate the guarantees of § 312 (a)(7)—which standards evolved principally on a case-by-case basis and are not embodied in formalized rules—do not contravene the statutory objectives or unduly intrude on petitioners' editorial discretion, and the statute was properly applied to petitioners in determining that they had failed to grant the "reasonable access" required by the statute. Pp. 386–394.

(a) The FCC's practice of independently determining—by examining objective evidence and considering the position of both the candidate and the networks as well as other factors—whether a campaign has begun and the obligations imposed by the statute have attached does not improperly involve the FCC in the electoral process or significantly impair broadcasters' editorial discretion. Nor is the FCC's standard requiring broadcasters to evaluate access requests on an individualized basis improper on the alleged ground that it attaches inordinate significance to candidates' needs, thereby precluding fair assessment of broadcasters' concerns. The FCC mandates careful consideration of, not blind assent to, candidates' desires for air time. Although the standard does proscribe blanket rules concerning access, such as a broadcaster's rule of granting only time spots of a fixed duration to all candidates, the standard is consistent with § 312 (a)(7)'s guarantee of reasonable access to *individual* candidates for federal elective office. The FCC's standards are not arbitrary and capricious, but represent a reasoned attempt to effectuate the statute's access requirement, giving broadcasters room to exercise their discretion but demanding that they act in good faith. Pp. 388–390.

(b) On the basis of prior FCC decisions and interpretations, petitioners had adequate notice that their conduct in responding to the Committee's request for access would contravene the statute. The FCC's conclusion about the status of the campaign accorded with its announced position on the vesting of § 312 (a)(7) rights and was adequately supported by the objective factors on which it relied. And under the circumstances here, it cannot be concluded that the FCC abused its discretion in finding that petitioners failed to grant the "reasonable access" required by § 312 (a)(7). Pp. 390–394.

3. The right of access to the media under § 312 (a) (7), as defined by the FCC and applied here, does not violate the First Amendment rights of broadcasters by unduly circumscribing their editorial discretion, but instead properly balances the First Amendment rights of federal candidates, the public, and broadcasters. Although the broadcasting industry is entitled under the First Amendment to exercise "the widest journalistic freedom consistent with its public [duties]," *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra,* at 110, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 390. Section 312 (a) (7), which creates only a *limited* right of access to the media, makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process. Pp. 394–397.

202 U. S. App. D. C. 369, 629 F. 2d 1, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, BLACKMUN, and POWELL, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST and STEVENS, JJ., joined, *post,* p. 397. STEVENS, J., filed a dissenting opinion, *post,* p. 418.

Floyd Abrams argued the cause for petitioners in all cases. On the briefs in No. 80–207 were *J. Roger Wollenberg, Timothy B. Dyk, Ralph E. Goldberg,* and *Joseph DeFranco.* On the briefs in No. 80–213 were *James A. McKenna, Jr., Thomas N. Frohock, Carl R. Ramey,* and *Robert J. Kaufman.* With Mr. Abrams on the briefs in No. 80–214 were *Dean Ringel, Patricia A. Pickrel, Corydon B. Dunham,* and *Howard Monderer. Erwin G. Krasnow* filed a brief for the National Association of Broadcasters, respondent under this Court's Rule 19.6, urging reversal.

Stephen M. Shapiro argued the cause for the federal respondents in all cases. With him on the brief were *Solicitor General McCree, Deputy Solicitor General Claiborne, Robert R. Bruce,* and *C. Grey Pash, Jr.*†

†*Heidi P. Sanchez* and *Andrew Jay Schwartzman* filed a brief for the

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether the Federal Communications Commission properly construed 47 U. S. C. § 312 (a)(7) and determined that petitioners failed to provide "reasonable access to . . . the use of a broadcasting station" as required by the statute. 449 U. S. 950 (1980).

I

A

On October 11, 1979, Gerald M. Rafshoon, President of the Carter-Mondale Presidential Committee, requested each of the three major television networks to provide time for a 30-minute program between 8 p. m. and 10:30 p. m. on either the 4th, 5th, 6th, or 7th of December 1979.[1] The Committee

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National Citizens Committee for Broadcasting et al. as *amici curiae* urging affirmance.

[1] The text of Mr. Rafshoon's letter to the three networks read as follows:

"On behalf of the Carter/Mondale Presidential Committee, Inc., I am requesting availabilities for a thirty (30) minute program on [ABC, CBS, or NBC] between 8:00 p. m. and 10:30 p. m. E. S. T. on December 4, December 5, December 6, or December 7, 1979. This program, to be run in conjunction with an announcement concerning his candidacy by President Carter for the Democratic nomination for President, consists of a documentary outlining the President's record and that of his administration. At the time this program is aired, it may be assumed that President Carter will be a legally qualified candidate under the Communications Act of 1934, as amended, and that the President would appear on the program.

"As you know, the first official contest to select delegates to the Democratic National Convention occurs January 21, 1980, in Iowa, which is 47 days after December 7, 1979, our last requested date for availabilities.

"Unlike all previous Presidential election years, the news media has chosen to focus enormous attention on the Florida Caucus (October 13, 1979) and Convention (November 16–18, 1979) as well as other aspects of the 1980 campaign. As illustration, I have noted that in the six-week period from September 1 through October 9, 1979, ABC devoted 51 minutes, 22 seconds to the 1980 campaign; CBS devoted 51 minutes, 17 seconds to this subject; and NBC devoted 70 minutes. Therefore, our request for the above

intended to present, in conjunction with President Carter's formal announcement of his candidacy, a documentary outlining the record of his administration.

The networks declined to make the requested time available. Petitioner CBS emphasized the large number of candidates for the Republican and Democratic Presidential nominations and the potential disruption of regular programming to accommodate requests for equal treatment, but it offered to sell two 5-minute segments to the Committee, one at 10:55 p. m. on December 8 and one in the daytime.[2] Peti-

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time seems eminently appropriate in view of the escalating political climate already generated by both print and broadcast media.

"I will expect to hear from one of your sales representatives within the next week regarding a selection of times in order that we may choose a mutually agreeable date." App. 35–40.

[2] The letter (dated October 17, 1979) to Mr. Rafshoon from Raymond E. Dillon, Director of Political Sales at CBS, read in pertinent part:

"Because of the large number of present and potential candidates for the Republican and Democratic presidential nominations, we are at this time unable to accede to your request to purchase a half-hour program. We note that three Democrats and eleven Republicans have already announced, or may reasonably be expected shortly to announce, their presidential candidacies; indeed two candidates for the Republican presidential nomination have already requested to purchase half-hour programs on the CBS Television Network, and their requests have been declined on the same basis as indicated below.

"In light of the above circumstances, were we to provide the half-hour program you seek, accommodating potential requests for equal treatment from other candidates for presidential nomination would involve massive disruptions of the regular entertainment and information schedule of the CBS Television Network. Accordingly, we must respectfully reject your request.

"We are, however, prepared to make one 5-minute segment in prime time and one 5-minute daytime segment available for purchase by your committee. We note that this is the same offer made to the Republican candidates referred to above in response to their requests to purchase half-hour time periods.

"While we are unable to make available time on the dates you have specified, we are able to offer for your purchase a 5-minute period on

tioner American Broadcasting Cos. replied that it had not yet decided when it would begin selling political time for the 1980 Presidential campaign,[3] but subsequently indicated that it would allow such sales in January 1980. App. 58. Petitioner National Broadcasting Co., noting the number of potential requests for time from Presidential candidates, stated that it was not prepared to sell time for political programs as early as December 1979.[4]

On October 29, 1979, the Carter-Mondale Presidential Committee filed a complaint with the Federal Communications Commission, charging that the networks had violated

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December 8 between approximately 10:55 and 11:00 PM. We will also provide a specific 5-minute daytime availability for your purchase on request." *Id.*, at 44–45.

[3] The letter (dated October 23, 1979) to Mr. Rafshoon from Charles C. Allen, Vice President for Sales Administration at ABC, read in pertinent part:

"[T]he ABC Television Network has not reached a decision as to when it will start selling political time for the 1980 Presidential campaign, and, accordingly, we are not in a position to comply with your request. As I mentioned on the telephone, I believe that later this year a decision will be made to make political time for the Presidential campaign available on ABC–TV early next year." *Id.*, at 41.

[4] The letter (dated October 23, 1979) to Mr. Rafshoon from Joseph J. Iaricci, Vice President for Sales and Administration at NBC, read in pertinent part:

"We have evaluated your request carefully. Based upon our experience with past campaigns, we believe it is too early in the political season for nationwide broadcast time to be made available for paid political purposes. In addition, we believe that honoring your request at this early stage of the Presidential campaign would require NBC to honor similar requests from a number of other Presidential aspirants. The impact of such an undertaking at this time is, of course, a significant factor in our decision.

"Insofar as the nomination process is now focused on political activities in individual states like Iowa, you may wish to contact stations serving those particular states.

"Please be assured that NBC News will continue to cover important and newsworthy aspects of President Carter's political activities." *Id.*, at 42–43.

their obligation to provide "reasonable access" under § 312 (a)(7) of the Communications Act of 1934, as amended. Title 47 U. S. C. § 312 (a)(7), as added to the Act, 86 Stat. 4, states:

> "The Commission may revoke any station license or construction permit—
>
> . . . . . .
>
> "(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."

At an open meeting on November 20, 1979, the Commission, by a 4-to-3 vote, ruled that the networks had violated § 312 (a)(7). In its memorandum opinion and order, the Commission concluded that the networks' reasons for refusing to sell the time requested were "deficient" under its standards of reasonableness, and directed the networks to indicate by November 26, 1979, how they intended to fulfill their statutory obligations. 74 F. C. C. 2d 631.

Petitioners sought reconsideration of the FCC's decision. The reconsideration petitions were denied by the same 4-to-3 vote, and, on November 28, 1979, the Commission issued a second memorandum opinion and order clarifying its previous decision. It rejected petitioners' arguments that § 312 (a)(7) was not intended to create a new right of access to the broadcast media and that the Commission had improperly substituted its judgment for that of the networks in evaluating the Carter-Mondale Presidential Committee's request for time. November 29, 1979, was set as the date for the networks to file their plans for compliance with the statute. 74 F. C. C. 2d 657.

The networks, pursuant to 47 U. S. C. § 402, then petitioned for review of the Commission's orders in the United States Court of Appeals for the District of Columbia Circuit. The

court allowed the Committee and the National Association of Broadcasters to intervene, and granted a stay of the Commission's orders pending review.

Following the seizure of American Embassy personnel in Iran, the Carter-Mondale Presidential Committee decided to postpone to early January 1980 the 30-minute program it had planned to broadcast during the period of December 4–7, 1979. However, believing that some time was needed in conjunction with the President's announcement of his candidacy, the Committee sought and subsequently obtained from CBS the purchase of five minutes of time on December 4. In addition, the Committee sought and obtained from ABC and NBC offers of time for a 30-minute program in January, and the ABC offer eventually was accepted. Throughout these negotiations, the Committee and the networks reserved all rights relating to the appeal.

B

The Court of Appeals affirmed the Commission's orders, 202 U. S. App. D. C. 369, 629 F. 2d 1 (1980), holding that the statute created a new, affirmative right of access to the broadcast media for individual candidates for federal elective office. As to the implementation of § 312 (a)(7), the court concluded that the Commission has the authority to independently evaluate whether a campaign has begun for purposes of the statute, and approved the Commission's insistence that "broadcasters consider and address all non-frivolous matters in responding to a candidate's request for time." *Id.*, at 386, 629 F. 2d, at 18. For example, a broadcaster must weigh such factors as: "(a) the individual needs of the candidate (as expressed by the candidate); (b) the amount of time previously provided to the candidate; (c) potential disruption of regular programming; (d) the number of other candidates likely to invoke equal opportunity rights if the broadcaster grants the request before him; and, (e) the timing of the request." *Id.*, at 387, 629 F. 2d, at 19. And in reviewing a broadcaster's decision, the Commission will confine

itself to two questions: "(1) has the broadcaster adverted to the proper standards in deciding whether to grant a request for access, and (2) is the broadcaster's explanation for his decision reasonable in terms of those standards?" *Id.*, at 386, 629 F. 2d, at 18.

Applying these principles, the Court of Appeals sustained the Commission's determination that the Presidential campaign had begun by November 1979, and, accordingly, the obligations imposed by § 312 (a)(7) had attached. Further, the court decided that "the record . . . adequately supports the Commission's conclusion that the networks failed to apply the proper standards." *Id.*, at 389, 629 F. 2d, at 21. In particular, the "across-the-board" policies of all three networks failed to address the specific needs asserted by the Carter-Mondale Presidential Committee. *Id.*, at 390, 629 F. 2d, at 22. From this the court concluded that the Commission was correct in holding that the networks had violated the statute's "reasonable access" requirement.

Finally, the Court of Appeals rejected petitioners' First Amendment challenge to § 312 (a)(7) as applied, reasoning that the statute as construed by the Commission "is a constitutionally acceptable accommodation between, on the one hand, the public's right to be informed about elections and the right of candidates to speak and, on the other hand, the editorial rights of broadcasters." *Id.*, at 389, 629 F. 2d, at 25. In a concurring opinion adopted by the majority, *id.*, at 389, n. 117, 629 F. 2d, at 25, n. 117, Judge Tamm expressed the view that § 312 (a)(7) is saved from constitutional infirmity "as long as the [Commission] . . . maintains a very limited 'overseer' role consistent with its obligation of careful neutrality . . . ." *Id.*, at 402, 629 F. 2d, at 34.

II

We consider first the scope of § 312 (a)(7). Petitioners CBS and NBC contend that the statute did not impose any

additional obligations on broadcasters, but merely codified prior policies developed by the Federal Communications Commission under the public interest standard. The Commission, however, argues that § 312 (a)(7) created an affirmative, promptly enforceable right of reasonable access to the use of broadcast stations for individual candidates seeking federal elective office.

A

The Federal Election Campaign Act of 1971, which Congress enacted in 1972, included as one of its four Titles the Campaign Communications Reform Act (Title I). Title I contained the provision that was codified as 47 U. S. C. § 312 (a)(7).[5]

We have often observed that the starting point in every case involving statutory construction is "the language employed by Congress." *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 337 (1979). In unambiguous language, § 312 (a)(7) authorizes the Commission to revoke a broadcaster's license

> "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."

It is clear on the face of the statute that Congress did not prescribe merely a general duty to afford some measure of political programming, which the public interest obligation

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[5] Title I also provided: (a) that during a specified period before a primary or general election, a broadcast station was not permitted to charge a legally qualified candidate for any public office a fee in excess of its "lowest unit charge . . . for the same class and amount of time for the same period," 47 U. S. C. § 315 (b)(1); and (b) that in using the communications media, candidates for federal elective office were not allowed to exceed established spending limits, 47 U. S. C. § 803 (1970 ed., Supp. II), repealed, Pub. L. 93–443, 88 Stat. 1278 (1974).

of broadcasters already provided for. Rather, § 312 (a)(7) focuses on the individual "legally qualified candidate" seeking air time to advocate *"his* candidacy," and guarantees him "reasonable access" enforceable by specific governmental sanction. Further, the sanction may be imposed for "willful *or* repeated" failure to afford reasonable access. This suggests that, if a legally qualified candidate for federal office is denied a reasonable amount of broadcast time, license revocation may follow even a single instance of such denial so long as it is willful; where the denial is recurring, the penalty may be imposed in the absence of a showing of willfulness.

The command of § 312 (a)(7) differs from the limited duty of broadcasters under the public interest standard. The practice preceding the adoption of § 312 (a)(7) has been described by the Commission as follows:

> "Prior to the enactment of the [statute], we recognized political broadcasting as one of the fourteen basic elements necessary to meet the public interest, needs and desires of the community. No legally qualified candidate had, at that time, a specific right of access to a broadcasting station. However, stations were required to make reasonable, good faith judgments about the importance and interest of particular races. Based upon those judgments, licensees were to 'determine how much time should be made available for candidates in each race on either a paid or unpaid basis.' There was no requirement that such time be made available for specific 'uses' of a broadcasting station to which Section 315 'equal opportunities' would be applicable." (Footnotes omitted.) *Report and Order: Commission Policy in Enforcing Section 312 (a)(7) of the Communications Act,* 68 F. C. C. 2d 1079, 1087–1088 (1978) (1978 Report and Order).

Under the pre-1971 public interest requirement, compliance with which was necessary to assure license renewal, some time

had to be given to political issues, but an individual candidate could claim no personal right of access unless his opponent used the station and no distinction was drawn between federal, state, and local elections.[6] See *Farmers Educational & Cooperative Union* v. *WDAY, Inc.*, 360 U. S. 525, 534 (1959). By its terms, however, § 312 (a)(7) singles out legally qualified candidates for *federal* elective office and grants them a special right of access on an individual basis, violation of which carries the serious consequence of license revocation. The conclusion is inescapable that the statute did more than simply codify the pre-existing public interest standard.

B

The legislative history confirms that § 312 (a)(7) created a right of access that enlarged the political broadcasting responsibilities of licensees. When the subject of campaign reform was taken up by Congress in 1971, three bills were introduced in the Senate—S. 1, S. 382, and S. 956. All three measures, while differing in approach, were "intended to increase a candidate's accessibility to the media and to reduce the level of spending for its use." Federal Election Campaign Act of 1971: Hearings on S. 1, S. 382, and S. 956 before the Subcommittee on Communications of the Senate Committee on Commerce, 92d Cong., 1st Sess., 2 (1971) (remarks of Sen. Pastore). The subsequent Report of the Senate Commerce Committee stated that one of the primary purposes of the Federal Election Campaign Act of 1971 was to "give candidates for public office *greater access to the media* so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters." S. Rep. No. 92–96, p. 20 (1971) (emphasis added). The Report con-

[6] The public interest requirement still governs the obligations of broadcasters with respect to political races at the state and local levels. See *Public Notice: The Law of Political Broadcasting and Cablecasting*, 69 F. C. C. 2d 2209, 2290 (1978) (1978 Primer).

tained neither an explicit interpretation of the provision that became § 312 (a)(7) nor a discussion of its intended impact, but simply noted:

> "[The amendment] provide[s] that willful or repeated failure by a broadcast licensee to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of his station's facilities by a lagally [*sic*] qualified candidate for Federal elective office on behalf of his candidacy shall be grounds for adverse action by the FCC.
>
> "The duty of broadcast licensees generally to permit the use of their facilities by legally qualified candidates for these public offices is inherent in the requirement that licensees serve the needs and interests of the [communities] of license. The Federal Communications Commission has recognized this obligation . . . ." *Id.*, at 34.

While acknowledging the "general" public interest requirement, the Report treated it separately from the specific obligation prescribed by the proposed legislation. See also *id.*, at 28.

As initially reported in the Senate, § 312 (a)(7) applied broadly to "the use of a broadcasting station by any person who is a legally qualified candidate on behalf of his candidacy." *Id.*, at 3. The Conference Committee confined the provision to candidates seeking *federal* elective office. S. Conf. Rep. No. 92–580, p. 22 (1971); H. Conf. Rep. No. 92–752, p. 22 (1971). During floor debate on the Conference Report in the House, attention was called to the substantial impact § 312 (a)(7) would have on the broadcasting industry:

> "[B]roadcasters [are required] to permit any legally qualified candidate [for federal office] to purchase a 'reasonable amount of time' for his campaign advertising. Any broadcaster found in willful or repeated violation of this requirement could lose his license and be

> thrown out of business, his total record of public service notwithstanding.
>
> . . . . . .
>
> "[U]nder this provision, a broadcaster, whose license is obtained and retained on basis of performance in the public interest, may be charged with being unreasonable and, therefore, fall subject to revocation of his license." 118 Cong. Rec. 326 (1972) (remarks of Rep. Keith).

Such emphasis on the thrust of the statute would seem unnecessary if it did nothing more than reiterate the public interest standard.

Perhaps the most telling evidence of congressional intent, however, is the contemporaneous amendment of § 315 (a) of the Communications Act.[7] That amendment was described by the Conference Committee as a "conforming amendment" necessitated by the enactment of § 312 (a)(7). S. Conf. Rep. No. 92–580, *supra,* at 22; H. Conf. Rep. No. 92–752, *supra,* at 22. Prior to the "conforming amendment," the second sentence of 47 U. S. C. § 315 (a) (1970 ed.) read: "No obligation is imposed upon any licensee to allow the use of its station by any such candidate." This language made clear that broadcasters were not common carriers as to affirmative, rather than responsive, requests for access. As a result of the amendment, the second sentence now contains an important qualification: "No obligation is imposed *under this subsection* upon any licensee to allow the use of its station by any such candidate." 47 U. S. C. § 315 (a) (emphasis added). Congress retreated from its statement that "no obligation" exists to afford individual access presumably because § 312 (a)(7) compels such access in the context of federal elections. If § 312 (a)(7) simply reaffirmed the pre-existing public inter-

[7] Title 47 U. S. C. § 315 (a) provides that, if a legally qualified candidate for public office is permitted to use a broadcasting station, the licensee must afford "equal opportunities to all other . . . candidates for that office in the use of [the] station."

est requirement with the added sanction of license revocation, no conforming amendment to § 315 (a) would have been needed.

Thus, the legislative history supports the plain meaning of the statute that individual candidates for federal elective office have a right of reasonable access to the use of stations for paid political broadcasts on behalf of their candidacies,[8] without reference to whether an opponent has secured time.

C

We have held that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction." *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 381 (1969) (footnotes omitted). Accord *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U. S. 94, 121 (1973). Such deference "is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives." *United States* v. *Rutherford,* 442 U. S. 544, 554 (1979).

Since the enactment of § 312 (a)(7), the Commission has consistently construed the statute as extending beyond the prior public interest policy. In 1972, the Commission made clear that § 312 (a)(7) "now imposes on the overall obligation to operate in the public interest *the additional specific requirement* that reasonable access and purchase of reasonable amounts of time be afforded candidates for Federal office." *Use of Broadcast and Cablecast Facilities by Candidates for Public Office,* 34 F. C. C. 2d 510, 537–538 (1972)

[8] No request for access must be honored under § 312 (a)(7) unless the candidate is willing to pay for the time sought. See *Kennedy for President Comm.* v. *FCC,* 204 U. S. App. D. C. 160, 174–178, 636 F. 2d 432, 446–450 (1980); 1978 Primer, at 2288.

(1972 Policy Statement) (emphasis added). Accord, *Public Notice Concerning Licensee Responsibility Under Amendments to the Communications Act Made by the Federal Election Campaign Act of 1971,* 47 F. C. C. 2d 516 (1974). In its 1978 Report and Order, the Commission stated:

> "When Congress enacted Section 312 (a)(7), it imposed an additional obligation on the general mandate to operate in the public interest. Licensees were specifically required to afford reasonable access to or to permit the purchase of reasonable amounts of broadcast time for the 'use' of Federal candidates.
>
> "We see no merit to the contention that Section 312 (a)(7) was meant merely as a codification of the Commission's already existing policy concerning political broadcasts. There was no reason to commit that policy to statute since it was already being enforced by the Commission. . . ." 68 F. C. C. 2d, at 1088.

See also 1978 Primer, 69 F. C. C. 2d, at 2286–2289. The Commission has adhered to this view of the statute in its rulings on individual inquiries and complaints. See, *e. g., The Labor Party,* 67 F. C. C. 2d 589, 590 (1978); *Ken Bauder,* 62 F. C. C. 2d 849 (Broadcast Bureau 1976); *Don C. Smith,* 49 F. C. C. 2d 678, 679 (Broadcast Bureau 1974); *Summa Corp.,* 43 F. C. C. 2d 602, 603–605 (1973); *Robert H. Hauslein,* 39 F. C. C. 2d 1064, 1065 (Broadcast Bureau 1973).

Congress has been made aware of the Commission's interpretation of § 312 (a)(7). In 1973, hearings were conducted to review the operation of the Federal Election Campaign Act of 1971. Federal Election Campaign Act of 1973: Hearings on S. 372 before the Subcommittee on Communications of the Senate Committee on Commerce, 93d Cong., 1st Sess. (1973). Commission Chairman Dean Burch testified regarding the agency's experience with § 312 (a)(7). *Id.,* at 136–137. He noted that the Commission's 1972 Policy Statement was "widely distributed and represented our best judgment as to

the requirements of the law and the intent of Congress." *Id.*, at 135. Chairman Burch discussed some of the difficult questions implicit in determining whether a station has afforded "reasonable access" to a candidate for federal office, and in conclusion stated: "We have brought our approach to these problems in the form of the 1972 Public Notice to the attention of Congress. If we have erred in some important construction, we would, of course, welcome congressional guidance." *Id.*, at 137. Senator Pastore, Chairman of the Communications Subcommittee, replied:

> "We didn't draw the provision any differently than we did because when you begin to legislate on guidelines, and on standards, and on criteria, you know what you run up against. I think what we did was reasonable enough, and I think what you did was reasonable enough as well.
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> . . . . . .
>
> "I would suppose that in cases of that kind, you would get some complaints. But, frankly, I think it has worked out pretty well." *Id.*, at 137–138.

The issue was joined when CBS Vice Chairman Frank Stanton also testified at the hearings and objected to the fact that § 312 (a)(7) "grants rights to all legally qualified candidates for Federal office . . . ." *Id.*, at 190. He strongly urged "repeal" of the statute, but his plea was unsuccessful. *Ibid.*[9]

The Commission's repeated construction of § 312 (a)(7) as affording an affirmative right of reasonable access to in-

[9] Broadcasters have continued to register their complaints about § 312 (a)(7) with Congress. See First Amendment Clarification Act of 1977: Hearing on S. 22 before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 95th Cong., 2d Sess., 67 (1978). And Congress has considered specific proposals to repeal the statute, but has declined to do so. See S. 22, 95th Cong., 1st Sess., § 3 (1977); S. 1178, 94th Cong., 1st Sess., § 2 (1975). Indeed when the Federal Election Campaign Act was amended in 1974, § 312 (a)(7) was left undisturbed. See Pub. L. 93–443, 88 Stat. 1272.

dividual candidates for federal elective office comports with the statute's language and legislative history and has received congressional review. Therefore, departure from that construction is unwarranted. "Congress' failure to repeal or revise [the statute] in the face of such administrative interpretation [is] persuasive evidence that that interpretation is the one intended by Congress." *Zemel* v. *Rusk,* 381 U. S. 1, 11 (1965).

D

In support of their narrow reading of § 312 (a)(7) as simply a restatement of the public interest obligation, petitioners cite our decision in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U. S. 94 (1973), which held that neither the First Amendment nor the Communications Act requires broadcasters to accept paid editorial advertisements from citizens at large. The Court in *Democratic National Committee* observed that "the Commission on several occasions has ruled that no private individual or group has a right to command the use of broadcast facilities," and that Congress has not altered that policy even though it has amended the Communications Act several times. *Id.,* at 113. In a footnote, on which petitioners here rely, we referred to the then recently enacted § 312 (a)(7) as one such amendment, stating that it had "essentially codified the Commission's prior interpretation of § 315 (a) as requiring broadcasters to make time available to political candidates." *Id.,* at 113–114, n. 12.

However, "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Reiter* v. *Sonotone Corp.,* 442 U. S., at 341. The qualified observation that § 312 (a)(7) "essentially codified" existing Commission practice was not a conclusion that the statute was in all respects coextensive with that practice and imposed no additional duties on broadcasters. In *Democratic National Committee,* we did not purport to rule on the precise con-

tours of the responsibilities created by § 312 (a)(7) since that issue was not before us. Like the general public interest standard and the equal opportunities provision of § 315 (a), § 312 (a)(7) reflects the importance attached to the use of the public airwaves by political candidates. Yet we now hold that § 312 (a)(7) expanded on those predecessor requirements and granted a new right of access to persons seeking election to federal office.[10]

III

A

Although Congress provided in § 312 (a)(7) for greater use of broadcasting stations by federal candidates, it did not give guidance on how the Commission should implement the statute's access requirement. Essentially, Congress adopted a "rule of reason" and charged the Commission with its enforcement. Pursuant to 47 U. S. C. § 303 (r), which empowers the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Communications Act]," the agency has developed standards to effectuate the guarantees of § 312 (a)(7). See also 47 U. S. C. § 154 (i). The Commission has issued some general interpretative statements, but its standards implementing § 312 (a)(7) have evolved principally on a case-by-case basis and are not embodied in formalized rules. The relevant criteria broadcasters must employ in evaluating access requests under the statute can be summarized from the Commission's 1978 Report and Order and the memorandum opinions and orders in these cases.

Broadcasters are free to deny the sale of air time prior to

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[10] See generally Note, The Right of "Reasonable Access" for Federal Political Candidates Under Section 312 (a)(7) of the Communications Act, 78 Colum. L. Rev. 1287 (1978).

the commencement of a campaign, but once a campaign has begun, they must give reasonable and good-faith attention to access requests from "legally qualified" candidates [11] for federal elective office. Such requests must be considered on an individualized basis, and broadcasters are required to tailor their responses to accommodate, as much as reasonably possible, a candidate's stated purposes in seeking air time. In responding to access requests, however, broadcasters may also give weight to such factors as the amount of time previously sold to the candidate, the disruptive impact on regular programming, and the likelihood of requests for time by rival candidates under the equal opportunities provision of § 315 (a). These considerations may not be invoked as pretexts for denying access; to justify a negative response, broadcasters must cite a realistic danger of substantial program disruption—perhaps caused by insufficient notice to allow adjustments in the schedule—or of an excessive number of equal time requests. Further, in order to facilitate review by the Commission, broadcasters must explain their reasons for refusing time or making a more limited counteroffer. If broadcasters take the appropriate factors into account and act reasonably and in good faith, their decisions will be entitled to deference even if the Commission's analysis would have differed in the first instance. But if broadcasters adopt "across-the-board policies" and do not attempt to respond to

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[11] In order to be "legally qualified" under the Commission's rules, a candidate must: (a) be eligible under law to hold the office he seeks; (b) announce his candidacy; and (c) qualify for a place on the ballot or be eligible under law for election as a write-in candidate. Persons seeking nomination for the Presidency or Vice Presidency are "legally qualified" in: (a) those states in which they or their proposed delegates have qualified for the primary or Presidential preference ballot; or (b) those states in which they have made a substantial showing of being serious candidates for nomination. Such persons will be considered "legally qualified" in all states if they have qualified in 10 or more states. See 1978 Primer, 69 F. C. C. 2d, at 2216–2218.

the individualized situation of a particular candidate, the Commission is not compelled to sustain their denial of access. See 74 F. C. C. 2d, at 665–674; 74 F. C. C. 2d, at 642–651; 1978 Report and Order, 68 F. C. C. 2d, at 1089–1092, 1094. Petitioners argue that certain of these standards are contrary to the statutory objectives of § 312 (a)(7).

(1)

The Commission has concluded that, as a threshold matter, it will independently determine whether a campaign has begun and the obligations imposed by § 312 (a)(7) have attached. 74 F. C. C. 2d, at 665–666. Petitioners assert that, in undertaking such a task, the Commission becomes improperly involved in the electoral process and seriously impairs broadcaster discretion.

However, petitioners fail to recognize that the Commission does not set the starting date for a campaign. Rather, on review of a complaint alleging denial of "reasonable access," it examines objective evidence to find whether the campaign has already commenced, "taking into account the position of the candidate *and the networks* as well as other factors." *Id.*, at 665 (emphasis added). As the Court of Appeals noted, the "determination of when the statutory obligations attach does not control the electoral process. . . . the determination is controlled by the process." 202 U. S. App. D. C., at 384, 629 F. 2d, at 16. Such a decision is not, and cannot be, purely one of editorial judgment.

Moreover, the Commission's approach serves to narrow § 312 (a)(7), which might be read as vesting access rights in an individual candidate as soon as he becomes "legally qualified" without regard to the status of the campaign. See n. 11, *supra*. By confining the applicability of the statute to the period after a campaign commences, the Commission has limited its impact on broadcasters and given substance to its command of *reasonable* access.

(2)

Petitioners also challenge the Commission's requirement that broadcasters evaluate and respond to access requests on an individualized basis. In petitioners' view, the agency has attached inordinate significance to candidates' needs, thereby precluding fair assessment of broadcasters' concerns and prohibiting the adoption of uniform policies regarding requests for access.

While admonishing broadcasters not to " 'second guess' the 'political' wisdom or . . . effectiveness" of the particular format sought by a candidate, the Commission has clearly acknowledged that "the candidate's . . . request is by no means conclusive of the question of how much time, if any, is appropriate. Other . . . factors, such as the disruption or displacement of regular programming (particularly as affected by a reasonable probability of requests by other candidates), must be considered in the balance." 74 F. C. C. 2d, at 667–668. Thus, the Commission mandates careful consideration of, not blind assent to, candidates' desires for air time.

Petitioners are correct that the Commission's standards proscribe blanket rules concerning access; each request must be examined on its own merits. While the adoption of uniform policies might well prove more convenient for broadcasters, such an approach would allow personal campaign strategies and the exigencies of the political process to be ignored. A broadcaster's "evenhanded" response of granting only time spots of a fixed duration to candidates may be "unreasonable" where a particular candidate desires less time for an advertisement or a longer format to discuss substantive issues. In essence, petitioners seek the unilateral right to determine in advance how much time to afford *all* candidates. Yet § 312 (a)(7) assures a right of reasonable access to *individual* candidates for federal elective office, and the Commission's requirement that their requests be considered on an *individualized* basis is consistent with that guarantee.

(3)

The Federal Communications Commission is the experienced administrative agency long entrusted by Congress with the regulation of broadcasting, and the Commission is responsible for implementing and enforcing § 312 (a)(7) of the Communications Act. Accordingly, its construction of the statute is entitled to judicial deference "unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S., at 381. As we held in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S., at 120, the Commission must be allowed to "remain in a posture of flexibility to chart a workable 'middle course' in its quest to preserve a balance between the essential public accountability and the desired private control of the media." Like the Court of Appeals, we cannot say that the Commission's standards are arbitrary and capricious or at odds with the language and purposes of § 312 (a)(7). See 5 U. S. C. § 706 (2)(A). Indeed, we are satisfied that the Commission's action represents a reasoned attempt to effectuate the statute's access requirement, giving broadcasters room to exercise their discretion but demanding that they act in good faith.[12]

B

There can be no doubt that the Commission's standards have achieved greater clarity as a result of the orders in these cases.[13] However laudable that may be, it raises the question

[12] The dissenters place great emphasis on the preservation of broadcaster discretion. However, endowing licensees with a "blank check" to determine what constitutes "reasonable access" would eviscerate § 312 (a)(7).

[13] In 1978, the Commission issued a Notice of Inquiry, which asked whether rulemaking proceedings should be commenced in order to clarify licensee obligations under § 312 (a)(7). 43 Fed. Reg. 12938. Petitioners and others in the broadcasting industry expressed strong opposition to the promulgation of specific rules, and none were formulated. 1978 Report and Order, 68 F. C. C. 2d, at 1079–1081. Petitioners, therefore, must share responsibility for any vagueness and confusion in the Commission's standards.

whether § 312 (a)(7) was properly applied to petitioners.[14] Based upon the Commission's prior decisions and 1978 Report and Order, however, we must conclude that petitioners had adequate notice that their conduct in responding to the Carter-Mondale Presidential Committee's request for access would contravene the statute.

In the 1978 Report and Order, the Commission stated that it could not establish a precise point at which § 312 (a)(7) obligations would attach for all campaigns because each is unique:

> "For instance, *a presidential campaign may be in full swing almost a year before an election;* other campaigns may be limited to a short concentrated period. . . . [W]e believe that, generally, a licensee would be unreasonable if it refused to afford access to Federal candidates at least during those time periods [when the 'lowest unit charge' provision of § 315 applied]. Moreover, it may be required to afford reasonable access before these periods; however, the determination of whether 'reasonable access' must be afforded before these periods for particular races must be made in each case under all the facts and circumstances present. . . . [W]e expect licensees to afford access at a reasonable time prior to a convention or caucus. We will review a licensee's decisions in

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[14] Section 312 (a) empowers the Commission to "revoke any *station* license or construction permit." (Emphasis added.) In the Court of Appeals, petitioners argued that the statute applies only to licensees, not to networks. However, the court rejected that contention, reasoning that the Commission's jurisdiction to "mandate reasonable network access . . . is 'reasonably ancillary' to the effective enforcement of the individual licensee's Section 312 (a)(7) obligations . . . ." 202 U. S. App. D. C., at 393–395, 629 F. 2d, at 25–27. Petitioners do not contest that holding in this Court. See Tr. of Oral Arg. 16–17. In any event, as the Commission noted, each petitioner is "a multi-station licensee fully reachable [as to its licenses] by [the express] revocation authority" granted under § 312 (a)(7). 74 F. C. C. 2d, at 640, n. 10.

> this area on a case-by-case basis." 68 F. C. C. 2d, at 1091–1092 (emphasis added).

In *Anthony R. Martin-Trigona,* 67 F. C. C. 2d 743 (1978), the Commission observed: "[T]he licensee, *and ultimately the Commission,* must look to the circumstances of each particular case to determine when it is reasonable for a candidate's access to begin . . . ." *Id.,* at 746, n. 4 (emphasis added). Further, the 1978 Report and Order made clear that "Federal candidates are the intended beneficiary of Section 312 (a)(7) and therefore a candidate's desires as to the method of conducting his or her media campaign should be considered by licensees in granting reasonable access." 68 F. C. C. 2d, at 1089, n. 14. The agency also stated:

> "[A]n arbitrary 'blanket' ban on the use by a candidate of a particular class or length of time in a particular period cannot be considered reasonable. A Federal candidate's decisions as to the best method of pursuing his or her media campaign should be honored as much as possible under the 'reasonable' limits imposed by the licensee." *Id.,* at 1090.

Here, the Carter-Mondale Presidential Committee sought broadcast time approximately 11 months before the 1980 Presidential election and 8 months before the Democratic National Convention. In determining that a national campaign was underway at that point, the Commission stressed: (a) that 10 candidates formally had announced their intention to seek the Republican nomination, and 2 candidates had done so for the Democratic nomination; (b) that various states had started the delegate selection process; (c) that candidates were traveling across the country making speeches and attempting to raise funds; (d) that national campaign organizations were established and operating; (e) that the Iowa caucus would be held the following month; (f) that public officials and private groups were making endorsements; and (g) that the national print media had given cam-

paign activities prominent coverage for almost two months. 74 F. C. C. 2d, at 645–647. The Commission's conclusion about the status of the campaign accorded with its announced position on the vesting of § 312 (a)(7) rights and was adequately supported by the objective factors on which it relied.

Nevertheless, petitioners ABC and NBC refused to sell the Carter-Mondale Presidential Committee any time in December 1979 on the ground that it was "too early in the political season." App. 41–43, 52–74; nn. 3 and 4, *supra.* These petitioners made no counteroffers, but adopted "blanket" policies refusing access despite the admonition against such an approach in the 1978 Report and Order. Cf. *Donald W. Riegle,* 59 F. C. C. 2d 1314 (1976); *WALB–TV, Inc.,* 59 F. C. C. 2d 1246 (1976). Likewise, petitioner CBS, while not barring access completely, had an across-the-board policy of selling only 5-minute spots to all candidates, notwithstanding the Commission's directive in the 1978 Report and Order that broadcasters consider "a candidate's desires as to the method of conducting his or her media campaign." 68 F. C. C. 2d, at 1089, n. 14. See App. 44–45, 75–93; n. 2, *supra.* Petitioner CBS responded with its standard offer of separate 5-minute segments, even though the Carter-Mondale Presidential Committee sought 30 minutes of air time to present a comprehensive statement launching President Carter's re-election campaign. Moreover, the Committee's request was made almost two months before the intended date of broadcast, was flexible in that it could be satisfied with any prime time slot during a 4-day period, was accompanied by an offer to pay the normal commercial rate, and was not preceded by other requests from President Carter for access. See App. 27–40; n. 1, *supra.* Although petitioners adverted to the disruption of regular programming and the potential equal time requests from rival candidates in their responses to the Carter-Mondale Presidential Committee's complaint, the Commission rejected these claims as "speculative and unsubstantiated at best." 74 F. C. C. 2d, at 674.

Under these circumstances, we cannot conclude that the Commission abused its discretion in finding that petitioners failed to grant the "reasonable access" required by § 312 (a) (7).[15] See 5 U. S. C. § 706 (2)(A). "[T]he fact that we might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem to the latter." *FCC* v. *WOKO, Inc.*, 329 U. S. 223, 229 (1946). "[C]ourts should not overrule an administrative decision merely because they disagree with its wisdom." *Radio Corp. of America* v. *United States*, 341 U. S. 412, 420 (1951).

IV

Finally, petitioners assert that § 312 (a)(7) as implemented by the Commission violates the First Amendment rights of broadcasters by unduly circumscribing their editorial discretion. In *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S., at 117, we stated:

> "Th[e] role of the Government as an 'overseer' and ultimate arbiter and guardian of the public interest and the role of the licensee as a journalistic 'free agent' call for a delicate balancing of competing interests. The maintenance of this balance for more than 40 years has called on both the regulators and the licensees to walk a 'tightrope' to preserve the First Amendment values written

[15] As it did here, the Commission, with the approval of broadcasters, engages in case-by-case adjudication of § 312 (a)(7) complaints rather than awaiting license renewal proceedings. See Tr. of Oral Arg. 11–16. Although the penalty provided by § 312 (a)(7) is license revocation, petitioners simply were directed to inform the Commission of how they intended to meet their statutory obligations. See 74 F. C. C. 2d, at 651; 74 F. C. C. 2d, at 676–677. In essence, the Commission entered a declaratory order that petitioners' responses to the Carter-Mondale Presidential Committee constituted a denial of "reasonable access." Such a ruling favors broadcasters by allowing an opportunity for curative action before their conduct is found to be "willful or repeated" and subject to the imposition of sanctions.

into the Radio Act and its successor, the Communications Act."

Petitioners argue that the Commission's interpretation of § 312 (a)(7)'s access requirement disrupts the "delicate balanc[e]" that broadcast regulation must achieve. We disagree.

A licensed broadcaster is "granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." *Office of Communication of the United Church of Christ* v. *FCC*, 123 U. S. App. D. C. 328, 337, 359 F. 2d 994, 1003 (1966). This Court has noted the limits on a broadcast license:

> "A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a . . . frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others . . . ." *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S., at 389.

See also *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U. S. 775, 799–800 (1978). Although the broadcasting industry is entitled under the First Amendment to exercise "the widest journalistic freedom consistent with its public [duties]," *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra,* at 110, the Court has made clear that:

> *"It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.* It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." *Red*

Lion Broadcasting Co. v. *FCC, supra,* at 390 (citations omitted) (emphasis added).

The First Amendment interests of candidates and voters, as well as broadcasters, are implicated by § 312 (a)(7). We have recognized that "it is of particular importance that candidates have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." *Buckley* v. *Valeo,* 424 U. S. 1, 52–53 (1976). Indeed, "speech concerning public affairs is . . . the essence of self-government," *Garrison* v. *Louisiana,* 379 U. S. 64, 74–75 (1964). The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co.* v. *Roy,* 401 U. S. 265, 272 (1971). Section 312 (a)(7) thus makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process.

Petitioners are correct that the Court has never approved a *general* right of access to the media. See, *e. g., FCC* v. *Midwest Video Corp.,* 440 U. S. 689 (1979); *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241 (1974); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra.* Nor do we do so today. Section 312 (a)(7) creates a *limited* right to "reasonable" access that pertains only to legally qualified federal candidates and may be invoked by them only for the purpose of advancing their candidacies once a campaign has commenced. The Commission has stated that, in enforcing the statute, it will "provide leeway to broadcasters and not merely attempt *de novo* to determine the reasonableness of their judgments . . . ." 74 F. C. C. 2d, at 672. If broadcasters have considered the relevant factors in good faith, the Commission will uphold their decisions. See 202 U. S. App. D. C., at 393, 629 F. 2d, at 25. Further, § 312

(a)(7) does not impair the discretion of broadcasters to present their views on any issue or to carry any particular type of programming.

Section 312 (a)(7) represents an effort by Congress to assure that an important resource—the airwaves—will be used in the public interest. We hold that the statutory right of access, as defined by the Commission and applied in these cases, properly balances the First Amendment rights of federal candidates, the public, and broadcasters.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE WHITE, with whom JUSTICE REHNQUIST and JUSTICE STEVENS join, dissenting.

The Court's opinion is disarmingly simple and seemingly straightforward: in 1972, Congress created a right of reasonable access for candidates for federal office; the Federal Communications Commission, charged with enforcing the statute, has defined that right; as long as the agency's action is within the zone of reasonableness, it should be accepted even though a court would have preferred a different course. This approach, however, conceals the fundamental issue in these cases, which is whether Congress intended not only to create a right of reasonable access but also to negate the longstanding statutory policy of deferring to editorial judgments that are not destructive of the goals of the Act. In these cases such a policy would require acceptance of network or station decisions on access as long as they are within the range of reasonableness, even if the Commission would have preferred different responses by the networks. It is demonstrable that Congress did not intend to set aside this traditional policy, and the Commission seriously misconstrued the statute when it assumed that it had been given authority to insist on its own views as to reasonable access even though this entailed rejection of media judgments representing different but nevertheless reasonable reactions to access requests. As this litiga-

tion demonstrates, the result is an administratively created right of access which, in light of the pre-existing statutory policies concerning access, is far broader than Congress could have intended to allow. The Court unfortunately accepts this major departure from the underlying themes of the Communications Act and from the cases that have construed that statute. With all due respect, I dissent.

Section 312 (a)(7) provides that the Commission may revoke a broadcast license "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." It is untenable to suggest that the right of access the Commission has created is required or even suggested by the plain language of this section. What is "reasonable" access and what are "reasonable" amounts of time that must be sold are matters about which fair minds could easily differ. The Commission recognized as much in this litigation: "The statutory language," it said, "does not expressly define the scope of the Commission's responsibilities or the procedures by which it should enforce them." 74 F. C. C. 2d 631, 637. Furthermore, the Commission thought "[t]he legislative history of Section 312 (a)(7) does little to clarify those responsibilities and procedures." *Ibid.* It also found the floor debates to be "equally uninstructive." *Ibid.* It then announced that "[i]n the absence of further direction, we must also assume that Congress wanted to delegate to the Commission broad responsibility to define and implement the scope of Section 312 (a)(7)'s rights and duties." *Id.*, at 638. Having conferred *carte blanche* on themselves, four of the seven members of the Commission proceeded to produce some 48 printed pages of guidelines, proscriptions, prescriptions, permissions, instructions on balancing, clarifications, summaries, conclusions, and orders, all purporting to define the "reasonable" access that broadcasters must provide federal candidates for office and to explain why the networks'

offers of access were not reasonable under the circumstances. The Commission issued an initial opinion covering 24 pages but felt compelled to write 24 more pages on reconsideration, purporting to clarify and explain what it had meant in the first place. I think the Commission fell into serious error and that its action was arbitrary, capricious, an abuse of discretion, and otherwise contrary to law. 5 U. S. C. § 706 (2)(A). At the very least, its decision represents "a clear error of judgment." *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U. S. 402, 416 (1971). I regret particularly that the Court of Appeals and this Court have compounded the error by suggesting that the Commission understood its task and competently performed it in an understandable manner. There are several reasons for my position.

1. The Commission seemed to approach this case as though Congress were legislating on a clean slate, without regard for other provisions of the Act and the manner in which those provisions had been construed and applied to avoid undue intrusions upon the editorial judgment of broadcasters and without regard for the longstanding statutory policies about access, including the recognized duty imposed on broadcasters to serve the public interest by keeping the citizenry reasonably informed about political candidates.

The history of the Federal Government's regulation of the broadcast media has been recounted by this Court on several occasions. See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U. S. 94, 103–110 (1973); *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 375–386 (1969). That history evinces Congress' efforts to deal with the inevitable tension between the need to allocate scarce frequencies and the importance of giving licensees broad discretion in exercising editorial judgment in the use of those frequencies. These efforts have led to the creation of a general requirement that broadcast licensees operate in the public interest but that they be given considerable leeway in the fulfillment of that duty. As the Court stated in *Columbia*

Broadcasting System, Inc. v. *Democratic National Committee, supra,* at 110: "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligation. Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the Act." In particular, Congress has explicitly provided that broadcast licensees are not common carriers, 47 U. S. C. § 153 (h), and that the Commission may not engage in censorship of radio communications. 47 U. S. C. § 326.

The parties agree that prior to the adoption of § 312 (a)(7) individuals or organizations had no specific right of access to broadcast facilities. This was the common view of the Commission, the courts, and Congress. As we said in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra,* at 122, Congress had "time and again rejected various legislative attempts that would have mandated a variety of forms of individual access." Broadcasters had obligations with respect to their programming, such as the fairness doctrine which obligated them to cover issues of public importance from opposing points of view, but this obligation was enforced with care so as not to unduly infringe on the "journalistic discretion in deciding how best to fulfill the Fairness Doctrine obligations." 412 U. S., at 111. We also observed: "[I]n the area of discussion of public issues Congress chose to leave broad journalistic discretion with the licensee. 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." *Id.,* at 105. Similarly, in *FCC* v. *Midwest Video Corp.,* 440 U. S. 689 (1979), where we held that the Commission had erred in providing for a general system of access to cable television, we noted that the Commission's authority with respect to cable television was derived from the provisions of the Communications Act and

concluded that the Commission should not have ignored "Congress' stern disapproval—evidenced in § 3 (h)—of negation of the editorial discretion otherwise enjoyed by broadcasters and cable operators alike." *Id.*, at 708. We reaffirmed "the policy of the Act to preserve editorial control of programming in the licensee." *Id.*, at 705.

Broadcasters, however, had certain statutory obligations with respect to political broadcasting: As the Commission has explained, it had "recognized political broadcasting as one of the fourteen basic elements necessary to meet the public interest, needs and desires of the community." *Report and Order: Commission Policy in Enforcing Section 312 (a)(7) of the Communications Act,* 68 F. C. C. 2d 1079, 1087–1088 (1978). Prior to the enactment of § 312 (a)(7):

> "No legally qualified candidate had, at that time, a specific right of access to a broadcasting station. However, stations were required to make reasonable, good-faith judgments about the importance and interests of particular races. Based upon those judgments, licensees were to 'determine how much time should be made available for candidates in each race on either a paid or unpaid basis.' There was no requirement that such time be made available for specific 'uses' of a broadcasting station to which Section 315 'equal opportunities' would be applicable." 68 F. C. C. 2d, at 1088.

The Communications Act had thus long been construed to impose upon the broadcasters a duty to satisfy the public need for information about political campaigns. As this Court observed in *Farmers Educational & Cooperative Union* v. *WDAY, Inc.*, 360 U. S. 525, 534 (1959), a broadcaster policy of "denying all candidates use of stations . . . would . . . effectively withdraw political discussion from the air," and such result would be quite contrary to congressional intent. Furthermore, § 315 had long provided that should a station permit a political candidate to use its broadcasting facilities, it must "afford equal opportunities to all other such candi-

dates for that office . . . ." As that section expressly provided, however, the provision for equal time created no right of initial access.

It is therefore as clear as can be that the regulation of the broadcast media has been and is marked by a clearly defined "legislative desire to preserve values of private journalism." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra,* at 109. The corollary legislative policy has been not to recognize or attempt to require individual rights of access to the broadcast media. These policies have been so clear and are so obviously grounded in constitutional considerations that in the absence of unequivocal legislative intent to the contrary, it should not be assumed that § 312 (a)(7) was designed to make the kind of substantial inroads in these basic considerations that the Commission has now mandated. Section 312 (a)(7) undoubtedly changed the law governing access in some respects, but the language of the section, as the Commission itself concedes, does not require the access rights the Commission has now created; and the legislative history, far from supporting the Commission's actions in these cases, has a contrary thrust.

2. The legislative history, most of which the Commission ignored, shows that Congress was well aware of the statutory and regulatory background recounted above. It also shows that Congress had no intention of working the radical change in the roles of the broadcaster and the Commission that the Commission now insists is consistent with the statutory mandate.

The initial effort to incorporate the "reasonable access" concept into the Communications Act arose in 1970 as part of a floor amendment to S. 3637, a bill designed to repeal the equal time provisions of the Act with respect to Presidential and Vice Presidential elections and to require the sale of broadcast time to be made at the "lowest unit charge" available to commercial advertisers. S. 3637, 91st Cong., 2d Sess. (1970). The amendment provided that "consistent with the other needs of the community broadcast licensees shall make

a reasonable amount of time available for legally qualified candidates for federal elective offices during [prime time]." It also limited expenditures by candidates on broadcast time. 116 Cong. Rec. 11593 (1970). Senator Pastore, sponsor of the amendment, explained that its purpose was "to avoid any misunderstanding as to the obligation of the licensee in making time available to candidates for a Federal elective office." *Ibid.* The amendment was adopted by the Senate, but not by the House. However, the House Committee Report made clear that "[t]he presentation of legally qualified candidates for public office is an essential part of any broadcast licensee's obligation to serve the public interest." H. R. Rep. No. 91–1347, p. 7 (1970). Senator Pastore's amendment would have codified that obligation with respect to federal elective office. The final bill was vetoed by President Nixon.

A second effort, this time by Senator Scott, to codify a "reasonable access" provision arose in the next session of Congress. That provision would have directed the Commission to promulgate regulations that would "insure that all licensees make available to legally qualified candidates for public office reasonable amounts of time for use of broadcasting stations." S. 956, 92d Cong., 2d Sess., § 302 (c) (1971). The then Chairman of the Commission testified that he understood this proposal to codify the existing obligation of broadcasters to present political broadcasts under the public interest standard. Federal Election Campaign Act of 1971: Hearings on S. 1, S. 382, and S. 956 before the Subcommittee on Communications of the Senate Committee on Commerce, 92d Cong., 1st Sess., 189 (1971). This proposal also was not enacted.

The third effort to codify a reasonable access standard met with success in the form of § 312 (a)(7) which the Senate Committee on Commerce added to Title I of what ultimately became the Federal Election Campaign Act of 1971. S. 382, 92d Cong., 1st Sess. (1971). The portions of this bill that addressed broadcast media included a repeal of the equal time provision of the Communications Act with respect to Presi-

dential and Vice Presidential elections, a requirement that broadcasters charge political candidates a "lowest unit charge" during certain periods of a campaign, and limitations on expenditures by candidates for federal office.[1] The Senate Committee indicated that these provisions should not result in the "diminution in the extent of such programming." S. Rep. No. 92–96, p. 28 (1971). And in this precise regard, § 312 (a)(7) was included in the bill "[i]n order to emphasize the public interest obligation inherent in making broadcast time available to candidates covered by the spending limitation in the legislation . . . ." *Ibid.* Section 312 (a)(7) was primarily a device to insure that other provisions of the bill would not dilute the pre-existing public interest standard as applied to federal elections. Consistent with this approach, the Committee described the section and observed that

> "[t]he duty of broadcast licensees generally to permit the use of their facilities by legally qualified candidates for these public offices is inherent in the requirement that licensees serve the needs and interests of the [communities] of license." *Id.*, at 34.

The legislative history thus reveals that Congress sought to codify what it conceived to be the pre-existing duty of the broadcasters to serve the public interest by presenting political broadcasts. It also negates any suggestion that Congress believed it was creating the extensive, inflexible duty to provide access that the Commission has now fastened upon the broadcasters. This is not to say that § 312 (a)(7) did not work important changes in the law, for it did put teeth in the obligation of the broadcasters' duty to serve the public interest by providing the remedy of license revocation for willful or repeated refusals to provide a candidate for federal elec-

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[1] The bill as enacted did not include the proposed repeal of the equal time provisions with respect to Presidential and Vice Presidential elections. 86 Stat. 3. In addition, the expenditure limitations of the Federal Election Campaign Act of 1971 have been repealed. 88 Stat. 1278.

tive office with reasonable access to broadcast time. The need for this remedy arose out of the concern that other provisions of the Federal Election Campaign Act could lead to a misunderstanding regarding the broadcasters' continuing duty to afford reasonable access to federal candidates.

The Commission almost totally ignored the legislative history as a possible limitation on the reach of the broadcasters' duty to provide reasonable access or upon the scope of its oversight responsibilities. The Commission did note that one of the purposes of the 1971 Act had been described as affording candidates a greater access to the broadcast media. But none of these statements indicated that this was the purpose of § 312 (a)(7), the provision at issue here. That purpose was served by other provisions of the amendments, such as the provision requiring the sale of broadcast time at the lowest unit charged during specified periods; § 312 (a)(7) itself aimed at preventing the charge limitation from reducing access that might otherwise be available.[2]

The Commission also noted, and the Court now heavily relies on, the so-called conforming amendment to § 315 (a), the equal time provision, which then provided that "[n]o obligation is imposed upon any licensee to allow the use of its station by any such candidate." 47 U. S. C. § 315 (a) (1970 ed.). But in its original form, 48 Stat. 1088, this portion of § 315 had provided that "no obligation is hereby imposed"—the word "hereby" being omitted by the codifier of Title 47 of the United States Code. To the extent that § 315 without

[2] One of the major purposes of the Federal Election Campaign Act was to shorten the length of campaigns, thereby reducing campaign costs. See S. Rep. No. 92–96, pp. 20–21, 28 (1971). Television advertising was described as "unquestionably the most used media in political campaigns, and it has been the most significant contributor to the spiraling cost of these campaigns." *Id.*, at 30. The majority's interpretation of § 312 (a)(7) runs directly contrary to this broad goal. This decision is nothing more than an open invitation to start campaigning early, thus increasing the overall length of the campaign and the overall costs to all the candidates.

the conforming amendment, which returned the relevant provision to approximately its original form, suggested that the Act in no way required access to political candidates, it also called into the question the Commission's public interest policy of requiring stations to give reasonable access to political candidates. That the conforming amendment was made is understandable, but the Court gives it undue significance.

In any event, the Court relies on the conforming amendment for no more than an affirmative indication that Congress intended to give individual candidates a right of reasonable access, a right that did not exist prior to the enactment of § 312 (a)(7). This much may be conceded, but nothing in this bit of legislative history, or in any other, furnishes any support for the Commission's sweeping decision in these cases. On the contrary, the legislative history negates the Commission's conclusion that it was free to so drastically limit the discretion of the broadcasters and to so radically expand its own oversight authority.

3. The Court relies, as it must, on the authority of the Commission to interpret and apply the statute and on the deference that courts should accord to agency views with respect to the legislation it is charged with enforcing. As the Court has said, however, "[t]he amount of deference due an administrative agency's interpretation of a statute . . . 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' " *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U. S. 772, 783, n. 13 (1981), quoting *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). I find the Commission's current radical version not only quite inconsistent with its prior views but also singularly unpersuasive.

As for its past views, the Commission's policy statement issued in 1972, shortly after the enactment of the Federal Election Campaign Act, expressed the view that the section

had expressly imposed on the public interest obligation of broadcasters the "additional" specific requirement that candidates for federal public office be afforded reasonable access to broadcast time, but it also clearly eschewed anything approaching the negation of broadcaster discretion and the extensive agency oversight that the Commission's present decision inevitably involves:

> "3. Q. How is a licensee to comply with the requirement of section 312 (a)(7) that he give reasonable access to his station to, or permit the purchase of reasonable amounts of time by, candidates for Federal elective office?
>
> "A. Each licensee, under the provisions of sections 307 and 309 of the Communications Act, is required to serve the public interest, convenience, or necessity. In its *Report and Statement of Policy Re: Commission En Banc Programming Inquiry (1960)*, the Commission stated that political broadcasts constitute one of the major elements in meeting that standard. (See *Farmers Educational and Cooperative Union of America, North Dakota Division* v. *WDAY, Inc.*, 360 U. S. 525 (1959), and *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U. S. 367, 393–394 (1969).) The foregoing broad standard has been applied over the years to the overall programming of licensees. New section 312 (a)(7) adds to that broad standard specific language concerning reasonable access.
>
> ". . . The test of whether a licensee has met the requirement of the new section is one of reasonableness. The Commission will not substitute its judgment for that of the licensee, but, rather, it will determine in any case that may arise whether the licensee can be said to have acted reasonably and in good faith in fulfilling his obligations under this section.
>
> . . . . .
>
> "8. Q. Some stations have in the past had the policy

of not selling short political spot announcements (*e. g.*, 10 seconds, 1 minute) on the ground that they did not contribute to an informed electorate. In light of the enactment of section 312 (a)(7), may stations have such policies, or must they sell reasonable numbers of short spots to legally qualified candidates for Federal office if requested?

"A. We have, prior to the enactment of section 312 (a)(7), when stations were (under the provisions of section 315) not required to allow use of their facilities by particular candidates for public office, ruled that licensees may have such policies. In so ruling, we have cautioned that licensees have the public interest consideration of making their facilities available to candidates, but have left to the good-faith judgment of the licensee the determination of how the facilities were to be used to serve the public interest. As complaints arose, we looked to the reasonableness of that judgment in a particular fact pattern. (31 F. C. C. 2d 782) (1971)). Section 312 (a)(7) now imposes on the overall obligation to operate in the public interest the additional specific requirement that reasonable access and purchase of reasonable amounts of time be afforded candidates for Federal office. *We shall, under this new section, apply the same test of reasonableness of the judgment of the licensee." Use of Broadcast and Cablecast Facilities by Candidates for Public Office,* 34 F. C. C. 2d 510, 536–538 (emphasis supplied).

There was no suggestion in 1972 that the "needs" of the requesting candidate shall be paramount. Indeed, the Commission embraced its prior practice. Discretion was thought to remain with the broadcaster, not to be placed in the hands of the candidates or subjected to close and exacting oversight by the Commission. Clearly, the Commission's contemporaneous construction of § 312 (a)(7) is inconsistent with the sweeping construction of the section it has now adopted. See *Udall* v. *Tallman,* 380 U. S. 1, 16 (1965).

Subsequent interpretations of the scope of § 312 (a)(7), including the comprehensive *Report and Order: Commission Policy in Enforcing Section 312 (a)(7) of the Communications Act,* 68 F. C. C. 2d 1079 (1978), have consistently refrained from curtailing broadcaster discretion by refusing to impose stringent standards or to second-guess the broadcaster's good-faith judgments. In the *Report and Order,* the Commission explained:

> "Since the passage of Section 312 (a)(7) as part of the Federal Election Campaign Act of 1971, the Commission's policy has generally been to defer to the reasonable, good faith judgment of licensees as to what constitutes 'reasonable access' under all the circumstances present in a particular case. The Commission desired, through its inquiry into this area, to learn whether that policy was proving manageable and equitable for candidates and licensees or whether additional rules or guidelines would be advisable." *Id.,* at 1079–1080.

After a detailed examination of the question, the Commission concluded:

> "We continue to believe that the best method for achieving a balance between the desires of candidates for air time and the commitments of licensees to the broadcast of other types of programming is to rely on the reasonable, good faith discretion of individual licensees. We are convinced that there are no formalized rules which would encompass all the various circumstances possible during an election campaign." *Id.,* at 1089.

The Commission went on to suggest some very broad guidelines it considered essential in effectuating the intent of Congress under § 312 (a)(7). For example, candidates generally were to be afforded some access to prime time, and access was to be flexible, including the possibility of program time and "spot" announcements. Candidates were not entitled, however, "to a particular placement of his or her political an-

nouncement on a station's broadcast schedule. . . . It is best left to the discretion of a licensee when and on what date a candidate's spot announcement or program should be aired" 68 F. C. C. 2d, at 1091. The Commission specifically refused to arrogate to itself the power to determine when the reasonable access duty attached except on a case-by-case basis leaving the initial judgment in the hands of the broadcast licensee. Finally, there is no statement in this report that requires broadcasters to look to the needs of a candidate in the initial determination of reasonable access other than the admonition that broadcasters could not "follow a policy of flatly banning access by a Federal candidate to any of the classes and lengths of program or spot time in the same periods which the station offers to commercial advertisers." *Id.*, at 1090. Like the initial policy statement issued in 1972, this report lends little credence to the new-found power of the Commission to oversee with an iron hand the implementation of § 312 (a)(7).

In terms of the degree to which broadcaster editorial judgments should be subject to review and reversal by the Commission—the most important issue in this litigation—it is evident that the Commission has been quite inconsistent. Its present radical interpretation of § 312 (a)(7) plainly rejects its earlier and more contemporaneous pronouncements as to the meaning and scope of the broadcasters' duties and of its own authority under § 312 (a)(7).

4. Equally, if not more fundamental, the Commission's opinions in this case are singularly unpersuasive. They contain a plethora of admonitions to the broadcast industry, some quite vague and others very specific but often inconsistent. Altogether, in operation and effect, they represent major departures from prior practice, from prior decisions, including those of this Court, and from congressionally recognized policies underlying the Federal Communications Act. As I have indicated, we should not endorse them without much clearer congressional direction than is apparent in the actions leading to the adoption of § 312 (a)(7). I shall men-

tion my major difficulties with the Commission's opinion and judgment.

4a. The Commission stated in a footnote that it should not differ with broadcaster decisions with respect to a candidate's access unless " 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' " an approach reflecting its traditional stance vis-à-vis the broadcasters. 74 F. C. C. 2d, at 642, n. 16. The Commission had already determined, however, that because § 312 (a)(7) was not self-explanatory on its face and because it failed to find explicit guidance to the contrary in the legislative history, it would and should exercise wide discretion in interpreting and enforcing the Act. It is therefore not surprising that the Commission's assertions of deference to editorial judgment are palpably incredible.[3]

The Commission first confounds itself by announcing that the duty to provide access attaches when the campaign begins and that this threshold issue was to be "based on [an] independent evaluation of the status of the campaign taking into account the position of the candidate and the networks as well as other factors" 74 F. C. C. 2d, at 665. This effectively withdrew the issue of timing from the area of broadcaster judgment and transformed it into a question of law to be determined by the Commission *de novo*. It was also a major shift in the agency's position, for its Broadcast Bureau just two years before had ruled that the assessment of when a campaign is sufficiently underway to warrant the provision of access was to be left to broadcaster discretion: "A licensee's discretion in providing coverage of elections extends not only to the type and amount of time to be made available to candi-

[3] Of a similar tenor is the Court of Appeals' observation that "[t]he interference with editorial discretion" created by the rigid scheme of regulatory oversight it was endorsing "seems no more or less" than had existed under the broad public interest standard. 202 U. S. App. D. C. 369, 391, n. 102, 629 F. 2d 1, 23, n. 102.

dates, but to the date on which its campaign coverage will commence." *Anthony R. Martin—Trigona,* 66 F. C. C. 2d 968, 969 (Broadcast Bureau 1977), application for review denied, 67 F. C. C. 2d 33, reconsideration denied, 67 F. C. C. 2d 743 (1978). Although I have some difficulty in perceiving why the access obligation should begin when "the campaign" is underway, even if there is such a triggering event, reasonable men could differ as to when that moment has arrived. The Commission overstepped its authority in imposing its own answer on the industry and in rejecting the networks' reasonable submissions. The Commission gave no explanation whatsoever for its action in this respect. In fact, it did not even acknowledge that it was making its own *de novo* determination until it issued its opinion on reconsideration.

4b. The Commission ruled that in responding to its obligation to provide reasonable time, a broadcaster should place particular emphasis on the candidates' needs, weigh each request in its own specific context on a particularized basis, and tailor its response to the individual candidate. This approach expressly rejects the thesis of § 315 that all candidates be treated equally. If the networks in this case had responded affirmatively to the candidate's request, § 315 would require that equal time be extended to all other Democratic candidates and would forbid any kind of individualized consideration that would result in giving them less time than had been previously given to their competitor. There is no trace of support in the language of the Act or in the legislative history for this unrealistic approach to § 312 (a)(7). Nor does the Commission offer any tenable explanation why a broadcaster's decision to provide equal time for all candidates is a violation of the obligation to provide reasonable time to each of them. The inference may be drawn from the Commission's position that reasonable access may require unequal access, but § 315 requires equal time for all once it is

granted to anyone. The Commission's rejection of the equality approach as one of the possible ways of complying with § 312 (a)(7) is a plain error.

Of course, the individualized-need approach requires a broadcaster to make an assessment with respect to each request for time, and each of these countless assessments will be subject to review by the Commission. If the degree of oversight to be exercised by the Commission is to be measured by its work in these cases, there will be very little deference paid to the judgment and discretion of the broadcaster. The demands of the candidate will be paramount. As Commissioner Lee said in this litigation: "I have listened carefully to my colleagues explain how this decision leaves broadcast discretion with the networks. However, the decision doesn't have this effect. By the time the majority finishes its analysis of the networks' reasons for not giving time, the networks do not have any choice other than to give the requested time. No other weighing of factors is reasonable in the view of the majority." 74 F. C. C. 2d, at 681 (footnote omitted).

4c. Indicative also of the stringent degree of oversight that the Commission now intends to exercise is the manner in which it dealt with the networks' suggestions that in responding to the request for time involved here, they were entitled to take into account the fact that a total of 122 persons had filed notices of candidacy for the Presidency with the Federal Election Commission. The Commission conceded that this was a proper concern and that Republican candidates might have to be treated equally with Democrats. The Commission, however, in its political wisdom, concluded that it was "unlikely" that more than a tiny percentage of all candidates would request time, the net effect being that the networks' anticipations based on their professional experience were rejected. As petitioner CBS submits in its brief: "Broadcasters are not permitted to consider the likelihood of multiple future requests by similarly situated candidates un-

less the imminence of such requests can be demonstrated to a near certainty. But the likelihood that there will be multiple demands from other candidates is not susceptible to proof in advance. Candidate needs are necessarily shifting in nature, and no candidate can supply a precise prediction of his future plans. Thus, under the Commission's approach, broadcasters can give only limited, if any, weight to potential disruption of normal program schedules, or their view that other material would better serve the interests of their audiences." Brief for Petitioner in No. 80–207, p. 38 (footnotes omitted).

4d. The Court tells us: "If broadcasters take the appropriate factors into account and act reasonably and in good faith, their decisions will be entitled to deference even if the Commission's analysis would have differed in the first instance." *Ante,* at 387. But this language can be taken with a grain of salt, since the Commission, the Court of Appeals, and the majority give the networks no deference whatsoever. This is so because the "appropriate factors" are designed to eviscerate broadcaster discretion. The abrupt departure from accepted norms and the truly remarkable extent to which the Commission will seek to control the programming of political candidates in the future is best demonstrated by its rejection, as being unreasonable, of the submissions filed by the networks in response to the complaints, these submissions being summarized in the networks' briefs as follows:

CBS:

> "On October 11, 1979, Gerald M. Rafshoon, President Carter's media adviser, asked CBS to offer the Carter/Mondale Presidential Committee, Inc. (the 'Carter Committee') a thirty-minute paid program on the CBS Television Network between 8:00 p.m. and 10:30 p.m. EST during the period December 4 to 7, 1979. The program, which was to be run following President Carter's anticipated announcement of his candidacy for reelection on

December 4, was described as 'a documentary outlining the President's record and that of his administration.' J. A. 39. CBS declined to offer a half-hour period that early in the campaign, but did offer two five-minute periods, one in the prime evening hours and one in the daytime hours, as it had to two other presidential candidates. J. A. 44–45.

"On October 29, 1979, the Carter Committee filed a complaint with the Commission alleging that CBS, ABC and NBC had violated Section 312 (a)(7). In its response to the complaint and later pleadings, CBS asserted that its decision had been reasonable. CBS stated that it had traditionally sold half-hour periods during later campaign periods and that it intended to do so in the 1980 campaign. J. A. 80. It emphasized that its sales policies were designed to assure evenhanded treatment of candidates. J. A. 170–173. CBS pointed out that the Carter Committee request had been made even before the President had announced his candidacy and more than a year before the general election. It also pointed out that campaigns for the presidential nominations consisted not of one national contest, but of a series of state delegate contests extending over a long period of time; that the first of these contests was more than four months away; and that it was not reasonable to expect networks to sell half-hour periods nationally at such an early date. Moreover, CBS noted that there were a large number of actual and potential candidates for the Presidency; that two candidates for the Republican nomination had already requested half-hour periods; and that a substantial disruption of regular programming would occur if multiple requests were received and granted. J. A. 78–84. CBS further pointed out that an incumbent President has unparalleled opportunities to present his views to the public by means of the broadcast media. J. A. 170–71."

Brief for Petitioner in No. 80–207, pp. 4–5 (footnotes omitted).

NBC:

"NBC responded by letter of October 23, 1979 declining the request to purchase time (JA 42). In its letter NBC noted that it had carefully evaluated the request, but concluded that the earliness of the requested broadcast dates (eight months before the Democratic National Convention and 11 months before the national election), the multiplicity of federal candidates at that stage of the campaign (12 announced candidates had held national elective office or been Governor of a state), and NBC's obligation under Section 315 (a) of the Communications Act to provide equal half-hour time periods to all candidates requesting it should NBC honor the President's request, were all factors in its decision. NBC also noted that since the nomination process was focused at that time on political activities in individual states, such as the Iowa Caucus, the Committee might wish to contact individual local stations in those states." Brief for Petitioner in No. 80–214, pp. 3–4.

ABC:

"In a letter dated October 23, 1979, ABC advised Mr. Rafshoon that it could not comply with the Committee's request for time on one of the early December dates, but that it expected to make time available early in 1980. J. A. 41. . . .

. . . . . .

"In response, ABC explained the factors which had led it to conclude that political time sales could reasonably commence in early January, 1980—instead of on the specific dates requested. Thus, the first of 36 Presidential primaries was, at that time, nearly four months away and the Democratic National Convention was more than

eight months away. J. A. 54–55. ABC also noted that the potential for program schedule disruption would be considerable if the Committee were sold time in early December, as multiple candidates would likely assert equal opportunities rights under Section 315 (a) of the Communications Act. J. A. 56. In this regard, ABC observed that at least nine Republicans had already declared their candidacy and that two Democratic leaders and a tenth prominent Republican were expected to announce within a short period of time. Finally, ABC emphasized that its continuing news coverage ensured that 'the mixture of issues, developments (including candidate announcements) and personalities that dominate this early stage of the campaign are brought to the public's attention.' J. A. 57." Brief for Petitioner in No. 80–213, pp. 6–7.

None of these justifications is patently unreasonable. They become so only because of the Commission's conclusion, adopted by the majority, that the reasonableness of access is to be considered from the individual candidate's perspective, including that candidate's particular "needs." While both the Court and the Commission describe other factors considered relevant such as the number of candidates and disruption in programming, the overarching focus is directed to the perceived needs of the individual candidate. This highly skewed approach is required because, as the Court sees it, the networks "seek the unilateral right to determine in advance how much time to afford *all* candidates." *Ante,* at 389. But such a right, reasonably applied, would seem to fall squarely within the traditionally recognized discretion of the broadcaster. Instead of adhering to this traditional approach, the Court has laid the foundation for the unilateral right of candidates to demand and receive any "reasonable" amount of time a candidate determines to be necessary to execute a particular campaign strategy. The concomitant Commission in-

volvement is obvious. There is no basis in the statute for this very broad and unworkable scheme of access.[4] Commissioner Washburn's dissenting observation is surely correct:

> "In addition, the document adopted by the majority today goes far beyond the proper limits of Commission responsibility in political broadcasting matters. In detail (see pages 12–13, paragraphs 13–35) it substitutes the Commission's judgment for the broadcaster's own good faith interpretation of candidate requests and his response thereto. Such governmental intrusion is unwarranted, is illegal and, I fear, will have far-reaching consequences that will come back to haunt the Commission and the public again and again." 74 F. C. C. 2d, at 682.

JUSTICE STEVENS, dissenting.

In my judgment, the question whether a broadcast licensee has violated 47 U. S. C. § 312 (a)(7) by denying a political candidate reasonable access to broadcast time must be an-

[4] The statute permits revocation upon "willful or repeated" refusal to afford reasonable access. I think this language indicates that the Commission would intervene in only the most egregious of circumstances—such as an outright refusal to afford any time regardless of the circumstances. Consistent with this view, Senator Scott described § 312 (a)(7) as directed at those few broadcasters who acted in "blatant disregard for the public interest." Federal Election Campaign Act of 1971: Hearings before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration, 92d Cong., 1st Sess., 103 (1971). The majority, however, reads this language as an open invitation for Commission intervention. A single "willful" violation is sufficient to trigger overview and immediate revocation. *Ante,* at 378. Since the Court has sustained the Commission's finding that the networks violated § 312 (a)(7) and since a violation of § 312 (a)(7) requires either willful or repeated refusal of reasonable access, it follows that the networks have been found to have acted willfully within the meaning of the statute and that their licenses are subject to immediate revocation. I doubt Congress intended to put the licenses of all broadcasters into a state of jeopardy on such tenuous grounds.

swered in the context of an entire political campaign, rather than by focusing upon the licensee's rejection of a single request for access. The licensee has a duty to act impartially and to make an adequate quantity of desirable time available. The performance of that duty cannot be evaluated adequately by focusing solely on particular requests or the particular needs of individual candidates. The approach the Federal Communications Commission has taken in this litigation, now adopted by the Court, creates an impermissible risk that the Commission's evaluation of a given refusal by a licensee will be biased—or will appear to be biased—by the character of the office held by the candidate making the request.* Indeed, anyone who listened to the campaign rhetoric that was broadcast during 1980 must wonder how an impartial administrator could conclude that any Presidential candidate was denied "reasonable access" to the electronic media. That wonderment is not dispelled by anything said in the opinions for the majority of the Commission in this litigation.

In sum, I find JUSTICE WHITE's analysis of the issue compelling. I accordingly join his opinion.

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*The possibility that Commission decisions under § 312 (a) (7) may appear to be biased is well illustrated by this litigation. In its initial decision and its decision on the networks' petitions for reconsideration, the Commission voted 4–3 in favor of the Carter-Mondale Presidential Committee. See 74 F. C. C. 2d 631, 652, 653, 654 (1979). In both instances, the four Democratic Commissioners concluded that the networks had violated the statute by denying the Committee's request for access; the three Republican Commissioners disagreed. See Federal Communications Commission, 45th Annual Report/Fiscal Year 1979, pp. 1–2, 86–87 (1980). See also 202 U. S. App. D. C. 369, 400–401, and n. 16, 629 F. 2d 1, 32–33, and n. 16 (1980) (Tamm, J., concurring).

ROBBINS *v.* CALIFORNIA

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 80–148. Argued April 27, 1981—Decided July 1, 1981

When California Highway Patrol officers stopped petitioner's station wagon for proceeding erratically, they smelled marihuana smoke as he opened the car door. In the ensuing search of the car, the officers found in the luggage compartment two packages wrapped in green opaque plastic. They then unwrapped the packages, both of which contained bricks of marihuana. Petitioner was charged with various drug offenses, and, after his pretrial motion to suppress the evidence found when the packages were unwrapped was denied, he was convicted. The California Court of Appeal affirmed, holding that the warrantless opening of the packages was constitutionally permissible since any experienced observer could reasonably have inferred from the appearance of the packages that they contained bricks of marihuana.

Held: The judgment is reversed. Pp. 423–429; 429–436.

103 Cal. App. 3d 34, 162 Cal. Rptr. 780, reversed.

JUSTICE STEWART, joined by JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL, concluded that the opening of the packages without a search warrant violated the Fourth and Fourteenth Amendments. Pp. 423–429.

(a) A closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else. *United States* v. *Chadwick*, 433 U. S. 1; *Arkansas* v. *Sanders*, 442 U. S. 753. Pp. 423–425.

(b) With respect to the constitutional protection to which a closed container found in the lawful search of an automobile is entitled, there is no distinction between containers, such as suitcases, commonly used to transport "personal effects," *i. e.*, property worn on or carried about the person or having some intimate relation to the person, and flimsier containers, such as cardboard boxes and plastic bags. Such a distinction has no basis in the language or meaning of the Fourth Amendment, which protects people and their effects, and protects those effects whether they are "personal" or "impersonal." And there are no objective criteria by which such a distinction could be made. Pp. 425–427.

(c) Unless a closed container found in an automobile is such that

its contents may be said to be in plain view, those contents are fully protected by the Fourth Amendment. Here, the evidence was insufficient to justify an exception to the rule on the ground that the contents of the packages in question could be inferred from their outward appearance. To fall within such exception, a container must so clearly announce its contents, whether by its distinctive configuration, transparency, or otherwise, that its contents are obvious to the observer. Pp. 427–428.

JUSTICE POWELL concluded that petitioner had a reasonable expectation of privacy in the opaquely wrapped and sealed package in question. The Fourth Amendment requires a police officer to obtain a warrant before searching a container that customarily serves as a repository for personal effects or when, as here, the circumstances indicate that the defendant has a reasonable expectation that the contents will not be open to public scrutiny. Pp. 429–436.

STEWART, J., announced the judgment of the Court and delivered an opinion, in which BRENNAN, WHITE, and MARSHALL, JJ., joined. BURGER, C. J., concurred in the judgment. POWELL, J., filed an opinion concurring in the judgment, *post,* p. 429. BLACKMUN, J., *post,* p. 436, REHNQUIST, J., *post,* p. 437, and STEVENS, J., *post,* p. 444, filed dissenting opinions.

Marshall W. Krause argued the cause for petitioner. With him on the briefs was *Joseph G. Baxter.*

Ronald E. Niver, Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *George Deukmejian,* Attorney General, *Robert H. Philibosian,* Chief Assistant Attorney General, *Edward P. O'Brien,* Assistant Attorney General, and *Clifford K. Thompson, Jr.,* Deputy Attorney General.

Deputy Solicitor General Frey argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General McCree, Acting Assistant Attorney General Keeney, Joshua I. Schwartz,* and *John Fichter De Pue.**

**Quin Denvir* and *Steffan Imhoff* filed a brief for the State Public Defender of California as *amicus curiae* urging reversal.

JUSTICE STEWART announced the judgment of the Court and delivered an opinion, in which JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL joined.

I

On the early morning of January 5, 1975, California Highway Patrol officers stopped the petitioner's car—a 1966 Chevrolet station wagon—because he had been driving erratically. He got out of his vehicle and walked towards the patrol car. When one of the officers asked him for his driver's license and the station wagon's registration, he fumbled with his wallet. When the petitioner opened the car door to get out the registration, the officers smelled marihuana smoke. One of the officers patted down the petitioner, and discovered a vial of liquid. The officer then searched the passenger compartment of the car, and found marihuana as well as equipment for using it.

After putting the petitioner in the patrol car, the officers opened the tailgate of the station wagon, located a handle set flush in the deck, and lifted it up to uncover a recessed luggage compartment. In the compartment were a totebag and two packages wrapped in green opaque plastic.[1] The police unwrapped the packages; each one contained 15 pounds of marihuana.

The petitioner was charged with various drug offenses, his pretrial motion to suppress the evidence found when the

[1] A photograph was made of one of the packages, and it was later described as follows:

"The package visible in the photograph is apparently wrapped or boxed in an opaque material covered by an outer wrapping of transparent, cellophane-type plastic. (The photograph is not in color, and the 'green' plastic cannot be seen at all.) Both wrappings are sealed on the outside with at least one strip of opaque tape. As thus wrapped and sealed, the package roughly resembles an oversized, extra-long cigar box with slightly rounded corners and edges. It bears no legend or other written indicia supporting any inference concerning its contents." 103 Cal. App. 3d 34, 44, 162 Cal. Rptr. 780, 785 (Rattigan, J., dissenting).

packages were unwrapped was denied, and a jury convicted him. In an unpublished opinion, the California Court of Appeal affirmed the judgment in all relevant respects. This Court granted a writ of certiorari, vacated the Court of Appeal's judgment, and remanded the case for further consideration in light of *Arkansas* v. *Sanders,* 442 U. S. 753. 443 U. S. 903. On remand, the Court of Appeal again found the warrantless opening of the packages constitutionally permissible, since the trial court "could reasonably [have] conclude[d] that the contents of the packages could have been inferred from their outward appearance, so that appellant could not have held a reasonable expectation of privacy with respect to the contents." 103 Cal. App. 3d 34, 40, 162 Cal. Rptr. 780, 783. Because of continuing uncertainty as to whether closed containers found during a lawful warrantless search of an automobile may themselves be searched without a warrant, this Court granted certiorari. 449 U. S. 1109.

II

The Fourth Amendment to the Constitution, which is made applicable to the States through the Fourteenth Amendment, establishes "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This Court has held that a search is *per se* unreasonable, and thus violates the Fourth Amendment, if the police making the search have not first secured from a neutral magistrate a warrant that satisfies the terms of the Warrant Clause of the Fourth Amendment. See, *e. g.,* *Katz* v. *United States,* 389 U. S. 347, 357; *Agnello* v. *United States,* 269 U. S. 20, 33. Although the Court has identified some exceptions to this warrant requirement, the Court has emphasized that these exceptions are "few," "specifically established," and "well-delineated." *Katz* v. *United States, supra,* at 357.

Among these exceptions is the so-called "automobile exception." See *Colorado* v. *Bannister,* 449 U. S. 1. In *Carroll*

v. *United States,* 267 U. S. 132, the Court held that a search warrant is unnecessary "where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained." *Chambers* v. *Maroney,* 399 U. S. 42, 51. In recent years, we have twice been confronted with the suggestion that this "automobile exception" somehow justifies the warrantless search of a closed container found inside an automobile. Each time, the Court has refused to accept the suggestion.

In *United States* v. *Chadwick,* 433 U. S. 1, the Government argued in part that luggage is analogous to motor vehicles for Fourth Amendment purposes, and that the "automobile exception" should thus be extended to encompass closed pieces of luggage. The Court rejected the analogy and insisted that the exception is confined to the special and possibly unique circumstances which were the occasion of its genesis. First, the Court said that "[o]ur treatment of automobiles has been based in part on their inherent mobility, which often makes obtaining a judicial warrant impracticable." *Id.,* at 12. While both cars and luggage may be "mobile," luggage itself may be brought and kept under the control of the police.

Second, the Court acknowledged that "inherent mobility" cannot alone justify the automobile exception, since the Court has sometimes approved warrantless searches in which the automobile's mobility was irrelevant. See *Cady* v. *Dombrowski,* 413 U. S. 433, 441–442; *South Dakota* v. *Opperman,* 428 U. S. 364, 367. The automobile exception, the Court said, is thus also supported by "the diminished expectation of privacy which surrounds the automobile" and which arises from the facts that a car is used for transportation and not as a residence or a repository of personal effects, that a car's occupants and contents travel in plain view, and that automobiles are necessarily highly regulated by government. *United States* v. *Chadwick, supra,* at 12–13. No such dimin-

ished expectation of privacy characterizes luggage; on the contrary, luggage typically is a repository of personal effects, the contents of closed pieces of luggage are hidden from view, and luggage is not generally subject to state regulation.

In *Arkansas* v. *Sanders,* 442 U. S. 753, the State of Arkansas argued that the "automobile exception" should be extended to allow the warrantless search of everything found in an automobile during a lawful warrantless search of the vehicle itself. The Court rejected this argument for much the same reason it had rejected the Government's argument in *Chadwick.* Pointing out, first, that "[o]nce police have seized a suitcase, as they did here, the extent of its mobility is in no way affected by the place from which it was taken," the Court said that there generally "is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places." 442 U. S., at 763–764. Second, the Court saw no reason to believe that the privacy expectation in a closed piece of luggage taken from a car is necessarily less than the privacy expectation in closed pieces of luggage found elsewhere.

In the present case, the Court once again encounters the argument—made in the Government's brief as *amicus curiae*—that the contents of a closed container carried in a vehicle are somehow not fully protected by the Fourth Amendment. But this argument is inconsistent with the Court's decisions in *Chadwick* and *Sanders.* Those cases made clear, if it was not clear before, that a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else.

The respondent, however, proposes that the *nature* of a container may diminish the constitutional protection to which it otherwise would be entitled—that the Fourth Amendment protects only containers commonly used to transport "personal effects." By personal effects the respondent means property worn on or carried about the person or having some intimate relation to the person. In taking this position, the

respondent relies on numerous opinions that have drawn a distinction between pieces of sturdy luggage, like suitcases, and flimsier containers, like cardboard boxes. Compare, *e. g.*, *United States* v. *Benson*, 631 F. 2d 1336 (CA8 1980) (leather totebag); *United States* v. *Miller*, 608 F. 2d 1089 (CA5 1979) (plastic portfolio); *United States* v. *Presler*, 610 F. 2d 1206 (CA4 1979) (briefcase); *United States* v. *Meier*, 602 F. 2d 253 (CA10 1979) (backpack); *United States* v. *Johnson*, 588 F. 2d 147 (CA5 1979) (duffelbag); *United States* v. *Stevie*, 582 F. 2d 1175 (CA8 1978), with *United States* v. *Mannino*, 635 F. 2d 110 (CA2 1980) (plastic bag inside paper bag); *United States* v. *Goshorn*, 628 F. 2d 697, 699 (CA1 1980) ("'[t]wo plastic bags, further in three brown paper bags, further in two clear plastic bags'"); *United States* v. *Gooch*, 603 F. 2d 122 (CA10 1979) (plastic bag); *United States* v. *Mackey*, 626 F. 2d 684 (CA9 1980) (paper bag); *United States* v. *Neumann*, 585 F. 2d 355 (CA8 1978) (cardboard box).

The respondent's argument cannot prevail for at least two reasons. First, it has no basis in the language or meaning of the Fourth Amendment. That Amendment protects people and their effects, and it protects those effects whether they are "personal" or "impersonal." The contents of Chadwick's footlocker and Sanders' suitcase were immune from a warrantless search because they had been placed within a closed, opaque container and because Chadwick and Sanders had thereby reasonably "manifested an expectation that the contents would remain free from public examination." *United States* v. *Chadwick*, *supra*, at 11. Once placed within such a container, a diary and a dishpan are equally protected by the Fourth Amendment.

Second, even if one wished to import such a distinction into the Fourth Amendment, it is difficult if not impossible to perceive any objective criteria by which that task might be accomplished. What one person may put into a suitcase, another may put into a paper bag. *United States* v. *Ross*,

210 U. S. App. D. C. 342, 655 F. 2d 1159 (1981) (en banc). And as the disparate results in the decided cases indicate, no court, no constable, no citizen, can sensibly be asked to distinguish the relative "privacy interests" in a closed suitcase, briefcase, portfolio, duffelbag, or box.

The respondent protests that footnote 13 of the *Sanders* opinion says that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment." 442 U. S., at 764, n. 13. But the exceptions listed in the succeeding sentences of the footnote are the very model of exceptions which prove the rule: "Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant." *Id.*, at 764–765, n. 13. The second of these exceptions obviously refers to items in a container that is not closed. The first exception is likewise little more than another variation of the "plain view" exception, since, if the distinctive configuration of a container proclaims its contents, the contents cannot fairly be said to have been removed from a searching officer's view. The same would be true, of course, if the container were transparent, or otherwise clearly revealed its contents. In short, the negative implication of footnote 13 of the *Sanders* opinion is that, unless the container is such that its contents may be said to be in plain view, those contents are fully protected by the Fourth Amendment.

The California Court of Appeal believed that the packages in the present case fell directly within the second exception described in this footnote, since "[a]ny experienced observer could have inferred from the appearance of the packages that they contained bricks of marijuana." 103 Cal. App. 3d, at 40, 162 Cal. Rptr., at 783. The only evidence the court

cited to support this proposition was the testimony of one of the officers who arrested the petitioner. When asked whether there was anything about "these two plastic wrapped green blocks which attracted your attention," the officer replied, somewhat obscurely:

> "A. I had previous knowledge of transportation of such blocks. Normally contraband is wrapped this way, merely hearsay. I had never seen them before.
>
> "Q. You had heard contraband was packaged this way?
>
> "A. Yes." *Id.*, at 40, n. 2, 162 Cal. Rptr., at 783, n. 4.

This vague testimony certainly did not establish that marihuana is ordinarily "packaged this way." Expectations of privacy are established by general social norms, and to fall within the second exception of the footnote in question a container must so clearly announce its contents, whether by its distinctive configuration, its transparency, or otherwise, that its contents are obvious to an observer. If indeed a green plastic wrapping reliably indicates that a package could only contain marihuana, that fact was not shown by the evidence of record in this case.[2]

Although the two bricks of marihuana were discovered during a lawful search of the petitioner's car, they were inside a closed, opaque container. We reaffirm today that such a container may not be opened without a warrant, even if it is found during the course of the lawful search of an automobile. Since the respondent does not allege the presence of any circumstances that would constitute a valid exception

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[2] As Judge Rattigan wrote in his dissenting opinion in the California Court of Appeal: "For all that I see, it could contain books, stationery, canned goods, or any number of other wholly innocuous items which might be heavy in weight. In fact, it bears a remarkable resemblance to an unlabelled carton of emergency highway flares that I bought from a store shelf and have carried in the trunk of my own automobile." 103 Cal. App. 3d, at 44, 162 Cal. Rptr., at 785.

to this general rule,[3] it is clear that the opening of the closed containers without a search warrant violated the Fourth and Fourteenth Amendments. Accordingly, the judgment of the California Court of Appeal is reversed.

It is so ordered.

THE CHIEF JUSTICE concurs in the judgment.

JUSTICE POWELL, concurring in the judgment.

The Court's judgment is justified, though not compelled, by the Court's opinion in *Arkansas* v. *Sanders,* 442 U. S. 753 (1979). Accordingly, I join the judgment. As the plurality today goes well beyond *Sanders* or any other prior case to establish a new "bright-line" rule, I cannot join its opinion.[1] It would require officers to obtain warrants in order to examine the contents of insubstantial containers in which no one had a reasonable expectation of privacy. The plurality's approach strains the rationales of our prior cases and imposes substantial burdens on law enforcement without vindicating any significant values of privacy. I nevertheless concur in the judgment because the manner in which the package at issue was carefully wrapped and sealed evidenced petitioner's expectation of privacy in its contents. As we have stressed

[3] In particular, it is not argued that the opening of the packages was incident to a lawful custodial arrest. Cf. *Chimel* v. *California,* 395 U. S. 752. See *Arkansas* v. *Sanders,* 442 U. S. 753, 764, n. 11. Further, the respondent does not argue that the petitioner consented to the opening of the packages.

[1] The plurality's "bright-line" rule would extend the Warrant Clause of the Fourth Amendment to every "closed, opaque container," without regard to size, shape, or whether common experience would suggest that the owner was asserting a privacy interest in the contents. The plurality would exempt from the broad reach of its rule only those "closed, opaque containers" where, because of shape or some other characteristic, the "contents may be said to be in plain view." In accordance with the plurality's usage I use the term "container" to include any and all packages, bags, boxes, tins, bottles, and the like.

in prior decisions, a central purpose of the Fourth Amendment is to safeguard reasonable expectations of privacy.

Having reached this decision on the facts of this case, I recognize—as the dissenting opinions find it easy to proclaim—that the law of search and seizure with respect to automobiles is intolerably confusing. The Court apparently cannot agree even on what it has held previously, let alone on how these cases should be decided. Much of this difficulty comes from the necessity of applying the general command of the Fourth Amendment to ever-varying facts; more may stem from the often unpalatable consequences of the exclusionary rule, which spur the Court to reduce its analysis to simple mechanical rules so that the constable has a fighting chance not to blunder.

This case and *New York* v. *Belton, post,* p. 454, decided today, involve three different Fourth Amendment questions that arise in automobile cases: (A) the scope of the search incident to arrest on the public highway; (B) whether officers must obtain a warrant when they have probable cause to search a particular container in which the suspect has a reasonable expectation of privacy; and (C) the scope of the "automobile exception" to the warrant requirement, which potentially includes all areas of the car and containers found therein. These issues frequently are intertwined, as the similar facts of these cases suggest: both involve the stop of an automobile upon probable cause, the arrest of the occupants, the search of the automobile, and the search of a personal container found therein. Nonetheless, the cases have been litigated and presented to us under entirely different theories. Intelligent analysis cannot proceed unless the issues are addressed separately. Viewing similar facts from entirely different perspectives need not lead to identical results.

A

I have joined the Court's opinion in *Belton* because I concluded that a "bright-line" rule was necessary in the quite

different circumstances addressed there.[2] *Belton,* unlike this case, concerns only the exception to the warrant requirement for a search incident to arrest; contrary to JUSTICE STEVENS' implication, *post,* at 444, 447–448, 451, and n. 13, the courts below never found that the officer had probable cause to search the automobile. *Belton* presents the volatile and fluid situation of an encounter between an arresting officer and a suspect apprehended on the public highway. While *Chimel* v. *California,* 395 U. S. 752 (1969), determines in principle the scope of a warrantless search incident to arrest, practical necessity requires that we allow an officer in these circumstances to secure thoroughly the automobile without requiring him in haste and under pressure to make close calculations about danger to himself or the vulnerability of evidence.

Any "bright-line" rule does involve costs. *Belton* trades marginal privacy of containers within the passenger area of an automobile for protection of the officer and of destructible evidence. The balance of these interests strongly favors the Court's rule. The occupants of an automobile enjoy only a limited expectation of privacy in the interior of the automobile itself. See *Almeida-Sanchez* v. *United States,* 413 U. S. 266, 279 (1973) (POWELL, J., concurring). This limited interest is diminished further when the occupants are placed under custodial arrest. Cf. *United States* v. *Robinson,* 414 U. S. 218, 237 (1973) (POWELL, J., concurring). Immediately preceding the arrest, the passengers have complete control over the entire interior of the automobile, and can place weapons or contraband into pockets or other containers as the officer approaches. Thus, practically speaking, it is difficult to justify varying degrees of protection for the general interior of the car and for the various containers found within. These

[2] The one significant factual difference is that *Belton* involved only the passenger compartment (the "interior") of an automobile, whereas this case involves search of the trunk.

considerations do not apply to the trunk of the car, which is not within the control of the passengers either immediately before or during the process of arrest.

B

Although petitioner Robbins was arrested, this case was litigated only on the question whether the officers needed a warrant to open a sealed, opaquely wrapped container in the rear compartment of a station wagon. The plurality treats this situation as identical with that in *United States* v. *Chadwick,* 433 U. S. 1 (1977), and *Sanders, supra,* which addressed warrantless searches of a double-locked footlocker and personal luggage respectively. Thus, the plurality's opinion in this case concerns itself primarily with the kinds of containers requiring a warrant for their search when police have probable cause to search them, and where there has been no arrest. For reasons explained more fully below, I will share the plurality's assumption that the police had probable cause to search the container rather than the automobile generally. Viewing this as a "container case," I concur in the judgment.

Chadwick and *Sanders* require police to obtain a warrant to search the contents of a container only when the container is one that generally serves as a repository for personal effects or that has been sealed in a manner manifesting a reasonable expectation that the contents will not be open to public scrutiny. See *Chadwick, supra,* at 13; *Sanders,* 442 U. S., at 764. See, *e. g., United States* v. *Mannino,* 635 F. 2d 110, 114 (CA2 1980); *United States* v. *Goshorn,* 628 F. 2d 697, 700–701 (CA1 1980); *United States* v. *Mackey,* 626 F. 2d 684, 687–688 (CA9 1980); *United States* v. *Ross,* 210 U. S. App. D. C. 342, 356–362, 655 F. 2d 1159, 1173–1179 (1981) (en banc) (Tamm, J., dissenting). This resembles in principle the inquiry courts must undertake to determine whether a search violates the Fourth Amendment rights of a complaining party. See *Rakas* v. *Illinois,* 439 U. S. 128 (1978); *id.,* at 150–152 (POWELL, J.,

concurring). In each instance, "[t]he ultimate question . . . is whether one's claim to privacy from government intrusion is reasonable in light of the surrounding circumstances." *Id.*, at 152; see *Katz* v. *United States,* 389 U. S. 347 (1967).

The plurality's approach today departs from this basic concern with interests in privacy, and adopts a mechanical requirement for a warrant before police may search any closed container. Nothing in *Chadwick* or *Sanders* justifies this extreme extension of the warrant requirement. Indeed, the Court in *Sanders* explicitly foreclosed that reading:

> "There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile." 442 U. S., at 765, n. 13.

While the plurality's blanket warrant requirement does not even purport to protect any privacy interest, it would impose substantial new burdens on law enforcement. Confronted with a cigarbox or a Dixie cup in the course of a probable-cause search of an automobile for narcotics, the conscientious policeman would be required to take the object to a magistrate, fill out the appropriate forms, await the decision, and finally obtain the warrant. Suspects or vehicles normally will be detained while the warrant is sought. This process may take hours, removing the officer from his normal police duties. Expenditure of such time and effort, drawn from the public's limited resources for detecting or preventing crimes, is justified when it protects an individual's reasonable privacy interests. In my view, the plurality's requirement cannot be so justified. The aggregate burden of procuring warrants whenever an officer has probable cause to search the most trivial

container may be heavy and will not be compensated by the advancement of important Fourth Amendment values. The sole virtue of the plurality's rule is simplicity.[3]

[3] The plurality overestimates the difficulties involved in determining whether a party has a reasonable expectation of privacy in a particular container. Many containers, such as personal luggage, are "inevitably associated with the expectation of privacy." *Arkansas* v. *Sanders*, 442 U. S. 753, 762 (1979). Many others, varying from a plastic cup to the ubiquitous brown paper grocery sack, consistently lack such an association. In the middle are containers, such as cardboard boxes and laundry bags, that may be used, although imperfectly, as repositories of personal effects, but often are not. As to such containers, I would adopt the view of Chief Judge Coffin:

"[W]e disagree that the mere possibility of such use leads to the conclusion that such containers are 'inevitably' associated with an expectation of privacy. The many and varied uses of these containers that entail no expectation of privacy militate against applying a presumption that a warrantless search of such a container violates the Fourth Amendment." *United States* v. *Goshorn*, 628 F. 2d 697, 700 (CA1 1980).

When confronted with the claim that police should have obtained a warrant before searching an ambiguous container, a court should conduct a hearing to determine whether the defendant had manifested a reasonable expectation of privacy in the contents of the container. *See id.*, at 701. Relevant to such an inquiry should be the size, shape, material, and condition of the exterior, the context within which it is discovered, and whether the possessor had taken some significant precaution, such as locking, securely sealing or binding the container, that indicates a desire to prevent the contents from being displayed upon simple mischance. A prudent officer will err on the side of respecting ambigous assertions of privacy, see *Rakas* v. *Illinois*, 439 U. S. 128, 152, n. 1 (1978) (POWELL, J., concurring), and a realistic court seldom should second-guess the good-faith judgment of the officer in the field when the public consequently must suffer from the suppression of probative evidence, cf. *Brown* v. *Illinois*, 422 U. S. 590, 611–612 (1975) (POWELL, J., concurring).

In this case, petitioner, by securely wrapping and sealing his package, had manifested a desire that the public not casually observe the contents. See *ante*, at 422, n. 1. Our society's traditional respect for the privacy of locked or sealed containers confirms the reasonableness of this expectation. See *Ex parte Jackson*, 96 U. S. 727, 733 (1878) (warrant required for postal inspectors to open sealed packages sent through mail). See also *United States* v. *Van Leeuwen*, 397 U. S. 249 (1970).

C

The dissenters argue, with some justice, that the controlling question should be the scope of the automobile exception to the warrant requirement. In their view, when the police have probable cause to search an automobile, rather than only to search a particular container that fortuitously is located in it, the exigencies that allow the police to search the entire automobile without a warrant support the warrantless search of every container found therein. See *post,* at 451, and n. 13 (STEVENS, J., dissenting). This analysis is entirely consistent with the holdings in *Chadwick* and *Sanders,* neither of which is an "automobile case," because the police there had probable cause to search the double-locked footlocker and the suitcase respectively before either came near an automobile. See *Chadwick,* 433 U. S., at 11; *Sanders,* 442 U. S., at 761; see also *id.,* at 766 (BURGER, C. J., concurring). Adoption of the dissenters' view would require, however, rejection of a good deal of the reasoning in the latter case.

Resolving this case by expanding the scope of the automobile exception is attractive not so much for its logical virtue, but because it may provide ground for agreement by a majority of the presently fractured Court on an approach that would give more specific guidance to police and courts in this recurring situation—one that has led to incessant litigation. I note, however, that this benefit would not be realized fully, as courts may find themselves deciding when probable cause ripened, or whether suspicion focused on the container or on the car in which it traveled.

The parties have not pressed this argument in this case and it is late in the Term for us to undertake *sua sponte* reconsideration of basic doctrines. Given these constraints, I adhere to statements in *Sanders* that the fact that the container was seized from an automobile is irrelevant to the question whether a warrant is needed to search its contents. Some future case affording an opportunity for more thorough con-

sideration of the basic principles at risk may offer some better, if more radical, solution to the confusion that infects this benighted area of the law.[4]

JUSTICE BLACKMUN, dissenting.

I must dissent for the reasons stated in my respective writings in *United States* v. *Chadwick,* 433 U. S. 1, 17 (1977), and *Arkansas* v. *Sanders,* 442 U. S. 753, 768 (1979). I also agree with much of what JUSTICE REHNQUIST says, *post,* at 439–443, in his dissenting opinion in the present case. The anticipated confusion that *Chadwick* and *Sanders* spawned for the Nation's trial and appellate courts is well illustrated by JUSTICE STEWART's listing, *ante,* at 425–426, of cases decided by Federal Courts of Appeals since *Chadwick* was announced in 1977.

The decision in the present case at least has the merit of a "bright line" rule that should serve to eliminate the opaqueness and to dissipate some of the confusion. See 442 U. S., at 771–772. Nonetheless, under today's holding, an arresting officer will still be forced, despite a concededly lawful search of the automobile, to go to the magistrate, whether near or far, for the search warrant inevitably to be issued when the facts are like those presented here. And only time will tell whether the "test," *ante,* at 427, for determining whether a package's exterior "announce[s] its contents" will lead to a new stream of litigation.

I continue to think the Court is in error and that it would have been better, see 442 U. S., at 772, "to adopt a clear-cut rule to the effect that a warrant should not be required to seize and search any personal property found in an automobile that may in turn be seized and searched without a war-

[4] We have an institutional responsibility not only to respect *stare decisis* but also to make every reasonable effort to harmonize our views on constitutional questions of broad practical application.

rant pursuant to *Carroll* [v. *United States,* 267 U. S. 132 (1925),] and *Chambers* [v. *Maroney,* 399 U. S. 42 (1970)]."

JUSTICE REHNQUIST, dissenting.

I have previously stated why I believe the so-called "exclusionary rule" created by this Court imposes a burden out of all proportion to the Fourth Amendment values which it seeks to advance by seriously impeding the efforts of the national, state, and local governments to apprehend and convict those who have violated their laws. See *California* v. *Minjares,* 443 U. S. 916 (1979) (REHNQUIST, J., joined by BURGER, C. J., dissenting from the denial of a stay). I have in no way abandoned those views, but believe that the plurality opinion of JUSTICE STEWART announcing the judgment of the Court in the present case compounds the evils of the "exclusionary rule" by engrafting subtleties into the jurisprudence of the Fourth Amendment itself that are neither required nor desirable under our previous decisions. As Justice Harlan stated in his concurring opinion in *Coolidge* v. *New Hampshire,* 403 U. S. 443, 490–491 (1971):

> "State and federal law enforcement officers and prosecutorial authorities must find quite intolerable the present state of uncertainty, which extends even to such an everyday question as the circumstances under which police may enter a man's property to arrest him and seize a vehicle believed to have been used during the commission of a crime.
>
> "I would begin [the] process of re-evaluation by overruling *Mapp* v. *Ohio,* 367 U. S. 643 (1961), and *Ker* v. *California,* 374 U. S. 23 (1963). . . .
>
> "Until we face up to the basic constitutional mistakes of *Mapp* and *Ker,* no solid progress in setting things straight in search and seizure law will, in my opinion, occur."

The 10 years which have intervened since Justice Harlan

made this statement have only tended to confirm its correctness.

The harm caused by the exclusionary rule is compounded by the judicially created preference for a warrant as indicating satisfaction of the reasonableness requirement of the Fourth Amendment. It is often forgotten that nothing in the Fourth Amendment itself requires that searches be conducted pursuant to warrants. The terms of the Amendment simply mandate that the people be secure from unreasonable searches and seizures, and that any warrants which *may* issue shall only issue upon probable cause: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Not only has historical study "suggested that in emphasizing the warrant requirement over the reasonableness of the search the Court has 'stood the fourth amendment on its head' from a historical standpoint," *Coolidge, supra,* at 492 (Harlan, J., concurring) (quoting T. Taylor, Two Studies in Constitutional Interpretation 23–24 (1969)), but the Court has failed to appreciate the impact of its decisions, not mandated by the Fourth Amendment, on law enforcement. Courts, including this Court, often make the rather casual assumption that police are not substantially frustrated in their efforts to apprehend those whom they have probable cause to arrest or to gather evidence of crime when they have probable cause to search by the judicially created preference for a warrant, apparently assuming that the typical case is one in which an officer can make a quick half mile ride to the nearest precinct station in an urban area to obtain such a warrant. See, *e. g., Steagald* v. *United States,* 451 U. S. 204, 222 (1981). But this casual assumption simply does not fit the realities of sparsely populated "cow counties" located in some of the Southern and Western States, where at least

apocryphally the number of cows exceed the number of people, and the number of square miles in the county may exceed 10,000 and the nearest magistrate may be 25 or even 50 miles away. The great virtue of the opinion in *Wolf* v. *Colorado,* 338 U. S. 25 (1949), was that it made allowance for these vast diversities between States; unfortunately such an approach to the Fourth Amendment in the true spirit of federalism was, as Justice Harlan observed, rejected in *Mapp* v. *Ohio,* 367 U. S. 643 (1961).

Recent developments have cast further doubt on the emphasis on a warrant as opposed to the reasonableness of the search. In *Shadwick* v. *City of Tampa,* 407 U. S. 345 (1972), the Court ruled that clerks of the Municipal Court of the city of Tampa, Fla., not trained in the law, are "neutral and detached magistrates" who may issue warrants which satisfy the Warrant Clause of the Fourth Amendment. And in *Franks* v. *Delaware,* 438 U. S. 154 (1978), the Court held that a defendant can go behind a warrant and attack its validity on a motion to suppress. In emphasizing the warrant requirement the Court has therefore not only erected an edifice without solid foundation but also one with little substance.

Even aside from these general observations on the warrant requirement, the case we decide today falls within what has been and should continue to be an exception to that requirement—the automobile exception. In *Cady* v. *Dombrowski,* 413 U. S. 433, 439–440 (1973), we explained that one class of cases which constitutes "at least a partial exception to this general rule [of requiring a warrant] is automobile searches. Although vehicles are 'effects' within the meaning of the Fourth Amendment, 'for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars.' *Chambers* v. *Maroney,* 399 U. S. 42, 52 (1970). See *Carroll* v. *United States,* 267 U. S. 132, 153–154 (1925)." We also stated in *Cady:*

> "[T]he application of Fourth Amendment standards, originally intended to restrict only the Federal Govern-

ment, to the States presents some difficulty when searches of automobiles are involved. The contact with vehicles by federal law enforcement officers usually, if not always, involves the detection or investigation of crimes unrelated to the operation of a vehicle. Cases such as *Carroll* v. *United States, supra,* and *Brinegar* v. *United States*, 338 U. S. 160 (1949), illustrate the typical situations in which federal officials come into contact with and search vehicles. In both cases, members of a special federal unit charged with enforcing a particular federal criminal statute stopped and searched a vehicle when they had probable cause to believe that the operator was violating that statute.

"As a result of our federal system of government, however, state and local police officers, unlike federal officers, have much more contact with vehicles for reasons related to the operation of vehicles themselves. All States require vehicles to be registered and operators to be licensed. States and localities have enacted extensive and detailed codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways." *Id.*, at 440–441.

I would not draw from the language of either *Cady* or of *South Dakota* v. *Opperman*, 428 U. S. 364 (1976), the conclusion which the plurality draws today that " 'inherent mobility' cannot alone justify the automobile exception, since the Court has sometimes approved warrantless searches in which the automobile's mobility was irrelevant." *Ante*, at 424. Logically, it seems to me that the conclusion to be drawn from *Cady* and *Opperman* is that one need *not* demonstrate that a *particular* automobile was capable of being moved, but that automobiles *as a class* are inherently mobile, and a defendant seeking to suppress evidence obtained from an automobile should not be heard to say that this particular automobile had broken down, was in a parking lot under the supervision

of the police, or the like. Thus, I continue to adhere to the view expressed by JUSTICE BLACKMUN:

> "If 'contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant,' *Carroll* v. *United States,* 267 U. S. 132, 153 (1925), then, in my view, luggage and similar containers found in an automobile may be searched for contraband without a warrant. The luggage, like the automobile transporting it, is mobile. And the expectation of privacy in a suitcase found in the car is probably not significantly greater than the expectation of privacy in a locked glove compartment.
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> . . . . .
>
> "In my view, it would be better to adopt a clear-cut rule to the effect that a warrant should not be required to seize and search any personal property found in an automobile that may in turn be seized and searched without a warrant pursuant to *Carroll and Chambers.*" *Arkansas* v. *Sanders,* 442 U. S. 753, 769, 772 (1979) (BLACKMUN, J., dissenting).

The proper application of the automobile exception would uphold the search conducted by the California Highway Patrol officers in this case inasmuch as the plurality acknowledges that the officers could constitutionally open the tailgate of the station wagon and then open the car's luggage compartment. *Ante,* at 428.

The plurality, however, concludes that the opening of the two plastic garbage bags which the officers found in the luggage compartment is unconstitutional. In so doing, the plurality relies on its earlier decision in *Arkansas* v. *Sanders, supra,* and rejects the argument that the search of the garbage bags should, at a minimum, fall within the exception noted in footnote 13 of the *Sanders* opinion. There, the Court had explained:

> "Not all containers and packages found by police dur-

ing the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant. See *Harris* v. *United States,* 390 U. S. 234, 236 (1968) (*per curiam*)." 442 U. S., at 764–765, n. 13.

It seems to me that the search conducted by the Highway Patrol officers falls squarely within the above exception. This is revealed by an examination of the events which prompted the search of the luggage compartment in the first place—events which are conspicuously absent from the recitation of the facts in the plurality opinion. Prior to opening the tailgate of the car, the Highway Patrol officers had already discovered marihuana in the passenger compartment of the car. While the officers were retrieving this marihuana and other drug paraphernalia from the front of the car, petitioner stated: "What you are looking for is in the back." Only then did an officer open the luggage compartment of the station wagon and discover the two plastic garbage bags being used to wrap the blocks of marihuana. One of the officers then testified that he was aware that contraband was often wrapped in this fashion—a fact of which all those who watch the evening news are surely well aware. Given these factors, particularly the petitioner's statement, it seems to me that petitioner could have no reasonable expectation of privacy in the contents of the garbage bags. Surely, given all the circumstances, the contents of the garbage bags "could be inferred from their outward appearance."

The present case aptly illustrates the problems inherent in the Fourth Amendment analysis adopted by the Court in the past two decades. Rather than apply the automobile excep-

tion to a situation such as the present one, the Court in *United States* v. *Chadwick*, 433 U. S. 1 (1977), and *Sanders, supra,* attempted to limit that exception so as not to include certain, but not all, containers found within an automobile. Apparently, the plurality today decides that distinguishing between containers found in a car is too difficult a task and accordingly denudes the language found in footnote 13 of *Sanders* of most of its meaning. It does so evidently in search of a workable rule to govern automobile searches. I seek such a workable rule as well, but unlike the plurality I feel that such a rule cannot be found as long as the Court continues in the direction in which it is headed. Instead, I would return to the rationale of *Carroll* and *Chambers* and hold that a warrant should not be required to seize and search any personal property found in an automobile that may in turn be constitutionally seized and searched without a warrant. I would not abandon this reasonably "bright line" in search of another.

But I think that probably any search for "bright lines" short of overruling *Mapp* v. *Ohio* is apt to be illusory. Our entire profession is trained to attack "bright lines" the way hounds attack foxes. Acceptance by the courts of arguments that one thing is the "functional equivalent" of the other, for example, soon breaks down what might have been a bright line into a blurry impressionistic pattern.

If city court clerks who are not trained in the law satisfy the warrant requirement of the Fourth and Fourteenth Amendments, and if a defendant may attack the validity of a warrant on a motion to suppress, it seems to me that little is lost in the way of the "core values" of the Fourth Amendment as made applicable to the States by the Fourteenth if *Mapp* v. *Ohio* is overruled. This will not establish a bright line except to the extent that it makes clear that the exclusionary rule is not applicable to the States. And it will leave to the Federal Government, with its generally more highly trained law enforcement personnel, the problems of wrestling with this

Court's twisting and turning as it makes decisional law applying the Fourth Amendment, rather than forcing the 50 States, with their widely varying conditions and greater traditional responsibility for prevention of serious crime, to engage in the burdensome and frequently futile efforts which are necessary to predict the "correct" result in a particular case.

JUSTICE STEVENS, dissenting.

It is quite clear to most of us that this case and *New York* v. *Belton, post,* p. 454, should be decided in the same way.[1] Both cases involve automobile searches. In both cases, the automobiles had been lawfully stopped on the highway, the occupants had been lawfully arrested, and the officers had probable cause to believe that the vehicles contained contraband. In my opinion, the "automobile exception" to the warrant requirement therefore provided each officer the authority to make a thorough search of the vehicle—including the glove compartment, the trunk, and any containers in the vehicle that might reasonably contain the contraband.

Such was the state of the law prior to the Court's discursive writing in *Arkansas* v. *Sanders,* 442 U. S. 753.[2] Be-

[1] JUSTICE BLACKMUN, JUSTICE REHNQUIST, and I would uphold the searches in both cases; JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL would invalidate both searches. Only THE CHIEF JUSTICE, JUSTICE STEWART, and JUSTICE POWELL reach the curious conclusion that a citizen has a greater privacy interest in a package of marihuana enclosed in a plastic wrapper than in the pocket of a leather jacket.

[2] Prior to the Court's decision in *United States* v. *Chadwick,* 433 U. S. 1, courts routinely relied on the automobile exception to uphold the search of a container found in a car. The court in *United States* v. *Soriano,* 497 F. 2d 147, 149 (CA5 1974), cited *Chambers* v. *Maroney,* 399 U. S. 42, and stated:

"And though it is true that the Court spoke of an automobile while we treat of containers in or just removed from one, the principle is not different. The officer who arrested Soriano and his companions indisputably had probable cause to believe that the vehicle contained contraband, a circumstance justifying the initial incursion into the trunk. Under

cause—as THE CHIEF JUSTICE cogently demonstrated in his separate opinion in *Sanders*—the actual holdings in both *Sanders* and *United States* v. *Chadwick*, 433 U. S. 1, are entirely consistent with that view of the law, I would apply it in this case. *Sanders* and *Chadwick* are both plainly distinguishable from this case because neither case truly involved the automobile exception.[3] In *Chadwick*, federal

established law in this circuit and elsewhere, this justification encompassed the search of containers in the vehicle which could reasonably be employed in the illicit carriage of the contraband."

See also *United States* v. *Anderson*, 500 F. 2d 1311, 1315 (CA5 1974); *United States* v. *Evans*, 481 F. 2d 990, 993–994 (CA9 1973). Indeed, in many cases it apparently never occurred to defendants challenging the validity of automobile searches or the courts considering such challenges that a search of a suitcase or other container located in an automobile presented a different question than the search of the car itself. See, *e. g.*, *United States* v. *Bowman*, 487 F. 2d 1229 (CA10 1973); *United States* v. *Garner*, 451 F. 2d 167 (CA6 1971); *United States* v. *Chapman*, 474 F. 2d 300 (CA5 1973), cert. denied, 414 U. S. 835; *State* v. *Hearn*, 340 So. 2d 1365 (La. 1976); *State* v. *Lee*, 113 N. H. 313, 307 A. 2d 827 (1973); Cf. *State* v. *Warren*, 283 So. 2d 740 (La. 1973). Even after *Chadwick* was decided, courts continued to apply the automobile exception to uphold searches of containers found in cars and rejected the argument that *Chadwick* constituted a limitation on the automobile exception. See *United States* v. *Milhollan*, 599 F. 2d 518, 525–527 (CA3 1979), cert. denied, 444 U. S. 909; *United States* v. *Finnegan*, 568 F. 2d 637, 641 (CA9 1977); *United States* v. *Ochs*, 595 F. 2d 1247 (CA2 1979), cert. denied, 444 U. S. 955. But see *United States* v. *Johnson*, 588 F. 2d 147, 150–152, and n. 6 (CA5 1979) (repudiating *United States* v. *Soriano*, *supra*).

[3] As THE CHIEF JUSTICE pointed out in his opinion concurring in the judgment in *Sanders*:

"The breadth of the Court's opinion and its repeated references to the 'automobile' from which respondent's suitcase was seized at the time of his arrest, however, might lead the reader to believe—as the dissenters apparently do—that this case involves the 'automobile' exception to the warrant requirement. See *ante*, at 762–765, and n. 14. It does not. Here, as in *Chadwick*, it was the *luggage* being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband. The relationship between the

narcotic agents had probable cause to search a footlocker which was seized immediately after being placed in the trunk of a car. In *Sanders,* the officers had probable cause to believe a particular piece of luggage contained contraband before it was placed in the trunk of a taxicab. The officers, however, had no reason to search the vehicle in either case, and no right to arrest the driver in *Sanders.* The issue in *Chadwick* and *Sanders* would have been exactly the same if the officers had apprehended the suspects before they placed the footlocker in the trunk of the car in *Chadwick* or before they hailed the taxi in *Sanders.*[4] The officers' duty to obtain a warrant in both cases could not be evaded by simply waiting until the luggage was placed in a vehicle.

I therefore believe that neither *Sanders* nor *Chadwick* precludes application of the automobile exception to authorize

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automobile and the contraband was purely coincidental, as in *Chadwick.* The fact that the suitcase was resting in the trunk of the automobile at the time of respondent's arrest does not turn this into an 'automobile' exception case. The Court need say no more.

"This case simply does not present the question of whether a warrant is required before opening luggage when the police have probable cause to believe contraband is located *somewhere* in the vehicle, but when they do *not* know whether, for example, it is inside a piece of luggage in the trunk, in the glove compartment, or concealed in some part of the car's structure." 442 U. S., at 767.

[4] Again, as pointed out by THE CHIEF JUSTICE:

"Because the police officers had probable cause to believe that respondent's green suitcase contained marihuana before it was placed in the trunk of the taxicab, their duty to obtain a search warrant before opening it is clear under *United States* v. *Chadwick,* 433 U. S. 1 (1977). The essence of our holding in *Chadwick* is that there is a legitimate expectation of privacy in the contents of a trunk or suitcase accompanying or being carried by a person; that expectation of privacy is not diminished simply because the owner's arrest occurs in a public place. Whether arrested in a hotel lobby, an airport, a railroad terminal, or on a public street, as here, the owner has the right to expect that the contents of his luggage will not, without his consent, be exposed on demand of the police." *Id.,* at 766–767.

searches of containers found in cars that police have probable cause to search. Moreover, neither the law as it had developed before *Sanders*, nor the holding in *Sanders*, requires the Court to draw distinctions among different kinds of containers. JUSTICE BLACKMUN is surely correct in his forceful demonstration that the Fourth Amendment cannot differentiate between "an orange crate, a lunch bucket, an attaché case, a duffelbag, a cardboard box, a backpack, a totebag, and a paper bag." *Arkansas* v. *Sanders*, 442 U. S., at 772 (dissenting opinion). Except for the author of the *Sanders* dictum,[5] all Members of the Court wisely avoid the pitfalls of such an approach; unfortunately, however, instead of adhering to the simple view that when a warrantless search is within the automobile exception the entire vehicle may be searched, the Court today simultaneously moves too far in opposite directions in these two cases. In *Robbins* v. *California* the plurality and JUSTICE POWELL forbid a reasonable search of a container found in the functional equivalent of a trunk, and in *New York* v. *Belton* the Court authorizes unreasonable searches of vehicles and containers without probable cause to believe that contraband will be found. I disagree with both of these new approaches and would decide both cases by a consistent application of the automobile exception.

I

Although a routine application of the automobile exception would provide an adequate basis for upholding the search in this case, the plurality instead quixotically concludes that notwithstanding an officer's probable cause to believe that

[5] See POWELL, J., concurring in the judgment, *ante*, p. 429. If containers can be classified on the basis of the owner's expectations of privacy, see *ibid.*, it would seem rather clear to me that a brick of marihuana wrapped in green plastic would fall in the nonprivate category. I doubt if many dealers in this substance would be very comfortable carrying around such packages in plain view.

there is marihuana in a recessed luggage compartment in a station wagon, a green opaque plastic covering provides the contraband with a mantle of constitutional protection. Instead of repudiating the unnecessarily broad dictum that it employed in *Sanders*—a course the Court recognized as necessary in other cases this Term [6]—the plurality engages in an unprecedented and unnecessary narrowing of the automobile exception.

In *Chambers* v. *Maroney*, 399 U. S. 42, the Court reaffirmed the automobile exception established a half century earlier in *Carroll* v. *United States*, 267 U. S. 132, and upheld the warrantless search of an automobile on probable cause.[7] The "exception" recognized in *Carroll* and *Chambers*, however, applies merely to the requirement that police seek a warrant from a magistrate before conducting a search of places or things protected by the Fourth Amendment. The scope of

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[6] Compare *McDaniel* v. *Sanchez*, 452 U. S. 130, with *East Carroll Parish School Board* v. *Marshall*, 424 U. S. 636, see especially STEWART, J., dissenting in *McDaniel*, *supra*, at 154; see also *Donovan* v. *Dewey*, 452 U. S. 594, 609 (STEWART, J., dissenting); *id.*, at 606 (STEVENS, J., concurring).

[7] The *Chambers* Court indicated that the automobile exception is a recognition of the fact that searches of automobiles generally involve exigent circumstances:

"In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, it has also required the judgment of a magistrate on the probable-cause issue and the issuance of a warrant before a search is made. Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. *Carroll*, *supra*, holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible." 399 U. S., at 51.

The *Chambers* Court held that if a car could be searched on the scene of an arrest, it could also be searched after being taken to the station house.

any search that is within the exception should be just as broad as a magistrate could authorize by warrant if he were on the scene; the automobile exception to the warrant requirement therefore justifies neither more nor less than could a magistrate's warrant. If a magistrate issued a search warrant for an automobile, and officers in conducting the search authorized by the warrant discovered a suitcase in the car, they surely would not need to return to the magistrate for another warrant before searching the suitcase.[8] The fact that the marihuana found in petitioner's car was wrapped in opaque green plastic does not take the search out of the automobile exception.[9] Accordingly, the search conducted here was proper, and the judgment of the California Court of Appeal should be affirmed.

II

In *Belton, post,* p. 454, instead of relying on the automobile exception to uphold the search of respondent's jacket pocket, the Court takes an extraordinarily dangerous detour to reach the same result by adopting an admittedly new rationale ap-

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[8] Similarly, if a magistrate issues a warrant for the search of a house, police executing that warrant clearly need not obtain a separate warrant for the search of a suitcase found in the house, so long as the things to be seized could reasonably be found in such a suitcase.

[9] Of course, a proper application of the automobile exception will uphold a search of a container located in a car only if the police have probable cause to search the entire car. If, as in *Sanders,* the police have probable cause only as to a suitcase, and not as to the entire car, then the automobile exception is inapplicable and a warrant is required unless some other exigency exists. Thus police would not be able to avoid a warrant requirement simply by waiting for the suspect to place an object in a car and then invoking the automobile exception. If, however, the occupants of a car have an opportunity to take contraband out of a suitcase and secrete it somewhere else in a car, see *Sanders,* 442 U. S., at 768, 770, n. 3 (BLACKMUN, J., dissenting), then I would conclude that police have probable cause to search the entire car, including the suitcase, without a warrant.

plicable to every "lawful custodial arrest" of the occupant of an automobile.

The Court's careful and repeated use of the term "lawful custodial arrest" [10] seems to imply that a significant distinction between custodial arrests and ordinary arrests exists. I am familiar with the distinction between a "stop," see, *e. g., Terry* v. *Ohio,* 392 U. S. 1, and an "arrest," but I am not familiar with any difference between custodial arrests and any other kind of arrest. It is, of course, true that persons apprehended for traffic violations are frequently not required to accompany the arresting officer to the police station before they are permitted to leave on their own recognizance or by using their driver's licenses as a form of bond. It is also possible that state law or local regulations may in some cases prohibit police officers from taking persons into custody for violation of minor traffic laws. As a matter of constitutional law, however, any person lawfully arrested for the pettiest misdemeanor may be temporarily placed in custody.[11] In-

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[10] See *post,* at 455, 458, 459, 460, 461, 462, 463, and the quotation from *United States* v. *Robinson,* 414 U. S. 218, *post,* at 461.

[11] JUSTICE STEWART apparently believes that the Fourth and Fourteenth Amendments might provide some impediment to police taking a defendant into custody for violation of a "minor traffic offense." See *Gustafson* v. *Florida,* 414 U. S. 260, 266 (STEWART, J. concurring). Although I agree that a police officer's authority to restrain an individual's liberty should be limited in the context of stops for routine traffic violations, see *Pennsylvania* v. *Mimms,* 434 U. S. 106, 115 (STEVENS, J., dissenting), the Court has not directly considered the question whether "there are some constitutional limits upon the use of 'custodial arrests' as the means for invoking the criminal process when relatively minor offenses are involved." See 2 W. LaFave, Search and Seizure § 5.2, p. 290 (1978); see also *id.,* § 5.1, pp. 256–260, § 5.2, pp. 281–291. To the extent that the Court has considered the scope of an officer's authority in making routine traffic stops, the Court has not imposed constitutional restrictions on that authority. See *Pennsylvania* v. *Mimms, supra; United States* v. *Robinson, supra; Gustafson* v. *Florida, supra.* Thus the Court may be assuming that its new rule will be limited by a constitutional restriction that does not exist.

deed, as the Court has repeatedly held, every arrest is a seizure of the person within the meaning of the Fourth Amendment. The rule of constitutional law the Court fashions today therefore potentially applies to every arrest of every occupant of an automobile.[12]

After the vehicle in which respondent was riding was stopped, the officer smelled marihuana and thereby acquired probable cause to believe that the vehicle contained contraband.[13] A thorough search of the car was therefore reasonable. But if there were no reason to believe that anything more than a traffic violation had occurred, I should think it palpably unreasonable to require the driver of a car to open

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[12] After today, the driver of a vehicle stopped for a minor traffic violation must look to state law for protection from unreasonable searches. Such protection may come from two sources. Statutory law may provide some protection. Legislatures in some States permit officers to take traffic violators into custody only for certain violations. See, *e. g.*, Mich. Comp. Laws §§ 257.727–257.728 (1979). In some States, however, the police officer has the discretion to make a "custodial arrest" for violation of any motor vehicle law. See, *e. g.*, Iowa Code §§ 321.482, 321.485 (1980); Kan. Stat. Ann. § 8–2105 (1975). See also Tex. Rev. Civ. Stat. Ann., Art. 6701d, §§ 147–153 (Vernon 1977); *Wallace* v. *State*, 467 S. W. 2d 608, 609–610 (Tex. Crim. App. 1971); *Tores* v. *State*, 518 S. W. 2d 378 (Tex. Crim. App. 1975) (officer may take driver into custody for any traffic offense except speeding). Additionally, the failure to produce a satisfactory bond will often justify "detention and custodial arrest." *People* v. *Mathis*, 55 Ill. App. 3d 680, 684, 371 N. E. 2d 245, 249 (1977). See also Y. Kamisar, W. LaFave, & J. Israel, Modern Criminal Procedure 402, n. a (Supp. 4th ed. 1980). Given the incomplete protection afforded by statutory law, drivers in many States will have to persuade state supreme courts to interpret their state constitution's equivalent to the Fourth Amendment to prohibit the unreasonable searches permitted by the Court here.

[13] The conclusion that the officers had probable cause to search the car is supported by *Robbins*, in which the plurality seems to assume the existence of probable cause on the basis of similar facts. Cf. *United States* v. *Bowman*, 487 F. 2d 1229, 1231 (CA10 1973); *United States* v. *Campos*, 471 F. 2d 296 (CA9 1972).

his briefcase or his luggage for inspection by the officer.[14] The driver so compelled, however, could make no constitutional objection to a decision by the officer to take the driver into custody and thereby obtain justification for a search of the entire interior of the vehicle. Indeed, under the Court's new rule, the arresting officer may find reason to follow that procedure whenever he sees an interesting looking briefcase or package in a vehicle that has been stopped for a traffic violation. That decision by a police officer will therefore provide the constitutional predicate for broader vehicle searches than any neutral magistrate could authorize by issuing a warrant.

The Court's reasoning, which will lead to a massive broadening of the automobile exception, is particularly unfortunate because that reasoning is not necessary to the decision. By taking the giant step of permitting searches in the absence of probable cause, the Court misses the shorter step of relying on the automobile exception to uphold the search.[15] By taking this shorter step the Court could have adhered to the fundamental distinction between a search that a magistrate

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[14] It would seem equally unreasonable to require a driver to open the trunk of his car, which the Court would not permit, and to require a driver to open luggage located in the back of a station wagon, which would be permissible under the Court's rule. The Court attempts to justify the search in *Belton* on the basis of the officer's safety, but JUSTICE BRENNAN, dissenting, *post*, at 466–469, has forcefully demonstrated the inadequacy of that rationale.

[15] It is true that the State in *Belton* did not argue that the automobile exception justified the search of respondent's jacket pocket. Nevertheless, just as the admission of a piece of evidence will be affirmed if any valid reason for admission existed—even if the one relied upon by the trial judge was not valid—I would uphold the admission of this evidence if any theory justifying the search is valid. This is particularly appropriate given the State's understandable reluctance to argue an issue that many courts have considered to be foreclosed by *Sanders*. See, *e. g.*, *United States* v. *Rigales*, 630 F. 2d 364 (CA5 1980); *United States* v. *MacKay*, 606 F. 2d 264 (CA9 1979); *State* v. *Jenkins*, 619 P. 2d 108 (Haw. 1980).

could authorize because it is based on probable cause and one that is not so justified under that standard. Although I am persuaded that the Court has reached the right result, its opinion misconstrues the Fourth Amendment.

Because I do not regard the dictum in *Sanders* as a correct statement of the law, because the holding of that case is not applicable in either *Robbins* or *Belton,* and because the search in both cases was supported by probable cause and falls within the automobile exception, I respectfully dissent in *Robbins* and concur in the judgment in *Belton.*

NEW YORK *v.* BELTON

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 80–328. Argued April 27, 1981—Decided July 1, 1981

An automobile in which respondent was one of the occupants was stopped by a New York State policeman for traveling at an excessive rate of speed. In the process of discovering that none of the occupants owned the car or was related to the owner, the policeman smelled burnt marihuana and saw on the floor of the car an envelope suspected of containing marihuana. He then directed the occupants to get out of the car and arrested them for unlawful possession of marihuana. After searching each of the occupants, he searched the passenger compartment of the car, found a jacket belonging to respondent, unzipped one of the pockets, and discovered cocaine. Subsequently, respondent was indicted for criminal possession of a controlled substance. After the trial court had denied his motion to suppress the cocaine seized from his jacket pocket, respondent pleaded guilty to a lesser included offense, while preserving his claim that the cocaine had been seized in violation of the Fourth and Fourteenth Amendments. The Appellate Division of the New York Supreme Court upheld the constitutionality of the search and seizure, but the New York Court of Appeals reversed.

Held: The search of respondent's jacket was a search incident to a lawful custodial arrest, and hence did not violate the Fourth and Fourteenth Amendments. The jacket, being located inside the passenger compartment of the car, was "within the arrestee's immediate control" within the meaning of *Chimel* v. *California*, 395 U. S. 752, wherein it was held that a lawful custodial arrest creates a situation justifying the contemporaneous warrantless search of the arrestee and of the immediately surrounding area. Not only may the police search the passenger compartment of the car in such circumstances, they may also examine the contents of any containers found in the passenger compartment. And such a container may be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have. Pp. 457–463.

50 N. Y. 2d 447, 407 N. E. 2d 420, reversed.

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

filed a concurring statement, *post*, p. 463. STEVENS, J., filed a statement concurring in the judgment, *post*, p. 463. BRENNAN, J., *post*, p. 463, and WHITE, J., *post*, p. 472, filed dissenting opinions, in which MARSHALL, J., joined.

James R. Harvey argued the cause for petitioner. With him on the brief was *R. Michael Tantillo.*

Paul J. Cambria, Jr., argued the cause and filed a brief for respondent.

Deputy Solicitor General Frey argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General McCree, Acting Assistant Attorney General Keeney,* and *Elliott Schulder.**

JUSTICE STEWART delivered the opinion of the Court.

When the occupant of an automobile is subjected to a lawful custodial arrest, does the constitutionally permissible scope of a search incident to his arrest include the passenger compartment of the automobile in which he was riding? That is the question at issue in the present case.

I

On April 9, 1978, Trooper Douglas Nicot, a New York State policeman driving an unmarked car on the New York Thruway, was passed by another automobile traveling at an excessive rate of speed. Nicot gave chase, overtook the speeding vehicle, and ordered its driver to pull it over to the side of the road and stop. There were four men in the car, one of whom was Roger Belton, the respondent in this case. The policeman asked to see the driver's license and automobile registration, and discovered that none of the men owned the vehicle or was related to its owner. Meanwhile, the policeman had smelled burnt marihuana and had seen on

**Richard Emery, Charles S. Sims,* and *Bruce J. Ennis, Jr.*, filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

the floor of the car an envelope marked "Supergold" that he associated with marihuana. He therefore directed the men to get out of the car, and placed them under arrest for the unlawful possession of marihuana. He patted down each of the men and "split them up into four separate areas of the Thruway at this time so they would not be in physical touching area of each other." He then picked up the envelope marked "Supergold" and found that it contained marihuana. After giving the arrestees the warnings required by *Miranda* v. *Arizona,* 384 U. S. 436, the state policeman searched each one of them. He then searched the passenger compartment of the car. On the back seat he found a black leather jacket belonging to Belton. He unzipped one of the pockets of the jacket and discovered cocaine. Placing the jacket in his automobile, he drove the four arrestees to a nearby police station.

Belton was subsequently indicted for criminal possession of a controlled substance. In the trial court he moved that the cocaine the trooper had seized from the jacket pocket be suppressed. The court denied the motion. Belton then pleaded guilty to a lesser included offense, but preserved his claim that the cocaine had been seized in violation of the Fourth and Fourteenth Amendments. See *Lefkowitz* v. *Newsome,* 420 U. S. 283. The Appellate Division of the New York Supreme Court upheld the constitutionality of the search and seizure, reasoning that "[o]nce defendant was validly arrested for possession of marihuana, the officer was justified in searching the immediate area for other contraband." 68 App. Div. 2d 198, 201, 416 N. Y. S. 2d 922, 925.

The New York Court of Appeals reversed, holding that "[a] warrantless search of the zippered pockets of an unaccessible jacket may not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article." 50 N. Y. 2d 447, 449, 407 N. E. 2d 420, 421. Two judges dis-

sented. They pointed out that the "search was conducted by a lone peace officer who was in the process of arresting four unknown individuals whom he had stopped in a speeding car owned by none of them and apparently containing an uncertain quantity of a controlled substance. The suspects were standing by the side of the car as the officer gave it a quick check to confirm his suspicions before attempting to transport them to police headquarters . . . ." *Id.*, at 454, 407 N. E. 2d, at 424. We granted certiorari to consider the constitutionally permissible scope of a search in circumstances such as these. 449 U. S. 1109.

II

It is a first principle of Fourth Amendment jurisprudence that the police may not conduct a search unless they first convince a neutral magistrate that there is probable cause to do so. This Court has recognized, however, that "the exigencies of the situation" may sometimes make exemption from the warrant requirement "imperative." *McDonald* v. *United States,* 335 U. S. 451, 456. Specifically, the Court held in *Chimel* v. *California,* 395 U. S. 752, that a lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area. Such searches have long been considered valid because of the need "to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape" and the need to prevent the concealment or destruction of evidence. *Id.*, at 763.

The Court's opinion in *Chimel* emphasized the principle that, as the Court had said in *Terry* v. *Ohio,* 392 U. S. 1, 19, "[t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Quoted in *Chimel* v. *California, supra,* at 762. Thus while the Court in *Chimel* found "ample justification" for a search of "the area from within which [an arrestee]

might gain possession of a weapon or destructible evidence," the Court found "no comparable justification . . . for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself." 395 U. S., at 763.

Although the principle that limits a search incident to a lawful custodial arrest may be stated clearly enough, courts have discovered the principle difficult to apply in specific cases. Yet, as one commentator has pointed out, the protection of the Fourth and Fourteenth Amendments "can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." LaFave, "Case-By-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma, 1974 S. Ct. Rev. 127, 142. This is because

> "Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.'" *Id.*, at 141.

In short, "[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway* v. *New York*, 442 U. S. 200, 213–214.

So it was that, in *United States* v. *Robinson,* 414 U. S. 218, the Court hewed to a straightforward rule, easily applied, and predictably enforced: "[I]n the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Id.,* at 235. In so holding, the Court rejected the suggestion that "there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." *Ibid.*

But no straightforward rule has emerged from the litigated cases respecting the question involved here—the question of the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants. The difficulty courts have had is reflected in the conflicting views of the New York judges who dealt with the problem in the present case, and is confirmed by a look at even a small sample drawn from the narrow class of cases in which courts have decided whether, in the course of a search incident to the lawful custodial arrest of the occupants of an automobile, police may search inside the automobile after the arrestees are no longer in it. On the one hand, decisions in cases such as *United States* v. *Sanders,* 631 F. 2d 1309 (CA8 1980); *United States* v. *Dixon,* 558 F. 2d 919 (CA9 1977); and *United States* v. *Frick,* 490 F. 2d 666 (CA5 1973), have upheld such warrantless searches as incident to lawful arrests. On the other hand, in cases such as *United States* v. *Benson,* 631 F. 2d 1336 (CA8 1980), and *United States* v. *Rigales,* 630 F. 2d 364 (CA5 1980), such searches, in comparable factual circumstances, have been held constitutionally invalid.[1]

When a person cannot know how a court will apply a

[1] The state-court cases are in similar disarray. Compare, *e. g., Hinkel* v. *Anchorage,* 618 P. 2d 1069 (Alaska 1980), with *Ulesky* v. *State,* 379 So. 2d 121 (Fla. App. 1979).

settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority. While the *Chimel* case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have found no workable definition of "the area within the immediate control of the arrestee" when that area arguably includes the interior of an automobile and the arrestee is its recent occupant. Our reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within "the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m]." *Chimel,* 395 U. S., at 763. In order to establish the workable rule this category of cases requires, we read *Chimel*'s definition of the limits of the area that may be searched in light of that generalization. Accordingly, we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile,[2] he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.[3]

It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach.[4] *United States* v. *Robinson, supra; Draper*

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[2] The validity of the custodial arrest of Belton has not been questioned in this case. Cf. *Gustafson* v. *Florida* 414 U. S. 260, 266 (concurring opinion).

[3] Our holding today does no more than determine the meaning of *Chimel*'s principles in this particular and problematic context. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.

[4] "Container" here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as

v. *United States,* 358 U. S. 307. Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have. Thus, while the Court in *Chimel* held that the police could not search all the drawers in an arrestee's house simply because the police had arrested him at home, the Court noted that drawers within an arrestee's reach could be searched because of the danger their contents might pose to the police. 395 U. S., at 763.

It is true, of course, that these containers will sometimes be such that they could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested. However, in *United States* v. *Robinson,* the Court rejected the argument that such a container—there a "crumpled up cigarette package"—located during a search of Robinson incident to his arrest could not be searched: "The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." 414 U. S., at 235.

The New York Court of Appeals relied upon *United States* v. *Chadwick,* 433 U. S. 1, and *Arkansas* v. *Sanders,* 442 U. S. 753, in concluding that the search and seizure in the present case were constitutionally invalid.[5] But neither of those

luggage, boxes, bags, clothing, and the like. Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk.

[5] It seems to have been the theory of the Court of Appeals that the search and seizure in the present case could not have been incident to the

cases involved an arguably valid search incident to a lawful custodial arrest. As the Court pointed out in the *Chadwick* case: "Here the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency." 433 U. S., at 15. And in the *Sanders* case, the Court explicitly stated that it did not "consider the constitutionality of searches of luggage incident to the arrest of its possessor. See, *e. g.*, *United States* v. *Robinson*, 414 U. S. 218 (1973). The State has not argued that respondent's suitcase was searched incident to his arrest, and it appears that the bag was not within his 'immediate control' at the time of the search." 442 U. S., at 764, n. 11. (The suitcase in question was in the trunk of the taxicab. See n. 4, *supra*.)

III

It is not questioned that the respondent was the subject of a lawful custodial arrest on a charge of possessing marihuana. The search of the respondent's jacket followed immediately upon that arrest. The jacket was located inside the passenger compartment of the car in which the respondent had been a passenger just before he was arrested. The jacket was thus within the area which we have concluded was "within the arrestee's immediate control" within the meaning of the *Chimel* case.[6] The search of the jacket, therefore, was a

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respondent's arrest, because Trooper Nicot, by the very act of searching the respondent's jacket and seizing the contents of its pocket, had gained "exclusive control" of them. 50 N. Y. 2d 447, 451, 407 N. E. 2d 420, 422. But under this fallacious theory no search or seizure incident to a lawful custodial arrest would ever be valid; by seizing an article even on the arrestee's person, an officer may be said to have reduced that article to his "exclusive control."

[6] Because of this disposition of the case, there is no need here to consider whether the search and seizure were permissible under the so-called

search incident to a lawful custodial arrest, and it did not violate the Fourth and Fourteenth Amendments. Accordingly, the judgment is reversed.

It is so ordered.

JUSTICE REHNQUIST, concurring.

Because it is apparent that a majority of the Court is unwilling to overrule *Mapp* v. *Ohio,* 367 U. S. 643 (1961), and because the Court does not find it necessary to consider the "automobile exception" in its disposition of this case, *ante,* at 462–463, n. 6, see *Robbins* v. *California, ante,* p. 437 (REHNQUIST, J., dissenting), I join the opinion of the Court.

JUSTICE STEVENS, concurring in the judgment.

For the reasons stated in my dissenting opinion in *Robbins* v. *California, ante,* p. 444, I agree with JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE REHNQUIST that these two cases should be decided in the same way, and I also agree with THE CHIEF JUSTICE, JUSTICE STEWART, JUSTICE BLACKMUN, JUSTICE POWELL, and JUSTICE REHNQUIST that this judgment should be reversed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

In *Chimel* v. *California,* 395 U. S. 752 (1969), this Court carefully analyzed more than 50 years of conflicting precedent governing the permissible scope of warrantless searches incident to custodial arrest. The Court today turns its back on the product of that analysis, formulating an arbitrary "bright-line" rule applicable to "recent" occupants of automobiles that fails to reflect *Chimel*'s underlying policy justifications. While the Court claims to leave *Chimel* intact, see *ante,* at 460, n. 3, I fear that its unwarranted abandonment of

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"automobile exception." *Chambers* v. *Maroney,* 399 U. S. 42; *Carroll* v. *United States,* 267 U. S. 132.

the principles underlying that decision may signal a wholesale retreat from our carefully developed search-incident-to-arrest analysis. I dissent.

I

It has long been a fundamental principle of Fourth Amendment analysis that exceptions to the warrant requirement are to be narrowly construed. *Arkansas* v. *Sanders,* 442 U. S. 753, 759–760 (1979); *Mincey* v. *Arizona,* 437 U. S. 385, 393–394 (1978); *Coolidge* v. *New Hampshire,* 403 U. S. 443, 454–455 (1971); *Vale* v. *Louisiana,* 399 U. S. 30, 34 (1970); *Katz* v. *United States,* 389 U. S. 347, 357 (1967); *Jones* v. *United States,* 357 U. S. 493, 499 (1958). Predicated on the Fourth Amendment's essential purpose of "shield[ing] the citizen from unwarranted intrusions into his privacy," *Jones* v. *United States, supra,* at 498, this principle carries with it two corollaries. First, for a search to be valid under the Fourth Amendment, it must be " 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry* v. *Ohio,* 392 U. S. 1, 19 (1968), quoting *Warden* v. *Hayden,* 387 U. S. 294, 310 (1967) (Fortas, J., concurring). See *Chimel* v. *California, supra,* at 762; *Cupp* v. *Murphy,* 412 U. S. 291, 295 (1973). Second, in determining whether to grant an exception to the warrant requirement, courts should carefully consider the facts and circumstances of each search and seizure, focusing on the reasons supporting the exception rather than on any bright-line rule of general application. See *Sibron* v. *New York,* 392 U. S. 40, 59 (1968); *Preston* v. *United States,* 376 U. S. 364, 367 (1964).[1]

The *Chimel* exception to the warrant requirement was designed with two principal concerns in mind: the safety of the arresting officer and the preservation of easily concealed or destructible evidence. Recognizing that a suspect might have

[1] As we noted in *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 357 (1931): "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."

access to weapons or contraband at the time of arrest, the Court declared:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule." 395 U. S., at 762–763.

The *Chimel* standard was narrowly tailored to address these concerns: it permits police officers who have effected a custodial arrest to conduct a warrantless search "of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.*, at 763. It thus places a temporal and a spatial limitation on searches incident to arrest, excusing compliance with the warrant requirement only when the search " 'is substantially contemporaneous with the arrest and is confined to the *immediate* vicinity of the arrest.' " *Shipley* v. *California,* 395 U. S. 818, 819 (1969), quoting *Stoner* v. *California,* 376 U. S. 483, 486 (1964). See *United States* v. *Chadwick,* 433 U. S. 1, 14–15 (1977); *Dyke* v. *Taylor Implement Mfg. Co.,* 391 U. S. 216, 220 (1968); *Preston* v. *United States, supra,* at 367; *United States* v. *Edwards,* 415 U. S. 800, 810 (1974) (STEWART, J., dissenting).[2] When the arrest has been

[2] " 'Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.' " *Chambers* v. *Maroney,* 399 U. S. 42, 47 (1970), quoting *Preston* v. *United* States, 376 U. S., at 367.

consummated and the arrestee safely taken into custody, the justifications underlying *Chimel*'s limited exception to the warrant requirement cease to apply: at that point there is no possibility that the arrestee could reach weapons or contraband. See *Chimel* v. *California, supra,* at 764.

In its attempt to formulate a " 'single, familiar standard . . . to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront,' " *ante,* at 458, quoting *Dunaway* v. *New York,* 442 U. S. 200, 213–214 (1979), the Court today disregards these principles, and instead adopts a fiction—that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car. The Court thus holds:

> "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile . . . [and] may also examine the contents of any containers found within the passenger compartment . . . ." *Ante,* at 460.

In so holding, the Court ignores both precedent and principle and fails to achieve its objective of providing police officers with a more workable standard for determining the permissible scope of searches incident to arrest.

II

As the facts of this case make clear, the Court today substantially expands the permissible scope of searches incident to arrest by permitting police officers to search areas and containers the arrestee could not possibly reach at the time of arrest. These facts demonstrate that at the time Belton and his three companions were placed under custodial arrest—which was *after* they had been removed from the car, patted down, and separated—none of them could have reached the jackets that had been left on the back seat of the car. The

New York Court of Appeals described the sequence of events as follows:

> "On April 9, 1978, defendant and three companions were traveling on the New York State Thruway in Ontario County when their car was stopped by a State trooper for speeding. Upon approaching the vehicle, the officer smelled the distinct odor of marihuana emanating from within and observed on the floor an envelope which he recognized as a type that is commonly used to sell the substance. At that point the officer ordered the occupants out of the vehicle, patted each down, removed the envelope from the floor and ascertained that it contained a small amount of marihuana.
>
> "*After the marihuana was found, the individuals, still standing outside the car, were placed under arrest. The officer then re-entered the vehicle, searched the passenger compartment* and seized the marihuana cigarette butts lying in the ashtrays. He also *rifled through the pockets of five jackets on the back seat.* Upon opening the zippered pocket of one of them, he discovered a small amount of cocaine and defendant's identification." 50 N. Y. 2d 447, 449, 407 N. E. 2d 420, 421 (1980) (emphasis added).[3]

Concluding that a "warrantless search of the zippered pockets of an *unaccessible jacket* may not be upheld as a search incident to a lawful arrest where there is *no longer any danger that the arrestee or a confederate might gain access to the article*," *ibid.* (emphasis added), the court further stated:

> "One searches the record in vain for support of the dissenter's claim that at the time of the arrest—the point from which the predicate for the warrantless search is measured—'the jackets were within reach of the four sus-

[3] See also 50 N. Y. 2d, at 454, n. 2, 407 N. E. 2d, at 423, n. 2; Tr. of Oral Arg. 4–5; App. A–36.

pects and had not yet been reduced to the exclusive control of the officer.'" *Id.*, at 452, n. 2, 407 N. E. 2d, at 423, n. 2, quoting *id.*, at 454, 407 N. E. 2d, at 424 (dissenting opinion).

By approving the constitutionality of the warrantless search in this case, the Court carves out a dangerous precedent that is not justified by the concerns underlying *Chimel*. Disregarding the principle "that the scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement," *Cupp* v. *Murphy*, 412 U. S., at 295, the Court for the first time grants police officers authority to conduct a warrantless "area" search under circumstances where there is no chance that the arrestee "might gain possession of a weapon or destructible evidence." *Chimel* v. *California*, 395 U. S., at 763. Under the approach taken today, the result would presumably be the same even if Officer Nicot had handcuffed Belton and his companions in the patrol car before placing them under arrest, and even if his search had extended to locked luggage or other inaccessible containers located in the back seat of the car.

This expansion of the *Chimel* exception is both analytically unsound and inconsistent with every significant search-incident-to-arrest case we have decided in which the issue was whether the police could lawfully conduct a warrantless search of the area surrounding the arrestee. See, *e. g.*, *United States* v. *Chadwick*, 433 U. S., at 15 (search of footlocker "conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody" not incident to arrest); *Coolidge* v. *New Hampshire*, 403 U. S., at 456–457, and n. 11 (search of car in driveway not incident to arrest in house); *Chambers* v. *Maroney*, 399 U. S. 42, 47 (1970) (warrantless search of car invalid once arrestee has been placed in police custody); *Vale* v. *Louisiana*, 399 U. S., at 35 (area of immediate control does not extend to inside of house when suspect is arrested on front step); *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U. S., at 220

(search of car after occupant placed in custody and taken to courthouse not valid as incident to arrest); *Preston* v. *United States,* 376 U. S., at 368 (search of car not valid as incident to arrest: although suspects were in car when arrested, they were in custody at police station when car was searched). These cases demonstrate that the crucial question under *Chimel* is not whether the arrestee could *ever* have reached the area that was searched, but whether he could have reached it at the time of arrest and search. If not, the officer's failure to obtain a warrant may not be excused.[4] By disregarding this settled doctrine, the Court does a great disservice not only to *stare decisis,* but to the policies underlying the Fourth Amendment as well.

III

The Court seeks to justify its departure from the principles underlying *Chimel* by proclaiming the need for a new "bright-line" rule to guide the officer in the field. As we pointed out in *Mincey* v. *Arizona,* 437 U. S., at 393, however, "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." Moreover, the Court's attempt to forge a "bright-line" rule fails on its own terms. While the "interior/trunk" distinction may provide a workable guide in certain routine cases—for example, where the officer arrests the driver of a car and then immediately searches the seats and floor—in the long run, I suspect it will create far more problems than it solves. The Court's new approach leaves open too many questions and, more important, it provides the police and the courts with too few tools with which to find the answers.

Thus, although the Court concludes that a warrantless search of a car may take place even though the suspect was

[4] "'We cannot be true to [the Fourth Amendment] and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation make that course imperative.'" *Chimel* v. *California,* 395 U. S., at 761, quoting *McDonald* v. *United States,* 335 U. S. 451, 456 (1948).

arrested outside the car, it does not indicate how long after the suspect's arrest that search may validly be conducted. Would a warrantless search incident to arrest be valid if conducted five minutes after the suspect left his car? Thirty minutes? Three hours? Does it matter whether the suspect is standing in close proximity to the car when the search is conducted? Does it matter whether the police formed probable cause to arrest before or after the suspect left his car? And *why* is the rule announced today necessarily limited to searches of cars? What if a suspect is seen walking out of a house where the police, peering in from outside, had formed probable cause to believe a crime was being committed? Could the police then arrest that suspect and enter the house to conduct a search incident to arrest? Even assuming today's rule is limited to searches of the "interior" of cars—an assumption not demanded by logic—what is meant by "interior"? Does it include locked glove compartments, the interior of door panels, or the area under the floorboards? Are special rules necessary for station wagons and hatchbacks, where the luggage compartment may be reached through the interior, or taxicabs, where a glass panel might separate the driver's compartment from the rest of the car? Are the only containers that may be searched those that are large enough to be "capable of holding another object"? Or does the new rule apply to any container, even if it "could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested"? Compare *ante,* at 460–461, n. 4, with *ante,* at 461.

The Court does not give the police any "bright-line" answers to these questions. More important, because the Court's new rule abandons the justifications underlying *Chimel, it offers no guidance to the police officer seeking to work out these answers for himself.* As we warned in *Chimel:* "No consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested

might obtain weapons or evidentiary items." 395 U. S., at 766. See also *Mincey* v. *Arizona, supra,* at 393. By failing to heed this warning, the Court has undermined rather than furthered the goal of consistent law enforcement: it has failed to offer any principles to guide the police and the courts in their application of the new rule to nonroutine situations.

The standard announced in *Chimel* is not nearly as difficult to apply as the Court suggests. To the contrary, I continue to believe that *Chimel* provides a sound, workable rule for determining the constitutionality of a warrantless search incident to arrest. Under *Chimel,* searches incident to arrest may be conducted without a warrant only if limited to the person of the arrestee, see *United States* v. *Robinson,* 414 U. S. 218 (1973), or to the area within the arrestee's "immediate control." While it may be difficult in some cases to measure the exact scope of the arrestee's immediate control, relevant factors would surely include the relative number of police officers and arrestees, the manner of restraint placed on the arrestee, and the ability of the arrestee to gain access to a particular area or container.[5] Certainly there will be some close cases, but when in doubt the police can always turn to the rationale underlying *Chimel*—the need to prevent the arrestee from reaching weapons or contraband—before

[5] The Court sets up a strawman when it claims that under the "exclusive control" approach taken by the Court of Appeals, "no search or seizure incident to a lawful custodial arrest would ever be valid; by seizing an article even on the arrestee's person, an officer may be said to have reduced that article to his 'exclusive control.'" *Ante,* at 461–462, n. 5. If a police officer could obtain exclusive control of an article by simply holding it in his hand, I would certainly agree with the Court. But as we recognized in *United States* v. *Chadwick,* 433 U. S. 1, 14–15 (1977), exclusive control means more than that. It means sufficient control such that there is no significant risk that the arrestee or his confederates "might gain possession of a weapon or destructible evidence." *Chimel* v. *California,* 395 U. S., at 763. The issue of exclusive control presents a question of fact to be decided under the circumstances of each case, just as the New York Court of Appeals has decided it here.

exercising their judgment. A rule based on that rationale should provide more guidance than the rule announced by the Court today. Moreover, unlike the Court's rule, it would be faithful to the Fourth Amendment.

JUSTICE WHITE, with whom JUSTICE MARSHALL joins, dissenting.

In *Robbins* v. *California, ante,* p. 420, it was held that a wrapped container in the trunk of a car could not be searched without a warrant even though the trunk itself could be searched without a warrant because there was probable cause to search the car and even though there was probable cause to search the container as well. This was because of the separate interest in privacy with respect to the container. The Court now holds that as incident to the arrest of the driver or any other person in an automobile, the interior of the car and any container found therein, whether locked or not, may be not only seized but also searched even absent probable cause to believe that contraband or evidence of crime will be found. As to luggage, briefcases, or other containers, this seems to me an extreme extension of *Chimel* and one to which I cannot subscribe. Even if the decision in *Robbins* had been otherwise and *United States* v. *Chadwick,* 433 U. S. 1 (1977), and *Arkansas* v. *Sanders,* 442 U. S. 753 (1979), had been overruled, luggage found in the trunk of a car could not be searched without probable cause to believe it contained contraband or evidence. Here, searches of luggage, briefcases, and other containers in the interior of an auto are authorized in the absence of any suspicion whatsoever that they contain anything in which the police have a legitimate interest. This calls for more caution than the Court today exhibits, and, with respect, I dissent.

Syllabus

GULF OFFSHORE CO., A DIVISION OF POOL CO. *v.* MOBIL OIL CORP. ET AL.

CERTIORARI TO THE COURT OF CIVIL APPEALS OF TEXAS, FOURTEENTH SUPREME JUDICIAL DISTRICT

No. 80–590. Argued March 31, 1981—Decided July 1, 1981

Respondent Mobil Oil Corp. contracted with petitioner for the latter's performance of certain operations on offshore oil drilling platforms. Under the agreement, petitioner promised to indemnify Mobil for all claims resulting directly or indirectly from the work. One of petitioner's employees (also a respondent), working on an oil drilling platform above the seabed of the Outer Continental Shelf, was injured while, because of a storm, he was being evacuated from the platform aboard a boat chartered by Mobil. The employee brought suit for damages in a Texas state court, alleging negligence by Mobil and the boatowner. Mobil filed a third-party complaint for indemnification against petitioner. The trial court rejected petitioner's contention that the court lacked subject-matter jurisdiction over the third-party complaint because Mobil's cause of action arose under the Outer Continental Shelf Lands Act (OCSLA), which vested exclusive subject-matter jurisdiction in a federal district court. During the trial, the court denied petitioner's request to instruct the jury that personal injury damages awards are not subject to federal income taxation and that they should not increase or decrease an award in contemplation of tax consequences. The jury found Mobil negligent and awarded the employee $900,000 for his injuries. It also found that the employee sustained his injuries while performing work subject to the contract of indemnification. The court then entered judgment against petitioner in the amount of $900,000. The Texas Court of Civil Appeals affirmed, and the Texas Supreme Court denied review.

Held:

1. Federal courts do not have exclusive jurisdiction over personal injury and indemnity cases arising under OCSLA. Nothing in the language, structure, legislative history, or underlying policies of OCSLA suggests that Congress intended federal courts to exercise exclusive jurisdiction over such actions. Pp. 477–484.

(a) As a general principle, state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication. Pp. 477–478.

(b) Congress did not explicitly grant federal courts exclusive jurisdiction over cases arising under OCSLA. And the OCSLA plan—declaring the Outer Continental Shelf to be an area of "exclusive federal jurisdiction" and adopting "applicable and not inconsistent" laws of the adjacent States to fill the substantial "gaps" in the coverage of federal law—is not inimical to state-court jurisdiction over personal injury actions. Nothing inherent in exclusive federal sovereignty or *political* jurisdiction over a territory precludes a state court from entertaining a suit concerning events occurring in the territory and governed by federal law. Nor can OCSLA's legislative history be read to rebut the presumption of concurrent state-court jurisdiction, given Congress' silence on the subject in the statute itself. Pp. 478–483.

(c) The operation of OCSLA, which borrows state law to govern claims arising under it, will not be frustrated by state-court jurisdiction over personal injury actions. And allowing personal injury and contract actions in state courts will advance interests identified by Congress in enacting OCSLA concerning the special relationship between the men working on offshore platforms and the adjacent shore to which they commute to visit their families. Pp. 483–484.

2. Whether petitioner was entitled to an instruction cautioning the jury that personal injury damages awards are not subject to federal income taxation depends on matters that were not addressed by the court below and that should be initially considered by it on remand of the case. Subsequent to the Texas Court of Civil Appeals' determination that petitioner was not entitled to such an instruction under then current federal case law, this Court decided *Norfolk & Western R. Co.* v. *Liepelt,* 444 U. S. 490. In that case, an action under the Federal Employers' Liability Act, this Court, in the absence of any guidance in the statute, articulated a federal common-law rule that a defendant in a federal personal injury action is entitled to an instruction that damages awards are not subject to federal income taxation. However, OCSLA mandates that the law of the adjacent State (Louisiana here) applies as federal law "[t]o the extent [it is] not inconsistent" with federal law. The question whether this incorporation of state law precludes a court from finding that state law is "inconsistent" with the federal common-law rule announced in *Liepelt* need be answered here only if Louisiana law would not require that the damages instruction be given upon timely request. Thus, the case is remanded to the Court of Civil Appeals to determine whether Louisiana law requires the instruction and, if it does not, whether *Liepelt* displaces the state rule in an OCSLA case. Pp. 484–488.

594 S. W. 2d 496, affirmed in part, vacated in part, and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, and STEVENS, JJ., joined, and in Parts I and II of which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the result, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 488. STEWART, J., took no part in the consideration or decision of the case.

Charles D. Kennedy argued the cause for petitioner. With him on the brief was *Bradley A. Jackson.*

Frank E. Caton argued the cause and filed a brief for respondent Mobil Oil Corp. *Joseph D. Jamail* argued the cause for respondent Gaedecke. With him on the brief were *Gus Kolius, John B. Neibel,* and *Nat B. King.*

JUSTICE POWELL delivered the opinion of the Court.

This case requires us to determine whether federal courts have exclusive jurisdiction over personal injury and indemnity cases arising under the Outer Continental Shelf Lands Act, 67 Stat. 462, as amended, 43 U. S. C. § 1331 *et seq.* (1976 ed. and Supp. III). We also consider whether the rule of *Norfolk & Western R. Co.* v. *Liepelt,* 444 U. S. 490 (1980), that the jury be instructed that personal injury damages awards are not subject to federal income taxation, is applicable to such a case.

I

Respondent, Mobil Oil Corp., contracted with petitioner, Gulf Offshore Co., for the latter to perform certain completion operations on oil drilling platforms offshore of Louisiana. As part of the agreement, petitioner promised to indemnify Mobil for all claims resulting directly or indirectly from the work. While the work was in progress in September 1975, the advent of Hurricane Eloise required that workers be evacuated from oil platforms in the Gulf of Mexico.

Steven Gaedecke was an employee of petitioner working on an oil drilling platform above the seabed of the Outer Continental Shelf. As the storm approached, a boat char-

tered by Mobil took him safely aboard. Shortly thereafter, while assisting crewmen attempting to evacuate other workers from the platforms in turbulent sea, he was washed across the deck of the vessel by a wave. He suffered injuries primarily to his back.

Gaedecke brought this suit for damages in the District Court of Harris County, a Texas state court, alleging negligence by Mobil and the boatowner. Mobil filed a third-party complaint for indemnification against petitioner.[1] In its third-party answer, petitioner denied that the state court had subject-matter jurisdiction over the third-party complaint. Petitioner argued that Mobil's cause of action arose under the Outer Continental Shelf Lands Act (OCSLA), and that OCSLA vested exclusive subject-matter jurisdiction in a United States district court. The Texas trial court rejected this contention, and the case went to trial before a jury.

In submitting the case to the jury, the trial court denied a request by petitioner to instruct them that personal injury damages awards are not subject to federal income taxation and that they should not increase or decrease an award in contemplation of tax consequences. The jury found Mobil negligent and awarded Gaedecke $900,000 for his injuries. The jury also found, however, that Gaedecke sustained his injuries while performing work subject to the contract of indemnification. Based on the two verdicts, the trial judge entered judgment against petitioner in the amount of $900,000.

The Texas Court of Civil Appeals affirmed. 594 S. W. 2d 496 (1979). It held that the Texas state courts had subject-

[1] Mobil claimed indemnification on the grounds of both its contract with petitioner and the allegation that petitioner's negligence caused the accident. Prior to trial Gaedecke entered into a conditional settlement agreement with Mobil, which limited his potential recovery against Mobil to $200,000; in return Mobil agreed to proceed against petitioner for indemnification only on the basis of the contract. Gaedecke also settled his claim with the boatowner.

matter jurisdiction over the causes of action.[2] It acknowledged that OCSLA governed the case, but found no explicit command in the Act that federal-court jurisdiction be exclusive. The court also observed that exclusive federal-court jurisdiction was unnecesary because the Act incorporates as federal law in personal injury actions the laws of the State adjacent to the scene of the events, when not inconsistent with other federal laws. 43 U. S. C. § 1333 (a)(2). Thus, the court reasoned, "[t]he end result would be an application of the same laws no matter where the forum was located, whether state or federal." 594 S. W. 2d, at 502. The court also held that the trial court did not err in refusing to instruct the jury that damages awards are not subject to federal income taxation. The Texas Supreme Court denied review.

We granted certiorari to resolve a conflict over whether federal courts have exclusive subject-matter jurisdiction over suits arising under OCSLA[3] and to consider whether an instruction that damages are not taxable is appropriate in such a case. 449 U. S. 1033 (1980).

II

A

The general principle of state-court jurisdiction over cases arising under federal laws is straightforward: state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-

[2] Texas had *in personam* jurisdiction over Mobil and petitioner, each of whom does business in Texas. Gaedecke was a resident of Harris County, Tex.

[3] See *Pool* v. *Kemper Ins. Group,* 386 So. 2d 1006 (La. App. 1980); *Friedrich* v. *Whittaker Corp.,* 467 F. Supp. 1012 (SD Tex. 1979); *Gravois* v. *Travelers Indemnity Co.,* 173 So. 2d 550 (La. App. 1965). See also *Fluor Ocean Services, Inc.* v. *Rucker Co.,* 341 F. Supp. 757, 760 (ED La. 1972).

court adjudication. *Charles Dowd Box Co.* v. *Courtney,* 368 U. S. 502, 507–508 (1962); *Claflin* v. *Houseman,* 93 U. S. 130, 136 (1876). This rule is premised on the relation between the States and the National Government within our federal system. See The Federalist No. 82 (Hamilton). The two exercise concurrent sovereignty, although the Constitution limits the powers of each and requires the States to recognize federal law as paramount. Federal law confers rights binding on state courts, the subject-matter jurisdiction of which is governed in the first instance by state laws.[4]

In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. See *California* v. *Arizona,* 440 U. S. 59, 66–67 (1979); *Charles Dowd Box Co.* v. *Courtney,* 368 U. S., at 507–508. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests. See *ibid.; Claflin, supra,* at 137. See also *Garner* v. *Teamsters,* 346 U. S. 485 (1953) (grievance within jurisdiction of National Labor Relations Board to prevent unfair labor practice not subject to relief by injunction in state court).

B

No one argues that Congress explicitly granted federal courts exclusive jurisdiction over cases arising under OCSLA. Congress did grant United States district courts "original

[4] Permitting state courts to entertain federal causes of action facilitates the enforcement of federal rights. If Congress does not confer jurisdiction on federal courts to hear a particular federal claim, the state courts stand ready to vindicate the federal right, subject always to review, of course, in this Court. See *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 346–348 (1816). This practical concern was more important before the statutory creation in 1875 of general federal-question jurisdiction.

jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf . . . ." 43 U. S. C. § 1333 (b).[5] It is black letter law, however, that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action.[6] *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 479 (1936).

OCSLA declares the Outer Continental Shelf to be an area of "exclusive federal jurisdiction." 43 U. S. C. § 1333 (a)(1). *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 100 (1971).[7]

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[5] Congress amended and recodified the jurisdictional provisions of OCSLA in 1978, without effecting any change that casts light on the issue of exclusive federal-court jurisdiction before us today. Pub. L. 95–372, Title II, § 208 (b), 92 Stat. 657. See S. Conf. Rep. No. 95–1091, p. 114 (1978). But cf. Pub. L. 95–372, Title II, § 208 (a)(2)(B), 92 Stat. 657 (contemplating suit by the Attorney General in state court to remedy violations of the Act). The grant of jurisdiction to a federal district court is now codified at 43 U. S. C. § 1349 (b)(1) (1976 ed., Supp. III). In this opinion, we employ the Code citations prior to the recodification.

[6] This principle defeats petitioner's reliance on the provision in § 1333 (a)(2): "All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States." The phrase "such applicable laws" refers to the laws of the adjacent States, which § 1333 (a)(2) incorporates as federal law for the Outer Continental Shelf. See *infra*, at 480–481. The language relied upon merely makes clear that these borrowed state laws are to be enforced like other federal laws, and nothing indicates an intent to exclude state courts from the subject-matter jurisdiction they exercise generally over federal claims.

[7] The legislative history confirms that the purpose of OCSLA was "to assert the exclusive jurisdiction and control of the Federal Government of the United States over the seabed and subsoil of the outer Continental Shelf, and to provide for the development of its vast mineral resources." S. Rep. No. 411, 83d Cong., 1st Sess., 2 (1953) (hereinafter 1953 S. Rep.). Congress enacted OCSLA in the wake of decisions by this Court that the Federal Government enjoyed sovereignty and ownership of the seabed and subsoil of the Outer Continental Shelf to the exclusion of adjacent States. See *United States* v. *Texas*, 339 U. S. 707 (1950); *United States* v. *Louisiana*, 339 U. S. 699 (1950). See also *United States*

Petitioner does contend that the assertion of exclusive political jurisdiction over the Shelf evinces a congressional intent that federal courts exercise exclusive jurisdiction over controversies arising from operations on the Shelf. See *Fluor Ocean Services, Inc.* v. *Rucker Co.*, 341 F. Supp. 757, 760 (ED La. 1972). This argument is premised on a perceived incompatibility between exclusive federal sovereignty over the Outer Continental Shelf and state-court jurisdiction over controversies relating to the Shelf. We think petitioner mistakes the purpose of OCSLA and the policies necessitating exclusive federal-court jurisdiction.

OCSLA extends the "Constitution and laws and civil and political jurisdiction of the United States" to the subsoil and seabed of the Outer Continental Shelf and to "artificial islands and fixed structures" built for discovery, extraction, and transportation of minerals. 43 U. S. C. § 1333 (a)(1). All law applicable to the Outer Continental Shelf is federal law, but to fill the substantial "gaps" in the coverage of federal law, OCSLA borrows the "applicable and not inconsistent" laws of the adjacent States as surrogate federal law.

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v. *California*, 332 U. S. 19 (1947). See generally *Maryland* v. *Louisiana*, 451 U. S. 725, 730 (1981). Congress chose to retain exclusive federal control of the administration of the Shelf because it underlay the high seas and the assertion of sovereignty there implicated the foreign policies of the Nation. See 1953 S. Rep., at 6. Much of OCSLA provides a federal framework for the granting of leases for exploration and extraction of minerals from the submerged lands of the Shelf. See 43 U. S. C. §§ 1334–1343.

Congress was not unaware, however, of the close, longstanding relationship between the Shelf and the adjacent States. See 1953 S. Rep., at 6. This concern manifested itself primarily in the incorporation of the law of adjacent States to fill gaps in federal law. See *Rodrigue* v. *Aetna Casualty Co.*, 395 U. S. 352, 365 (1969). It should be emphasized that this case only involves state-court jurisdiction over actions based on incorporated state law. We express no opinion on whether state courts enjoy concurrent jurisdiction over actions based on the substantive provisions of OCSLA.

§ 1333 (a)(2); *Rodrigue* v. *Aetna Casualty Co.*, 395 U. S. 352, 355–359 (1969). Thus, a personal injury action involving events occurring on the Shelf is governed by federal law, the content of which is borrowed from the law of the adjacent State, here Louisiana. See *id.*, at 362–365. Cf. *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715 (1979) (state law incorporated as federal common law concerning priority of liens created by federal law).

The OCSLA plan is not inimical to state-court jurisdiction over personal injury actions. Nothing inherent in exclusive federal sovereignty over a territory precludes a state court from entertaining a personal injury suit concerning events occurring in the territory and governed by federal law. *Ohio River Contract Co.* v. *Gordon*, 244 U. S. 68 (1917). See 16 U. S. C. § 457 (personal injury and wrongful-death actions involving events occurring "within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State" shall be maintained as if the place were under the jurisdiction of the State). Cf. *Evans* v. *Cornman*, 398 U. S. 419, 424 (1970) (residents of an area of exclusive federal jurisdiction within a State are "subject to the process and jurisdiction of state courts"). "The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe." The Federalist No. 82, p. 514 (H. Lodge ed. 1908) (Hamilton), quoted in *Claflin* v. *Houseman*, 93 U. S., at 138. State courts routinely exercise subject-matter jurisdiction over civil cases arising from events in other States and governed by the other States' laws. See, *e. g.*, *Dennick* v. *Railroad Co.*, 103 U. S. 11 (1881). Cf. *Allstate Ins. Co.* v. *Hague*, 449 U. S. 302 (1981). That the location of the event giving rise to the suit is an area of exclusive federal jurisdiction rather than another State, does not introduce any new limitation on the forum State's subject-

matter jurisdiction.[8] *Ohio River Contract Co.* v. *Gordon, supra,* at 72.

Section 1333 (a)(3) provides that "adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom." Petitioner argues that state-court jurisdiction over this personal injury case would contravene this provision. This argument again confuses the political jurisdiction of a State with its judicial jurisdiction. Section 1333 (a)(3) speaks to the geographic boundaries of state sovereignty, because Congress primarily was concerned in enacting OCSLA to assure federal control over the Shelf and its resources. See n. 7, *supra.* The language of the provision refers to "any interest in or jurisdiction over" real property, minerals, and revenues, not over causes of action. Indeed, opponents of OCSLA urged Congress to extend the political boundaries of the States seaward over the Shelf, at least for some purposes. See 99 Cong. Rec. 7230 (remarks of Sen. Ellender), 7232 (remarks of Sen. Long) (1953). The Senate Report explains that § 1333 (a)(3) was intended to make plain that the adoption of state law as federal law cannot be the basis for a claim by the State "for participation in the administration of or revenues from the areas outside of State boundaries." 1953 S. Rep., at 23.

We do not think the legislative history of OCSLA can be read to rebut the presumption of concurrent state-court jurisdiction, given Congress' silence on the subject in the statute

[8] OCSLA does supersede the normal choice-of-law rules that the forum would apply. See *Chevron Oil Co.* v. *Huson,* 404 U. S. 97, 102–103 (1971). It also provides where proper venue will be found: "in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose." 43 U. S. C. § 1349 (b)(1) (1976 ed., Supp. III).

itself. Petitioner relies principally on criticisms by the two Senators from Louisiana, Ellender and Long, who opposed the bill that eventually became OCSLA.[9] Yet "[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 394 (1951).[10] Moreover, the amendments offered by the Senators sought to confer political control over the Shelf and its mineral wealth on the States, not jurisdiction on the state courts over OCSLA cases. See 99 Cong. Rec. 7230 (Sen. Ellender), 7232 (Sen. Long) (1953).[11]

C

The operation of OCSLA will not be frustrated by state-court jurisdiction over personal injury actions. The factors generally recommending exclusive federal-court jurisdiction over an area of federal law include[12] the desirability of uni-

[9] Petitioner also relies on a report made to the Senate Committee by the Department of Justice, which argued that the Federal Government should "have the exclusive control of lawmaking and law enforcement" on the Shelf. 1953 S. Rep., at 6. But Congress rejected the Department's premise that the Shelf is "not comparable to . . . federally owned areas within a State." *Ibid.* See *Rodrigue* v. *Aetna Casualty Co.*, 395 U. S., at 365. Section 1333 (a)(1) rather provides that the federal laws apply to the Shelf "to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State."

[10] Senator Long did express the fear that OCSLA placed exclusive jurisdiction over all civil suits in federal district courts. 1953 S. Rep., at 66 (minority report); 99 Cong. Rec. 7233 (1953).

[11] Most of the Senators' statements regarding OCSLA's effect on state-court jurisdiction criticize placing exclusive criminal jurisdiction in federal courts. See, *e. g.*, *id.*, at 7231–7232 (Sen. Ellender). But the statute that gives federal courts exclusive jurisdiction over federal crimes, 18 U. S. C. § 3231, has no relevance to this case.

[12] Exclusive federal-court jurisdiction over a cause of action generally is unnecessary to protect the parties. The plaintiff may choose the available forum he prefers, and the defendant may remove the case if it could have been brought originally in a federal court. 28 U. S. C. § 1441 (b). Also, exclusive federal jurisdiction will not prevent a state court from deciding a federal question collaterally even if it would not have subject-matter

form interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims.[13] These factors cannot support exclusive federal jurisdiction over claims whose governing rules are borrowed from state law. There is no need for uniform interpretation of laws that vary from State to State. State judges have greater expertise in applying these laws and certainly cannot be thought unsympathetic to a claim only because it is labeled federal rather than state law.

Allowing personal injury and contract actions in state courts will advance interests identified by Congress in enacting OCSLA. A recurring consideration in the deliberations leading to enactment was "the special relationship between the men working on these [platforms] and the adjacent shore to which they commute to visit their families." *Rodrigue* v. *Aetna Casualty Co.*, 395 U. S., at 365. Allowing state-court jurisdiction over these cases will allow these workers, and their lawyers, to pursue individual claims in familiar, convenient, and possibly less expensive fora. See *Chevron Oil Co.* v. *Huson,* 404 U. S., at 103 (state statute of limitations applies to personal injury actions arising under OCSLA).

In summary, nothing in the language, structure, legislative history, or underlying policies of OCSLA suggests that Congress intended federal courts to exercise exclusive jurisdiction over personal injury actions arising under OCSLA. The Texas courts had jurisdiction over this case.

III

The Court of Civil Appeals held that petitioner was not entitled to an instruction cautioning the jury that personal

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jurisdiction over a case raising the question directly. See Note, Exclusive Jurisdiction of Federal Courts in Private Civil Actions, 70 Harv. L. Rev. 509, 510 (1957).

[13] See Redish & Muench, Adjudication of Federal Causes of Action in State Court, 75 Mich. L. Rev. 311, 329–335 (1976); Note, 70 Harv. L. Rev., *supra* n. 12, at 511–515.

injury damages awards are not subject to federal income taxation, § 104 (a)(2) of the Internal Revenue Code of 1954, 26 U. S. C. § 104 (a)(2). In so ruling the court relied on *Johnson* v. *Penrod Drilling Co.*, 510 F. 2d 234, 236–237 (CA5) (en banc) (*per curiam*), cert. denied, 423 U. S. 839 (1975), a Jones Act case where the Court of Appeals prohibited presenting evidence or instructing the jury as to the impact of taxes on damages awards based on lost wages. This Court subsequently held that a defendant in a suit brought under the Federal Employers' Liability Act (FELA), 45 U. S. C. § 51 *et seq.*, is entitled to an instruction that damages for lost future wages are not subject to federal income taxation. *Norfolk & Western R. Co.* v. *Liepelt*, 444 U. S. 490 (1980).[14] Petitioner now argues that *Liepelt* applies to an OCSLA personal injury action and that this case should be remanded for a new trial on damages before a properly instructed jury.[15]

Our first task is to determine the source of law that will govern whether such an instruction must be available in an OCSLA case. OCSLA, as discussed above, mandates that state laws apply as federal laws "[t]o the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws." 43 U. S. C. § 1333 (a)(2). In any particular case, the adjacent State's law applies to those

[14] *Liepelt* also found error in the trial court's refusal to allow the defendant to introduce evidence showing the effect of income taxes on the plaintiff's future earnings. 444 U. S., at 493–496. This case does not present the question whether this second holding is applicable to OCSLA cases.

[15] Respondents argue that we cannot address the necessity of giving the requested instruction because petitioner did not preserve its objection in the trial court in the manner required by Texas law. This argument is incorrect. The Texas Court of Civil Appeals held on the merits that petitioner was not entitled to the instruction.

We also reject respondents' contention that we are foreclosed from deciding the issue because petitioner did not introduce any evidence about the effect of taxation on Gaedecke's future earnings. No evidentiary predicate is required to instruct a jury *not* to consider taxes.

areas "which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . . ." *Ibid.* The statute thus contains an explicit choice-of-law provision. See n. 8, *supra.* The parties agree that the substantive law of Louisiana applies to this case, unless it is inconsistent with federal law.

To apply the statutory directive a court must consider the content of both potentially applicable federal and state law. Subsequent to the decision of the Texas court, as noted above, we held in *Liepelt, supra,* that a defendant in an FELA case is entitled to an instruction that damages awards are not subject to federal income taxation.[16] As FELA afforded no guidance on this issue, the holding articulated a federal common-law rule. The purpose was to eliminate from the de-

[16] Respondents' argument that *Liepelt* should apply prospectively only is insubstantial. Here, we address a change in the law occurring while the case is on direct appeal. "[A]n appellate court must apply the law in effect at the time it renders its decision." *Thorpe* v. *Housing Authority of City of Durham,* 393 U. S. 268, 281 (1969); see *United States* v. *Schooner Peggy,* 1 Cranch 103 (1801). While there well might be an exception to the rule to prevent "manifest injustice," *Bradley* v. *Richmond School Board,* 416 U. S. 696, 717 (1974), this equitable exception does not reach a private civil suit where the change does not extinguish a cause of action but merely requires a retrial on damages before a properly instructed jury. *Lang* v. *Texas & Pacific R. Co.,* 624 F. 2d 1275, 1279–1280, and n. 9 (CA5 1980). Indeed, considerations of fairness support retroactive application: failure to give the instruction may lead to the plaintiff recovering a windfall award. *Norfolk & Western R. Co.* v. *Liepelt, supra,* at 497–498.

The overwhelming weight of authority supports retroactive application of this decision. See *O'Byrne* v. *St. Louis Southwestern R. Co.,* 632 F. 2d 1285 (CA5 1980); *Flanigan* v. *Burlington Northern Inc.,* 632 F. 2d 880 (CA8 1980); *Lang* v. *Texas & Pacific R. Co., supra; Crabtree* v. *St. Louis-San Francisco R. Co.,* 89 Ill. App. 3d 35, 411 N. E. 2d 19 (1980). Other cases have applied *Liepelt* retroactively without comment. *Cazad* v. *Chesapeake & Ohio R. Co.,* 622 F. 2d 72 (CA4 1980); *Seaboard Coast Line R. Co.* v. *Yow,* 384 So. 2d 13 (Ala. 1980). But see *Ingle* v. *Illinois Central Gulf R. Co.,* 608 S. W. 2d 76 (Mo. App. 1980), cert. denied, 450 U. S. 916 (1981).

liberations of juries "an area of doubt or speculation that might have an improper impact on the computation of the amount of damages." 444 U. S., at 498.[17] Thus, the instruction furthers strong federal policies of fairness and efficiency in litigation of federal claims. If Congress had been silent about the source of federal law in an OCSLA personal injury case, *Liepelt* would require that the instruction be given.

But Congress was not silent. It incorporated for this case the applicable law of Louisiana, but only "[t]o the extent [it is] not inconsistent" with federal law. The statute does not distinguish between federal statutory and judge-made law. It would seem then that if Louisiana law is "inconsistent," *Liepelt* controls. Doubt arises, however, because in OCSLA Congress borrowed a remedy provided by state law and thereby "specifically rejected national uniformity" as a paramount goal. *Chevron Oil* v. *Huson,* 404 U. S., at 104. In *Chevron,* we held that Louisiana rather than federal common law provided the federal statute of limitations for personal injury damages actions under OCSLA. We recognized that "Congress made clear provision for filling the 'gaps' in

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[17] The general applicability of *Liepelt* is indicated by the Court's quotation with approval of the explanation of need for the instruction in *Domeracki* v. *Humble Oil & Refining Co.*, 443 F. 2d 1245, 1251 (CA3), cert. denied, 404 U. S. 883 (1971), a longshoreman's action based on the unseaworthiness of a vessel.

" 'We take judicial notice of the "tax consciousness" of the American public. Yet, we also recognize, as did the court in Dempsey v. Thompson, 363 Mo. 339, 251 S. W. 2d 42 (1952), that few members of the general public are aware of the special statutory exemption for personal injury awards contained in the Internal Revenue Code.

" ' "[T]here is always danger that today's tax-conscious juries may assume (mistakenly of course) that the judgment will be taxable and therefore make their verdict big enough so that plaintiff would get what they think he deserves after the imaginary tax is taken out of it."

" 'II Harper & James, The Law of Torts § 25.12, at 1327–1328 (1956).' " *Liepelt, supra,* at 497.

None of the Court's reasoning was directed particularly at FELA.

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federal law; it did not intend that federal courts fill those 'gaps' themselves by creating new federal common law." *Id.*, at 104–105. In this case, we face an analogous question: does the incorporation of state law preclude a court from finding that state law is "inconsistent" with a federal common-law rule generally applicable to federal damages actions?

We need answer this question only if Louisiana law would not require that the instruction be given upon timely request. The court below never addressed this question [18] but relied solely on federal case law now superseded. Under these circumstances it is the better practice to remand this case to the Texas Court of Civil Appeals for a determination of whether Louisiana law requires the instruction and, if it does not, whether *Liepelt* displaces the state rule in an OCSLA case. If the court decides that it was error to refuse the instruction, it may then address respondents' argument that petitioner was not prejudiced by the error.

Affirmed in part, vacated in part, and remanded.

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

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in part and concurring in the result.

I join the Court's opinion as to Parts I and II, and I concur in the decision to remand this case for further proceedings as

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[18] The Louisiana cases that have come to our attention do not provide conclusive guidance. Compare the earlier case of *Guerra* v. *Young Construction Corp.*, 165 So. 2d 882 (La. App. 1964) (not error to *deny* the instruction), with the later cases of *DeBose* v. *Trapani*, 295 So. 2d 72 (La. App. 1974), and *Francis* v. *Government Employers' Ins. Co.*, 376 So. 2d 609 (La. App. 1979) (proper to *give* the instruction). These Louisiana cases were considered by the Court of Appeals for the Fifth Circuit in a diversity case, *Croce* v. *Bromley Corp.*, 623 F. 2d 1084 (1980), cert. denied *sub nom. Bromley Corp.* v. *Cortese*, 450 U. S. 981 (1981), and it followed the holding in *Guerra*.

to the applicability of the rule adopted in *Norfolk & Western R. Co.* v. *Liepelt,* 444 U. S. 490 (1980). I write separately because I have reservations about the Court's expressed intention to apply the *Liepelt* rule expansively, a ruling I consider unwise and unnecessary to this case in its present posture.

As the Court makes clear, *ante,* at 488, the Texas Court of Civil Appeals on remand must determine, first, what Louisiana law requires as to this form of instruction, and, second, whether that state rule is "inconsistent" with OCSLA or "other Federal laws." 43 U. S. C. § 1333 (a)(2). The Court acknowledges, and I agree, that the choice-of-law provision contained in OCSLA creates "[d]oubt," *ante,* at 487, as to whether Congress intended state law or federal law to govern the grant of this instruction. As I understand OCSLA, the purpose of incorporating state law was to permit actions arising on these federal lands to be determined by rules essentially the same as those applicable to actions arising on the bordering state lands. Congress apparently intended to provide a kind of local uniformity of result, regardless of whether the action arose on shelf lands or on neighboring state lands. I would read the statute, thus, to encourage use of state law, and I would permit the state court to weigh, as an initial matter and only if the Louisiana rule differs from the *Liepelt* rule, whether Congress' desire for local uniformity outweighs any perceived need, as a matter of federal common law, for the instruction. I do not find it self-evident that *Liepelt* created a general "federal common-law rule" that so greatly "furthers strong federal policies of fairness and efficiency in litigation of federal claims," *ante,* at 486, 487, as to require its application in cases governed by the Outer Continental Shelf Lands Act. In my view, this question was not settled in *Liepelt,* and it remains open for future adjudication.

METROMEDIA, INC., ET AL. *v.* CITY OF SAN DIEGO, ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 80–195. Argued February 25, 1981—Decided July 2, 1981

Appellee city of San Diego enacted an ordinance which imposes substantial prohibitions on the erection of outdoor advertising displays within the city. The stated purpose of the ordinance is "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays" and "to preserve and improve the appearance of the City." The ordinance permits onsite commercial advertising (a sign advertising goods or services available on the property where the sign is located), but forbids other commercial advertising and noncommercial advertising using fixed-structure signs, unless permitted by 1 of the ordinance's 12 specified exceptions, such as temporary political campaign signs. Appellants, companies that were engaged in the outdoor advertising business in the city when the ordinance was passed, brought suit in state court to enjoin enforcement of the ordinance. The trial court held that the ordinance was an unconstitutional exercise of the city's police power and an abridgment of appellants' First Amendment rights. The California Court of Appeal affirmed on the first ground alone, but the California Supreme Court reversed, holding, *inter alia,* that the ordinance was not facially invalid under the First Amendment.

Held: The judgment is reversed, and the case is remanded. Pp. 498–521; 527–540.

26 Cal. 3d 848, 610 P. 2d 407, reversed and remanded.

JUSTICE WHITE, joined by JUSTICE STEWART, JUSTICE MARSHALL, and JUSTICE POWELL, concluded that the ordinance is unconstitutional on its face. Pp. 498–521.

(a) As with other media of communication, the government has legitimate interests in controlling the noncommunicative aspects of billboards, but the First and Fourteenth Amendments foreclose similar interests in controlling the communicative aspects of billboards. Because regulation of the noncommunicative aspects of a medium often impinges to some degree on the communicative aspects, the courts must reconcile the government's regulatory interests with the individual's right to expression. Pp. 500–503.

(b) Insofar as it regulates commercial speech, the ordinance meets the constitutional requirements of *Central Hudson Gas & Electric Corp.* v.

Public Service Comm'n, 447 U. S. 557. Improving traffic safety and the appearance of the city are substantial governmental goals. The ordinance directly serves these goals and is no broader than necessary to accomplish such ends. Pp. 503–512.

(c) However, the city's general ban on signs carrying noncommercial advertising is invalid under the First and Fourteenth Amendments. The fact that the city may value commercial messages relating to onsite goods and services more than it values commercial communications relating to offsite goods and services does not justify prohibiting an occupant from displaying his own ideas or those of others. Furthermore, because under the ordinance's specified exceptions some noncommercial messages may be conveyed on billboards throughout the commercial and industrial zones, the city must allow billboards conveying other noncommercial messages throughout those zones. The ordinance cannot be characterized as a reasonable "time, place, and manner" restriction. Pp. 512–517.

(d) Government restrictions on protected speech are not permissible merely because the government does not favor one side over another on a subject of public controversy. Nor can a prohibition of all messages carried by a particular mode of communication be upheld merely because the prohibition is rationally related to a nonspeech interest. Courts must protect First Amendment interests against legislative intrusion, rather than defer to merely rational legislative judgments in this area. Since the city has concluded that its official interests are not as strong as private interests in onsite commercial advertising, it may not claim that those same official interests outweigh private interests in noncommercial communications. Pp. 517–521.

JUSTICE BRENNAN, joined by JUSTICE BLACKMUN, concluded that in practical effect the city's ordinance constitutes a total ban on the use of billboards to communicate to the public messages of general applicability, whether commercial or noncommercial, and that under the appropriate First Amendment analysis a city may totally ban billboards only if it can show that a sufficiently substantial governmental interest is directly furthered thereby and that any more narrowly drawn restriction would promote less well the achievement of that goal. Under this test, San Diego's ordinance is invalid since (1) the city failed to produce evidence demonstrating that billboards actually impair traffic safety in San Diego, (2) the ordinance is not narrowly drawn to accomplish the traffic safety goal, and (3) the city failed to show that its asserted interest in esthetics was sufficiently substantial in its commercial and industrial areas. Nor would an ordinance totally banning commercial billboards but allowing noncommercial billboards be constitutional, since

it would give city officials the discretion to determine in the first instance whether a proposed message is "commercial" or "noncommercial." Pp. 527–540.

WHITE, J., announced the judgment of the Court and delivered an opinion, in which STEWART, MARSHALL, and POWELL, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined, *post,* p. 521. STEVENS, J., while concurring in Parts I–IV of the plurality opinion, filed an opinion dissenting from Parts V–VII of the plurality opinion and from the judgment, *post,* p. 540. BURGER, C. J., *post,* p. 555, and REHNQUIST, J., *post,* p. 569, filed dissenting opinions.

Floyd Abrams argued the cause for appellants. With him on the briefs were *Theodore B. Olson, Dean Ringel,* and *Wayne W. Smith.*

C. Alan Sumption argued the cause for appellees. With him on the brief was *John W. Witt.**

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*Briefs of *amici curiae* urging reversal were filed by *Nadine Strossen* and *Bruce J. Ennis, Jr.,* for the American Civil Liberties Union; by *Arthur B. Hanson, Frank M. Northam,* and *Mitchell W. Dale* for the American Newspaper Publishers Association; by *Eric M. Rubin* for the Outdoor Advertising Association of America; by *Ronald A. Zumbrun, Thomas E. Hookano,* and *Raymond M. Momboisse* for the Pacific Legal Foundation; and by *Kip Pope* for Robert P. Pope et al.

Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Claiborne, Edwin S. Kneedler, F. Kaid Benfield,* and *Edward J. Shawaker;* for the State of Hawaii et al. by *Wayne Minami,* Attorney General of Hawaii, and *Laurence Lau,* Deputy Attorney General, *Richard S. Cohen,* Attorney General of Maine, and *Cabanne Howard,* Assistant Attorney General, and *M. Jerome Diamond,* Attorney General of Vermont, and *Benson D. Scotch,* Assistant Attorney General; for the City of Alameda et al. by *Carter J. Stroud, David E. Schricker,* and *John Powers;* for the City and County of San Francisco by *George Agnost, Burk E. Delventhal, Diane L. Hermann,* and *Alice Suet Yee Barkley;* and for the National Institute of Municipal Law Officers by *Aaron A. Wilson, J. LaMar Shelley, Benjamin L. Brown, John Dekker, James B. Brennan, Henry W. Underhill, Jr., William R. Quinlan, George F. Knox, Jr., Max P. Zall, Allen G. Schwartz, Lee E. Holt, Burt Pines, Walter M. Powell, Roger F. Cutler, Conrad B. Mattox, Jr., Charles S. Rhyne,* and *William S. Rhyne.*

JUSTICE WHITE announced the judgment of the Court and delivered an opinion, in which JUSTICE STEWART, JUSTICE MARSHALL, and JUSTICE POWELL joined.

This case involves the validity of an ordinance of the city of San Diego, Cal., imposing substantial prohibitions on the erection of outdoor advertising displays within the city.

I

Stating that its purpose was "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays" and "to preserve and improve the appearance of the City," San Diego enacted an ordinance to prohibit "outdoor advertising display signs."[1] The California Supreme Court subsequently defined the term "advertising display sign" as "a rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public." 26 Cal. 3d 848, 856, n. 2, 610 P.

[1] San Diego Ordinance No. 10795 (New Series), enacted March 14, 1972. The general prohibition of the ordinance reads as follows:

"B. OFF-PREMISE OUTDOOR ADVERTISING DISPLAY SIGNS PROHIBITED

"Only those outdoor advertising display signs, hereinafter referred to as signs in this Division, which are either signs designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed shall be permitted. The following signs shall be prohibited:

"1. Any sign identifying a use, facility or service which is not located on the premises.

"2. Any sign identifying a product which is not produced, sold or manufactured on the premises.

"3. Any sign which advertises or otherwise directs attention to a product, service or activity, event, person, institution or business which may or may not be identified by a brand name and which occurs or is generally conducted, sold, manufactured, produced or offered elsewhere than on the premises where such sign is located."

2d 407, 410, n. 2 (1980). "Advertising displays signs" include any sign that "directs attention to a product, service or activity, event, person, institution or business." [2]

The ordinance provides two kinds of exceptions to the general prohibition: onsite signs and signs falling within 12 specified categories. Onsite signs are defined as those

> "designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed."

The specific categories exempted from the prohibition include: government signs; signs located at public bus stops; signs manufactured, transported, or stored within the city, if not used for advertising purposes; commemorative historical plaques; religious symbols; signs within shopping malls; for sale and for lease signs; signs on public and com-

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[2] The California Supreme Court noted that the ordinance as written might be interpreted "to apply to signs of a character very different from commercial billboards—for example, to a picket sign announcing a labor dispute or a small sign placed in one's front yard proclaiming a political or religious message." 26 Cal. 3d, at 856, n. 2, 610 P. 2d, at 410, n. 2. For this reason the court adopted the narrowing definition (quoted in the text). That definition, however, focused on the structure not the content of the billboard: It excluded "picket signs" but not billboards used to convey a noncommercial message. Cf. *State ex rel. Dept. of Transportation* v. *Pile,* 603 P. 2d 337 (1979) (Oklahoma Supreme Court construed a state statute prohibiting outdoor advertising signs as not covering noncommercial speech in order to avoid constitutional problems). The court explicitly recognized this continuing burden on noncommercial speech: "The relatively few non-commercial advertisers who would be restricted by the San Diego ordinance . . . possess a great variety of alternative means of communication." 26 Cal. 3d, at 869, 610 P. 2d, at 418–419. Furthermore, the city continues to contend that the ordinance prohibits the use of billboards to convey a noncommercial message, unless that message falls within one of the specified exemptions contained in the ordinance. Brief for Appellees 6.

mercial vehicles; signs depicting time, temperature, and news; approved temporary, off-premises, subdivision directional signs; and "[t]emporary political campaign signs." [3] Under this scheme, onsite commercial advertising is per-

[3] Section 101.0700 (F) provides as follows:

"The following types of signs shall be exempt from the provisions of these regulations:

"1. Any sign erected and maintained pursuant to and in discharge of any governmental function or required by any law, ordinance or governmental regulation.

"2. Bench signs located at designated public transit bus stops; provided, however, that such signs shall have any necessary permits required by Sections 62.0501 and 62.0502 of this Code.

"3. Signs being manufactured, transported and/or stored within the City limits of the City of San Diego shall be exempt; provided, however, that such signs are not used, in any manner or form, for purposes of advertising at the place or places of manufacture or storage.

"4. Commemorative plaques of recognized historical societies and organizations.

"5. Religious symbols, legal holiday decorations and identification emblems of religious orders or historical societies.

"6. Signs located within malls, courts, arcades, porches, patios and similar areas where such signs are not visible from any point on the boundary of the premises.

"7. Signs designating the premises for sale, rent or lease; provided, however, that any such sign shall conform to all regulations of the particular zone in which it is located.

"8. Public service signs limited to the depiction of time, temperature or news; provided, however, that any such sign shall conform to all regulations of the particular zone in which it is located.

"9. Signs on vehicles regulated by the City that provide public transportation including, but not limited to, buses and taxicabs.

"10. Signs on licensed commercial vehicles, including trailers; provided, however, that such vehicles shall not be utilized as parked or stationary outdoor display signs.

"11. Temporary off-premise subdivision directional signs if permitted by a conditional use permit granted by the Zoning Administrator.

"12. Temporary political campaign signs, including their supporting structures, which are erected or maintained for no longer than 90 days and which are removed within 10 days after election to which they pertain."

mitted, but other commercial advertising and noncommercial communications using fixed-structure signs are everywhere forbidden unless permitted by one of the specified exceptions.

Appellants are companies that were engaged in the outdoor advertising business in San Diego at the time the ordinance was passed. Each owns a substantial number of outdoor advertising displays (approximately 500 to 800) within the city. These signs are all located in areas zoned for commercial and industrial purposes, most of them on property leased by the owners to appellants for the purpose of maintaining billboards. Each sign has a remaining useful income-producing life of over 25 years, and each sign has a fair market value of between $2,500 and $25,000. Space on the signs was made available to "all comers" and the copy on each sign changed regularly, usually monthly.[4] The nature of the outdoor advertising business was described by the parties as follows:

> "Outdoor advertising is customarily purchased on the basis of a presentation or campaign requiring multiple exposure. Usually a large number of signs in a variety of locations are utilized to communicate a particular advertiser's message. An advertiser will generally purchase a 'showing' which would involve the utilization of a specific number of signs advertising the same message in a variety of locations throughout a metropolitan area." [5]

Although the purchasers of advertising space on appellants' signs usually seek to convey a commercial message, their billboards have also been used to convey a broad range of noncommercial political and social messages.

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[4] This account of appellants' businesses is taken from the joint stipulation of facts entered into by the parties and filed with their cross-motions for summary judgment in the California Superior Court. See Joint Stipulation of Facts Nos. 12–20, App. 44a–45a.

[5] Joint Stipulation of Facts No. 24, App. 47a.

Appellants brought suit in state court to enjoin enforcement of the ordinance. After extensive discovery, the parties filed a stipulation of facts, including:

> "2. If enforced as written, Ordinance No. 10795 will eliminate the outdoor advertising business in the City of San Diego.
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> . . . . . .
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> "28. Outdoor advertising increases the sales of products and produces numerous direct and indirect benefits to the public. Valuable commercial, political and social information is communicated to the public through the use of outdoor advertising. Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." Joint Stipulation of Facts Nos. 2, 28, App. 42a, 48a.

On cross-motions for summary judgment, the trial court held that the ordinance was an unconstitutional exercise of the city's police power and an abridgment of appellants' First Amendment rights. The California Court of Appeal affirmed on the first ground alone and did not reach the First Amendment argument. Without questioning any of the stipulated facts, including the fact that enforcement of the ordinance would "eliminate the outdoor advertising business in the City of San Diego," the California Supreme Court reversed. It held that the two purposes of the ordinance were within the city's legitimate interests and that the ordinance was "a proper application of municipal authority over zoning and land use for the purpose of promoting the public safety and welfare." 26 Cal. 3d, at 858, 610 P. 2d, at 411 (footnote omitted). The court rejected appellants' argument that the ordinance was facially invalid under the First Amendment. It relied on certain summary actions of this Court, dismissing for want of a substantial federal question appeals from several state-court decisions sustaining governmental restrictions

on outdoor sign displays.[6] Appellants sought review in this Court, arguing that the ordinance was facially invalid on First Amendment grounds and that the city's threatened destruction of the outdoor advertising business was prohibited by the Due Process Clause of the Fourteenth Amendment. We noted probable jurisdiction. 449 U. S. 897.

II

Early cases in this Court sustaining regulation of and prohibitions aimed at billboards did not involve First Amendment considerations. See *Packer Corp.* v. *Utah,* 285 U. S. 105 (1932); *St. Louis Poster Advertising Co.* v. *St. Louis,* 249 U. S. 269 (1919); *Thomas Cusack Co.* v. *City of Chicago,* 242 U. S. 526 (1917).[7] Since those decisions, we have not given plenary consideration to cases involving First Amendment challenges to statutes or ordinances limiting the use of billboards, preferring on several occasions summarily to affirm decisions sustaining state or local legislation directed at billboards.

Suffolk Outdoor Advertising Co. v. *Hulse,* 439 U. S. 808 (1978), involved a municipal ordinance that distinguished between offsite and onsite billboard advertising prohibiting the former and permitting the latter. We summarily dismissed as not presenting a substantial federal question an appeal from a judgment sustaining the ordinance, thereby rejecting the submission, repeated in this case, that prohibit-

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[6] *Suffolk Outdoor Advertising Co.* v. *Hulse,* 439 U. S. 808 (1978); *Newman Signs, Inc.* v. *Hjelle,* 440 U. S. 901 (1979); *Lotze* v. *Washington,* 444 U. S. 921 (1979).

[7] These cases primarily involved due process and equal protection challenges to municipal regulations directed at billboards. The plaintiffs claimed that their method of advertising was improperly distinguished from other methods that were not similarly regulated and that the ordinances resulted in takings of property without due process. The Court rejected these claims, holding that the regulation of billboards fell within the legitimate police powers of local government.

ing offsite commercial advertising violates the First Amendment. The definition of "billboard," however, was considerably narrower in *Suffolk* than it is here: "A sign which directs attention to a business, commodity, service, entertainment, or attraction sold, offered or existing elsewhere than upon the same lot where such sign is displayed." This definition did not sweep within its scope the broad range of noncommercial speech admittedly prohibited by the San Diego ordinance. Furthermore, the Southampton, N. Y., ordinance, unlike that in San Diego, contained a provision permitting the establishment of public information centers in which approved directional signs for businesses could be located. This Court has repeatedly stated that although summary dispositions are decisions on the merits, the decisions extend only to "the precise issues presented and necessarily decided by those actions." *Mandel* v. *Bradley,* 432 U. S. 173, 176 (1977); see also *Hicks* v. *Miranda,* 422 U. S. 332, 345, n. 14 (1975); *Edelman* v. *Jordan,* 415 U. S. 651, 671 (1974). Insofar as the San Diego ordinance is challenged on the ground that it prohibits noncommercial speech, the *Suffolk* case does not directly support the decision below.

The Court has summarily disposed of appeals from state-court decisions upholding state restrictions on billboards on several other occasions. *Markham Advertising Co.* v. *Washington,* 393 U. S. 316 (1969), and *Newman Signs, Inc.* v. *Hjelle,* 440 U. S. 901 (1979), both involved the facial validity of state billboard prohibitions that extended only to certain designated roadways or to areas zoned for certain uses. The statutes in both instances distinguished between onsite commercial billboards and offsite billboards within the protected areas. Our most recent summary action was *Lotze* v. *Washington,* 444 U. S. 921 (1979), which involved an "as applied" challenge to a Washington prohibition on offsite signs. In that case, appellants erected, on their own property, billboards expressing their political and social views. Although billboards conveying information relating to the commercial

use of the property would have been permitted, appellants' billboards were prohibited, and the state courts ordered their removal. We dismissed as not raising a substantial federal question an appeal from a judgment rejecting the First Amendment challenge to the statute.

Insofar as our holdings were pertinent, the California Supreme Court was quite right in relying on our summary decisions as authority for sustaining the San Diego ordinance against First Amendment attack. *Hicks* v. *Miranda, supra.* As we have pointed out, however, summary actions do not have the same authority in this Court as do decisions rendered after plenary consideration, *Illinois State Board of Elections* v. *Socialist Workers Party,* 440 U. S. 173, 180–181 (1979); *Edelman* v. *Jordan, supra,* at 671; see also *Fusari* v. *Steinberg,* 419 U. S. 379, 392 (1975) (BURGER, C. J., concurring). They do not present the same justification for declining to reconsider a prior decision as do decisions rendered after argument and with full opinion. "It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action." *Washington* v. *Yakima Indian Nation,* 439 U. S. 463, 477, n. 20 (1979); see also *Tully* v. *Griffin, Inc.,* 429 U. S. 68, 74–75 (1976); *Usery* v. *Turner Elkhorn Mining Co.,* 428 U. S. 1, 14 (1976). Probable jurisdiction having been noted to consider the constitutionality of the San Diego ordinance, we proceed to do so.

III

This Court has often faced the problem of applying the broad principles of the First Amendment to unique forums of expression. See, *e. g., Consolidated Edison Co.* v. *Public Service Comm'n,* 447 U. S. 530 (1980) (billing envelope inserts); *Carey* v. *Brown,* 447 U. S. 455 (1980) (picketing in residential areas); *Schaumburg* v. *Citizens for a Better Environment,* 444 U. S. 620 (1980) (door-to-door and on-street

solicitation); *Greer* v. *Spock,* 424 U. S. 828 (1976) (Army bases); *Erznoznik* v. *City of Jacksonville,* 422 U. S. 205 (1975) (outdoor movie theaters); *Lehman* v. *City of Shaker Heights,* 418 U. S. 298 (1974) (advertising space within city-owned transit system). Even a cursory reading of these opinions reveals that at times First Amendment values must yield to other societal interests. These cases support the cogency of Justice Jackson's remark in *Kovacs* v. *Cooper,* 336 U. S. 77, 97 (1949): Each method of communicating ideas is "a law unto itself" and that law must reflect the "differing natures, values, abuses and dangers" of each method.[8] We deal here with the law of billboards.

Billboards are a well-established medium of communication, used to convey a broad range of different kinds of messages.[9] As Justice Clark noted in his dissent below:

> "The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the poster or 'broadside' to the billboard, outdoor signs have played a prominent role throughout American history, rallying support for political and social causes." 26 Cal. 3d, at 888, 610 P. 2d, at 430–431.

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[8] The uniqueness of each medium of expression has been a frequent refrain: See, *e. g., Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S. 546, 557 (1975) ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems"); *FCC* v. *Pacifica Foundation,* 438 U. S. 726, 748 (1978) ("We have long recognized that each medium of expression presents special First Amendment problems"); *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 503 (1952) ("Each method tends to present its own peculiar problems").

[9] For a description of the history of the use of outdoor advertising in this country and the use of billboards within that history, see F. Presbrey, The History and Development of Advertising 497–511 (1929); Tocker, Standardized Outdoor Advertising: History, Economics and Self-Regulation, in Outdoor Advertising: History and Regulation 11, 29 (J. Houck ed. 1969).

The record in this case indicates that besides the typical commercial uses, San Diego billboards have been used

> "to publicize the 'City in motion' campaign of the City of San Diego, to communicate messages from candidates for municipal, state and national offices, including candidates for judicial office, to propose marriage, to seek employment, to encourage the use of seat belts, to denounce the United Nations, to seek support for Prisoners of War and Missing in Action, to promote the United Crusade and a variety of other charitable and socially-related endeavors and to provide directions to the traveling public." [10]

But whatever its communicative function, the billboard remains a "large, immobile, and permanent structure which like other structures is subject to . . . regulation." *Id.*, at 870, 610 P. 2d, at 419. Moreover, because it is designed to stand out and apart from its surroundings, the billboard creates a unique set of problems for land-use planning and development.

Billboards, then, like other media of communication, combine communicative and noncommunicative aspects. As with other media, the government has legitimate interests in controlling the noncommunicative aspects of the medium, *Kovacs* v. *Cooper, supra,* but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects. Because regulation of the noncommunicative aspects of a medium often impinges to some degree on the communicative aspects, it has been necessary for the courts to reconcile the government's regulatory interests with the individual's right to expression. " '[A] court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.' " *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 91 (1977), quoting *Bigelow* v.

[10] Joint Stipulation of Facts No. 23, App. 46a–47a.

Virginia, 421 U. S. 809, 826 (1975). Performance of this task requires a particularized inquiry into the nature of the conflicting interests at stake here, beginning with a precise appraisal of the character of the ordinance as it affects communication.

As construed by the California Supreme Court, the ordinance restricts the use of certain kinds of outdoor signs. That restriction is defined in two ways: first, by reference to the structural characteristics of the sign; second, by reference to the content, or message, of the sign. Thus, the regulation only applies to a "permanent structure constituting, or used for the display of, a commercial or other advertisement to the public." 26 Cal. 3d, at 856, n. 2, 610 P. 2d, at 410, n. 2. Within that class, the only permitted signs are those (1) identifying the premises on which the sign is located, or its owner or occupant, or advertising the goods produced or services rendered on such property and (2) those within one of the specified exemptions to the general prohibition, such as temporary political campaign signs. To determine if any billboard is prohibited by the ordinance, one must determine how it is constructed, where it is located, and what message it carries.

Thus, under the ordinance (1) a sign advertising goods or services available on the property where the sign is located is allowed; (2) a sign on a building or other property advertising goods or services produced or offered elsewhere is barred; (3) noncommercial advertising, unless within one of the specific exceptions, is everywhere prohibited. The occupant of property may advertise his own goods or services; he may not advertise the goods or services of others, nor may he display most noncommercial messages.

IV

Appellants' principal submission is that enforcement of the ordinance will eliminate the outdoor advertising business in San Diego and that the First and Fourteenth Amendments

prohibit the elimination of this medium of communication. Appellants contend that the city may bar neither all offsite commercial signs nor all noncommercial advertisements and that even if it may bar the former, it may not bar the latter. Appellants may raise both arguments in their own right because, although the bulk of their business consists of offsite signs carrying commercial advertisements, their billboards also convey a substantial amount of noncommercial advertising.[11] Because our cases have consistently distinguished between the constitutional protection afforded commercial as

[11] The California Supreme Court suggested that appellants, owners of billboard businesses, did not have standing to raise the argument that billboards may, for some individuals or groups, be the only affordable method of communicating to a large audience. 26 Cal. 3d, at 869, n. 14, 610 P. 2d, at 419, n. 14. In so holding, the California court seems to have confused the category of "commercial speech" with the category of individuals who have a "commercial interest" in protected speech. We have held that the overbreadth doctrine, under which a party whose own activities are unprotected may challenge a statute by showing that it substantially abridges the First Amendment rights of parties not before the court, will not be applied in cases involving "commercial speech." *Bates* v. *State Bar of Arizona,* 433 U. S. 350, 381 (1977). However, we have never held that one with a "commercial interest" in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of others. Were it otherwise, newspapers, radio stations, movie theaters and producers—often those with the highest interest and the largest stake in a First Amendment controversy—would not be able to challenge government limitations on speech as substantially overbroad. As the opinion in *Bates* observed, *id.,* at 363:

"[O]ur cases long have protected speech even though it is in the form of a paid advertisement, *Buckley* v. *Valeo,* 424 U. S. 1 (1976); *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964); in a form that is sold for profit, *Smith* v. *California,* 361 U. S. 147 (1959); *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943); or in the form of a solicitation to pay or contribute money, *New York Times Co.* v. *Sullivan, supra; Cantwell* v. *Connecticut,* 310 U. S. 296 (1940). If commercial speech is to be distinguished, it 'must be distinguished by its content.' 425 U. S., at 761."

See also *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council,* 425 U. S. 748, 761 (1976).

opposed to noncommercial speech, in evaluating appellants' contention we consider separately the effect of the ordinance on commercial and noncommercial speech.

The extension of First Amendment protections to purely commercial speech is a relatively recent development in First Amendment jurisprudence. Prior to 1975, purely commercial advertisements of services or goods for sale were considered to be outside the protection of the First Amendment. *Valentine* v. *Chrestensen,* 316 U. S. 52 (1942). That construction of the First Amendment was severely cut back in *Bigelow* v. *Virginia, supra.* In *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council,* 425 U. S. 748 (1976), we plainly held that speech proposing no more than a commercial transaction enjoys a substantial degree of First Amendment protection: A State may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon its disseminators and its recipients. That decision, however, did not equate commercial and noncommercial speech for First Amendment purposes; indeed, it expressly indicated the contrary. See *id.,* at 770–773, and n. 24. See also *id.,* at 779–781 (STEWART, J., concurring).[12]

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[12] JUSTICE STEWART'S comments in *Virginia Pharmacy Board* are worth quoting here:

"The Court's determination that commercial advertising of the kind at issue here is not 'wholly outside the protection of' the First Amendment indicates by its very phrasing that there are important differences between commercial price and product advertising, on the one hand, and ideological communication on the other. Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought—thought that may shape our concepts of the whole universe of man. Although such expression may convey factual information relevant to social and individual decisionmaking, it is protected by the Constitution, whether or not it contains factual representations and even if it includes inaccurate assertions of fact. . . .

"Commercial price and product advertising differs markedly from ideological expression because it is confined to the promotion of specific goods

Although the protection extended to commercial speech has continued to develop, commercial and noncommercial communications, in the context of the First Amendment, have been treated differently. *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977), held that advertising by attorneys may not be subjected to blanket suppression and that the specific advertisement at issue there was constitutionally protected. However, we continued to observe the distinction between commercial and noncommercial speech, indicating that the former could be forbidden and regulated in situations where the latter could not be. *Id.*, at 379–381, 383–384. In *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978), the Court refused to invalidate on First Amendment grounds a lawyer's suspension from practice for face-to-face solicitation of business for pecuniary gain. In the course of doing so, we again recognized the common-sense and legal distinction between speech proposing a commercial transaction and other varieties of speech:

> "To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." *Id.*, at 456.

In *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 69,

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or services. The First Amendment protects the advertisement because of the 'information of potential interest and value' conveyed, rather than because of any direct contribution to the interchange of ideas." *Id.*, at 779–780 (references and footnotes omitted).

n. 32 (1976), JUSTICE STEVENS stated that the difference between commercial price and product advertising and ideological communication permits regulation of the former "that the First Amendment would not tolerate with respect to the latter." See also *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S., at 91–92, and *Friedman* v. *Rogers,* 440 U. S. 1, 8–10 (1979).

Finally, in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n,* 447 U. S. 557 (1980), we held: "The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for a particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Id.,* at 562–563 (citation omitted). We then adopted a four-part test for determining the validity of government restrictions on commercial speech as distinguished from more fully protected speech. (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective. *Id.,* at 563–566.

Appellants agree that the proper approach to be taken in determining the validity of the restrictions on commercial speech is that which was articulated in *Central Hudson,* but assert that the San Diego ordinance fails that test. We do not agree.

There can be little controversy over the application of the first, second, and fourth criteria. There is no suggestion that the commercial advertising at issue here involves unlawful activity or is misleading. Nor can there be substantial doubt that the twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are sub-

stantial governmental goals.[13] It is far too late to contend otherwise with respect to either traffic safety, *Railway Express Agency, Inc.* v. *New York,* 336 U. S. 106 (1949), or esthetics, see *Penn Central Transportation Co.* v. *New York City,* 438 U. S. 104 (1978); *Village of Belle Terre* v. *Boraas,* 416 U. S. 1 (1974); *Berman* v. *Parker,* 348 U. S. 26, 33 (1954). Similarly, we reject appellants' claim that the ordinance is broader than necessary and, therefore, fails the fourth part of the *Central Hudson* test. If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The city has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of fully accomplishing its ends: It has not prohibited all billboards, but allows onsite advertising and some other specifically exempted signs.

The more serious question, then, concerns the third of the *Central Hudson* criteria: Does the ordinance "directly advance" governmental interests in traffic safety and in the appearance of the city? It is asserted that the record is inadequate to show any connection between billboards and traffic safety. The California Supreme Court noted the meager record on this point but held "as a matter of law that an ordinance which eliminates billboards designed to be viewed from streets and highways reasonably relates to traffic safety." 26 Cal. 3d, at 859, 610 P. 2d, at 412. Noting that "[b]illboards are intended to, and undoubtedly do, divert a driver's attention from the roadway," *ibid.,* and that

[13] The California Supreme Court had held in *Varney & Green* v. *Williams,* 155 Cal. 318, 100 P. 867 (1909), that a municipal ordinance prohibiting all advertising billboards purely for esthetic reasons was an unconstitutional exercise of municipal police power. The court specifically overruled *Varney* in upholding the San Diego ordinance at issue here. California's current position is in accord with that of most other jurisdictions. See n. 15, *infra.*

whether the "distracting effect contributes to traffic accidents invokes an issue of continuing controversy," *ibid.*, the California Supreme Court agreed with many other courts that a legislative judgment that billboards are traffic hazards is not manifestly unreasonable and should not be set aside. We likewise hesitate to disagree with the accumulated, commonsense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety.[14] There is nothing here to suggest that these judgments are unreasonable. As we said in a different context, *Railway Express Agency, Inc.* v. *New York, supra,* at 109:

> "We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false."

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[14] See *E. B. Elliott Advertising Co.* v. *Metropolitan Dade County,* 425 F. 2d 1141, 1152 (CA5 1970); *Markham Advertising Co.* v. *Washington,* 73 Wash. 2d 405, 420–421, 439 P. 2d 248, 258 (1968); *New York State Thruway Authority* v. *Ashley Motor Court, Inc.,* 10 N. Y. 2d 151, 155–156, 176 N. E. 2d 566, 568 (1961); *Ghaster Properties, Inc.* v. *Preston,* 176 Ohio St. 425, 438, 200 N. E. 2d 328, 337 (1964); *Newman Signs, Inc.* v. *Hjelle,* 268 N. W. 2d 741, 757 (N. D. 1978); *Lubbock Poster Co.* v. *City of Lubbock,* 569 S. W. 2d 935, 939 (Tex. Civ. App. 1978); *State* v. *Lotze,* 92 Wash. 2d 52, 59, 593 P. 2d 811, 814 (1979); *Inhabitants, Town of Boothbay* v. *National Advertising Co.,* 347 A. 2d 419, 422 (Me. 1975); *Stuckey's Stores, Inc.* v. *O'Cheskey,* 93 N. M. 312, 321, 600 P. 2d 258, 267 (1979); *In re Opinion of the Justices,* 103 N. H. 268, 270, 169 A. 2d 762, 764 (1961); *General Outdoor Advertising Co.* v. *Department of Public Works,* 289 Mass. 149, 180–181, 193 N. E. 799, 813–814 (1935). But see *John Donnelly & Sons* v. *Campbell,* 639 F. 2d 6, 11 (CA1 1980); *State ex rel. Dept. of Transportation* v. *Pile,* 603 P. 2d, at 343; *Metromedia, Inc.* v. *City of Des Plaines,* 26 Ill. App. 3d 942, 946, 326 N. E. 2d 59, 62 (1975).

We reach a similar result with respect to the second asserted justification for the ordinance—advancement of the city's esthetic interests. It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an "esthetic harm." [15] San Diego, like many States and other municipalities, has chosen to minimize the presence of such structures.[16] Such esthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose. But there is no claim in this case that San Diego has as an ulterior motive the suppression of speech, and the judgment involved here is not so unusual as to raise suspicions in itself.

It is nevertheless argued that the city denigrates its in-

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[15] See *John Donnelly & Sons* v. *Campbell, supra,* at 11–12; *E. B. Elliott Advertising Co.* v. *Metropolitan Dade County, supra,* at 1152; *Newman Signs, Inc.* v. *Hjelle, supra,* at 757; *Markham Advertising Co.* v. *Washington, supra,* at 422–423, 439 P. 2d, at 259; *Stuckey's Stores, Inc.* v. *O'Cheskey, supra,* at 321, 600 P. 2d, at 267; *Suffolk Outdoor Advertising Co.* v. *Hulse,* 43 N. Y. 2d 483, 489, 373 N. E. 2d 263, 265 (1977); *John Donnelly & Sons, Inc.* v. *Outdoor Advertising Bd.,* 369 Mass. 206, 219, 339 N. E. 2d 709, 717 (1975); *Cromwell* v. *Ferrier,* 19 N. Y. 2d 263, 269, 225 N. E. 2d 749, 753 (1967); *State* v. *Diamond Motors, Inc.,* 50 Haw. 33, 35–36, 429 P. 2d 825, 827 (1967); *United Advertising Corp.* v. *Metuchen,* 42 N. J. 1, 6, 198 A. 2d 447, 449 (1964); *In re Opinion of the Justices, supra,* at 270–271, 169 A. 2d, at 764. But see *State ex rel. Dept. of Transportation* v. *Pile, supra,* at 342; *Sunad, Inc.* v. *Sarasota,* 122 So. 2d 611, 614–615 (Fla. 1960).

[16] The federal Highway Beautification Act of 1965, Pub. L. 89–285, 79 Stat. 1028, as amended, 23 U. S. C. § 131 (1976 ed. and Supp. III), requires that States eliminate billboards from areas adjacent to certain highways constructed with federal funds. The Federal Government also prohibits billboards on federal lands. 43 CFR § 2921.0–6 (a) (1980). Three States have enacted statewide bans on billboards. Maine, Me. Rev. Stat. Ann., Tit. 23, § 1901 *et seq.* (1980); Hawaii, Haw. Rev. Stat. § 264–71 *et seq.*, § 445–111 *et seq.* (1976); Vermont, Vt. Stat. Ann., Tit. 10, § 488 *et seq.* (1973).

terest in traffic safety and beauty and defeats its own case by permitting onsite advertising and other specified signs. Appellants question whether the distinction between onsite and offsite advertising on the same property is justifiable in terms of either esthetics or traffic safety. The ordinance permits the occupant of property to use billboards located on that property to advertise goods and services offered at that location; identical billboards, equally distracting and unattractive, that advertise goods or services available elsewhere are prohibited even if permitting the latter would not multiply the number of billboards. Despite the apparent incongruity, this argument has been rejected, at least implicitly, in all of the cases sustaining the distinction between offsite and onsite commercial advertising.[17] We agree with those cases and with our own decisions in *Suffolk Outdoor Advertising Co.* v. *Hulse,* 439 U. S. 808 (1978); *Markham Advertising Co.* v. *Washington,* 393 U. S. 316 (1969); and *Newman Signs, Inc.* v. *Hjelle,* 440 U. S. 901 (1979).

In the first place, whether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising. Second, the city may believe that offsite advertising, with its periodically changing content, presents a more acute problem than does onsite advertising. See *Railway Express,* 336 U. S., at 110.

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[17] See *Howard* v. *State Department of Highways of Colorado,* 478 F. 2d 581 (CA10 1973); *John Donnelly & Sons* v. *Campbell, supra; John Donnelly & Sons, Inc.* v. *Outdoor Advertising Bd., supra; Donnelly Advertising Corp.* v. *City of Baltimore,* 279 Md. 660, 668, 370 A. 2d 1127, 1132 (1977); *Modjeska Sign Studios, Inc.* v. *Berle,* 43 N. Y. 2d 468, 373 N. E. 2d 255 (1977); *Suffolk Outdoor Advertising Co.* v. *Hulse, supra; Ghaster Properties, Inc.* v. *Preston, supra; Newman Signs, Inc.* v. *Hjelle, supra; United Advertising Corp.* v. *Borough of Raritan,* 11 N. J. 144, 93 A. 2d 362 (1952) (Brennan, J.); *United Advertising Corp.* v. *Metuchen, supra; Stuckey's Stores, Inc.* v. *O'Cheskey, supra.*

Third, San Diego has obviously chosen to value one kind of commercial speech—onsite advertising—more than another kind of commercial speech—offsite advertising. The ordinance reflects a decision by the city that the former interest, but not the latter, is stronger than the city's interests in traffic safety and esthetics. The city has decided that in a limited instance—onsite commercial advertising—its interests should yield. We do not reject that judgment. As we see it, the city could reasonably conclude that a commercial enterprise—as well as the interested public—has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere. See *Railway Express, supra,* at 116 (Jackson, J., concurring); *Bradley* v. *Public Utilities Comm'n,* 289 U. S. 92, 97 (1933). It does not follow from the fact that the city has concluded that some commercial interests outweigh its municipal interests in this context that it must give similar weight to all other commercial advertising. Thus, offsite commercial billboards may be prohibited while onsite commercial billboards are permitted.

The constitutional problem in this area requires resolution of the conflict between the city's land-use interests and the commercial interests of those seeking to purvey goods and services within the city. In light of the above analysis, we cannot conclude that the city has drawn an ordinance broader than is necessary to meet its interests, or that it fails directly to advance substantial government interests. In sum, insofar as it regulates commercial speech the San Diego ordinance meets the constitutional requirements of *Central Hudson, supra.*

V

It does not follow, however, that San Diego's general ban on signs carrying noncommercial advertising is also valid

under the First and Fourteenth Amendments. The fact that the city may value commercial messages relating to onsite goods and services more than it values commercial communications relating to offsite goods and services does not justify prohibiting an occupant from displaying its own ideas or those of others.

As indicated above, our recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech. San Diego effectively inverts this judgment, by affording a greater degree of protection to commercial than to noncommercial speech. There is a broad exception for onsite commercial advertisements, but there is no similar exception for noncommercial speech. The use of onsite billboards to carry commercial messages related to the commercial use of the premises is freely permitted, but the use of otherwise identical billboards to carry noncommercial messages is generally prohibited. The city does not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city. Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.[18]

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[18] In *John Donnelly & Sons* v. *Campbell*, 639 F. 2d 6 (1980), the Court of Appeals for the First Circuit considered a statewide limitation on billboards, which similarly afforded a greater degree of protection to commercial than to noncommercial messages. That court took a position very similar to the one that we take today: it sustained the regulation insofar as it restricted commercial advertising, but held unconstitutional its more intrusive restrictions on noncommercial speech. The court stated: "The law thus impacts more heavily on ideological than on commercial speech—a peculiar inversion of First Amendment values. The statute . . . provides

Furthermore, the ordinance contains exceptions that permit various kinds of noncommercial signs, whether on property where goods and services are offered or not, that would otherwise be within the general ban. A fixed sign may be used to identify any piece of property and its owner. Any piece of property may carry or display religious symbols, commemorative plaques of recognized historical societies and organizations, signs carrying news items or telling the time or temperature, signs erected in discharge of any governmental function, or temporary political campaign signs.[19] No other noncommercial or ideological signs meeting the structural definition are permitted, regardless of their effect on traffic safety or esthetics.

Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests. See *Carey* v. *Brown,* 447 U. S., at 462; *Police Dept. of Chicago* v. *Mosley,*

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greater restrictions—and fewer alternatives, the other side of the coin—for ideological than for commercial speech . . . . In short, the statute's impositions are both legally and practically the most burdensome on ideological speech, where they should be the least." 639 F. 2d, at 15–16. Other courts, however, have failed to give adequate weight to the distinction between commercial and noncommercial speech and to the higher level of protection to be afforded the latter. See *Donnelly Advertising Corp.* v. *City of Baltimore,* 279 Md. 660, 370 A. 2d 1127 (1977); *State* v. *Lotze,* 92 Wash. 2d 52, 593 P. 2d 811 (1979). To the extent that this decision is not consistent with the conclusion reached in *Lotze,* we overrule our prior summary approval of that decision in 444 U. S. 921 (1979).

[19] In this sense, this case presents the opposite situation from that in *Lehman* v. *City of Shaker Heights,* 418 U. S. 298 (1974), and *Greer* v. *Spock,* 424 U. S. 828 (1976). In both of those cases a government agency had chosen to prohibit from a certain forum speech relating to political campaigns, while other kinds of speech were permitted. In both cases this Court upheld the prohibition, but both cases turned on unique fact situations involving government-created forums and have no application here.

408 U. S. 92, 96 (1972). With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse: "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consolidated Edison Co.,* 447 U. S., at 538. Because some noncommercial messages may be conveyed on billboards throughout the commercial and industrial zones, San Diego must similarly allow billboards conveying other noncommercial messages throughout those zones.[20]

Finally, we reject appellees' suggestion that the ordinance may be appropriately characterized as a reasonable "time, place, and manner" restriction. The ordinance does not gen-

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[20] Because a total prohibition of outdoor advertising is not before us, we do not indicate whether such a ban would be consistent with the First Amendment. But see *Schad* v. *Mount Ephraim,* 452 U. S. 61 (1981), on the constitutional problems created by a total prohibition of a particular expressive forum, live entertainment in that case. Despite JUSTICE STEVENS' insistence to the contrary, *post,* at 540, 541, and 548, n. 16, we do not imply that the ordinance is unconstitutional *because* it "does not abridge enough speech."

Similarly, we need not reach any decision in this case as to the constitutionality of the federal Highway Beautification Act of 1965. That Act, like the San Diego ordinance, permits onsite commercial billboards in areas in which it does not permit billboards with noncommercial messages. 23 U. S. C. § 131 (c) (1976 ed., Supp. III). However, unlike the San Diego ordinance, which prohibits billboards conveying noncommercial messages throughout the city, the federal law does not contain a total prohibition of such billboards in areas adjacent to the interstate and primary highway systems. As far as the Federal Government is concerned, such billboards are permitted adjacent to the highways in areas zoned industrial or commercial under state law or in unzoned commercial or industrial areas. 23 U. S. C. § 131 (d). Regulation of billboards in those areas is left primarily to the States. For this reason, the decision today does not determine the constitutionality of the federal statute. Whether, in fact, the distinction is constitutionally significant can only be determined on the basis of a record establishing the actual effect of the Act on billboards conveying noncommercial messages.

erally ban billboard advertising as an unacceptable "manner" of communicating information or ideas; rather, it permits various kinds of signs. Signs that are banned are banned everywhere and at all times. We have observed that time, place, and manner restrictions are permissible if "they are justified without reference to the content of the regulated speech, . . . serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council,* 425 U. S., at 771. Here, it cannot be assumed that "alternative channels" are available, for the parties stipulated to just the opposite: "Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." [21] A similar argument was made with respect to a prohibition on real estate "For Sale" signs in *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85 (1977), and what we said there is equally applicable here:

> "Although in theory sellers remain free to employ a number of different alternatives, in practice [certain products are] not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sellers realistically are relegated . . . involve more cost and less autonomy then . . . signs[,] . . . are less likely to reach persons not deliberately seeking sales information[,] . . . and may be less effective media for communicating the message that is conveyed by a . . . sign . . . . The alternatives, then, are far from satisfactory." *Id.,* at 93.

It is apparent as well that the ordinance distinguishes in several ways between permissible and impermissible signs at a particular location by reference to their content.

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[21] See Joint Stipulation of Facts No. 28, App. 48a.

Whether or not these distinctions are themselves constitutional, they take the regulation out of the domain of time, place, and manner restrictions. See *Consolidated Edison Co.* v. *Public Service Comm'n, supra.*

VI

Despite the rhetorical hyperbole of THE CHIEF JUSTICE's dissent, there is a considerable amount of common ground between the approach taken in this opinion and that suggested by his dissent. Both recognize that each medium of communication creates a unique set of First Amendment problems, both recognize that the city has a legitimate interest in regulating the noncommunicative aspects of a medium of expression, and both recognize that the proper judicial role is to conduct " 'a careful inquiry into the competing concerns of the State and the interests protected by the guarantee of free expression.' " *Post,* at 556. Our principal difference with his dissent is that it gives so little weight to the latter half of this inquiry.[22]

THE CHIEF JUSTICE writes that

> "[a]lthough we must ensure that any regulation of speech 'further[s] a sufficiently substantial government interest' . . . given a reasonable approach to a perceived problem, this Court's duty . . . is to determine whether the legislative approach is essentially neutral to the messages conveyed and leaves open other adequate means of conveying those messages." *Post,* at 561.[23]

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[22] JUSTICE STEVENS' suggested standard seems to go even further than THE CHIEF JUSTICE in ignoring the private interests protected by the First Amendment. He suggests that regulation of speech is permissible so long as it is not biased in favor of a particular position and leaves open "ample" means of communication. *Post,* at 552. Nowhere does he suggest that the strength or weakness of the government's interests is a factor in the analysis.

[23] THE CHIEF JUSTICE correctly notes that traditional labels should not be substituted for analysis and, therefore, he correctly rejects any simple

Despite his belief that this is "the essence of . . . democracy," this has never been the approach of this Court when a legislative judgment is challenged as an unconstitutional infringement of First Amendment rights.[24]

By "essentially neutral," THE CHIEF JUSTICE may mean either or both of two things. He may mean that government restrictions on protected speech are permissible so long as the government does not favor one side over another on a subject of public controversy. This concept of neutrality was specifically rejected by the Court last Term in *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S., at 537. There, the Court dismissed the Commission's contention that a prohibition of all discussion, regardless of the viewpoint expressed, on controversial issues of public policy does not

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classification of the San Diego ordinance as either a "prohibition" or a "time, place, and manner restriction." These "labels" or "categories," however, have played an important role in this Court's analysis of First Amendment problems in the past. The standard THE CHIEF JUSTICE himself adopts appears to be based almost exclusively on prior discussions of time, place, and manner restrictions. See *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981); *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S. 530, 535 (1980); *California* v. *LaRue*, 409 U. S. 109, 117, n. 4 (1972); *Adderley* v. *Florida*, 385 U. S. 39 (1966); *Kovacs* v. *Cooper*, 336 U. S. 77 (1949). But this Court has never held that the less strict standard of review applied to time, place, and manner restrictions is appropriately used in every First Amendment case, or that it is the most that the First Amendment requires of government legislation which infringes on protected speech. If this were the case, there would be no need for the detailed inquiry this Court consistently pursues in order to answer the question of whether a challenged restriction is in fact a time, place, and manner restriction—the same standard of review would apply regardless of the outcome of that inquiry. As we demonstrated above, the San Diego ordinance is not such a restriction and there is, therefore, no excuse for applying a lower standard of First Amendment review to that ordinance.

[24] Nor has this Court ever accepted the view that it must defer to a legislative judgment that a particular medium of communication is "offensive" and "intrusive," merely because "other means [of communication] are available." *Post*, at 561.

unconstitutionally suppress freedom of speech. "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Ibid.* On the other hand, THE CHIEF JUSTICE may mean by neutrality that government restrictions on speech cannot favor certain communicative contents over others. As a general rule, this, of course, is correct, see, *e. g., Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92 (1972); *Carey* v. *Brown,* 447 U. S. 455 (1980). The general rule, in fact, is applicable to the facts of this case: San Diego has chosen to favor certain kinds of messages—such as onsite commercial advertising, and temporary political campaign advertisements—over others. Except to imply that the favored categories are for some reason *de minimis* in a constitutional sense, his dissent fails to explain why San Diego should not be held to have violated this concept of First Amendment neutrality.

Taken literally THE CHIEF JUSTICE's approach would require reversal of the many cases striking down antisolicitation statutes on First Amendment grounds: In each of them the city would argue that preventing distribution of leaflets rationally furthered the city's interest in limiting litter, applied to all kinds of leaflets and hence did not violate the principle of government neutrality, and left open alternative means of communication. See, *e. g., Martin* v. *Struthers,* 319 U. S. 141 (1943); *Schneider* v. *State,* 308 U. S. 147 (1939). Despite the dissent's assertion to the contrary, however, it has been this Court's consistent position that democracy stands on a stronger footing when courts protect First Amendment interests against legislative intrusion, rather than deferring to merely rational legislative judgments in this area:

> "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so

> vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." *Id.*, at 161.

Because THE CHIEF JUSTICE misconceives the nature of the judicial function in this situation, he misunderstands the significance of the city's extensive exceptions to its billboard prohibition. He characterizes these exceptions as "essentially negligible," *post*, at 562, and then opines that it borders on the frivolous to suggest that in "allowing such signs but forbidding noncommercial billboards, the city has infringed freedom of speech." *Post*, at 565. That, of course, is not the nature of this argument.

There can be no question that a prohibition on the erection of billboards infringes freedom of speech: The exceptions do not create the infringement, rather the general prohibition does. But the exceptions to the general prohibition are of great significance in assessing the strength of the city's interest in prohibiting billboards. We conclude that by allowing commercial establishments to use billboards to advertise the products and services they offer, the city necessarily has conceded that some communicative interests, *e. g.*, onsite commercial advertising, are stronger than its competing interests in esthetics and traffic safety. It has nevertheless banned all noncommercial signs except those specifically excepted.

THE CHIEF JUSTICE agrees that in allowing the exceptions to the rule the city has balanced the competing interests, but he argues that we transgress the judicial role by independently reviewing the relative values the city has assigned to various communicative interests. He seems to argue that although the Constitution affords a greater degree of protection to noncommercial than to commercial speech, a legisla-

ture need not make the same choices. *Post,* at 567. This position makes little sense even abstractly, and it surely is not consistent with our cases or with THE CHIEF JUSTICE's own argument that statutes challenged on First Amendment grounds must be evaluated in light of the unique facts and circumstances of the case. Governmental interests are only revealed and given concrete force by the steps taken to meet those interests. If the city has concluded that its official interests are not as strong as private interests in commercial communications, may it nevertheless claim that those same official interests outweigh private interests in noncommercial communications? Our answer, which is consistent with our cases, is in the negative.

VII

Because the San Diego ordinance reaches too far into the realm of protected speech, we conclude that it is unconstitutional on its face.[25] The judgment of the California Supreme Court is reversed, and the case is remanded to that court.[26]

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE BLACKMUN joins, concurring in the judgment.

Believing that "a total prohibition of outdoor advertising is not before us," *ante,* at 515, n. 20, the plurality does not decide

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[25] Appellants contend that the ordinance will effectively eliminate their businesses and that this violates the Due Process Clause. We do not know, however, what kind of ordinance, if any, San Diego will seek to enforce in place of that which we invalidate today. In any case, any question of unconstitutional "takings" aside, the Due Process Clause does not afford a greater degree of protection to appellants' business than does the First Amendment. Since we hold that the First Amendment interests in commercial speech are not sufficient to prevent the city from prohibiting offsite commercial advertisements, no different result should be reached under the Due Process Clause.

[26] Although the ordinance contains a severability clause, determining the meaning and application of that clause is properly the responsibility of the state courts. See *Dombrowski* v. *Pfister,* 380 U. S. 479, 497 (1965)

"whether such a ban would be consistent with the First Amendment," *ibid.* Instead, it concludes that San Diego may ban all billboards containing commercial speech messages without violating the First Amendment, thereby sending the signal to municipalities that bifurcated billboard regulations prohibiting commercial messages but allowing noncommercial messages would pass constitutional muster. *Ante,* at 521, n. 25. I write separately because I believe this case in effect presents the total ban question, and because I believe the plurality's bifurcated approach itself raises serious First Amendment problems and relies on a distinction between commercial and noncommercial speech unanticipated by our prior cases.

I

As construed by the California Supreme Court, a billboard subject to San Diego's regulation is "a rigidly assembled sign,

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("The record suffices . . . to permit this Court to hold that, without the benefit of limiting construction, the statutory provisions on which the indictments are founded are void on their face; until an acceptable limiting construction is obtained, the provisions cannot be applied"); *Liggett Co.* v. *Lee,* 288 U. S. 517, 541 (1933) ("The operation of this [severability clause] consequent on our decision is a matter of state law. While we have jurisdiction of the issue, we deem it appropriate that we should leave the determination of the question to the state court"); *Dorchy* v. *Kansas,* 264 U. S. 286, 291 ("In cases coming from the state courts, this Court, in the absence of a controlling state decision may, in passing upon the claim under the federal law, decide, also, the question of severability. But it is not obliged to do so. The situation may be such as to make it appropriate to leave the determination of the question to the state court"). This rule is reflected in the different approaches this Court has taken to statutory construction of federal and state statutes infringing on protected speech. Compare *United States* v. *Thirty-seven Photographs,* 402 U. S. 363 (1971), with *Freedman* v. *Maryland,* 380 U. S. 51, 60 (1965). Since our judgment is based essentially on the inclusion of noncommercial speech within the prohibitions of the ordinance, the California courts may sustain the ordinance by limiting its reach to commercial speech, assuming the ordinance is susceptible to this treatment.

display, or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public." 26 Cal. 3d 848, 856, n. 2, 610 P. 2d 407, 410, n. 2 (1980), quoting Cal. Rev. & Tax. Code Ann. § 18090.2 (West Supp. 1970–1980).[1] San Diego's billboard regulation bans all commercial and noncommercial billboard advertising [2] with a few limited exceptions. The largest of these exceptions is for on-premises identification signs, defined as

> "signs designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed." App. to Juris. Statement 107a.

Other exceptions permit signs for governmental functions, signs on benches at bus stops, commemorative plaques for

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[1] According to Joint Stipulation of Facts No. 25 entered into by the parties for purposes of cross-motions for summary judgment:

"Outdoor advertising is presented in two basic standardized forms. A 'poster panel' is a 12-foot by 24-foot sign on which a pre-printed message is posted, in sheets. A 'painted bulletin' is generally a 14-foot by 48-foot sign which contains a hand painted message. The message will remain in one place for a period of time, usually a month, and will then be disassembled and replaced by another message while the first message is moved to another sign. In this way, the same hand painted message will be moved throughout a metropolitan area over a six-month or twelve-month period." App. 47a.

The ordinance does not apply to such signs as "a picket sign announcing a labor dispute or a small sign placed in one's front yard proclaiming a political or religious message." 26 Cal. 3d 848, 856, n. 2, 610 P. 2d 407, 410, n. 2 (1980).

[2] I will sometimes refer to billboards containing commercial speech messages as "commercial billboards," and billboards containing noncommercial speech messages as "noncommercial billboards."

historical sites, religious symbol signs, for sale signs, time/weather/news public service signs, and temporary political campaign signs erected for no longer than 90 days and removed within 10 days after the election to which they pertain. *Id.*, at 111a–112a; *ante*, at 495, n. 3.[3]

II

Let me first state the common ground that I share with the plurality. The plurality and I agree that billboards are a medium of communication warranting First Amendment protection. The plurality observes that "[b]illboards are a well-established medium of communication, used to convey a broad range of different kinds of messages." *Ante*, at 501. See generally Tocker, Standardized Outdoor Advertising: History, Economics and Self-Regulation, in Outdoor Advertising: History and Regulation 11, 11–56 (J. Houck ed. 1969); F. Presbrey, The History and Development of Advertising 497–511 (1929). As the parties have stipulated, billboards in San Diego have been used

> "to advertise national and local products, goods and services, new products being introduced to the consuming public, to publicize the 'City in Motion' campaign of the City of San Diego, to communicate messages from candidates for municipal, state and national offices, including candidates for judicial office, to propose marriage, to seek employment, to encourage the use of seat belts, to denounce the United Nations, to seek support for Prisoners of War and Missing in Action, to promote the United Crusade and a variety of other charitable and

[3] Additional exceptions include signs manufactured, transported, or stored in San Diego so long as they are not used for advertising purposes; signs located within areas where such signs are not visible from the boundary of the premises; signs on vehicles such as buses and taxicabs; signs on other licensed commercial vehicles; and temporary off-premises subdivision directional signs. App. to Juris. Statement 111a–112a.

socially-related endeavors and to provide directions to the traveling public." Joint Stipulation of Facts No. 23, App. 46a–47a.[4]

Although there are alternative channels for communication of messages appearing on billboards, such as newspapers, television, and radio, these alternatives have never dissuaded active and continued use of billboards as a medium of expression and appear to be less satisfactory. See *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 93 (1977). Indeed the parties expressly stipulated that "[m]any businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." Joint Stipulation of Facts No. 28, App. 48a. Justice Black said it well when he stated the First Amendment's presumption that "all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition." *Kovacs* v. *Cooper,* 336 U. S. 77, 102 (1949) (dissenting opinion).

Where the plurality and I disagree is in the characterization of the San Diego ordinance and thus in the appropriate analytical framework to apply. The plurality believes that the question of a total ban is not presented in this case, *ante,* at 515, n. 20, because the ordinance contains exceptions to its general prohibition. In contrast, my view is that the *practical* effect of the San Diego ordinance is to eliminate the billboard as an effective medium of communication for the

[4] Perusal of the photographs of billboards included in the appendix to the jurisdictional statement filed in this Court reveals the wide range of noncommercial messages communicated through billboards, including the following: "Welcome to San Diego[:] Home of 1,100 Underpaid Cops"; "Support San Diego's No-Growth Policy[:] Spend Your Money in Los Angeles!"; "Voluntary Integration. Better Education By Choice"; "Support America's First Environment Strike. Don't Buy Shell!"; and "Get US out! of the United Nations."

speaker who wants to express the sorts of messages described in Joint Stipulation of Facts No. 23, and that the exceptions do not alter the overall character of the ban. Unlike the on-premises sign, the off-premises billboard "is, generally speaking, made available to 'all-comers', in a fashion similar to newspaper or broadcasting advertising. It is a forum for the communication of messages to the public." Joint Stipulation of Facts No. 22 (c), App. 46a.[5] Speakers in San Diego no longer have the opportunity to communicate their messages of general applicability to the public through billboards. None of the exceptions provides a practical alternative for the general commercial or noncommercial billboard advertiser. Indeed, unless the advertiser chooses to buy or lease premises in the city, or unless his message falls within one of the narrow exempted categories, he is foreclosed from announcing either commercial or noncommercial ideas through a billboard.

The characterization of the San Diego regulation as a total ban of a medium of communication has more than semantic implications, for it suggests a First Amendment analysis quite different from the plurality's. Instead of relying on the exceptions to the ban to invalidate the ordinance, I would apply the tests this Court has developed to analyze content-neutral

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[5] Outdoor advertising traditionally has been classified into two categories: "on-premises" and "off-premises." One commentator describes:

"The on-premise classification of outdoor advertising is referred to as the sign industry, in that signs are custom-made and are manufactured by a sign contractor on premises *not* owned, leased or controlled by the sign contractor or his agent. Such signs are used primarily for the purpose of identifying a business, its products or its services at the point of manufacture, distribution or sale, hence on-premise.

. . . . .

"Off-premise advertising is an advertising service for others which erects and maintains outdoor advertising displays on premises owned, leased or controlled by the producer of the advertising service." Tocker, Standardized Outdoor Advertising: History, Economics and Self-Regulation, in Outdoor Advertising: History and Regulation 11, 15, 18 (J. Houck ed. 1969).

prohibitions of particular media of communication.[6] Most recently, in *Schad* v. *Mount Ephraim,* 452 U. S. 61 (1981), this Court assessed "the substantiality of the governmental interests asserted" and "whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment," in striking down the borough's total ban on live commercial entertainment. *Id.,* at 70. *Schad* merely articulated an analysis applied in previous cases concerning total bans of media of expression. For example, in *Schneider* v. *State,* 308 U. S. 147 (1939), the Court struck down total bans on handbill leafletting because there were less restrictive alternatives to achieve the goal of prevention of litter, in fact alternatives that did not infringe at all on that important First Amendment privilege. *Id.,* at 162. In *Martin* v. *City of Struthers,* 319 U. S. 141 (1943), the Court invalidated a municipal ordinance that forbade persons from engaging in the time-honored activity of door-to-door solicitation. See also *Jamison* v. *Texas,* 318 U. S. 413, 416–417 (1943) (distribution of handbills); *Hague* v. *CIO,* 307 U. S. 496, 518 (1939) (opinion of Roberts, J.) (distribution of pamphlets). See generally Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205, 1335–1336 (1970).

Of course, as the plurality notes, "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." *Ante,* at 501, quoting *Kovacs* v. *Cooper, supra,* at 97 (Jackson, J., concurring). Similarly, in *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S. 546, 557 (1975), this Court observed: "Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited

[6] Different factors come into play when the challenged legislation is simply a time, place, or manner regulation rather than a total ban of a particular medium of expression.

to it, for each may present its own problems." It is obvious that billboards do present their own unique problems: they are large immobile structures that depend on eye-catching visibility for their value. At the same time, the special problems associated with billboards are not of a different genus than those associated with commercial live entertainment in the borough of Mount Ephraim, or with door-to-door literature distribution in the city of Struthers. In the case of billboards, I would hold that a city may totally ban them if it can show that a sufficiently substantial governmental interest is directly furthered by the total ban, and that any more narrowly drawn restriction, *i. e.,* anything less than a total ban, would promote less well the achievement of that goal.

Applying that test to the instant case, I would invalidate the San Diego ordinance. The city has failed to provide adequate justification for its substantial restriction on protected activity. See *Schad* v. *Mount Ephraim, supra,* at 72. First, although I have no quarrel with the substantiality of the city's interest in traffic safety, the city has failed to come forward with evidence demonstrating that billboards actually impair traffic safety in San Diego. Indeed, the joint stipulation of facts is completely silent on this issue. Although the plurality hesitates "to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety," *ante,* at 509, I would not be so quick to accept legal conclusions in other cases as an adequate substitute for evidence *in this case* that banning billboards directly furthers traffic safety.[7] Moreover, the ordinance is not

[7] Not 1 of the 11 cases cited by the plurality in its footnote 14 stands for the proposition that reviewing courts have determined that "billboards are real and substantial hazards to traffic safety." These 11 cases merely apply the minimal scrutiny rational relationship test and the presumption of legislative validity to hold that it would not be *unreasonable* or *inconceivable* for a legislature or city government to conclude that billboards are

narrowly drawn to accomplish the traffic safety goal. Although it contains an exception for signs "not visible from any point on the boundary of the premises," App. to Juris.

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traffic hazards. For example, in *New York State Thruway Authority* v. *Ashley Motor Court, Inc.*, 10 N. Y. 2d 151, 156, 176 N. E. 2d 566, 568 (1961), the court held:

"There are some, perhaps, who may dispute whether billboards and other advertising devices interfere with safe driving and constitute a traffic hazard . . . , but mere disagreement may not cast doubt on the statute's validity. Matters such as these are reserved for legislative judgment, and the legislative determination, here expressly announced, will not be disturbed unless manifestly unreasonable."

Only 5 of the 11 cases even discuss the First Amendment. See *Stuckey's Stores, Inc.* v. *O'Cheskey*, 93 N. M. 312, 600 P. 2d 258 (1979), appeal dism'd, 446 U. S. 930 (1980); *State* v. *Lotze*, 92 Wash. 2d 52, 593 P. 2d 811, appeal dism'd, 444 U. S. 921 (1979); *Lubbock Poster Co.* v. *City of Lubbock*, 569 S. W. 2d 935 (Tex. Civ. App. 1978), cert. denied, 444 U. S. 833 (1979); *Newman Signs, Inc.* v. *Hjelle*, 268 N. W. 2d 741 (N. D. 1978), appeal dism'd, 440 U. S. 901 (1979); *Markham Advertising Co.* v. *Washington*, 73 Wash. 2d 405, 439 P. 2d 248 (1968), appeal dism'd, 393 U. S. 316 (1969). Therefore, when the plurality states that "[t]here is nothing here to suggest that these judgments are unreasonable," *ante*, at 509, it is really saying that there is nothing unreasonable about other courts finding that there is nothing unreasonable about a legislative judgment. This is hardly a sufficient finding under the heightened scrutiny appropriate for this case. It is not surprising that, of the three cases cited in the plurality's footnote 14 that declined to accept the traffic safety rationale, two *were* decided under heightened scrutiny.

There is another reason why I would hesitate to accept the purported judgment of lawmakers that billboards are traffic hazards. Until recently, it was thought that aesthetics *alone* could never be a sufficient justification to support an exercise of the police power, and that aesthetics would have to be accompanied by a more traditional health, safety, morals, or welfare justification. Indeed, the California Supreme Court decision below explicitly repudiated the holding of a prior case, *Varney & Green* v. *Williams*, 155 Cal. 318, 100 P. 867 (1909), that held aesthetics to be an insufficient predicate for police power action. 26 Cal. 3d, at 860–861, 610 P. 2d, at 413. Therefore, in the case of billboard regulations, many cities may have used the justification of traffic safety in order to sustain ordinances where their true motivation was aesthetics. As the Hawaii Supreme Court com-

Statement 111a, billboards not visible from the street but nevertheless visible from the "boundary of the premises" are not exempted from the regulation's prohibition.

Second, I think that the city has failed to show that its asserted interest in aesthetics is sufficiently substantial in the commercial and industrial areas of San Diego. I do not doubt that "[i]t is within the power of the [city] to determine that the community should be beautiful," *Berman* v. *Parker,* 348 U. S. 26, 33 (1954), but that power may not be exercised in contravention of the First Amendment. This Court noted in *Schad* that "[t]he [city] has presented no evidence, and it is not immediately apparent as a matter of experience, that live entertainment poses problems . . . more significant than those associated with various permitted uses; nor does it appear that the [city] has arrived at a defensible conclusion that unusual problems are presented by live entertainment." 452 U. S., at 73. Substitute the word "billboards" for the words "live entertainment," and that sentence would equally apply to this case.

It is no doubt true that the appearance of certain areas of the city would be enhanced by the elimination of billboards, but "it is not immediately apparent as a matter of experience" that their elimination in all other areas as well would

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mented in *State* v. *Diamond Motors, Inc.*, 50 Haw. 33, 36, 429 P. 2d 825, 827 (1967), in upholding a comprehensive sign ordinance:

"[The City's] answering brief admittedly 'does not extend to supporting the proposition that aesthetics alone is a proper objective for the exercise of the City's police power.' Perhaps, the 'weight of authority' in other jurisdictions persuaded the City to present the more traditional arguments because it felt that it was safer to do so. However, the brief of The Outdoor Circle as amicus curiae presents, as we think, a more modern and forthright position . . . .

". . . We are mindful of the reasoning of most courts that have upheld the validity of ordinances regulating outdoor advertising and of the need felt by them to find some basis in economics, health, safety, or even morality. . . . We do not feel so constrained." (Footnote omitted.)

See also C. Haar, Land-Use Planning 403–408 (3d ed. 1976).

have more than a negligible impact on aesthetics. See *John Donnelly & Sons* v. *Campbell,* 639 F. 2d 6, 23 (CA1 1980) (Pettine, J., concurring in judgment), summarily aff'd, *post,* p. 916.[8] The joint stipulation reveals that

> "[s]ome sections of the City of San Diego are scenic, some blighted, some containing strips of vehicle related commercial uses, some contain new and attractive office buildings, some functional industrial development and some areas contain older but useful commercial establishments." Joint Stipulation of Facts No. 8, App. 43a.

A billboard is not *necessarily* inconsistent with oil storage tanks, blighted areas, or strip development. Of course, it is not for a court to impose its own notion of beauty on San Diego. But before deferring to a city's judgment, a court must be convinced that the city is seriously and comprehensively addressing aesthetic concerns with respect to its environment. Here, San Diego has failed to demonstrate a comprehensive coordinated effort in its commercial and industrial areas to address other obvious contributors to an unattractive environment. In this sense the ordinance is underinclusive. See *Erznoznik* v. *City of Jacksonville,* 422 U. S. 205, 214 (1975). Of course, this is not to say that the city must address all aesthetic problems at the same time, or none at all. Indeed, from a planning point of view, attacking the problem

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[8] Judge Pettine comments on Maine's statewide ban:

"Even assuming that a total ban on billboards will produce some aesthetic gain in all highway areas, the quantum of improvement will obviously vary with the site involved. In undeveloped areas, it may very well be that signs and billboards are the principal eyesores; here, the benefit will be great, for their removal would return the landscape to its pristine beauty. In industrial and commercial areas, however, signs and billboards are but one of countless types of manmade intrusions on the natural landscape. Without denying that some perceptible change for the better would occur even here, I question whether the margin of improvement obtained in these areas can really justify the state's decision to virtually eradicate commercial speech by sign and billboard." 639 F. 2d, at 23.

incrementally and sequentially may represent the most sensible solution. On the other hand, if billboards alone are banned and no further steps are contemplated or likely, the commitment of the city to improving its physical environment is placed in doubt. By showing a comprehensive commitment to making its physical environment in commercial and industrial areas more attractive,[9] and by allowing only narrowly tailored exceptions, if any,[10] San Diego could demon-

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[9] For example, Williamsburg, Va., requires that any building newly constructed or altered in the city "shall have such design and character as not to detract from the value and general harmony of design of buildings already existing in the surrounding area in which the building is located or is to be located." Williamsburg City Code § 30–80 (1979).

[10] Appellants argue that the exceptions to the total ban, such as for on-premises signs, undercut the very goals of traffic safety and aesthetics that the city claims as paramount, and therefore invalidate the whole ordinance. Brief for Appellants 42–43. But obviously, a city can have special goals the accomplishment of which would conflict with the overall goals addressed by the total billboard ban. It would make little sense to say that a city has an all-or-nothing proposition—either ban all billboards or none at all. Because I conclude that the San Diego ordinance impermissibly infringes First Amendment rights in that the city has failed to justify the ordinance sufficiently in light of substantial governmental interests, I need not decide, as the plurality does in Part V of its opinion, whether the exceptions to the total ban constitute independent grounds for invalidating the regulation. However, if a city can justify a total ban, I would allow an exception only if it directly furthers an interest that is at least as important as the interest underlying the total ban, if the exception is no broader than necessary to advance the special goal, and if the exception is narrowly drawn so as to impinge as little as possible on the overall goal. To the extent that exceptions rely on content-based distinctions, they must be scrutinized with special care.

The San Diego billboard ordinance is a classic example of conflicting interests. In its section entitled "Purpose and Intent," the ordinance states:

"It is the purpose of these regulations to eliminate excessive and confusing sign displays which do not relate to the premises on which they are located; to eliminate hazards to pedestrians and motorists brought about by distracting sign displays; to ensure that signing is used as

strate that its interest in creating an aesthetically pleasing environment is genuine and substantial. This is a requirement where, as here, there is an infringement of important constitutional consequence.

I have little doubt that some jurisdictions will easily carry the burden of proving the substantiality of their interest in

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identification and not as advertisement; and to preserve and improve the appearance of the City as a place in which to live and work.

"It is the intent of these regulations to protect an important aspect of the economic base of the City by preventing the destruction of the natural beauty and environment of the City, which is instrumental in attracting nonresidents who come to visit, trade, vacation or attend conventions; to safeguard and enhance property values; to protect public and private investment in buildings and open spaces; and to protect the public health, safety and general welfare." App. to Juris. Statement 106a–107a.

To achieve these purposes, the ordinance effects a general ban on billboards, but with an exception for on-premises identification signs. Of course, each on-premises sign detracts from achieving the city's goals of traffic safety and aesthetics, but contributes to the alternative goal of identification. In this way San Diego seeks to achieve the best compromise between the goals of traffic safety and aesthetics on the one hand, and convenience for the public on the other.

San Diego has shown itself fully capable of drafting narrow exceptions to the general ban. For example, the city has promulgated special regulations for sign control in the La Jolla sign control district:

"The Sign Control District is intended to maintain the unique, distinctive character and economic value of the La Jolla area in the City of San Diego and to regulate advertising of commercial enterprises . . . .

. . . . . .

"One sign shall be permitted on each lot or parcel of real estate, . . . provided . . .:

. . . . . .

"Such sign shall not exceed 5″ x 8″ in size and no part of such sign shall extend more than four feet above the surface of the ground upon which it is erected." *Id.*, at 113a–115a.

My views in this case make it unnecessary to decide the permissibility of the on-premises exception, but it is not inconceivable that San Diego could incorporate an exception to its overall ban to serve the identification interest without violating the Constitution. I also do not decide the validity of the other exceptions to the San Diego regulation.

aesthetics. For example, the parties acknowledge that a historical community such as Williamsburg, Va., should be able to prove that its interests in aesthetics and historical authenticity are sufficiently important that the First Amendment value attached to billboards must yield. See Tr. of Oral Arg. 22–25. And I would be surprised if the Federal Government had much trouble making the argument that billboards could be entirely banned in Yellowstone National Park, where their very existence would so obviously be inconsistent with the surrounding landscape. I express no view on whether San Diego or other large urban areas will be able to meet the burden.[11] See *Schad* v. *Mount Ephraim,* 452 U. S., at 77 (BLACKMUN, J., concurring). But San Diego failed to do so here, and for that reason I would strike down its ordinance.

III

The plurality's treatment of the commercial-noncommercial distinction in this case is mistaken in its factual analysis of the San Diego ordinance, and departs from this Court's precedents. In Part IV of its opinion, the plurality concludes that the San Diego ordinance is constitutional insofar as it regulates commercial speech. Under its view, a city with merely a reasonable justification could pick and choose between those commercial billboards it would allow and those it would not, or could totally ban all commercial billboards.[12] In Part V,

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[11] Likewise, I express no view on the constitutionality of the Highway Beautification Act of 1965, 23 U. S. C. § 131 (1976 ed. and Supp. III).

[12] The plurality comments that "the city *could reasonably conclude* that a commercial enterprise—as well as the interested public—has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere." *Ante,* at 512 (emphasis added). But *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n,* 447 U. S. 557 (1980), demands more than a rational basis for preferring one kind of commercial speech over another. Moreover, this case does not present legislation implicating the "common-

the plurality concludes, however, that the San Diego ordinance as a whole is unconstitutional because, *inter alia,* it affords a greater degree of protection to commercial than to noncommercial speech:

> "The use of onsite billboards to carry commercial messages related to the commercial use of the premises is freely permitted, but the use of otherwise identical billboards to carry noncommercial messages is generally prohibited. . . . Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." *Ante,* at 513.

The plurality apparently reads the onsite premises exception as limited solely to commercial speech. I find no such limitation in the ordinance. As noted *supra,* the onsite exception allows "signs designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed." App. to Juris. Statement 107a. As I read the ordinance, the content of the sign depends strictly on the identity of the owner or occupant of the premises. If the occupant is a commercial enterprise, the substance of a permissible identifying sign would be com-

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sense differences" between commercial and noncommercial speech that " 'suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.' " *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 98 (1977), quoting *Virginia Pharmacy Board* v. *Virginia Citizens Consumers Council, Inc.,* 425 U. S. 748, 771–772, n. 24 (1976). There is no suggestion that San Diego's billboard ordinance is designed to deal with "false or misleading signs." *Linmark Associates, Inc.* v. *Willingboro, supra,* at 98.

mercial. If the occupant is an enterprise usually associated with noncommercial speech, the substance of the identifying sign would be noncommercial. Just as a supermarket or barbershop could identify itself by name, so too could a political campaign headquarters or a public interest group. I would also presume that, if a barbershop could advertise haircuts, a political campaign headquarters could advertise "Vote for Brown," or "Vote for Proposition 13."

More importantly, I cannot agree with the plurality's view that an ordinance totally banning commercial billboards but allowing noncommercial billboards would be constitutional.[13] For me, such an ordinance raises First Amendment problems at least as serious as those raised by a total ban, for it gives city officials the right—before approving a billboard—to determine whether the proposed message is "commercial" or "noncommercial." Of course the plurality is correct when it observes that "our cases have consistently distinguished between the constitutional protection afforded commercial as opposed to noncommercial speech," *ante*, at 504–505, but it errs in assuming that a *governmental unit* may be put in the position in the first instance of deciding whether the proposed speech is commercial or noncommercial. In individual cases, this distinction is anything but clear. Because making such determinations would entail a substantial exercise of discretion by a city's official, it presents a real danger of curtailing

[13] Of course, as a matter of marketplace economics, such an ordinance may prove the undoing of *all* billboard advertising, both commercial and noncommercial. It may well be that no company would be able to make a profit maintaining billboards used solely for noncommercial messages. Although the record does not indicate how much of appellants' income is produced by noncommercial communicators, it would not be unreasonable to assume that the bulk of their customers advertise commercial messages. Therefore, noncommercial users may represent such a small percentage of the billboard business that it would be impossible to stay in business based upon their patronage alone. Therefore, the plurality's prescription may represent a *de facto* ban on both commercial and noncommercial billboards. This is another reason to analyze this case as a "total ban" case.

noncommercial speech in the guise of regulating commercial speech.

In *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940), the Court reviewed a statute prohibiting solicitation of money by religious groups unless such solicitation was approved in advance by the Secretary of the Public Welfare Council. The statute provided in relevant part:

> "Upon application of any person in behalf of such [solicitation], the secretary shall determine whether such cause is a religious one . . . and conforms to reasonable standards of efficiency and integrity, and, if he shall so find, shall approve the same and issue to the authority in charge a certificate to that effect." *Id.,* at 302.

The Court held that conditioning the ability to solicit on a license, "the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution." *Id.,* at 307. Specifically rejecting the State's argument that arbitrary and capricious acts of a state officer would be subject to judicial review, the Court observed:

> "Upon [the state official's] decision as to the nature of the cause, the right to solicit funds depends. . . . [T]he availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible." *Id.,* at 306.

See *Saia* v. *New York,* 334 U. S. 558, 560 (1948). As Justice Frankfurter subsequently characterized *Cantwell:* "To determine whether a cause is, or is not, 'religious' opens too wide a field of personal judgment to be left to the mere discretion of an official." 334 U. S., at 564 (dissenting opinion).

According such wide discretion to city officials to control the free exercise of First Amendment rights is precisely what

has consistently troubled this Court in a long line of cases starting with *Lovell* v. *Griffin,* 303 U. S. 444, 451 (1938). See, *e. g., Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S., at 552–553 (theatrical performance in city-owned auditorium); *Shuttlesworth* v. *Birmingham,* 394 U. S. 147, 150–153 (1969) (picketing and parading); *Staub* v. *City of Baxley,* 355 U. S. 313, 321–325 (1958) (solicitation); *Kunz* v. *New York,* 340 U. S. 290, 294 (1951) (public meetings); *Saia* v. *New York, supra,* at 560–562 (sound trucks); *Cantwell* v. *Connecticut, supra,* at 307 (solicitation); *Schneider* v. *State,* 308 U. S., at 163–164 (handbills); *Hague* v. *CIO,* 307 U. S., at 516 (handbills). See also *Young* v. *American Mini Theatres, Inc.,* 427 U. S. 50, 93 (1976) (BLACKMUN, J., dissenting); *Hynes* v. *Mayor and Council of Oradell,* 425 U. S. 610, 617 (1976); *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92, 97 (1972). The plurality's bifurcated approach, I fear, will generate billboard ordinances providing the grist for future additions to this list, for it creates discretion where none previously existed.

It is one thing for a court to classify in specific cases whether commercial or noncommercial speech is involved, but quite another—and for me dispositively so—for a city to do so regularly for the purpose of deciding what messages may be communicated by way of billboards. Cities are equipped to make traditional police power decisions, see *Saia* v. *New York, supra,* at 564–565 (Frankfurter, J., dissenting), not decisions based on the content of speech. I would be unhappy to see city officials dealing with the following series of billboards and deciding which ones to permit: the first billboard contains the message "Visit Joe's Ice Cream Shoppe"; the second, "Joe's Ice Cream Shoppe uses only the highest quality dairy products"; the third, "Because Joe thinks that dairy products are good for you, please shop at Joe's Shoppe"; and the fourth, "Joe says to support dairy price supports: they mean lower prices for you at his Shoppe." Or how about some San Diego Padres baseball fans—with no connection to

the team—who together rent a billboard and communicate the message "Support the San Diego Padres, a great baseball team." May the city decide that a United Automobile Workers billboard with the message "Be a patriot—do not buy Japanese-manufactured cars" is "commercial" and therefore forbid it? What if the same sign is placed by Chrysler? [14]

I do not read our recent line of commercial cases as authorizing this sort of regular and immediate line-drawing by governmental entities. If anything, our cases recognize the difficulty in making a determination that speech is either "commercial" or "noncommercial." In *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 764 (1976), after noting that "not all commercial messages contain . . . a very great public interest element," the Court suggested that "[t]here are few to which such an element, however, could not be added." The Court continued: "Our pharmacist, for example, could cast himself as a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof. We see little point in requiring him to do so, and little difference if he does not." *Id.*, at 764–765. Cf. *Murdock* v. *Pennsylvania,* 319 U. S. 105, 111 (1943). In *Bigelow* v. *Virginia,* 421 U. S. 809, 822 (1975), the Court observed that the advertisement of abortion services placed by a New York clinic in a Virginia weekly newspaper—although in part a commercial advertisement—was far more than that:

> "Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curi-

[14] These are not mere hypotheticals that can never occur. The Oil, Chemical and Atomic Workers International Union, AFL–CIO, actually placed a billboard advertisement stating: "Support America's First Environment Strike. Don't Buy Shell!" App. to Juris. Statement; see, n. 4, *supra.* What if Exxon had placed the advertisement? Could Shell respond in kind?

> osity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia. The mere existence of the Women's Pavilion in New York City, with the possibility of its being typical of other organizations there, and the availability of the services offered, were not unnewsworthy."

"The line between ideological and nonideological speech is impossible to draw with accuracy." *Lehman* v. *City of Shaker Heights,* 418 U. S. 298, 319 (1974) (BRENNAN, J., dissenting). I have no doubt that those who seek to convey commercial messages will engage in the most imaginative of exercises to place themselves within the safe haven of noncommercial speech, while at the same time conveying their commercial message. Encouraging such behavior can only make the job of city officials—who already are inclined to ban billboards—that much more difficult and potentially intrusive upon legitimate noncommercial expression.

Accordingly, I would reverse the decision of the California Supreme Court upholding the San Diego billboard ordinance.

JUSTICE STEVENS, dissenting in part.

If enforced as written, the ordinance at issue in this case will eliminate the outdoor advertising business in the city of San Diego.[1] The principal question presented is, therefore, whether a city may prohibit this medium of communication. Instead of answering that question, the plurality focuses its attention on the exceptions from the total ban and, somewhat ironically, concludes that the ordinance is an unconstitutional abridgment of speech because it does not abridge enough speech.[2]

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[1] The parties so stipulated. See Joint Stipulation of Facts No. 2, App. 42a, quoted in n. 8, *infra.*

[2] That is the effect of both JUSTICE WHITE's reaction to the exceptions from a total ban and JUSTICE BRENNAN's concern about the city's attempt to differentiate between commercial and noncommercial messages, although

The plurality first holds that a total prohibition of the use of "outdoor advertising display signs" [3] for commercial messages, other than those identifying or promoting a business located on the same premises as the sign, is permissible. I agree with the conclusion that the constitutionality of this prohibition is not undercut by the distinction San Diego has drawn between onsite and offsite commercial signs, see *ante,* at 512 (plurality opinion), and I therefore join Parts I through IV of JUSTICE WHITE's opinion. I do not, however, agree with the reasoning which leads the plurality to invalidate the ordinance because San Diego failed to include a total ban on the use of billboards for both commercial and noncommercial messages. While leaving open the possibility that a total ban on billboards would be permissible, see *ante,* at 515, n. 20,[4] the plurality finds two flaws in the ordinance. First, because the ordinance permits commercial, but not noncommercial, use of onsite signs, it improperly "afford[s] a greater degree of protection to commercial than to noncommercial speech." *Ante,* at 513. And, second, because the ordinance excepts certain limited categories of noncommercial signs from the prohibition, the city is guilty of "choos[ing] the appropriate subjects for public discourse." *Ante,* at 515.

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both of their conclusions purportedly rest on the character of the abridgment rather than simply its quantity.

[3] The ordinance does not define the term "outdoor advertising display signs." The California Supreme Court adopted the following definition to avoid overbreadth problems:

"'[A] rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public.'" 26 Cal. 3d 848, 856, n. 2, 610 P. 2d 407, 410, n. 2 (1980).

[4] As a practical matter, the plurality may well be approving a total ban on billboards, or at least on offsite billboards. For it seems unlikely that the outdoor advertising industry will be able to survive if its only customers are those persons and organizations who wish to use billboards to convey noncommercial messages. See *ante,* at 536, n. 13 (BRENNAN, J., concurring in judgment).

Although it is possible that some future applications of the San Diego ordinance may violate the First Amendment, I am satisfied that the ordinance survives the challenges that these appellants have standing to raise. Unlike the plurality, I do not believe that this case requires us to decide any question concerning the kind of signs a property owner may display on his own premises. I do, however, believe that it is necessary to confront the important question, reserved by the plurality, whether a city may entirely ban one medium of communication. My affirmative answer to that question leads me to the conclusion that the San Diego ordinance should be upheld; that conclusion is not affected by the content-neutral exceptions that are the principal subject of the debate between the plurality and THE CHIEF JUSTICE.

I

Appellants are engaged in the outdoor advertising business. The parties stipulated that there are critical differences between that business and so-called "onsite" or business signs.[5]

[5] The parties' stipulation described these differences:

"There is a difference between the outdoor advertising business and 'on-site' or business signs. On-site signs advertise businesses, goods or services available on the property on which the sign is located. On the other hand, the outdoor advertising businesses lease real property and erect signs thereon which are made available to national and local advertisers for commercial, political and social messages. Outdoor advertising is different from on-site advertising in that:

"(a) The outdoor advertising sign seldom advertises goods or services sold or made available on the premises on which the sign is located.

"(b) The outdoor advertising sign seldom advertises products or services sold or made available by the owner of the sign.

"(c) The outdoor advertising sign is, generally speaking, made available to 'all-comers', in a fashion similar to newspaper or broadcasting advertising. It is a forum for the communication of messages to the public.

"(d) The copy of the outdoor advertising sign changes, usually monthly. For example, a particular sign may advertise a local savings and loan association one month, a candidate for mayor the next month, the San Diego Zoo the third month, a new car the fourth month, and a union

Outdoor advertising is presented on large, standardized billboards which display a variety of commercial and noncommercial messages that change periodically.[6] The only information in the record about onsite signs is that they "advertise businesses, goods or services available on the property on which the sign is located." Joint Stipulation of Facts No. 22, App. 45a. There is no evidence that any onsite signs in San Diego of the permanent character covered by the ordinance [7] have ever been used for noncommercial messages.

If the ordinance is enforced, two consequences are predictable. Appellants' large and profitable outdoor advertising businesses will be destroyed.[8] Moreover, many persons who

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grievance the fifth month." Joint Stipulation of Facts No. 22, App. 45a–46a.

The importance of the distinction between the outdoor advertising business in which appellants are engaged and the use of "onsite" signs is supported by the fact that the respective kinds of signs are produced by different manufacturers. See JUSTICE BRENNAN'S opinion concurring in the judgment, *ante*, at 526, n. 5.

[6] The physical characteristics of outdoor advertising signs were established by stipulation:

"Outdoor advertising is presented in two basic standardized forms. A 'poster panel' is a 12-foot by 24-foot sign on which a pre-printed message is posted, in sheets. A 'painted bulletin' is generally a 14-foot by 48-foot sign which contains a hand painted message." Joint Stipulation of Facts No. 25, App. 47a.

[7] The California Supreme Court's narrowing construction of the ordinance, see n. 3, *supra*, makes it applicable only to rigidly assembled permanent signs. For that reason, the plurality is able to state that it deals only "with the law of billboards." *Ante*, at 501.

[8] The parties stipulated to the economic effects of the ordinance:

"If enforced as written, Ordinance No. 10795 will eliminate the outdoor advertising business in the City of San Diego.

. . . . . .

"Plaintiffs' outdoor advertising displays produce substantial gross annual income.

. . . . . .

"Enforcement of Ordinance No. 10795 will prevent plaintiffs from engaging in the outdoor advertising business in the City of San Diego and

now rent billboards to convey both commercial and noncommercial messages to the public will not have access to an equally effective means of communication.[9] There is no evidence, however, that enforcement of the ordinance will have any effect whatsoever upon any property owner's use of onsite advertising signs.[10] Nor is there anything in the record to suggest that the use of onsite signs has had any effect on the outdoor advertising business or on any of the consumers of offsite billboard space.

Appellants, of course, have standing to challenge the ordinance because of its impact on their own commercial operations. Because this challenge is predicated in part on the First Amendment, I agree with the plurality and JUSTICE BRENNAN that they also have standing to argue that the ordinance is invalid because of its impact on their customers—the persons who use their billboards to communicate with the public. See *ante,* at 504, n. 11 (plurality opinion). I do not agree, however, that they have any standing to assert the purely hypothetical claims of property owners whose onsite advertising is entirely unaffected by the application of the ordinance at issue in this case.

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will cause plaintiffs to suffer substantial monetary losses." Joint Stipulation of Facts Nos. 2, 26, 32, App. 42a, 48a, 49a.

[9] By stipulation, the parties agreed that the San Diego ordinance will limit the ability of some billboard users to communicate their messages to the public:

"Outdoor advertising increases the sales of products and produces numerous direct and indirect benefits to the public. Valuable commercial, political and social information is communicated to the public through the use of outdoor advertising. Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." Joint Stipulation of Facts No. 28, App. 48a.

[10] Nor is there any evidence that the total elimination of the outdoor advertising business will have any economic effect on manufacturers of onsite signs. See JUSTICE BRENNAN's opinion concurring in the judgment, *ante,* at 526, n. 5.

This case involves only the use of permanent signs in areas zoned for commercial and industrial purposes.[11] It is conceivable that some public-spirited or eccentric businessman might want to use a permanent sign on his commercial property to display a noncommercial message. The record, however, discloses no such use in the past, and it seems safe to assume that such uses in the future will be at best infrequent. Rather than speculate about hypothetical cases that may be presented by property owners not now before the Court, I would judge this ordinance on the basis of its effect on the outdoor advertising market and save for another day any questions concerning its possible effect in an entirely separate market.

The few situations in which constitutional rights may be asserted vicariously represent exceptions from one of the Court's most fundamental principles of constitutional adjudication.[12] Our explanation of that principle in *Broadrick* v. *Oklahoma*, 413 U. S. 601, 610–611 (footnote omitted), merits emphasis and repetition:

> "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others,

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[11] Appellants each own between 500 and 800 outdoor advertising displays in San Diego. See Joint Stipulation of Facts No. 13, App. 44a. All of their signs are located in areas zoned for commercial and industrial uses. Joint Stipulation of Facts No. 20, App. 45a.

The California Supreme Court's narrowing construction of the ordinance was specifically intended to exclude from the coverage of the ordinance signs very different from commercial billboards, such as "a picket sign announcing a labor dispute or a small sign placed in one's front yard proclaiming a political or religious message." 26 Cal. 3d, at 856, n. 2, 610 P. 2d, at 410, n. 2.

[12] See, *e. g.*, *McGowan* v. *Maryland*, 366 U. S. 420, 429: "[T]he general rule is that 'a litigant may only assert his own constitutional rights or immunities' . . . ."

in other situations not before the Court. See, *e. g., Austin* v. *The Aldermen,* 7 Wall. 694, 698–699 (1869); *Supervisors* v. *Stanley,* 105 U. S. 305, 311–315 (1882); *Hatch* v. *Reardon,* 204 U. S. 152, 160–161 (1907); *Yazoo & M. V. R. Co.* v. *Jackson Vinegar Co.,* 226 U. S. 217, 219–220 (1912); *United States* v. *Wurzbach,* [280 U. S.], at 399; *Carmichael* v. *Southern Coal & Coke Co.,* 301 U. S. 495, 513 (1937); *United States* v. *Raines,* 362 U. S. 17 (1960). A closely related principle is that constitutional rights are personal and may not be asserted vicariously. See *McGowan* v. *Maryland,* 366 U. S. 420, 429–430 (1961). These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. See *Younger* v. *Harris,* 401 U. S. 37, 52 (1971). Constitutional judgments, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court:

"'So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.' *Marbury* v. *Madison,* 1 Cranch 137, 178 (1803).

"In the past, the Court has recognized some limited exceptions to these principles, but only because of the most 'weighty countervailing policies.' *United States* v. *Raines,* 362 U. S., at 22–23."

The most important exception to this standing doctrine permits some litigants to challenge on First Amendment grounds laws that may validly be applied against them but

which may, because of their unnecessarily broad reach, inhibit the protected speech of third parties. That exception plays a vital role in our First Amendment jurisprudence.[13] But it is nonetheless a limited exception. Because "[a]pplication of the overbreadth doctrine . . . is, manifestly, strong medicine," it is employed "sparingly and only as a last resort." *Broadrick,* 413 U. S., at 613. As the Court explained in *Broadrick,* the doctrine will be applied only if the overbreadth of a statute is substantial in relation to its "plainly legitimate sweep":

> "Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. Cf. *Alderman* v. *United States,* 394 U. S. 165, 174–175 (1969). To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that § 818 is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Id.,* at 615–616 (footnote omitted).[14]

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[13] See, *e. g., Dombrowski* v. *Pfister,* 380 U. S. 479; *Gooding* v. *Wilson,* 405 U. S. 518; *Keyishian* v. *Board of Regents,* 385 U. S. 589; *Shuttlesworth* v. *Birmingham,* 394 U. S. 147.

[14] Even the dissenting Justices in *Broadrick,* although they disagreed with the Court's refusal to apply the overbreadth doctrine in that case, acknowledged that an overbreadth challenge should not be entertained in every case raising First Amendment issues:

"We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible applica-

In my judgment, the likelihood that the San Diego ordinance will have a significant adverse impact on the users of onsite signs is sufficiently speculative and remote that I would not attempt to adjudicate the hypothetical claims of such parties on this record. Surely the interests of such parties do not necessarily parallel the interests of these appellants.[15] Moreover, changes in the provisions of the ordinance concerning onsite advertising would not avoid the central question that is presented by appellants' frontal attack on the application of the ordinance to their own businesses and to their customers.[16] I believe the Court should decide that question and put the hypothetical claims of onsite advertisers entirely to one side.

II

Just as the regulation of an economic market may either enhance or curtail the free exchange of goods and services,[17] so may regulation of the communications market sometimes facilitate and sometimes inhibit the exchange of information, ideas, and impressions. Procedural rules in a deliberative body are designed to improve the quality of debate. Our

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tion, and in that sense a requirement of substantial overbreadth is already implicit in the doctrine." 413 U. S., at 630 (BRENNAN, J., joined by STEWART and MARSHALL, JJ., dissenting).

[15] Indeed, the parties stipulated that onsite advertising differs in significant respects from the outdoor advertising business in which appellants are engaged. See n. 5, *supra*.

[16] Ironically, today the plurality invalidates this ordinance—not because it is too broad—but rather because it is not broad enough. It assumes for the purpose of decision that a repeal of all exceptions, including the exception for onsite advertising, would cure the defects it finds in the present ordinance. See *ante*, at 515, n. 20. However, because neither the appellants nor the onsite advertisers would derive any benefits from a repeal of the exception for onsite commercial signs, the plurality's reliance on the overbreadth doctrine to support vicarious standing in this case is curious indeed.

[17] Compare *Chicago Board of Trade* v. *United States*, 246 U. S. 231, with *United States* v. *Trenton Potteries Co.*, 273 U. S. 392.

cases upholding regulation of the time, place, or manner of communication have been decided on the implicit assumption that the net effect of the regulation on free expression would not be adverse. In this case, however, that assumption cannot be indulged.

The parties have stipulated, correctly in my view,[18] that the net effect of the city's ban on billboards will be a reduction in the total quantity of communication in San Diego. If the ban is enforced, some present users of billboards will not be able to communicate in the future as effectively as they do now.[19] This ordinance cannot, therefore, be sustained on the assumption that the remaining channels of communication will be just as effective for all persons as a communications marketplace which includes a thousand or more large billboards available for hire.

The unequivocal language of the First Amendment prohibits any law "abridging the freedom of speech." That language could surely be read to foreclose any law reducing the quantity of communication within a jurisdiction. I am convinced, however, that such a reading would be incorrect. My conviction is supported by a hypothetical example, by the Court's prior cases, and by an appraisal of the healthy character of the communications market.

Archaeologists use the term "graffiti" to describe informal inscriptions on tombs and ancient monuments. The graffito was familiar in the culture of Egypt and Greece, in the Italian decorative art of the 15th century, and it survives today in some subways and on the walls of public buildings.[20] It is

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[18] Because the record makes it clear that the business of operating billboards has prospered in San Diego, it is obvious that this medium is more effective than others for some forms of communication. See n. 8, *supra*.

[19] See nn. 8, 9, *supra*.

[20] See generally A. Read, Classic American Graffiti (1977); R. Reisner, Graffiti: Two Thousand Years of Wall Writing (1971); V. Pritchard, English Medieval Graffiti (1967).

an inexpensive means of communicating political, commercial, and frivolous messages to large numbers of people; some creators of graffiti have no effective alternative means of publicly expressing themselves. Nevertheless, I believe a community has the right to decide that its interests in protecting property from damaging trespasses and in securing beautiful surroundings outweigh the countervailing interest in uninhibited expression by means of words and pictures in public places. If the First Amendment categorically protected the marketplace of ideas from any quantitative restraint, a municipality could not outlaw graffiti.

Our prior decisions are not inconsistent with this proposition. Whether one interprets the Court's decision in *Kovacs* v. *Cooper*, 336 U. S. 77, as upholding a total ban on the use of sound trucks, or merely a ban on the "loud and raucous" use of amplifiers, the case at least stands for the proposition that a municipality may enforce a rule that curtails the effectiveness of a particular means of communication.[21] Even the dissenting Justices in that case thought it obvious that "cities may restrict or absolutely ban the use of amplifiers on busy streets in the business area." *Id.*, at 104 (Black, J., joined by Douglas and Rutledge, JJ., dissenting).[22] *Kovacs*, I be-

[21] In his opinion announcing the judgment of the Court, Justice Reed wrote:

"That more people may be more easily and cheaply reached by sound trucks, perhaps borrowed without cost from some zealous supporter, is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open." 336 U. S., at 88–89.

[22] That excerpt from Justice Black's dissent is not, of course, sufficient evidence to tell us whether or not he would have upheld a city's total ban on billboards. It does seem clear, however, that he did not adopt the absolute position that any reduction in the quantity of effective communication is categorically prohibited by the First Amendment. The full paragraph in which the quoted phrase appears reads:

"I am aware that the 'blare' of this new method of carrying ideas is susceptible of abuse and may under certain circumstances constitute an

lieve, forecloses any claim that a prohibition of billboards must fall simply because it has some limiting effect on the communications market.[23]

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intolerable nuisance. But ordinances can be drawn which adequately protect a community from unreasonable use of public speaking devices without absolutely denying to the community's citizens all information that may be disseminated or received through this new avenue for trade in ideas. I would agree without reservation to the sentiment that 'unrestrained use throughout a municipality of all sound amplifying devices would be intolerable.' And of course cities may restrict or absolutely ban the use of amplifiers on busy streets in the business area. A city ordinance that reasonably restricts the volume of sound, or the hours during which an amplifier may be used, does not, in my mind, infringe the constitutionally protected area of free speech. It is because this ordinance does none of these things, but is instead an absolute prohibition of all uses of an amplifier on any of the streets of Trenton at any time that I must dissent." *Id.*, at 104.

[23] Our decisions invalidating ordinances prohibiting or regulating door-to-door solicitation and leafletting are not to the contrary. In those cases, the state interests the ordinances purported to serve—for instance, the prevention of littering or fraud—were only indirectly furthered by the regulation of communicative activity. See, *e. g., Schneider* v. *State,* 308 U. S. 147, 162, 164; *Martin* v. *City of Struthers,* 319 U. S. 141, 147–148; *Cantwell* v. *Connecticut,* 310 U. S. 296, 306; *Schaumburg* v. *Citizens for a Better Environment,* 444 U. S. 620, 636–639. In many of the cases, the ordinances provided for a licensing scheme, rather than a blanket prohibition. The discretion thus placed in the hands of municipal officials was found constitutionally offensive because of the risk of censorship. See, *e. g., Schneider, supra,* at 163–164; *Hague* v. *CIO,* 307 U. S. 496, 516 (opinion of Roberts, J.); *Lovell* v. *Griffin,* 303 U. S. 444, 451–452; *Cantwell, supra,* at 305–307. In addition, because many of these cases involved the solicitation efforts of the Jehovah's Witnesses, see, *e. g., Lovell, supra,* at 448; *Jamison* v. *Texas,* 318 U. S. 413, 413–414; *Schneider, supra,* at 158; *Martin, supra,* at 142; *Cantwell, supra,* at 300, the Court was properly sensitive to the risk that the ordinances could be used to suppress unpopular viewpoints.

In this case, as the plurality acknowledges, the ban on billboards directly serves, and indeed is necessary to further, the city's legitimate interests in traffic safety and aesthetics. See *ante,* at 507–510, 511. San Diego's ordinance places no discretion in any municipal officials, and there is no

I therefore assume that some total prohibitions may be permissible. It seems to be accepted by all that a zoning regulation excluding billboards from residential neighborhoods is justified by the interest in maintaining pleasant surroundings and enhancing property values. The same interests are at work in commercial and industrial zones. Reasonable men may assign different weights to the conflicting interests, but in constitutional terms I believe the essential inquiry is the same throughout the city. For whether the ban is limited to residential areas, to the entire city except its most unsightly sections, or is citywide, it unquestionably will limit the quantity of communication. Moreover, the interests served by the ban are equally legitimate and substantial in all parts of the city. Those interests are both psychological and economic. The character of the environment affects property values and the quality of life not only for the suburban resident but equally so for the individual who toils in a factory or invests his capital in industrial properties.

Because the legitimacy of the interests supporting a citywide zoning plan designed to improve the entire municipality are beyond dispute, in my judgment the constitutionality of the prohibition of outdoor advertising involves two separate questions. First, is there any reason to believe that the regulation is biased in favor of one point of view or another, or that it is a subtle method of regulating the controversial subjects that may be placed on the agenda for public debate? Second, is it fair to conclude that the market which remains open for the communication of both popular and unpopular ideas is ample and not threatened with gradually increasing restraints?

In this case, there is not even a hint of bias or censorship in the city's actions. Nor is there any reason to believe that the overall communications market in San Diego is inade-

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reason to suspect that the ordinance was designed or is being applied to suppress unpopular viewpoints.

quate. Indeed, it may well be true in San Diego as in other metropolitan areas that the volume of communication is excessive and that the public is presented with too many words and pictures to recognize those that are most worthy of attention. In any event, I agree with THE CHIEF JUSTICE that nothing in this record suggests that the ordinance poses a threat to the interests protected by the First Amendment.

III

If one is persuaded, as I am, that a wholly impartial total ban on billboards would be permissible,[24] it is difficult to understand why the exceptions in San Diego's ordinance present any additional threat to the interests protected by the First Amendment. The plurality suggests that, because the exceptions are based in part on the subject matter of noncommercial speech, the city somehow is choosing the permissible subjects for public debate. See *ante,* at 515. While this suggestion is consistent with some of the broad dictum in *Consolidated Edison Co.* v. *Public Service Comm'n,* 447 U. S. 530, it does not withstand analysis in this case.

The essential concern embodied in the First Amendment is that government not impose its viewpoint on the public or select the topics on which public debate is permissible. The San Diego ordinance simply does not implicate this concern. Although *Consolidated Edison* broadly identified regulations based on the subject matter of speech as impermissible content-based regulations, essential First Amendment concerns

[24] It seems fair to infer that Justice Douglas, who cast the deciding vote in *Lehman* v. *City of Shaker Heights,* 418 U. S. 298, would have approved of a prohibition on billboards. See his opinion concurring in the judgment, *id.,* at 306–308. After drawing an analogy between billboards and advertising on municipal vehicles, Justice Douglas noted:

"In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience." *Id.,* at 307.

were implicated in that case because the government was attempting to limit discussion of controversial topics, see *id.*, at 533, and thus was shaping the agenda for public debate. The neutral exceptions in the San Diego ordinance do not present this danger.

To the extent that the exceptions relate to subject matter at all,[25] I can find no suggestion on the face of the ordinance that San Diego is attempting to influence public opinion or to limit public debate on particular issues. Except for the provision allowing signs to be used for political campaign purposes for limited periods, see § 101.0700 (F)(12), none of the exceptions even arguably relates to any controversial subject matter. As a whole they allow a greater dissemination of information than could occur under a total ban. Moreover, it was surely reasonable for the city to conclude that exceptions for clocks, thermometers, historic plaques, and the like, would have a lesser impact on the appearance of the city than the typical large billboards.

The exception for political campaign signs presents a different question. For I must assume that these signs may be

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[25] Most of the ordinance's 12 exceptions, quoted *ante*, at 495, n. 3 (opinion of WHITE, J.), are not based on the subject matter of speech. Several exceptions can be disregarded because they pertain to signs that are not within the coverage of the ordinance at any rate, in light of the California Supreme Court's limiting construction. See n. 3, *supra*. The exceptions relating to vehicular signs fall into this category, see §§ 101.0700 (F)(9), (10), as do the exceptions for signs in transit and storage, see § 101.0700 (F)(3), and for temporary subdivision directional signs, see § 101.0700 (F)(11). The exception for "for sale" signs also appears to describe signs not covered by the ordinance since such signs ordinarily are not "permanently affixed to the ground or permanently attached to a building." Of the remaining exceptions, two are based on the location, rather than content, of the signs, see §§ 101.0700 (F)(2), (6), and a third permits signs required by law or otherwise erected in discharge of governmental functions, see § 101.0700 (F)(1). Thus, only four exceptions are actually based in any way on the subject matter of the signs at issue. See §§ 101.0700 (F)(4), (5), (8), (12).

just as unsightly and hazardous as other offsite billboards. Nevertheless, the fact that the community places a special value on allowing additional communication to occur during political campaigns is surely consistent with the interests the First Amendment was designed to protect. Of course, if there were reason to believe that billboards were especially useful to one political party or candidate, this exception would be suspect. But nothing of that sort is suggested by this record. In the aggregate, therefore, it seems to me that the exceptions in this ordinance cause it to have a less serious effect on the communications market than would a total ban.

In sum, I agree with THE CHIEF JUSTICE that nothing more than a rather doctrinaire application of broad statements that were made in other contexts may support a conclusion that this ordinance is unconstitutional because it includes a limited group of exceptions that neither separately nor in the aggregate compromise "our zealous adherence to the principle that the government may not tell the citizen what he may or may not say." *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 63 (opinion of STEVENS, J.). None of the exceptions is even arguably "conditioned upon the sovereign's agreement with what a speaker may intend to say." *Ibid.* Accordingly, and for the reasons stated in greater detail by THE CHIEF JUSTICE, I respectfully dissent.

CHIEF JUSTICE BURGER, dissenting.

Today the Court takes an extraordinary—even a bizarre—step by severely limiting the power of a city to act on risks it perceives to traffic safety and the environment posed by large, permanent billboards. Those joining the plurality opinion invalidate a city's effort to minimize these traffic hazards and eyesores simply because, in exercising rational legislative judgment, it has chosen to permit a narrow class of signs that serve special needs.

Relying on simplistic platitudes about content, subject matter, and the dearth of other means to communicate, the

billboard industry attempts to escape the real and growing problems every municipality faces in protecting safety and preserving the environment in an urban area. The Court's disposition of the serious issues involved exhibits insensitivity to the impact of these billboards on those who must live with them and the delicacy of the legislative judgments involved in regulating them. American cities desiring to mitigate the dangers mentioned must, as a matter of *federal constitutional law,* elect between two unsatisfactory options: (a) allowing all "noncommercial" signs, no matter how many, how dangerous, or how damaging to the environment; or (b) forbidding signs altogether. Indeed, lurking in the recesses of today's opinions is a not-so-veiled threat that the second option, too, may soon be withdrawn. This is the long arm and voracious appetite of federal power—this time judicial power—with a vengeance, reaching and absorbing traditional concepts of local authority.

(1)

This case presents the Court with its first occasion to address the constitutionality of billboard regulation by local government. I fear that those joining in today's disposition have become mesmerized with broad, but not controlling, language appearing in our prior opinions but now torn from its original setting. They overlook a cogent admonition to avoid

> "mechanically apply[ing] the doctrines developed in other contexts. . . . The unique situation presented by this ordinance calls, as cases in this area so often do, for a careful inquiry into the competing concerns of the State and the interests protected by the guarantee of free expression." *Young* v. *American Mini Theatres, Inc.,* 427 U. S. 50, 76 (1976) (POWELL, J., concurring).

See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U. S. 94, 134 (1973) (STEWART, J., concurring).

It is not really relevant whether the San Diego ordinance is viewed as a regulation regarding time, place, and manner, or as a total prohibition on a medium with some exceptions defined, in part, by content. Regardless of the label we give it, we are discussing a very simple and basic question: the authority of local government to protect its citizens' legitimate interests in traffic safety and the environment by eliminating distracting and ugly structures from its buildings and roadways, to define which billboards actually pose that danger, and to decide whether, in certain instances, the public's need for information outweighs the dangers perceived. The billboard industry's superficial sloganeering is no substitute for analysis, and the plurality opinion and the opinion concurring in the judgment adopt much of that approach uncritically. General constitutional principles indeed apply, but "each case ultimately must depend on its own specific facts . . . ." *Erznoznick* v. *City of Jacksonville,* 422 U. S. 205, 209 (1975).

(2)

(a)

As all those joining in today's disposition necessarily recognize, " '[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.' " *Ante,* at 501, n. 8 (plurality opinion); *ante,* at 527–528 (BRENNAN, J., concurring in judgment) (quoting *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S. 546, 557 (1975)). Accord, *California* v. *LaRue,* 409 U. S. 109, 117 (1972); *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 386 (1969); *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 503 (1952); *Kovacs* v. *Cooper,* 336 U. S. 77, 97 (1949) (Jackson, J., concurring).[1] The uniqueness of

[1] For example, because of the limited spectrum available and the peculiar intrusiveness of the medium, broadcasting is subject to limitations that would be intolerable if applied to other forms of communication. *FCC* v. *Pacifica Foundation,* 438 U. S. 726, 748–749 (1978). Compare *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367 (1969), with *Miami Herald Pub-*

the medium, the availability of alternative means of communication, and the public interest the regulation serves are important factors to be weighed; and the balance very well may shift when attention is turned from one medium to another. *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981). Regulating newspapers, for example, is vastly different from regulating billboards.

Some level of protection is generally afforded to the medium a speaker chooses, but as we have held just this past week in *Heffron*, "the First Amendment does not guarantee the right to communicate one's views at all times and places or *in any manner* that may be desired." *Id.*, at 647 (emphasis added). Justice Black, speaking for the Court in *Adderley* v. *Florida*, 385 U. S. 39, 48 (1966) (emphasis added), "vigorously and forthrightly rejected" the notion that "people who want to propagandize protests or views have a constitutional right to do so whenever and *however* and wherever they please."

In *Kovacs* v. *Cooper, supra*, the Court upheld a municipal ordinance that totally banned sound trucks from a town's borders; other media were available. The Court had no difficulty distinguishing *Saia* v. *New York*, 334 U. S. 558 (1948), decided seven months earlier, where the Court had invalidated an ordinance requiring a permit from the local police chief before using a sound truck. The danger seen in *Saia* was in allowing a single government official to regulate a medium of communication with the attendant risk that the decision would be based on the message, not the medium. *Id.*, at 560–561.

The ordinance in *Kovacs*, however, did not afford that kind of potential for censorship and was held not to violate the First Amendment. 336 U. S., at 82–83 (plurality opin-

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lishing Co. v. *Tornillo*, 418 U. S. 241 (1974). For the same reason, certain media may mix the form with the substance of the communication and the permissible range of regulation is correspondingly narrower than when the message is completely separable from the medium used to convey it.

ion of Reed, J.). Justice Frankfurter, concurring, expressed this point more broadly:

> "So long as a legislature does not prescribe what ideas may be noisily expressed and what may not be, nor discriminate among those who would make inroads upon the public peace, it is not for us to supervise the limits the legislature may impose in safeguarding the steadily narrowing opportunities for serenity and reflection." *Id.*, at 97.

Justice Jackson, also concurring separately, agreed with this core proposition, writing that the *Kovacs* type of regulation would not infringe freedoms of speech "unless such regulation or prohibition undertakes to censor the contents of the broadcasting." *Ibid.*

Later, Chief Justice Warren, speaking for the Court in *United States* v. *O'Brien,* 391 U. S. 367, 376 (1968), observed:

> "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."

In the 1979 Term, we once again reaffirmed that restrictions are valid if they "serve a significant governmental interest and leave ample alternative channels for communication." *Consolidated Edison Co.* v. *Public Service Comm'n,* 447 U. S. 530, 535 (1980). The Court has continued to apply this same standard almost literally to this day in *Heffron* v. *International Society for Krishna Consciousness, Inc., supra,* at 647–648. Accord, *Schad* v. *Mount Ephraim,* 452 U. S. 61, 75–76 (1981).

(b)

San Diego adopted its ordinance to eradicate what it perceives—and what it has a right to perceive—as ugly and dangerous eyesores thrust upon its citizens. This was done

with two objectives in mind: the disfigurement of the surroundings and the elimination of the danger posed by these large, eye-catching signs that divert the attention of motorists.[2] The plurality acknowledges—as they must—that promoting traffic safety and preserving scenic beauty "are substantial governmental goals." *Ante,* at 507–508. See also *ante,* at 528 (BRENNAN, J., concurring in judgment) (traffic safety). But, having acknowledged the legitimacy of local governmental authority, the plurality largely ignores it.

As the plurality also recognizes, *ante,* at 508–510, the means the city has selected to advance these goals are sensible and do not exceed what is necessary to eradicate the dangers seen. When distraction of motorists is the perceived harm, the authorities reasonably can conclude that each billboard adds to the dangers in moving traffic; obviously, the billboard industry does not erect message carriers that do not catch the eye of the traveler.[3] In addition, a legislative body reasonably can conclude that every large billboard adversely

[2] Congress, too, has recognized the dangers to safety and the environment posed by billboards. The Highway Beautification Act of 1965 provides in part:

"The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, *to promote the safety and recreational value of public travel, and to preserve natural beauty.*" 23 U. S. C. § 131 (a) (emphasis added).

If San Diego, through its duly constituted legislative body, may not guard against the defacing of its environs and the risks to the movement of traffic by eliminating billboards, the authority of Congress to limit billboards adjacent to federally funded highways is called into question as well. See *ante,* at 515, n. 20 (plurality opinion); *ante,* at 534, n. 11 (BRENNAN, J., concurring in judgment). Surely, the legislative powers of a municipality over its own affairs cannot be less than those of the Congress of the United States in its area of authority.

[3] The parties have stipulated that billboards come in "two basic standardized forms," 12 ft. by 24 ft. and 14 ft. by 48 ft. Joint Stipulation of Facts No. 25, App. 47a.

affects the environment, for each destroys a unique perspective on the landscape and adds to the visual pollution of the city.[4] Pollution is not limited to the air we breathe and the water we drink; it can equally offend the eye and the ear.

The means chosen to effectuate legitimate governmental interests are not for this Court to select. "These are matters for the legislative judgment controlled by public opinion." *Kovacs* v. *Cooper,* 336 U. S., at 96–97 (Frankfurter, J., concurring). The plurality ignores this Court's seminal opinions in *Kovacs* by substituting its judgment for that of city officials and disallowing a ban on one offensive and intrusive means of communication when other means are available. Although we must ensure that any regulation of speech "further[s] a sufficiently substantial government interest," *Schad* v. *Mount Ephraim, supra,* at 68, given a reasonable approach to a perceived problem, this Court's duty is not to make the primary policy decisions but instead is to determine whether the legislative approach is essentially neutral to the messages conveyed and leaves open other adequate means of conveying those messages. This is the essence of both democracy and federalism, and we gravely damage both when we undertake to throttle legislative discretion and judgment at the "grass roots" of our system.

(c)

The plurality, in a remarkable *ipse dixit,* states that "[t]here can be no question that a prohibition on the erection of billboards infringes freedom of speech . . . ." *Ante,* at 520. Of course the city has restricted one form of communication, and this action implicates the First Amendment. But to say the ordinance presents a First Amendment *issue* is not necessarily to say that it constitutes a First Amendment *violation.*

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[4] Indeed, streets themselves may be places of tranquility. *Heffron* v. *International Society for Krishna Consciousness, Inc.,* 452 U. S. 640, 651 (1981).

The plurality confuses the Amendment's coverage with the scope of its protection. See generally Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand. L. Rev. 265, 270, 275–276 (1981).

In the process of eradicating the perceived harms, the ordinance here in no sense suppresses freedom of expression, either by discriminating among ideas or topics or by supressing discussion generally. San Diego has not attempted to suppress any particular point of view or any category of messages; it has not censored any information; it has not banned any thought. See *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92, 96 (1972). It has not "attempt[ed] to give one side of a debatable public question an advantage in expressing its view to the people . . . ." *First National Bank of Boston* v. *Bellotti,* 435 U. S. 765, 785 (1978) (footnote omitted). See *Madison School District* v. *Wisconsin Employment Relations Comm'n,* 429 U. S. 167, 175–176 (1976). There is no suggestion or danger that the city has permitted these narrow categories of signs but forbidden the vast majority "merely because public officials disapprove of the speaker's view." *Niemotko* v. *Maryland,* 340 U. S. 268, 282 (1951) (Frankfurter, J., concurring in result). Moreover, aside from a few narrow and essentially negligible exceptions, see *infra,* at 564–565, 566, San Diego has not differentiated with regard to topic. See *Consolidated Edison Co.* v. *Public Service Comm'n,* 447 U. S., at 537–538; *Carey* v. *Brown,* 447 U. S. 455, 462, n. 6, 463 (1980); *First National Bank* v. *Bellotti, supra,* at 784–785; *Police Dept. of Chicago* v. *Mosley, supra,* at 96. The city has not undertaken to determine, paternalistically, " 'what information is relevant to self-government.' " *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323, 339 (1974) (quoting *Rosenbloom* v. *Metromedia, Inc.,* 403 U. S. 29, 79 (1971) (MARSHALL, J., dissenting)).

The messages conveyed on San Diego billboards—whether commercial, political, social, or religious—are not inseparable from the billboards that carry them. These same mes-

sages can reach an equally large audience through a variety of other media: newspapers, television, radio, magazines, direct mail, pamphlets, etc. True, these other methods may not be so "eye-catching"—or so cheap—as billboards,[5] but there has been no suggestion that billboards heretofore have advanced any particular viewpoint or issue disproportionately to advertising generally. Thus, the ideas billboard advertisers have been presenting are not *relatively* disadvantaged vis-à-vis the messages of those who heretofore have chosen other methods of spreading their views. See *First National Bank* v. *Bellotti, supra,* at 789. See also *Martin* v. *Struthers,* 319 U. S. 141, 146 (1943). It borders on the frivolous to suggest that the San Diego ordinance infringes on freedom of expression, given the wide range of alternative means available.

(3)

(a)

The plurality concludes that a city may constitutionally exercise its police power by eliminating offsite *commercial* billboards; they reach this result by following our recent cases holding that commercial speech, while protected by the Constitution, receives less protection than "noncommercial"—*i. e.,* political, religious, social—speech. See, *e. g., Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n,* 447 U. S. 557 (1980); *Ohralik* v. *Ohio State Bar Assn.,* 436 U. S. 447 (1978); *Bates* v. *State Bar of Arizona,* 433 U. S. 350 (1977). But as the plurality giveth, they also taketh away—and, in the process take away virtually everything.

[5] Before trial, the parties stipulated: "Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." Joint Stipulation of Facts No. 28, App. 48a. This sweeping, conclusory, and rather vague generalization does nothing to explain how other media are insufficient, inappropriate, or too expensive. More important, the stipulation does not suggest that any particular point of view or issue will be suppressed by the elimination of billboards.

In a bizarre twist of logic, the plurality seems to hold that *because* San Diego has recognized the hardships of its ordinance on certain special needs of citizens and, therefore, exempted a few narrowly defined classes of signs from the ordinance's scope—for example, onsite signs identifying places of business, time-and-temperature signs, commemorative and historic plaques—the ordinance violates the First Amendment. From these dubious premises, the plurality has given every city, town, and village in this country desiring to respond to the hazards posed by billboards a choice, as previously noted, between two equally unsatisfactory alternatives:

> (a) banning all signs of any kind whatsoever, or
>
> (b) permitting all "noncommercial" signs, no matter how numerous, how large, how damaging to the environment, or how dangerous to motorists and pedestrians.

Otherwise, the municipality must give up and do nothing in the face of an ever-increasing menace to the urban environment. Indeed, the plurality hints—and not too subtly—that the first option might be withdrawn if any city attempts to invoke it. See *ante,* at 515, n. 20. This result is insensitive to the needs of the modern urban dweller and devoid of valid constitutional foundations.

(b)

The exceptions San Diego has provided—the presence of which is the plurality's sole ground for invalidating the ordinance—are few in number, are narrowly tailored to peculiar public needs, and do not remotely endanger freedom of speech. Indeed, the plurality concludes that the distinctions among commercial signs are valid. *Ante,* at 512. More generally, as stated *supra,* at 562–563, San Diego has not preferred any viewpoint and, aside from these limited exceptions, has not allowed some subjects while forbidding others.

Where the ordinance does differentiate among topics, it simply allows such noncontroversial things as conventional

signs identifying a business enterprise, time-and-temperature signs, historical markers, and for sale signs. It borders—if not trespasses—on the frivolous to suggest that, by allowing such signs but forbidding noncommercial billboards, the city has infringed freedom of speech. This ignores what we recognized in *Police Dept. of Chicago* v. *Mosley,* 408 U. S., at 98, that "there may be sufficient regulatory interests justifying selective exclusions or distinctions . . . ." For each exception, the city is either acknowledging the unique connection between the medium and the message conveyed, see, *e. g., Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85 (1977) (for sale signs), or promoting a legitimate public interest in information. Similarly, in each instance, the city reasonably could conclude that the balance between safety and aesthetic concerns on the one hand and the need to communicate on the other has tipped the opposite way.[6] More important, in no instance is the exempted topic controversial; there can be no rational debate over, for example, the time, the temperature, the existence of an offer of sale, or the identity of a business establishment. The danger of San Diego's setting the agenda of public discussion is not simply *de minimis;* it is nonexistent. The plurality today trivializes genuine First Amendment values by hinging its holding on the city's decision to allow some signs while preventing others that constitute the vast majority of the genre.

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[6] Indeed, the plurality acknowledges that a city may undertake this kind of balancing:

"As we see it, the city could reasonably conclude that a commercial enterprise—as well as the interested public—has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere." *Ante,* at 512.

A city reasonably may decide that onsite signs, by identifying the premises (even if in the process of advertising), actually promote traffic safety. Prohibiting them would require motorists to pay more attention to street numbers and less to traffic.

Thus, despite the plurality's unique focus, we are not confronted with an ordinance like the one in *Saia* v. *New York*, which vested in a single official—the local police chief—an unlimited discretion to grant or to deny licenses for sound trucks. "Annoyance at ideas can be cloaked in annoyance at sound. The power of censorship inherent in this type of ordinance reveals its vice." 334 U. S., at 562. Accord, *Shuttlesworth* v. *Birmingham*, 394 U. S. 147, 150–151 (1969); *Staub* v. *City of Baxley*, 355 U. S. 313, 322–325 (1958); *Lovell* v. *Griffin*, 303 U. S. 444, 451–452 (1938). See also *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S., at 546–548 (STEVENS, J., concurring in judgment). But here we have no allegation and no danger that San Diego is using its billboard ordinance as a mask for promoting or deterring any viewpoint or issue of public debate. This ordinance, in precisely the same sense as the regulation we upheld last week in *Heffron* v. *International Society for Krishna Consciousness, Inc.*, "is not open to the kind of arbitrary application that this Court has condemned . . . because such discretion has the potential for becoming a means of suppressing a particular point of view." 452 U. S., at 649.[7]

San Diego simply is exercising its police power to provide an environment of tranquility, safety, and as much residual beauty as a modern metropolitan area can achieve. A city's simultaneous recognition of the need for certain exceptions permitting limited forms of communication, purely factual in nature and neutral as to the speaker, should not wholly deprive the city of its ability to address the balance of the problem. There is no threat here to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964).

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[7] As JUSTICE BRENNAN recognizes, *ante*, at 536–540, the plurality's treatment of the ordinance may well create this very danger, for the plurality appears willing to allow municipal officials to determine what is and is not noncommercial speech.

(c)

The fatal flaw in the plurality's logic comes when it concludes that San Diego, by exempting onsite commercial signs, thereby has "afford[ed] a greater degree of protection to commercial than to noncommercial speech." *Ante,* at 513. The "greater degree of protection" our cases have given noncommercial speech establishes a narrower range of constitutionally permissible regulation. To say noncommercial speech receives a greater degree of *constitutional* protection, however, does not mean that a legislature is forbidden to afford differing degrees of *statutory* protection when the restrictions on each form of speech—commercial and noncommercial—otherwise pass constitutional muster under the standards respectively applicable.

No case in this Court creates, as the plurality suggests, a hierarchy of types of speech in which, if one type is actually protected through legislative judgment, the Constitution compels that that judgment be exercised in favor of all types ranking higher on the list. When a city chooses to impose looser restrictions in one area than it does in another analogous area—even one in which the Constitution more narrowly constrains legislative discretion—it neither undermines the constitutionality of its regulatory scheme nor renders its legislative choices *ipso facto* irrational. A city does not thereby "conced[e] that some communicative interests . . . are stronger than its competing interests in esthetics and traffic safety," *ante,* at 520; it has only declined, in one area, to exercise its powers to the full extent the Constitution permits. The Constitution does not require any governmental entity to reach the limit of permissible regulation solely because it has chosen to do so in a related area. Cf. *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489 (1955) (a "legislature may select one phase of one field and apply a remedy there, neglecting the others"). The plurality today confuses the degree of constitutional protection—*i. e.,* the strictness of the test applied—with the outcome of legislative judgment.

By allowing communication of certain commercial ideas via billboards, but forbidding noncommercial signs altogether, a city does not necessarily place a greater "value" on commercial speech.[8] In these situations, the city is simply recognizing that it has greater latitude to distinguish among various forms of commercial communication when the same distinctions would be impermissible if undertaken with regard to noncommercial speech. Indeed, when adequate alternative channels of communication are readily available so that the message may be freely conveyed through other means, a city arguably is more faithful to the Constitution by treating all noncommercial speech the same than by attempting to impose the same classifications in noncommercial as it has in commercial areas. To undertake the same kind of balancing and content judgment with noncommercial speech that is permitted with commercial speech is far more likely to run afoul of the First Amendment.[9]

Thus, we may, consistent with the First Amendment, hold that a city may—and perhaps must—take an all-or-nothing approach with noncommercial speech yet remain free to adopt selective exceptions for commercial speech, as long as the latter advance legitimate governmental interests. In-

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[8] Indeed, in *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (1974), we upheld a municipal policy allowing commercial but not political advertising on city buses. I cannot agree with the plurality that *Lehman* "ha[s] no application here." *Ante*, at 514, n. 19. Although *Lehman* dealt with limited space leased by the city and this case deals with municipal regulation of privately leased space, the constitutional principle is the same: a city may forgo the "lurking doubts about favoritism" in granting space to some, but necessarily not all, political advertisers. 418 U. S., at 304 (plurality opinion of BLACKMUN, J.). The same constitutional dangers do not arise in allocating space among commercial advertisers.

[9] See n. 8, *supra*. If a city were to permit onsite noncommercial billboards, one can imagine a challenge based on the argument that this favors the views of persons who can afford to own property in commercial districts. See *supra*, at 562–563. I intimate no view on whether I would accept such an argument should that case ever arise.

deed, it is precisely *because* "the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests," *ante,* at 514, that a city should be commended, not condemned, for treating all noncommercial speech the same.

(4)

The Court today unleashes a novel principle, unnecessary and, indeed, alien to First Amendment doctrine announced in our earlier cases. As JUSTICE STEVENS cogently observes, the plurality, "somewhat ironically, concludes that the ordinance is an unconstitutional abridgment of speech *because it does not abridge enough speech.*" *Ante,* at 540 (emphasis added). The plurality gravely misconstrues the commercial-noncommercial distinction of earlier cases when it holds that the preferred position of noncommercial speech compels a city to impose the same or greater limits on commercial as on noncommercial speech. The Court today leaves the modern metropolis with a series of Hobson's choices and rejects basic concepts of federalism by denying to every community the important powers reserved to the people and the States by the Constitution. This is indeed "an exercise of raw judicial power," *Doe* v. *Bolton,* 410 U. S. 179, 222 (1973) (WHITE, J., dissenting), and is far removed from the high purposes of the First Amendment.

JUSTICE REHNQUIST, dissenting.

I agree substantially with the views expressed in the dissenting opinions of THE CHIEF JUSTICE and JUSTICE STEVENS and make only these two additional observations: (1) In a case where city planning commissions and zoning boards must regularly confront constitutional claims of this sort, it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn; and (2) I regret even more

keenly my contribution to this judicial clangor, but find that none of the views expressed in the other opinions written in the case come close enough to mine to warrant the necessary compromise to obtain a Court opinion.

In my view, the aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community, see *Berman* v. *Parker,* 348 U. S. 26, 32–33 (1954), regardless of whether the particular community is "a historical community such as Williamsburg" or one as unsightly as the older parts of many of our major metropolitan areas. Such areas should not be prevented from taking steps to correct, as best they may, mistakes of their predecessors. Nor do I believe that the limited exceptions contained in the San Diego ordinance are the types which render this statute unconstitutional. The closest one is the exception permitting billboards during political campaigns, but I would treat this as a virtually self-limiting exception which will have an effect on the aesthetics of the city only during the periods immediately prior to a campaign. As such, it seems to me a reasonable outlet, limited as to time, for the free expression which the First and Fourteenth Amendments were designed to protect.

Unlike JUSTICE BRENNAN, I do not think a city should be put to the task of convincing a local judge that the elimination of billboards would have more than a negligible impact on aesthetics. Nothing in my experience on the bench has led me to believe that a judge is in any better position than a city or county commission to make decisions in an area such as aesthetics. Therefore, little can be gained in the area of constitutional law, and much lost in the process of democratic decisionmaking, by allowing individual judges in city after city to second-guess such legislative or administrative determinations.

Syllabus

ARKANSAS LOUISIANA GAS CO. *v.* HALL ET AL.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 78–1789. Argued April 20, 1981—Decided July 2, 1981

In 1952, respondent natural gas producers and petitioner entered into a contract under which respondents agreed to sell petitioner natural gas from a certain gas field in Louisiana. The contract contained a fixed price schedule and a "favored nations clause," which provided that if petitioner purchased gas from the gas field from another party at a higher rate than it was paying respondents, then respondents would be entitled to a higher price for their sales to petitioner. In 1954, respondents filed the contract and their rates with the Federal Power Commission (now the Federal Energy Regulatory Commission) and obtained from it a certificate authorizing the sale of gas at the specified contract rates. In 1961, petitioner purchased certain leases in the same gas field from the United States and began producing gas on its leasehold. In 1974, respondents filed an action in a Louisiana state court, contending that petitioner's lease payments to the United States had triggered the favored nations clause. Because petitioner had not increased its payments to respondents as required by that clause, respondents sought as damages an amount equal to the difference between the price they actually were paid in the intervening years and the price they would have been paid had that clause gone into effect. Although finding that the clause had been triggered, the trial court held that the "filed rate doctrine," which prohibits a federally regulated seller of natural gas from charging rates higher than those filed with the Commission pursuant to the Natural Gas Act, precluded an award of damages for the period prior to 1972 (the time during which respondents were subject to the Commission's jurisdiction). The intermediate appellate court affirmed, but the Louisiana Supreme Court reversed, holding that respondents were entitled to damages for the period between 1961 and 1972 notwithstanding the filed rate doctrine. The court reasoned that petitioner's failure to inform respondents of the lease payments to the United States had prevented respondents from filing rate increases with the Commission, and that if they had done so the increases would have been approved.

Held: The filed rate doctrine prohibits the award of damages for petitioner's breach during the period that respondents were subject to the Commission's jurisdiction. Pp. 576–585.

(a) The Natural Gas Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and prevents the Commission itself from imposing a rate increase for gas already sold. Here, the Louisiana Supreme Court's ruling amounts to nothing less than the award of a retroactive rate increase based on speculation about what the Commission might have done had it been faced with the facts of this case. This is precisely what the filed rate doctrine forbids. It would undermine the congressional scheme of uniform rate regulation to allow a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the Act. Pp. 576–579.

(b) Congress has granted exclusive authority over rate regulation to the Commission, and, in so doing, withheld the authority to grant retroactive rate increases or to permit collection of a rate other than the one on file. It would be inconsistent with this purpose to permit a state court to do through a breach-of-contract action what the Commission may not do. Under the filed rate doctrine, the Commission alone is empowered to approve the higher rate respondents might have filed with it, and until it has done so, no rate other than the one on file may be charged. The court below thus has usurped a function that Congress has assigned to a federal regulatory body. Cf. *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U. S. 311. This the Supremacy Clause will not permit. Pp. 579–582.

(c) Under the filed rate doctrine, when there is a conflict between the filed rate and the contract rate, the filed rate prevails. P. 582.

(d) Permitting the state court to award what amounts to a retroactive right to collect a rate in excess of the filed rate "only accentuates the danger of conflict," and no appeal to equitable principles can justify such usurpation of federal authority. Pp. 583–584.

368 So. 2d 984, affirmed in part, vacated in part, and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, and BLACKMUN, JJ., joined. POWELL, J., filed a dissenting opinion, *post*, p. 585. STEVENS, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 586. STEWART, J., took no part in the consideration or decision of the case.

Reuben Goldberg argued the cause for petitioner. With him on the briefs were *Robert Roberts, Jr., Marlin Risinger, Jr., W. Michael Adams,* and *Glenn W. Letham.*

James Fleet Howell argued the cause and filed a brief for respondents.*

JUSTICE MARSHALL delivered the opinion of the Court.

The "filed rate doctrine" prohibits a federally regulated seller of natural gas from charging rates higher than those filed with the Federal Energy Regulatory Commission pursuant to the Natural Gas Act, 52 Stat. 821, as amended, 15 U. S. C. § 717 *et seq.* (1976 ed. and Supp. III). The question before us is whether that doctrine forbids a state court to calculate damages in a breach-of-contract action based on an assumption that had a higher rate been filed, the Commission would have approved it.

I

Respondents are producers of natural gas, and petitioner Arkansas Louisiana Gas Co. (Arkla) is a customer who buys their gas. In 1952, respondents [1] and Arkla entered into a contract under which respondents agreed to sell Arkla natural gas from the Sligo Gas Field in Louisiana. The contract contained a fixed price schedule and a "favored nations clause." The favored nations clause provided that if Arkla purchased Sligo Field natural gas from another party at a rate higher than the one it was paying respondents, then respondents would be entitled to a higher price for their sales to Arkla.[2]

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*Briefs of *amici curiae* urging reversal were filed by *Solicitor General McCree, Elliott Schulder, Jerome Nelson, Jerome M. Feit,* and *Joshua Z. Rokach* for the United States et al.; and by *Edward Kliewer, Jr., Dean W. Wallace,* and *Patrick J. McCarthy* for Northern Natural Gas Co.

James R. Coffee and *Edward J. Kremer* filed a brief for Atlantic Richfield Co. as *amicus curiae* urging affirmance.

[1] Respondents include both original parties to the contract and successors in interest to parties to the contract.

[2] The favored nations clause provided in relevant part:

"If at any time during the term of this agreement Buyer should purchase from another party seller gas produced from the subject wells or any other well or wells located in the Sligo Gas Field at a higher price than

In 1954, respondents filed with the Federal Power Commission (now the Federal Energy Regulatory Commission) [3] the contract and their rates and obtained from the Commission a certificate authorizing the sale of gas at the rates specified in the contract.

In September 1961, Arkla purchased certain leases in the Sligo Field from the United States and began producing gas on its leasehold. In 1974, respondents filed this state-court action contending that Arkla's lease payments to the United States had triggered the favored nations clause. Because Arkla had not increased its payments to respondents as required by the clause, respondents sought as damages an amount equal to the difference between the price they actually were paid in the intervening years and the price they would have been paid had the favored nations clause gone into effect.

In its answer, Arkla denied that its lease payments were purchases of gas within the meaning of the favored nations clause. Arkla subsequently amended its answer to allege in addition that the Commission had primary jurisdiction over the issues in contention. Arkla also sought a Commission ruling that its lease payments had not triggered the favored nations clause. The Commission did not act immediately, and the case proceeded to trial. The state trial court found that Arkla's payments had triggered the favored nations clause, but nonetheless held that the filed rate doctrine pre-

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is provided to be paid for gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the difference between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract." App. 99.

[3] On October 1, 1977, the relevant responsibilities of the Federal Power Commission were transferred to the Federal Energy Regulatory Commission. See 10 CFR § 1000.1 (d) (1980). The term "Commission" in this opinion refers to the Federal Power Commission when referring to action taken prior to that date and to the Federal Energy Regulatory Commission when referring to action taken after that date.

cluded an award of damages for the period prior to 1972. The intermediate appellate court affirmed, 359 So. 2d 255 (1978), and both parties sought leave to appeal. The Supreme Court of Louisiana denied Arkla's petition for appeal, 362 So. 2d 1120 (1978), and Arkla sought certiorari in this Court on the question whether the interpretation of the favored nations clause should have been referred to the Commission. We denied the petition. 444 U. S. 878 (1979).

While Arkla's petition for certiorari was pending, the Supreme Court of Louisiana granted respondents' petition for review and reversed the intermediate court on the measure of damages. 368 So. 2d 984 (1979). The court held that respondents were entitled to damages for the period between 1961 and 1972 notwithstanding the filed rate doctrine. The court reasoned that Arkla's failure to inform respondents of the lease payments to the United States had prevented respondents from filing rate increases with the Commission, and that had respondents filed rate increases with the Commission, the rate increases would have been approved. *Id.*, at 991. After the decision by the Supreme Court of Louisiana, the Commission in May 1979 finally declined to exercise primary jurisdiction over the case, holding that the interpretation of the favored nations clause raised no matters on which the Commission had particular expertise. *Arkansas Louisiana Gas Co.* v. *Hall*, 7 FERC ¶ 61,175, p. 61,321.[4] The Commis-

[4] The May 1979 order was actually the Commission's second decision on primary jurisdiction. The Commission initially declined to exercise primary jurisdiction in March 1976, citing a then-existing policy against assuming jurisdiction over matters pending before a court. *Arkansas Louisiana Gas Co.* v. *Hall*, 55 F. P. C. 1018, 1020–1021. On rehearing, the Commission further noted that on October 19, 1972, respondents had gained "small producer" status, see n. 5, *infra*, and were therefore no longer required to make rate increase filings. *Arkansas Louisiana Gas Co.* v. *Hall*, 56 F. P. C. 2905 (1976). Arkla challenged the Commission's automatic deferral policy before the United States Court of Appeals for the District of Columbia Circuit. While the matter was pending before that court, the Commission asked that the record be remanded to it for further considera-

sion did, however, state: "It is our opinion that the Louisiana Supreme Court's award of damages for the 1961–1972 period violates the filed rate doctrine." *Id.*, at 61,325, n. 18.[5] Under that doctrine, no regulated seller is legally entitled to collect a rate in excess of the one filed with the Commission for a particular period. See *infra*, at 576–579. We granted Arkla's subsequent petition for certiorari challenging the judgment of the Louisiana Supreme Court. 449 U. S. 1109 (1981).[6]

II

Sections 4 (c) and 4 (d) of the Natural Gas Act, 52 Stat. 822–823, 15 U. S. C. §§ 717c (c) and 717c (d), require sellers of

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tion, and the Court of Appeals granted the motion. The May 1979 order resulted from this remand, and review of that order is pending before the Court of Appeals.

[5] The Commission limited its disagreement with the state court to the period before 1972 because of its additional finding that as of October 1972 respondents had become "small producers" and were no longer required to file their rates with the Commission. See 18 CFR § 157.40 (1980). It therefore took the position that the filed rate doctrine did not apply to respondents after that date. Arkla disputes here the administrative determination that respondents met the criteria to be considered "small producers." The Commission's finding itself is not before us, and we do not believe that the state courts erred in deferring to that finding.

[6] Subsequent to the award of damages but prior to our action on Arkla's petition for certiorari, the Commission informed respondents that in order to collect a damages award amounting to a retroactive rate increase, they would have to ask the Commission to waive the filing requirements of the Natural Gas Act. Respondents sought a waiver, which was denied by the Commission. *Arkansas Louisiana Gas Co.* v. *Hall*, 13 FERC ¶ 61,000 (1980). In its order, the Commission explained that in order to grant a waiver, it would have to "speculat[e] as to what the Commission would or would not have done in 1961 . . . ." *Id.*, at 61,213. The Commission added that because the request for an increase called for contract interpretation, the 1961 Commission "would almost certainly have either suspended or rejected the filing." *Ibid.* The Commission added that granting a waiver in this case would present a "potential for disruption of natural gas markets." *Ibid.* Review of that order is pending before the United States Court of Appeals for the Fifth Circuit.

natural gas in interstate commerce to file their rates with the Commission. Under § 4 (a) of the Act, 52 Stat. 822, 15 U. S. C. § 717c (a), the rates that a regulated gas company files with the Commission for sale and transportation of natural gas are lawful only if they are "just and reasonable." No court may substitute its own judgment on reasonableness for the judgment of the Commission. The authority to decide whether the rates are reasonable is vested by § 4 of the Act solely in the Commission, see *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 611 (1944), and "the right to a reasonable rate is the right to the rate which the Commission files or fixes," *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 251 (1951).[7] Except when the Commission permits a waiver, no regulated seller of natural gas may collect a rate other than the one filed with the Commission. § 4 (d), 52 Stat. 823, 15 U. S. C. § 717c (d). These straightforward principles underlie the "filed rate doctrine," which forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority. See, *e. g., T. I. M. E. Inc.* v. *United States,* 359 U. S. 464, 473 (1959). The filed rate doctrine has its origins in this Court's cases interpreting the Interstate Commerce Act, see, *e. g., Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 520–521 (1939); *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184, 196–197 (1913), and has been extended across the spectrum of regulated utilities. "The considerations underlying the doctrine . . . are preservation of the agency's primary juris-

[7] *Montana-Dakota Utilities* was a case under the Federal Power Act rather than under the Natural Gas Act, but as we have previously said, the relevant provisions of the two statutes "are in all material respects substantially identical." *FPC* v. *Sierra Pacific Power Co.*, 350 U. S. 348, 353 (1956). In this opinion we therefore follow our established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes. See, *e. g., ibid.; Permian Basin Area Rate Cases,* 390 U. S. 747, 820–821 (1968).

diction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant." *City of Cleveland* v. *FPC*, 174 U. S. App. D. C. 1, 10, 525 F. 2d 845, 854 (1976). See *City of Piqua* v. *FERC*, 198 U. S. App. D. C. 8, 13, 610 F. 2d 950, 955 (1979).

Not only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively.[8] When the Commission finds a rate unreasonable, it "shall determine the just and reasonable rate . . . to be *thereafter* observed and in force." § 5 (a), 52 Stat. 823, 15 U. S. C. § 717d (a) (emphasis added). See, *e. g.*, *FPC* v. *Tennessee Gas Co.*, 371 U. S. 145, 152–153 (1962); *FPC* v. *Sierra Pacific Power Co.*, 350 U. S. 348, 353 (1956). This rule bars "the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate." *City of Piqua* v. *FERC*, *supra*, at 12, 610 F. 2d, at 954.

In sum, the Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and prevents the Commission itself from imposing a rate increase for gas already sold. Petitioner Arkla and the Commission as *amicus curiae* both argue that these rules taken in tandem are sufficient to dispose of this case. No matter how the ruling of the Louisiana Supreme Court may be characterized, they argue, it amounts to nothing less than the award of a retroactive rate increase based on speculation

[8] Although the Commission may not *impose* a retroactive rate alteration and, in particular, may not order reparations, see, *e. g.*, *FPC* v. *Sunray DX Oil Co.*, 391 U. S. 9, 24 (1968), it may "for good cause shown," 15 U. S. C. § 717c (d), waive the usual requirement of timely filing of an alteration in a rate. Assuming, *arguendo*, that waiver is available for retroactive collection of a higher rate than the one on file, we note that in this case, the Commission has expressly found that respondents have not demonstrated that good cause exists for waiving the filing requirements on their behalf. See n. 6, *supra*.

about what the Commission might have done had it been faced with the facts of this case. This, they contend, is precisely what the filed rate doctrine forbids. We agree. It would undermine the congressional scheme of uniform rate regulation to allow a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the Act. Following that course would permit state courts to grant regulated sellers greater relief than they could obtain from the Commission itself.

In asserting that the filed rate doctrine has no application here, respondents contend first that the state court has done no more than determine the damages they have suffered as a result of Arkla's breach of the contract.[9] No federal interests, they maintain, are affected by the state court's action. But the Commission itself has found that permitting this damages award could have an "unsettling effect . . . on other gas purchase transactions" and would have a "potential for disruption of natural gas markets . . . ." *Arkansas Louisiana Gas Co.* v. *Hall,* 13 FERC ¶ 61,100, p. 61,213 (1980).[10]

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[9] Arkla seeks to have this Court determine, as a matter of law, whether it actually breached its contract with respondents. This we decline to do. We see no reason to disagree with the Commission's judgment that interpretation of the favored nations clause raises only questions of state law. The state court found that the contract had been breached. We will not overturn the construction of Louisiana law by the highest court of that State.

[10] Apparently in an effort to challenge this determination, respondents assert that the damages would be paid entirely from Arkla's corporate assets and would not be passed on to consumers. We see no reason why this fact, even if true, would alter our analysis. In any case, the record does not support respondents' assertion that Arkla could not pass the damages award along to its customers. In its order denying respondents' request for a waiver of the § 4 (d) notice requirement, the Commission conceded that Arkla would have the right to do so, even though all the natural gas for which Arkla would be paying was long since sold. 13 FERC, at 61,213.

Even were the Commission not on record in this case, the mere fact that respondents brought this suit under state law would not rescue it, for when Congress has established an exclusive form of regulation, "there can be no divided authority over interstate commerce." *Missouri Pacific R. Co.* v. *Stroud,* 267 U. S. 404, 408 (1925). Congress here has granted exclusive authority over rate regulation to the Commission. In so doing, Congress withheld the authority to grant retroactive rate increases or to permit collection of a rate other than the one on file. It would surely be inconsistent with this congressional purpose to permit a state court to do through a breach-of-contract action what the Commission itself may not do.

We rejected an analogous claim earlier this Term in *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.,* 450 U. S. 311 (1981). There, a shipper of goods by rail sought to assert a state common-law tort action for damages stemming from a regulated rail carrier's decision to cease service on a rail line. We held unanimously that because the Interstate Commerce Commission had, in approving the cessation, ruled on all issues that the shipper sought to raise in the state-court suit, the common-law action was pre-empted. In reaching our conclusion, we explained that "[a] system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act." *Id.,* at 326. To hold otherwise, we said, would merely approve "an attempt by a disappointed shipper to gain from the Iowa courts the relief it was denied by the Commission." *Id.,* at 324.

In the case before us, the Louisiana Supreme Court's award of damages to respondents was necessarily supported by an assumption that the higher rate respondents might have filed with the Commission was reasonable. Otherwise, there would have been no basis for that court's conclusion, 368

So. 2d, at 991, that the Commission would have approved the rate. But under the filed rate doctrine, the Commission alone is empowered to make that judgment, and until it has done so, no rate other than the one on file may be charged. And far from approving the rate here in issue, the Commission has expressly declined to speculate on what its predecessor might have done.[11] The court below, like the state

[11] Respondents assert, and the Supreme Court of Louisiana found, that the Commission has expressly approved the damages award through its repeated statements that the award is not in excess of applicable ceilings. This is simply not the case. The court below based its conclusion on the Commission's order denying rehearing on Arkla's request that it exercise primary jurisdiction. 368 So. 2d, at 991, citing *Arkansas Louisiana Gas Co.* v. *Hall,* 56 F. P. C. 2905 (1976). Nothing in that order approves the retroactive rate increase; it only lists, at the request of the parties, "the maximum rates . . . which, if contractually authorized and if proper filing procedures had been followed, would have been approved . . . ." *Id.,* at 2906. The fact that the retroactive rate increase was within the rate ceiling does not mean that it would have been approved if actually submitted, and certainly does not mean that it would be approved after the fact. In rejecting respondents' request for a waiver of its filing requirements, the Commission set forth several reasons for disapproving a rate increase falling within the ceiling rates and expressly declined to speculate on what the earlier Commission might have done. See n. 6, *supra.*

In addition to the order denying rehearing, respondents also rely on language in the Commission's May 18, 1979, order declining to exercise primary jurisdiction and in a letter from the Commission's staff counsel. Staff counsel's letter is ambiguous at best, and in any case, it should be unnecessary to add that staff counsel may not speak for the Commission. The language relied on in the May 18 order appears to have reference only to damages for the period after 1972. The same order twice disapproves granting damages for the period prior to respondents' assumption of small-producer status. See *Arkansas Louisiana Gas Co.* v. *Hall,* 7 FERC ¶ 61,175, p. 61,325, n. 18 (1979) ("It is our opinion that the Louisiana Supreme Court's award of damages for the 1961–1972 period violates the filed rate doctrine"); *id.,* at 61,325, n. 20 ("As we stated above, the Louisiana Supreme Court, in effect, waived one of this Commission's filing requirements when it determined that [respondents'] group was entitled to damages back to 1961. This holding of the Louisiana Supreme Court conflicts with the filed rate doctrine"). The unconnected and am-

court in *Kalo Brick,* has consequently usurped a function that Congress has assigned to a federal regulatory body. This the Supremacy Clause will not permit.

Respondents' theory of the case would give inordinate importance to the role of contracts between buyers and sellers in the federal scheme for regulating the sale of natural gas. Of course, as we have held on more than one occasion, nothing in the Act *forbids* parties to set their rates by contract. *E. g., Permian Basin Area Rate Cases,* 390 U. S. 747, 820–822 (1968); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.,* 350 U. S. 332, 338–340 (1956). But those cases stand only for the proposition that the Commission itself lacks affirmative authority, absent extraordinary circumstances, to "abrogate existing contractual arrangements." *Permian Basin Area Rate Cases, supra,* at 820. See *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* at 338–339. That rule does not affect the supremacy of the Act itself, and under the filed rate doctrine, when there is a conflict between the filed rate and the contract rate, the filed rate controls. See, *e. g., Louisville & Nashville R. Co.* v. *Maxwell,* 237 U. S. 94, 97 (1915); *Texas & Pacific R. Co.* v. *Mugg,* 202 U. S. 242, 245 (1906). "This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress . . . ." *Louisville & Nashville R. Co.* v. *Maxwell, supra,* at 97. Moreover, to permit parties to vary by private agreement the rates filed with the Commission would undercut the clear purpose of the congressional scheme: granting the Commission an opportunity in every case to judge the reasonableness of the rate. Cf. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* at 338–339.[12]

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biguous references on which respondents and the court below rely to find Commission "approval" of the retroactive rate increase cannot override these express statements of disapproval.

[12] None of the other cases relied on by respondents commands a contrary result. *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U. S. 667 (1950), held only that federal courts are not granted jurisdiction over

Respondents also appeal to what they say are equitable considerations. The filed rate doctrine and the Supremacy Clause, we are told, should not bar recovery when the defendant's misconduct prevented filing of a higher rate. We do not find this argument compelling. The court below did not find that Arkla intentionally failed to inform respondents of its lease payments to the United States in an effort to defraud them. Consequently, we are not faced with affirmative misconduct, and we need not consider the application of the filed rate doctrine in such a case.[13] The courts

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state-law declaratory judgment actions merely because a federal question might potentially be raised in defense of the suit. The only issue in *Skelly Oil* was whether certain contracts had properly been terminated, so there was no occasion to consider whether the filed rate doctrine barred a damages remedy. *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U. S. 103 (1958), like the cases mentioned in text, held only that the Act does not automatically abrogate all private contracts. And *Pan American Petroleum Corp.* v. *Superior Court*, 366 U. S. 656 (1961), stated only that a state rather than a federal court was the proper forum in which a buyer should bring a breach-of-contract action to obtain a refund of charges in *excess* of the filed rate. Permitting that action in no way contravened the filed rate doctrine; in fact, it furthered the doctrine's purpose.

We note that a panel of the District of Columbia Circuit stated in *City of Cleveland* v. *FPC*, 174 U. S. App. D. C. 1, 10–11, 525 F. 2d 845, 854–855 (1976), that "the proposition that a filed rate variant from an agreed rate is nonetheless the legal rate wages war with basic premises of the . . . Act." That case is immediately distinguishable from the one before us because it involved a claim that the rate itself had been filed in violation of a contract. We express no opinion on the merits of that case, but to the extent that the quoted dictum would lead to a contrary result in the instant case, it is expressly disapproved.

[13] We agree with the Commission's finding that Arkla "could have reasonably assumed that the government royalty payment did not trigger the [favored nations clause]." 13 FERC, at 61,213. Because the record contains no findings of misconduct, respondents' argument that this Court has consistently recognized the doctrine of estoppel has no relevance. We save for another day the question whether the filed rate doctrine applies in the face of fraudulent conduct.

below found that Arkla has done no more than commit a simple breach of its contract. But when a court is called upon to decide whether state and federal laws are in conflict, the fact that the state law has been violated does not affect the analysis. Every pre-emption case involves a conflict between a claim of right under federal law and a claim of right under state law. A finding that federal law provides a shield for the challenged conduct will almost always leave the state-law violation unredressed. Thus in *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959), the mere fact that a group of unions violated state law through their peaceful picketing did not permit enforcement of that law when it would conflict with the federal regulatory scheme. That the state-court suit was one for damages rather than for the type of relief available from the National Labor Relations Board weighed against pre-emption, not in favor of it. "[S]ince remedies form an ingredient of any integrated scheme of regulation," Justice Frankfurter wrote for the Court, "to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict." *Id.,* at 247.

The same principle applies here. Permitting the state court to award what amounts to a retroactive right to collect a rate in excess of the filed rate "only accentuates the danger of conflict." No appeal to equitable principles can justify this usurpation of federal authority.

III

We hold that the filed rate doctrine prohibits the award of damages for Arkla's breach during the period that respondents were subject to Commission jurisdiction.[14] In all respects other than those relating to damages, the judgment of the Supreme Court of Louisiana is affirmed. With respect

[14] There is no bar to damages for the period after respondents gained "small producer" status. See n. 5, *supra.*

to its calculation of damages, the judgment is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

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

JUSTICE POWELL, dissenting.

I agree with much of JUSTICE STEVENS' dissenting opinion and would affirm the judgment of the Supreme Court of Louisiana. Respondents are entitled to the relief they seek based on Louisiana state contract law.

By virtue of the "most favored nations" clause in its contract with respondents, petitioner was obligated to pay respondents the higher rate it paid a comparable supplier. Petitioner did not comply with this provision, but the Court today holds that respondents nevertheless may not recover damages because they failed to file with the Commission the increased rate. It is said that the "filed rate doctrine" requires such a filing.

I would agree with the Court if it were clear that respondents were neglectful or otherwise at fault in not filing and seeking Commission approval of the higher rate. But the Louisiana courts found that petitioner was responsible for respondents' failure to file. Petitioner did not disclose that it was paying higher rates to another producer from the same field under comparable conditions. The Louisiana Court of Appeal expressly found that respondents' failure to comply with the filed rate doctrine was caused primarily by the "uncooperative and evasive" conduct of petitioner's officials. See 359 So. 2d 255, 264 (1978). Petitioner knew the facts, and the Louisiana Supreme Court held that petitioner had a state-law duty to disclose them in order not to frustrate the "most favored nations" clause. There is no showing that respond-

ents had any knowledge of their entitlement to invoke the clause until they finally obtained the facts through the Freedom of Information Act. In these circumstances, the filed rate doctrine should not preclude a state-law damages action. In holding to the contrary, the Court in effect rewards petitioner's breach of its state-law contractual duty to notify respondents that it was paying a higher rate to a comparable supplier.

JUSTICE STEVENS, with whom JUSTICE REHNQUIST joins, dissenting.

From 1961 through 1975, petitioner Arkansas Louisiana Gas Co. (Arkla) acquired natural gas from two different sources in the Sligo Gas Field in Louisiana. By the terms of a contract that was entirely consistent with the federal policies reflected in the Natural Gas Act, 52 Stat. 821, as amended, 15 U. S. C. § 717 *et seq.* (1976 ed. and Supp. III), Arkla was obligated to pay both sources of supply the same price.[1] In fact, however, unbeknown to respondents, and in violation of their contract, Arkla paid them a substantially lower price than it paid to the United States, its other source for Sligo Field gas. No one, not even Arkla, suggests that there is any legitimate justification for the discrimination.

Despite the fact that Arkla breached its contract, and despite the fact that no federal policy is threatened by allowing the Louisiana courts to redress that breach, the Court today denies respondents the benefit of their lawful bargain. Surely, if the price paid to the United States was just and reasonable, the same price paid to private sellers of gas taken from the same field at the same time and delivered to the same customer also would be just and reasonable. The statutory policy favors uniformity, not secret discrimination.

[1] This obligation was created by the "favored nations clause" in the natural gas sales contract between Arkla and respondents. The clause is quoted *ante*, at 573–574, n. 2.

Yet the Court, by a wondrous extension of the so-called "filed rate doctrine," concludes that the Louisiana courts may not assess damages against petitioner for breach of its contract to pay respondents the same price it paid to a comparable supplier. Because no federal rule of law deprives the State of Louisiana of the power to prevent Arkla from profiting so handsomely from its own wrong, and because I believe that enforcement of the state court's judgment is not only consistent with federal regulatory policies, but actually will further those policies, I respectfully dissent.

I

As a result of lengthy proceedings in the state courts, the relevant facts have been established. Arkla is an integrated utility company engaged in the natural gas business in six States.[2] Over the years, it has purchased large quantities of natural gas produced in the Sligo Gas Field in Bossier Parish, La.; some of that gas was acquired from respondents, and some from the United States. By law, Arkla was prohibited from paying either of these suppliers more than the area ceiling price set by the Federal Power Commission, and it did not do so.[3] By contract with the United States, Arkla was required to pay an amount established by reference "to the highest price paid for a part or for a majority of production of like quality in the same field." App. 123. By contract with respondents, Arkla was obligated to pay them a price at least as high as it paid for other gas produced from any well

[2] Arkla does business in Arkansas, Louisiana, Texas, Oklahoma, Kansas, and Missouri.

[3] For example, in 1968 the relevant area base rate ceiling established by the Federal Power Commission for sales of natural gas was 18.6 cents per thousand cubic feet (Mcf). See *Arkansas Louisiana Gas Co.* v. *Hall*, 56 F. P. C. 2905, 2906 (1976). The trial court in this case found that during 1968 Arkla paid the United States a fraction over 14 cents per Mcf. See App. 11. Under the terms of the 1952 contract with respondents, Arkla paid a fraction under 10 cents per Mcf for gas produced during 1968. See *id.*, at 98.

located in the Sligo Field.[4] See *ante,* at 573–574, n. 2. In fact, however, it paid respondents only about two-thirds of the price paid to the United States.

Arkla did not disclose the price differential to respondents. The Louisiana Court of Appeal found that, in response to inquiries from respondents about the arrangement with the United States, "the officials of Arkla were uncooperative and evasive." 359 So. 2d 255, 264 (1978). That court characterized Arkla's nondisclosure and evasiveness as "not commendable," but held that because, under the law of Louisiana, a "party alleging fraud has the burden of establishing it by more than a mere preponderance of the evidence," respondents had failed to prove that Arkla was guilty of actual fraud. *Ibid.* It is clear, however, that Arkla's failure to disclose to respondents its discriminatory payments to another supplier in the same gas field constituted a breach of contract.[5]

The Louisiana Supreme Court decided that the damages for Arkla's breach of contract should be measured by the difference between the price paid to the United States and the price paid to respondents. For the period after 1972, when

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[4] Although Arkla consistently has contended that its lease arrangement with the United States was not a "purchase" within the meaning of the favored nations clause in its contract with respondents, that issue has been resolved against Arkla by every court that has considered it. See *id.,* at 16; 359 So. 2d 255, 261–262 (La. App. 1978); 368 So. 2d 984, 989, and n. 4 (La. 1979). See also *Eastern Petroleum Co.* v. *Kerr-McGee Corp.,* 447 F. 2d 569 (CA7 1971). The Court properly declines to reopen this question of state law. See *ante,* at 579, n. 9.

[5] Because the Louisiana courts held that the contract required Arkla to pay to respondents the higher price that was being paid to the United States, and because such payments could not have been made without revealing the existence of the higher price, there can be no doubt about Arkla's contractual duty to disclose the differential even though the Louisiana Supreme Court had no occasion to comment on this specific obligation other than by noting the applicability of the principle "that one should not be able to take advantage of his own wrongful act." 368 So. 2d, at 990.

respondents had been formally certificated as "small producers," the court held that respondents had no obligation to file new rate schedules with the Federal Power Commission because the increased rates did not exceed the ceiling rate set by the Commission.[6] Although the court recognized that respondents could not have collected higher prices during the period between 1961 and 1972 without first filing new rate schedules with the Commission,[7] it held that damages for that period were nevertheless recoverable for two reasons. First, as a matter of Louisiana law, when a party's entitlement is subject to a condition, the condition is considered to have been fulfilled when performance is prevented by the other party.[8] In this case, the court squarely held that respondents had been effectively precluded from making the

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[6] The court explained the significance of respondents' certification as small producers:

"A 'small producer' (as defined by the Commission's regulations) may obtain a 'small producer certificate' exempting it from the requirement of having to file a rate schedule as long as the increase in rate does not exceed the ceiling rate set by the Commission. *See* 18 C. F. R. § 157.40. Several of the plaintiffs obtained 'small producer certificates' in October 1972, and the certificates issued to those parties were made effective as to all plaintiffs by order of the Commission." *Ibid.*

[7] Throughout this opinion, the term "Commission" refers to the Federal Power Commission with respect to actions taken before October 1, 1977, and to the Federal Energy Regulatory Commission with respect to actions taken thereafter. See *ante,* at 574, n. 3.

[8] This state-law rule was explained, as follows:

"Article 2040, properly interpreted, means that the condition is considered fulfilled, when it is the debtor, bound under that condition, who prevents the fulfillment. *George W. Garig Transfer* v. *Harris,* [226 La. 117, 75 So. 2d 28 (1954)]; *Southport Mill* v. *Friedrichs,* [171 La. 786, 132 So. 346 (1931)]; *Morrison* v. *Mioton,* [163 La. 1065, 113 So. 456 (1927)]. This rule is but an application of the long-established principles of law that he who prevents a thing may not avail himself of the non-performance he has occasioned and that one should not be able to take advantage of his own wrongful act. See *Cox* v. *Department of Highways,* 252 La. 22, 209 So. 2d 9 (1968)." 368 So. 2d, at 990.

necessary filings by Arkla's failure to inform them of its contractual arrangement with the United States.[9] Second, after noting that respondents made no claim that they would have been entitled to an increase in excess of the area base rate ceilings established by the Commission,[10] and after noting that an order of the Commission had indicated that it would have approved the rate increase if it had been filed,[11] the court concluded that "it was more probable than not that the Commission would have approved a contractually-authorized price increase if the proper filing procedures had been followed." 368 So. 2d 984, 991 (1979).

Summarizing the effect of the state courts' rulings, these

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[9] "To realize this higher, contractually-authorized price, plaintiffs, pursuant to the Natural Gas Act, were required to file new rate schedules with the Commission. However, plaintiffs were effectively precluded from making the requisite filings because they were not, at any time, informed by defendant that it was, in fact, paying a higher price to another party seller. Although defendant was only bound to pay plaintiffs a higher price if plaintiffs filed new rate schedules with the Commission, it is apparent that defendant prevented the fulfillment of that condition (plaintiffs filing with the Commission) by failing to inform plaintiffs of its contractual arrangements with the United States government. Pursuant to article 2040 and this court's jurisprudence interpreting that article, the condition (that plaintiffs file new rate schedules) is considered fulfilled." *Ibid.*

[10] The Louisiana Supreme Court expressly noted its understanding of respondents' position:

"We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission." *Id.*, at 991, n. 7.

[11] "At trial, a November 8, 1976 order of the Commission was produced which indicated the maximum rates to which plaintiffs would have been entitled if contractually authorized and *if* proper filing procedures had been followed (Exhibit D–59). The Commission clearly indicated in its order that it would have approved such rates. No evidence was adduced by defendant to establish that Commission approval would have been unlikely." *Id.*, at 991 (emphasis in original).

propositions must be taken as having been established: (1) Arkla breached its contract with respondents; (2) Arkla is responsible for respondents' failure to file new rate schedules with the Commission; (3) if such schedules had been filed, and if Arkla had paid respondents the same prices it paid to the United States, those prices would not have exceeded the applicable area rate ceilings established by the Commission; and (4) because prices well below the applicable rate ceilings are at the very least presumptively "just and reasonable," it is indeed more probable than not that the Commission would have approved the new rate schedule if it had been promptly filed. These propositions are plainly adequate to support respondents' recovery of damages as a matter of state law. In my opinion, they also support the conclusion that the applicable rules of state law have not been pre-empted by federal law.

II

Section 4 of the Natural Gas Act, 52 Stat. 822, 15 U. S. C. § 717c, identifies four separate federal policies that are arguably implicated by this litigation. The judgment of the Supreme Court of Louisiana is fully consistent with each of these policies.

First, subsection (a) of § 4 requires that all charges paid or received by regulated companies for the sale of natural gas shall be "just and reasonable." [12] In this case, there is no dispute about the fact that the prices received from Arkla by the United States were well below the relevant area ceiling rates fixed by the Federal Power Commission. It is equally clear that payment of the same prices to respondents for com-

[12] Section 4 (a) of the Act provides:

"All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful." 52 Stat. 822, 15 U. S. C. § 717c (a).

parable gas contemporaneously produced in the same field also would have been well below the ceiling. Both the Louisiana courts and the Commission have repeatedly and unambiguously determined that if respondents had been paid in accordance with the terms of their contract, there would have been no violation of the applicable area ceiling rates.[13] Indeed, in noting that respondents were not required to file new rates for the period after they had been certificated as small producers in 1972, the Commission expressly found "that the rates requested are within what the Commission has determined to be the zone of reasonableness." [14]

[13] See App. 18–19; 368 So. 2d, at 991, and n. 7; 56 F. P. C., at 2906.

[14] In an order entered on May 18, 1979, declining to exercise jurisdiction to determine whether Arkla had violated the favored nations clause in its contract with respondents, the Federal Energy Regulatory Commission stated:

"Finally, we must decide now what impact this case has on our regulatory responsibilities. This type of case, involving small producers not required by regulation under the Natural Gas Act to file for rate increases authorized by contract, is not a matter of great import to our regulatory responsibility as we find no need for a uniform interpretation of a contractual provision, and find that the rates requested are within what the Commission has determined to be the zone of reasonableness.

"On the facts of this case, the damages do not exceed applicable area ceiling rates. The Louisiana Supreme Court concluded that the Hall group was entitled to damages measured by the difference between the price Arkla paid the United States under the royalty agreement and the price it paid the Hall group. In so doing, it noted that it considered the fact that the Commission, in previous orders in this case, had stated the maximum rates to which the Hall group would have been entitled if contractually authorized and if proper filing procedures had been followed. The Supreme Court of Louisiana further stated:

"We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission.

"In light of the fact that the Hall group makes no claim for damages higher than the applicable area ceiling rates, that the Louisiana Supreme Court did not authorize rates higher than the applicable area ceiling rates, and that the state district court on remand from the Louisiana Supreme

It is perfectly clear that an award of damages against Arkla measured by the prices it paid to the United States will not violate the Act's substantive prohibition against charging rates that are not "just and reasonable." That prohibition has the same application to respondents for the period after 1972, when they were certificated as small producers, as it does for the period prior to 1972. In neither of those periods did the Commission specifically determine that the rates were "just and reasonable," but the record makes it clear that those rates were in fact within the zone of reasonableness established by the Commission during both periods. For the purpose of determining whether damages are recoverable in a state-court breach-of-contract suit, there is no reason to treat the two periods differently. There is simply nothing in this record to suggest that a state-court judgment that has the effect of allowing respondents to receive the same prices that Arkla paid to the United States would violate the *substantive* policy underlying the statutory requirement that all rates be just and reasonable.[15]

Court will presumably not award damages higher than the area ceiling rates, we do not feel that our regulatory responsibilities are so affected that we must exercise our jurisdiction in this case." *Arkansas Louisiana Gas Co.* v. *Hall,* 7 FERC ¶ 61,175, pp. 61,323–61,324 (1979) (footnotes omitted).

[15] Arkla has argued that the award of damages improperly included an amount attributable to the liquefiable hydrocarbons in the natural gas produced from respondents' wells. If that argument were valid, it would simply establish an error in the computation of the amount required to be paid to respondents under their contract, and would require adjustment of the post-1972, as well as the pre-1972, award. No tribunal has found any greater merit in this argument than in Arkla's continuing claims that it did not breach its contract because its lease arrangement with the United States did not trigger the favored nations clause, and that respondents are not really small producers. At any rate, Arkla has challenged the Louisiana courts' computation of damages in a separate petition for certiorari, No. 79–1896, *Arkansas Louisiana Gas Co.* v. *Hall* (vacated and remanded, *post,* p. 917), and the question thus is not properly presented here.

Second, subsection (b) of § 4 expresses the strong federal policy—reflected in most regulatory statutes—against discriminatory pricing.[16] The result the Court reaches today not only tolerates a blatant violation of that policy, but also will encourage such violations in the future.

Entirely apart from Arkla's contractual undertaking to pay respondents the same price it paid to other producers of comparable gas in the same field, this statutory policy surely favors a holding that results in equal treatment of competing suppliers. Nothing other than Arkla's proven wrongdoing provides any explanation for its discrimination against respondents. For no one has pointed to any even arguably legitimate justification for any differential pricing at all—let alone a differential of the magnitude revealed by this record. The lesson this case will teach is that, notwithstanding the plain language in § 4 (b), it is perfectly proper to grant an undue preference if one can conceal it.

Third, subsection (c) of § 4 expresses a policy favoring the public disclosure of all rates and charges and all contracts which affect rates.[17] The contractual arrangement between

[16] Section 4 (b) provides:

"No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." 52 Stat. 822, 15 U. S. C. § 717c (b).

[17] Section 4 (c) provides:

"Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time . . . and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." 52 Stat. 822, 15 U. S. C. § 717c (c).

Arkla and the United States relating to production in the Sligo Gas Field was not made available to the public. Only by resort to the remedies provided by the Freedom of Information Act were respondents able to obtain access to that contract and to confirm their suspicions that Arkla was violating its "favored nations" undertaking. By rewarding Arkla's successful concealment of a contract that directly affected rates payable for gas produced in the Sligo Field, the Court simply ignores the statutory policy which the Louisiana Supreme Court's judgment would plainly serve.

Fourth, subsection (d) of § 4 imposes a procedural requirement that is designed to protect the substantive policy interests reflected in the three preceding subsections.[18] Because none of these substantive policies is infringed in the slightest by the state court's judgment, it surely exalts procedure over substance to deny respondents relief because they were wrongfully prevented from following the normal statutory procedures.

Under the normal procedures, no change in rates may take effect until after 30 days' notice is given to the Commission and to the public by filing a new schedule with the Commission. This filing requirement is designed to give the Commission the opportunity to prevent new rates from going into effect if it has reason to believe the new rates are not just and

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[18] Section 4 (d) provides:

"Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published." 52 Stat. 823, 15 U. S. C. § 717c (d).

reasonable. In this case, if the record provided any basis for believing that the rates that Arkla paid to the United States were not just and reasonable—or that paying the same rates to these respondents would not have been equally just and reasonable—it might make some sense to argue that the filing requirement of § 4 (d) precludes recovery of damages for breach of contract. But to regard the filing requirement as an inflexible barrier to any recovery regardless of the substantive merits of the claim is neither necessary to further, nor even consistent with, the purpose of § 4 (d).[19]

It is commonplace that damages must often be measured by reference to a standard or an event that did not actually materialize. When an executory contract is breached, the attempt to measure the injured party's damages requires an evaluation of the benefits that probably would have resulted if the breach had not occurred.[20] If an attorney hired by

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[19] One of the weaknesses in the Court's consideration of this issue is its implicit assumption that the filing requirement has the same importance under all regulatory statutes. Under the Natural Gas Act, however, the source of the rate is the parties' contract which must be filed to enable the Commission to review its reasonableness; in contrast, under the Interstate Commerce Act, because private rate agreements are precluded, the source of the rate is the carrier's filed tariff. As Justice Harlan pointed out for a unanimous Court in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, 338:

"In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. In this respect, the Act is in marked contrast to the Interstate Commerce Act, which in effect precludes private rate agreements by its requirement that the rates to all shippers be uniform, a requirement which made unnecessary any provision for filing contracts."

[20] Every first-year law student is familiar with this rule:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of

respondents to file a new rate schedule negligently failed to do so, he might defend against a malpractice complaint by arguing that respondents were not damaged because the Commission would have rejected the new rates in all events. But if respondents could prove that rejection was highly unlikely, it would be absurd to deny them any recovery at all simply because the defendant's own wrongdoing had made it impossible to know with absolute certainty that new rates would have been accepted as "just and reasonable." In damages actions, whether in tort or in breach of contract, it is often necessary to deal in probabilities.

This case also raises a question that requires the evaluation of probabilities. Because the rates in issue were below the applicable Commission ceilings, and because no legitimate reason for rejecting them has been adduced, it is only reasonable to presume that they would have become effective routinely. As a garden-variety issue of damages, there is no significant difference between this case and one in which a purchaser might have employed thugs to waylay the respondents' lawyer on the way to the Commission to prevent him from filing a new schedule.

Nor in terms of federal regulatory policy is there any difference between this case and hypothetical cases involving actual fraud or violence.[21] If damages cannot be measured

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things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." *Hadley* v. *Baxendale*, 9 Ex. 341, 354, 156 Eng. Rep. 145, 151 (1854).

[21] The Court seems to attach great significance to the fact that respondents failed to prove that Arkla was guilty of actual fraud, see *ante*, at 583–584, and n. 13, but suggests no reason why the case might be decided differently if actual fraud had been proved by clear and convincing evidence. Surely a state court should not be able to avoid federal preemption of state remedies by applying a different label to conduct with precisely the same economic consequences. Cf. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 252–253.

by reference to any standard except a rate that has been duly filed with the Commission in accordance with the procedural requirements of § 4 (d), there could be no state-law recovery no matter what kind of wrong prevented respondents from filing. And conversely, if a high probability that a timely filing would have been accepted is an adequate standard for measuring damages in a tort case, why should not that probability be adequate in a breach-of-contract case as well? The fact that a regulated carrier or seller has no right to collect a rate or price that has not been duly filed with the appropriate regulatory body is surely not a sufficient reason for leaping to the conclusion that an injured party may never prove damages by reference to a standard that is less certain than a filed rate.

The federal policy that comes closest to supporting Arkla's position is that of protecting the Commission's primary jurisdiction to determine whether or not a new rate is reasonable. But in this case the basic reasonableness determination was made by the Commission when it established the area rate ceilings. Because the rates at issue in this case are well below those ceilings, the danger that a court might venture into the area of ratemaking on its own is not present. Moreover, on more than one occasion Arkla requested the Commission to assume jurisdiction of this controversy, and the Commission consistently declined to do so.[22] In assessing damages for the breach of an executory contract, the state courts exercised a jurisdiction that the Commission did not have. In no sense did the Louisiana courts usurp the primary jurisdiction of the Commission. In sum, whether we test the state-court judgment against the substantive or the procedural requirements of the federal statute, it seems perfectly clear that the relief that has been awarded is fully consistent with federal policy.

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[22] See *Arkansas Louisiana Gas Co.* v. *Hall*, 55 F. P. C. 1018 (1976); 7 FERC ¶ 61,175 (1979).

III

Although, until today, the term "filed rate doctrine" had never been used by this Court, our prior decisions have established rather clear contours for the doctrine. It apparently encompasses two components, both of which are entirely consistent with the award of damages ordered by the Louisiana Supreme Court in this case.

First, the two cases that are generally accepted as the source of the doctrine, *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246,[23] and *T. I. M. E. Inc.* v. *United States*, 359 U. S. 464,[24] established that an

[23] In *Montana-Dakota Utilities*, the plaintiff claimed injury because the filed rates that had applied to past transactions with an affiliate allegedly were unjust and unreasonable, and had been fraudulently established. The ultimate issue was whether a federal claim for relief had been alleged, because there was no diversity of citizenship to support federal jurisdiction. The Court first held that the Federal Power Act's requirement that rates be reasonable did not provide a statutory basis for a federal cause of action because the courts have no authority to determine what a reasonable rate in the past should have been. The Court then held that the allegations of fraud added nothing to the plaintiff's federal claim. Assuming that an actionable wrong had been alleged, the Court concluded that in the absence of diversity, a federal court could only dismiss the complaint for failure to state a claim cognizable in federal court. And finally, the Court rejected the argument of Justice Frankfurter in dissent that it should fashion an implied federal judicial remedy in which the issue of reasonableness could be referred to the Commission. In refusing to create a federal remedy for a common-law fraud, the Court assumed that appropriate relief would be available in a state tribunal. Its opinion surely cannot be read as pre-empting any such state claim.

[24] In *T. I. M. E. Inc.*, the Court refused to find a federal remedy for a shipper who claimed that the rates charged by a motor carrier were unreasonable and unlawful even though they had been properly filed with the Interstate Commerce Commission. The case involved little more than a determination that the express remedies afforded against rail carriers in Part I and against water carriers in Part III of the Interstate Commerce Act, having been deliberately omitted from Part II, which regulated motor carriers, would not be judicially implied. In *T. I. M. E. Inc.*, as in *Montana-Dakota Utilities*, the question was whether a federal court

entity whose prices or rates are regulated by a federal agency has no federal right to claim any rate or price that has not been filed with and approved by the agency. Thus, these respondents, without either filing the escalated rates or obtaining a waiver of the filing requirement, have no *federal* right to require Arkla to pay the higher rates. That does not mean, however, that they have no *contractual* right to require Arkla to do so. Cf. *Pan American Petroleum Corp.* v. *Superior Court,* 366 U. S. 656, 662–664. The question whether a state court could measure damages for breach of contract, or a tort, by reference to a rate schedule that presumably would have been accepted if it had been filed earlier is by no means the same as the question whether respondents had a federal right to collect such rates. There would be a valid federal objection to such a damages award if there were reason to believe that the parties had entered into an agreement to circumvent either a procedural or a substantive requirement of the Natural Gas Act, or if the litigation arguably represented a collusive method of granting an unlawful preference. But no such considerations are present in this case.

Second, *Montana-Dakota Utilities* and *T. I. M. E. Inc.* also recognize that the task of determining in the first instance what rate should be considered "reasonable" within the meaning of a regulatory statute is not a judicial task, but rather is a task for the administrative agency. But when the zone of reasonableness has already been established by an agency—

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had authority to decide that a filed rate was unlawful because it violated the reasonableness requirement of the relevant regulatory statute. In the present case, however, there is no claim that the price that Arkla paid to respondents was illegal in any sense. Both that price and the higher price paid to the United States were well within the zone of reasonableness and in full compliance with the statute's substantive requirements. The fact that respondents might not be able to assert a federal claim for violation of the federal statute sheds no light on the question whether their state-law cause of action for breach of contract may be maintained.

as it has been in this case—that consideration simply does not apply to an award of damages measured by reference to a standard that is well within that zone.

In my judgment, the cases which gave rise to the filed rate doctrine are plainly distinguishable from the present case, and thus do not support the result the Court reaches today. In *Montana-Dakota Utilities* and *T. I. M. E. Inc.*, the plaintiff's claim was that the filed rate, which had already been approved by the relevant federal regulatory body, was nonetheless unreasonable in violation of federal statutory requirements.[25] The plaintiff's suit thus directly challenged the rate determinations of the federal agency without compliance with the judicial review procedures established in the governing statute.[26] In the present case, in contrast, respondents do not contend that the filed rate, approved by the Commission, is unreasonable or otherwise inconsistent with federal law; they contend only that they had a contractual right to receive a different reasonable rate under their contract with Arkla. Respondents do not seek to enforce a federal right outside

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[25] See also *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

[26] The concise statement of the holding in *Montana-Dakota Utilities* indicates that the Court's central concern was to bar actions which asserted a federal right to a "reasonable" rate other than that declared to be reasonable by the Commission:

"We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one." 341 U. S., at 251–252.

Of course, in this case respondents are not invoking a federal right to receive a reasonable rate, but rather a state-law right to receive the rate for which they contracted. Similarly, the Louisiana Supreme Court's decision is not based on a determination that the rate requested by respondents is "the only or the more reasonable one," but rather on a determination that respondents are entitled to that rate under their contract with Arkla.

the procedures established for the vindication of such rights, nor do they seek to overturn the determinations of the expert federal agency; respondents merely seek to recover the higher of two rates, both of which are within the federal zone of reasonableness, because it is the rate they contracted to receive.[27] Cf. *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U. S. 84.

The unanimous decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Co.*, 350 U. S. 332, sheds more light on this case than do the cases on which the Court places its primary reliance. In *United Gas*, United, a regulated natural gas producer, supplied gas to Mobile under a long-term contract which had been filed with and approved by the Federal Power Commission. United thereafter filed with the Commission a new rate that purported to increase the price payable by Mobile under the contract. The Commission denied Mobile's request that it reject United's filing, and held that the increased rate was the applicable rate unless and until it was declared unlawful by the Commission. *Id.*, at 336–337. This Court rejected the Commission's position, holding that compliance with the filing procedure of § 4 (d) was effective to establish a new rate only if that rate were otherwise lawful, that is, in compliance with contractual requirements. *Id.*, at 339–340. The Court found that although the new rate filed by United had been established in compliance with fed-

[27] This distinction not only undercuts the Court's reliance on the filed rate doctrine, but also renders wholly inapposite our decision earlier this Term in *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U. S. 311, on which the Court relies heavily. See *ante*, at 580–582. The filed rate doctrine was not remotely implicated in that decision. Our holding in *Kalo Brick* that the Interstate Commerce Commission had decided the precise issues that the shipper sought to raise in state-court litigation is wholly dissimilar from this case in which the regulatory agency rejected the opportunity to decide the questions presented to the Louisiana courts. This is not merely an attempt by a disappointed litigant to gain from the state courts the relief it has been denied by the Commission. See *ante*, at 580.

eral law, it was unlawful under the contract. The Court accordingly held that the Commission had erred in failing to reject United's filing, and directed that United make restitution to Mobile of all overpayments. *Id.*, at 347.

Under the rationale in *United Gas*, private parties have a right to establish a lawful rate by contract as long as the rate they have agreed upon is just and reasonable. When the contract rate is within the zone of reasonableness established by the Commission, that contract rate is presumptively lawful,[28] and not subject to unilateral change.[29] The Commission has no power to specify a rate other than the contract rate when that rate is itself just and reasonable.[30] Neither the filed rate

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[28] As the Court noted, whenever a new rate is filed, "the Commission's only concern is with the reasonableness of the *new* rate." 350 U. S., at 340 (emphasis in original).

[29] This prohibition is founded not only on the law of contracts, but also on the Act itself:

"Our conclusion that the Natural Gas Act does not empower natural gas companies unilaterally to change their contracts fully promotes the purposes of the Act. By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry." *Id.*, at 344.

[30] While there are differences between this case and *United Gas*, it seems to me that the cases are nonetheless closely analogous. In the present case, as in *United Gas*, one party to a duly filed contract attempted unilaterally to change the price at which natural gas would be sold under the contract. In *United Gas*, United did so directly by filing an increased rate with the Commission; in this case, the unilateral change was accomplished indirectly when Arkla prevented respondents from taking the steps necessary to recover the contractually authorized higher rate. Of course, in *United Gas* the lawful contract rate had actually been approved by the Commission, while in this case the contract rate claimed by respondents has never been filed. This distinction is not, however, of controlling significance. In *United Gas*, the Court was confronted with two rates, both presumptively reasonable, of which only one was lawful under the contract. In the present case, we are confronted with essentially the same situation. While the rate ultimately awarded in *United Gas* had in fact been filed with the Commission, it was not the

doctrine, nor any other principle of federal regulatory law, requires the result the Court announces today.

IV

In an attempt to bolster its reliance on the filed rate doctrine, Arkla contends that we cannot be sure that, if respondents had been notified of the United States lease and had filed a new rate schedule in 1961, the Commission would have approved their new rates. This argument is supported by statements in an order entered by the Commission on November 5, 1980.[31] That order was entered after the petition for certiorari had been filed, and after the United States and the Commission had taken the position as *amici* in this Court

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rate currently recognized by the Commission as "just and reasonable," because it had been replaced by the new rate filed by United. The Court nonetheless directed that Mobile pay only the old rate, which the Commission's order had purported to supersede. The lawful rate in *United Gas* is analogous to the contractually authorized rate in this case because it was presumptively reasonable, having received Commission approval, but was not the currently applicable filed rate for the gas sales at issue. In light of this fact, I can see no reason why respondents should be precluded from recovering from Arkla a presumptively reasonable rate, well below applicable Commission rate ceilings, merely because Arkla's own breach of contract prevented respondents from filing that rate with the Commission.

[31] The Commission stated:

"Finally, we confess that we are at least troubled by the prospect of speculating as to what the Commission would or would not have done in 1961 had it been confronted at that time with a rate increase filing by the Hall group. . . . Whether the Commission in 1961 would have provided a forum for resolving the contractual dispute is a question we cannot answer definitively . . . . At that time, the Commission might well have concluded that the favored nations clause was not triggered. More importantly, even if the Commission in 1961 had reached the same contractional interpretation as the Louisiana court, the Commission might have determined that the public interest would not permit the grant of rate increases based upon the triggering of favored nations clauses even in existing contracts." *Arkansas Louisiana Gas Co.* v. *Hall*, 13 FERC ¶ 61,100, p. 61,213 (1980).

that the Louisiana Supreme Court had erred in awarding damages for the period between 1961 and 1972.[32] Because the Commission had decided to lend its support to Arkla in this Court, it is not surprising that some of the statements in that order are consistent with Arkla's argument. What is most significant about that order is the fact that the Commission does not advance any reason why a rate schedule filed by respondents in 1961 in accordance with the favored nations clause of their contract with Arkla would not have been deemed just and reasonable.

Although the Commission stated that it was reluctant to speculate about what its predecessors might have done in response to such a filing, the only issues that it now can describe as speculative are issues that have been decided against Arkla. I do not believe speculation that the Commission might have committed error in 1961 is an adequate reason for not presuming that just and reasonable rates would have been routinely approved when filed.

The first issue on which the Commission indicates a reluctance to speculate is a question of contract interpretation, namely, whether the favored nations clause had been triggered by Arkla's arrangement with the United States. There is no reason for the Commission, or anyone else, to speculate on this question. The Commission twice was presented with the opportunity to decide this question, and it twice declined

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[32] The petition was filed on May 29, 1979. On October 1, 1979, the Court requested the views of the Solicitor General. A brief was filed by the Solicitor General on behalf of the United States and the Federal Energy Regulatory Commission on February 11, 1980, in which the *amici* took the position that the Louisiana Supreme Court had erred. The *amici* maintained that the error was sufficiently serious to warrant review, but recommended that the Court defer action until the Commission had acted on respondents' request for a waiver of the § 4 (d) filing requirement. The Commission denied that request in its November 5 order, and shortly thereafter the *amici* recommended that certiorari be granted, and that the decision of the Louisiana Supreme Court be reversed.

to do so.[33] That question now has been correctly resolved by the Louisiana courts. The other issue on which the Commission declines to speculate is whether its predecessor would have regarded a favored nations clause in a pre-1961 contract as lawful. Again, speculation is wholly unnecessary. The Commission actually confronted that precise issue in 1961. Although it concluded that such escalation clauses should be prohibited in the future, it specifically decided that it would not eliminate such provisions from previously executed contracts.[34] That the Commission's treatment of that issue in

[33] On September 11, 1975, Arkla filed a petition with the Federal Power Commission requesting a declaratory order holding that the "favored nations" clause in its contract with respondents had not been triggered by the royalty payments made by Arkla to the United States. The Commission denied the petition, stating in part:

"This case presents a question of concurrent jurisdiction, not primary or exclusive jurisdiction. The Commission has jurisdiction over rates, filing and notice as to both Arkla and Respondents. While this Commission has jurisdiction to decide the subject contract question, the Louisiana court also has jurisdiction over an action based upon asserted breach of contract. Accordingly, we believe it appropriate to defer to the court to decide these contract questions." 55 F. P. C., at 1020 (footnote omitted).

On May 18, 1979, the Federal Energy Regulatory Commission re-examined this issue and came to the same conclusion, although for different reasons, in the order from which I have quoted in n. 14, *supra*.

[34] After explaining its reasons for prohibiting indefinite escalation clauses in newly executed contracts, the Commission stated:

"However, we are convinced that we cannot declare the escalation provisions in Pure's contracts with El Paso void or voidable, and thus in effect strike them from the contracts. There is no question but that these exceedingly material parts of the contracts were a basic part of the exchange between the parties in arriving at these agreements. Under familiar rules of law, if these material provisions are stricken, the contracts, which lack any provisions for the severability of parts found invalid, must also fall. This would result in legal and regulatory problems that might cause material harm to the public, harm that might well exceed the injurious effects of the escalation provisions themselves. For example, if these provisions were stricken and the contracts fell, the producer's sales might then presumably constitute *ex parte* offerings of gas and the pro-

1961 is applicable to the contracts between respondents and Arkla is demonstrated by the fact that the escalated rates are accepted by the Court and the Commission for the purpose of computing respondents' damages for the period between 1972 and 1975. If the favored nations clause in this pre-1961 contract were not perfectly lawful, respondents would receive no damages at all, rather than the truncated recovery which the Court's holding today allows.

The Commission also has expressed concern about the impact of this damages award on its broader "regulatory responsibilities." See *Arkansas Louisiana Gas Co.* v. *Hall,* 13 FERC ¶ 61,100, p. 61,213 (1980). Two specific concerns are identified—that the burden of the award might be passed on to consumers, and that it might give rise to other claims that favored nations clauses have been breached. The short answer to the first concern is that there is no more reason to assume that this award will justify an increase in utility rates than any other damages judgment that a public utility may be required to pay; if the regulatory concern is valid, the agency having jurisdiction over Arkla's sales has ample authority to require its stockholders rather than its customers to bear this additional cost. The second concern seems exaggerated because it applies only to contracts executed before 1961, see *supra,* at 606 and this page, and n. 34, and it seems unlikely that many large purchasers of natural gas could successfully have concealed violations of escalation clauses from their suppliers. To the extent that this case does have counterparts in such contracts, however, it seems to me

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ducer could change its rates at will, unimpeded by any contractual limitations of the kind that presently exist. Thus, instead of being limited under the *Mobile* and related decisions only to increases permitted by contractual provisions, the company could file for increases whenever it happened to feel justified in doing so. Thus the uncertainty and spiraling prices resulting from the escalation clauses might well be compounded many times over." *The Pure Oil Co.,* 25 F. P. C. 383, 388–389 (1961).

that those cases should be decided in the same way. After all, we are concerned here merely with cases in which a utility has failed to pay an agreed price that is well below the just and reasonable ceiling set by the Commission.

I agree that speculation about what the Commissioners might have done in 1961 is inappropriate. Unlike the Court, however, I see no need to speculate in this case. Rather than speculate, I would presume that the Commission would have acted in a lawful manner and that it would then have perceived the correct answer to disputed questions that have subsequently been resolved.

In my judgment, the Court's decision today is founded on nothing more than the mechanical application to this case of principles developed in other contexts to serve other purposes. The Court commits manifest error by applying the filed rate doctrine to ratify action by Arkla that not only breached its contract with respondents, but also directly undercut the substantive policies identified in § 4 of the Natural Gas Act. Because absolutely no federal interest is served by today's intrusion into state contract law, I respectfully dissent.

Syllabus

COMMONWEALTH EDISON CO. ET AL. *v.* MONTANA ET AL.

APPEAL FROM THE SUPREME COURT OF MONTANA

No. 80–581. Argued March 30, 1981—Decided July 2, 1981

Montana imposes a severance tax on each ton of coal mined in the State, including coal mined on federal land. The tax is levied at varying rates depending on the value, energy content, and method of extraction of the coal, and may equal, at a maximum, 30% of the "contract sales price." Appellants, certain Montana coal producers and 11 of their out-of-state utility company customers, sought refunds, in a Montana state court, of severance taxes paid under protest and declaratory and injunctive relief, contending that the tax was invalid under the Commerce and Supremacy Clauses of the United States Constitution. Without receiving any evidence, the trial court upheld the tax, and the Montana Supreme Court affirmed.

Held:

1. The Montana severance tax does not violate the Commerce Clause. Pp. 614–629.

(a) A state severance tax is not immunized from Commerce Clause scrutiny by a claim that the tax is imposed on goods prior to their entry into the stream of interstate commerce. Any contrary statements in *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, and its progeny are disapproved. The Montana tax must be evaluated under the test set forth in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279, whereby a state tax does not offend the Commerce Clause if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State." Pp. 614–617.

(b) Montana's tax comports with the requirements of the *Complete Auto Transit* test. The tax is not invalid under the third prong of the test on the alleged ground that it discriminates against interstate commerce because 90% of Montana coal is shipped to other States under contracts that shift the tax burden primarily to non-Montana utility companies and thus to citizens of other States. There is no real discrimination since the tax is computed at the same rate regardless of the final destination of the coal and the tax burden is borne according to the amount of coal consumed, not according to any distinction between in-state and out-of-state consumers. Nor is there any merit to

appellants' contention that they are entitled to an opportunity to prove that the tax is not "fairly related to the services provided by the State" by showing that the *amount* of the taxes collected exceeds the *value* of the services provided to the coal mining industry. The fourth prong of the *Complete Auto Transit* test requires only that the *measure* of the tax be reasonably related to the extent of the taxpayer's contact with the State, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a just share of the state tax burden. Because it is measured as a percentage of the value of the coal taken, the Montana tax, a general revenue tax, is in proper proportion to appellants' activities within the State and, therefore, to their enjoyment of the opportunities and protection which the State has afforded in connection with those activities, such as police and fire protection, the benefit of a trained work force, and the advantages of a civilized society. The appropriate level or rate of taxation is essentially a matter for legislative, not judicial, resolution. Pp. 617–629.

2. Nor does Montana's tax violate the Supremacy Clause. Pp. 629–636.

(a) The tax is not invalid as being inconsistent with the Mineral Lands Leasing Act of 1920, as amended. Even assuming that the tax may reduce royalty payments to the Federal Government under leases executed in Montana, this fact alone does not demonstrate that the tax is inconsistent with the Act. Indeed, in § 32 of the Act, Congress expressly authorized the States to impose severance taxes on federal lessees without imposing any limits on the amount of such taxes. And there is nothing in the language or legislative history of the Act or its amendments to support appellants' assertion that Congress intended to maximize and capture through royalties *all* "economic rents" (the difference between the cost of production and the market price of the coal) from the mining of federal coal, and then to divide the proceeds with the State in accordance with the statutory formula. The history speaks in terms of securing a "fair return to the public" and if, as was held in *Mid-Northern Oil Co.* v. *Walker,* 268 U. S. 45, the States, under § 32, may levy and collect taxes as though the Federal Government were not concerned, the manner in which the Federal Government collects receipts from its lessees and then shares them with the States has no bearing on the validity of a state tax. Pp. 629–633.

(b) The tax is not unconstitutional on the alleged ground that it frustrates national energy policies, reflected in several federal statutes, encouraging production and use of coal, and appellants are not entitled to a hearing to explore the contours of these national policies and to adduce evidence supporting their claim. General statements in federal statutes reciting the objective of encouraging the use of coal do not

demonstrate a congressional intent to pre-empt all state legislation that may have an adverse impact on the use of coal. Nor is Montana's tax pre-empted by the Powerplant and Industrial Fuel Use Act of 1978. Section 601 (a)(2) of that Act clearly contemplates the continued existence, not the pre-emption, of state severance taxes on coal. Furthermore, the legislative history of that section reveals that Congress enacted the provision with Montana's tax specifically in mind. Pp. 633–636.

—— Mont. ——, 615 P. 2d 847, affirmed.

MARSHALL, J., delivered the opinion of the Court in which BURGER, C. J., and BRENNAN, STEWART, WHITE, and REHNQUIST, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 637. BLACKMUN, J., filed a dissenting opinion, in which POWELL and STEVENS, JJ., joined, *post*, p. 638.

William P. Rogers argued the cause for appellants. With him on the briefs were *William R. Glendon, Stanley Godofsky, Stephen Froling, James N. Benedict, Patrick F. Hooks, William J. Carl,* and *George J. Miller.*

Mike Greely, Attorney General of Montana, argued the cause for appellees. With him on the brief were *Mike McCrath* and *Mike McCarter,* Assistant Attorneys General, and *A. Raymond Randolph, Jr.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Minnesota et al. by *Warren Spannaus,* Attorney General of Minnesota, and *Kent G. Harbison* and *Karen G. Schanfield,* Special Assistant Attorneys General, *Thomas J. Miller,* Attorney General of Iowa, and *Bronson C. La Follette,* Attorney General of Wisconsin; for the State of Kansas by *Robert T. Stephan,* Attorney General, and *Bruce E. Miller,* Deputy Attorney General; for the State of New Jersey et al. by *John J. Degnan,* Attorney General of New Jersey, *Stephen Skillman,* Assistant Attorney General, and *Claude E. Solomon,* Deputy Attorney General, *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Arthur E. D'Hondt* and *John M. Dempsey,* Assistant Attorneys General; for the State of Texas by *Mark White,* Attorney General, *John Stuart Fryer, James R. Meyers,* and *Justin Andrew Kever,* Assistant Attorneys General, *John W. Fainter, Jr.,* First Assistant Attorney General, and *Richard E. Gray III,* Executive Assistant Attorney General; and for Robert W. Edgar et al. by *Lewis B. Kaden.*

Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General McCree, Acting Assistant Attorney General Liotta,*

JUSTICE MARSHALL delivered the opinion of the Court.

Montana, like many other States, imposes a severance tax on mineral production in the State. In this appeal, we consider whether the tax Montana levies on each ton of coal mined in the State, Mont. Code Ann. § 15–35–101 *et seq.* (1979), violates the Commerce and Supremacy Clauses of the United States Constitution.

I

Buried beneath Montana are large deposits of low-sulfur coal, most of it on federal land. Since 1921, Montana has imposed a severance tax on the output of Montana coal mines, including coal mined on federal land. After commissioning a study of coal production taxes in 1974, see House Resolutions Nos. 45 and 93, Senate Resolution No. 83, 1974 Mont. Laws 1619–1620, 1653–1654, 1683–1684 (Mar. 14 and

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Deputy Solicitor General Claiborne, Edwin S. Kneedler, Edward J. Shawaker, and *Christopher Kirk Harris;* for the State of New Mexico by *Jeff Bingaman,* Attorney General, *Thomas L. Dunigan,* Deputy Attorney General, *Denise Fort,* Assistant Attorney General, and *Paul L. Bloom,* Special Assistant Attorney General; for the State of North Dakota et al. by *Robert O. Welfald,* Attorney General of North Dakota, and *Leo F. J. Wilking,* Assistant Attorney General, and *Chauncey H. Browning, Jr.,* Attorney General of West Virginia; for the State of Wyoming et al. by *John D. Troughton,* Attorney General of Wyoming, *Mary B. Guthrie* and *Dennis M. Boal,* Assistant Attorneys General, *Nancy D. Freudenthal,* Special Assistant Attorney General, and *Steven F. Freudenthal, J. D. MacFarlane,* Attorney General of Colorado, *Richard H. Bryan,* Attorney General of Nevada, *David H. Leroy,* Attorney General of Idaho, *Kenneth O. Eikenberry,* Attorney General of Washington, and *Dave Frohnmayer,* Attorney General of Oregon; for Max Baucus et al. by *R. Stephen Browning, Hamilton P. Fox III,* and *Peter Van N. Lockwood;* for the Environmental Defense Fund et al. by *David B. Roe;* for Malcolm Wallop et al. by *Ann B. Vance* and *Dennis Charles Stickley;* for the Western Conference of the Council of State Governments by *John E. Thorson.*

Briefs of *amici curiae* were filed by *Richard Anthony Baenen, Edward M. Fogarty,* and *Thomas J. Lynaugh,* for the Crow Tribe of Indians; and by *David E. Engdahl* for the Western Governors' Policy Office.

16, 1974); Montana Legislative Council, Fossil Fuel Taxation (1974), in 1975, the Montana Legislature enacted the tax schedule at issue in this case. Mont. Code Ann. § 15–35–103 (1979). The tax is levied at varying rates depending on the value, energy content, and method of extraction of the coal, and may equal, at a maximum, 30% of the "contract sales price." [1] Under the terms of a 1976 amendment to the Montana Constitution, after December 31, 1979, at least 50% of the revenues generated by the tax must be paid into a permanent trust fund, the principal of which may be appropriated only by a vote of three-fourths of the members of each house of the legislature. Mont. Const., Art. IX, § 5.

Appellants, 4 Montana coal producers and 11 of their out-of-state utility company customers, filed these suits in Montana state court in 1978. They sought refunds of over $5.4 million in severance taxes paid under protest, a declaration that the tax is invalid under the Supremacy and Commerce Clauses, and an injunction against further collection of the tax. Without receiving any evidence, the court upheld the tax and dismissed the complaints.

On appeal, the Montana Supreme Court affirmed the judgment of the trial court. —— Mont. ——, 615 P. 2d 847 (1980). The Supreme Court held that the tax is not subject to scrutiny under the Commerce Clause [2] because it is imposed on the severance of coal, which the court characterized as an intrastate activity preceding entry of the coal into interstate

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[1] Under Mont. Code Ann. § 15–35–103 (1979), the value of the coal is determined by the "contract sales price" which is defined as "the price of coal extracted and prepared for shipment f. o. b. mine, excluding the amount charged by the seller to pay taxes paid on production . . . ." § 15–35–102 (1). Taxes paid on production are defined in § 15–35–102 (6). Because production taxes are excluded from the computation of the value of the coal, the effective rate of the tax is lower than the statutory rate.

[2] "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U. S. Const., Art. I, § 8, cl. 3.

commerce. In this regard, the Montana court relied on this Court's decisions in *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245 (1922), *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172 (1923), and *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284 (1927), which employed similar reasoning in upholding state severance taxes against Commerce Clause challenges. As an alternative basis for its resolution of the Commerce Clause issue, the Montana court held, as a matter of law, that the tax survives scrutiny under the four-part test articulated by this Court in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977). The Montana court also rejected appellants' Supremacy Clause [3] challenge, concluding that appellants had failed to show that the Montana tax conflicts with any federal statute.

We noted probable jurisdiction, 449 U. S. 1033 (1980), to consider the important issues raised. We now affirm.

II

A

As an initial matter, appellants assert that the Montana Supreme Court erred in concluding that the Montana tax is not subject to the strictures of the Commerce Clause. In appellants' view, *Heisler*'s "mechanical" approach, which looks to whether a state tax is levied on goods prior to their entry into interstate commerce, no longer accurately reflects the law. Appellants contend that the correct analysis focuses on whether the challenged tax substantially affects interstate commerce, in which case it must be scrutinized under the *Complete Auto Transit* test.

We agree that *Heisler*'s reasoning has been undermined by more recent cases. The *Heisler* analysis evolved at a time when the Commerce Clause was thought to prohibit the States from imposing any direct taxes on interstate commerce.

[3] The "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . ." U. S. Const., Art. VI, cl. 2.

See, *e. g., Helson & Randolph* v. *Kentucky,* 279 U. S. 245, 250–252 (1929); *Ozark Pipe Line Corp.* v. *Monier,* 266 U. S. 555, 562 (1925). Consequently, the distinction between intrastate activities and interstate commerce was crucial to protecting the States' taxing power.[4]

The Court has, however, long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a "local" or intrastate activity. See *Hunt* v. *Washington Apple Advertising Comm'n,* 432 U. S. 333, 350 (1977); *Pike* v. *Bruce Church, Inc.,* 397 U. S. 137, 141–142 (1970); *Nippert* v. *Richmond,* 327 U. S. 416, 423–424 (1946). Correspondingly, the Court has rejected the notion that state taxes levied on interstate commerce are *per se* invalid. See, *e. g., Washington Revenue Dept.* v. *Association of Wash. Stevedoring Cos.,* 435 U. S. 734 (1978); *Complete Auto Transit, Inc.* v. *Brady, supra.* In reviewing Commerce Clause challenges to state taxes, our goal has instead been to "establish a consistent and rational method of inquiry" focusing on "the practical effect of a challenged tax." *Mobil Oil Corp.* v. *Commissioner of Taxes,* 445 U. S. 425, 443 (1980). See *Moorman Mfg. Co.* v. *Bair,* 437 U. S. 267, 276–281 (1978); *Washington Revenue Dept.* v. *Association of Wash. Stevedor-*

[4] The *Heisler* Court explained that any other approach would "nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to States other than those of their production." 260 U. S., at 259–260.

Of course, the "fruits of California" and the "wheat of the West" have long since been held to be within the reach of the Commerce Clause. *Pike* v. *Bruce Church, Inc.,* 397 U. S. 137 (1970); *Wickard* v. *Filburn,* 317 U. S. 111 (1942).

ing Cos., supra, at 743–751; *Complete Auto Transit, Inc.* v. *Brady, supra,* at 277–279. We conclude that the same "practical" analysis should apply in reviewing Commerce Clause challenges to state severance taxes.

In the first place, there is no real distinction—in terms of economic effects—between severance taxes and other types of state taxes that have been subjected to Commerce Clause scrutiny.[5] See, *e. g., Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157 (1954); *Joseph* v. *Carter & Weekes Stevedoring Co.,* 330 U. S. 422 (1947), *Puget Sound Stevedoring Co.* v. *State Tax Comm'n,* 302 U. S. 90 (1937), both overruled in *Washington Revenue Dept.* v. *Association of Wash. Stevedoring Cos., supra.*[6] State taxes levied on a "local" activity preceding entry of the goods into interstate commerce may substantially affect interstate commerce, and this effect is the proper focus of Commerce Clause inquiry. See *Mobil Oil Corp.* v. *Commissioner of Taxes, supra,* at 443. Second, this Court has acknowledged that "a State has a significant interest in exacting from interstate commerce its fair share of the cost of state government," *Washington Revenue Dept.* v. *Association of Wash. Stevedoring Cos., supra,* at 748. As the Court has stated, " '[e]ven interstate business must pay its way.' " *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 254 (1938), quoting *Postal Telegraph-Cable*

[5] The *Heisler* approach has been criticized as unresponsive to economic reality. See Hellerstein, Constitutional Constraints on State and Local Taxation of Energy Resources, 31 Nat. Tax. J. 245, 249 (1978); Brown, The Open Economy: Justice Frankfurter and the Position of the Judiciary, 67 Yale L. J. 219, 232–233 (1957); Developments in the Law: Federal Limitations on State Taxation of Interstate Business, 75 Harv. L. Rev. 953, 970–971 (1962) (Developments).

[6] The *Heisler* approach has forced the Court to draw distinctions that can only be described as opaque. Compare, for example, *East Ohio Gas Co.* v. *Tax Comm'n,* 283 U. S. 465 (1931) (movement of gas into local supply lines at reduced pressure constitutes local business), with *State Tax Comm'n* v. *Interstate Natural Gas Co.,* 284 U. S. 41 (1931) (movement of gas into local supply lines constitutes part of interstate business).

Co. v. *Richmond,* 249 U. S. 252, 259 (1919). Consequently, the *Heisler* Court's concern that a loss of state taxing authority would be an inevitable result of subjecting taxes on "local" activities to Commerce Clause scrutiny is no longer tenable.

We therefore hold that a state severance tax is not immunized from Commerce Clause scrutiny by a claim that the tax is imposed on goods prior to their entry into the stream of interstate commerce. Any contrary statements in *Heisler* and its progeny are disapproved.[7] We agree with appellants that the Montana tax must be evaluated under *Complete Auto Transit*'s four-part test. Under that test, a state tax does not offend the Commerce Clause if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State." 430 U. S., at 279.

B

Appellants do not dispute that the Montana tax satisfies the first two prongs of the *Complete Auto Transit* test. As the Montana Supreme Court noted, "there can be no argument here that a substantial, in fact, the only nexus of the severance of coal is established in Montana." —— Mont., at ——, 615 P. 2d, at 855. Nor is there any question here regarding apportionment or potential multiple taxation, for as the state court observed, "the severance can occur in no other state" and "no other state can tax the severance." *Ibid.* Appellants do contend, however, that the Montana tax is invalid under the third and fourth prongs of the *Complete Auto Transit* test.

Appellants assert that the Montana tax "discriminate[s] against interstate commerce" because 90% of Montana coal is shipped to other States under contracts that shift the tax burden primarily to non-Montana utility companies and thus

[7] This is not to suggest, however, that *Heisler* and its progeny were wrongly decided.

to citizens of other States. But the Montana tax is computed at the same rate regardless of the final destination of the coal, and there is no suggestion here that the tax is administered in a manner that departs from this evenhanded formula. We are not, therefore, confronted here with the type of differential tax treatment of interstate and intrastate commerce that the Court has found in other "discrimination" cases. See, *e. g., Maryland* v. *Louisiana,* 451 U. S. 725 (1981); *Boston Stock Exchange* v. *State Tax Comm'n,* 429 U. S. 318 (1977); cf. *Lewis* v. *BT Investment Managers, Inc.,* 447 U. S. 27 (1980); *Philadelphia* v. *New Jersey,* 437 U. S. 617 (1978).

Instead, the gravamen of appellants' claim is that a state tax must be considered discriminatory for purposes of the Commerce Clause if the tax burden is borne primarily by out-of-state consumers. Appellants do not suggest that this assertion is based on any of this Court's prior discriminatory tax cases. In fact, a similar claim was considered and rejected in *Heisler.* There, it was argued that Pennsylvania had a virtual monopoly of anthracite coal and that, because 80% of the coal was shipped out of State, the tax discriminated against and impermissibly burdened interstate commerce. 260 U. S., at 251–253. The Court, however, dismissed these factors as "adventitious considerations." *Id.,* at 259. We share the *Heisler* Court's misgivings about judging the validity of a state tax by assessing the State's "monopoly" position or its "exportation" of the tax burden out of State.

The premise of our discrimination cases is that "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States." *McLeod* v. *J. E. Dilworth Co.,* 322 U. S. 327, 330 (1944). See *Hunt* v. *Washington Apple Advertising Comm'n,* 432 U. S., at 350; *Boston Stock Exchange* v. *State Tax Comm'n, supra,* at 328. Under such a regime, the borders between the States are essentially irrelevant. As the Court stated in *West* v. *Kansas Natural Gas Co.,* 221 U. S. 229, 255 (1911), " 'in matters of foreign

and interstate commerce there are no state lines.' " See *Boston Stock Exchange* v. *State Tax Comm'n, supra,* at 331–332. Consequently, to accept appellants' theory and invalidate the Montana tax solely because most of Montana's coal is shipped across the very state borders that ordinarily are to be considered irrelevant would require a significant and, in our view, unwarranted departure from the rationale of our prior discrimination cases.

Furthermore, appellants' assertion that Montana may not "exploit" its "monopoly" position by exporting tax burdens to other States, cannot rest on a claim that there is need to protect the out-of-state consumers of Montana coal from discriminatory tax treatment. As previously noted, there is no real discrimination in this case; the tax burden is borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers. Rather, appellants assume that the Commerce Clause gives residents of one State a right of access at "reasonable" prices to resources located in another State that is richly endowed with such resources, without regard to whether and on what terms residents of the resource-rich State have access to the resources. We are not convinced that the Commerce Clause, of its own force, gives the residents of one State the right to control in this fashion the terms of resource development and depletion in a sister State. Cf. *Philadelphia* v. *New Jersey, supra,* at 626.[8]

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[8] Nor do we share appellants' apparent view that the Commerce Clause injects principles of antitrust law into the relations between the States by reference to such imprecise standards as whether one State is "exploiting" its "monopoly" position with respect to a natural resource when the flow of commerce among them is not otherwise impeded. The threshold questions whether a State enjoys a "monopoly" position and whether the tax burden is shifted out of State, rather than borne by in-state producers and consumers, would require complex factual inquiries about such issues as elasticity of demand for the product and alternative sources of supply. Moreover, under this approach, the constitutionality of a state tax could

In any event, appellants' discrimination theory ultimately collapses into their claim that the Montana tax is invalid under the fourth prong of the *Complete Auto Transit* test: that the tax is not "fairly related to the services provided by the State." 430 U. S., at 279. Because appellants concede that Montana may impose *some* severance tax on coal mined in the State,[9] the only remaining foundation for their discrimination theory is a claim that the tax burden borne by the out-of-state consumers of Montana coal is excessive. This is, of course, merely a variant of appellants' assertion that the Montana tax does not satisfy the "fairly related" prong of the *Complete Auto Transit* test, and it is to this contention that we now turn.

Appellants argue that they are entitled to an opportunity to prove that the amount collected under the Montana tax is not fairly related to the additional costs the State incurs because of coal mining.[10] Thus, appellants' objection is to

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well turn on whether the in-state producer is able, through sales contracts or otherwise, to shift the burden of the tax forward to its out-of-state customers. As the Supreme Court of Montana observed, "[i]t would be strange indeed if the legality of a tax could be made to depend on the vagaries of the terms of contracts." — Mont. —, —, 615 P. 2d 847, 856 (1980). It has been suggested that the "formidable evidentiary difficulties in appraising the geographical distribution of industry, with a view toward determining a state's monopolistic position, might make the Court's inquiry futile." Developments, *supra* n. 5, at 970. See Hellerstein, *supra* n. 5, at 248–249.

[9] Since this Court has held that interstate commerce must bear its fair share of the state tax burden, see *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 254 (1938), appellants cannot argue that *no* severance tax may be imposed on coal primarily destined for interstate commerce.

[10] Appellants expect to show that the "legitimate local impact costs [of coal mining]—for schools, roads, police, fire and health protection, and environmental protection and the like—might amount to approximately 2 [cents] per ton, compared to present average revenues from the severance tax alone of over $2.00 per ton." Brief for Appellants 12. Appellants

the *rate* of the Montana tax, and even then, their only complaint is that the *amount* the State receives in taxes far exceeds the *value* of the services provided to the coal mining industry. In objecting to the tax on this ground, appellants may be assuming that the Montana tax is, in fact, intended to reimburse the State for the cost of specific services furnished to the coal mining industry. Alternatively, appellants could be arguing that a State's power to tax an activity connected to interstate commerce cannot exceed the value of the services specifically provided to the activity. Either way, the premise of appellants' argument is invalid. Furthermore, appellants have completely misunderstood the nature of the inquiry under the fourth prong of the *Complete Auto Transit* test.

The Montana Supreme Court held that the coal severance tax is "imposed for the general support of the government." —— Mont., at ——, 615 P. 2d, at 856, and we have no reason to question this characterization of the Montana tax as a general revenue tax.[11] Consequently, in reviewing appellants' contentions, we put to one side those cases in which the Court reviewed challenges to "user" fees or "taxes" that were designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services. See, *e. g., Evans-*

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contend that inasmuch as 50% of the revenues generated by the Montana tax is "cached away, in effect, for unrelated and unknown purposes," it is clear that the tax is not fairly related to the services furnished by the State. Reply Brief for Appellants 8.

At oral argument before the Montana Supreme Court, appellants' counsel suggested that a tax of "perhaps twelve and a half to fifteen percent of the value of the coal" would be constitutional. —— Mont., at ——, 615 P. 2d, at 851.

[11] Contrary to appellants' suggestion, the fact that 50% of the proceeds of the severance tax is paid into a trust fund does not undermine the Montana court's conclusion that the tax is a general revenue tax. Nothing in the Constitution prohibits the people of Montana from choosing to allocate a portion of current tax revenues for use by future generations.

ville-Vanderburgh Airport Authority Dist. v. *Delta Airlines, Inc.*, 405 U. S. 707 (1972); *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583 (1939); *Ingels* v. *Morf*, 300 U. S. 290 (1937).[12]

This Court has indicated that States have considerable latitude in imposing general revenue taxes. The Court has, for example, consistently rejected claims that the Due Process Clause of the Fourteenth Amendment stands as a barrier against taxes that are "unreasonable" or "unduly burdensome." See, *e. g.*, *Pittsburgh* v. *Alco Parking Corp.*, 417 U. S. 369 (1974); *Magnano Co.* v. *Hamilton*, 292 U. S. 40 (1934); *Alaska Fish Salting & By-Products Co.* v. *Smith*, 255 U. S. 44 (1921). Moreover, there is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity. Instead, our consistent rule has been:

> "Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
>
> "A tax is not an assessment of benefits. It is, as we

[12] As the Court has stated, "such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes." *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183, 190 (1931). Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, we have required a showing, based on factual evidence in the record, that "the fees charged do not appear to be manifestly disproportionate to the services rendered . . . ." *Clark* v. *Paul Gray, Inc.*, 306 U. S., at 599. See *id.*, at 598–600; *Ingels* v. *Morf*, 300 U. S., at 296–297.

One commentator has suggested that these "user" charges "are not true revenue measures and . . . the considerations applicable to ordinary tax measures do not apply." P. Hartman, State Taxation of Interstate Commerce 20, n. 72 (1953). Instead, "user" fees "partak[e] . . . of the nature of a rent charged by the State, based upon its proprietary interest in its public property, [rather] than of a tax, as that term is thought of in a technical sense." *Id.*, at 122. See generally *id.*, at 122–130.

> have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good." *Carmichael* v. *Southern Coal & Coke Co.,* 301 U. S. 495, 521–523 (1937) (citations and footnote omitted).

See *St. Louis & S. W. R. Co.* v. *Nattin,* 277 U. S. 157, 159 (1928); *Thomas* v. *Gay,* 169 U. S. 264, 280 (1898).

There is no reason to suppose that this latitude afforded the States under the Due Process Clause is somehow divested by the Commerce Clause merely because the taxed activity has some connection to interstate commerce; particularly when the tax is levied on an activity conducted within the State. "The exploitation by foreign corporations [or consumers] of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations." *Ford Motor Co.* v. *Beauchamp,* 308 U. S. 331, 334–335 (1939); see also *Ott* v. *Mississippi Valley Barge Line Co.,* 336 U. S. 169 (1949). To accept appellants' apparent suggestion that the Commerce Clause prohibits the States from requiring an activity connected to interstate commerce to contribute to the general cost of providing governmental services, as distinct from those costs attributable to the taxed activity, would place such commerce in a privileged position. But as we recently reiterated, "'[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it in-

creases the cost of doing business.'" *Colonial Pipeline Co.* v. *Traigle,* 421 U. S. 100, 108 (1975), quoting *Western Live Stock* v. *Bureau of Revenue,* 303 U. S., at 254. The "just share of state tax burden" includes sharing in the cost of providing "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.'" *Exxon Corp.* v. *Wisconsin Dept. of Revenue,* 447 U. S. 207, 228 (1980), quoting *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U. S. 434, 445 (1979). See *Washington Revenue Dept.* v. *Association of Wash. Stevedoring Cos.,* 435 U. S., at 750–751; *id.,* at 764 (POWELL, J., concurring in part and concurring in result); *General Motors Corp.* v. *Washington,* 377 U. S. 436, 440–441 (1964).

Furthermore, there can be no question that Montana may constitutionally raise general revenue by imposing a severance tax on coal mined in the State. The entire value of the coal, before transportation, originates in the State, and mining of the coal depletes the resource base and wealth of the State, thereby diminishing a future source of taxes and economic activity.[13] Cf. *Maryland* v. *Louisiana,* 451 U. S., at 758–759. In many respects, a severance tax is like a real property tax, which has never been doubted as a legitimate means of raising revenue by the situs State (quite apart from the right of that or any other State to tax income derived from use of the property). See, *e. g., Old Dominion S.S. Co.* v. *Virginia,* 198 U. S. 299 (1905); *Western Union Telegraph Co.* v. *Missouri ex rel. Gottlieb,* 190 U. S. 412 (1903); *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688 (1895). When, as here, a general revenue tax does not discriminate against interstate commerce and is apportioned to activities occurring within

[13] Most of the States raise revenue by levying a severance tax on mineral production. The first such tax was imposed by Michigan in 1846. See U. S. Dept. of Agric., State Taxation of Mineral Deposits and Production (1977). By 1979, 33 States had adopted some type of severance tax. See U. S. Bureau of Census, State Government Tax Collections in 1979, Table 3, p. 6 (1980).

the State, the State "is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444 (1940). As we explained in *General Motors Corp.* v. *Washington, supra,* at 440–441:

> "[T]he validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. For our purposes, the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. . . . As was said in *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444 (1940), '[t]he simple but controlling question is whether the state has given anything for which it can ask return.' "

The relevant inquiry under the fourth prong of the *Complete Auto Transit* test [14] is not, as appellants suggest, the *amount* of the tax or the *value* of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities.[15] Rather, the test is

[14] The fourth prong of the *Complete Auto Transit* test is derived from *General Motors, J. C. Penney,* and similar cases. See 430 U. S., at 279, n. 8; see also *National Geographic Society* v. *California Board of Equalization,* 430 U. S. 551, 558 (1977).

[15] Indeed, the words "amount" and "value" were not even used in *Complete Auto Transit*. See 430 U. S., at 279. Similarly, our cases applying the *Complete Auto Transit* test have not mentioned either of these words. See *Exxon Corp.* v. *Wisconsin Dept. of Revenue,* 447 U. S. 207, 228 (1980); *Mobil Oil Corp.* v. *Commissioner of Taxes,* 445 U. S. 425, 443 (1980); *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U. S.

closely connected to the first prong of the *Complete Auto Transit* test. Under this threshold test, the interstate business must have a substantial nexus with the State before *any* tax may be levied on it. See *National Bellas Hess, Inc.* v. *Illinois Revenue Dept.*, 386 U. S. 753 (1967). Beyond that threshold requirement, the fourth prong of the *Complete Auto Transit* test imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a "just share of state tax burden," *Western Live Stock* v. *Bureau of Revenue*, 303 U. S., at 254. See *National Geographic Society* v. *California Board of Equalization*, 430 U. S. 551 (1977); *Standard Pressed Steel Co.* v. *Washington Revenue Dept.*, 419 U. S. 560 (1975). As the Court explained in *Wisconsin* v. *J. C. Penney Co., supra*, at 446 (emphasis added), "the incidence of the tax *as well as its measure* [must be] tied to the earnings which the State . . . has made possible, insofar as government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes."

Against this background, we have little difficulty concluding that the Montana tax satisfies the fourth prong of the *Complete Auto Transit* test. The "operating incidence" of the tax, see *General Motors Corp.* v. *Washington*, 377 U. S., at 440–441, is on the mining of coal within Montana. Because it is measured as a percentage of the value of the coal taken, the Montana tax is in "proper proportion" to appellants' activities within the State and, therefore, to their "consequent enjoyment of the opportunities and protections which the State has afforded" in connection with those activities. *Id.*, at 441. Cf. *Nippert* v. *Richmond*, 327 U. S., at 427.

434, 444–445 (1979); *Washington Revenue Dept.* v. *Association of Wash. Stevedoring Cos.*, 435 U. S. 734, 750 (1978); *National Geographic Society* v. *California Board of Equalization, supra*, at 558.

When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.'" *Exxon Corp.* v. *Wisconsin Dept. of Revenue,* 447 U. S., at 228, quoting *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U. S., at 445.

Appellants argue, however, that the fourth prong of the *Complete Auto Transit* test must be construed as requiring a factual inquiry into the relationship between the revenues generated by a tax and costs incurred on account of the taxed activity, in order to provide a mechanism for judicial disapproval under the Commerce Clause of state taxes that are excessive. This assertion reveals that appellants labor under a misconception about a court's role in cases such as this.[16] The simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution.[17] See *Helson & Randolph* v. *Kentucky,* 279 U. S. 245, 252 (1929); cf. *Pittsburgh* v. *Alco Parking Corp.,* 417

[16] In any event, the linchpin of appellants' contention is the incorrect assumption that the amount of state taxes that may be levied on an activity connected to interstate commerce is limited by the costs incurred by the State on account of that activity. Only then does it make sense to advocate judicial examination of the relationship between taxes paid and benefits provided. But as we have previously noted, see *supra,* at 623–624, interstate commerce may be required to contribute to the cost of providing *all* governmental services, including those services from which it arguably receives no direct "benefit." In such circumstances, absent an equal protection challenge (which appellants do not raise), and unless a court is to second-guess legislative decisions about the amount or disposition of tax revenues, it is difficult to see how the court is to go about comparing costs and benefits in order to decide whether the tax burden on an activity connected to interstate commerce is excessive.

[17] Of course, a taxing statute may be judicially disapproved if it is "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property." *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44 (1934).

U. S. 369 (1974); *Magnano Co.* v. *Hamilton,* 292 U. S. 40 (1934). In essence, appellants ask this Court to prescribe a test for the validity of state taxes that would require state and federal courts, as a matter of federal constitutional law, to calculate acceptable rates or levels of taxation of activities that are conceded to be legitimate subjects of taxation. This we decline to do.

In the first place, it is doubtful whether any legal test could adequately reflect the numerous and competing economic, geographic, demographic, social, and political considerations that must inform a decision about an acceptable rate or level of state taxation, and yet be reasonably capable of application in a wide variety of individual cases. But even apart from the difficulty of the judicial undertaking, the nature of the factfinding and judgment that would be required of the courts merely reinforces the conclusion that questions about the appropriate level of state taxes must be resolved through the political process. Under our federal system, the determination is to be made by state legislatures in the first instance and, if necessary, by Congress, when particular state taxes are thought to be contrary to federal interests.[18] Cf. *Mobil Oil Corp.* v. *Commissioner of Taxes,* 445 U. S., at 448–449; *Moorman Mfg. Co.* v. *Bair,* 437 U. S., at 280.

Furthermore, the reference in the cases to police and fire protection and other advantages of civilized society is not, as appellants suggest, a disingenuous incantation designed to avoid a more searching inquiry into the relationship between the *value* of the benefits conferred on the taxpayer and the *amount* of taxes it pays. Rather, when the measure of a tax is reasonably related to the taxpayer's activities or presence in the State—from which it derives some benefit such as the

[18] The controversy over the Montana tax has not escaped the attention of the Congress. Several bills were introduced during the 96th Congress to limit the rate of state severance taxes. See S. 2695, H. R. 6625, H. R. 6654 and H. R. 7163. Similar bills have been introduced in the 97th Congress. See S. 178, H. R. 1313.

substantial privilege of mining coal—the taxpayer will realize, in proper proportion to the taxes it pays, "[t]he only benefit to which the taxpayer is constitutionally entitled . . . [:] that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes." *Carmichael* v. *Southern Coal & Coke Co.,* 301 U. S., at 522. Correspondingly, when the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude under the fourth prong of the *Complete Auto Transit* test that the State is imposing an undue burden on interstate commerce. See *Nippert* v. *Richmond,* 327 U. S., at 427; cf. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157 (1954). We are satisfied that the Montana tax, assessed under a formula that relates the tax liability to the value of appellant coal producers' activities within the State, comports with the requirements of the *Complete Auto Transit* test. We therefore turn to appellants' contention that the tax is invalid under the Supremacy Clause.

III

A

Appellants contend that the Montana tax, as applied to mining of federally owned coal, is invalid under the Supremacy Clause because it "substantially frustrates" the purposes of the Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437, 30 U. S. C. § 181 *et seq.* (1976 ed. and Supp. III) (1920 Act), as amended by the Federal Coal Leasing Amendments Act of 1975, Pub. L. 94–377, 90 Stat. 1083 (1975 Amendments). Appellants argue that under the 1920 Act, the "economic rents" attributable to the mining of coal on federal land—*i. e.,* the difference between the cost of production (including a reasonable profit) and the market price of the coal—are to be captured by the Federal Government in the form of royalty payments from federal lessees. The payments thus

received are then to be divided between the States and the Federal Government according to a formula prescribed by the Act.[19] In appellants' view, the Montana tax seriously undercuts and disrupts the 1920 Act's division of revenues between the Federal and State Governments by appropriating directly to Montana a major portion of the "economic rents." Appellants contend the Montana tax will alter the statutory scheme by causing potential coal producers to reduce the amount they are willing to bid in royalties on federal leases.

As an initial matter, we note that this argument rests on a factual premise—that the principal effect of the tax is to shift a major portion of the relatively fixed "economic rents" attributable to the extraction of federally owned coal from the Federal Treasury to the State of Montana—that appears to be inconsistent with the premise of appellants' Commerce Clause claims. In pressing their Commerce Clause arguments, appellants assert that the Montana tax increases the cost of Montana coal, thereby *increasing* the total amount of "economic rents," and that the burden of the tax is borne by out-of-state consumers, not the Federal Treasury.[20] But

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[19] As originally enacted in 1920, § 35 of the Mineral Lands Leasing Act, ch. 85, 41 Stat. 450, 30 U. S. C. § 191 (1970 ed.), provided that all receipts from the leasing of public lands under the Act were to be paid into the United States Treasury and then divided as follows: 37.5% to the State in which the leased lands are located; 52.5% to the reclamation fund created by the Reclamation Act of 1902, ch. 1093, § 1, 32 Stat. 388, 43 U. S. C. § 391; and the remaining 10% to be deposited in the Treasury under "miscellaneous receipts."

Section 35 was amended by § 9 (a) of the 1975 Amendments to provide for a new statutory formula which is currently in effect. Under this formula, the State in which the mining occurs receives 50% of the revenues, the reclamation fund receives 40%, and the United States Treasury the remaining 10%. 30 U. S. C. § 191.

[20] Indeed, appellants alleged in their complaints that the contracts between appellant coal producers and appellant utility companies *require* the utility companies to reimburse the coal producers for their severance tax payments, and that the ultimate incidence of the tax primarily falls

even assuming that the Montana tax may reduce royalty payments to the Federal Government under leases executed in Montana, this fact alone hardly demonstrates that the tax is inconsistent with the 1920 Act. Indeed, appellants' argument is substantially undermined by the fact that in § 32 of the 1920 Act, 41 Stat. 450, 30 U. S. C. § 189, Congress expressly authorized the States to impose severance taxes on federal lessees without imposing any limits on the amount of such taxes. Section 32, as set forth in 30 U. S. C. § 189, provides in pertinent part:

> "Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States."

This Court had occasion to construe § 32 soon after it was enacted. The Court explained:

> "Congress . . . meant by the proviso to say in effect that, although the act deals with the letting of public lands and the relations of the [federal] government to the lessees thereof, nothing in it shall be so construed as to affect the right of the states, in respect of such private persons and corporations, to *levy and collect taxes as though the government were not concerned.* . . .
>
> . . . . . .
>
> "We think the proviso plainly discloses the intention of Congress that *persons and corporations contracting with the United States under the act, should not, for that reason, be exempt from any form of state taxation other-*

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on the utilities' out-of-state customers. Complaint ¶¶ 17, 18, App. to Juris. Statement (J. S. App.) 53a–54a. Presumably, with regard to these contracts, the Federal Government's receipts will be unaffected by the Montana tax.

wise lawful." Mid-Northern Oil Co. v. *Walker,* 268 U. S. 45, 48–50 (1925) (emphasis added).

It necessarily follows that if the Montana tax is "otherwise lawful," the 1920 Act does not forbid it.

Appellants contend that the Montana tax is not "otherwise lawful" because it conflicts with the very purpose of the 1920 Act. We do not agree. There is nothing in the language or legislative history of either the 1920 Act or the 1975 Amendments to support appellants' assertion that Congress intended to maximize and capture *all* "economic rents" from the mining of federal coal, and then to distribute the proceeds in accordance with the statutory formula. The House Report on the 1975 Amendments, for example, speaks only in terms of a congressional intent to secure a "fair return to the public." H. R. Rep. No. 94–681, pp. 17–18 (1975). Moreover, appellants' argument proves too much. By definition, any state taxation of federal lessees reduces the "economic rents" accruing to the Federal Government, and appellants' argument would preclude any such taxes despite the explicit grant of taxing authority to the States by § 32. Finally, appellants' contention necessarily depends on inferences to be drawn from §§ 7 and 35 of the 1920 Act, 30 U. S. C. §§ 207 and 191, which, as amended, prescribe the statutory formula for the division of the payments received by the Federal Government. See Complaint ¶¶ 38–41, J. S. App. 57a–58a. Yet § 32 of the 1920 Act, as set forth in 30 U. S. C. § 189, states that "[n]othing in this chapter"—which includes §§ 7 and 35—"shall be construed or held to affect the rights of the States . . . to levy and collect taxes upon . . . output of mines . . . of any lessee of the United States." And if, as the Court has held, the States may "levy and collect taxes as though the [federal] government were not concerned," *Mid-Northern Oil Co.* v. *Walker, supra,* at 49, the manner in which the Federal Government collects receipts from its lessees and then shares them with the States has no bearing on the validity of a state tax. We

therefore reject appellants' contention that the Montana tax must be invalidated as inconsistent with the Mineral Lands Leasing Act.

B

The final issue we must consider is appellants' assertion that the Montana tax is unconstitutional because it substantially frustrates national energy policies, reflected in several federal statutes, encouraging the production and use of coal, particularly low-sulfur coal such as is found in Montana. Appellants insist that they are entitled to a hearing to explore the contours of these national policies and to adduce evidence supporting their claim that the Montana tax substantially frustrates and impairs the policies.

We cannot quarrel with appellants' recitation of federal statutes encouraging the use of coal. Appellants correctly note that § 2 (6) of the Energy Policy and Conservation Act of 1975, 89 Stat. 874, 42 U. S. C. § 6201 (6), declares that one of the Act's purposes is "to reduce the demand for petroleum products and natural gas through programs designed to provide greater availability and use of this Nation's abundant coal resources." And § 102 (b)(3) of the Powerplant and Industrial Fuel Use Act of 1978 (PIFUA), 92 Stat. 3291, 42 U. S. C. § 8301 (b)(3) (1976 ed., Supp. III), recites a similar objective "to encourage and foster the greater use of coal and other alternate fuels, in lieu of natural gas and petroleum, as a primary energy source." We do not, however, accept appellants' implicit suggestion that these general statements demonstrate a congressional intent to pre-empt all state legislation that may have an adverse impact on the use of coal. In *Exxon Corp.* v. *Governor of Maryland,* 437 U. S. 117 (1978), we rejected a pre-emption argument similar to the one appellants urge here. There, it was argued that the "basic national policy favoring free competition" reflected in the Sherman Act pre-empted a state law regulating retail distribution of gasoline. *Id.,* at 133. The Court acknowledged

the conflict between the state law and this national policy, but rejected the suggestion that the "broad implications" of the Sherman Act should be construed as a congressional decision to pre-empt the state law. *Id.*, at 133–134. Cf. *New Motor Vehicle Bd. of California* v. *Orrin W. Fox Co.*, 439 U. S. 96, 110–111 (1978). As we have frequently indicated, "[p]re-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U. S. 311, 317 (1981), quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142 (1963). See *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S. 504, 522 (1981); *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525–526 (1977); *Perez* v. *Campbell*, 402 U. S. 637, 649 (1971). In cases such as this, it is necessary to look beyond general expressions of "national policy" to specific federal statutes with which the state law is claimed to conflict.[21] The only specific statutory provisions favoring the use of coal cited by appellants are those in PIFUA.

PIFUA prohibits new electric power plants or new major fuel-burning installations from using natural gas or petroleum as a primary energy source, and prohibits existing facilities from using natural gas as a primary energy source after 1989. 42 U. S. C. §§ 8311 (1), 8312 (a) (1976 ed., Supp. III). Appellants contend that "the manifest purpose of this Act to favor the use of coal is clear." Brief for Appellants 37. As the statute itself makes clear, however, Congress did not intend PIFUA to pre-empt state severance taxes on coal. Section 601 (a)(1) of PIFUA, 92 Stat. 3323, 42 U. S. C. § 8401 (a)(1) (1976 ed., Supp. III), provides for federal fi-

[21] Thus, in *Exxon*, after rejecting the "national policy" pre-emption argument, the Court went on to consider more focused allegations concerning alleged conflicts between the state law and specific provisions of the Robinson-Patman Act. 437 U. S., at 129–133.

nancial assistance to areas of a State adversely affected by increased coal or uranium mining, based upon findings by the Governor of the State that the state or local government lacks the financial resources to meet increased demand for housing or public services and facilities in such areas. Section 601 (a)(2), 42 U. S. C. § 8401 (a)(2) (1976 ed., Supp. III), then provides that

> "increased revenues, *including severance tax revenues,* royalties, and similar fees to the State and local governments which are associated with the increase in coal or uranium development activities . . . shall be taken into account in determining if a State or local government lacks financial resources."

This section clearly contemplates the continued existence, not the pre-emption, of state severance taxes on coal and other minerals.

Furthermore, the legislative history of § 601 (a)(2) reveals that Congress enacted this provision with Montana's tax specifically in mind. The Senate version of the PIFUA bill provided for impact aid, but the House bill did not. See H. R. Conf. Rep. No. 95–1749, p. 93 (1978). The Senate's proposal for impact aid was opposed by the House conferees, who took the position that the States would be able to satisfy the demand for additional facilities and services caused by increased coal production through imposition of severance taxes and, in Western States, through royalties received under the Mineral Lands Leasing Act. See Transcript of the Joint Conference on Energy 1822, 1824, 1832, 1834–1837, 1839 (1977) (Tr.), reprinted in 2 U. S. Dept. of Energy, Legislative History: Powerplant and Industrial Fuel Use Act, 777, 779, 787, 789–792, 794 (1978) (Legislative History). In explaining the objections of the House conferees, Representative Eckhardt pointed out:

> "[T]he western states may collect severance taxes on that coal.

"As I pointed out [see Tr. 1822, Legislative History, at 777], Montana already collects $3 a ton on severance taxes on coal and still enjoys a 50 percent royalty return. As the price of coal goes up . . . these severance taxes in addition go up.

"This is a percentage tax, not a flat tax in most instances.

"If we are going to merely determine on the basis of impact on a particular community in a state how much money is going to go to that community, without taking into account how much that community is enriched, I think we are going to have people who are so angry at us in Congress . . . ." Tr. 1835, Legislative History, at 790.

Section 601 (a)(2) was obviously included in PIFUA as a response to these concerns, for it provides that severance taxes and royalties are to be "taken into account" in determining eligibility for impact aid. The legislative history of § 601 (a)(2) thus confirms what seems evident from the face of the statute—that Montana's severance tax is not pre-empted by PIFUA. Since PIFUA is the only federal statute that even comes close to providing a specific basis for appellants' claims that the Montana statute "substantially frustrates" federal energy policies, this aspect of appellants' Supremacy Clause argument must also fail.[22]

IV

In sum, we conclude that appellants have failed to demonstrate either that the Montana tax suffers from any of the constitutional defects alleged in their complaints, or that a

[22] Appellants' assertion that the Montana tax is pre-empted by the Clean Air Act, 42 U. S. C. § 7401 *et seq.* (1976 ed., Supp. III), merits little discussion. The Clean Air Act does not mandate the use of coal; it merely prescribes standards governing the emission of sulfur dioxide when coal is used. Any effect those standards might have on the use of high or low sulphur coal is incidental.

trial is necessary to resolve the issue of the constitutionality of the tax. Consequently, the judgment of the Supreme Court of Montana is affirmed.

So ordered.

JUSTICE WHITE, concurring.

This is a very troublesome case for me, and I join the Court's opinion with considerable doubt and with the realization that Montana's levy on consumers in other States may in the long run prove to be an intolerable and unacceptable burden on commerce. Indeed, there is particular force in the argument that the tax is here and now unconstitutional. Montana collects most of its tax from coal lands owned by the Federal Government and hence by all of the people of this country, while at the same time sharing equally and directly with the Federal Government all of the royalties reserved under the leases the United States has negotiated on its land in the State of Montana. This share is intended to compensate the State for the burdens that coal mining may impose upon it. Also, as JUSTICE BLACKMUN cogently points out, *post,* at 643, n. 9, another 40% of the federal revenue from mineral leases is indirectly returned to the States through a reclamation fund. In addition, there is statutory provision for federal grants to areas affected by increased coal production.

But this very fact gives me pause and counsels withholding our hand, at least for now. Congress has the power to protect interstate commerce from intolerable or even undesirable burdens. It is also very much aware of the Nation's energy needs, of the Montana tax, and of the trend in the energy-rich States to aggrandize their position and perhaps lessen the tax burdens on their own citizens by imposing unusually high taxes on mineral extraction. Yet, Congress is so far content to let the matter rest, and we are counseled by the Executive Branch through the Solicitor General not to overturn the Montana tax as inconsistent with either the Commerce Clause

or federal statutory policy in the field of energy or otherwise. The constitutional authority and the machinery to thwart efforts such as those of Montana, if thought unacceptable, are available to Congress, and surely Montana and other similarly situated States do not have the political power to impose their will on the rest of the country. As I presently see it, therefore, the better part of both wisdom and valor is to respect the judgment of the other branches of the Government. I join the opinion and the judgment of the Court.

JUSTICE BLACKMUN, with whom JUSTICE POWELL and JUSTICE STEVENS join, dissenting.

In *Complete Auto Transit, Inc.* v. *Brady,* 430 U. S. 274 (1977), a unanimous Court observed: "A tailored tax, however accomplished, must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce." *Id.,* at 288–289, n. 15. In this case, appellants have alleged that Montana's severance tax on coal is tailored to single out interstate commerce, and that it produces a forbidden effect on that commerce because the tax bears no "relationship to the services provided by the State." *Ibid.* The Court today concludes that appellants are not entitled to a *trial* on this claim. Because I believe that the "careful scrutiny" due a tailored tax makes a trial here necessary, I respectfully dissent.

I

The State of Montana has approximately 25% of all known United States coal reserves, and more than 50% of the Nation's low-sulfur coal reserves.[1] Department of Energy, Demonstrated Reserve Base of Coal in the United States on January 1, 1979, p. 8 (1981); National Coal Assn., Coal Data 1978, p. I–6 (1980). Approximately 70–75% of Montana's

[1] Montana and Wyoming together contain 40% of all United States coal reserves and 68% of all reserves of low-sulfur coal. H. R. Rep. No. 96–1527, pt. 1, p. 3 (1980).

coal lies under land owned by the Federal Government in the State. See Hearings on H. R. 6625, H. R. 6654, and H. R. 7163 before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, 96th Cong., 2d Sess., 22 (1980) (Hearings) (statement of Rep. Vento). The great bulk of the coal mined in Montana—indeed, allegedly as much as 90%, see *ante,* at 617–618—is exported to other States pursuant to long-term purchase contracts with out-of-state utilities. See H. R. Rep. No. 96–1527, pt. 1, pp. 3–4 (1980). Those contracts typically provide that the costs of state taxation shall be passed on to the utilities; in turn, fuel adjustment clauses allow the utilities to pass the cost of taxation along to their consumers. *Ibid.* Because federal environmental legislation has increased the demand for low-sulfur coal, *id.,* at 3, and because the Montana coal fields occupy a "pivotal" geographic position in the midwestern and northwestern energy markets, see J. Krutilla & A. Fisher with R. Rice, Economic and Fiscal Impacts of Coal Development: Northern Great Plains xvi (1978) (Krutilla), Montana has supplied an increasing percentage of the Nation's coal.[2]

In 1975, following the Arab oil embargo and the first federal coal conversion legislation, the Montana Legislature, by 1975 Mont. Laws, ch. 525, increased the State's severance tax on coal from a flat rate of approximately 34 cents per ton to a maximum rate of 30% of the "contract sales price." Mont. Code Ann. § 15–35–103 (1979).[3] See H. R. Rep. No. 96–1527, pt. 1, p. 3 (1980). The legislative history of this tax is illuminating. The Joint Conference Committees of the Mon-

[2] Together with Wyoming, Montana supplied 10% of the United States' demand for coal in 1977; it is estimated that Montana and Wyoming will supply 33% of the Nation's coal by 1990. Hearings 22 (statement of Rep. Vento).

[3] The pre-1975 rate was 12, 22, 34, or 40 cents per ton depending on the Btu content of the coal mined. Krutilla, at 50. Appellants state that coal taxed at 34 cents per ton prior to the 1975 amendment is now typically taxed at the effective rate of $2.08 per ton. Brief for Appellants 7–8.

tana Legislature that recommended this amendment acknowledged: "It is true that this is a higher rate of taxation than that levied by any other American state on the coal industry." [4] Statement to Accompany the Report of the Free Joint Conference Committees on Coal Taxation 1 (1975). The Committees pointed out, however, that the Province of Alberta, Canada, recently had raised sharply its royalty on natural gas, thereby forcing consumers of Alberta gas in Montana and elsewhere to finance involuntarily Alberta's "universities, hospitals, reduction of other taxes, etc." *Ibid.* Stating that "we should . . . look north to Alberta," the Conference Committees observed: "While coal is not as scarce as natural gas, most of the Montana coal now produced is committed for sale under long-term contracts and will be purchased with this tax added to its price." *Ibid.* The Committees noted that although some new coal contracts might shift to Wyoming to take advantage of that State's lower severance tax, Montana's severance tax was comparable to that recently enacted by North Dakota.[5] Thus, the Com-

[4] In fact, the study of coal production taxes commissioned by the Montana Legislature in 1974, see *ante,* at 612–613, found that while other States may have imposed a higher overall tax burden on coal, "no coal state had, through 1973, higher severance and property taxes than Montana." Subcommittee on Fossil Fuel Taxation, Interim Study on Fossil Fuel Taxation 14 (1974). Thus, even prior to the 1975 amendment, "Montana and its local governments tax[ed] the *production* of fossil fuels at a higher level than any competitive state . . . ." (Emphasis in original.) *Ibid.*

[5] North Dakota taxes lignite at a flat rate that is estimated to equal about 20% of value. See H. R. Rep. No. 96–1527, pt. 1, p. 3 (1980). Apparently inspired by these examples, Wyoming increased its state severance and local ad valorem taxes to a combined total of approximately 17½% of value. Wyo. Stat. Ann. §§ 39–2–202, 39–2–402, 39–6–302 (a)–(f), and 39–6–303 (a) (1977 and Supp. 1980). See H. R. Rep. No. 96–1527, pt. 1, p. 3 (1980). With the possible exception of North Dakota's tax on lignite, the severance taxes imposed by Montana and Wyoming are higher than the taxes imposed on energy reserves by any other State. *Ibid.*

Significantly, however, other Western States have considered or are considering raising their taxes on coal production. *Ibid.* One study con-

mittees had no doubt that the coal industry would grow even with this tax, since "the combined coal reserves of Montana and North Dakota are simply too great a part of the nation's fossil fuel resources to be ignored because of taxes at these levels." [6] *Ibid.*

As the Montana Legislature foresaw, the imposition of this severance tax has generated enormous revenues for the State. Montana collected $33.6 million in severance taxes in fiscal year 1978, H. R. Rep. No. 96–1527, pt. 1, p. 3 (1980), and appellants alleged that it would collect not less than $40 million in fiscal year 1979. App. to Juris. Statement 55a. It has been suggested that by the year 2010, Montana will have collected more than $20 billion through the implementation of this tax. Hearings 22 (statement of Rep. Vento).

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cluded that "'[t]ax leadership' in the western states appears to be an emerging reality," and that informal cartel arrangements may arise among these States. Church, Conflicting Federal, State and Local Interest Trends in State and Local Energy Taxation: Coal and Copper—A Case in Point, 31 Nat. Tax J. 269, 278 (1978) (Church). Indeed, the 1974 Montana Subcommittee on Fossil Fuel Taxation, see n. 4, *supra,* was directed by the Montana Legislature "to investigate the feasibility and value of multi-state taxation of coal with the Dakotas and Wyoming, and to contract and cooperate joining with these other states to achieve that end . . . ." House Resolution No. 45, 1974 Mont. Laws, p. 1620. The Subcommittee recommended that the Executive pursue this goal. Subcommittee on Fossil Fuel Taxation, *supra,* at 2.

[6] One of the principal sponsors of the severance tax bill explained to the Montana Legislature:

"Most of Montana's coal is shipped out of state to power plants and utility companies in the Midwest. In reviewing the [long-term] contracts between the coal companies and the utility companies who purchase the coal, all of the contracts that were shown to our Legislative Committee contain an escalation clause for taxes. In other words, the local companies simply add the additional taxes to their bill, and the entire cost is passed on to the purchasers in the Midwest or elsewhere. Because most of the purchasers are regulated utility companies, it is reasonable to assume these companies will, in turn, pass on their extra costs to their customers." Towe, Explanation of Reasons for Montana's Coal Tax 4, cited in Brief for Appellants 34.

No less remarkable is the increasing percentage of total revenue represented by the severance tax. In 1972, the then-current flat rate severance tax on coal provided only 0.4% of Montana's total tax revenue; in contrast, in the year following the 1975 amendment, the coal severance tax supplied 11.4% of the State's total tax revenue. See Griffin & Shelton, Coal Severance Tax Policies in the Rocky Mountain States, 7 Policy Studies J. 29, 33 (1978) (Griffin). Appellants assert that the tax now supplies almost 20% of the State's total revenue. Tr. of Oral Arg. 31. Indeed, the funds generated by the tax have been so large that, beginning in 1980, at least 50% of the severance tax is to be transferred and dedicated to a permanent trust fund, the principal of which must "forever remain inviolate" unless appropriated by a vote of three-fourths of the members of each house of the legislature. Mont. Const., Art. IX, § 5. Moreover, in 1979, Montana passed legislation providing property and income tax relief for state residents. 1979 Mont. Laws, ch. 698.

Appellants' complaint alleged that Montana's severance tax is ultimately borne by out-of-state consumers, and for the purposes of this appeal that allegation is to be treated as true.[7] Appellants further alleged that the tax bears no reasonable relationship to the services or protection provided by the State. The issue here, of course, is whether they are entitled to a trial on that claim, not whether they will succeed on the merits. It should be noted, however, that Montana imposes numerous other taxes upon coal mining.[8] In addi-

[7] The Montana Supreme Court observed that under Montana law, facts well pleaded in the complaint must be accepted as true on review of a judgment of dismissal; it therefore necessarily held that appellants could not prevail "under any view of the alleged facts." —— Mont. ——, ——, 615 P. 2d 847, 849 (1980). See also Tr. of Oral Arg. 17–18.

[8] In addition to the severance tax on coal, Montana imposes a gross proceeds tax, Mont. Code Ann. § 15–6–132 (1979), a resource indemnity trust tax, § 15–38–104, a property tax on mining equipment, § 15–6–138

tion, because 70% to 75% of the coal-bearing land in Montana is owned by the Federal Government, Montana derives a large amount of coal mining revenue from the United States as well.[9] In light of these circumstances, the Interstate and Foreign Commerce Committee of the United States House of Representatives concluded that Montana's coal severance tax results in revenues "far in excess of the direct and indirect impact costs attributable to the coal production." H. R. Rep. No. 96–1527, pt. 1, p. 2 (1980). Several commentators have agreed that Montana and other similarly situated Western States have pursued a policy of "OPEC-like revenue maximization," and that the Montana tax accordingly bears no reasonable relationship to the services and protection afforded by the State. R. Nehring & B. Zycher with J. Wharton, Coal Development and Government Regulation in the Northern Great Plains: A Preliminary Report 148 (1976); Church, at 272. See Krutilla, at 185. These findings, of course, are not dispositive of the issue whether the Montana severance tax is "fairly related" to the services

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(b), and a corporation license tax, § 15–31–101. See Krutilla, at 50–54. Furthermore, all costs of reclamation must be borne by the coal companies under both federal and state law, and Montana requires each company to purchase a reclamation bond prior to the commencement of mining operations. § 82–4–338.

[9] By federal statute, 50% of the "sales, bonuses, royalties, and rentals" of federal public lands are payable to the State within which the leased land lies "to be used by such State and its subdivisions, as the legislature of the State may direct giving priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this chapter, for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service . . . ." Mineral Lands Leasing Act of 1920, § 35, 41 Stat. 450, as amended, 30 U. S. C. § 191. An additional 40% of this federal revenue from mineral leases is indirectly returned to the States through a reclamation fund. *Ibid.* Moreover, § 601 of the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, 92 Stat. 3323, 42 U. S. C. § 8401 (1976 ed., Supp. III), authorizes federal grants to areas affected by increased coal production.

provided by the State within the meaning of our prior cases. They do suggest, however, that appellants' claim is a substantial one. The failure of the Court to acknowledge this stems, it seems to me, from a misreading of our prior cases. It is to those cases that I now turn.

II

This Court's Commerce Clause cases have been marked by tension between two competing concepts: the view that interstate commerce should enjoy a "free trade" immunity from state taxation, see, *e. g., Freeman* v. *Hewit,* 329 U. S. 249, 252 (1946), and the view that interstate commerce may be required to " 'pay its way,' " see, *e. g., Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 254 (1938). See generally *Complete Auto Transit, Inc.* v. *Brady,* 430 U. S., at 278–281, 288–289, n. 15; Simet & Lynn, Interstate Commerce Must Pay Its Way: The Demise of Spector, 31 Nat. Tax J. 53 (1978); Hellerstein, Foreword, State Taxation Under the Commerce Clause: An Historical Perspective, 29 Vand. L. Rev. 335, 335–339 (1976). In *Complete Auto Transit,* the Court resolved that tension by unanimously reaffirming that interstate commerce is not immune from state taxation. 430 U. S., at 288. But at the same time the Court made clear that not all state taxation of interstate commerce is valid; a state tax will be sustained against Commerce Clause challenge *only* if "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.,* at 279. See *Maryland* v. *Louisiana,* 451 U. S. 725, 754 (1981).

The Court today acknowledges and, indeed, holds that a Commerce Clause challenge to a state severance tax must be evaluated under *Complete Auto Transit's* four-part test. *Ante,* at 617. I fully agree. I cannot agree, however, with the Court's application of that test to the facts of the present case. Appellants concede, and the Court properly concludes,

that the first two prongs of the test—substantial nexus and fair apportionment—are satisfied here. The Court also correctly observes that Montana's severance tax is facially neutral. It does not automatically follow, however, that the Montana severance tax does not unduly burden or interfere with interstate commerce. The gravamen of appellants' complaint is that the severance tax does not satisfy the fourth prong of the *Complete Auto Transit* test because it is tailored to, and does, force interstate commerce to pay *more* than its way. Under our established precedents, appellants are entitled to a trial on this claim.

The Court's conclusion to the contrary rests on the premise that the relevant inquiry under the fourth prong of the *Complete Auto Transit* test is simply whether the *measure* of the tax is fixed as a percentage of the value of the coal taken. *Ante,* at 626. This interpretation emasculates the fourth prong. No trial will ever be necessary on the issue of fair relationship so long as a State is careful to impose a proportional rather than a flat tax rate; thus, the Court's rule is no less "mechanical" than the approach entertained in *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245 (1922), disapproved today, *ante,* at 617.[10] Under the Court's reasoning, any ad valorem tax will satisfy the fourth prong; indeed, the Court implicitly ratifies Montana's contention that it is free to tax this coal at 100% or even 1,000% of value, should it

[10] This is a marked departure from the Court's prior cases. Rather than suggesting such a mechanical test, those cases imply that a tax will be struck down under the fourth prong of the *Complete Auto Transit* test if the plaintiff establishes a factual record that the tax is not fairly related to the services and protection provided by the State. See, *e. g., Washington Revenue Dept.* v. *Association of Wash. Stevedoring Cos.,* 435 U. S. 734, 750–751 (1978); *id.,* at 764 (POWELL, J., concurring in part and concurring in result). See *Merrion* v. *Jicarilla Apache Tribe,* 617 F. 2d 537, 545, n. 4 (CA10) (en banc), cert. granted, 449 U. S. 820 (1980). Even the trial court in the present case recognized that if it reached this question it "would necessarily have to deny the motion to dismiss and proceed to a factual determination." App. 37a.

choose to do so. Tr. of Oral Arg. 21. Likewise, the Court's analysis indicates that Montana's severance tax would not run afoul of the Commerce Clause even if it raised sufficient revenue to allow Montana to eliminate all other taxes upon its citizens.[11]

The Court's prior cases neither require nor support such a startling result.[12] The Court often has noted that "'[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their *just share* of state tax burden even though it increases the cost of doing the business.'" *Complete Auto Transit,* 430 U. S., at 279 (emphasis added), quoting *Western Live Stock,* 303 U. S., at 254. See *Maryland* v. *Louisiana,* 451 U. S., at 754. Accordingly,

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[11] As the example of Alaska illustrates, this prospect is not a fanciful one. Ninety percent of Alaska's revenue derives from petroleum taxes and royalties; because of the massive sums that have been so raised, that State's income tax has been eliminated. See N. Y. Times, June 5, 1981, section 1, p. A10, col. 1. As noted above, Montana's severance tax already allegedly accounts for 20% of its total tax revenue, and the State has enacted property and income tax relief.

[12] The Court apparently derives its interpretation of the fourth prong of the *Complete Auto Transit* test primarily from *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435 (1940), and *General Motors Corp.* v. *Washington,* 377 U. S. 436 (1964). *Ante,* at 624–626. In neither of those cases, however, did the Court consider the question presented here. *J. C. Penney* involved a *Fourteenth Amendment* challenge brought by a foreign corporation to a Wisconsin tax imposed on domestic and foreign corporations "for the privilege of declaring . . . dividends" out of income from property located and business transacted in Wisconsin. The corporation argued that because the income from the Wisconsin transactions had been transferred to New York, Wisconsin had "no jurisdiction to tax" those amounts. 311 U. S., at 436. The Court rejected that argument, holding that "[t]he fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction." *Id.,* at 445. In *General Motors,* the question before the Court was the validity of an unapportioned tax on the gross receipts of a corporation in interstate commerce. The Court concluded that there was a sufficient nexus to uphold the tax. 377 U. S., at 448. See *id.,* at 449–450 (BRENNAN, J., dissenting).

interstate commerce cannot claim any exemption from a state tax that "is fairly related to the services provided by the State." *Complete Auto Transit,* 430 U. S., at 279. We have not interpreted this requirement of "fair relation" in a narrow sense; interstate commerce may be required to share equally with intrastate commerce the cost of providing "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.' " *Exxon Corp.* v. *Wisconsin Dept. of Revenue,* 447 U. S. 207, 228 (1980), quoting *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U. S. 434, 445 (1979). See, *e. g., Nippert* v. *Richmond,* 327 U. S. 416, 433 (1946). Moreover, interstate commerce can be required to "pay its own way" in a narrower sense as well: the State may tax interstate commerce for the purpose of recovering those costs attributable to the activity itself. See, *e. g., Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252 (1919).[13]

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[13] In *Postal Telegraph-Cable Co.,* a telegraph company engaged in interstate commerce challenged both an annual license tax and an annual tax of $2 for each telegraph pole that the company maintained in the city of Richmond, Va. The Court sustained the validity of the license tax on the ground that it was simply a nondiscriminatory "exercise of the police power . . . for revenue purposes." 249 U. S., at 257. In contrast, the pole tax was subjected to stricter scrutiny; the Court stated that while interstate commerce must pay its way, the authority remains in the courts, "on proper application, to determine whether, under the conditions prevailing in a given case, the charge made is reasonably proportionate to the service to be rendered and the liabilities involved, or whether it is a disguised attempt to impose a burden on interstate commerce." *Id.,* at 260.

The Court has continued to scrutinize carefully taxes on interstate commerce that are designed to reimburse the State for the particular costs imposed by that commerce. See, *e. g., Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines, Inc.,* 405 U. S. 707 (1972); *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583 (1939); *Ingels* v. *Morf,* 300 U. S. 290 (1937). In analyzing such taxes, it has required that there be factual evidence in the record that "the fees charged do not appear to be manifestly disproportionate to the services rendered." *Clark,* 306 U. S., at 599. The Court concludes that this test has no bearing here because the Montana Supreme Court held that the coal severance tax was " 'imposed for the

The Court has never suggested, however, that interstate commerce may be required to pay *more* than its own way. The Court today fails to recognize that the Commerce Clause does impose limits upon the State's power to impose even facially neutral and properly apportioned taxes. See *ante,* at 622–623. In *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157, 163 (1954), Texas argued that no inquiry into the constitutionality of a facially neutral tax on the "taking" of gas was necessary because the State "has afforded great benefits and protection to pipeline companies." The *Calvert* Court rejected this argument, holding that "these benefits are relevant here only to show that the essential requirements of due process have been met sufficiently to justify the imposition of *any* tax on the interstate activity." *Id.,* at 163–164. The Court held, *id.,* at 164, that when a tax is challenged on Commerce Clause grounds its validity " 'depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce,' " quoting *Nippert* v. *Richmond,* 327 U. S., at 424. Accordingly, while

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general support of the government.' " *Ante,* at 621. In fact, however, the matter is not nearly so clear as the Court suggests. The Montana court also implied that the tax was designed at least in part to compensate the State for the special costs attributable to coal mining, — Mont., at —, —, 615 P. 2d, at 850, 855, as have appellees here. Brief for Appellees 1–3, 26–27.

Indeed, the stated objectives of the 1975 amendment were to: "(a) preserve or modestly increase revenues going to the general fund, (b) to respond to current social impacts attributable to coal development, and (c) to invest in the future, when new energy technologies reduce our dependence on coal and mining activity may decline." Statement to Accompany the Report of the Free Joint Conference Committees on Coal Taxation 1 (1975). Since the tax was designed only to "preserve or modestly increase" general revenues, it is appropriate for a court to inquire here whether the "surplus" revenue Montana has received from this severance tax is "manifestly disproportionate" to the present or future costs attributable to coal development.

the Commerce Clause does not require that interstate commerce be placed in a privileged position, it does require that it not be unduly burdened. In framing its taxing measures to reach interstate commerce, the State must be "at pains to do so in a manner which avoids the evils forbidden by the commerce clause and puts that commerce *actually* on a plane of equality with local trade in local taxation." *Nippert,* 327 U. S., at 434 (emphasis added).

Thus, the Court has been particularly vigilant to review taxes that "single out interstate business," since "[a]ny tailored tax of this sort creates an increased danger of error in apportionment, of discrimination against interstate commerce, and of a lack of relationship to the services provided by the State." *Complete Auto Transit,* 430 U. S., at 288–289, n. 15.[14] Moreover, the Court's vigilance has not been limited to taxes that discriminate upon their face: "Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern." *Nippert,* 327 U. S., at 431. See *Maryland* v. *Louisiana,* 451 U. S., at 756. This is particularly true when the challenged tax, while facially neutral, falls so heavily upon interstate commerce that its burden "is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state." *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, 46, n. 2 (1940). Cf. *Raymond Motor Transportation, Inc.* v. *Rice,* 434 U. S. 429, 446–447 (1978). In sum, then, when a tax has been "tailored" to reach interstate com-

[14] *Complete Auto Transit* gave several examples of "tailored" taxes: property taxes designed to differentiate between property used in transportation and other types of property; an income tax using different rates for different types of business; and a tax on the "privilege of doing business in corporate form" that changed with the nature of the corporate activity involved. 430 U. S., at 288, n. 15. A severance tax using different rates for different minerals is, of course, directly analogous to these examples.

merce, the Court's cases suggest that we require a closer "fit" under the fourth prong of the *Complete Auto Transit* test than when interstate commerce has not been singled out by the challenged tax.

As a number of commentators have noted, state severance taxes upon minerals are particularly susceptible to "tailoring." "Like a tollgate lying athwart a trade route, a severance or processing tax conditions access to natural resources." Developments in the Law: Federal Limitations on State Taxation of Interstate Business, 75 Harv. L. Rev. 953, 970 (1962). Thus, to the extent that the taxing jurisdiction approaches a monopoly position in the mineral, and consumption is largely outside the State, such taxes are "[e]conomically and politically analogous to transportation taxes exploiting geographical position." Brown, The Open Economy: Justice Frankfurter and the Position of the Judiciary, 67 Yale L. J. 219, 232 (1957) (Brown). See also Hellerstein, Constitutional Constraints on State and Local Taxation of Energy Resources, 31 Nat. Tax J. 245, 249–250 (1978); R. Posner, Economic Analysis of Law 510–514 (2d ed. 1977) (Posner). But just as a port State may require that imports pay their own way even though the tax levied increases the cost of goods purchased by inland customers, see *Michelin Tire Corp.* v. *Wages,* 423 U. S. 276, 288 (1976),[15] so also may a mineral-rich State require that those who consume its resources pay a fair share of the general costs of government, as well as the specific costs attributable to the commerce itself. Thus, the mere fact that the burden of a severance tax is largely shifted forward to out-of-state consumers does not, standing alone, make out a Commerce Clause violation. See Hellerstein, *supra,* at 249. But the Clause *is* violated when, as appellants allege is the case here, the State effectively selects "a class of out-of-state

[15] See also *Washington Revenue Dept.* v. *Association of Wash. Stevedoring Cos.,* 435 U. S. 734, 754–755 (1978); *id.,* at 764 (POWELL, J., concurring in part and concurring in result).

taxpayers to shoulder a tax burden grossly in excess of any costs imposed directly or indirectly by such taxpayers on the State." *Ibid.*

III

It is true that a trial in this case would require "complex factual inquiries" into whether economic conditions are such that Montana is in fact able to export the burden of its severance tax, *ante,* at 619, n. 8.[16] I do not believe, however, that this threshold inquiry is beyond judicial competence.[17] If the trial court were to determine that the tax is exported, it would then have to determine whether the tax is "fairly related," within the meaning of *Complete Auto Transit.* The Court to the contrary, this would not require the trial court "to second-guess legislative decisions about the amount or disposition of tax revenues." *Ante,* at 627, n. 16. If the tax is in fact a legitimate general revenue measure identical or roughly comparable to taxes imposed upon similar industries, a court's inquiry is at an end; on the other hand, if the tax

[16] The degree to which a tax may be "exported" turns on such factors as the taxing jurisdiction's relative dominance of the market, the elasticity of demand for the product, and the availability of adequate substitutes. See, *e. g.,* McLure, Economic Constraints on State and Local Taxation of Energy Resources, 31 Nat. Tax J. 257, 257–259 (1978); Posner, at 510–512. Commentators are in disagreement over the likelihood that coal severance taxes are in fact exported. Compare, *e. g.,* McLure, at 259, and Gillis & Peprah, Severance Taxes on Coal and Uranium in the Sunbelt, Tex. Bus. Rev. 302, 308 (1980), with Church, at 277, and Griffin, at 33. It is clear, however, that that likelihood increases to the extent that the taxing States form a cartel arrangement. Gillis, at 308. See n. 5, *supra.* Whether the tax is in fact exported here is, of course, an issue for trial.

[17] There is no basis for the conclusion that the issues presented would be more difficult than those routinely dealt with in complex civil litigation. See, *e. g., Milwaukee* v. *Illinois,* 451 U. S. 304, 349 (1981) (dissenting opinion). "The complexity of a properly presented federal question is hardly a suitable basis for denying federal courts the power to adjudicate." *Id.,* at 349, n. 25.

singles out this particular interstate activity and charges it with a grossly disproportionate share of the general costs of government,[18] the court must determine whether there is some reasonable basis for the legislative judgment that the tax is necessary to compensate the State for the particular costs imposed by the activity.

To be sure, the task is likely to prove to be a formidable one; but its difficulty does not excuse our failure to undertake it. This case poses extremely grave issues that threaten both to "polarize the Nation," see H. R. Rep. No. 96–1527, pt. 1, p. 2 (1980), and to reawaken "the tendencies toward economic Balkanization" that the Commerce Clause was designed to remedy. See *Hughes* v. *Oklahoma*, 441 U. S. 322, 325–326 (1979). It is no answer to say that the matter is better left to Congress: [19]

> "While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action . . . . Perhaps even more than by interpretation of its written word, this Court has ad-

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[18] See n. 13, *supra*. Cf. *Maryland* v. *Louisiana*, 451 U. S. 725, 755, n. 27 (1981) (reciting argument of United States that use of 75% of proceeds of Louisiana's "First-Use Tax" to service general debt, and only 25% to alleviate alleged environmental damage from pipeline activities, suggests that tax was not fairly apportioned to value of activities occurring within the State).

[19] As the Court notes, the issue has not escaped congressional attention. *Ante*, at 628, n. 18. No bill, however, has yet been passed, and this Court is not disabled to act in the interim; to the contrary, strong policy and institutional considerations suggest that it is appropriate that the Court consider this issue. See Brown, at 222. Indeed, whereas Montana argues that the question presented here is one better left to Congress, in 1980 hearings before the Senate Committee on Energy and Natural Resources, the then Governor of Montana took the position that the reasonableness of this tax was "a question most properly left to the court," not a congressional committee. See Hearing on S. 2695 before the Senate Committee on Energy and Natural Resources, 96th Cong., 2d Sess., 237 (1980).

> vanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution." *H. P. Hood & Sons, Inc.* v. *Du Mond,* 336 U. S. 525, 534–535 (1949).

I would not lightly abandon that role.[20] Because I believe that appellants are entitled to an opportunity to prove that, in Holmes' words, Montana's severance tax "embodies what the Commerce Clause was meant to end," I dissent.[21]

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[20] Justice Holmes' words are relevant:

"I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end." O. Holmes, Law and the Court, in Collected Legal Papers 291, 295–296 (reprint, 1952).

[21] I agree with the Court that appellants' Supremacy Clause claims are without merit.

DAMES & MOORE *v.* REGAN, SECRETARY OF TREASURY, ET AL.

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

No. 80–2078. Argued June 24, 1981—Decided July 2, 1981

In response to the seizure of American personnel as hostages at the American Embassy in Tehran, Iran, President Carter, pursuant to the International Emergency Economic Powers Act (IEEPA), declared a national emergency on November 14, 1979, and blocked the removal or transfer of all property and interests in property of the Government of Iran which were subject to the jurisdiction of the United States. The Treasury Department then issued implementing regulations providing that "[u]nless licensed or authorized . . . any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since [November 14, 1979,] there existed an interest of Iran," and that any licenses or authorizations granted could be "amended, modified, or revoked at any time." The President then granted a general license that authorized certain judicial proceedings, including prejudgment attachments, against Iran but did not allow the entry of any judgment or decree. On December 19, 1979, petitioner filed suit in Federal District Court against the Government of Iran, the Atomic Energy Organization of Iran, and a number of Iranian banks, alleging that it was owed a certain amount of money for services performed under a contract with the Atomic Energy Organization. The District Court issued orders of attachment against the defendants' property, and property of certain Iranian banks was then attached to secure any judgment that might be entered against them. Subsequently, on January 19, 1981, the Americans held hostage were released by Iran pursuant to an agreement with the United States. Under this agreement the United States was obligated to terminate all legal proceedings in United States courts involving claims of United States nationals against Iran, to nullify all attachments and judgments obtained therein, and to bring about the termination of such claims through binding arbitration in an Iran-United States Claims Tribunal. The President at the same time issued implementing Executive Orders revoking all licenses that permitted the exercise of "any right, power, or privilege" with regard to Iranian funds, nullifying all non-Iranian interests in such assets acquired after the blocking order of Novem-

ber 14, 1979, and requiring banks holding Iranian assets to transfer them to the Federal Reserve Bank of New York to be held or transferred as directed by the Secretary of the Treasury. On February 24, 1981, President Reagan issued an Executive Order which ratified President Carter's Executive Orders and "suspended" all claims that may be presented to the Claims Tribunal, but which provided that the suspension of a claim terminates if the Claims Tribunal determines that it has no jurisdiction over the claim. Meanwhile, the District Court granted summary judgment for petitioner and awarded it the amount claimed under the contract plus interest, but stayed execution of the judgment pending appeal by the defendants, and ordered that all prejudgment attachments against the defendants be vacated and that further proceedings against the bank defendants be stayed. Petitioner then filed an action in Federal District Court against the United States and the Secretary of the Treasury, seeking to prevent enforcement of the various Executive Orders and regulations implementing the agreement with Iran. It was alleged that the actions of the President and the Secretary of the Treasury were beyond their statutory and constitutional powers, and, in any event, were unconstitutional to the extent they adversely affect petitioner's final judgment against Iran and the Atomic Energy Organization, its execution of that judgment, its prejudgment attachments, and its ability to continue to litigate against the Iranian banks. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted, but entered an injunction pending appeal to the Court of Appeals prohibiting the United States from requiring the transfer of Iranian property that is subject to any writ of attachment issued by any court in petitioner's favor. This Court then granted certiorari before judgment.

Held:

1. The President was authorized to nullify the attachments and order the transfer of Iranian assets by the provision of the IEEPA, 50 U. S. C. § 1702 (a)(1)(B), which empowers the President to "compel," "nullify," or "prohibit" any "transfer" with respect to, or transactions involving, any property subject to the jurisdiction of the United States, in which any foreign country has any interest. Pp. 669–674.

(a) Nothing in the legislative history of either § 1702 or § 5 (b) of the Trading With the Enemy Act (TWEA), from which § 1702 was directly drawn, requires reading out of § 1702 all meaning to the words "transfer," "compel," or "nullify," and limiting the President's authority in this case only to continuing the freeze, as petitioner claims. To the contrary, both the legislative history and cases interpreting the TWEA fully sustain the President's broad authority when acting under

such congressional grant of power. And the changes brought about by the enactment of the IEEPA did not in any way affect the President's authority to take the specific action taken here. By the time petitioner brought the instant action, the President had already entered the freeze order, and petitioner proceeded against the blocked assets only after the Treasury Department had issued revocable licenses authorizing such proceedings and attachments. The attachments obtained by petitioner, being subject to revocation, were specifically made subordinate to further actions which the President might take under the IEEPA. Pp. 671–673.

(b) Blocking orders, such as the one here, permit the President to maintain foreign assets at his disposal for use in negotiating the resolution of a declared national emergency, and the frozen assets serve as a "bargaining chip" to be used by the President when dealing with a hostile country. To limit the President's authority, as petitioner urges, would mean that claimants could minimize or eliminate this "bargaining chip" through attachments or similar encumbrances. Pp. 673–674.

(c) Petitioner's interest in its attachments was conditional and revocable and as such the President's action nullifying the attachments and ordering the transfer of the assets did not effect a taking of property in violation of the Fifth Amendment absent just compensation. P. 674, n. 6.

(d) Because the President's action in nullifying the attachments and ordering the transfer of assets was taken pursuant to specific congressional authorization, it is "supported by the strongest presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 637 (Jackson, J., concurring). Under the circumstances of this case, petitioner has not sustained that burden. P. 674.

2. On the basis of the inferences to be drawn from the character of the legislation, such as the IEEPA and the Hostage Act, which Congress has enacted in the area of the President's authority to deal with international crises, and from the history of congressional acquiescence in executive claims settlement, the President was authorized to suspend claims pursuant to the Executive Order in question here. Pp. 675–688.

(a) Although neither the IEEPA nor the Hostage Act constitutes specific authorization for the President's suspension of the claims, these statutes are highly relevant as an indication of congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case. Pp. 675–679.

(b) The United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries.

Although those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate, and this practice continues at the present time. Pp. 679–680.

(c) That Congress has implicitly approved the practice of claims settlement by executive agreement is best demonstrated by Congress' enactment of the International Claims Settlement Act of 1949, which created the International Claims Commission, now the Foreign Claims Settlement Commission, and gave it jurisdiction to make final and binding decisions with respect to claims by United States nationals against settlement funds. And the legislative history of the IEEPA further reveals that Congress has accepted the authority of the President to enter into settlement agreements. Pp. 680–682.

(d) In addition to congressional acquiescence in the President's power to settle claims, prior cases of this Court have also recognized that the President has some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate. See, *e. g.*, *United States* v. *Pink*, 315 U. S. 203. Pp. 682–683.

(e) Petitioner's argument that all settlement claims prior to 1952 when the United States had adhered to the doctrine of absolute sovereign immunity should be discounted because of the evolution of sovereign immunity, is refuted by the fact that since 1952 there have been at least 10 claim settlements by executive agreement. Thus, even if the pre-1952 cases should be disregarded, congressional acquiescence in settlement agreements since that time supports the President's power to act here. Pp. 683–684.

(f) By enacting the Foreign Sovereign Immunities Act of 1976 (FSIA), which granted personal and subject-matter jurisdiction to federal district courts over commercial suits by claimants against foreign states that waived immunity, Congress did not divest the President of the authority to settle claims. The President, by suspending petitioner's claim, has not circumscribed the jurisdiction of the United States courts in violation of Art. III, but has simply effected a change in the substantive law governing the lawsuit. The FSIA was designed to remove one particular barrier to suit, namely, sovereign immunity, and cannot be read as *prohibiting* the President from settling claims of United States nationals against foreign governments. Pp. 684–686.

(g) Long continued executive practice, known to and acquiesced in by Congress, raises a presumption that the President's action has been taken pursuant to Congress' consent. Such practice is present here and such a presumption is also appropriate. P. 686.

(h) The conclusion that the President's action in suspending peti-

tioner's claim did not exceed his powers is buttressed by the fact the President has provided an alternative forum, the Claims Tribunal, to settle the claims of the American nationals. Moreover, Congress has not disapproved the action taken here. Pp. 686–688.

(i) While it is not concluded that the President has plenary power to settle claims, even against foreign governmental entities, nevertheless, where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between this country and another, and Congress has acquiesced in the President's action, it cannot be said that the President lacks the power to settle such claims. P. 688.

3. The possibility that the President's actions with respect to the suspension of the claims may effect a taking of petitioner's property in violation of the Fifth Amendment in the absence of just compensation, makes ripe for adjudication the question whether petitioner will have a remedy at law in the Court of Claims. And there is no jurisdictional obstacle to an appropriate action in that court under the Tucker Act. Pp. 688–690.

Affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined; in all but n. 6 of which POWELL, J., joined; and in all but Part V of which STEVENS, J., joined. STEVENS, J., filed an opinion concurring in part, *post,* p. 690. POWELL, J., filed an opinion concurring in part and dissenting in part, *post,* p. 690.

C. Stephen Howard argued the cause for petitioner. With him on the briefs were *Raymond C. Fisher* and *Stanley C. Fickle.*

Rex E. Lee argued the cause for the federal respondents. On the briefs were *Solicitor General McCree, Acting Assistant Attorney General Schiffer, Deputy Solicitor General Geller, Edwin S. Kneedler, Robert E. Kopp,* and *Michael F. Hertz.*

Thomas G. Shack, Jr., argued the cause for intervenor-respondent Islamic Republic of Iran. With him on the briefs were *Raymond J. Kimball* and *Christine Cook Nettsheim. Eric M. Lieberman* argued the cause for intervenor-respondent Bank Markazi Iran. With him on the briefs were *Leon-*

ard B. Boudin, Gordon J. Johnson, Michael Krinsky, Ellen J. Winner, Edward Copeland, and *Judith Levin. Elihu Inselbuch* filed a brief for intervenor-respondent Atomic Energy Organization of Iran.*

JUSTICE REHNQUIST delivered the opinion of the Court.

The questions presented by this case touch fundamentally upon the manner in which our Republic is to be governed. Throughout the nearly two centuries of our Nation's existence under the Constitution, this subject has generated considerable debate. We have had the benefit of commentators such as John Jay, Alexander Hamilton, and James Madison writing in The Federalist Papers at the Nation's very inception, the benefit of astute foreign observers of our system such as

*Briefs of *amici curiae* urging reversal were filed by *Carol Goodman* and *Samuel Hoar* for Chas. T. Main International, Inc.; by *Gerald M. Singer* for Daniel, Mann, Johnson & Mendenhall; and by *Edward N. Costikyan* and *George P. Felleman* for Marschalk Co., Inc.

Daniel P. Levitt, Michael S. Oberman, Greg A. Danilow, Alan R. Friedman, and *Martin S. Zohn* filed a brief for Bank Melli Iran et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed by *David Ginsburg, Lee R. Marks, Alan S. Weitz, James A. DeBois,* and *Frank M. Steadman, Jr.,* for American Bell International Inc.; by *Thomas W. Luce III, M. David Bryant, Jr., Eugene Zemp DuBose, Monroe Leigh,* and *Michael Sandler* for Electronic Data Systems Corporation Iran; by *Brice M. Clagett* and *Paul G. Gaston* for FLAG, Inc.; by *Bartlett H. McGuire, Karen E. Wagner, George M. Duff III, Ralph L. McAfee, George F. Hritz, Robert B. von Mehren, Richard J. Medalie, Joseph S. Hellman, Norman R. Nelson, Richard C. Tufaro, A. H. Wilcox, Gilbert J. Helwig, John E. Hoffman, Jr., Thomas W. Cashel, Edwin McAmis, John W. Dickey, Michael M. Maney,* and *Peter H. Kaminer* for Morgan Guaranty Trust Company of New York; by *Michael Burrows, Robert B. Davidson, Lawrence W. Newman, David R. Hyde, Michael P. Tierney, Powell Pierpoint, Joseph S. Hellman, Kurt J. Wolff, Jeremiah D. Lambert, William Coston, Edward A. Woolley, James Schreiber,* and *James M. McHale* for Reading & Bates Corp. et al.; by *Alan Raywid* and *Margaret E. Rolnick* for Sperry Corp. et al.; by *John Carey* and *Jerry L. Siegel* for Sylvania Technical Systems, Inc.; and by *Alan I. Rothenberg* and *Robert E. Mangels* for Jerry Plotkin.

Alexis de Tocqueville and James Bryce writing during the first century of the Nation's existence, and the benefit of many other treatises as well as more than 400 volumes of reports of decisions of this Court. As these writings reveal it is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed. Indeed, as Justice Jackson noted, "[a] judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves." *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 634 (1952) (concurring opinion).

Our decision today will not dramatically alter this situation, for the Framers "did not make the judiciary the overseer of our government." *Id.,* at 594 (Frankfurter, J., concurring). We are confined to a resolution of the dispute presented to us. That dispute involves various Executive Orders and regulations by which the President nullified attachments and liens on Iranian assets in the United States, directed that these assets be transferred to Iran, and suspended claims against Iran that may be presented to an International Claims Tribunal. This action was taken in an effort to comply with an Executive Agreement between the United States and Iran. We granted certiorari before judgment in this case, and set an expedited briefing and argument schedule, because lower courts had reached conflicting conclusions on the validity of the President's actions and, as the Solicitor General informed us, unless the Government acted by July 19, 1981, Iran could consider the United States to be in breach of the Executive Agreement.

But before turning to the facts and law which we believe determine the result in this case, we stress that the expeditious treatment of the issues involved by all of the courts which have considered the President's actions makes us acutely aware of the necessity to rest decision on the narrowest possible ground capable of deciding the case. *Ashwander* v. *TVA,*

297 U. S. 288, 347 (1936) (Brandeis, J., concurring). This does not mean that reasoned analysis may give way to judicial fiat. It does mean that the statement of Justice Jackson—that we decide difficult cases presented to us by virtue of our commissions, not our competence—is especially true here. We attempt to lay down no general "guidelines" covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case.

Perhaps it is because it is so difficult to reconcile the foregoing definition of Art. III judicial power with the broad range of vitally important day-to-day questions regularly decided by Congress or the Executive, without either challenge or interference by the Judiciary, that the decisions of the Court in this area have been rare, episodic, and afford little precedential value for subsequent cases. The tensions present in any exercise of executive power under the tripartite system of Federal Government established by the Constitution have been reflected in opinions by Members of this Court more than once. The Court stated in *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 319–320 (1936):

> "[W]e are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."

And yet 16 years later, Justice Jackson in his concurring opinion in *Youngstown, supra,* which both parties agree brings together as much combination of analysis and common sense as there is in this area, focused not on the "plenary and ex-

clusive power of the President" but rather responded to a claim of virtually unlimited powers for the Executive by noting:

> "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image." 343 U. S., at 641.

As we now turn to the factual and legal issues in this case, we freely confess that we are obviously deciding only one more episode in the never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances.

I

On November 4, 1979, the American Embassy in Tehran was seized and our diplomatic personnel were captured and held hostage. In response to that crisis, President Carter, acting pursuant to the International Emergency Economic Powers Act, 91 Stat. 1626, 50 U. S. C. §§ 1701–1706 (1976 ed., Supp. III) (hereinafter IEEPA), declared a national emergency on November 14, 1979,[1] and blocked the removal or transfer of "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to

[1] Title 50 U. S. C. § 1701 (a) (1976 ed., Supp. III) states that the President's authority under the Act "may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." Petitioner does not challenge President Carter's declaration of a national emergency.

the jurisdiction of the United States . . . ." Exec. Order No. 12170, 3 CFR 457 (1980), note following 50 U. S. C. § 1701 (1976 ed., Supp. III).[2] President Carter authorized the Secretary of the Treasury to promulgate regulations carrying out the blocking order. On November 15, 1979, the Treasury Department's Office of Foreign Assets Control issued a regulation providing that "[u]nless licensed or authorized . . . any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since [November 14, 1979,] there existed an interest of Iran." 31 CFR § 535.203 (e) (1980). The regulations also made clear that any licenses or authorizations granted could be "amended, modified, or revoked at any time." § 535.805.[3]

On November 26, 1979, the President granted a general license authorizing certain judicial proceedings against Iran but which did not allow the "entry of any judgment or of any decree or order of similar or analogous effect . . . ." § 535.504 (a). On December 19, 1979, a clarifying regulation was issued stating that "the general authorization for judicial proceedings contained in § 535.504 (a) includes pre-judgment attachment." § 535.418.

On December 19, 1979, petitioner Dames & Moore filed suit in the United States District Court for the Central District of California against the Government of Iran, the Atomic

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[2] Title 50 U. S. C. § 1702 (a)(1)(B) (1976 ed., Supp. III) empowers the President to

"investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest . . . ."

[3] Title 31 CFR § 535.805 (1980) provides in full: "The provisions of this part and any rulings, licenses, authorizations, instructions, orders, or forms issued thereunder may be amended, modified, or revoked at any time."

Energy Organization of Iran, and a number of Iranian banks. In its complaint, petitioner alleged that its wholly owned subsidiary, Dames & Moore International, S. R. L., was a party to a written contract with the Atomic Energy Organization, and that the subsidiary's entire interest in the contract had been assigned to petitioner. Under the contract, the subsidiary was to conduct site studies for a proposed nuclear power plant in Iran. As provided in the terms of the contract, the Atomic Energy Organization terminated the agreement for its own convenience on June 30, 1979. Petitioner contended, however, that it was owed $3,436,694.30 plus interest for services performed under the contract prior to the date of termination.[4] The District Court issued orders of attachment directed against property of the defendants, and the property of certain Iranian banks was then attached to secure any judgment that might be entered against them.

On January 20, 1981, the Americans held hostage were released by Iran pursuant to an Agreement entered into the day before and embodied in two Declarations of the Democratic and Popular Republic of Algeria. Declaration of the Government of the Democratic and Popular Republic of Algeria (App. to Pet. for Cert. 21–29), and Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (*id.*, at 30–35). The Agreement

[4] The contract stated that any dispute incapable of resolution by agreement of the parties would be submitted to conciliation and that, if either party was unwilling to accept the results of conciliation, "the matter shall be decided finally by resort to the courts of Iran." Pet. for Cert. 7, n. 2. In its complaint, which was based on breach of contract and related theories, petitioner alleged that it had sought a meeting with the Atomic Energy Organization for purposes of settling matters relating to the contract but that the Organization "has continually postponed [the] meeting and obviously does not intend that it take place." Complaint in *Dames & Moore* v. *Atomic Energy Organization of Iran,* No. CV 79–04918 LEW (Px) (CD Cal.), ¶ 27.

stated that "[i]t is the purpose of [the United States and Iran] . . . to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration." *Id.*, at 21–22. In furtherance of this goal, the Agreement called for the establishment of an Iran-United States Claims Tribunal which would arbitrate any claims not settled within six months. Awards of the Claims Tribunal are to be "final and binding" and "enforceable . . . in the courts of any nation in accordance with its laws." *Id.*, at 32. Under the Agreement, the United States is obligated

> "to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration." *Id.*, at 22.

In addition, the United States must "act to bring about the transfer" by July 19, 1981, of all Iranian assets held in this country by American banks. *Id.*, at 24–25. One billion dollars of these assets will be deposited in a security account in the Bank of England, to the account of the Algerian Central Bank, and used to satisfy awards rendered against Iran by the Claims Tribunal. *Ibid.*

On January 19, 1981, President Carter issued a series of Executive Orders implementing the terms of the agreement. Exec. Orders Nos. 12276–12285, 46 Fed. Reg. 7913–7932. These Orders revoked all licenses permitting the exercise of "any right, power, or privilege" with regard to Iranian funds, securities, or deposits; "nullified" all non-Iranian interests in such assets acquired subsequent to the blocking order of November 14, 1979; and required those banks holding Iranian assets to transfer them "to the Federal Reserve Bank of New

York, to be held or transferred as directed by the Secretary of the Treasury." Exec. Order No. 12279, 46 Fed. Reg. 7919.

On February 24, 1981, President Reagan issued an Executive Order in which he "ratified" the January 19th Executive Orders. Exec. Order No. 12294, 46 Fed. Reg. 14111. Moreover, he "suspended" all "claims which may be presented to the . . . Tribunal" and provided that such claims "shall have no legal effect in any action now pending in any court of the United States." *Ibid.* The suspension of any particular claim terminates if the Claims Tribunal determines that it has no jurisdiction over that claim; claims are discharged for all purposes when the Claims Tribunal either awards some recovery and that amount is paid, or determines that no recovery is due. *Ibid.*

Meanwhile, on January 27, 1981, petitioner moved for summary judgment in the District Court against the Government of Iran and the Atomic Energy Organization, but not against the Iranian banks. The District Court granted petitioner's motion and awarded petitioner the amount claimed under the contract plus interest. Thereafter, petitioner attempted to execute the judgment by obtaining writs of garnishment and execution in state court in the State of Washington, and a sheriff's sale of Iranian property in Washington was noticed to satisfy the judgment. However, by order of May 28, 1981, as amended by order of June 8, the District Court stayed execution of its judgment pending appeal by the Government of Iran and the Atomic Energy Organization. The District Court also ordered that all prejudgment attachments obtained against the Iranian defendants be vacated and that further proceedings against the bank defendants be stayed in light of the Executive Orders discussed above. App. to Pet. for Cert. 106–107.

On April 28, 1981, petitioner filed this action in the District Court for declaratory and injunctive relief against the United States and the Secretary of the Treasury, seeking to

prevent enforcement of the Executive Orders and Treasury Department regulations implementing the Agreement with Iran. In its complaint, petitioner alleged that the actions of the President and the Secretary of the Treasury implementing the Agreement with Iran were beyond their statutory and constitutional powers and, in any event, were unconstitutional to the extent they adversely affect petitioner's final judgment against the Government of Iran and the Atomic Energy Organization, its execution of that judgment in the State of Washington, its prejudgment attachments, and its ability to continue to litigate against the Iranian banks. *Id.*, at 1–12. On May 28, 1981, the District Court denied petitioner's motion for a preliminary injunction and dismissed petitioner's complaint for failure to state a claim upon which relief could be granted. *Id.*, at 106–107. Prior to the District Court's ruling, the United States Courts of Appeals for the First and the District of Columbia Circuits upheld the President's authority to issue the Executive Orders and regulations challenged by petitioner. See *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority,* 651 F. 2d 800 (CA1 1981); *American Int'l Group, Inc.* v. *Islamic Republic of Iran,* 211 U. S. App. D. C. 468, 657 F. 2d 430 (1981).

On June 3, 1981, petitioner filed a notice of appeal from the District Court's order, and the appeal was docketed in the United States Court of Appeals for the Ninth Circuit. On June 4, the Treasury Department amended its regulations to mandate "the transfer of bank deposits and certain other financial assets of Iran in the United States to the Federal Reserve Bank of New York by noon, June 19." App. to Pet. for Cert. 151–152. The District Court, however, entered an injunction pending appeal prohibiting the United States from requiring the transfer of Iranian property that is subject to "any writ of attachment, garnishment, judgment, levy, or other judicial lien" issued by any court in favor of petitioner. *Id.*, at 168. Arguing that this is a case of "imperative public importance," petitioner then sought a writ of certiorari be-

fore judgment. Pet. for Cert. 10. See 28 U. S. C. § 2101 (e); this Court's Rule 18. Because the issues presented here are of great significance and demand prompt resolution, we granted the petition for the writ, adopted an expedited briefing schedule, and set the case for oral argument on June 24, 1981. 452 U. S. 932 (1981).

II

The parties and the lower courts, confronted with the instant questions, have all agreed that much relevant analysis is contained in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579 (1952). Justice Black's opinion for the Court in that case, involving the validity of President Truman's effort to seize the country's steel mills in the wake of a nationwide strike, recognized that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." *Id.,* at 585. Justice Jackson's concurring opinion elaborated in a general way the consequences of different types of interaction between the two democratic branches in assessing Presidential authority to act in any given case. When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Id.,* at 637. When the President acts in the absence of congressional authorization he may enter "a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Ibid.* In such a case the analysis becomes more complicated, and the validity of the President's action, at least so far as separation-of-powers principles are concerned, hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including "con-

gressional inertia, indifference or quiescence." *Ibid.* Finally, when the President acts in contravention of the will of Congress, "his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject." *Id.*, at 637–638.

Although we have in the past found and do today find Justice Jackson's classification of executive actions into three general categories analytically useful, we should be mindful of Justice Holmes' admonition, quoted by Justice Frankfurter in *Youngstown, supra,* at 597 (concurring opinion), that "[t]he great ordinances of the Constitution do not establish and divide fields of black and white." *Springer* v. *Philippine Islands,* 277 U. S. 189, 209 (1928) (dissenting opinion). Justice Jackson himself recognized that his three categories represented "a somewhat over-simplified grouping," 343 U. S., at 635, and it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition. This is particularly true as respects cases such as the one before us, involving responses to international crises the nature of which Congress can hardly have been expected to anticipate in any detail.

III

In nullifying post-November 14, 1979, attachments and directing those persons holding blocked Iranian funds and securities to transfer them to the Federal Reserve Bank of New York for ultimate transfer to Iran, President Carter cited five sources of express or inherent power. The Government, however, has principally relied on § 203 of the IEEPA, 91 Stat. 1626, 50 U. S. C. § 1702 (a)(1) (1976 ed., Supp. III), as authorization for these actions. Section 1702 (a)(1) provides in part:

> "At the times and to the extent specified in section 1701 of this title, the President may, under such regu-

lations as he may prescribe, by means of instructions, licenses, or otherwise—

"(A) investigate, regulate, or prohibit—

"(i) any transactions in foreign exchange,

"(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

"(iii) the importing or exporting of currency or securities, and

"(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;

"by any person, or with respect to any property, subject to the jurisdiction of the United States."

The Government contends that the acts of "nullifying" the attachments and ordering the "transfer" of the frozen assets are specifically authorized by the plain language of the above statute. The two Courts of Appeals that have considered the issue agreed with this contention. In *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority,* the Court of Appeals for the First Circuit explained:

"The President relied on his IEEPA powers in November 1979, when he 'blocked' all Iranian assets in this country, and again in January 1981, when he 'nullified' interests acquired in blocked property, and ordered that property's transfer. The President's actions, in this regard, are in keeping with the language of IEEPA: initially he 'prevent[ed] and prohibit[ed]' 'transfers' of Iranian assets; later he 'direct[ed] and compel[led]' the

'transfer' and 'withdrawal' of the assets, 'nullify[ing]' certain 'rights' and 'privileges' acquired in them.

"Main argues that IEEPA does not supply the President with power to override judicial remedies, such as attachments and injunctions, or to extinguish 'interests' in foreign assets held by United States citizens. But we can find no such limitation in IEEPA's terms. The language of IEEPA is sweeping and unqualified. It provides broadly that the President may void or nullify the 'exercising [by *any* person of] *any* right, power or privilege with respect to . . . any property in which any foreign country has any interest . . . .' 50 U. S. C. § 1702 (a)(1)(B)." 651 F. 2d, at 806–807 (emphasis in original).

In *American Int'l Group, Inc.* v. *Islamic Republic of Iran,* the Court of Appeals for the District of Columbia Circuit employed a similar rationale in sustaining President Carter's action:

"The Presidential revocation of the license he issued permitting prejudgment restraints upon Iranian assets is an action that falls within the plain language of the IEEPA. In vacating the attachments, he acted to 'nullify [and] void . . . any . . . exercising any right, power, or privilege with respect to . . . any property in which any foreign country . . . has any interest . . . by any person . . . subject to the jurisdiction of the United States.'" 211 U. S. App. D. C., at 477, 657 F. 2d, at 439 (footnote omitted).

Petitioner contends that we should ignore the plain language of this statute because an examination of its legislative history as well as the history of § 5 (b) of the Trading With the Enemy Act (hereinafter TWEA), 40 Stat. 411, as amended, 50 U. S. C. App. § 5 (b) (1976 ed. and Supp. III), from which the pertinent language of § 1702 is directly drawn,

reveals that the statute was not intended to give the President such extensive power over the assets of a foreign state during times of national emergency. According to petitioner, once the President instituted the November 14, 1979, blocking order, § 1702 authorized him "only to continue the freeze or to discontinue controls." Brief for Petitioner 32.

We do not agree and refuse to read out of § 1702 all meaning to the words "transfer," "compel," or "nullify." Nothing in the legislative history of either § 1702 or § 5 (b) of the TWEA requires such a result. To the contrary, we think both the legislative history and cases interpreting the TWEA fully sustain the broad authority of the Executive when acting under this congressional grant of power. See, *e. g., Orvis* v. *Brownell,* 345 U. S. 183 (1953).[5] Although Congress in-

[5] Petitioner argues that under the TWEA the President was given two powers: (1) the power temporarily to freeze or block the transfer of foreign-owned assets; and (2) the power summarily to seize and permanently vest title to foreign-owned assets. It is contended that only the "vesting" provisions of the TWEA gave the President the power *permanently* to dispose of assets and when Congress enacted the IEEPA in 1977 it purposefully did not grant the President this power. According to petitioner, the nullification of the attachments and the transfer of the assets will permanently dispose of the assets and would not even be permissible under the TWEA. We disagree. Although it is true the IEEPA does not give the President the power to "vest" or to take title to the assets, it does not follow that the President is not authorized under both the IEEPA and the TWEA to otherwise permanently dispose of the assets in the manner done here. Petitioner errs in assuming that the only power granted by the language used in both § 1702 and § 5(b) of the TWEA is the power temporarily to freeze assets. As noted above, the plain language of the statute defies such a holding. Section 1702 authorizes the President to "direct and compel" the "transfer, withdrawal, transportation, . . . or exportation of . . . any property in which any foreign country . . . has any interest . . . ."

We likewise reject the contention that *Orvis* v. *Brownell* and *Zittman* v. *McGrath,* 341 U. S. 446 (1951), grant petitioner the right to retain its attachments on the Iranian assets. To the contrary, we think *Orvis* supports the proposition that an American claimant may not use an attach-

tended to limit the President's emergency power in peacetime, we do not think the changes brought about by the enactment of the IEEPA in any way affected the authority of the President to take the specific actions taken here. We likewise note that by the time petitioner instituted this action, the President had already entered the freeze order. Petitioner proceeded against the blocked assets only after the Treasury Department had issued revocable licenses authorizing such proceedings and attachments. The Treasury Regulations provided that "unless licensed" any attachment is null and void, 31 CFR § 535.203 (e) (1980), and all licenses "may be amended, modified, or revoked at any time." § 535.805. As such, the attachments obtained by petitioner were specifically made subordinate to further actions which the President might take under the IEEPA. Petitioner was on notice of the contingent nature of its interest in the frozen assets.

This Court has previously recognized that the congressional purpose in authorizing blocking orders is "to put control of foreign assets in the hands of the President . . . ." *Propper* v. *Clark,* 337 U. S. 472, 493 (1949). Such orders permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency. The frozen assets serve as a "bargaining chip" to be used by the President when dealing with a hostile country. Accordingly, it is difficult to accept petitioner's argument because the practical effect of it is to allow individual claimants throughout the country to minimize or wholly eliminate this "bargaining chip" through attachments, garnishments, or similar encumbrances on property. Neither the purpose the

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ment that is subject to a revocable license and that has been obtained after the entry of a freeze order to limit in any way the actions the *President* may take under § 1702 respecting the frozen assets. An attachment so obtained is in every sense subordinate to the President's power under the IEEPA.

statute was enacted to serve nor its plain language supports such a result.[6]

Because the President's action in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization, it is "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Youngstown*, 343 U. S., at 637 (Jackson, J., concurring). Under the circumstances of this case, we cannot say that petitioner has sustained that heavy burden. A contrary ruling would mean that the Federal Government as a whole lacked the power exercised by the President, see *id.*, at 636–637, and that we are not prepared to say.

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[6] Although petitioner concedes that the President could have forbidden attachments, it nevertheless argues that once he allowed them the President permitted claimants to acquire property interests in their attachments. Petitioner further argues that only the licenses to obtain the attachments were made revocable, not the attachments themselves. It is urged that the January 19, 1981, order revoking all licenses only affected petitioner's right to obtain future attachments. We disagree. As noted above, the regulations specifically provided that any attachment is null and void "unless licensed," and all licenses may be revoked at any time. Moreover, common sense defies petitioner's reading of the regulations. The President could hardly have intended petitioner and other similarly situated claimants to have the power to take control of the frozen assets out of his hands.

Our construction of petitioner's attachments as being "revocable," "contingent," and "in every sense subordinate to the President's power under the IEEPA," in effect answers petitioner's claim that even if the President had the authority to nullify the attachments and transfer the assets, the exercise of such would constitute an unconstitutional taking of property in violation of the Fifth Amendment absent just compensation. We conclude that because of the President's authority to prevent or condition attachments, and because of the orders he issued to this effect, petitioner did not acquire any "property" interest in its attachments of the sort that would support a constitutional claim for compensation.

IV

Although we have concluded that the IEEPA constitutes specific congressional authorization to the President to nullify the attachments and order the transfer of Iranian assets, there remains the question of the President's authority to suspend claims pending in American courts. Such claims have, of course, an existence apart from the attachments which accompanied them. In terminating these claims through Executive Order No. 12294, the President purported to act under authority of both the IEEPA and 22 U. S. C. § 1732, the so-called "Hostage Act." [7] 46 Fed. Reg. 14111 (1981).

We conclude that although the IEEPA authorized the nullification of the attachments, it cannot be read to authorize the suspension of the claims. The claims of American citizens against Iran are not in themselves transactions involving Iranian property or efforts to exercise any rights with respect to such property. An *in personam* lawsuit, although it might eventually be reduced to judgment and that judgment might be executed upon, is an effort to establish liability and fix damages and does not focus on any particular property within the jurisdiction. The terms of the IEEPA therefore do not authorize the President to suspend claims in American courts. This is the view of all the courts which have considered the question. *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority,* 651 F. 2d, at 809–814; *American Int'l Group, Inc.* v. *Islamic Republic of Iran,* 211 U. S. App. D. C., at 481, n. 15, 657 F. 2d, at 443, n. 15; *The Marschalk Co.* v. *Iran National Airlines Corp.,* 518 F. Supp. 69, 79 (SDNY

[7] Judge Mikva, in his separate opinion in *American Int'l Group, Inc.* v. *Islamic Republic of Iran,* 211 U. S. App. D. C. 468, 490, 657 F. 2d 430, 452 (1981), argued that the moniker "Hostage Act" was newly coined for purposes of this litigation. Suffice it to say that we focus on the language of 22 U. S. C. § 1732, not any shorthand description of it. See W. Shakespeare, Romeo and Juliet, Act II, scene 2, line 43 ("What's in a name?").

1981); *Electronic Data Systems Corp.* v. *Social Security Organization of Iran*, 508 F. Supp. 1350, 1361 (ND Tex. 1981).

The Hostage Act, passed in 1868, provides:

> "Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress." Rev. Stat. § 2001, 22 U. S. C. § 1732.

We are reluctant to conclude that this provision constitutes specific authorization to the President to suspend claims in American courts. Although the broad language of the Hostage Act suggests it may cover this case, there are several difficulties with such a view. The legislative history indicates that the Act was passed in response to a situation unlike the recent Iranian crisis. Congress in 1868 was concerned with the activity of certain countries refusing to recognize the citizenship of naturalized Americans traveling abroad, and repatriating such citizens against their will. See, *e. g.*, Cong. Globe, 40th Cong., 2d Sess., 4331 (1868) (Sen. Fessenden); *id.*, at 4354 (Sen. Conness); see also 22 U. S. C. § 1731. These countries were not interested in returning the citizens in exchange for any sort of ransom. This also explains the reference in the Act to imprisonment "in violation of the rights of American citizenship." Although the Iranian hostage-taking violated international law and common decency,

the hostages were not seized out of any refusal to recognize their American citizenship—they were seized precisely *because of* their American citizenship. The legislative history is also somewhat ambiguous on the question whether Congress contemplated Presidential action such as that involved here or rather simply reprisals directed against the offending foreign country and *its* citizens. See, *e. g.,* Cong. Globe, 40th Cong., 2d Sess., 4205 (1868); *American Int'l Group, Inc.* v. *Islamic Republic of Iran, supra,* at 490–491, 657 F. 2d, at 452–453 (opinion of Mikva, J.).

Concluding that neither the IEEPA nor the Hostage Act constitutes specific authorization of the President's action suspending claims, however, is not to say that these statutory provisions are entirely irrelevant to the question of the validity of the President's action. We think both statutes highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case. As noted in Part III, *supra,* at 670–672, the IEEPA delegates broad authority to the President to act in times of national emergency with respect to property of a foreign country. The Hostage Act similarly indicates congressional willingness that the President have broad discretion when responding to the hostile acts of foreign sovereigns. As Senator Williams, draftsman of the language eventually enacted as the Hostage Act, put it:

> "If you propose any remedy at all, you must invest the Executive with some discretion, so that he may apply the remedy to a case as it may arise. As to England or France he might adopt one policy to relieve a citizen imprisoned by either one of those countries; as to the Barbary powers, he might adopt another policy; as to the islands of the ocean, another. With different countries that have different systems of government he might adopt different means." Cong. Globe, 40th Cong., 2d Sess., 4359 (1868).

Proponents of the bill recognized that it placed a "loose discretion" in the President's hands, *id.*, at 4238 (Sen. Stewart), but argued that "[s]omething must be intrusted to the Executive" and that "[t]he President ought to have the power to do what the exigencies of the case require to rescue [a] citizen from imprisonment." *Id.*, at 4233, 4357 (Sen. Williams). An original version of the Act, which authorized the President to suspend trade with a foreign country and even arrest citizens of that country in the United States in retaliation, was rejected because "there may be a great variety of cases arising where other and different means would be equally effective, and where the end desired could be accomplished without resorting to such dangerous and violent measures." *Id.*, at 4233 (Sen. Williams).

Although we have declined to conclude that the IEEPA or the Hostage Act directly authorizes the President's suspension of claims for the reasons noted, we cannot ignore the general tenor of Congress' legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress. As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, "especially . . . in the areas of foreign policy and national security," imply "congressional disapproval" of action taken by the Executive. *Haig* v. *Agee, ante,* at 291. On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" "measures on independent presidential responsibility," *Youngstown,* 343 U. S., at 637 (Jackson, J., concurring). At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort

engaged in by the President. It is to that history which we now turn.

Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are "sources of friction" between the two sovereigns. *United States* v. *Pink*, 315 U. S. 203, 225 (1942). To resolve these difficulties, nations have often entered into agreements settling the claims of their respective nationals. As one treatise writer puts it, international agreements settling claims by nationals of one state against the government of another "are established international practice reflecting traditional international theory." L. Henkin, Foreign Affairs and the Constitution 262 (1972). Consistent with that principle, the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries. Though those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate.[8] Under such agreements, the President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump-sum payments or the establishment of arbitration procedures. To be sure, many of these settlements were encouraged by the United States claimants themselves, since a claimant's only hope of obtaining any payment at all might lie in having his Government negotiate a diplomatic settlement on his behalf. But it is also undisputed

[8] At least since the case of the "Wilmington Packet" in 1799, Presidents have exercised the power to settle claims of United States nationals by executive agreement. See Lillich, The Gravel Amendment to the Trade Reform Act of 1974, 69 Am. J. Int'l L. 837, 844 (1975). In fact, during the period of 1817–1917, "no fewer than eighty executive agreements were entered into by the United States looking toward the liquidation of claims of its citizens." W. McClure, International Executive Agreements 53 (1941). See also 14 M. Whiteman, Digest of International Law 247 (1970).

that the "United States has sometimes disposed of the claims of its citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole." Henkin, *supra,* at 262–263. Accord, Restatement (Second) of Foreign Relations Law of the United States § 213 (1965) (President "may waive or settle a claim against a foreign state . . . [even] without the consent of the [injured] national"). It is clear that the practice of settling claims continues today. Since 1952, the President has entered into at least 10 binding settlements with foreign nations, including an $80 million settlement with the People's Republic of China.[9]

Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement. This is best demonstrated by Congress' enactment of the International Claims Settlement Act of 1949, 64 Stat. 13, as amended, 22 U. S. C. § 1621 *et seq.* (1976 ed. and Supp. IV). The Act had two purposes: (1) to allocate to United States nationals funds received in the course of an executive claims settlement with Yugoslavia, and (2) to provide a procedure whereby funds resulting from future settlements could be distributed. To achieve these ends Congress created the International Claims Commission, now the Foreign Claims Settlement Commission, and gave it jurisdiction to make final and binding decisions with respect to claims by United States nationals against settlement funds. 22 U. S. C. § 1623 (a). By creating a procedure to implement future settlement agreements, Congress placed its stamp of approval on such agreements. Indeed, the legislative history of the Act observed that the United States was seeking settle-

[9] Those agreements are [1979] 30 U. S. T. 1957 (People's Republic of China); [1976] 27 U. S. T. 3933 (Peru); [1976] 27 U. S. T. 4214 (Egypt); [1974] 25 U. S. T. 227 (Peru); [1973] 24 U. S. T. 522 (Hungary); [1969] 20 U. S. T. 2654 (Japan); [1965] 16 U. S. T. 1 (Yugoslavia); [1963] 14 U. S. T. 969 (Bulgaria); [1960] 11 U. S. T. 1953 (Poland); [1960] 11 U. S. T. 317 (Rumania).

ments with countries other than Yugoslavia and that the bill contemplated settlements of a similar nature in the future. H. R. Rep. No. 770, 81st Cong., 1st Sess., 4, 8 (1949).

Over the years Congress has frequently amended the International Claims Settlement Act to provide for particular problems arising out of settlement agreements, thus demonstrating Congress' continuing acceptance of the President's claim settlement authority. With respect to the Executive Agreement with the People's Republic of China, for example, Congress established an allocation formula for distribution of the funds received pursuant to the Agreement. 22 U. S. C. § 1627 (f) (1976 ed., Supp. IV). As with legislation involving other executive agreements, Congress did not question the fact of the settlement or the power of the President to have concluded it. In 1976, Congress authorized the Foreign Claims Settlement Commission to adjudicate the merits of claims by United States nationals against East Germany, prior to any settlement with East Germany, so that the Executive would "be in a better position to negotiate an adequate settlement . . . of these claims." S. Rep. No. 94–1188, p. 2 (1976); 22 U. S. C. § 1644b. Similarly, Congress recently amended the International Claims Settlement Act to facilitate the settlement of claims against Vietnam. 22 U. S. C. §§ 1645, 1645a (5) (1976 ed., Supp. IV). The House Report stated that the purpose of the legislation was to establish an official inventory of losses of private United States property in Vietnam so that recovery could be achieved "through future direct Government-to-Government negotiation of private property claims." H. R. Rep. No. 96–915, pp. 2–3 (1980). Finally, the legislative history of the IEEPA further reveals that Congress has accepted the authority of the Executive to enter into settlement agreements. Though the IEEPA was enacted to provide for some limitation on the President's emergency powers, Congress stressed that "[n]othing in this act is intended . . . to interfere with the authority

of the President to [block assets], or to impede the settlement of claims of U. S. citizens against foreign countries." S. Rep. No. 95–466, p. 6 (1977); 50 U. S. C. § 1706 (a)(1) (1976 ed., Supp. III).[10]

In addition to congressional acquiescence in the President's power to settle claims, prior cases of this Court have also recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate. In *United States* v. *Pink,* 315 U. S. 203 (1942), for example, the Court upheld the validity of the Litvinov Assignment, which was part of an Executive Agreement whereby the Soviet Union assigned to the United States amounts owed to it by American nationals so that outstanding claims of other American nationals could

[10] Indeed, Congress has consistently failed to object to this longstanding practice of claim settlement by executive agreement, even when it has had an opportunity to do so. In 1972, Congress entertained legislation relating to congressional oversight of such agreements. But Congress took only limited action, requiring that the text of significant executive agreements be transmitted to Congress. 1 U. S. C. § 112b. In *Haig* v. *Agee, ante,* p. 280, we noted that "[d]espite the longstanding and officially promulgated view that the Executive has the power to withhold passports for reasons of national security and foreign policy, Congress in 1978, 'though it once again enacted legislation relating to passports, left completely untouched the broad rule-making authority granted in the earlier Act.'" *Ante,* at 301, quoting *Zemel* v. *Rusk,* 381 U. S. 1, 12 (1965). Likewise in this case, Congress, though legislating in the area, has left "untouched" the authority of the President to enter into settlement agreements.

The legislative history of 1 U. S. C. § 112b further reveals that Congress has accepted the President's authority to settle claims. During the hearings on the bill, Senator Case, the sponsor of the Act, stated with respect to executive claim settlements:

"I think it is a most interesting [area] in which we have accepted the right of the President, one individual, acting through his diplomatic force, to adjudicate and settle claims of American nationals against foreign countries. But that is a fact." Transmittal of Executive Agreements to Congress: Hearings on S. 596 before the Senate Committee on Foreign Relations, 92d Cong., 1st Sess., 74 (1971).

be paid. The Court explained that the resolution of such claims was integrally connected with normalizing United States' relations with a foreign state:

> "Power to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest implied power of the President . . . . No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities . . . is to be drastically revised." *Id.,* at 229–230.

Similarly, Judge Learned Hand recognized:

> "The constitutional power of the President extends to the settlement of mutual claims between a foreign government and the United States, at least when it is an incident to the recognition of that government; and it would be unreasonable to circumscribe it to such controversies. The continued mutual amity between the nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations." *Ozanic* v. *United States,* 188 F. 2d 228, 231 (CA2 1951).

Petitioner raises two arguments in opposition to the proposition that Congress has acquiesced in this longstanding practice of claims settlement by executive agreement. First, it suggests that all pre-1952 settlement claims, and corresponding court cases such as *Pink,* should be discounted because of the evolution of the doctrine of sovereign immunity. Petitioner observes that prior to 1952 the United States adhered to the doctrine of absolute sovereign immunity, so that absent action by the Executive there simply would be no remedy for a United States national against a foreign government. When the United States in 1952 adopted a more restrictive

notion of sovereign immunity, by means of the so-called "Tate" letter, it is petitioner's view that United States nationals no longer needed executive aid to settle claims and that, as a result, the President's authority to settle such claims in some sense "disappeared." Though petitioner's argument is not wholly without merit, it is refuted by the fact that since 1952 there have been at least 10 claims settlements by executive agreement. Thus, even if the pre-1952 cases should be disregarded, congressional acquiescence in settlement agreements since that time supports the President's power to act here.

Petitioner next asserts that Congress divested the President of the authority to settle claims when it enacted the Foreign Sovereign Immunities Act of 1976 (hereinafter FSIA), 28 U. S. C. §§ 1330, 1602 *et seq.* The FSIA granted personal and subject-matter jurisdiction in the federal district courts over commercial suits brought by claimants against those foreign states which have waived immunity. 28 U. S. C. § 1330. Prior to the enactment of the FSIA, a foreign government's immunity to suit was determined by the Executive Branch on a case-by-case basis. According to petitioner, the principal purpose of the FSIA was to depoliticize these commercial lawsuits by taking them out of the arena of foreign affairs—where the Executive Branch is subject to the pressures of foreign states seeking to avoid liability through a grant of immunity—and by placing them within the exclusive jurisdiction of the courts. Petitioner thus insists that the President, by suspending its claims, has circumscribed the jurisdiction of the United States courts in violation of Art. III of the Constitution.

We disagree. In the first place, we do not believe that the President has attempted to divest the federal courts of jurisdiction. Executive Order No. 12294 purports only to "suspend" the claims, not divest the federal court of "jurisdiction." As we read the Executive Order, those claims not within the jurisdiction of the Claims Tribunal will "revive"

and become judicially enforceable in United States courts. This case, in short, illustrates the difference between modifying federal-court jurisdiction and directing the courts to apply a different rule of law. See *United States* v. *Schooner Peggy*, 1 Cranch 103 (1801). The President has exercised the power, acquiesced in by Congress, to settle claims and, as such, has simply effected a change in the substantive law governing the lawsuit. Indeed, the very example of sovereign immunity belies petitioner's argument. No one would suggest that a determination of sovereign immunity divests the federal courts of "jurisdiction." Yet, petitioner's argument, if accepted, would have required courts prior to the enactment of the FSIA to reject as an encroachment on their jurisdiction the President's determination of a foreign state's sovereign immunity.

Petitioner also reads the FSIA much too broadly. The principal purpose of the FSIA was to codify contemporary concepts concerning the scope of sovereign immunity and withdraw from the President the authority to make binding determinations of the sovereign immunity to be accorded foreign states. See *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, 651 F. 2d, at 813–814; *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, 211 U. S. App. D. C., at 482, 657 F. 2d, at 444. The FSIA was thus designed to remove one particular barrier to suit, namely sovereign immunity, and cannot be fairly read as *prohibiting* the President from settling claims of United States nationals against foreign governments. It is telling that the Congress which enacted the FSIA considered but rejected several proposals designed to limit the power of the President to enter into executive agreements, including claims settlement agreements.[11]

[11] The rejected legislation would typically have required congressional approval of executive agreements before they would be considered effective. See Congressional Oversight of Executive Agreements: Hearings on S. 632 and S. 1251 before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 243–261,

It is quite unlikely that the same Congress that rejected proposals to limit the President's authority to conclude executive agreements sought to accomplish that very purpose *sub silentio* through the FSIA. And, as noted above, just one year after enacting the FSIA, Congress enacted the IEEPA, where the legislative history stressed that nothing in the IEEPA was to impede the settlement of claims of United States citizens. It would be surprising for Congress to express this support for settlement agreements had it intended the FSIA to eliminate the President's authority to make such agreements.

In light of all of the foregoing—the inferences to be drawn from the character of the legislation Congress has enacted in the area, such as the IEEPA and the Hostage Act, and from the history of acquiescence in executive claims settlement—we conclude that the President was authorized to suspend pending claims pursuant to Executive Order No. 12294. As Justice Frankfurter pointed out in *Youngstown,* 343 U. S., at 610–611, "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II." Past practice does not, by itself, create power, but "long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . . ." *United States* v. *Midwest Oil Co.,* 236 U. S. 459, 474 (1915). See *Haig* v. *Agee, ante,* at 291–292. Such practice is present here and such a presumption is also appropriate. In light of the fact that Congress may be considered to have consented to the President's action in suspending claims, we cannot say that action exceeded the President's powers.

Our conclusion is buttressed by the fact that the means

302–311 (1975); Congressional Review of International Agreements: Hearings before the Subcommittee on International Security and Scientific Affairs of the House Committee on International Relations, 94th Cong., 2d Sess., 167, 246 (1976).

chosen by the President to settle the claims of American nationals provided an alternative forum, the Claims Tribunal, which is capable of providing meaningful relief. The Solicitor General also suggests that the provision of the Claims Tribunal will actually *enhance* the opportunity for claimants to recover their claims, in that the Agreement removes a number of jurisdictional and procedural impediments faced by claimants in United States courts. Brief for Federal Respondents 13–14. Although being overly sanguine about the chances of United States claimants before the Claims Tribunal would require a degree of naiveté which should not be demanded even of judges, the Solicitor General's point cannot be discounted. Moreover, it is important to remember that we have already held that the President has the *statutory* authority to nullify attachments and to transfer the assets out of the country. The President's power to do so does not depend on his provision of a forum whereby claimants can recover on those claims. The fact that the President has provided such a forum here means that the claimants are receiving something in return for the suspension of their claims, namely, access to an international tribunal before which they may well recover something on their claims. Because there does appear to be a real "settlement" here, this case is more easily analogized to the more traditional claim settlement cases of the past.

Just as importantly, Congress has not disapproved of the action taken here. Though Congress has held hearings on the Iranian Agreement itself,[12] Congress has not enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement. Quite the contrary, the relevant Sen-

[12] See Hearings on the Iranian Agreements before the Senate Committee on Foreign Relations, 97th Cong., 1st Sess. (1981); Hearings on the Iranian Asset Settlement before the Senate Committee on Banking, Housing and Urban Affairs, 97th Cong., 1st Sess. (1981); Hearings on the Algerian Declarations before the House Committee on Foreign Affairs, 97th Cong., 1st Sess. (1981).

ate Committee has stated that the establishment of the Tribunal is "of vital importance to the United States." S. Rep. No. 97–71, p. 5 (1981).[13] We are thus clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority.

Finally, we re-emphasize the narrowness of our decision. We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities. As the Court of Appeals for the First Circuit stressed, "[t]he sheer magnitude of such a power, considered against the background of the diversity and complexity of modern international trade, cautions against any broader construction of authority than is necessary." *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority,* 651 F. 2d, at 814. But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.

V

We do not think it appropriate at the present time to address petitioner's contention that the suspension of claims, if authorized, would constitute a taking of property in violation of the Fifth Amendment to the United States Constitution in the absence of just compensation.[14] Both petitioner and

[13] Contrast congressional reaction to the Iranian Agreements with congressional reaction to a 1973 Executive Agreement with Czechoslovakia. There the President sought to settle over $105 million in claims against Czechoslovakia for $20.5 million. Congress quickly demonstrated its displeasure by enacting legislation requiring that the Agreement be renegotiated. See Lillich, *supra* n. 8, at 839–840. Though Congress has shown itself capable of objecting to executive agreements, it has rarely done so and has not done so in this case.

[14] Though we conclude that the President has settled petitioner's claims against Iran, we do not suggest that the settlement has terminated peti-

the Government concede that the question whether the suspension of the claims constitutes a taking is not ripe for review. Brief for Petitioner 34, n. 32; Brief for Federal Respondents 65. Accord, *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority, supra,* at 814–815; *American Int'l Group, Inc.* v. *Islamic Republic of Iran,* 211 U. S. App. D. C., at 485, 657 F. 2d, at 447. However, this contention, and the possibility that the President's actions may effect a taking of petitioner's property, make ripe for adjudication the question whether petitioner will have a remedy at law in the Court of Claims under the Tucker Act, 28 U. S. C. § 1491 (1976 ed., Supp. III), in such an event. That the fact and extent of the taking in this case is yet speculative is inconsequential because "there must be at the time of taking 'reasonable, certain and adequate provision for obtaining compensation.'" *Regional Rail Reorganization Act Cases,* 419 U. S. 102, 124–125 (1974), quoting *Cherokee Nation* v. *Southern Kansas R. Co.,* 135 U. S. 641, 659 (1890); see also *Cities Service Co.* v. *McGrath,* 342 U. S. 330, 335–336 (1952); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* 438 U. S. 59, 94, n. 39 (1978).

It has been contended that the "treaty exception" to the jurisdiction of the Court of Claims, 28 U. S. C. § 1502, might preclude the Court of Claims from exercising jurisdiction over any takings claim the petitioner might bring. At oral argument, however, the Government conceded that § 1502 would not act as a bar to petitioner's action in the Court of Claims. Tr. of Oral Arg. 39–42, 47. We agree. See *United States* v. *Weld,* 127 U. S. 51 (1888); *United States* v. *Old Settlers,* 148 U. S. 427 (1893); *Hughes Aircraft Co.* v. *United States,* 209 Ct. Cl. 446, 534 F. 2d 889 (1976). Accordingly, to the extent petitioner believes it has suffered an unconstitutional taking by the suspension of the claims, we see no jurisdic-

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tioner's possible taking claim against the United States. We express no views on petitioner's claims that it has suffered a taking.

tional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act.

The judgment of the District Court is accordingly affirmed, and the mandate shall issue forthwith.

It is so ordered.

JUSTICE STEVENS, concurring in part.

In my judgment the possibility that requiring this petitioner to prosecute its claim in another forum will constitute an unconstitutional "taking" is so remote that I would not address the jurisdictional question considered in Part V of the the Court's opinion. However, I join the remainder of the opinion.

JUSTICE POWELL, concurring in part and dissenting in part.

I join the Court's opinion except its decision that the nullification of the attachments did not effect a taking of property interests giving rise to claims for just compensation. *Ante,* at 674, n. 6. The nullification of attachments presents a separate question from whether the suspension and proposed settlement of claims against Iran may constitute a taking. I would leave both "taking" claims open for resolution on a case-by-case basis in actions before the Court of Claims. The facts of the hundreds of claims pending against Iran are not known to this Court and may differ from the facts in this case. I therefore dissent from the Court's decision with respect to attachments. The decision may well be erroneous,[1] and it certainly is premature with respect to many claims.

[1] Even though the Executive Orders purported to make attachments conditional, there is a substantial question whether the Orders themselves may have effected a taking by making conditional the attachments that claimants against Iran otherwise could have obtained without condition. Moreover, because it is settled that an attachment entitling a creditor to resort to specific property for the satisfaction of a claim is a property right compensable under the Fifth Amendment, *Armstrong* v. *United States,* 364 U. S. 40 (1960); *Louisville Bank* v. *Radford,* 295 U. S. 555

I agree with the Court's opinion with respect to the suspension and settlement of claims against Iran and its instrumentalities. The opinion makes clear that some claims may not be adjudicated by the Claims Tribunal, and that others may not be paid in full. The Court holds that parties whose valid claims are not adjudicated or not fully paid may bring a "taking" claim against the United States in the Court of Claims, the jurisdiction of which this Court acknowledges. The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as "bargaining chips" claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts.[2] The extraordinary powers of the President and Congress upon which our decision rests cannot, in the circumstances of this case, displace the Just Compensation Clause of the Constitution.

(1935), there is a question whether the revocability of the license under which petitioner obtained its attachments suffices to render revocable the attachments themselves. See *Marschalk Co.* v. *Iran National Airlines Corp.*, 518 F. Supp. 69 (SDNY 1981).

[2] As the Court held in *Armstrong* v. *United States, supra,* at 49:

"The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

The Court unanimously reaffirmed this understanding of the Just Compensation Clause in the recent case of *Agins* v. *City of Tiburon,* 447 U. S. 255, 260–261 (1980).

Reporter's Note

The next page is purposely numbered 901. The numbers between 691 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM JUNE 29 THROUGH OCTOBER 2, 1981

JUNE 29, 1981

Appeal Dismissed

No. 80–336. BRUBECK ET AL. *v.* FLORIDA. Appeal from Dist. Ct. App. Fla., 2d Dist., dismissed for want of substantial federal question. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 384 So. 2d 1378.

Vacated and Remanded on Appeal

No. 79–1567. VIRGINIA CITIZENS FOR BETTER RECLAMATION, INC., ET AL. *v.* VIRGINIA SURFACE MINING & RECLAMATION ASSN., INC., ET AL. Appeal from D. C. W. D. Va. Judgment vacated and case remanded for further consideration in light of *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U. S. 264 (1981). Reported below: 483 F. Supp. 425.

No. 80–49. WATT, SECRETARY OF THE INTERIOR, ET AL. *v.* STAR COAL CO. Appeal from D. C. S. D. Iowa. Judgment vacated and case remanded for further consideration in light of *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U. S. 264 (1981), and *Hodel* v. *Indiana,* 452 U. S. 314 (1981).

Certiorari Granted—Reversed and Remanded. (See No. 80–1846, *ante,* p. 355.)

Certiorari Granted—Vacated and Remanded

No. 80–640. JAMES ET UX. *v.* FORD MOTOR CREDIT CO. ET AL.; and HERNANDEZ ET AL. *v.* O'NEAL MOTORS, INC., ET AL. C. A. 10th Cir. Certiorari granted limited to the second question presented by the petition. Judgment of the United States Court of Appeals for the Tenth Circuit in *Hernandez* v. *O'Neal Motors, Inc.,* is vacated insofar as it directed the

United States District Court for the District of New Mexico to dismiss the actions of petitioners Jackson Brown and Delores Brown, Theresa M. Shields, Nona Jackson, Nellie Pino, David Juanico and Lucy Juanico, Rita Cata, and Marie Johnson, and case is remanded to the Court of Appeals. Certiorari in all other respects denied. Reported below: 638 F. 2d 147 (first case); 638 F. 2d 153 (second case).

No. 79–5002. WILDER *v.* TEXAS;
No. 79–5007. ARMOUR *v.* TEXAS;
No. 79–5464. GARCIA *v.* TEXAS;
No. 79–6603. SIMMONS *v.* TEXAS;
No. 79–6749. PARKER *v.* TEXAS; and
No. 80–5360. BRANDON *v.* TEXAS. Ct. Crim. App. Tex. Motions of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Judgments vacated and cases remanded for further consideration in light of *Estelle* v. *Smith,* 451 U. S. 454 (1981). Reported below: Nos. 79–5002 and 79–5007, 583 S. W. 2d 349; No. 79–5464, 581 S. W. 2d 168; No. 79–6603, 594 S. W. 2d 760; No. 79–6749, 594 S. W. 2d 419; No. 80–5360, 599 S. W. 2d 567.

No. 80–1315. HAWAII ET AL. *v.* MEDERIOS ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Howe* v. *Smith,* 452 U. S. 473 (1981). Reported below: 637 F. 2d 1130.

No. 80–1737. UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS *v.* AIKENS. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Texas Dept. of Community Affairs* v. *Burdine,* 450 U. S. 248 (1981). Reported below: 206 U. S. App. D. C. 109, 642 F. 2d 514.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

At the behest of the petitioner, the Court today summarily vacates a judgment of the Court of Appeals for the District of Columbia Circuit and remands the case to that

court for reconsideration in light of our decision earlier this Term in *Texas Dept. of Community Affairs* v. *Burdine,* 450 U. S. 248 (1981). Because I regard this disposition as wholly inappropriate and unnecessary, I dissent.

Respondent Aikens is a retired Negro employee of the United States Postal Service. He filed this suit alleging that the Postal Service Board of Governors, petitioner here, had violated Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.,* by discriminating against him because of his race with respect to the awarding of promotions and work details. The District Court, in dismissing the action, concluded that respondent had failed to establish a prima facie case of discrimination because he had not shown "that he was as qualified or more qualified than the individuals who were promoted." The Court of Appeals reversed, concluding that the District Court's ruling was "[p]lainly . . . a misstatement of applicable law." 206 U. S. App. D. C. 109, 114, 642 F. 2d 514, 519 (1980). The panel noted that even the petitioner had conceded that the District Court had mischaracterized the showing necessary to establish a prima facie case under Title VII. *Ibid.* The court concluded that this Court's controlling decision in *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792 (1973), required that a Title VII plaintiff, as part of his prima facie case, show only that "he applied and was qualified for a job for which the employer was seeking applicants." *Id.,* at 802.[1] Accordingly, the case was remanded to

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[1] As set forth in *McDonnell Douglas Corp.* v. *Green,* a Title VII plaintiff establishes a prima facie case of discrimination when he shows

"(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U. S., at 802.

There is no dispute in this case that the other elements of a Title VII prima facie case are satisfied. As the Court of Appeals observed:

"On the record in this case, it is clear that Aikens met the first, third

the District Court for further proceedings under the appropriate standard.

The petitioner, ignoring its earlier concession of error by the District Court, now asks this Court to vacate the judgment of the Court of Appeals on the ground that it is "inconsistent" with this Court's decision in *Texas Dept. of Community Affairs* v. *Burdine, supra.* While the majority without explanation today accepts this suggestion, I find it untenable. Simply put, our decision in *Texas Dept. of Community Affairs* has almost nothing to do with the issue raised in this case. That decision involved "[t]he narrow question . . . whether, *after the plaintiff has proved a prima facie case of discriminatory treatment,* the burden shifts to the [employer] to persuade the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed." 450 U. S., at 250 (emphasis added). The exclusive focus of the case was on the sort of showing a Title VII defendant must make to rebut a prima facie case of discrimination. The dispute here, in contrast, involves only the threshold issue whether a Title VII plaintiff, *in order to establish a prima facie case of discrimination,* must show that he was qualified for the sought-after position or, as the District Court ruled and the petitioner now suggests, that he was as qualified as, or more qualified than, the person selected by the employer. In resolving this entirely different question, the Court of Appeals correctly turned to our decision in *McDonnell Douglas Corp.* v. *Green, supra,* and concluded that the decision of the District Court

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and fourth elements of the test set forth in *McDonnell Douglas:* he is a black man; he sought promotion to higher level positions that became available; and white Post Office employees received the positions." 206 U. S. App. D. C. 109, 112, 642 F. 2d 514, 517 (1980).

Thus, the only issue raised here is the nature of the second requirement of a prima facie case: that the complainant "was qualified for a job for which the employer was seeking applicants." *McDonnell Douglas, supra,* at 802.

was "plainly at odds" with the express language of that decision.

This conclusion, in my view, is unassailable. *McDonnell Douglas* requires a Title VII plaintiff as part of his prima facie case to show that he "was qualified for a job for which the employer was seeking applicants," 411 U. S., at 802. Nothing in that decision or subsequent ones by this Court supports the District Court's view, now embraced by the petitioner, that the plaintiff at this threshold stage must also show that he was as qualified as, or more qualified than, the selected applicant. Indeed, our decision in *Texas Dept. of Community Affairs* expressly reaffirmed the *McDonnell Douglas* formulation of the prima facie case, 450 U. S., at 253–254, n. 6, and specifically noted that the respondent in that case had established this segment of the prima facie case by simply showing that she was "a qualified woman who sought an available position." *Ibid.* See also *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 575–576 (1978).

In asserting that our decision in *Texas Dept. of Community Affairs* may have altered the *McDonnell Douglas* test of a prima facie case, the petitioner relies on the statement in *Texas Dept. of Community Affairs* that a prima facie case is established when an applicant is "rejected under circumstances which give rise to an inference of unlawful discrimination." 450 U. S., at 253. In the promotion context, the petitioner asserts, such an inference of unlawful conduct does not arise simply because a qualified applicant is rejected for a job. Other persons may have also applied for the promotion, and the rejection of the applicant may merely indicate that a *more* qualified applicant was selected. Thus, in the petitioner's view, the unsuccessful applicant for a promotion must disprove this possibility in order to establish a prima facie case of discrimination.

The petitioner's view represents one potential way to structure the burdens of proof in a Title VII case,[2] but it has never

[2] In my view, the fact that the chosen employee was *more* qualified than

been embraced by this Court. If the Court now feels that the issue requires re-examination, it should grant the petition for certiorari and hear oral argument in the case. Instead, the Court remands without opinion to the Court of Appeals for reconsideration in light of ambiguous dictum in an opinion dealing with an entirely distinct issue. I am at a loss to understand this disposition, as I suspect the Court of Appeals will be. Perhaps it reflects the pressures of the end of the Term, or an excessive deference to the views of the Solicitor General, or a desire for an easy, temporary solution to a potentially troublesome issue. But these reasons simply cannot justify today's disposition, which rather than clarifying the law, needlessly obscures it. Such action is contrary to our judicial duty, and I therefore dissent.

No. 80–5074. RODRIGUEZ *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Estelle* v. *Smith,* 451 U. S. 454 (1981), and *Adams* v. *Texas,* 448 U. S. 38 (1980). Reported below: 597 S. W. 2d 917.

Miscellaneous Orders

No. A–998. MOWAD *v.* UNITED STATES. C. A. 2d Cir. Application for stay and/or bail, addressed to JUSTICE BRENNAN and referred to the Court, denied.

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other qualified applicants for the job is the sort of justification that the *employer* is entitled to use to rebut the prima facie case. An applicant who has satisfied the objective qualifications established by the employer for promotion may have no way of knowing what additional considerations the employer relied on in selecting a particular person among the pool of qualified applicants. This information is uniquely within the control of the employer, and thus it places an unfair burden on the plaintiff to require him, as part of his prima facie case, to guess what additional considerations the employer might have relied on and to prove that even under these considerations he was at least as qualified as the selected applicant.

No. A–1016. North Carolina et al. *v.* United States. D. C. E. D. N. C. Application for stay, presented to The Chief Justice, and by him referred to the Court, denied.

No. A–1030. Edgewood School District et al. *v.* Hoots et al. D. C. W. D. Pa. Application for stay, presented to Justice Brennan, and by him referred to the Court, denied.

No. A–1042 (80–2140). Gadek, t/a Poor Billy's *v.* Township of Woodbridge. Super. Ct. N. J., App. Div. Application for stay, addressed to Justice Blackmun and referred to the Court, denied.

No. A–1043. Rodriguez et al. *v.* Popular Democratic Party et al. Application to continue the stay entered by the Supreme Court of Puerto Rico, presented to Justice Brennan, and by him referred to the Court, denied.

No. D–222. In re Disbarment of Strickland. It is ordered that the order of this Court entered March 9, 1981 [450 U. S. 976], suspending Maurice R. Strickland from the further practice of law in this Court, is vacated and that the rule to show cause issued March 9, 1981, is discharged.

Chief Justice Burger, with whom Justice Rehnquist joins, dissenting.

Maurice R. Strickland was admitted to the practice of law in New Jersey in 1960, and admitted to practice before this Court in 1966. He has not practiced in this Court.

Prior to November 15, 1975, Strickland misappropriated money from two clients. As a result of his actions, complaints were filed against him with the Essex County Ethics Committee. After a plenary hearing before the Committee, the Supreme Court of New Jersey entered an order suspending Strickland from the practice for one year or until further order of the court. The suspension remained in effect until February 1981, and was not reported to this Court until then either by Strickland or that court.

Strickland continued to meet with members of the Committee, admitted his misappropriations, and arranged to repay the funds he had misappropriated. The funds were repaid by February 1978. A formal hearing was conducted by the Committee on April 30, 1980. The Committee recommended leniency. A hearing then was held by the Disciplinary Review Board of the Supreme Court of New Jersey which recommended that Strickland be suspended for five years commencing November 15, 1975. On February 3, 1981, the Supreme Court of New Jersey adopted the recommendation of the Disciplinary Review Board. Strickland immediately applied to the Supreme Court of New Jersey for reinstatement. He was reinstated on March 4, 1981.

On February 10, 1981, this Court, for the first time, learned of Strickland's suspension. On March 9, pursuant to Supreme Court Rule 8, Strickland was suspended from practice before this Court and ordered to show cause why his name should not be stricken from our rolls.

In response to the order to show cause, Strickland filed a petition for reinstatement. Strickland states that he has not practiced law since November 1975, has admitted his defalcations, and has made restitution. Since July 1977, he has been employed an as investigator and administrative analyst by the Essex County Welfare Board. Having been reinstated to the practice of law by the Supreme Court of New Jersey, Strickland intends to re-enter private practice specializing in the area of welfare law. As mitigating factors, Strickland states that he joined Alcoholics Anonymous in 1974, and has abstained from alcohol since then. He asserts he is active in his church and in the parents-teachers association.

Supreme Court Rule 8 provides that if a member of the Court's Bar is suspended from practice in any court of record, the attorney shall be suspended forthwith from practice before the Court and ordered to show cause why he should not be disbarred. The Rule's import is that absent exceptional

circumstances, an attorney suspended by a state will be disbarred by this Court.

The policy expressed in Rule 8 is consistent with the role this Court should play in monitoring professional misconduct. In light of the inadequacies that pervade this country's attorney discipline systems,* membership in the Bar of the country's highest Court should remain a privilege and a responsibility. Thus to be admitted to this Court's Bar, an applicant must show not only that he has been admitted to the practice of law for three years, but also that he "appears . . . to be of good moral and professional character." This Court's Rule 5.1.

Strickland, having admittedly violated his oath and having been suspended from the practice of law for five years, seeks to remain a member of this Bar simply because his suspension has run its course and he has been reinstated to the practice of law in New Jersey. In my opinion, a 5-year suspension is a *per se* basis for disbarment by this Court. With deference to the Supreme Court of New Jersey's decisions, this Court is not, and must never be, bound by a state court's decision as it relates to our decision based on a record such as we find in this case. A state court, when disciplining an attorney, deals directly with the attorney's livelihood. Membership in this Court's Bar is not shown to be critical to Strickland's livelihood except as he may seek to use it as "evidence" that his misconduct somehow has been excused by this Court or that he has been "vindicated" by this Court. The quality of this Court's Bar and the public's confidence in the Bar is compromised by the retention, as well as the admission, of attorneys found guilty of unethical professional conduct.

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*See the Report of the American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, entitled Problems and Recommendations in Disciplinary Enforcement (1970, chaired by Justice Tom C. Clark).

Retention of Strickland as a member of this Court's Bar reflects unfairly on all attorneys who are members in good standing. The procedural novelty of the New Jersey disciplinary proceedings should not excuse Strickland from proving that he is worthy of admission to this Court's Bar, which on this record he has not demonstrated.

The hard fact remains that when Strickland last practiced law in New Jersey, he violated his oath of office by embezzling clients' funds; accordingly, he should be stricken from the rolls of this Court.

No. D–241. IN RE DISBARMENT OF PRIDE. Disbarment entered. [For earlier order herein, see 452 U. S. 902.]

No. D–243. IN RE DISBARMENT OF WITTE. It is ordered that Donald M. Witte, of Clayton, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 80–847. COMMON CAUSE ET AL. *v.* SCHMITT ET AL.; and

No. 80–1067. FEDERAL ELECTION COMMISSION *v.* AMERICANS FOR CHANGE ET AL. D. C. D. C. [Probable jurisdiction noted, 450 U. S. 908.] Motion of appellees Americans for Change, Americans for an Effective Presidency, Fund for a Conservative Majority, Harrison H. Schmitt, and Carl T. Curtis for divided argument denied.

No. 80–986. NORTH HAVEN BOARD OF EDUCATION ET AL. *v.* BELL, SECRETARY OF EDUCATION, ET AL. C. A. 2d Cir. [Certiorari granted, 450 U. S. 909.] Motion of the parties to dispense with printing the joint appendix granted.

No. 80–1431. IN RE R. M. J. Sup. Ct. Mo. [Probable jurisdiction noted, 452 U. S. 904.] Motion of the parties to dispense with printing the joint appendix granted.

No. 80–1430. ENGLE, CORRECTIONAL SUPERINTENDENT *v.* ISAAC; PERINI, CORRECTIONAL SUPERINTENDENT *v.* BELL; and ENGLE, CORRECTIONAL SUPERINTENDENT *v.* HUGHES. C. A. 6th Cir. [Certiorari granted, 451 U. S. 906.] Motions of respondents for divided argument granted. Motions of respondents for additional time for oral argument or designation of counsel to present oral argument denied. Motion for appointment of counsel granted, and it is ordered that James R. Kingsley, Esquire, of Circleville, Ohio, be appointed to serve as counsel for respondent Isaac in this case.

No. 80–1804. LEDBETTER, SHERIFF, ET AL. *v.* JONES ET AL. C. A. 5th Cir. The order heretofore entered on June 22, 1981 [452 U. S. 959], is amended to read as follows: Certiorari granted limited to Question B presented by the petition.

No. 80–5727. EDDINGS *v.* OKLAHOMA. Ct. Crim. App. Okla. [Certiorari granted, 450 U. S. 1040.] Motion of Kentucky Youth Advocates et al. for leave to file a brief as *amici curiae* granted.

Certiorari Granted

No. 80–1595. UNITED STATES *v.* FRADY. C. A. D. C. Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. THE CHIEF JUSTICE and JUSTICE MARSHALL took no part in the consideration or decision of this motion and this petition. Reported below: 204 U. S. App. D. C. 234, 636 F. 2d 506.

Certiorari Denied. (See also No. 80–640, *supra.*)

No. 80–1148. CHAGNON ET AL. *v.* BELL, FORMER ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 206 U. S. App. D. C. 280, 642 F. 2d 1248.

No. 80–1247. ERRICO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 635 F. 2d 152.

No. 80–1703. MISSISSIPPI COLLEGE *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 477.

No. 80–1748. MORELLI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 643 F. 2d 402.

No. 80–1970. AIKENS *v.* UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS. C. A. D. C. Cir. Certiorari denied. Reported below: 206 U. S. App. D. C. 109, 642 F. 2d 514.

No. 80–1982. MURRAY, COMMISSIONER OF MENTAL HEALTH OF INDIANA, ET AL. *v.* CUA. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 78.

No. 80–6058. ELKINS ET AL. *v.* UNITED STATES;
No. 80–6137. HENSLEY *v.* UNITED STATES;
No. 80–6141. SUTTON ET AL. *v.* UNITED STATES;
No. 80–6147. HARRIS *v.* UNITED STATES;
No. 80–6253. HOLMES *v.* UNITED STATES;
No. 80–6254. ADAMS *v.* UNITED STATES; and
No. 80–6272. CRAVENS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 642 F. 2d 1001.

No. 80–6354. BESHAW *v.* FENTON, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 635 F. 2d 239.

No. 80–6552. JOHNSON *v.* SMITH, ATTORNEY GENERAL, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 641 F. 2d 850.

No. 79–881. MITCHELL *v.* ZWEIBON ET AL.;
No. 79–882. NIXON ET AL. *v.* SMITH ET AL.; and
No. 79–883. ZWEIBON ET AL. *v.* MITCHELL. C. A. D. C. Cir. Certiorari denied. JUSTICE REHNQUIST took no part in the consideration or decision of these petitions. Reported below: Nos. 79–881 and 79–883, 196 U. S. App. D. C. 265, 606 F. 2d 1172; No. 79–882, 196 U. S. App. D. C. 276, 606 F. 2d 1183.

No. 79–721. Woods *v.* Texas;
No. 79–5199. Bell *v.* Texas;
No. 79–5587. Brooks *v.* Texas;
No. 79–6081. Green *v.* Texas;
No. 79–6608. Demouchette *v.* Texas; and
No. 80–5320. Barefoot *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: No. 79–721, 569 S. W. 2d 901; No. 79–5199, 582 S. W. 2d 800; No. 79–5587, 599 S. W. 2d 312; No. 79–6081, 587 S. W. 2d 167; No. 79–6608, 591 S. W. 2d 488; No. 80–5320, 596 S. W. 2d 875.

Justice Brennan and 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. 79–1120. Mitchell et al. *v.* Forsyth et al. C. A. 3d Cir. Certiorari denied. Justice Rehnquist took no part in the consideration or decision of this petition. Reported below: 599 F. 2d 1203.

No. 80–833. Local Union No. 35 of the International Brotherhood of Electrical Workers *v.* City of Hartford et al. C. A. 2d Cir. Certiorari denied. Justice Stewart would grant certiorari. Reported below: 625 F. 2d 416.

No. 80–1134. Lead Industries Assn., Inc., et al. *v.* Donovan, Secretary of Labor, et al.;
No. 80–1155. South Central Bell Telephone Co. et al. *v.* Donovan, Secretary of Labor, et al.; and
No. 80–1170. National Association of Recycling Industries, Inc., et al. *v.* Secretary of Labor et al. C. A. D. C. Cir. Certiorari denied. Justice Stewart and Justice Powell took no part in the consideration or decision of these petitions. Reported below: 208 U. S. App. D. C. 60, 647 F. 2d 1189.

No. 80–1112. UNITED STATES *v.* CHAMBERLIN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. CHIEF JUSTICE BURGER would grant certiorari and reverse the judgment. JUSTICE BLACKMUN would grant certiorari and set case for oral argument. Reported below: 644 F. 2d 1262.

No. 80–6620. JEFFRIES *v.* BARKSDALE, SHERIFF. C. A. 6th Cir. Certiorari denied.

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

If this case were properly before the Court I would have no difficulty in joining my Brethren in denying the petition for writ of certiorari. It is clear to me, however, that under the applicable statutes we have no jurisdiction to entertain the petition. Accordingly, I would dismiss for want of jurisdiction.

The facts need be only briefly stated. Petitioner was convicted in state court. He succeeded in obtaining a reversal of his conviction on appeal and a retrial was ordered. After several continuances were granted petitioner sought habeas corpus relief in Federal District Court, alleging that he was being denied his rights to a speedy trial. The District Court dismissed the action on the ground that petitioner had failed to exhaust available state remedies, see 28 U. S. C. § 2254. Petitioner appealed to the Court of Appeals for the Sixth Circuit. That court agreed that petitioner had failed to exhaust available state remedies, and issued an order specifically denying petitioner's application for a certificate of probable cause to appeal. Petitioner thereupon sought from this Court a writ of certiorari to the Court of Appeals.

Congress has enacted a specific provision governing the right to appeal in cases such as this:

> "An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued

> by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause." 28 U. S. C. § 2253.

See also Fed. Rule App. Proc. 22 (b) ("In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause").

The effect of this statute, which could not have been drafted in plainer terms, is clear: A certificate of probable cause is an indispensible prerequisite to an appeal in the courts of appeals. This has long been recognized by the courts, see, *e. g., Wilson* v. *Lanagan,* 79 F. 2d 702 (CA1 1935); *Hooks* v. *Fourth District Court of Appeal,* 442 F. 2d 1042 (CA5 1971), and by distinguished commentators, see, *e. g.,* Blackmun, Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases, 43 F. R. D. 343, 351 (1967).

When this Court was confronted with a predecessor of 28 U. S. C. § 2253 which required, in certain habeas corpus cases, a certificate of probable cause before there could be an appeal to the Supreme Court, ch. 76, 35 Stat. 40 (1908), it had no difficulty in concluding that it had no jurisdiction over appeals brought before it in the absence of such a certificate. *Bilik* v. *Strassheim,* 212 U. S. 551 (1908); *Ex parte Patrick,* 212 U. S. 555 (1908). The provision was amended in 1925 to provide that it "shall apply to appellate proceedings . . . as [it] heretofore [has] applied to direct appeals to the Supreme Court," 43 Stat. 940 (1925). There is therefore no jurisdiction in the courts of appeals in cases covered by 28 U. S. C. § 2253 without a certificate of probable cause.

Our certiorari jurisdiction, however, extends only to "[c]ases in the courts of appeals." 28 U. S. C. § 1254. Since there was no certificate of probable cause issued in this case, it was never "in" the Court of Appeals. In the plain words of the statute, "[a]n appeal may not be taken to the court

of appeals." Since the case was never in the Court of Appeals we cannot review it by writ of certiorari to that court.

The legislative history of 28 U. S. C. § 2253 and its predecessors demonstrates the clear congressional purpose to impose the certificate-of-probable-cause requirement as a means of *terminating* frivolous appeals in certain habeas corpus cases. See H. R. Rep. No. 23, 60th Cong., 1st Sess. (1908); *United States ex rel. Tillery* v. *Cavell,* 294 F. 2d 12, 14–15 (CA3 1961). That legislative purpose is frustrated when this Court assumes jurisdiction to review cases in which both the district and appellate courts have denied a certificate. For in such a case review continues, if only eventuating in the inevitable denial of a writ of certiorari.

It is true that 28 U. S. C. § 2253 has largely been ignored by this Court, presumably because it is not too much bother simply to deny a petition for certiorari. The exercise of jurisdiction over a case which Congress has provided shall terminate before reaching this Court, however, is a serious matter. The imperative that other branches of Government obey our duly issued decrees is weakened whenever we decline, for whatever reason other than the exercise of our own constitutional duties, to adhere to the decrees of Congress and the Executive.

For the foregoing reasons, I dissent from the *denial* of the petition for writ of certiorari: the petition should be *dismissed* for want of jurisdiction.

July 2, 1981

Affirmed on Appeal

No. 80–1597. Campbell, Commissioner of Transportation of Maine *v.* John Donnelly & Sons et al. Affirmed on appeal from C. A. 1st Cir. The Chief Justice, Justice Rehnquist, and Justice Stevens would note probable jurisdiction and set case for oral argument. Justice Stewart took no part in the consideration or decision of this case. Reported below: 639 F. 2d 6.

Appeals Dismissed

No. 80–815. COUNCIL OF GREENBURGH CIVIC ASSNS. ET AL. *v.* UNITED STATES POSTAL SERVICE. Appeal from D. C. S. D. 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: 490 F. Supp. 157.

No. 80–1740. LANCE *v.* FEDERAL ELECTION COMMISSION. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 635 F. 2d 1132.

Vacated and Remanded on Appeal

No. 80–1797. RYAN OUTDOOR ADVERTISING, INC. *v.* CITY OF SALINAS. Appeal from Ct. App. Cal., 1st App. Dist. Judgment vacated and case remanded for further consideration in light of *Metromedia, Inc.* v. *San Diego, ante,* p. 490.

Certiorari Granted—Vacated and Remanded

No. 79–1690. STANTON, ADMINISTRATOR, INDIANA DEPARTMENT OF PUBLIC WELFARE *v.* BROWN ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Schweiker* v. *Gray Panthers, ante,* p. 34. Reported below: 617 F. 2d 1224.

No. 79–1896. ARKANSAS LOUISIANA GAS CO. *v.* HALL ET AL. Ct. App. La., 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Arkansas Louisiana Gas Co.* v. *Hall, ante,* p. 571. JUSTICE STEWART took no part in the consideration or decision of this case. Reported below: 379 So. 2d 1142.

No. 80–126. OUTBOARD MARINE CORP. *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Milwaukee* v. *Illinois,* 451 U. S. 304 (1981). Reported below: 619 F. 2d 623.

No. 80–291. MILLER *v.* MILLER. Sup. Ct. Mont. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McCarty* v. *McCarty, ante,* p. 210. Reported below: —— Mont. ——, 609 P. 2d 1185.

No. 80–578. MILHAN *v.* MILHAN. Sup. Ct. Cal. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McCarty* v. *McCarty, ante,* p. 210. Reported below: 27 Cal. 3d 765, 613 P. 2d 812.

No. 80–817. JIMINEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Robbins* v. *California, ante,* p. 420. Reported below: 626 F. 2d 39.

No. 80–1037. CALIFORNIA *v.* SILVEY. Ct. App. Cal., 1st App. Dist. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the Court of Appeal to consider whether its judgment is based upon federal or state constitutional grounds, or both. *California* v. *Krivda,* 409 U. S. 33 (1972). Reported below: 110 Cal. App. 3d 67, 167 Cal. Rptr. 566.

No. 80–1080. BIBLE ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Robbins* v. *California, ante,* p. 420. Reported below: 389 So. 2d 42.

No. 80–1317. UNITED STATES *v.* BENSON. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *New York* v. *Belton, ante,* p. 454. Reported below: 631 F. 2d 1336.

No. 80–1469. CUTTITTA *v.* CUTTITTA. Ct. App. Cal., 4th App. Dist. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *McCarty* v. *McCarty, ante,* p. 210.

No. 80–1421. California *v.* Riegler. Ct. App. Cal., 5th App. Dist. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *New York* v. *Belton, ante,* p. 454. Reported below: 111 Cal. App. 3d 580, 168 Cal. Rptr. 816.

No. 80–5677. Ruggles *v.* California. Ct. App. Cal., 2d App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Robbins* v. *California, ante,* p. 420.

Certified Questions Answered in Part and Dismissed in Part

No. 80–2127. Iran National Airlines Corp. et al. *v.* Marschalk Co., Inc., et al. It is the opinion of this Court that the questions certified by the United States Court of Appeals for the Second Circuit must be answered as follows:

(1). Yes. See *Dames & Moore* v. *Regan, ante,* p. 654.

(2). Yes. See *Dames & Moore* v. *Regan, ante,* p. 654.

(3). The President's action in nullifying the attachments did not constitute a taking of property for which compensation must be paid. We dismiss question (3) so far as it concerns whether the action of the President in suspending the claims constituted a taking of property for which compensation must be paid. See *Dames & Moore* v. *Regan, ante,* p. 654.

Justice Powell, with whom Justice Marshall and Justice Stevens join, dissenting.

I would dismiss the certificate, citing *Dames & Moore* v. *Regan, ante,* p. 654, announced today. The Court's opinion in that case provides the only answers that this Court should give to the questions certified to us by the United States Court of Appeals for the Second Circuit. Having rendered an opinion on the subject of those questions, we should not answer them in monosyllables nor attempt a syllabus of

a portion of the Court's opinion. We recently have dismissed certification of questions where the Court has addressed the subject of the questions in a full opinion. *Foley* v. *Carter*, 449 U. S. 1073 (1981). See also *United States* v. *Will*, 449 U. S. 200 (1980).

Miscellaneous Orders

No. A–1006 (80–2157). ANCHORAGE TIMES PUBLISHING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–1029. COTA ET AL. *v.* LOS ANGELES UNIFIED SCHOOL DISTRICT ET AL. Application for injunction, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–1051. OPTION ADVISORY SERVICE, INC. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. Application for stay, addressed to JUSTICE STEWART and referred to the Court, denied.

No. A–1052. IN RE MCGEAN. Ct. App. D. C. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–227. IN RE DISBARMENT OF SCHMIDT. Disbarment entered. [For earlier order herein, see 450 U. S. 1037.]

No. D–231. IN RE DISBARMENT OF KELLEY. Disbarment entered. [For earlier order herein, see 451 U. S. 903.]

No. 80–11. MERRION ET AL., DBA MERRION & BAYLESS, ET AL. *v.* JICARILLA APACHE TRIBE ET AL.; and

No. 80–15. AMOCO PRODUCTION CO. ET AL. *v.* JICARILLA APACHE TRIBE ET AL. C. A. 10th Cir. [Certiorari granted, 449 U. S. 820.] Cases restored to calendar for reargument. JUSTICE STEWART took no part in the consideration or decision of this order.

No. 80–317. UNIVERSITY OF TEXAS ET AL. *v.* CAMENISCH, 451 U. S. 390. Motion of respondent to retax costs denied.

No. 80–1240. LANE, CORRECTIONS DIRECTOR *v.* WILLIAMS ET AL. C. A. 7th Cir. [Certiorari granted *sub nom. Franzen* v. *Williams,* 452 U. S. 914.] Motion for appointment of counsel granted, and it is ordered that Martha A. Mills, of Chicago, Ill., be appointed to serve as counsel for respondents in this case.

No. 80–1350. COMMUNITY COMMUNICATIONS CO., INC. *v.* CITY OF BOULDER, COLORADO, ET AL. C. A. 10th Cir. [Certiorari granted, 450 U. S. 1039.] Motions of National Institute of Municipal Law Officers, Cable Television Information Center, National League of Cities, and City of Los Angeles for leave to file briefs as *amici curiae* granted.

No. 80–1624. LARSEN ET AL. *v.* VAN SLOOTEN. Appeal from Sup. Ct. Mich. Motion of appellants to expedite consideration of the appeal denied.

No. 80–2049. RALSTON, WARDEN *v.* ROBINSON. C. A. 7th Cir. [Certiorari granted, 452 U. S. 960.] Motion for appointment of counsel granted, and it is ordered that Jerold S. Solovy, Esquire, of Chicago, Ill., be appointed to serve as counsel for respondent in this case.

Probable Jurisdiction Postponed

No. 80–1481. BREAD POLITICAL ACTION COMMITTEE ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL. Appeal from C. A. 7th Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 635 F. 2d 621.

Certiorari Granted

No. 80–60. HERWEG ET VIR *v.* RAY, GOVERNOR OF IOWA, ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 619 F. 2d 1265.

Certiorari Denied. (See also Nos. 80–815 and 80–1740, *supra.*)

No. 79–1469. Cose *v.* Cose. Sup. Ct. Alaska. Certiorari denied. Reported below: 592 P. 2d 1230.

No. 79–1617. Department of Transportation of Oklahoma *v.* Pile. Sup. Ct. Okla. Certiorari denied. Reported below: 603 P. 2d 337.

No. 80–196. City of San Diego et al. *v.* Metromedia, Inc., et al. Sup. Ct. Cal. Certiorari denied. Reported below: 26 Cal. 3d 848, 610 P. 2d 407.

No. 80–1132. Russell *v.* Russell. Ct. App. Ky. Certiorari denied. Reported below: 605 S. W. 2d 33.

No. 80–1403. Seafarers International Union, Pacific District-Pacific Maritime Association Pension Plan *v.* Stone et al.; and

No. 80–1454. Carpenters Pension Trust for Southern California *v.* Kronschnabel; and Carpenters Pension Trust for Southern California *v.* Stone et al. C. A. 9th Cir. Certiorari denied. Reported below: Nos. 80–1403 and 80–1454 (second case), 632 F. 2d 740; No. 80–1454 (first case), 632 F. 2d 745.

No. 80–6302. Castillo *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 389 So. 2d 1307.

No. 80–6631. In re John C. Sup. Ct. R. I. Certiorari denied. Reported below: —— R. I. ——, 425 A. 2d 536.

No. 80–498. Schweiker, Secretary of Health and Human Services *v.* Norman et al. C. A. 5th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 610 F. 2d 1228.

No. 80–792. Januszewski *v.* Connecticut. Sup. Ct. Conn. Certiorari denied. Justice Brennan and Justice Marshall would grant certiorari. Reported below: 182 Conn. 142, 438 A. 2d 679.

No. 80–1008. ILLINOIS *v.* BAYLES. Sup. Ct. Ill. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 82 Ill. 2d 128, 411 N. E. 2d 1346.

Rehearing Denied

No. 79–1977. RODRIGUEZ *v.* COMPASS SHIPPING CO., LTD., ET AL.; PEREZ *v.* ARYA NATIONAL SHIPPING LINE, LTD.; and BARULEC *v.* OVE SKOU, R. A., 451 U. S. 596;

No. 80–5693. CRAWFORD *v.* TEXAS, 452 U. S. 931;

No. 80–6214. DUFFIELD *v.* UNITED STATES, 451 U. S. 1019;

No. 80–6324. MILTON *v.* TEXAS, 451 U. S. 1031; and

No. 80–6542. COLLIER *v.* LOS ANGELES SOUTHWEST COLLEGE, 452 U. S. 919. Petitions for rehearing denied.

No. 80–1313. LAMPKIN-ASAM *v.* FLORIDA TEACHING PROFESSION-NATIONAL EDUCATION ASSN., 451 U. S. 978. Motion of appellant to defer consideration of petition for rehearing denied. Petition for rehearing denied.

No. 80–1534. OCHS *v.* UNITED STATES, 451 U. S. 1016. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

Assignment Order

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that JUSTICE WHITE be, and he is hereby, assigned to the Sixth Circuit as Circuit Justice, effective July 4, 1981, pending further order of the Court.

JULY 14, 1981

Dismissal Under Rule 53

No. 80–2097. POTTER INSTRUMENT CO., INC. *v.* STORAGE TECHNOLOGY CORP. ET AL. C. A. 4th Cir. Certiorari dismissed as to Telex Computer Products, Inc., under this Court's Rule 53. Reported below: 641 F. 2d 190.

AUGUST 28, 1981

Miscellaneous Orders

No. A–789 (80–1573). GLUESENKAMP *v.* FLORIDA. Application for bail, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–901. VALENTINE *v.* UNITED STATES. Application for bail, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–1064. TIBBS *v.* UNITED STATES. Sup. Ct. Fla. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–13. ELCAN *v.* UNITED STATES. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–15 (81–171). OESTERLEN SERVICES FOR YOUTH, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A–32. GEDEON *v.* GEDEON, AKA ROSE. Sup. Ct. Colo. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–86. CAPITOL CITIES COMMUNICATIONS, INC., ET AL. *v.* FLYNN, JUSTICE, SUPREME COURT OF NEW YORK. Sup. Ct. N. Y., Erie County. Motion for leave to file the application for stay under seal, presented to JUSTICE MARSHALL, and by him referred to the Court, denied. JUSTICE BLACKMUN, JUSTICE POWELL, and JUSTICE STEVENS would grant the motion. Application for stay, presented to JUSTICE MARSHALL, and by him referred to the Court, denied. JUSTICE BRENNAN would grant the application.

No. 80–203. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. *v.* CURRAN ET AL. C. A. 6th Cir. [Certiorari granted, 451 U. S. 906.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 80–644. G. D. SEARLE & CO. *v.* COHN ET AL. C. A. 3d Cir. [Certiorari granted, 451 U. S. 905.] Motion of Brinco Mining Ltd. for leave to file a brief as *amicus curiae* granted.

No. 80–824. POLK COUNTY ET AL. *v.* DODSON. C. A. 8th Cir. [Certiorari granted, 450 U. S. 963.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 80–848. PIPER AIRCRAFT CO. *v.* REYNO, PERSONAL REPRESENTATIVE OF THE ESTATES OF FEHILLY ET AL.; and

No. 80–883. HARTZELL PROPELLER, INC. *v.* REYNO, PERSONAL REPRESENTATIVE OF THE ESTATES OF FEHILLY ET AL. C. A. 3d Cir. [Certiorari granted, 450 U. S. 909.] Motion of Law Offices of Gerald C. Sterns for leave to file a brief as *amicus curiae* granted.

No. 80–931. CHARLES D. BONANNO LINEN SERVICE, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 1st Cir. [Certiorari granted, 450 U. S. 979.] Motion of the Solicitor General for divided argument granted.

No. 80–951. INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS *v.* TRANS WORLD AIRLINES, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 450 U. S. 979.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 80–986. North Haven Board of Education et al. *v.* Bell, Secretary of Education, et al. C. A. 2d Cir. [Certiorari granted, 450 U. S. 909.] Motion of Hillsdale College for leave to file a brief as *amicus curiae* granted.

No. 80–1208. New England Power Co. *v.* New Hampshire Public Utilities Commission et al.;

No. 80–1471. Massachusetts et al. *v.* New Hampshire Legislative Utility Consumers' Council et al.; and

No. 80–1610. Roberts, Attorney General of Rhode Island, et al. *v.* New Hampshire Public Utilities Commission et al. Sup. Ct. N. H. [Probable jurisdiction noted, 451 U. S. 981.] Motion of New England Power Pool Executive Committee for leave to file a brief as *amicus curiae* granted.

No. 80–1430. Engle, Correctional Superintendent *v.* Isaac; Perini, Correctional Superintendent *v.* Bell; and Engle, Correctional Superintendent *v.* Hughes. C. A. 6th Cir. [Certiorari granted, 451 U. S. 906.] Motion of Ohio Criminal Defense Lawyers Association for leave to participate in oral argument as *amicus curiae* denied.

No. 80–1576. Princeton University et al. *v.* Schmid. Sup. Ct. N. J. [Probable jurisdiction postponed, 451 U. S. 982.] Motion of Massachusetts Institute of Technology for leave to file a brief as *amicus curiae* granted. Justice Brennan took no part in the consideration or decision of this motion.

No. 80–1681. Village of Hoffman Estates et al. *v.* The Flipside, Hoffman Estates, Inc. C. A. 7th Cir. [Probable jurisdiction noted, 452 U. S. 904.] Motion of Community Action Against Drug Abuse for leave to file a brief as *amicus curiae* granted. Justice Stevens took no part in the consideration or decision of this motion.

No. 80–1538. PLYLER, SUPERINTENDENT, TYLER INDEPENDENT SCHOOL DISTRICT, ET AL. *v.* DOE, GUARDIAN, ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 451 U. S. 968]; and

No. 80–1934. TEXAS ET AL. *v.* CERTAIN NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 452 U. S. 937.] Motion of Mountain States Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 80–1781. MCNICHOLS, MAYOR OF DENVER, ET AL. *v.* BALDRIGE, SECRETARY OF COMMERCE, ET AL. C. A. 10th Cir. [Certiorari granted, 452 U. S. 937.] Motion of National Lead Counsel and National Liaison Counsel for leave to participate in oral argument as *amici curiae* denied. The suggestion of the Solicitor General that this case be consolidated with No. 80–1436, *Baldrige, Secretary of Commerce, et al.* v. *Shapiro, Essex County Executive* [certiorari granted, 451 U. S. 936], is adopted. Cases consolidated and a total of one and one-half hours allotted for oral argument.

Rehearing Denied

No. 79–5199. BELL *v.* TEXAS, *ante,* p. 913;

No. 79–6081. GREEN *v.* TEXAS, *ante,* p. 913;

No. 79–6423. LASSITER *v.* DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY, NORTH CAROLINA, 452 U. S. 18;

No. 79–6749. PARKER *v.* TEXAS, *ante,* p. 902;

No. 80–581. COMMONWEALTH EDISON CO. ET AL. *v.* MONTANA ET AL., *ante,* p. 609;

No. 80–1010. CURREY ET AL., DBA CURREY & CURREY *v.* CORPORATION COMMISSION OF OKLAHOMA ET AL., 452 U. S. 938;

No. 80–1696. HARING *v.* REGAN, SECRETARY OF THE TREASURY, 452 U. S. 939; and

No. 80–1805. BOSWORTH, DBA GULF TO BAY TITLE CO. *v.* COONEY, EXECUTOR, 452 U. S. 956. Petitions for rehearing denied.

No. 80–1940. LONG *v.* DISTRICT DIRECTOR, INTERNAL REVENUE SERVICE, PHOENIX, ARIZONA, 452 U. S. 934;

No. 80–6322. SKILLERN *v.* TEXAS, 452 U. S. 931;

No. 80–6506. FLEMING *v.* AUSTIN, WARDEN, 452 U. S. 910;

No. 80–6510. SMITH *v.* KENTUCKY, 452 U. S. 908;

No. 80–6551. RUCKER *v.* CITY OF ST. LOUIS ET AL., 452 U. S. 942;

No. 80–6580. ZARRILLI *v.* CAPITOL BANK & TRUST CO. ET AL., 452 U. S. 965;

No. 80–6593. REITER *v.* CITY OF KEENE, 452 U. S. 965;

No. 80–6657. PATTERSON *v.* ABERNATHY ET AL., 452 U. S. 956; and

No. 80–6672. SONDERUP *v.* UNITED STATES, 452 U. S. 920. Petitions for rehearing denied.

No. 79–880. KISSINGER ET AL. *v.* HALPERIN ET AL., 452 U. S. 713;

No. 79–881. MITCHELL *v.* ZWEIBON ET AL., *ante*, p. 912;

No. 79–882. NIXON ET AL. *v.* SMITH ET AL., *ante*, p. 912;

No. 79–883. ZWEIBON ET AL. *v.* MITCHELL, *ante*, p. 912; and

No. 79–1120. MITCHELL ET AL. *v.* FORSYTH ET AL., *ante*, p. 913. Petitions for rehearing denied. JUSTICE REHNQUIST took no part in the consideration or decision of these petitions.

No. 79–1314. 1776 K STREET ASSOCIATES ET AL. *v.* UNITED STATES, 447 U. S. 905; and

No. 80–6426. ODES *v.* NOWLAND, ACTING DIRECTOR, DEPARTMENT OF REGISTRATION AND EDUCATION OF ILLINOIS, 451 U. S. 991. Motions for leave to file petitions for rehearing denied.

SEPTEMBER 2, 1981

Miscellaneous Order

No. A–72. GRADDICK, ATTORNEY GENERAL OF ALABAMA *v.* NEWMAN ET AL. D. C. M. D. Ala. Application for stay,

presented to The Chief Justice, and by him referred to the Court, denied.

Opinion of Justice Powell.

This case, involving an application and "reapplication" for a stay, arises in a complex and unusual procedural posture. The applicant Charles A. Graddick is the Attorney General of Alabama. Late on the afternoon of July 23 he applied to me as Circuit Justice to stay an order of the District Court for the Middle District of Alabama. The order arose from protracted litigation, commenced in 1971, involving conditions in the Alabama prison system. It directed release of some 400 inmates at midnight on July 24. In order to consider the issues presented, I entered a temporary stay and requested responses. I subsequently denied the application on July 25.

In his application to me as Circuit Justice, Attorney General Graddick did not claim standing as a party to the underlying prison litigation. On the contrary, he came to this Court complaining of the District Court's refusal to grant his motion to *intervene* in that lawsuit. He sought a stay to permit him to appeal following resolution of his claimed right of intervention.

On July 25, the order of the District Court was given effect. More than 200 prisoners were released. Despite this change in the underlying circumstances—which a "stay" would ordinarily be entered to preserve—Graddick promptly filed a "reapplication" for stay with The Chief Justice. The Chief Justice referred this "reapplication," on which we act today, to the full Court.

The "reapplication" was in fact a *new* application. In it Graddick for the first time claimed standing as the successor Attorney General to a party defendant dating back to the original action in 1971. If he is such a party, his motion to intervene was unnecessary.

Crediting Graddick's claim to status as a party, the Court decides today that he is still not entitled to a stay.

I

In view of the change in Attorney General Graddick's position and the unusual history of this case, and its resulting present posture, I write to summarize the relevant facts and to restate my reasons for concluding that Graddick is not entitled to a stay. The current controversy represents the latest chapter in protracted litigation over conditions in the Alabama prisons. The litigation involves at least three cases, consolidated by the Fifth Circuit in *Newman* v. *Alabama,* 559 F. 2d 283 (1977). See *Newman* v. *Alabama,* 349 F. Supp. 278 (MD Ala. 1972); *Pugh* v. *Locke,* 406 F. Supp. 318 (MD Ala. 1976) (together with *James* v. *Wallace*). The original lawsuits in each of the cases sought redress of alleged constitutional violations in the Alabama prisons. On more than one occasion the District Court has held specifically that the conditions in the Alabama prison system, including overcrowding, violate the rights of inmates under the Eighth and Fourteenth Amendments. See *Newman* v. *Alabama,* 349 F. Supp. 278; *Pugh* v. *Locke, supra; James* v. *Wallace, supra.*

In *Pugh* and *James,* the court awarded far-reaching injunctive relief, and enjoined the defendants from failing fully to implement it. But the status of various defendants has proved a recurring problem in the lawsuits. In *Pugh* and *James* the defendants included the State of Alabama; the Governor of Alabama, George C. Wallace; the Commissioner of Corrections; the Deputy Commissioner of Corrections; the Members of the Alabama Board of Corrections; the State Board of Corrections; and Wardens at various state institutions. In *Newman,* the original complaint also named the Attorney General of Alabama, William J. Baxley, among those from whom relief was sought. On consolidated appeal, the Court of Appeals for the Fifth Circuit upheld most of the relief prescribed in various orders of the District Court, includ-

ing those issued in *Newman* v. *Alabama, supra; Pugh* v. *Locke, supra;* and *James* v. *Wallace, supra.* See *Newman* v. *Alabama,* 559 F. 2d 283. But it also held that certain terms of the order in *Pugh* and *James* must be modified, and it ordered dissolution of the injunction entered against Governor Wallace. This Court then granted certiorari on the limited question whether suits against the State of Alabama and the Alabama Board of Corrections were barred by the Eleventh Amendment. We held that they were. *Alabama* v. *Pugh,* 438 U. S. 781 (1978).

As a result of the decisions by this Court and by the Court of Appeals, the State of Alabama, the Governor of Alabama, and the Alabama Board of Corrections were dismissed as parties. Nonetheless, the District Court retained jurisdiction, and it continued to enter orders and decrees affecting various areas of compliance. The active defendants appear to have been the officials responsible for the management of the State's prison system. The Attorney General appeared as a party infrequently. An exception appears to have occurred in 1977, when the then Attorney General sought to "intervene" in the District Court. The District Court denied the motion as unnecessary, noting that the Attorney General had been named as a defendant in the original complaint in *Newman.* Even after this motion, however, the Attorney General did not continue to participate as a party. Nor does he appear to have been named in any subsequent order of the District Court. When Attorney General Graddick moved to intervene on July 16, it was his first attempt to participate as a party to the action.

The State's principal representative in the recent litigation has been Fob James, elected Governor of Alabama in November 1978. In February 1979, the District Court entered an order naming him as Receiver of the Alabama Prison System. The order provided that all powers, duties, and authority of the Alabama Board of Corrections were transferred to the

Receiver. After James' appointment as Receiver, the Alabama Legislature abolished the Alabama Board of Corrections and transferred its power, duties, and authority to the Governor. See Ala. Code §§ 14–1–15, 14–1–16 (Supp. 1980). Thus, both by court order and by Alabama law, responsibility for the maintenance of Alabama prisons has now rested for more than two years in Governor James.

On October 9, 1980, the District Court found, based on the agreement of the parties, that the Alabama prison system had failed to achieve compliance with standards provided in prior judicial orders. By order of that date, the court established deadlines for the achievement of certain levels of compliance. At a hearing on May 18, 1981, it was stipulated that those deadlines had not been met. On the contrary, it was established that overcrowding had grown more severe. Although the District Court took no immediate remedial action, on May 20 it ordered the Alabama Department of Corrections and the Receiver to submit a list of prisoners "least deserving of further incarceration." Having received such a list, on July 15 it entered the order at issue here, granting a writ of habeas corpus directing the release of some 400 named inmates, all of whom normally were entitled to be released no later than January 8, 1982.

At this juncture the applicant Charles A. Graddick undertook to enter the litigation. On July 16, he filed papers in the District Court seeking to intervene as a party defendant. Purporting to represent the interests of the people of the State of Alabama, he sought a stay of the order granting the writ of habeas corpus. On July 17, Governor Fob James, in his capacity as Receiver, moved to dismiss all motions filed by Attorney General Graddick. The District Court set the Attorney General's motions for hearing on August 6. But it declined to stay its order directing release of the 400 inmates on July 24. On July 22, Attorney General Graddick filed a notice of appeal with the Court of Appeals for the Fifth Cir-

cuit. He also requested a stay pending appeal. The Court of Appeals denied the stay on July 23. Following this denial, Attorney General Graddick filed his application for a stay with me as Circuit Justice.

II

Our cases establish that an applicant for a stay bears a heavy burden of persuasion. "The judgment of the court below is presumed to be valid, and absent unusual circumstances we defer to the decision of that court not to stay its judgment." *Wise* v. *Lipscomb,* 434 U. S. 1329, 1333 (1977) (POWELL, J., in chambers). The applicant's burden is especially heavy when, as in this case, both the District Court and the Court of Appeals have declined his petitions for stay without dissent. *Beame* v. *Friends of the Earth,* 434 U. S. 1310, 1312 (1977) (MARSHALL, J., in chambers); *Board of Education* v. *Taylor,* 82 S. Ct. 10, 10–11 (1961) (BRENNAN, J., in chambers).

To prevail on an application for stay, an applicant must make a showing of a threat of irreparable injury to interests that he properly represents. See *Bailey* v. *Patterson,* 368 U. S. 346, 346–347 (1961) (*per curiam*). This requirement has two dimensions. The first, embraced by the concept of "standing," looks to the status of the party to redress the injury of which he complains. The second aspect of the inquiry involves the nature and severity of the actual or threatened harm alleged by the applicant. In acting on an application for a stay, a Circuit Justice must " 'balance the equities' . . . and determine on which side the risk of irreparable injury weighs most heavily." *Holtzman* v. *Schlesinger,* 414 U. S. 1304, 1308–1309 (1973) (MARSHALL, J., in chambers); *Beame* v. *Friends of the Earth, supra,* at 1312.

Considering that the burden is on the applicant to establish his entitlement to the extraordinary relief that he requests, on July 25 I denied Graddick's application for a stay. In his papers filed as of that date, Attorney General Graddick

had failed to establish *either* irreparable injury to any cognizable interests *or* his standing to assert the interests to which he alleged that injury had occurred. Graddick had made no allegation that he, either as an official or as a citizen of the State of Alabama, would suffer any individualized injury. His application did aver that "the people of the State of Alabama" would incur irreparable injury if a stay were not granted. But the dimensions of any such injury were cast into serious doubt by the position of the Governor of the State.

Even if Graddick's allegation of irreparable injury were accepted, he had made no showing that he was the proper official to assert that claim. Graddick's original application presented no state-law basis for his attempt to assert the rights of Alabama citizens generally. His standing to represent Alabama's interests in this matter was not self-evident in the unusual context of this case. Alabama statutes had vested responsibility for the prison system in the Governor, and the Governor, who is also the State's chief executive officer, opposed Graddick's application. The Governor averred that he, not the Attorney General, properly represented the State's interests in this case.

Finally, Graddick had failed to show that the "balance of equities" favored the grant of a stay. The District Court had issued its relief order to remedy what it perceived as possible serious violations of constitutional rights. As long ago as 1972, Judge Frank Johnson had determined that conditions in the Alabama prisons failed to satisfy the constitutional minimum. See *Newman* v. *Alabama,* 349 F. Supp. 278 (MD Ala. 1972). Subject to judicial orders for nearly a decade, the State had still failed to achieve compliance with standards established in *Newman.* As I have asserted previously, a Circuit Justice should show great "reluctance, in considering in-chambers stay applications, to substitute [his] view for that of other courts that are closer to the relevant factual

considerations that so often are critical to the proper resolution of these questions." *Times-Picayune Publishing Corp.* v. *Schulingkamp,* 419 U. S. 1301, 1305 (1974) (in chambers); see *Graves* v. *Barnes,* 405 U. S. 1201, 1203 (1972) (POWELL, J., in chambers). Here there was no basis, on the record as presented, to disagree with the two courts below as to the balance of equities.

Established legal criteria thus required that the application for stay should be denied. In so concluding, I was not unaware that the application raised interesting and substantial questions on the merits. These included the propriety of the District Court's use of the writ of habeas corpus as a class remedy for prison overcrowding. But these questions were not properly presented for decision.

III

In his "reapplication" for a stay, Attorney General Graddick claims standing as a party to the underlying controversy. He also asserts a state-law basis for his claim of authority to represent the interests of the people of the State of Alabama. As I understand them, these averments pertain only to the issue of standing. They do not speak to the other considerations governing the grant of stays by this Court. However the standing question would now be resolved—for I remain uncertain whether Graddick even now has established his standing to seek a stay in the highly unusual context of this case—those considerations continue to require a denial of Graddick's application. He has not met the heavy burden imposed on an applicant who asks us to grant extraordinary relief denied by both the District Court and the Court of Appeals.

A

Assuming that Graddick now has established his position as a party, he still has failed to show that the "balance of equities" would support a stay. The views of the Governor,

stated above, remain entitled to great weight in assessing the competing risks of irreparable injury. The court-ordered release of prisoners occurred on July 25. Graddick alleges no specific damage that has occurred since then. Moreover, the sudden return of more than 200 former prisoners to jail would present the State with large administrative problems, as well as exacerbating the overcrowding of all prisoners within the Alabama system. A risk of new constitutional rights violations would arise.

In deciding whether to grant extraordinary equitable relief pending appeal, this Court must consider the confusion and disruption that affirmative action might occasion. See, *e. g.*, *Westerman* v. *Nelson,* 409 U. S. 1236 (1972) (Douglas, J., in chambers); *Gomperts* v. *Chase,* 404 U. S. 1237 (1971) (Douglas, J., in chambers); cf. *Mahan* v. *Howell,* 404 U. S. 1201 (1971) (Black, J., in chambers). This equitable concern weighs most heavily in a case, such as this one, in which the applicant has moved with unexplained tardiness. See, *e. g.*, *Westerman* v. *Nelson, supra,* at 1237 (Douglas, J., in chambers) ("[O]ne in my position cannot give relief in a responsible way when the application is as tardy as this one"); *O'Brien* v. *Skinner,* 409 U. S. 1240 (1972) (MARSHALL, J., in chambers).

B

Additionally, I believe that Graddick's request for a "stay" is now moot. Ordinary linguistic usage suggests that an order, once executed, cannot be "stayed." Affirmative action then becomes necessary to restore the status quo. See *McCarthy* v. *Briscoe,* 429 U. S. 1317, n. 1 (1976) (POWELL, J., in chambers) (although application is styled as seeking a "stay," it actually requests "affirmative relief" and must therefore be considered under different standards governing affirmative relief); *Barthuli* v. *Board of Trustees,* 434 U. S. 1337, 1338–1339 (1977) (REHNQUIST, J., in chambers) ("stay" of state-court decision would not reinstate a discharged employee,

though "the extraordinary interim remedy of a mandatory injunction" would do so).

I do not doubt the power of this Court to enter an injunction ordering restoration of the prior status quo. See 28 U. S. C. § 1651 (a). If it were "necessary or appropriate in aid of" our jurisdiction, *ibid.*, we could order the arrest and imprisonment of all the prisoners released on July 25. But it is settled that our injunctive power "should be used sparingly and only in the most critical and exigent circumstances." *Williams* v. *Rhodes,* 89 S. Ct. 1, 2, 21 L. Ed. 2d 69, 70 (1968) (Stewart, J., in chambers); *Fishman* v. *Schaffer,* 429 U. S. 1325, 1326 (1976) (MARSHALL, J., in chambers). "In order that it be available, the applicants' right to relief must be indisputably clear." *Communist Party of Indiana* v. *Whitcomb,* 409 U. S. 1235 (1972) (REHNQUIST, J., in chambers).

In view of all the legal and factual circumstances of this case, Attorney General Graddick's application falls far distant from this exacting standard.

Opinion of JUSTICE REHNQUIST.

Applicant seeks to stay an order of the United States District Court for the Middle District of Alabama pending an appeal to the United States Court of Appeals for the Fifth Circuit. By that order the District Court issued a writ of habeas corpus mandating the release of some 400 inmates incarcerated in the Alabama prison system. The order also accelerated by six months the parole eligibility dates of a substantial number of other prisoners. Applicant unsuccessfully sought a stay from the District Court and from the Court of Appeals. On July 25, 1981, JUSTICE POWELL also denied a stay, largely on the ground that applicant was without standing to seek the relief requested. Also of significance was the opposition to the stay manifested by Governor Fob James, who possesses authority, under both statute and court order, for administration of the Alabama prison system.

Following JUSTICE POWELL's decision denying a stay, Alabama prison authorities effectuated the District Court's order by releasing more than 200 prisoners. Regardless of whether this event altered the nature of relief that applicant now must seek to obtain a satisfactory result, there is no question that it increased the practical difficulty of arresting the procedural momentum of the District Court's release order on reapplication for a stay. The opinion of JUSTICE POWELL accompanying the Court's denial of the reapplication reflects this fact. See *ante*, at 935–936, 937. Nevertheless, a reapplication was filed and referred to the full Court.

The Court has decided to deny a stay. Had this result been communicated without explanation, the parties might well have been left with the impression that the full Court adopted the rationale of JUSTICE POWELL's opinion accompanying his denial of the original application, *i. e.*, that applicant lacks standing to seek a stay. I write separately to emphasize my view that such an impression would be erroneous.

I

"Standing" is not a term used for its precision. As it is most commonly understood, standing embraces both constitutional and prudential limitations on a federal court's exercise of jurisdiction. So used, it normally measures the quality of the interest asserted by a private plaintiff in obtaining resolution of a particular dispute through the authority of a court. As a threshold inquiry, we have required the plaintiff to show "some threatened or actual injury resulting from the putatively illegal action." *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973). Further generalization is hazardous.

In this reapplication, however, the issue of standing has been raised in an unusual setting. The question is whether the chief legal officer of a State, named as a defendant in a suit asserting constitutional limitations on the State's authority and acting as counsel for other state officials, has "stand-

ing" to seek a stay of court orders that suspend the normal operation of the State's laws regarding the confinement of convicted criminals. One might well regard the answer as self-evident. On the assumption that further investigation is warranted, one still might doubt whether conventional methods of analysis are relevant. For example, to ask if the state official has suffered individualized injury from the court's order strikes me as anomalous. The "standing" of a state official to defend against judicial orders that impinge upon the sovereignty of the State derives not from his individualized interest in the suit, but from the authority delegated to the official by the State's citizens to act on their behalf in upholding the laws enacted by their representatives.

The issue of standing as it has been raised in this reapplication, therefore, involves only two questions. First, as a matter of federal law, is applicant's procedural status in the underlying litigation such that he may seek a stay? Second, as a matter of state law, is applicant acting within his statutory authority in seeking a stay?

At the time the original application was filed the first question was not free from doubt. The applicant had sought to intervene as a matter of right pursuant to Federal Rule of Civil Procedure 24 (a), but the District Court had not yet ruled on the motion. The applicant now maintains, however, that he seeks a stay in his status as a party defendant in this litigation. I am inclined to believe that this new position is the product not of a tactical change of course, but of attention to a question previously neglected due to the press of events. In any event, I am persuaded that the position is correct.

The original complaint in *Newman* v. *Alabama,* Civ. A. No. 3501–N (MD Ala.), filed in 1971, named as a party defendant the Attorney General of Alabama, at that time William J. Baxley. An order issued by the District Court as late as 1977 expressly recognized that the Attorney General was still a party defendant, as well as counsel of record for

the other defendant state officials. In response to Attorney General Baxley's motion for leave to appear as *amicus curiae*, the order recited:

> "This Court finds no necessity for granting the motion of the Attorney General of the State of Alabama to 'intervene' in these cases since the Attorney General is not only a named defendant in *Newman*, but the records of this Court reflect that the Attorney General of the State of Alabama has been counsel of record for defendants in all these cases since their inception." App. N to Brief in Support of Applicant's Reapplication.

Governor James, in his papers opposing the original application, asserted that this Court in *Alabama* v. *Pugh*, 438 U. S. 781 (1978), "restricted the parties to those persons 'responsible for the administration of [Alabama] prisons.'" Objection of Fob James to the Application for Stay 3, n. (quoting *Alabama* v. *Pugh*, *supra*, at 781). That assertion is without foundation. The narrow question that we considered was whether the Eleventh Amendment barred the District Court's injunction against the State of Alabama and the Alabama Board of Corrections. 438 U. S., at 782, and n. 2. Our affirmative answer resulted in the dismissal of the State and the Board, but had no effect on the remaining parties defendant, whose amenability to suit was an issue not encompassed by our limited grant of certiorari.

In short, the Attorney General of Alabama was named as a party defendant in this litigation, and there is no indication he has ever been dismissed. I would have thought this simple fact conclusive of the question of procedural status, as that question bears on applicant's standing to seek a stay. Nevertheless, it has been argued that applicant's lack of active participation as a party in this litigation prior to the District Court's release order somehow weakens his claim of standing as a party. I am aware, however, of no rule that conditions party status on the appearance of activity or results in auto-

matic dismissal from the lack thereof. Certainly, Charles Graddick has lost nothing by his evident failure to request a formal substitution of parties following his replacement of William Baxley as Attorney General. Federal Rule of Civil Procedure 25 (d) provides that when a public officer ceases to hold office, his successor is *automatically* substituted as a party, regardless of whether the court enters an order of substitution.

Whether applicant's past participation in this litigation has been sufficient to demonstrate vigilance in protection of the State's interests is a question I am not in a position to answer and one that is, in any event, irrelevant to the issue of standing. I do note that applicant has represented the other defendant state officials since commencement of this litigation. There would be little reason for him to participate actively as a party so long as his interests and those of the officials he represents as counsel do not diverge. Applicant has indicated that the District Court's release order has occasioned just such a divergence. While I do not know whether other orders issued by the District Court in the course of this litigation should have called for a response by a vigilant Attorney General acting as a party, I am surely not surprised that this Attorney General has taken exception to an order opening the doors of the State's prisons.

The remaining question, therefore, is whether Alabama law provides the applicant sufficient authority to request a stay of the release order. Two statutes are relevant. The first, Ala. Code § 36–15–12 (1975), authorizes the Attorney General "to institute and prosecute, in the name of the state, all civil actions and other proceedings necessary to protect the rights and interests of the state." Although the term "other proceedings" does not appear to have been authoritatively construed, it would be incongruous for the term to exclude appeals from actions in which the Attorney General is authorized to participate. See *McDowell* v. *State,* 243 Ala. 87,

89, 8 So. 2d 569, 570–571 (1942) ("We can perceive of no good reason why the express statutory authority of the Attorney General to institute and prosecute suits should not carry with it the implied authority to do all things necessary and proper to their final conclusion"). With respect to the commencement of actions, the Alabama Supreme Court consistently has held that the Attorney General's authority is independent of that of the Governor. *State* v. *Stacks,* 264 Ala. 510, 88 So. 2d 696 (1956) (institution of suit for recovery of funds misused by public officers); *Try-Me Bottling Co.* v. *State,* 235 Ala. 207, 210, 178 So. 231, 232 (1938) (institution of suit to enjoin operation of lottery); *Montgomery* v. *Sparks,* 225 Ala. 343, 344–345, 142 So. 769, 770 (1932) (institution of suit for recovery of public funds).

The second statute, Ala. Code § 36–15–21 (1975), provides that "[a]ll litigation concerning the interest of the state, or any department thereof, shall be under the direction and control of the attorney general . . . ." The Alabama Supreme Court, construing the predecessor of this statute, held that the Attorney General was authorized to settle a suit for the liquidation of a tax claim asserted by the State Department of Revenue, despite the objections of the state official charged with collection of the tax and despite a specific statute conditioning dismissal of such suits on the approval of that official. *State ex rel. Carmichael* v. *Jones.* 252 Ala. 479, 41 So. 2d 280 (1949). The court held that in the absence of specific legislative expression to the contrary, the Attorney General " 'is empowered to make any disposition of the state's litigation which he deems for its best interest.' " *Id.,* at 484, 41 So. 2d, at 284.

These two statutes, taken together, convince me that the Attorney General possesses ample authority under Alabama law to seek a stay of the release order, with or without the consent of the Governor. But any doubts about applicant's authority could have been resolved by adopting the course

this Court pursued in *Massachusetts* v. *Feeney*, 429 U. S. 66 (1976), and certifying the question to the State's highest court. The Supreme Court of Alabama has provided a certification procedure in Alabama Rule of Appellate Procedure 18. I have no reason to second-guess applicant's assessment of the State's interest in ensuring both proper enforcement of duly imposed sentences and unimpeded administration of the statutes and regulations relating to parole. Coupled with the fact that applicant is a party defendant in this litigation, the foregoing conclusion establishes his standing to seek a stay of the District Court's release order.

II

As explained at the outset, I have decided to state my views on the question of standing to ensure that the Court's denial of the reapplication for a stay does not engender the erroneous impression that applicant is somehow barred from requesting extraordinary relief from orders of the District Court. My decision to so confine my remarks should not be similarly misconstrued as an expression of approval of the District Court's order. JUSTICE POWELL's decision to state his views on the merits of the reapplication, however, have prompted me to depart somewhat from my original intention. In particular, I am compelled to state my disagreement with his assertion that applicant's request for a stay is now moot.

JUSTICE POWELL initially relies on "ordinary linguistic usage" for the proposition that an order, once executed, cannot be "stayed." *Ante*, at 936. I have some doubt whether this proposition is true, even as a matter of linguistic usage. Where an order has been actually effectuated but remains subject to the issuance of temporary common-law writs, such as those authorized by 28 U. S. C. § 1651, it is frequent practice in both federal and state courts to recite that "the mandate is recalled," rather than "the order is stayed."

Linguistics aside, the proposition rests on one of two assumptions of law, both of which are erroneous. The first is

that the legal force of an order is spent once the parties to whom it is directed have complied with the decree. Discharge of a writ of habeas corpus, however, does not exhaust the force of the writ. Until vacated by reversal or a stay, the writ stands as a barrier to the lawful resumption of custody.

The second assumption is that issuance of a stay would be an empty gesture, because a stay exerts no compulsion on the parties to return to the positions they occupied before issuance of the original order. It is, of course, true that a stay does not have the legal effect of an injunction. Unlike an injunction, a stay in this case would not compel Alabama authorities to arrest and imprison those convicts freed by the District Court. It would, however, remove the federal barrier to efforts by the State itself to restore the prior status quo. This much plainly follows from the Court's decision in *Eagles* v. *United States ex rel. Samuels,* 329 U. S. 304 (1946). The petitioner in *Eagles* sought exemption from military service and toward that end filed a petition for a writ of habeas corpus in federal court. The District Court denied the writ, but the Court of Appeals reversed and remanded with instructions to discharge petitioner from military custody. On remand the writ issued and petitioner was unconditionally released. The post commander appealed and this Court rejected petitioner's claim that the case was moot. Noting that his release had been "obtained through the assertion of judicial power," the Court held:

> "It is the propriety of the exercise of that power which is in issue in the appellate court, whether the prisoner is discharged or remanded to custody. Though the writ has been granted and the prisoner released, the appellate court by what it does is not rendering an opinion and issuing an order which cannot affect the litigants in the case before it. . . . Affirmance makes the prisoner's release final and unconditional. *Reversal undoes what*

the habeas corpus court did and makes lawful a resumption of the custody." Id., at 307–308 (emphasis added).

See *Michigan* v. *Doran*, 439 U. S. 282, 285, n. 2 (1978); *Carr* v. *Zaja*, 283 U. S. 52, 53 (1931).*

The only action sought by applicant from this Court is a decision "mak[ing] lawful a resumption of the custody." *Eagles* v. *United States ex rel. Samuels, supra*, at 308. A stay of the release order would achieve that result by removing the federal impediment to applicant's exercise of authority to return the prisoners to confinement. This request should not be deemed moot simply because he has not asked for more. Although applicant might have encountered further impediments in attempting to return the prisoners to confinement, he chose to confront those problems on his own. It is enough for now that issuance of a stay would amount to something considerably more than "a mere declaration in the air." *Giles* v. *Harris*, 189 U. S. 475, 486 (1903).

September 8, 1981

Dismissal Under Rule 53

No. 90, Orig. California *v.* Texas et al. Stipulation to dismiss the State of Mississippi as a party defendant was filed under Rule 53.

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*The same conclusion follows from the more familiar line of cases concerning appellate review of judgments involving the payment of money or transfer of property. Since property transferred or money paid involuntarily pursuant to a judgment can be recovered, execution of the lower court's judgment pending appeal normally does not render the case moot. *E. g., Cahill* v. *New York, N. H. & H. R. Co.*, 351 U. S. 183, 184 (1956); *Porter* v. *Lee*, 328 U. S. 246, 251 (1946); *Dakota County* v. *Glidden*, 113 U. S. 222, 224 (1885). These cases represent merely a particularization of the rule that issuance of a court's mandate or obedience to its judgment does not bar timely appellate review. *Bakery Drivers* v. *Wagshal*, 333 U. S. 437, 442 (1948); *Aetna Casualty Co.* v. *Flowers*, 330 U. S. 464, 467 (1947).

SEPTEMBER 9, 1981

Miscellaneous Order

No. A–218. KOCH, MAYOR OF NEW YORK CITY, ET AL. *v.* HERRON ET AL. Application to stay enforcement of the order filed with the Clerk of the United States District Court for the Southern District of New York on September 8, 1981, presented to JUSTICE MARSHALL, and by him referred to the Court, denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

SEPTEMBER 12, 1981

Dismissals Under Rule 53

No. 80–1946. CITY OF PENSACOLA, FLORIDA, ET AL. *v.* JENKINS ET AL. Appeal from C. A. 5th Cir.; and

No. 80–1962. JENKINS ET AL. *v.* CITY OF PENSACOLA, FLORIDA, ET AL. C. A. 5th Cir. Jurisdictional statement in No. 80–1946 and petition for writ of certiorari in No. 80–1962 dismissed under this Court's Rule 53. Reported below: No. 80–1946, 638 F. 2d 1239; No. 80–1962, 638 F. 2d 1249.

SEPTEMBER 16, 1981

Dismissal Under Rule 53

No. 80–2062. ALPHA PORTLAND INDUSTRIES, INC., ET AL. *v.* CALIFORNIA ET AL. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 53.2 (c). Reported below: 649 F. 2d 387.

SEPTEMBER 21, 1981

Dismissal Under Rule 53

No. 80–2091. INDIANA *v.* CHERRY. Sup. Ct. Ind. Certiorari dismissed under this Court's Rule 53. Reported below: —— Ind. ——, 414 N. E. 2d 301.

SEPTEMBER 23, 1981

Miscellaneous Orders

No. A–43 (81–247). ALABAMA *v.* RITTER. Sup. Ct. Ala. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied. JUSTICE REHNQUIST dissents from the denial of the application for stay. He believes that upon consideration of Alabama's petition for certiorari, a majority of this Court will conclude that the case should be remanded to the Supreme Court of Alabama for such proceedings as may be appropriate under *California* v. *Krivda,* 409 U. S. 33, 35 (1972), and that therefore the traditional stay equities favor the applicant.

No. A–137 (81–463). BROWN, WARDEN *v.* VARGAS. C. A. 1st Cir. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A–142. ALANDER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–144. METROPOLITAN COUNTY BOARD OF EDUCATION ET AL. *v.* KELLEY ET AL. Application to vacate the stay entered by the United States Court of Appeals for the Sixth Circuit, presented to JUSTICE REHNQUIST, and by him referred to the Court, denied.

No. A–152. MARTINS FERRY HOSPITAL ASSN. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A–157 (81–453). LABRIOLA *v.* UNITED STATES. C. A. 2d Cir. Application for stay and/or recall of mandate, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. 80–415. RAILWAY LABOR EXECUTIVES' ASSN. *v.* GIBBONS, TRUSTEE, ET AL. D. C. N. D. Ill. [Probable jurisdiction postponed, 451 U. S. 936]; and

No. 80–1239. RAILWAY LABOR EXECUTIVES' ASSN. *v.* GIBBONS, TRUSTEE, ET AL. C. A. 7th Cir. [Probable jurisdiction noted, 451 U. S. 936.] Motion of the Solicitor General for divided argument and for additional time for oral argument granted, and 10 additional minutes allotted for that purpose. The nonfederal appellees are also allotted an additional 10 minutes for oral argument.

No. 80–990. CABELL, ACTING CHIEF PROBATION OFFICER OF LOS ANGELES COUNTY, ET AL. *v.* CHAVEZ-SALIDO ET AL. D. C. C. D. Cal. [Probable jurisdiction noted, 450 U. S. 978.] Motion of Service Employees International Union, Local 535, for leave to file a brief as *amicus curiae* granted.

No. 80–1082. SMITH, CORRECTIONAL SUPERINTENDENT *v.* PHILLIPS. C. A. 2d Cir. [Certiorari granted, 450 U. S. 909.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 80–1208. NEW ENGLAND POWER CO. *v.* NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION ET AL.;

No. 80–1471. MASSACHUSETTS ET AL. *v.* NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL ET AL.; and

No. 80–1610. ROBERTS, ATTORNEY GENERAL OF RHODE ISLAND, ET AL. *v.* NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION ET AL. Sup. Ct. N. H. [Probable jurisdiction noted, 451 U. S. 981.] Motion of appellants for divided argument granted.

No. 80–1348. FLORIDA DEPARTMENT OF STATE *v.* TREASURE SALVORS, INC., ET AL. C. A. 5th Cir. [Certiorari granted, 451 U. S. 982.] Motion of petitioner for divided argument and for additional time for oral argument denied.

No. 80–1429. YOUNGBERG, SUPERINTENDENT, PENNHURST STATE SCHOOL AND HOSPITAL, ET AL. *v.* ROMEO, AN INCOMPETENT, BY HIS MOTHER AND NEXT FRIEND, ROMEO. C. A. 3d Cir. [Certiorari granted, 451 U. S. 982.] Motion of American Psychiatric Association for leave to participate in oral argument as *amicus curiae* and for additional time for argument denied. Motion of respondent for divided argument to permit *amicus curiae* American Psychological Association to present oral argument denied.

No. 80–1430. ENGLE, CORRECTIONAL SUPERINTENDENT *v.* ISAAC; PERINI, CORRECTIONAL SUPERINTENDENT *v.* BELL; and ENGLE, CORRECTIONAL SUPERINTENDENT *v.* HUGHES. C. A. 6th Cir. [Certiorari granted, 451 U. S. 906.] Motion of Institutional Legal Services Project for leave to file a brief as *amicus curiae* granted.

No. 80–1538. PLYLER, SUPERINTENDENT, TYLER INDEPENDENT SCHOOL DISTRICT, ET AL. *v.* DOE, GUARDIAN, ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 451 U. S. 968]; and

No. 80–1934. TEXAS ET AL. *v.* CERTAIN NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 452 U. S. 937.] Motion of National School Boards Association for leave to file a brief as *amicus curiae* in No. 80–1934 granted.

No. 80–1640. UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. *v.* SHOLLY ET AL.; and

No. 80–1656. METROPOLITAN EDISON CO. ET AL. *v.* PEOPLE AGAINST NUCLEAR ENERGY ET AL. C. A. D. C. Cir. [Certiorari granted, 451 U. S. 1016.] Motion of Edison Electric Institute for leave to file a brief as *amicus curiae* granted. Motion of petitioners for divided argument granted.

No. 80–1765. AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC. *v.* HYDROLEVEL CORP. C. A. 2d Cir. [Certiorari granted, 452 U. S. 937.] Motion of Legal Foundation of America for leave to file a brief as *amicus curiae* granted.

No. 80–5727. EDDINGS *v.* OKLAHOMA. Ct. Crim. App. Okla. [Certiorari granted, 450 U. S. 1040.] Motion of Washington Legal Foundation for leave to file brief as *amicus curiae* granted.

Rehearing Denied

No. 79–5587. BROOKS *v.* TEXAS, *ante*, p. 913;

No. 80–148. ROBBINS *v.* CALIFORNIA, *ante*, p. 420;

No. 80–289. UNITED MINE WORKERS OF AMERICA, LOCAL No. 1854, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL., *ante*, p. 322;

No. 80–692. NATIONAL LABOR RELATIONS BOARD *v.* AMAX COAL CO., A DIVISION OF AMAX, INC., ET AL., *ante*, p. 322;

No. 80–328. NEW YORK *v.* BELTON, *ante*, p. 454; and

No. 80–6604. THOMAS *v.* GEORGIA, 452 U. S. 973. Petitions for rehearing denied.

No. 80–5284. SARTO *v.* NEW JERSEY, 449 U. S. 938; and

No. 80–6501. MANLEY *v.* UNITED STATES, 451 U. S. 992. Motions for leave to file petitions for rehearing denied.

SEPTEMBER 29, 1981

Dismissal Under Rule 53

No. 80–2068. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 632 F. 2d 568.

OCTOBER 1, 1981

Dismissals Under Rule 53

No. 80–2076. STOKELY-VAN CAMP, INC. *v.* ESPINOZA ET AL. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53.1 Reported below: 641 F. 2d 535.

No. 80–1804. LEDBETTER, SHERIFF, ET AL. *v.* JONES ET AL. C. A. 5th Cir. [For order limiting grant of certiorari, see *ante*, p. 911.] Writ of certiorari dismissed under this Court's Rule 53.

OCTOBER 2, 1981

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No. 80–6946. CSAKY *v.* HORNBLOWER & WEEKS-HEMPHILL, NOYES, INC. C. A. D. C. Cir. Certiorari dismissed under this Court's Rule 53.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 951 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

SOUTH PARK INDEPENDENT SCHOOL DISTRICT *v.* UNITED STATES

ON APPLICATION FOR STAY

No. A–5. Decided July 21, 1981*

Applications of a school district and a group of intervenor parents, children, and citizens to stay, pending disposition of their petition for certiorari, the Court of Appeals' mandate to the District Court to prepare and implement a school desegregation plan for the 1981–1982 school year are denied. There is no reasonable probability that four Members of the Court will vote to grant certiorari.

JUSTICE POWELL, Circuit Justice.

A school district in Beaumont, Tex., and a group of intervenor parents, children, and citizens have requested me as Circuit Justice to stay the mandate of the Court of Appeals for the Fifth Circuit pending disposition of their petition for a writ of certiorari. The Court of Appeals ordered the District Court to prepare and implement a desegregation plan to operate during the 1981–1982 school year. For the reasons stated below, I must deny the applications.

Much of the history of this lawsuit is set out in *Huch* v. *United States* and *South Park Independent School District* v. *United States,* 439 U. S. 1007, 1008 (1978) (REHNQUIST, J., dissenting from denial of certiorari). In brief, prior to 1970, the applicant school district maintained a dual school system based on *de jure* racial segregation. In that year the District Court entered a school integration plan that was ac-

*Together with No. A–33, *Huch et al.* v. *United States,* also on application for stay of the same mandate.

cepted by all parties. The plan established racially neutral attendance zones for each school and included a provision allowing any student to transfer from a school where his race was in the majority to one where it was in the minority.

In 1976, the United States filed a motion for supplemental relief, alleging that a dual system still existed in fact. The District Court denied relief, holding that its 1970 order had created a unitary school system and finding that the present racial concentrations in the school district were the result of shifting residential patterns, the transfer of some pupils to private schools, and other factors beyond the control of the school district. It held that it no longer retained jurisdiction over the case and that the United States must file a new complaint if it seeks further relief.

The Court of Appeals reversed. 566 F. 2d 1221 (1978). Relying on *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 26 (1971), it held that the District Court's findings were insufficient to show that the predominance of substantially one-race schools was not the result of past or present acts of intentional discrimination. The court remanded to the District Court to hold further hearings on the question whether the school district is now a unitary system. This Court denied certiorari. 439 U. S. 1007. Two Justices dissented, suggesting that the case presented an important issue whether *Pasadena City Board of Education* v. *Spangler,* 427 U. S. 424 (1976), precluded continuing jurisdiction by the District Court where all parties had acquiesced in a desegregation plan six years previously.

On remand the District Court held an evidentiary hearing and made findings of fact. It found that the 1970 order created a unitary school system by implementing a racially neutral attendance zone for each school and that the court was now without jurisdiction to entertain a motion for supplemental relief. The court recounted at length evidence tending to show that the "lesser percentage of desegregation

that had been anticipated" was caused by demographic changes and parental resistance. The court found no evidence that the school district had committed any act of intentional discrimination, but rather that the authorities had implemented the 1970 plan in good faith.

The Court of Appeals again reversed. *United States* v. *Texas Education Agency,* 647 F. 2d 504 (1981). It held that the District Court's finding that the implementation of the 1970 order had created a unitary school system was clearly erroneous. In reaching this decision, the court compared statistics concerning the racial composition of schools in the district in the 1969 and 1979 school years. These statistics indicate that there has been little lasting progress in achieving schools with balanced pupil populations. In 1969, 15 of 20 schools in the district had student populations 90% or more of one race; in 1979, 11 of 18 still were 90% or more of one race. The percentage of blacks in the system rose from 33% in 1969 to 40% in 1979. The court held that the District Court retained jurisdiction because these figures proved that the school authorities "had failed to eliminate the continuing system wide effects of the prior discriminatory dual school system." *Id.,* at 508.

The standards for granting a stay of mandate pending disposition of a petition for certiorari are well established:

> "[T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." *Times-Picayune Publishing Corp.* v. *Schulingkamp,* 419 U. S. 1301, 1305 (1974) (POWELL, J., in chambers).

I cannot conclude that there is a "reasonable probability" four Members of the Court will vote to grant certiorari. The

issues presented by applicants are almost identical to those presented three years ago, when the Court voted to deny certiorari. Indeed, much of the school district's argument for granting a stay merely incorporates by reference JUSTICE REHNQUIST's opinion, joined by me, dissenting from the denial of certiorari at that time. Because this argument did not persuade the Court then, I cannot predict responsibly that it will persuade the Court now.

Speaking for myself, I believe that the case in its present posture merits review by this Court. The Court of Appeals, relying exclusively on statistics comparing 1969 and 1979, rejected with little explanation the District Court's finding of fact that the implementation of the consensual 1970 plan had created a unitary school system, and that the degree of segregation existing in 1980 was caused, not by any discriminatory action by the school authorities, but by demographic changes in the public school population and by private parental choice. The statistics relied on by the Court of Appeals do not address the legal effect of the implementation of the 1970 order or the legal cause of the degree of present imbalance. These latter questions should determine whether the District Court retains jurisdiction over the local schools.

It seems to me that the Court of Appeals may have erred as a matter of law in failing to give appropriate recognition to the District Court's factual findings as to the cause of the lack of present integration. *Pasadena* made clear that once a unitary school system has been attained, the District Court no longer has jurisdiction to continue its oversight, respond to inevitable demographic changes, and attempt by judicial decree to maintain for an indefinite time what it perceives to be a desirable racial mix in the schools. This is not to say, of course, that a federal court should not respond forcefully to proof of fresh or continued racial discrimination.

In sum, it seems to me that there is an impasse between the District Court and the Court of Appeals as to the mean-

ing of our decision in *Pasadena*. This is an important question of law. For this reason, I expect to vote to grant certiorari. Yet, I cannot say with confidence that the requisite number of other Justices will join me. Accordingly, the requests for a stay are denied.

METROPOLITAN COUNTY BOARD OF EDUCATION ET AL. *v.* KELLEY ET AL.

ON MOTION TO VACATE STAY

No. A–144. Decided August 20, 1981

The motion of Nashville, Tenn., school officials to vacate the Court of Appeals' stay, pending appeal to that court, of the District Court's order, which substantially modified its earlier school desegregation order, is denied. The changes in the prior order are of sufficient significance that they should be reviewed by an appellate court before they are implemented.

JUSTICE STEVENS.

Pursuant to the Rules of this Court, the motion of the Metropolitan Nashville Board of Education to vacate the stay entered by the United States Court of Appeals for the Sixth Circuit on August 19, 1981, has been referred to me for decision. The movants have persuaded me that I have jurisdiction to vacate the stay entered by the Court of Appeals, but for the following reasons I have decided not to do so.

The District Court order of April 17, 1981, that has been stayed by the Court of Appeals substantially modifies the desegregation order that had previously been in effect in Davidson County, Tenn. The plaintiffs filed an appeal from the April 17 order and, after hearing oral argument in connection with the plaintiffs' application for a stay, the Court of Appeals expressed the opinion that the changes in the prior order are of sufficient significance that they should be reviewed by an appellate court before they are implemented. I share that opinion.

Although, as the Board of Education has pointed out, the stay will cause significant expense and inconvenience to the community, because the interim order will affect 21 elementary schools, 6 middle schools and 3 high schools immediately, and also will have an impact on the permanent plan sched-

uled to go into effect in 1984, it seems to me that even greater inconvenience might result if the plan were to go into effect forthwith and be modified or set aside at a later date when the Court of Appeals reviews its merits. The Court of Appeals has greater familiarity with the case than it is possible for me to have in the brief time I have had to examine the papers that have been filed with me; for the purpose of my action I accept the correctness of that court's determination that there is a likelihood that plaintiffs will prevail on their appeal. If that be so, it seems to me that in the long run there will be less inconvenience and hardship to all parties if appellate review is had prior to the implementation of the interim order of the District Court. Accordingly, the motion of the Board of Education to vacate the stay is denied.

CITY OF LOS ANGELES ET AL. *v.* LYONS

ON APPLICATION FOR STAY

No. A–230. Decided September 29, 1981

An application to stay the Court of Appeals' order affirming the District Court's preliminary injunction—which prohibits members of applicant city's police department from using "choke-holds" in making arrests under circumstances that are not life threatening—is granted, pending the filing and disposition of a petition for certiorari. There is a substantial likelihood that four Members of this Court will vote to grant certiorari to review the Court of Appeals' holding that respondent, who had once been subject to such a "choke-hold," has standing to maintain the action, and there are sufficient equities in the city's favor to warrant the stay.

JUSTICE REHNQUIST, Circuit Justice.

The Court of Appeals, in its most recent opinion in this case, rested its holding on the proposition that "[t]his court will not disturb an order granting a preliminary injunction unless it was an abuse of discretion by the district court." 656 F. 2d 417 (CA9 1981). This proposition, of course, is not only in accord with its own precedents cited in the opinion, but with our own cases on the subject. See, *e. g.*, *Brown* v. *Chote,* 411 U. S. 452, 457 (1973). If that were all the case involved, there would be so little likelihood that four Members of this Court would grant certiorari that no further discussion would be necessary and the applicants' request for a stay would be denied.

But, as I understand the matter, there is a good deal more to this case than the most recent opinion of the Court of Appeals issued August 17, 1981. The preliminary injunction referred to in that opinion was issued by the District Court only after its earlier partial summary judgment in favor of the applicants had been reversed by the Court of Appeals in *Lyons* v. *City of Los Angeles,* 615 F. 2d 1243 (CA9), cert. denied, 449 U. S. 934 (1980) (*Lyons I*).

In its opinion in *Lyons I,* the Court of Appeals held that respondent had standing to challenge the use by members of the City of Los Angeles Police Department of so-called "choke-holds" in situations that are not life threatening. 615 F. 2d, at 1246–1249. Because respondent had once been the subject of such a "choke-hold," the Court of Appeals held that respondent had standing to seek an injunction, even though there was no indication that he would ever be subjected to them again by reason of an arrest by Los Angeles police officers. "[T]he threat of future injury to not only Lyons, but to every citizen in the area is much more immediate" than those described in *Rizzo* v. *Goode,* 423 U. S. 362 (1976), or *O'Shea* v. *Littleton,* 414 U. S. 488 (1974). 615 F. 2d, at 1246.

The Court of Appeals in *Lyons I* also held that respondent's request for injunctive relief was not moot. "Lyons once had a live and active claim meeting all the Article III requirements . . . if only for a period that lasted but a few seconds. That period could be described as the time between the moment he was stopped and the moment the stranglehold was applied, or even the split second between the moment the officer moved to grab him and the moment the stranglehold was applied." *Id.,* at 1248. The Court of Appeals also explained that Lyons' claim is one that is "capable of repetition, yet evading review," even though a "future recurring controversy [will] have but a small chance of affecting the original plaintiff."

On remand, the United States District Court entered the following temporary injunction:

> "IT IS ORDERED that defendants are hereby enjoined from the use of both the carotid artery and bar arm holds under circumstances which do not threaten death or serious bodily harm.
>
> "IT IS FURTHER ORDERED that this injunction is effective . . . and shall continue in force until this Court

approves a training program presented to it. Such program shall consist of a detailed written training manual, prepared by qualified individuals, in addition to appropriate, practical training sessions for the members of the Los Angeles Police Department.

"IT IS FURTHER ORDERED that defendant City of Los Angeles establish a requirement, forthwith, that all applications of the use of the holds in question, *even under the conditions permitted by this Order,* to wit, the death or serious bodily harm situation, be reported in writing to said defendant within forty-eight hours after the use of such holds.

"IT IS FURTHER ORDERED that defendant City of Los Angeles shall maintain records of such reports in an orderly fashion, and shall allow this court ready access to such records upon twenty-four hours' notice." Application, Ex. 4 (emphasis added).

It was this latter "preliminary injunction" that the Court of Appeals affirmed in its most recent *per curiam* opinion issued August 17, 1981. Respondent, in opposing this stay of that judgment of the Court of Appeals, states that "[t]he question of Lyons' standing to sue was settled in *Lyons I.*" Response, at 2. This is undoubtedly quite true insofar as the Court of Appeals for the Ninth Circuit is concerned, but *Lyons I* is not "law of the case" so far as this Court is concerned. The city petitioned for certiorari to review *Lyons I,* but its petition was at that time denied. JUSTICE WHITE, JUSTICE POWELL, and I dissented. *City of Los Angeles* v. *Lyons,* 449 U. S. 934 (1980).

I am of the opinion that since the District Court has now formulated the specific terms of an injunction, and held the use of the so-called "choke-holds" unconstitutional except in life-threatening situations, there is a substantial likelihood that an additional Member of this Court would now join JUSTICE WHITE's dissent from denial of certiorari in *Lyons I,*

thereby resulting in a grant if the city, as it proposes to do, files a timely petition for certiorari by December 9, 1981. The issue to be reviewed, of course, is not whether a preliminary injunction should be affirmed on appeal unless it represents an abuse of discretion, but whether respondent has standing to maintain this action. On this issue, I think there is enough difference in the approach of the Court of Appeals in this case and the approach of this Court in *O'Shea* v. *Littleton, supra,* and *Rizzo* v. *Goode, supra,* to offer applicants a reasonable chance of success on the merits should the Court grant certiorari. I likewise think that the Court of Appeals' "capable of repetition, yet evading review" discussion with respect to mootness is not entirely consistent with this Court's opinion in *Weinstein* v. *Bradford,* 423 U. S. 147, 149 (1975).

Applicants assert that "[t]he effect of the district court's order will be to cause more injuries to and deaths of suspects," because "[p]olice officers will be unequipped to deal with the day-to-day handling of violent arrestees who do *not* threaten death or serious bodily harm." Application, at 12–13. Respondent argues to the contrary, since he claims that the applicant city of Los Angeles may obtain relief from the preliminary injunction merely by properly reforming its training practices "to assure that its police officers understand how dangerous strangulation is and when its officers should strangle." Response, at 18. I find it both unnecessary and probably impossible to decide which of these forecasts, if either, will prove true.

Respondent urges that I should not act on this stay, because the applicants' request for a stay is nothing more than a petition for rehearing of the earlier denial of certiorari by this Court and therefore our Rule 51.1 prevents me from granting a stay. I am not persuaded by this argument. In *Lyons I,* the Court of Appeals stated:

> "We note that the appellant in no way asks for a complete prohibition on the use of the stranglehold. He

only seeks to restrain its use to situations where it is constitutional. In what circumstances the use of the strangleholds is constitutional is, of course, a judgment for the district court to make." 615 F. 2d, at 1244, n. 1.

The District Court has now made that judgment, and entered an injunction forbidding its use except under certain circumstances. The order requires recordkeeping and that such records be made available to the District Court upon its request. The case has thus progressed considerably further toward final resolution than it had at the time certiorari was denied in *Lyons I*.

The complaint alleging the use of these police tactics was filed on February 7, 1977, and the city's petition for certiorari is due by December 9, 1981. Thus, what is basically involved in a consideration of traditional "stay equities" is whether the city shall be allowed to use a particular procedure, already in use for at least four years, for the few additional months before this Court acts on its petition for certiorari. I conclude that there is sufficient doubt about the correctness of the basic holding of the Court of Appeals with respect to standing on the part of respondent, together with sufficient equities in favor of the city, to warrant a stay of the Court of Appeals' order affirming the District Court's granting of an injunction, pending a timely filing of a petition for certiorari by the applicants and the disposition thereof by this Court.

It is so ordered.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS 1978, 1979, AND 1980 (AS OF JULY 2, 1981)

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
Terms	1978	1979	1980	1978	1979	1980	1978	1979	1980	1978	1979	1980
Number of cases on dockets	17	23	24	2,379	2,509	2,749	2,335	2,249	2,371	4,731	4,781	5,144
Number disposed of during terms	0	1	7	1,954	1,982	2,227	1,985	1,828	2,021	3,939	3,811	4,255
Number remaining on dockets	17	22	17	425	527	522	350	421	350	792	970	889

	TERMS		
	1978	1979	1980
Cases argued during term	168	156	154
Number disposed of by full opinions	153	143	144
Number disposed of by per curiam opinions	8	12	8
Number set for reargument	8	1	2
Cases granted review this term	163	158	[1] 183
Cases reviewed and decided without oral argument	112	128	[2] 131
Total cases to be available for argument at outset of following term	79	78	102

[1] Does not include No. 78–1549, which was removed from the Argument Calendar.
[2] Includes No. 78–1851.

JULY 23, 1981

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III. Equal Protection of the Laws.

1. *Federal Election Campaign Act of 1971—Contributions to multicandidate political committees—Validity of restrictions.*—Provisions of Federal Election Campaign Act of 1971 prohibiting individuals and unincorporated associations from contributing more than $5,000 annually to any multicandidate political committee do not violate equal protection component of Fifth Amendment even though a corporation's or labor union's contributions to a segregated political fund are unlimited under Act. California Medical Assn. v. FEC, p. 182.

2. *Military Selective Service Act—Registration provisions—Sex discrimination.*—Provisions of Military Selective Service Act authorizing President to require registration for possible military service of males but not females do not violate Fifth Amendment. Rostker v. Goldberg, p. 57.

IV. Freedom of Speech.

1. *Billboard restrictions—Validity of ordinance.*—California Supreme Court's judgment—holding that a city ordinance which generally prohibited commercial and noncommercial advertising by billboards but permitted commercial advertising of goods or services available on property where sign was located was not facially invalid under First Amendment—is reversed. Metromedia, Inc. v. San Diego, p. 490.

2. *Federal Election Campaign Act of 1971—Contributions to multicandidate political committee—Validity of restrictions.*—Court of Appeals' judgment holding that provisions of Federal Election Campaign Act of 1971 prohibiting individuals and unincorporated associations from contributing more than $5,000 annually to any multicandidate political committee do not violate right of free speech under First Amendment, is affirmed. California Medical Assn. v. FEC, p. 182.

3. *Federal elections—Candidates' access to broadcasting facilities.*—Right of access to media under § 312 (a)(7) of Communications Act of 1934, which authorizes Federal Communications Commission to revoke license for broadcasting stations' failure to allow "reasonable access" to station

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by a qualified candidate for federal office—as defined by FCC and as applied in determining that television networks had failed to grant "reasonable access" to Carter-Mondale Presidential Committee, which requested certain broadcast time for 1980 Presidential campaign—does not violate First Amendment rights of broadcasters by unduly circumscribing their editorial discretion, but instead properly balances First Amendment rights of federal candidates, public, and broadcasters. CBS, Inc. v. FCC, p. 367.

4. *Letterboxes—Prohibition against use for unstamped notices.*—Title 18 U. S. C. § 1725, which prohibits deposit of unstamped mailable matter in a letterbox approved by United States Postal Service, does not unconstitutionally abridge First Amendment right of free speech of civic association insofar as it precludes association's practice of delivering messages to residents by placing unstamped notices in letterboxes of private homes. U. S. Postal Service v. Council of Greenburgh Civic Assns., p. 114.

5. *Revocation of passport—Activities damaging national security or foreign policy.*—Application of regulation—authorizing passport revocation when Secretary of State determines that citizens' activities abroad are causing or are likely to cause serious damage to national security or foreign policy—to revoke passport of respondent, who engaged in activities abroad resulting in identification of alleged undercover Central Intelligence Agency agents and of intelligence sources in foreign countries, did not violate First Amendment right to free speech. Haig v. Agee, p. 280.

V. Right to Counsel.

Police interrogation—Adequacy of Miranda warnings.—*Miranda* warnings were not inadequate simply because of order in which they were given to respondent (a minor), who—after being advised of his right to presence of an attorney before and during police interrogation—was informed that he had right to have his parents present before he was informed of his right to have a lawyer appointed without cost to him. California v. Prysock, p. 355.

VI. Searches and Seizures.

1. *Automobile search—Plastic wrapped packages.*—California Court of Appeal's judgment holding that Constitution was not violated by warrantless opening of packages wrapped in green opaque plastic and containing marihuana—which packages were found in luggage compartment of station wagon by police after they stopped it for proceeding erratically and smelled marihuana smoke—is reversed. Robbins v. California, p. 420.

2. *Automobile search incident to arrest—Jacket pockets.*—Search of respondent's jacket was a search incident to a lawful custodial arrest and did not violate Fourth and Fourteenth Amendments where policeman stopped an automobile for speeding, smelled burnt marihuana, saw en-

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velope suspected of containing marihuana on car floor, ordered occupants (including respondent) to leave car, arrested and searched them, found respondent's jacket in car's passenger compartment, unzipped jacket pocket, and discovered cocaine. New York v. Belton, p. 454.

VII. Supremacy Clause.

Validity of state severance tax on coal.—Montana's severance tax on each ton of coal mined in State, including coal mined on federal land, does not violate Supremacy Clause as being inconsistent with Mineral Lands Leasing Act of 1920 or as frustrating national energy policies reflected in other federal statutes encouraging production and use of coal. Commonwealth Edison Co. v. Montana, p. 609.

CONTAINER SEARCHES. See **Constitutional Law**, VI.

CONTRIBUTIONS BY EMPLOYER TO UNION TRUST FUNDS. See **National Labor Relations Act.**

CONTRIBUTIONS TO POLITICAL COMMITTEES. See **Constitutional Law**, III, 1; IV, 2; **Federal Election Campaign Act of 1971.**

COURT OF CLAIMS. See **Tucker Act.**

CRIMINAL LAW. See **Constitutional Law**, V; VI; **Stays**, 3.

CUSTODIAL QUESTIONING. See **Constitutional Law**, V.

DAMAGES. See **Civil Rights Act of 1871; Federal Rules of Civil Procedure; Outer Continental Shelf Lands Act.**

DAMAGES AWARDS AS SUBJECT TO INCOME TAXES. See **Outer Continental Shelf Lands Act.**

"DEEMING" SPOUSE'S INCOME IN DETERMINING ELIGIBILITY FOR MEDICAID. See **Social Security Act.**

DEPOSITING UNSTAMPED MATTER IN LETTERBOXES. See **Constitutional Law**, IV, 4.

DESEGREGATION OF SCHOOLS. See **Stays**, 1, 2.

DISCRIMINATION AGAINST EMPLOYEES BASED ON AGE. See **Age Discrimination in Employment Act of 1967.**

DISCRIMINATION AGAINST INTERSTATE COMMERCE. See **Constitutional Law**, I.

DISCRIMINATION AGAINST MALES. See **Constitutional Law**, III, 2.

DISCRIMINATION ON BASIS OF RACE. See **Stays**, 1, 2.

DIVORCE. See **Armed Forces.**

DRAFT LAWS. See **Constitutional Law**, III, 2.

DUE PROCESS. See **Constitutional Law**, II; III, 2.

ELECTIONS. See **Communications Act of 1934**; **Constitutional Law**, III, 1; IV, 2, 3; **Federal Election Campaign Act of 1971.**

ELIGIBILITY FOR MEDICAID. See **Social Security Act.**

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974. See **National Labor Relations Act.**

EMPLOYER AND EMPLOYEES. See **Age Discrimination in Employment Act of 1967**; **National Labor Relations Act.**

EMPLOYER DISCRIMINATION BASED ON EMPLOYEE'S AGE. See **Age Discrimination in Employment Act of 1967.**

EMPLOYER-SELECTED TRUSTEES OF UNION TRUST FUNDS. See **National Labor Relations Act.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law**, III.

EXCLUSIVE JURISDICTION. See **Outer Continental Shelf Lands Act.**

FAILURE TO OBJECT TO JURY INSTRUCTIONS. See **Federal Rules of Civil Procedure.**

"FAVORED NATIONS CLAUSE" OF CONTRACT FOR SALE OF NATURAL GAS. See **Natural Gas Act.**

FEDERAL COMMON LAW OF NUISANCE. See **Water Pollution.**

FEDERAL COMMUNICATIONS COMMISSION. See **Communications Act of 1934**; **Constitutional Law**, IV, 3.

FEDERAL ELECTION CAMPAIGN ACT OF 1971. See also **Constitutional Law**, III, 1; IV, 2.

Jurisdiction of Supreme Court—Appeal from Court of Appeals' judgment in declaratory judgment action.—Under Act's provisions for judicial review, this Court has jurisdiction of appeal from Court of Appeals' judgment in declaratory judgment action upholding constitutionality of Act's provisions limiting amounts of annual contributions to multicandidate political committees, notwithstanding Federal Election Commission enforcement proceeding against some of plaintiffs in declaratory judgment action was pending in District Court. California Medical Assn. v. FEC, p. 182.

FEDERAL ELECTIONS. See **Communications Act of 1934**; **Constitutional Law**, IV, 3; **Federal Election Campaign Act of 1971.**

FEDERAL EMPLOYEES. See **Age Discrimination in Employment Act of 1967.**

FEDERAL INCOME TAXES. See **Outer Continental Shelf Lands Act.**

FEDERAL LAND AS SUBJECT TO STATE SEVERANCE TAX ON COAL. See **Constitutional Law**, VII.

FEDERAL RULES OF CIVIL PROCEDURE.

Jury instructions—Failure to object at trial.—A city's failure to object at trial, as required by Rule 51, to instruction authorizing jury to award punitive damages against city in an action under 42 U. S. C. § 1983 does not foreclose this Court from reviewing issue whether a municipality may be held liable for punitive damages under § 1983. Newport v. Fact Concerts, Inc., p. 247.

FEDERAL-STATE RELATIONS. See **Armed Forces**; **Constitutional Law**, VII; **Natural Gas Act**; **Outer Continental Shelf Lands Act.**

FEDERAL WATER POLLUTION CONTROL ACT. See **Water Pollution.**

FIFTH AMENDMENT. See **Constitutional Law**, II; III; **International Emergency Economic Powers Act**; **Tucker Act.**

"FILED RATE" DOCTRINE. See **Natural Gas Act.**

FIRST AMENDMENT. See **Constitutional Law**, IV.

FISHING RIGHTS. See **Water Pollution.**

FOREIGN POLICY. See **Constitutional Law**, II; IV, 5; **International Emergency Economic Powers Act**; **Passport Act of 1926.**

FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976. See **International Emergency Economic Powers Act.**

FOURTEENTH AMENDMENT. See **Constitutional Law**, IV, 1; VI.

FOURTH AMENDMENT. See **Constitutional Law**, VI.

FREEDOM OF SPEECH. See **Constitutional Law**, IV.

GAS. See **Natural Gas Act.**

GENDER-BASED DISCRIMINATION. See **Constitutional Law**, III, 2.

GOVERNMENT EMPLOYEES. See **Age Discrimination in Employment Act of 1967.**

HEARINGS ON REVOCATION OF PASSPORTS. See **Constitutional Law**, II.

HOSTAGE ACT. See **International Emergency Economic Powers Act.**

HUSBAND AND WIFE. See **Armed Forces**; **Social Security Act.**

IMMUNITY OF FEDERAL GOVERNMENT FROM SUIT. See **Age Discrimination in Employment Act of 1967.**

IMMUNITY OF MUNICIPALITIES FROM PUNITIVE DAMAGES. See **Civil Rights Act of 1871; Federal Rules of Civil Procedure.**

IMPLIED PRIVATE RIGHTS OF ACTION. See **Water Pollution.**

INCOME TAXES. See **Outer Continental Shelf Lands Act.**

INDEMNIFICATION. See **Outer Continental Shelf Lands Act.**

INJUNCTIONS. See **Stays, 3.**

INSTRUCTIONS TO JURY. See **Federal Rules of Civil Procedure; Outer Continental Shelf Lands Act.**

INTERNATIONAL CLAIMS SETTLEMENT ACT OF 1949. See **International Emergency Economic Powers Act.**

INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT.

Presidential powers—Release of hostages held in Iran—Suspension of claims against Iran.—In implementing agreement with Iran for release of Americans being held hostage in Iran, President was authorized to nullify attachments of property of Iran in United States obtained in judicial proceedings by United States nationals, and to order transfer of Iranian assets to certain bank to be held subject to Secretary of Treasury's directions, by provision of Act empowering President to "compel," "nullify," or "prohibit" any "transfer" of any property subject to United States' jurisdiction in which any foreign country has any interest, and President's action did not effect a taking of property in violation of Fifth Amendment; on basis of inferences to be drawn from character of federal legislation, such as IEEPA and Hostage Act, President was also authorized to suspend claims against Iran. Dames & Moore v. Regan, p. 654.

INTERSTATE COMMERCE. See **Constitutional Law, I.**

IRAN-UNITED STATES CLAIMS TRIBUNAL. See **International Emergency Economic Powers Act.**

JACKET SEARCHES. See **Constitutional Law, VI, 2.**

JURISDICTION. See **Federal Election Campaign Act of 1971; Outer Continental Shelf Lands Act; Tucker Act.**

JURY INSTRUCTIONS. See **Federal Rules of Civil Procedure; Outer Continental Shelf Lands Act.**

JURY TRIAL IN FEDERAL EMPLOYEE'S AGE-DISCRIMINATION SUIT. See **Age Discrimination in Employment Act of 1967.**

JUST COMPENSATION CLAUSE. See **International Emergency Economic Powers Act; Tucker Act.**

LABOR MANAGEMENT RELATIONS ACT. See **National Labor Relations Act.**

LETTERBOXES. See **Constitutional Law**, IV, 4.

LIMITATIONS ON POLITICAL CONTRIBUTIONS. See **Constitutional Law**, III, 1; IV, 2; **Federal Election Campaign Act of 1971.**

LOUISIANA. See **Natural Gas Act.**

LUGGAGE SEARCHES. See **Constitutional Law**, VI, 1.

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MANAGEMENT-APPOINTED TRUSTEES OF UNION TRUST FUNDS. See **National Labor Relations Act.**

MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT OF 1972. See **Water Pollution.**

MEDICAID BENEFITS. See **Social Security Act.**

MILITARY RETIREMENT PAY AS CONSTITUTING COMMUNITY PROPERTY. See **Armed Forces.**

MILITARY SELECTIVE SERVICE ACT. See **Constitutional Law**, III, 2.

MINERAL LANDS LEASING ACT OF 1920. See **Constitutional Law**, VII.

MIRANDA WARNINGS. See **Constitutional Law**, V.

MONTANA. See **Constitutional Law**, I; VII.

MULTICANDIDATE POLITICAL COMMITTEES. See **Constitutional Law**, III, 1; IV, 2; **Federal Election Campaign Act of 1971.**

MUNICIPALITIES' LIABILITY FOR PUNITIVE DAMAGES. See **Civil Rights Act of 1871; Federal Rules of Civil Procedure.**

NASHVILLE, TENN. See **Stays**, 2.

NATIONAL LABOR RELATIONS ACT.

Unfair labor practice—Strike to compel employer's contribution to union trust funds.—Employer-selected trustees of a union's national pension and welfare trust funds, established under § 302 (c)(5) of Labor Management Relations Act, are not "representatives" of employer "for the purposes of collective bargaining or the adjustment of grievances" within meaning of § 8 (b)(1)(B) of National Labor Relations Act, and thus union did not commit unfair labor practice in striking employer's surface coal mine in an attempt to compel employer to agree to contribute to union's national trust funds as employer did under collective-bargaining contract covering its deep-shaft coal mines. NLRB v. Amax Coal Co., p. 322.

NATIONAL SECURITY. See **Constitutional Law**, II; III, 2; IV, 5; **Passport Act of 1926.**

NATURAL GAS ACT.

Sales of natural gas—"Filed rate" doctrine.—"Filed rate" doctrine—prohibiting a federally regulated seller of natural gas from charging rates higher than those filed with Federal Energy Regulatory Commission pursuant to Act—precluded respondents, regulated gas producers that had filed contract rates and obtained certificate to sell at such rates, from recovering in state-court action higher rates under "favored nations clause" of contract with petitioner which provided that if petitioner purchased gas from another party at a higher rate than it was paying respondents they would be entitled to a higher price for their sales to petitioner. Arkansas Louisiana Gas Co. v. Hall, p. 571.

NEW YORK. See **Constitutional Law**, VI, 2.

NONCOMMERCIAL ADVERTISING ON BILLBOARDS. See **Constitutional Law**, IV, 1.

NUISANCES. See **Water Pollution.**

OBJECTIONS TO JURY INSTRUCTIONS. See **Federal Rules of Civil Procedure.**

OCEAN POLLUTION. See **Water Pollution.**

OUTDOOR ADVERTISING DISPLAYS. See **Constitutional Law**, IV, 1.

OUTER CONTINENTAL SHELF LANDS ACT.

Personal injury action—Indemnification claim—State-court jurisdiction.—Federal courts do not have exclusive jurisdiction over personal injury and indemnity cases arising under Act, and thus Texas state court—in an action against respondent for personal injuries occurring over seabed of Outer Continental Shelf—had subject-matter jurisdiction over third-party complaint against petitioner, plaintiff's employer, for indemnification; question whether petitioner was entitled to a jury instruction that personal injury damages awards are not subject to federal income taxation depended on matters that were not addressed by court below and should be considered on remand. Gulf Offshore Co. v. Mobil Oil Corp., p. 473.

PACKAGE SEARCHES. See **Constitutional Law**, VI, 1.

PASSPORT ACT OF 1926.

Revocation of passport—Activities damaging national security or foreign policy.—Act authorized revocation of passport of respondent—who engaged in activities abroad resulting in identification of alleged undercover Central Intelligence Agency agents and of intelligence sources in foreign countries—pursuant to regulation authorizing revocation when Secretary of State determines that citizen's activities abroad are causing or are likely to cause serious damage to national security or foreign policy. Haig v. Agee, p. 280.

PASSPORTS. See Constitutional Law, II; IV, 5; Passport Act of 1926.

PENSION TRUST FUNDS OF UNIONS. See National Labor Relations Act.

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POLICE CONDUCT IN MAKING ARRESTS. See Stays, 3.

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POLITICAL CANDIDATES' RIGHT OF ACCESS TO BROADCASTING STATIONS. See Communications Act of 1934; Constitutional Law, IV, 3.

POLITICAL CONTRIBUTIONS. See Constitutional Law, III, 1; IV, 2; Federal Election Campaign Act of 1971.

POLLUTION. See Water Pollution.

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POWERPLANT AND INDUSTRIAL FUEL USE ACT OF 1978. See Constitutional Law, VII.

PRE-EMPTION OF FEDERAL COMMON LAW BY STATUTES. See Water Pollution.

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See Constitutional Law, VII.

PREJUDGMENT ATTACHMENT OF PROPERTY OF IRAN. See International Emergency Economic Powers Act.

PRELIMINARY INJUNCTIONS. See Stays, 3.

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PUBLIC EMPLOYEES. See Age Discrimination in Employment Act of 1967.

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PURCHASES OF NATURAL GAS. See **Natural Gas Act.**

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"REASONABLE ACCESS" BY POLITICAL CANDIDATES TO BROADCASTING STATIONS. See **Communications Act of 1934; Constitutional Law, IV, 3.**

REGISTRATION FOR MILITARY SERVICE. See **Constitutional Law, III, 2.**

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RIGHT TO COUNSEL. See **Constitutional Law, V.**

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SETTLEMENT OF CLAIMS AGAINST IRAN. See **International Emergency Economic Powers Act; Tucker Act.**

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SOCIAL SECURITY ACT.

Medicaid benefits—Eligibility—"Deeming" of spouse's income.—Regulations of Secretary of Health and Human Services governing "deeming" of spouse's income in determining institutionalized applicant's eligibility for Medicaid benefits, without determining that spouse's income actually is contributed to applicant, are consistent with Act's scheme and are reasonable exercises of authority delegated to Secretary. Schweiker v. Gray Panthers, p. 34.

SPOUSE'S INCOME AS AFFECTING ELIGIBILITY FOR MEDICAID. See **Social Security Act.**

STATE-COURT JURISDICTION. See **Outer Continental Shelf Lands Act.**

STAYS.

1. *Court of Appeals' mandate—School desegregation plan.*—Applications of school district and intervenor parents, children, and citizens to stay Court of Appeals' mandate to District Court to prepare and implement a school desegregation plan for coming school year, are denied. South Park Independent School District v. United States (POWELL, J., in chambers), p. 1301.

2. *Motion to vacate Court of Appeals' stay—School desegregation order.*—Motion of school officials to vacate Court of Appeals' stay, pending appeal to that court, of District Court's order modifying its earlier school desegregation order, is denied. Metropolitan County Board of Education v. Kelley (STEVENS, J., in chambers), p. 1306.

3. *Preliminary injunction—Arrests—Use of "choke-holds" by police.*—Application to stay Court of Appeals' order affirming District Court's preliminary injunction—which prohibited city's police officers from using "choke-holds" in making arrests under circumstances that were not life threatening—is granted. Los Angeles v. Lyons (REHNQUIST, J., in chambers), p. 1308.

STRIKES. See **National Labor Relations Act.**

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1. Retirement of JUSTICE STEWART, p. VII.
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TUCKER ACT.

Court of Claims' jurisdiction—Suspension of claims against Iran—President's actions as violating Fifth Amendment.—There is no jurisdictional obstacle to an action in Court of Claims under Act to determine whether President's actions in suspending claims of United States nationals against Iran (including petitioner's claim)—pursuant to agreement between countries for release of Americans being held hostage in Iran—effected a taking of property in violation of Fifth Amendment. Dames & Moore v. Regan, p. 654.

UNFAIR LABOR PRACTICES. See **National Labor Relations Act.**

UNION PENSION AND WELFARE TRUST FUNDS. See **National Labor Relations Act.**

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WARRANTLESS SEARCHES. See **Constitutional Law, VI.**

WATER POLLUTION.

Federal statutes—Implied private rights of action—Suit against governmental entities and officials.—There is no implied private right of action under either Federal Water Pollution Control Act or Marine Protection, Research, and Sanctuaries Act of 1972—in addition to express remedies provided in Acts—by which private parties, alleging damage to fishing grounds caused by discharges and ocean dumping of sewage and other waste, could seek relief against various state and federal governmental entities and officials, and federal common law of nuisance was pre-empted in area of water pollution by FWPCA and, to extent ocean waters not covered by that Act were involved, by MPRSA. Middlesex County Sewerage Authority v. National Sea Clammers Assn., p. 1.

WELFARE BENEFITS. See **Social Security Act.**

WELFARE TRUST FUNDS OF UNIONS. See **National Labor Relations Act.**

WORDS AND PHRASES.

1. *"Reasonable access to . . . a broadcasting station."* § 312 (a)(7), Communications Act of 1934, 47 U. S. C. § 312 (a)(7). CBS, Inc. v. FCC, p. 367.

WORDS AND PHRASES—Continued.

2. *"Representatives for the purposes of collective bargaining or the adjustment of grievances."* § 8 (b) (1) (B), National Labor Relations Act, 29 U. S. C. § 158 (b) (1) (B). NLRB v. Amax Coal Co., p. 322.

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