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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1982

(BEGINNING OF TERM)

OCTOBER 4, 1982, THROUGH FEBRUARY 22, 1983

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY C. LIND

REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1985

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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

RETIRED

POTTER STEWART, Associate Justice.

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, Attorney General.
REX E. LEE, Solicitor General.
ALEXANDER L. STEVAS, Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

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

Pursuant to the provisions of Title 28, United States Code, Section 42, *It is ordered* that the CHIEF JUSTICE be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

DEATH OF MRS. BRENNAN

SUPREME COURT OF THE UNITED STATES

MONDAY, DECEMBER 6, 1982

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

THE CHIEF JUSTICE said:

Last Wednesday, Marjorie Leonard Brennan, wife of JUSTICE BRENNAN, died, after a long and courageous struggle with illness. What marked her in a very special way that all who knew her admired, was her shining spirit and uncomplaining attitude. No one can really know what that kind of courage, in the face of long illness, calls for, but she inspired the love and admiration of all who knew her. Especially those of us who saw her frequently, marvelled at her courage and cheerfulness.

The light of her spirit will be sorely missed, not only by her family, but all those who, over the years, witnessed her quiet strength, her smile, her determination to carry on with life and live it to its fullest. Marjorie Brennan truly lived her life to the fullest against great odds.

As a mark of our sorrow, and of our affection for her, and for our Brother JUSTICE BRENNAN and his family, and our deep and lasting affection for Marjorie Brennan, the Journal of the Court will record that adjournment of this Court today is in honor of her life, and her memory.

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF JUSTICE FORTAS*

MONDAY, DECEMBER 13, 1982

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

THE CHIEF JUSTICE said:

The Court is in special session this afternoon to receive the Resolutions of the Bar of the Supreme Court in tribute to our former colleague and friend, the late Justice Fortas.

The Solicitor General is recognized at this time for the purpose of presenting those Resolutions which were adopted by the Bar. Mr. Solicitor General.

Mr. Solicitor General Lee addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

The members of the Bar of the Court met this day and have adopted resolutions in honor of Justice Fortas. And I would ask leave of the Court to present those resolutions at this time.

Abe Fortas, Associate Justice of the Supreme Court of the United States from 1965 to 1969, died at his home in Washington, D. C., on April 5, 1982. He was 71 years old, but even for a man whose career had been so rich, so varied, and

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*Justice Fortas, who resigned from the Court effective May 14, 1969 (395 U. S. III), died in Washington, D. C., on April 5, 1982 (456 U. S. V).

so fruitful, his death cannot be said to have come in the fullness of time. Only a few days before, he had argued before the Court and neither his appetite for work nor his powers showed any signs of diminishing. The members of the Bar have met in the Supreme Court building on December 13, 1982, to commemorate him as one of the great figures of our profession, to survey his vast and diverse accomplishments, and to testify to the enrichment he brought to the law, to the arts, and to the nation. To recall the details of his life is to exhibit, as the historian Burckhardt said, only the "underside of the tapestry": the knots and stitches, not the whole work. Abe Fortas was animated by a warmth, a compassion, a profound gravity that could be felt, that cannot be captured in words, but that made him who he was and whom we remember.

Abe Fortas was born in Memphis, Tennessee, on June 19, 1910. His Orthodox Jewish parents had emigrated from England. His father was a cabinetmaker who was also a sometime shopkeeper and jeweler. Abe was the youngest of five children and the family's modest circumstances dictated that any achievement he enjoyed would be self-made. He worked his way through high school by playing the violin in a small dance band. The violin began as a source of pleasure, became a means of self-support (along with part-time work in a shoe store), and remained a passion throughout his life. His academic record led to a scholarship at Southwestern College, a Presbyterian institution in Memphis. There he was president of the drama and debating clubs and leader of the school orchestra. With a near-perfect academic record, he won the Peres Scholarship to the Yale Law School, which he entered in 1930 at the age of twenty.

Propitious circumstances and the relentless application of his remarkable ability made Yale the turning point of Fortas' life. He led his class academically, was Editor in Chief of the *Law Journal*, and authored a brilliant student note at the direction of William O. Douglas, then a young Sterling Professor of Law who would later call Fortas "my prize student" and who would be an intimate friend for life. Fortas was

appointed assistant professor of law upon his graduation in 1933, but for the next four years his world had two centers, New Haven and Washington. During summers and semesters when he was not teaching he worked at the Agricultural Adjustment Administration, at the behest of two other Yale faculty members who had been drawn to the New Deal, Thurman Arnold and Wesley Sturges. In 1934, Fortas joined Douglas at the new Securities and Exchange Commission as a consultant. He became an important collaborator with Douglas in the preparation of a study of protective committees that led to major legislative revisions in reorganization proceedings under the Bankruptcy Act. Three years after joining the Commission, Fortas left the Yale faculty. In the meantime he had married Carolyn Agger. She, too, became a brilliant student at the Yale Law School and after her graduation in 1938 began the outstanding career as a tax lawyer that has continued to the present day.

In 1939, at the age of twenty-nine, Fortas became General Counsel to the Bituminous Coal Division in the Department of the Interior. Two years later he became Director of the Division of Power in the Department. In that capacity he met a young Congressman named Lyndon B. Johnson who was interested in a proposed power project in his home state of Texas. The introduction led to a life-long friendship, which included Fortas' representation of Johnson in the contested Texas Senatorial election of 1948 and in other less public matters.

Talented young men, of whom Fortas was one of the best, were able to rise quickly in the New Deal. In 1942, at the age of thirty-two, Fortas became Under Secretary of the Interior. His legal abilities had been firmly established. In the new post he demonstrated the judgment and force required to become a successful second in command to Secretary Harold Ickes, the self-styled curmudgeon of the Roosevelt administration. Fortas won Ickes' trust so quickly and to such a degree that he frequently substituted for the Secretary at Cabinet meetings.

With the declaration of war after Pearl Harbor, the business of the Interior Department acquired new gravity. The Department was charged with administering the removal of Japanese-Americans from the West Coast and with overseeing the administration of martial law in the Hawaiian Territory. Fortas fought a determined, though unsuccessful, battle to prevent the relocation and internment of the Japanese-Americans. In later years he would tell associates that he was prouder of his efforts in that cause than in any other he undertook in more than a decade of government service. With Ickes, he also fought to ameliorate the harshest aspects of martial law in Hawaii during the War.

Fortas' tenure in the Interior Department was interrupted briefly when he resigned to enlist as an apprentice seaman in the Navy. Rejecting any high-level desk assignment in the service, he was in boot camp when a persistent serious eye ailment compelled his release and he was reappointed to his still-vacant post as Under Secretary.

When the War ended, so did the New Deal. In January 1946, the law firm of Arnold and Fortas was organized in Washington, D. C. Its purpose as Fortas later recalled in a tribute to Thurman Arnold, "was to provide a means for its two partners to make a living." For almost twenty years, Fortas managed the firm and built it into one of the leading institutions in the city and in the country.

The firm was extraordinarily successful in satisfying the purposes of its founders, who later included Paul Porter, former Price Administrator during the War. But Arnold, Fortas & Porter was more than a lucrative practice meeting the needs of large corporate clients. During the period of the 1950s that Justice Douglas called the time of the "Black Silence of Fear," the firm represented not only large companies but also private citizens who were victims of anti-Communist hysteria, such as Dorothy Bailey, Dr. John Peters, Owen Lattimore, and Dr. Edward Condon, Director of the National Bureau of Standards. The cases all involved the fundamental right of individuals to differ from orthodoxy and to join, or at least to associate freely, with others of similar

views. The issues on which the firm based its defense of such cases were drier and more legalistic. "Most of them," Fortas later wrote, "involved fundamental questions of procedural rights: to specific charges, to confrontation and cross-examination, to judgments based solely on substantial evidence, to the presentation of a defense and to counsel." Each victory was one of both substance and process.

The mere fact that the firm would take an unpopular case was a repudiation of the orthodoxy that had swept the country during the period. But Fortas and his colleagues did not rest on symbolism. Each case, be the client Lever Brothers, Federated Department Stores or Ezra Pound, received the same meticulous care. In every case in which he was involved, Fortas was at once the manager and the master of the smallest detail. The temperament of the named partners in the firm was illustrated by Thurman Arnold's description of how each would have handled a trial involving the United Fruit Company. "I would try it carload by carload, Paul would try it case by case, and Abe would try it banana by banana."

Mastery of detail requires time, and in addition to his remarkable intellectual ability Fortas had enormous stamina. From his earliest days in the New Deal, law was a fourteen-hour a day, six- or seven-day a week task. To junior colleagues he could be a humorless, somewhat distant perfectionist: no early draft of any document was ever quite satisfactory. Final approval was only achieved after the most exacting professional standards had been satisfied.

Although Abe Fortas was identified with "causes," he did not see the lawyer's duty as service to a cause. The only duty was to the client, and not to the client's wishes but to the client's interests. In praising Thurman Arnold, Fortas obviously articulated a mutual view and his own credo in rejecting a new vogue: "As the young lawyer views many of today's battles, the client is of relatively little importance. The cause, not the client, is the object of dedication. The client is a technical necessity, not a person whose life or welfare is at stake. The undertaking is shaped and prosecuted not in

defense or vindication of the client, but in maximum furtherance of the idea or program." As he rejected representing causes instead of—and perhaps at the expense of—people, Fortas also refused to pass judgment on the relative moral worth of his clients. The function and responsibility of the lawyer was to serve and to represent "each client as an individual, whether the client was a corporate malefactor or a presumably saintly civil libertarian."

Two of Fortas' most important victories were for clients who fell somewhere between the poles he thus identified. His representation of Monte Durham in 1954, by appointment of the United States Court of Appeals for the District of Columbia Circuit, led to a decision that for its time was a landmark in the modern attempt to bring into closer proximity legal rules and scientific knowledge concerning insanity. Less than a decade later, again by appointment of the court, he convinced the Supreme Court that Clarence Earl Gideon was entitled under the Constitution to a lawyer to defend him in state court for a petty offense. Both cases were constitutional watersheds.

Abe Fortas was an advocate of not only the powerful and the penniless, but also of the arts. If his passion professionally was craftsmanship, his passion privately was music and art. The two merged symbolically, in the form of his desk at the firm, which was made from a Victorian grand piano. He was an effective supporter of the National Endowments for the Arts and for the Humanities. He arranged for Pablo Casals to play at the White House, and in later years he helped direct the John F. Kennedy Center for the Performing Arts. He once said that the only thing he could not live without was his music. Though he played for pleasure, his musical sense and skill were of a high order, and he played the violin and viola regularly with the talented professionals who were his friends, in the Sunday evening sessions at his home that he called The 3025 N Street Strictly No Refund Quartet. His violin was a 200-year-old Guidantus, the gift of violinist Isaac Stern, cellist Leonard Rose, and pianist Eugene Istomin. A month after Fortas' death, Stern led a

memorial concert at the Kennedy Center in memory of the man who worked to make the Kennedy Center a vital force in the arts, who with Stern successfully fought the destruction of Carnegie Hall, and who helped make the Hirshhorn Museum a reality.

Abe Fortas was a man of rare completeness—patron and practitioner of the arts, successful corporate lawyer and superb advocate, defender of the poor and the persecuted. His legal renown came as a "Washington lawyer," but not of the breed sometimes thought to provide clients with influence more than advice. Fortas knew Washington from the inside, but his success rested on an intuitive knowledge, built from the ground up, of how bureaucracies worked and thus how they needed to be addressed. His grasp of the workings of government extended to both the recondite and the mundane details. When an elevator car carrying lawyers, judges, and administrators was trapped between floors in the Export-Import Bank on the way to a meeting, Fortas opened the operator's panel, pulled a lever, flicked a switch or two and the car was once again on its way. When his fellow passengers expressed their astonishment, Fortas replied with the mock innocence he occasionally affected, "It's really quite simple, for an insider."

Fortas made fun of his personal connections in other ways. He listed his business in the 1965 edition of WHO'S WHO IN THE SOUTH AND SOUTHWEST as "Presidential Adviser, c/o The White House, 1600 Pennsylvania Avenue, Washington, D. C." The joke would later prove to be somewhat of an embarrassment when President Johnson named Fortas to be Associate Justice of the Supreme Court of the United States on July 28, 1965, but nothing could hide the fact that the President valued him as a trusted adviser and consulted him informally on a wide range of matters. Fortas was not eager to accept appointment to the Court, but Johnson styled the nomination as a call to "vital duty" and Fortas accepted. The President, noting Fortas' well-known reluctance to assume public office again after twenty years in private life, declared that "the job has sought the man—a scholar, a pro-

found thinker, a lawyer of superior ability and a man of deeply compassionate feelings toward his fellow man."

Abe Fortas took the constitutional and judicial oaths on October 4, 1965, to become the ninety-fifth Justice to sit on the Supreme Court of the United States. In the four terms that he sat as an Associate Justice he wrote 106 opinions—forty opinions for the Court, twenty-one concurring opinions, and forty-five dissenting opinions. His importance to the Court and to the nation during the parlous times in which he sat cannot be measured by output. Part of his value lay, as Holmes said of John Marshall, in the fact that he, and not someone else, was there during "a strategic point in the campaign of history."

His opinions did not strive for rhetorical effect. He could reduce a penetrating insight to a barbed phrase and he could summarize a complicated constitutional concept in a glistening sentence, but the quality of his work is not reflected in a string of memorable pearls. Each opinion spoke crisply with the authority of a master craftsman who readily apprehended the facts and arguments and who then went to the heart of the matter without reinventing the wheel along the way. His passion broke through the surface rarely, and then usually in cases involving the civil rights of racial minorities or the investigative abuses of the police. In both areas, he rejected abstract characterizations that hid disagreeable truths, and he sought to make equal protection of the laws and freedom from self-incrimination living realities and not technical constructs.

The days that Justice Fortas sat on the Court lent themselves to pat labels for characterizing complex social problems and the Court's role in addressing those problems. How the future will regard his times is not for us to say, but it is certain that he brought to his task a mature vision that refused to accept simple formulas. "Constitutional commandments are not surgical instruments," he wrote. "They have a tendency to hack deeply—to amputate." *Avery* v. *Midland County*, 390 U. S. 474, 497 (1968). He thus cautioned against the application of slogans to resolve problems

touching many institutions, and he warned that adjudication was an inefficient tool to preserve constitutional guarantees: "The full realization of our great charter of liberty, set forth in our Constitution, cannot be achieved by this Court alone." *Desist* v. *United States*, 394 U. S. 244, 277 (1969). He also warned that courts should be chary of overreaching, especially where economic policy was at stake either in the interpretation of the antitrust laws or in the review of agency action: "The courts may be the principal guardians of the liberties of the people. They are not the chief administrators of its economic destiny." *B. & O. R. Co.* v. *United States*, 386 U. S. 372, 478 (1967).

His greatest contributions to the jurisprudence of the Supreme Court touched on what he saw as the essence of the liberties guaranteed by the Constitution, the procedures used by the criminal justice system. In addition to numerous opinions on the Fifth Amendment, he wrote, in the case of *In re Gault*, 387 U. S. 1 (1967), the charter of juvenile justice. He was acutely sensitive to the constitutional and procedural rights of minors, not only those charged with breaking the law as in *Gault*, but also those who wished to criticize public policy, *Tinker* v. *Des Moines School District*, 393 U. S. 503 (1969), and those who sought to learn more than one-sided orthodoxy, *Epperson* v. *Arkansas*, 393 U. S. 97 (1968). And he pleaded that the First Amendment had room to protect individuals and families from the loss of their legitimate privacy. *Time, Inc.* v. *Hill*, 385 U. S. 374, 412 (1967).

Abe Fortas' tenure on the Supreme Court embraced a period in which the law and its future were called into open question not only in the courtroom but also in the streets. Although he invested remarkable energy and industry in his court work, he could not ignore what he viewed to be multiple threats to the law and to its basic organizing principles for society. In 1968 he published a pamphlet which he had begun before he joined the Court, *Concerning Dissent and Civil Disobedience*. He argued that civil disobedience was sometimes appropriate, but that violence never was, because violence begat more violence and thus destroyed the opportu-

nities for peaceful social change. The book was strangely misunderstood by some as a manifesto for lawlessness, but nothing could have been further from Fortas' purpose or belief. "Democratic processes do indeed function," the small book concluded, "and they can bring about fundamental response to fundamental demands, and can do this without revolution, and despite the occasional violence of those who either reject or have not attained the maturity and restraint to use, and not to abuse, their freedom. This is an extraordinary tribute to our institutions." To confound those who misread him, he elaborated his views in an address to the American College of Trial Lawyers in August of 1968. "I say proudly that I am a man of the law," he began. He repeated his faith in the rule of law and his abhorrence of violence, but he also issued a warning: "We will not tolerate violence or lawlessness but at the same time we will protect and preserve—despite the onslaught of those whose purported adherence to constitutional principles conceals a danger to our institutions more virulent and dangerous than outright attack—the possibilities of peaceful and orderly change that our Constitution guarantees."

On June 27, 1968, President Johnson nominated Abe Fortas to be Chief Justice of the United States to replace Earl Warren, who had announced the day before that he would retire as soon as a successor was confirmed. The nomination never went to a vote in the Senate, because Fortas asked on October 3 that his name be withdrawn from consideration after stormy confirmation hearings where questions were raised about decisions made by the Court both before and during his tenure, about the pamphlet and about Fortas' extrajudicial activities. The following Spring further questions were raised which, it became evident, could not be laid to rest short of a full confrontation. To Fortas, the political implications of the controversy transcended personal vindication. He knew, as he said, that "if I stayed on the Court, there would be a constitutional confrontation that would go on for months. I feel that there wasn't any choice for a man of conscience." Against the urgings of friends and those who

recognized the importance of his contribution to the work of the Court, he resigned from the Court on May 14, 1969.

After the resignation, he resumed an active practice as an eminent and valuable member of the bar. The practice was remarkably varied, challenging and consuming. Of particular interest to him was the future of the Commonwealth of Puerto Rico, with which he had a long association and which he represented in his only argument before the Court after leaving it.

He continued his manifold activities on behalf of the arts, and he occasionally lectured. Although his work and his avocation seemed to fill a twenty-five hour day, he always had time for friends. During the illness that forced Justice Douglas to retire from the Court, and in the years following, Fortas was on hand at a moment's notice.

The life of Abe Fortas was so full, so rich, and lived at such intensity that it is possible we do not fully know the man we have lost. He recognized his own complexity. The Supreme Court, he said, "brings you face to face with the problems of what you really believe, and that accounts for some of the transformations of men on the Court. Maybe if I'd stayed on the Court long enough I'd have discovered a Fortas under the Fortas under the Fortas. But it didn't happen."

Abe Fortas was not so much a man of contradictions as a man of great tensions. An instinctive, emotional passion for justice and fair play underlay his quiet and controlled public reserve; the man who moved so easily in the corridors of power was acutely uncomfortable with the trappings of that power, so much so that he could not bear to ride in the back seat of a limousine alone, because he detested the distinction between the passenger and the driver that the seating arrangement symbolized; and the active and diverse social life that he and Carolyn so enjoyed was at odds with his lifelong gravity and social concern. Abe Fortas bore the burden of the same kind of conscience that he perceived in his friend and former partner Louis Eisenstein: "He believed in man and man's capability. He *believed*—although life could not have been easy for him, because he was a sensitive instru-

ment, responding too easily, too deeply, too quietly, too passionately to the vibrations of others—not only those whom he knew, whose sorrows impinged upon his life, but also to the unseen multitudes whose problems to him were not abstract, but a personal agony and a personal responsibility."

We would not honor Abe Fortas properly, however, if our memory were cast only in sadness at his departure. As he said of Eisenstein, in that deep, deliberate, somewhat mournful voice which none who heard it can ever forget: "The death of a remarkable man is not just an end. It is also a beginning. His death does not terminate his life. His life continues in each of those whom he has touched, and in thousands whom he never encountered, but whose lives are better and richer because *he* lived."

WHEREFORE, IT IS RESOLVED, that we, the Bar of the Supreme Court of the United States, express our grievous sense of loss upon the death of Justice Abe Fortas, that we acknowledge our professional debt to him for his accomplishments as a lawyer, public servant and public citizen, and that we gratefully recognize his enduring contributions to our profession, to the arts and to the nation: It is further

RESOLVED, that the Chairman of our Committee on Resolutions be directed to present these resolutions to the Court with the prayer that they be embodied in its permanent records.

THE CHIEF JUSTICE said:

Thank you, Mr. Solicitor General. The Court now recognizes the Attorney General of the United States.

Mr. Attorney General Smith addressed the Court as follows:

MR. CHIEF JUSTICE and may it please the Court.

The Bar of the Court met today to honor the memory of Abe Fortas, Associate Justice of the Supreme Court from 1965 to 1969.

Justice Fortas came to this Court after two extraordinary decades in the private practice of law. He was the first lawyer appointed to the Court directly from private practice in 35 years. He brought to the Court not only the habits of mind of the outstanding private practitioner, but the deeply felt concerns that shaped his own life.

As a young man, Justice Fortas came to Washington with the New Deal. He served with distinction at the Agricultural Adjustment Administration, the Securities and Exchange Commission, and the Department of the Interior—where he became the Under Secretary at 32.

From 1946 until 1965, Justice Fortas engaged in the private practice of law—founding his own firm, which became an exemplar of the Washington practice. During this period, however, Justice Fortas did not forsake public service. He demonstrated the importance of the lawyer to the service of the public through his representation of a broad range of clients. By appointment of the United States Court of Appeals for the District of Columbia Circuit and this Court, he successfully represented indigent clients in two historic cases. In the latter instance, he made an important contribution to the work of this Court. In 1962, the Court appointed him to brief and argue the cause of Clarence Earl Gideon, a destitute Florida convict. The story is well known. And it is a story that will continue to tutor future generations of law students and lawyers concerning their responsibilities to the public as members of the bar.

Justice Fortas' keen intellect, and his intolerance for obscure arguments, were apparent both in his opinions and in the courtroom. One of Justice Fortas' law partners has said that it was a dangerous gamble to answer a question from him unless it could be done with certainty, and that no one gambled more than once. Those who argued before him quickly learned the same lesson. If there was a weakness in a lawyer's argument, it was often Justice Fortas who would question the advocate about it—and not let him easily escape. The advocate's only consolation was that when his opponent was making a questionable point, it was again Justice Fortas

who would often ask the incisive question and pursue the issue relentlessly until the weaknesses of the argument were fully revealed.

Although a member of this Court for less than four years, he played a central role in the significant changes wrought during that period. He wrote forty opinions of the Court during those four terms. Although considered by most a stalwart of the Warren Court, he revealed the nuances of judgment that characterized his superb intellect by writing twenty-one concurring opinions and forty-five dissents. On this Court—as in private life—Mr. Fortas was his own man—indeed, a most remarkable man whose unique insights were the result of exceptional experience, hard work, and a sharp intellect.

After leaving the Court, Justice Fortas returned to the private practice of law, and to a diverse life in which he devoted much of his time to public service. He gave generously of his efforts to the John F. Kennedy Center for the Performing Arts and to the National Endowment for the Arts. From 1970 until his death he was a member of the Advisory Committee on Appellate Rules of the Judicial Conference of the United States. His law practice once again led him back before this Court, where he presented another memorable oral argument only two weeks before his death.

President Theodore Roosevelt once said that in life, "The credit belongs to the man . . . who knows the great enthusiasms, the great devotions, and spends himself in a worthy cause . . . ." Abe Fortas was such a man. Throughout his life—which spanned a turbulent era of change—Justice Fortas proved himself a brilliant lawyer and a tireless advocate for his clients and those principles he cherished. In public service and in private life, he spent himself fully for those things in which he believed. Those who agreed with him, and those who did not, all recognize that Justice Fortas was always a magnificent advocate—and so often a successful one.

MR. CHIEF JUSTICE, on behalf of the lawyers of this nation and, in particular, of the Bar of this Court, I respectfully

request that the resolutions presented to you in honor and celebration of the memory of Justice Fortas be accepted by this Court.

THE CHIEF JUSTICE said:

Mr. Attorney General and Mr. Solicitor General, the Court thanks you on behalf of the Bar for your presentations today in memory of our late colleague and friend, Justice Fortas.

We ask that you convey to Chairman Koven and the members of the Committee on Resolutions our profound appreciation for these very appropriate resolutions. Your motion that these resolutions be made a part of the permanent records of the Court is granted.

These resolutions of the Bar of the Court that you have presented, Mr. Solicitor General and Mr. Attorney General, reveal a man who, for all his skills as an advocate and for all his fine professional standing as a lawyer and as a Justice of this Court, was far more than a legal technician.

There's very little to add to the resolutions you have presented in terms of Abe Fortas' career as a Justice, as a lawyer and as a public figure. In many respects, he was cut of the same cloth as so many of those Eighteenth Century figures in our history who were as much at home in the corridors of government as in the courtroom or in the concert hall. His services in government, as the resolutions have told us, began very early in his life, and very soon won him national recognition.

He was always vigorous in his support of or in his opposition to measures and to people when he disagreed. His public rebuke of Senator Wayne Morse can really be appreciated best by the generation who remember Senator Wayne Morse as one of the powerful figures in the Congress of the United States, and as a leading spokesman for liberal causes.

Few people cared and even fewer dared to cross swords with Wayne Morse in public debate. And Abe Fortas' courageous opposition to the internment of Japanese Americans that has been referred to in the resolutions was another

example of his willingness to oppose popular trends, including the entire force of President Roosevelt's administration.

I first became personally acquainted with Abe Fortas when I served on the Court of Appeals and worked with him on Circuit Judicial Conference Committees. He had returned to private practice by the time I came to this Court, and when we reactivated the important Judicial Conference Committee to review the appellate rules, I asked him to serve on it and he accepted.

In private conversations with him, I found that he shared the view that judges and lawyers had a great obligation to work together to reduce the steadily mounting costs of appeals as cases became more complex and as the cost of printed records sometimes ran into literally small fortunes. Here his quick grasp of the realities, his vast experience in the law made him a very valuable contributor to the work of that Committee.

Abe Fortas was deeply involved, as the resolutions have indicated, in the political life of the country much of his life, especially in the earlier years. But one could not accurately say he was a politician, as that term is commonly used in Washington. He was surely no hail fellow well met. He saved his warmth for his friends and his close associates. Yet, he played an important role in the political life on the level of ideas and issues, beginning with the stirring days of the New Deal.

One can easily visualize Abe Fortas as counsel to the truculent Harold Ickes, seeking to restrain the public outbursts of that dynamic curmudgeon, as the Solicitor General's resolution has described him, in order to protect the Secretary and enhance his effectiveness in government.

Abe Fortas' role in the political life of his times was largely on an intellectual level, as I have suggested. And as with any advocate, he performed with great zest and vigor on behalf of the young Lyndon Johnson in the Texas litigation that the Solicitor General has referred to. And, of course, we know the result of that case was to place Lyndon Johnson on

the ballot for United States Senator and open his national political career.

I have said that Abe Fortas was as much at home in the corridors of government as in the courtroom, but that description fails to describe the complete man. From his childhood, he loved music and he never did forsake his beloved violin. Yet, it would have been unnatural for a fine musician, possessing the great talent that he exhibited, to confine his interest in the arts simply to music. Quietly and effectively he supported many causes of the arts on a broad scale, notably, the Kennedy Center, and it was his participation, at the request of President Johnson, that led to the Smithsonian Institution acquiring the great Hirshhorn collection—and that was an essential step, for the project was not without vigorous opposition.

The Solicitor General has referred to the final appearance of Abe Fortas as an advocate in this Court, and that came shortly before his death. That was the kind of case that called for his large grasp of the realities and the practicalities of the business of government, as well as an acute understanding of the relevant law. A unanimous Court found in favor of Puerto Rico, one of his long-time clients.

Those who knew Abe Fortas as a cool, if not sometimes even a cold, steely advocate in the competitive arenas of the law and of government would have been somewhat baffled, I think, to have seen him as part of a string quartet with his musician friends in a private home. These groups, as the resolutions have noted, sometimes included some of the leading figures in the world of music, Isaac Stern, Judith Serkin, Leonard Rose.

Abe Fortas was as much at home with the music of Brahms, Mozart and Rachmaninoff as with the treatises of Lord Coke and of Maitland.

Although he was a very private person, he did not make a point of concealing his love for and the practice of music or his interest in the arts. Neither did he flaunt it or exploit it. His love of the arts was a sincere expression and it tells something about the breadth of the man and of his interests.

I was present, as many of you were, at the musicial memorial tribute in May at the Eisenhower Theater when some of the great artists of America paid tribute to this man with their music. We heard Isaac Stern, Slava Rostropovich and others who had shared private musical evenings with him. They played the Andante Movement from Mozart's String Quintet, one of Abe Fortas' favorites. It was their way of paying tribute to an Eighteenth Century man of the arts who was also a Twentieth Century man of the Law.

Abe Fortas will be missed, not just by his life companion, Carolyn, and by his family and his friends and colleagues at the Bar, but by all those who have tried to make our Nation's Capital a center for the beauty and serenity so essential today in the turbulent world that we live in.

In a day of specialists and specialization, he will be remembered for his contributions on many levels. As his love of the arts and music enriched his life, it served also to enrich the life of this great city and of our country.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1982

CALIFORNIA EX REL. STATE LANDS COMMISSION *v.* UNITED STATES

ON CROSS-MOTIONS FOR ENTRY OF DECREE

No. 89, Orig. Decided June 18, 1982—Decree entered October 18, 1982

Decree entered.

Opinion reported: 457 U. S. 273.

DECREE

For the purpose of giving effect to the decision of this Court herein, announced June 18, 1982, 457 U. S. 273, rehearing having been denied on September 9, 1982, 458 U. S. 1131,

IT IS ORDERED, ADJUDGED, AND DECREED:

1. As against the State of California and all those claiming under it, the United States holds all right, title and interest in the parcel of land described in the Complaint filed herein and in Exhibit A hereto, the seaward boundary of which shall be the line of mean high water of the Pacific Ocean, as heretofore or hereafter modified by accretion, erosion or reliction, whether attributable to natural or artificial causes;

2. The State of California has no right, title or interest in the said parcel of land, and the State, its agencies, political

subdivisions, officers and agents, and all those claiming under them or in privity with them, are enjoined from interfering in any way with the right, title, and interest of the United States in the said parcel;

3. Each party shall bear its own costs.

EXHIBIT A

All that certain real property in the State of California, County of Humboldt situated in Townships 4 and 5 North, Range 1 West, Humboldt Base & Meridian ("HB&M") and particularly described as follows:

COMMENCING at the east 1/4 corner of Section 31, Township 5 North, Range 1 West HB&M, thence from said point of commencement; N 88°01'20" W, 1981.14 feet along the north line of U. S. Lot 3 of said Section 31, as said lot is shown on the official United States Government Township Plat, to the United States Meander Line of the Pacific Ocean as surveyed by J. S. Murray under contract dated October 18, 1854, and the TRUE POINT OF BEGINNING: thence from said true point of beginning southerly along the shore of the Pacific Ocean with the meander lines of said Section 31 the following (3) courses:

1. S 14°38'54" W, 395.44 feet;
2. S 03°38'54" W, 1863.84 feet; and
3. S 10°21'06" E, 400.10 feet; to the United States Meander Corner on the Township line common to said Townships 4 and 5 North Range 1 West; thence southerly along the shore of the Pacific Ocean with the meander lines of Section 6 of Township 4 North, Range 1 West as surveyed by J. H. Miller under contract dated October 19, 1854, the following (3) courses:

1. S 08°24'17" W, 968.24 feet;
2. S 01°24'17" W, 869.50 feet; and
3. S 11°35'43" E, 646.26 feet more or less to the centerline of the North Jetty at the entrance to Humboldt Bay; thence westerly along said centerline the following (6) courses:

1. N 75°15′58″ W, 307.31 feet;
2. N 65°00′58″ W, 431.97 feet;
3. N 52°05′24″ W, 442.91 feet;
4. N 53°15′24″ W, 408.72 feet;
5. N 50°02′05″ W, 400.00 feet;
6. N 46°08′24″ W, 1427 feet more or less to the line of mean high water of the Pacific Ocean; thence northerly along said line of mean high water to a point which bears N 88°01′ 20″ W, from the true point of beginning; thence S 88°01′20″ E, along the north line of U. S. Lot 3, of Section 31 of Township 5 North, Range 1 West produced, to the true point of beginning.

Bearings and distances are based on the State of California Coordinate System (Lambert Conformal Projection), Zone 1, derived locally from that certain map entitled "Record of Survey, Surplus Property," recorded in Book 29 of Surveys at Page 137, Humboldt County Records as surveyed by the United States Coast Guard; 12th District.

ANDERSON, WARDEN *v.* HARLESS

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

No. 81–2066. Decided November 1, 1982

Respondent was convicted of first-degree murder after a jury trial in a Michigan state court, and the Michigan Court of Appeals affirmed. The Michigan Supreme Court, on review of the record, denied relief. Respondent then obtained habeas corpus relief in Federal District Court, which held that the trial court's jury instruction allowing malice to be implied from the fact that a weapon was used unconstitutionally shifted the burden of proof to respondent and was inconsistent with the presumption of innocence. The District Court also held that respondent had exhausted available state-court remedies, as required by 28 U. S. C. § 2254. The Federal Court of Appeals affirmed, holding that the exhaustion requirement was met because respondent had presented to the Michigan Court of Appeals the facts on which he based his federal claim, had argued that the malice instruction was "reversible error," and had cited *People* v. *Martin*, 392 Mich. 553, 221 N. W. 2d 336—a decision predicated solely on state law, but in which the defendant had argued broadly that failure to properly instruct a jury violates the Sixth and Fourteenth Amendments.

Held: The requirement under 28 U. S. C. § 2254 that the state courts must have been provided a "fair opportunity" to apply controlling legal principles to the facts bearing upon the federal habeas petitioner's constitutional claim was not met here. The "substance" of respondent's federal habeas corpus claim was not fairly presented to the state courts so as to meet § 2254's exhaustion requirement. The Michigan Court of Appeals interpreted respondent's claim as being predicated on the state-law rule of *Martin*, *supra*, that malice should not be implied from the fact that a weapon was used, and the record shows that respondent's constitutional argument was never presented to, or considered by, the Michigan courts.

Certiorari granted; 664 F. 2d 610, reversed and remanded.

PER CURIAM.

Respondent was convicted of two counts of first-degree murder and was sentenced to life imprisonment. The Michigan Court of Appeals affirmed respondent's conviction, *Peo-*

ple v. *Harless*, 78 Mich. App. 745, 261 N. W. 2d 41 (1977), and the Michigan Supreme Court, on review of the record, denied respondent's request for relief. App. to Pet. for Cert. 30a.

Respondent then filed a petition for writ of habeas corpus, pursuant to 28 U. S. C. § 2254, in the United States District Court for the Eastern District of Michigan. He alleged, *inter alia*, that the trial court's instruction on "malice"—a crucial element in distinguishing between second-degree murder and manslaughter under Michigan law—was unconstitutional.[1] In particular, respondent focused on the following language from the trial court's lengthy charge:

> "Malice is implied from the nature of the act which caused the death. Malice can be implied from using the weapon on another person. You are not obligated to reach the conclusion, but you must imply malice if you find death was implied *[sic]* by the use of a gun against another." App. to Pet. for Cert. 59a.

Relying primarily on *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), the District Court held that this instruction unconstitutionally shifted the burden of proof to respondent and was inconsistent with the presumption of innocence. 504 F. Supp. 1135 (1981). The court also held that respondent had exhausted available state-court remedies, as required by 28 U. S. C. §§ 2254 (b) and (c), since his conviction had been reviewed by both the Michigan Court of Appeals and the Michigan Supreme Court. The District Court ordered that the application for writ of habeas corpus be granted unless respondent was retried within 90 days.

The United States Court of Appeals for the Sixth Circuit affirmed. 664 F. 2d 610 (1982). The court held that re-

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[1] Respondent was convicted of *first*-degree murder, which requires proof not only of "malice" but also of premeditation. For this reason, petitioner argues that any error in the trial court's definition of malice was harmless. In light of our disposition, we do not reach the issue.

spondent's claim had been properly exhausted in the state courts, because respondent had presented to the Michigan Court of Appeals the facts on which he based his federal claim and had argued that the malice instruction was "reversible error." See *People* v. *Harless*, *supra*, at 748, 261 N. W. 2d, at 43. The court also emphasized that respondent, in his brief to the Michigan Court of Appeals, had cited *People* v. *Martin*, 392 Mich. 553, 221 N. W. 2d 336 (1974)—a decision predicated solely on state law in which no federal issues were decided, but in which the defendant had argued broadly that failure to properly instruct a jury violates the Sixth and Fourteenth Amendments. In the view of the United States Court of Appeals, respondent's assertion before the Michigan Court of Appeals that the trial court's malice instruction was erroneous, coupled with his citation of *People* v. *Martin*, *supra*, provided the Michigan courts with sufficient opportunity to consider the issue encompassed by respondent's subsequent federal habeas petition.

We reverse. In *Picard* v. *Connor*, 404 U. S. 270 (1971), we made clear that 28 U. S. C. § 2254 requires a federal habeas petitioner to provide the state courts with a "fair opportunity" to apply controlling legal principles to the facts bearing upon his constitutional claim. *Id.*, at 276–277. It is not enough that all the facts necessary to support the federal claim were before the state courts, *id.*, at 277, or that a somewhat similar state-law claim was made. See, *e. g.*, *Gayle* v. *LeFevre*, 613 F. 2d 21 (CA2 1980); *Paullet* v. *Howard*, 634 F. 2d 117, 119–120 (CA3 1980); *Wilks* v. *Israel*, 627 F. 2d 32, 37–38 (CA7), cert. denied, 449 U. S. 1086 (1980); *Conner* v. *Auger*, 595 F. 2d 407, 413 (CA8), cert. denied, 444 U. S. 851 (1979). In addition, the habeas petitioner must have "fairly presented" to the state courts the "substance" of his federal habeas corpus claim. *Picard*, *supra*, at 275, 277–278. Cf. *Rose* v. *Lundy*, 455 U. S. 509, 518 (1982).

In this case respondent argued on appeal that the trial court's instruction on the element of malice was "erroneous." He offered no support for this conclusion other than a citation to, and three excerpts from, *People* v. *Martin*, *supra*—a case which held that, under *Michigan* law, malice should not be implied from the fact that a weapon is used. See App. to Pet. for Cert. 47a–49a, 51a–53a.[2] Not surprisingly, the Michigan Court of Appeals interpreted respondent's claim as being predicated on the state-law rule of *Martin*, and analyzed it accordingly. 78 Mich. App., at 748–750, 261 N. W. 2d, at 43.

The United States Court of Appeals concluded that "the due process ramifications" of respondent's argument to the Michigan court "were self-evident," and that respondent's "reliance on *Martin* was sufficient to present the state courts with the substance of his due process challenge to the malice instruction for habeas exhaustion purposes." 664 F. 2d, at 612. We disagree. The District Court based its grant of habeas relief in this case on the doctrine that certain sorts of "mandatory presumptions" may undermine the prosecution's burden to prove guilt beyond a reasonable doubt and thus deprive a criminal defendant of due process. See *Sandstrom*, *supra*; *In re Winship*, 397 U. S. 358 (1970). The Court of Appeals affirmed on the same rationale. However, it is plain from the record that this constitutional argument was never presented to, or considered by, the Michigan courts. Nor is this claim even the same as the constitutional claim advanced in *Martin*—the defendant there asserted a broad federal due process right to jury instructions that "properly explain" state law, 392 Mich., at 558, 221 N. W. 2d, at 339, and did not rely on the more particular analysis developed in cases such as *Sandstrom*, *supra*.[3]

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[2] Respondent was represented by counsel on appeal.

[3] We doubt that a defendant's citation to a state-court decision predicated solely on state law ordinarily will be sufficient to fairly apprise a reviewing court of a potential federal claim merely because the defendant in

Since it appears that respondent is still free to present his *Sandstrom* claim to the Michigan Court of Appeals, see *People* v. *Berry*, 10 Mich. App. 469, 474–475, 157 N. W. 2d 310, 312–313 (1968), we conclude that he has not exhausted his available state-court remedies as required by 28 U. S. C. § 2254. Accordingly, the petition for certiorari and respondent's motion for leave to proceed *in forma pauperis* are granted, the judgment of the United States Court of Appeals for the Sixth Circuit is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

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

Few issues consume as much of the scarce time of federal judges as the question whether a state prisoner adequately exhausted his state remedies before filing a petition for a federal writ of habeas corpus. Distressingly, the Court seems oblivious of this fact and takes action in this case that can only exacerbate that problem.

On the merits the question presented by this case is whether a somewhat garbled jury instruction contained a mandatory presumption that required a finding of malice or merely a permissive inference that allowed the jury to make such a finding.[1] The parties seem to agree that if the in-

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the *cited* case advanced a federal claim. However, it is clear that such a citation is insufficient when, as here, the federal claim asserted in the cited case is not even the same as the federal claim on which federal habeas relief is sought. See *Picard* v. *Connor*, 404 U. S. 270, 276 (1971).

[1] The instruction stated:

"Members of the jury, the term malice is a technical term which has to do with the doing of a cruel act against another human being without excuse or justification. The doing of a cruel act against another human being without excuse or justification. Malice is implied from the nature of the act which caused the death. Malice can be implied from using the weapon on another person. You are not obligated to reach the conclusion, but you

struction is considered mandatory, the respondent's conviction must be set aside under principles that are well settled in Michigan[2] and in the federal courts.[3]

The Michigan Court of Appeals rejected respondent's construction of the jury instruction and therefore affirmed his conviction. After the Supreme Court of Michigan denied leave to appeal and after the state trial court denied a subsequent motion for a new trial, respondent commenced this federal habeas corpus proceeding.

The Federal District Court carefully analyzed the difference between a permissive inference and a mandatory presumption and concluded that the Michigan Court of Appeals' construction of the jury instruction was simply untenable. 504 F. Supp. 1135, 1138 (1981). It also considered and rejected the argument that the respondent had not exhausted his state remedies. *Id.*, at 1139.

On appeal, the Court of Appeals for the Sixth Circuit affirmed, 664 F. 2d 610 (1982). That court first carefully considered the Warden's contention that respondent's state remedies had not been exhausted because his federal claim had not been fairly presented to the state courts. After explaining in some detail why the federal claim necessarily presented the very question that the state court had already resolved against the respondent, the Court of Appeals concluded "that the Michigan courts had a fair opportunity to consider the issue encompassed by Harless' habeas corpus petition." *Id.*, at 612. Thereafter, the Court of Appeals reviewed and upheld the District Court's holding on the merits.

I agree with the sensible approach to the exhaustion issue that was followed by the District Court and the Court of Ap-

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must imply malice if you find death was implied by the use of a gun against another." App. to Pet. for Cert. 59a.

[2] See *People* v. *Martin*, 392 Mich. 553, 221 N. W. 2d 336 (1974).

[3] Compare *Ulster County Court* v. *Allen*, 442 U. S. 140, with *Sandstrom* v. *Montana*, 442 U. S. 510.

peals.[4] I also believe that approach was entirely faithful to *Picard* v. *Connor*, 404 U. S. 270, which requires only that the "substance" of the federal claim (not the form) be "fairly

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[4] Because this Court's description of the Court of Appeals' treatment of the exhaustion issue is so abbreviated it seems appropriate to quote in full the relevant portion of that opinion:

"In our view, Harless adequately exhausted available state remedies for purposes of 28 U. S. C. §§ 2254(b) and (c). The respondent concedes that Harless presented to the state appellate courts all the facts on which he based his federal constitutional claim. Respondent contends, however, that the state courts had no opportunity to correct the constitutional error, because Harless did not explicitly complain to the state courts that the malice instruction denied him due process.

"Although we do not have before us Harless' state appellate papers, we learn from the Michigan Court of Appeals opinion the substance of Harless' contention before that court: 'The trial court committed *reversible error* by instructing the jury *incorrectly* on the implication [sic] of malice that might be drawn from defendant's use of a deadly weapon, *the effect of which was to remove the possible finding of manslaughter.*' *People* v. *Harless*, 261 N. W. 2d 41, 43 (1977) (emphasis added). At Harless' trial the court gave the following definition of malice to the jury:

"'Malice is implied from the nature of the act which caused the death. Malice can be implied from using the weapon on another person. You are not obligated to reach the conclusion, *but you must imply malice if you find death was implied [sic] by the use of a gun against another*' (emphasis added).

"Harless claimed on appeal that this instruction was reversible error under *People* v. *Martin*, 392 Mich. 553, 221 N. W. 2d 336 (1974), a case holding that the law does not imply malice from the use of a deadly weapon. In *Martin*, appellant challenged his murder conviction on numerous state and constitutional grounds. The gist of Martin's appeal was that he was denied a fair trial because certain instructions failed to provide the jury with sufficient understanding of the elements of the crimes charged, to enable them to perceive the crucial distinctions between first and second degree murder, and manslaughter. In particular, Martin challenged a malice instruction in which the jury was informed that the law implies malice from the use of a deadly weapon. The Court of Appeals ultimately decided as a matter of state law that the malice instruction 'erroneously categorized [the issue of malice] as a presumption of law rather than a permissible inference.' 221 N. W. 2d, at 341. However, Martin's constitutional argument was broadly phrased: failure to explain the law properly to a jury

presented" to the state courts.[5] In this case the only arguable justification for dismissing the petition for failure to exhaust is a possibility that the state court might decide the

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through adequate instructions abridges the due process right to a fair trial. The Court of Appeals neither rejected nor refined this constitutional argument. Rather, it seems to have accepted it tacitly, for in response to defendant's argument that his Sixth and Fourteenth Amendment rights to a fair trial had been abridged by an inadequate manslaughter instruction, the court stated that 'an erroneous or misleading charge denies the defendant the right to have a properly instructed jury pass upon the evidence.' *Id.*, at 341. Although it did not specifically label this a *federal* right, the court clearly felt that a properly instructed jury is a prerequisite to a fair trial.

"In our view, Harless' reliance on *Martin* was sufficient to present the state courts with the substance of his due process challenge to the malice instruction for habeas exhaustion purposes. The substance of Harless' state appeal, although unartfully phrased, sufficiently asked the state court to consider that the incorrect malice instruction denied Harless a fair jury trial by effectively eliminating the possibility of a manslaughter verdict from the jury's consideration. In our view, the due process ramifications were self-evident. Under *Picard* v. *Connor*, 404 U. S. 270 . . . (1971), a habeas petitioner need not label his state claim as federal or constitutional. Given the elasticity of the due process concept, we are convinced that the Michigan courts had a fair opportunity to consider the issue encompassed by Harless' habeas corpus petition." 664 F. 2d, at 611–612.

[5] In *Picard*, the habeas petitioner had argued in the Massachusetts courts that his indictment had been contrary to Massachusetts law and that, if the procedures used in his case had been in accord with Massachusetts law, then those procedures could not be approved without reference to whether the Fifth Amendment's requirement of a grand jury indictment applied to the States through incorporation in the Fourteenth Amendment. 404 U. S., at 277. This Court held that such an argument did not give the State a fair opportunity to consider the proposition that its treatment of the petitioner denied him equal protection, in view of the Commonwealth's otherwise universal commitment to grand jury indictments in felony cases.

In this case, the federal courts ordered habeas relief on the theory that the "operative effect" of the instruction quoted above was to cause the jury to use an unconstitutional mandatory presumption of malice. It held that the instruction was therefore inconsistent with *Sandstrom*, *supra*. 664 F. 2d, at 612. Accord, *ante*, at 7. In state court, the defendant had argued that the instruction was inconsistent with *People* v. *Martin*, *supra*, because *Martin* had struck down an instruction that caused the jury to use

instruction issue differently if phrased in terms of *Sandstrom* v. *Montana*, 442 U. S. 510, rather than in terms of *People* v. *Martin*, 392 Mich. 553, 221 N. W. 2d 336 (1974). See n. 4, *supra*. That possibility is virtually nonexistent. The Court apparently perceives this case as a simple application of *Picard;* I think it can only be explained as an expansion of *Picard*. Such an expansion should be accompanied by a more careful analysis than the Court provides in this case, and it should not be undertaken without full briefing and argument.

But even if I shared the Court's analysis of the exhaustion question in this particular case, I would nevertheless take issue with its decision to grant certiorari for the sole purpose of correcting what it considers to be a technical, procedural error. It is not appropriate for this Court to expend its scarce resources crafting opinions that correct technical errors in cases of only local importance where the correction in no way promotes the development of the law.[6]

If the Court of Appeals was correct in its appraisal of the merits, the respondent should be given a prompt retrial. If that court was incorrect on the merits, nothing will be gained by requiring the respondent to present his claim to three

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a mandatory presumption of malice. See *People* v. *Harless*, 78 Mich. App. 745, 749, 261 N. W. 2d 41, 43 (1977). The substance of the argument—that the instruction deprived him of fair jury consideration because it created a mandatory presumption of malice—is the same.

[6] In many respects this case is merely a sequel to *Board of Education of Rogers, Ark.* v. *McCluskey*, 458 U. S. 966. In my dissent in that case, I observed:

"As JUSTICE REHNQUIST has reminded us, in 'our zeal to provide "equal justice under law," we must never forget that this Court is not a forum for the correction of errors.' *Boag* v. *MacDougall*, 454 U. S. 364, 367–368 (1982) (dissenting opinion). 'To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.' This case illustrates how ineffectively the Court is supervising its discretionary docket." *Id.*, at 971 (footnote omitted).

more sets of Michigan judges and two more sets of federal judges before this Court decides whether the substantive error merits our review. Cf. *Rose* v. *Lundy*, 455 U. S. 509, 545 (STEVENS, J., dissenting).

I respectfully dissent.

IMMIGRATION AND NATURALIZATION SERVICE *v.* MIRANDA

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

No. 82–29. Decided November 8, 1982

While in the United States after the expiration of his temporary visitor's visa, respondent alien married a United States citizen. His wife filed a petition with the Immigration and Naturalization Service (INS), requesting that he be granted an immigrant visa as her spouse, and respondent simultaneously applied to the INS for adjustment of his status to that of a permanent resident alien. The wife's petition, if approved, would have satisfied § 245(a) of the Immigration and Nationality Act of 1952, which conditions the granting of permanent resident status to an alien on the immediate availability of an immigrant visa. The INS did not act on either the wife's petition or respondent's application for 18 months, and when the marriage broke up the wife withdrew her petition. The INS then denied respondent's application because an immigrant visa was not immediately available to him. In subsequent administrative deportation proceedings, the INS rejected respondent's claims that his previous marriage was sufficient to support his application for permanent resident status, and that the INS was estopped from denying his application because of its "unreasonable delay." Respondent sought review of the administrative decision in the Court of Appeals, which ultimately reversed, holding that the INS's unexplained 18-month delay in processing respondent's application was "affirmative misconduct" that estopped the Government from denying the application.

Held: Regardless of whether or not even "affirmative misconduct" will estop the Government from enforcing the immigration laws, the evidence here did not rise to that level. Respondent showed only that the Government failed to process his application promptly. Even if the INS arguably was negligent in not acting more expeditiously, neither such conduct nor the harm to respondent was sufficient to estop the Government. Cf. *Montana* v. *Kennedy*, 366 U. S. 308; *INS* v. *Hibi*, 414 U. S. 5; *Schweiker* v. *Hansen*, 450 U. S. 785.

Certiorari granted; 673 F. 2d 1105, reversed.

PER CURIAM.

Respondent Horacio Miranda, a citizen of the Philippines, entered the United States in 1971 on a temporary visitor's

visa. After his visa expired, he stayed in this country, eventually marrying Linda Milligan, a citizen of the United States, on May 26, 1976. Shortly thereafter, Milligan filed a visa petition with the Immigration and Naturalization Service (INS) on respondent's behalf. She requested that he be granted an immigrant visa as her spouse.[1] Respondent simultaneously filed an application requesting the INS to adjust his status to that of a permanent resident alien. Section 245(a) of the Immigration and Nationality Act of 1952 conditions the granting of permanent resident status to an alien on the immediate availability of an immigrant visa.[2] Milligan's petition, if approved, would have satisfied this condition.

The INS did not act on either Milligan's petition or respondent's application for 18 months. Following the breakup of her marriage with respondent, Milligan withdrew her petition in December 1977. At that point, the INS denied respondent's application for permanent residence because he had not shown that an immigrant visa was immediately available to him. The INS also issued an order to show cause why he should not be deported.

At a deportation hearing, respondent conceded his deportability but renewed his application for permanent resident status because of his marriage to Milligan. Although the marriage had ended, he claimed that a previous marriage was sufficient to support his application. The Immigration Judge rejected this claim, concluding that the immediate availa-

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[1] Section 201(b) of the Immigration and Nationality Act of 1952 provides for the admission of immigrants who are immediate relatives of United States citizens. 66 Stat. 175, as amended, 8 U. S. C. § 1151(b).

[2] Section 245(a) provides that the status of an alien who was admitted into the United States "may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed." 66 Stat. 217, as amended, 8 U. S. C. § 1255(a).

bility of an immigrant visa was a necessary condition to respondent's application. Since Milligan had withdrawn her petition for an immigrant visa before the INS had acted on it, respondent was ineligible for permanent resident status.

Respondent appealed the decision to the Board of Immigration Appeals. For the first time, he raised the claim that the INS was estopped from denying his application because of its "unreasonable delay." He argued that the "failure to act was not only unreasonable, unfair and unjust but also an abuse of governmental process if the delay was deliberate." Record 44. The Board rejected respondent's claim. It found "no evidence of any 'affirmative misconduct'" and no basis for an equitable estoppel. *Id.*, at 4.

Respondent sought review of the Board's decision in the Court of Appeals for the Ninth Circuit. The Court of Appeals reversed, holding that "[t]he unexplained failure of the INS to act on the visa petition for an eighteen-month period prior to the petitioner's withdrawal . . . was affirmative misconduct by the INS." *Miranda* v. *INS*, 638 F. 2d 83, 84 (1980). We granted certiorari, vacated the judgment of the Court of Appeals, and remanded the case for further consideration in light of *Schweiker* v. *Hansen*, 450 U. S. 785 (1981). 454 U. S. 808 (1981).

On remand, the Court of Appeals adhered to its earlier decision. 673 F. 2d 1105 (1982) *(per curiam)*. It found *Hansen* inapplicable for three reasons. First, the Government's conduct in *Hansen* had not risen to the level of affirmative misconduct. In this case, however, affirmative misconduct was established by the INS's unexplained delay in processing respondent's application. Second, although the private party in *Hansen* subsequently had been able to correct the Government's error, the INS's error here inflicted irrevocable harm on respondent. Finally, unlike the private party in *Hansen* who sought to recover from the public treasury, respondent was seeking only to become a permanent resident—a result that would entail no burden on the public

fisc. The Court of Appeals determined that "the Supreme Court's conclusion that the government was not estopped in *Hansen* neither compels nor suggests the same conclusion here." 673 F. 2d, at 1106.

In *Hansen*, we did not consider whether estoppel will lie against the Government when there is evidence of affirmative misconduct. We found that a Government official's misstatement to an applicant for federal insurance benefits, conceded to be less than affirmative misconduct, did not justify allowing the applicant to collect retroactive benefits from the public treasury. See 450 U. S., at 788–789. Although *Hansen* involved estoppel in the context of a claim against the public treasury, we observed that "[i]n two cases involving denial of citizenship, the Court has declined to decide whether even 'affirmative misconduct' would estop the Government from denying citizenship, for in neither case was 'affirmative misconduct' involved." *Id.*, at 788.

The Court of Appeals thus correctly considered whether, as an initial matter, there was a showing of affirmative misconduct. See *INS* v. *Hibi*, 414 U. S. 5, 8–9 (1973) *(per curiam)*; *Montana* v. *Kennedy*, 366 U. S. 308, 314–315 (1961). *Hibi* and *Montana* indicate, however, that the Court of Appeals erred in determining that the evidence in this case established affirmative misconduct. In *Montana*, a Government official had incorrectly informed the petitioner's mother that she was unable to return to the United States because she was pregnant. The Court found that the official's misstatement "falls far short of misconduct such as might prevent the United States from relying on petitioner's foreign birth" as a basis for denying him citizenship. 366 U. S., at 314–315. In *Hibi*, Congress had exempted aliens serving in the United States Armed Forces from certain requirements normally imposed on persons seeking naturalization. We found that neither the Government's failure to publicize fully the rights accorded by Congress nor its failure to make an

authorized naturalization representative available to aliens serving outside of the United States estopped the Government from rejecting respondent's untimely application for naturalization. See 414 U. S., at 8–9.

Unlike *Montana* and *Hibi*, where the Government's error was clear, the evidence that the Government failed to fulfill its duty in this case is at best questionable. The only indication of negligence is the length of time that the INS took to process respondent's application. Although the time was indeed long, we cannot say in the absence of evidence to the contrary that the delay was unwarranted.[3] Cf. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 415 (1971) (presumption of regularity supports official act of public officer); *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 14–15 (1926) (same). Both the number of the applications received by the INS and the need to investigate their validity may make it difficult for the agency to process an application as promptly as may be desirable.[4] Even if the INS arguably was negligent in not acting more expeditiously, its conduct was not significantly different from that in *Montana* and *Hibi*. Nor is the harm to respondent different. *Montana* and *Hibi* make clear that neither the Government's conduct nor the harm to the respondent is sufficient to estop the Government from enforcing the conditions imposed by Congress for residency in this country.

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[3] The INS has maintained consistently that the 18-month delay was reasonable because of the need to investigate the validity of respondent's marriage. Because the issue of estoppel was raised initially on appeal, the parties were unable to develop any factual record on the issue.

[4] In 1976, the year in which Milligan filed her petition on behalf of respondent, some 206,319 immediate-relative petitions were filed. See INS Ann. Rep. 11 (1976). The Service has noted: "In dealing with these petitions, an inordinate amount of fraud, particularly in relation to claimed marriages, has been uncovered. . . . For a fee, partners are provided and marriages contracted to establish eligibility under the statutes for visa issuance benefits." *Ibid.* We cannot discount the need for careful investigation by the INS that these petitions demand.

The final distinction drawn by the Court of Appeals between this case and *Hansen* is unpersuasive. It is true that *Hansen* relied on a line of cases involving claims against the public treasury. But there was no indication that the Government would be estopped in the absence of the potential burden on the fisc. An increasingly important interest, implicating matters of broad public concern, is involved in cases of this kind. Enforcing the immigration laws, and the conditions for residency in this country, is becoming more difficult. See n. 4, *supra*. Moreover, the INS is the agency primarily charged by Congress to implement the public policy underlying these laws. See, *e. g.*, *INS* v. *Jong Ha Wang*, 450 U. S. 139, 144–145 (1981) *(per curiam); Hibi*, *supra*, at 8. Appropriate deference must be accorded its decisions.

This case does not require us to reach the question we reserved in *Hibi*, whether affirmative misconduct in a particular case would estop the Government from enforcing the immigration laws. Proof only that the Government failed to process promptly an application falls far short of establishing such conduct. Accordingly, we grant the petition for certiorari and reverse the judgment of the Court of Appeals.

It is so ordered.

JUSTICE MARSHALL, dissenting.

I dissent from the Court's summary reversal of the Court of Appeals. The Court concedes that the INS's 18-month delay in processing respondent's application "was indeed long," but concludes that it "cannot say in the absence of evidence to the contrary that the delay was unwarranted." *Ante*, at 18. The Court relies on a presumption of regularity which it says attends the official acts of public officers. *Ibid.* In view of the unusual delay in the processing of respondent's application, I do not agree that this case should be summarily disposed of on the basis of this convenient presumption. If the Court believes, as I do not, that this case raises an issue of sufficient importance to justify the exercise of our certio-

rari jurisdiction, and if the Court also believes that oral argument should be dispensed with, I would at least notify the parties that the Court is considering a summary disposition, so that they may have an opportunity to submit briefs on the merits.

Syllabus

LANDON, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE *v.* PLASENCIA

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

No. 81–129. Argued October 5, 1982—Decided November 15, 1982

Section 235 of the Immigration and Nationality Act of 1952 (Act) permits the Immigration and Naturalization Service (INS) to examine "all aliens" who seek "admission or readmission to" the United States and empowers immigration officers to take evidence concerning the privilege of any persons suspected of being an alien "to enter, reenter, pass through, or reside" in the United States, and to detain for further inquiry "every alien" who does not appear "to be clearly and beyond a doubt entitled to" enter. Under § 236(a), if an alien is so detained, the officer is directed to determine whether the alien "shall be allowed to enter or shall be excluded and deported." Following an exclusion hearing, the INS denied respondent, a permanent resident alien, admission to the United States when she returned from a brief visit to Mexico that involved an attempt to smuggle aliens across the border. Subsequently, respondent filed a petition for a writ of habeas corpus in Federal District Court, seeking release from the exclusion order and contending that she was entitled to have the question of her admissibility litigated in a deportation proceeding where she would be entitled to procedural protections and substantive rights not available in exclusion proceedings. The District Court vacated the INS's decision, instructing it to proceed against respondent, if at all, only in deportation proceedings. The Court of Appeals affirmed.

Held:

1. The INS had statutory authority to proceed in an exclusion hearing to determine whether respondent was attempting to "enter" the United States and whether she was excludable. The language and history of the Act both clearly reflect a congressional intent that, whether or not the alien is a permanent resident, admissibility shall be determined in an exclusion hearing. Nothing in the language or history suggests that respondent's status as a permanent resident entitles her to a suspension of the exclusion hearing or requires the INS to proceed only through a deportation hearing. Pp. 25–28.

2. Contrary to the view of the Court of Appeals, it was not "circular" and "unfair" to allow the INS to litigate the question of "entry" in exclu-

sion proceedings simply because that question also went to the merits of respondent's admissibility. Nor did the use of exclusion proceedings violate either the "scope" or "spirit" of *Rosenberg* v. *Fleuti*, 374 U. S. 449, where the Court held that an "innocent, casual, and brief excursion" by a resident alien outside this country's borders would not subject him to the consequences of an "entry" on his return. Pp. 28–32.

3. Although, under the circumstances, respondent is entitled to due process in her exclusion hearing, the case will be remanded to the Court of Appeals to consider whether she was accorded due process, because the factors relevant to due process analysis have not been adequately presented here to permit an assessment of the sufficiency of the hearing. Pp. 32–37.

637 F. 2d 1286, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. MARSHALL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 37.

Elliott Schulder argued the cause for petitioner. With him on the briefs were *Solicitor General Lee* and *Deputy Solicitor General Geller.*

Gary H. Manulkin argued the cause and filed a brief for respondent.

JUSTICE O'CONNOR delivered the opinion of the Court.

Following an exclusion hearing, the Immigration and Naturalization Service (INS) denied the respondent, a permanent resident alien, admission to the United States when she attempted to return from a brief visit abroad. Reviewing the respondent's subsequent petition for a writ of habeas corpus, the Court of Appeals vacated the decision, holding that the question whether the respondent was attempting to "enter" the United States could be litigated only in a deportation hearing and not in an exclusion hearing. Because we conclude that the INS has statutory authority to proceed in an exclusion hearing, we reverse the judgment below. We remand to allow the Court of Appeals to consider whether the respondent, a permanent resident alien, was accorded due process at the exclusion hearing.

I

Respondent Maria Antonieta Plasencia, a citizen of El Salvador, entered the United States as a permanent resident alien in March 1970. She established a home in Los Angeles with her husband, a United States citizen, and their minor children. On June 27, 1975, she and her husband traveled to Tijuana, Mexico. During their brief stay in Mexico, they met with several Mexican and Salvadoran nationals and made arrangements to assist their illegal entry into the United States. She agreed to transport the aliens to Los Angeles and furnished some of the aliens with alien registration receipt cards that belonged to her children. When she and her husband attempted to cross the international border at 9:27 on the evening of June 29, 1975, an INS officer at the port of entry found six nonresident aliens in the Plasencias' car. The INS detained the respondent for further inquiry pursuant to § 235(b) of the Immigration and Nationality Act of 1952 (Act), 66 Stat. 182, as amended, 8 U. S. C. § 1101 *et seq.*[1] In a notice dated June 30, 1975, the INS charged her under § 212(a)(31) of the Act, 8 U. S. C. § 1182(a)(31), which provides for the exclusion of any alien seeking admission "who at any time shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law,"

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[1] Section 235, as set forth in 8 U. S. C. § 1225, provides in part:

(a) "The inspection . . . of aliens (including alien crewmen) seeking admission or readmission to . . . the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. . . ."

(b) "Every alien . . . who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer."

and gave notice that it would hold an exclusion hearing at 11 a. m. on June 30, 1975.[2]

An Immigration Law Judge conducted the scheduled exclusion hearing. After hearing testimony from the respondent, her husband, and three of the aliens found in the Plasencias' car, the judge found "clear, convincing and unequivocal" evidence that the respondent did "knowingly and for gain encourage, induce, assist, abet, or aid nonresident aliens" to enter or try to enter the United States in violation of law. He also found that the respondent's trip to Mexico was a "meaningful departure" from the United States and that her return to this country was therefore an "entry" within the meaning of § 101(a)(13), 8 U. S. C. § 1101(a)(13).[3]

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[2] The hearing was authorized by § 236(a), which, as set forth in 8 U. S. C. § 1226(a), provides:

"A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. He shall have authority in any case to determine whether an arriving alien who has been detained for further inquiry under section 1225 of this title shall be allowed to enter or shall be excluded and deported. The determination of such special inquiry officer shall be based only on the evidence produced at the inquiry. . . . Proceedings before a special inquiry officer under this section shall be conducted in accordance with this section, the applicable provisions of sections 1225 and 1375(b) of this title, and such regulations as the Attorney General shall prescribe, and shall be the sole and exclusive procedure for determining admissibility of a person to the United States under the provisions of this section. . . . A complete record of the proceedings and of all testimony and evidence produced at such inquiry, shall be kept."

[3] Section 101(a)(13), 8 U. S. C. § 1101(a)(13), defines "entry" as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided*, That no person whose departure from the United

On the basis of these findings, he ordered her "excluded and deported."

After the Board of Immigration Appeals (BIA) dismissed her administrative appeal and denied her motion to reopen the proceeding, the respondent filed a petition for a writ of habeas corpus in the United States District Court, seeking release from the exclusion and deportation order. The Magistrate initially proposed a finding that, on the basis of evidence adduced at the exclusion hearing, "a meaningful departure did not occur . . . and that therefore [the respondent] is entitled to a deportation hearing." After considering the Government's objections, the Magistrate declared that the Government could relitigate the question of "entry" at the deportation hearing. The District Court adopted the Magistrate's final report and recommendation and vacated the decision of the BIA, instructing the INS to proceed against respondent, if at all, only in deportation proceedings.

The Court of Appeals for the Ninth Circuit affirmed. *Plasencia* v. *Sureck*, 637 F. 2d 1286 (1980).

II

The immigration laws create two types of proceedings in which aliens can be denied the hospitality of the United States: deportation hearings and exclusion hearings. See generally *Leng May Ma* v. *Barber*, 357 U. S. 185, 187 (1958). The deportation hearing is the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission. The two types of proceedings differ in a number of ways. See generally *Maldonado-Sandoval* v. *INS*, 518 F. 2d 278, 280, n. 3 (CA9 1975). An exclusion proceeding is usually held at the port of entry, while a deportation hearing is usually held near the residence of the alien within the United

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States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception."

States, see 1A C. Gordon & H. Rosenfield, Immigration Law and Procedure § 5.6c (rev. ed. 1981). The regulations of the Attorney General, issued under the authority of § 242(b), 8 U. S. C. § 1252(b), require in most deportation proceedings that the alien be given seven days' notice of the charges against him, 8 CFR § 242.1(b) (1982), while there is no requirement of advance notice of the charges for an alien subject to exclusion proceedings. Indeed, the BIA has held that, "as long as the applicant is informed of the issues confronting him at some point in the hearing, and he is given a reasonable opportunity to meet them," no further notice is necessary. *In re Salazar*, 17 I. & N. Dec. 167, 169 (1979). Also, if the INS prevails in a deportation proceeding, the alien may appeal directly to the court of appeals, § 106(a), 75 Stat. 651, as amended, 8 U. S. C. § 1105a(a) (1976 ed. and Supp. V), while the alien can challenge an exclusion order only by a petition for a writ of habeas corpus, § 106(b), 75 Stat. 653, 8 U. S. C. § 1105a(b). Finally, the alien who loses his right to reside in the United States in a deportation hearing has a number of substantive rights not available to the alien who is denied admission in an exclusion proceeding: he can, within certain limits, designate the country of deportation, § 243(a), 8 U. S. C. § 1253(a) (1976 ed. and Supp. V); he may be able to depart voluntarily, § 244(e), 8 U. S. C. § 1254(e) (1976 ed., Supp. V), avoiding both the stigma of deportation, § 242(b), 8 U. S. C. § 1252(b) (1976 ed. and Supp. V), and the limitations on his selection of destination, § 243(a), 8 U. S. C. § 1253(a) (1976 ed. and Supp. V);[4] or he

[4] Voluntary departure for an alien who would otherwise be deported also means that he will not be subject to § 212(a)(17), 8 U. S. C. § 1182(a)(17), which, at the time of Plasencia's hearing, required aliens who had once been deported to seek prior approval of the Attorney General before reentering. There was no comparable requirement of prior approval for aliens who had been excluded and sought again to enter more than one year later. § 212(a)(16), 8 U. S. C. § 1182(a)(16). The requirement of prior approval for deported aliens now applies only within five years of de-

can seek suspension of deportation, § 242(e), 8 U. S. C. § 1252(e) (1976 ed., Supp. V).

The respondent contends that she was entitled to have the question of her admissibility litigated in a deportation hearing, where she would be the beneficiary of the procedural protections and the substantive rights outlined above. Our analysis of whether she is entitled to a deportation rather than an exclusion hearing begins with the language of the Act. Section 235(a) of the Act, 8 U. S. C. § 1225(a), permits the INS to examine "*[a]ll* aliens" who seek "admission or *readmission* to" the United States and empowers immigration officers to take evidence concerning the privilege of any person suspected of being an alien "to enter, *reenter*, pass through, or reside" in the United States. (Emphasis added.) Moreover, "every alien" who does not appear "to be clearly and beyond a doubt entitled to land shall be detained" for further inquiry. § 235(b). If an alien is so detained, the Act directs the special inquiry officer to determine whether the arriving alien "shall be allowed to enter or shall be excluded and deported." § 236(a), 8 U. S. C. § 1226(a). The proceeding before that officer, the exclusion hearing, is by statute "the sole and exclusive procedure for determining admissibility of a person to the United States . . . ." *Ibid.*

The Act's legislative history also emphasizes the singular role of exclusion hearings in determining whether an alien should be admitted. The Reports of both the House and Senate state:

> "The special inquiry officer is empowered to determine whether an alien detained for further inquiry shall be excluded and deported or shall be allowed to enter after he has given the alien a hearing. The procedure established in the bill is made the sole and exclusive procedure for determining the admissibility of a person to the

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portation. 95 Stat. 1612, § 212(a)(17), 8 U. S. C. § 1182(a)(17) (1976 ed., Supp. V).

United States." S. Rep. No. 1137, 82d Cong., 2d Sess., 29 (1952); H. R. Rep. No. 1365, 82d Cong., 2d Sess., 56 (1952).

The language and history of the Act thus clearly reflect a congressional intent that, whether or not the alien is a permanent resident, admissibility shall be determined in an exclusion hearing. Nothing in the statutory language or the legislative history suggests that the respondent's status as a permanent resident entitles her to a suspension of the exclusion hearing or requires the INS to proceed only through a deportation hearing. Under the terms of the Act, the INS properly proceeded in an exclusion hearing to determine whether respondent was attempting to "enter" the United States[5] and whether she was excludable.

III

To avoid the impact of the statute, the respondent contends, and the Court of Appeals agreed, that unless she was "entering," she was not subject to exclusion proceedings, and that prior decisions of this Court indicate that she is entitled to have the question of "entry" decided in deportation proceedings.

The parties agree that only "entering" aliens are subject to exclusion. See Brief for Petitioner 19. That view accords with the language of the statute, which describes the exclusion hearing as one to determine whether the applicant "shall be allowed to *enter* or shall be excluded and deported." § 236(a), 8 U. S. C. § 1226(a) (emphasis added). But the respondent's contention that the question of entry can be determined only in deportation proceedings reflects a misconception of our decisions.

In *Rosenberg* v. *Fleuti*, 374 U. S. 449 (1963), we faced the question whether a resident alien's return from an afternoon

[5] Apparently the practice of the INS is to determine this question in exclusion proceedings. See *In re Leal*, 15 I. & N. Dec. 477, 478–479 (BIA 1975); *In re Becerra-Miranda*, 12 I. & N. Dec. 358, 362–363 (BIA 1967).

trip across the border was an "entry" for immigration law purposes. The definition of that term was the same then as it is now: it means "any coming of an alien into the United States . . . except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him . . . ." § 101(a)(13), 8 U. S. C. § 1101(a)(13). We held in *Fleuti* that the "intent exception" refers to an intent to depart in a "manner which can be regarded as meaningfully interruptive of the alien's permanent residence." 374 U.S, at 462. Thus, an "innocent, casual, and brief excursion" by a resident alien outside this country's borders would not subject him to the consequences of an "entry" on his return. *Ibid.* If, however, "the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful." *Ibid.* That distinction both protects resident aliens from "unsuspected risks and unintended consequences of . . . a wholly innocent action," *ibid.*, and gives effect to the language of § 101(a)(13).[6]

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[6] Section 101(a)(13), 8 U. S. C. § 1101(a)(13), which defines "entry," was enacted in 1952 in response to the harsh results visited upon resident aliens by earlier restrictive interpretations of the term. Both the House and Senate Reports contained identical explanatory language:

"Normally an entry occurs when the alien crosses the borders of the United States and makes a physical entry, and the question of whether an entry has been made is susceptible of a precise determination. However, for the purposes of determining the effect of a subsequent entry upon the status of an alien who has previously entered the United States and resided therein, the preciseness of the term 'entry' has not been found to be as apparent. Earlier judicial constructions of the term in the immigration laws, as set forth in *Volpe* v. *Smith* (289 U. S. 422 (1933)), generally held that the

The Government has argued in this case that Plasencia violated the immigration laws by attempting to smuggle aliens for gain. Therefore, her departure was "meaningfully interruptive" of her residence, she was attempting an "entry," and she was subject to exclusion proceedings. And, the Government urges, under § 212(a)(31), 8 U. S. C. § 1182(a)(31), she was excludable because she had attempted to smuggle aliens for gain. Plasencia, on the other hand, argues that it would "violat[e] both the scope and spirit," Brief for Respondent 15, of *Fleuti* to permit the INS to litigate questions of "entry" in exclusion proceedings.

The Court of Appeals viewed *Fleuti* as a deportation case rather than an exclusion case, 637 F. 2d, at 1288, and therefore not relevant in deciding whether the question of "entry" could be determined in exclusion proceedings. For guidance on that decision, the Court of Appeals turned to *Kwong Hai Chew* v. *Colding*, 344 U. S. 590 (1953), which it read to hold that a resident alien returning from a brief trip "could not be

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term 'entry' included any coming of an alien from a foreign country to the United States whether such coming be the first or a subsequent one. More recently, the courts have departed from the rigidity of that rule and have recognized that an alien does not make an entry upon his return to the United States from a foreign country where he had no intent to leave the United States (*Di Pasquale* v. *Karnuth*, 158 F. 2d 878 (C. C. A. 2d 1947)), or did not leave the country voluntarily (*Delgadillo* v. *Carmichael*, 332 U. S. 388 (1947)). The bill defines the term 'entry' as precisely as practicable, giving due recognition to the judicial precedents. Thus any coming of an alien from a foreign port or place or an outlying possession into the United States is to be considered an entry, whether voluntary or otherwise, unless the Attorney General is satisfied that the departure of the alien, other than a deportee, from this country was unintentional or was not voluntary." S. Rep. No. 1137, 82d Cong., 2d Sess., 4 (1952); H. R. Rep. No. 1365, 82d Cong., 2d Sess., 32 (1952).

In *Di Pasquale*, the court refused to allow a deportation that depended upon an "entry" that occurred after an overnight train on which an alien was a passenger passed through Canada on its way from Buffalo to Detroit. In *Delgadillo*, the Court refused to define as an "entry" the return of an alien taken to Cuba to recuperate after the merchant ship on which he sailed was torpedoed in the Caribbean during World War II.

excluded without the procedural due process to which he would have been entitled had he never left the country"—*i. e.*, in this case, a deportation proceeding. 637 F. 2d, at 1288. The court concluded that Plasencia was entitled to litigate her admissibility in deportation proceedings. It would be "circular" and "unfair," thought the court, to allow the INS to litigate the question of "entry" in exclusion proceedings when that question also went to the merits of the respondent's admissibility. *Id.*, at 1288–1289.

We disagree. The reasoning of *Chew* was only that a resident alien returning from a brief trip has a right to due process just as would a continuously present resident alien. It does not create a right to identical treatment for these two differently situated groups of aliens.[7] As the Ninth Circuit seemed to recognize, if the respondent here was making an "entry," she would be subject to exclusion proceedings. It is no more "circular" to allow the immigration judge in the exclusion proceeding to determine whether the alien is making an entry than it is for any court to decide that it has jurisdiction when the facts relevant to the determination of jurisdiction are also relevant to the merits. Thus, in *United States* v. *Sing Tuck*, 194 U. S. 161 (1904), this Court held that an immigration inspector could make a determination whether an applicant for admission was an alien or a citizen, although only aliens were subject to exclusion. Cf. *Land* v. *Dollar*, 330 U. S. 731, 739 (1947) (district court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits). Nor is it in any way "unfair" to decide the question of entry in exclusion proceedings as long as those proceedings themselves are fair. Finally, the use of exclusion proceed-

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[7] Indeed, we expressly declined to reach the question whether Chew himself was entitled to a deportation proceeding. We stated: "From a constitutional point of view, he is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien, and we do not now reach the question whether he is to be so treated." 344 U. S., at 600.

ings violates neither the "scope" nor the "spirit" of *Fleuti*. As the Court of Appeals held, that case only defined "entry" and did not designate the forum for deciding questions of entry. The statutory scheme is clear: Congress intended that the determinations of both "entry" and the existence of grounds for exclusion could be made at an exclusion hearing.

IV

Our determination that the respondent is not entitled to a deportation proceeding does not, however, resolve this case. In challenging her exclusion in the District Court, Plasencia argued not only that she was entitled to a deportation proceeding but also that she was denied due process in her exclusion hearing. See App. 5, ¶9; Record 19, 20, 23. We agree with Plasencia that under the circumstances of this case, she can invoke the Due Process Clause on returning to this country, although we do not decide the contours of the process that is due or whether the process accorded Plasencia was insufficient.

This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative. See, *e. g.*, *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 542 (1950); *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659–660 (1892). Our recent decisions confirm that view. See, *e. g.*, *Fiallo* v. *Bell*, 430 U. S. 787, 792 (1977); *Kleindienst* v. *Mandel*, 408 U. S. 753 (1972). As we explained in *Johnson* v. *Eisentrager*, 339 U. S. 763, 770 (1950), however, once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly. Our cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing when threatened with deportation, see, *e. g.*, *United States ex rel. Tisi* v. *Tod*, 264 U. S. 131, 133, 134 (1924); *Low Wah Suey* v. *Backus*, 225 U. S. 460,

468 (1912) (hearing may be conclusive "when fairly conducted"); see also *Kwong Hai Chew*, 344 U. S., at 598, n. 8, and, although we have only rarely held that the procedures provided by the executive were inadequate, we developed the rule that a continuously present permanent resident alien has a right to due process in such a situation. See, *e. g.*, *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 106 (1927); *The Japanese Immigrant Case*, 189 U. S. 86, 100–101 (1903); see also *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49–50 (1950); *Bridges* v. *Wixon*, 326 U. S. 135, 153–154 (1945).

The question of the procedures due a returning resident alien arose in *Kwong Hai Chew* v. *Colding*, *supra*. There, the regulations permitted the exclusion of an arriving alien without a hearing. We interpreted those regulations not to apply to Chew, a permanent resident alien who was returning from a 5-month voyage abroad as a crewman on an American merchant ship. We reasoned that, "[f]or purposes of his constitutional right to due process, we assimilate petitioner's status to that of an alien continuously residing and physically present in the United States." 344 U. S., at 596. Then, to avoid constitutional problems, we construed the regulation as inapplicable. Although the holding was one of regulatory interpretation, the rationale was one of constitutional law. Any doubts that *Chew* recognized constitutional rights in the resident alien returning from a brief trip abroad were dispelled by *Rosenberg* v. *Fleuti*, where we described *Chew* as holding "that the returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him." 374 U. S., at 460.

If the permanent resident alien's absence is extended, of course, he may lose his entitlement to "assimilat[ion of his] status," *Kwong Hai Chew* v. *Colding*, *supra*, at 596, to that of an alien continuously residing and physically present in the United States. In *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 (1953), this Court rejected the argu-

ment of an alien who had left the country for some 20 months that he was entitled to due process in assessing his right to admission on his return. We did not suggest that no returning resident alien has a right to due process, for we explicitly reaffirmed *Chew*. We need not now decide the scope of *Mezei;* it does not govern this case, for Plasencia was absent from the country only a few days, and the United States has conceded that she has a right to due process, see Tr. of Oral Arg. 6, 9, 14; Brief for Petitioner 9–10, 20–21.

The constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances. See, *e. g.*, *Lassiter* v. *Department of Social Services*, 452 U. S. 18, 24–25 (1981); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 12 (1979); *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). In evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures. *Mathews* v. *Eldridge*, 424 U. S. 319, 334–335 (1976). Plasencia's interest here is, without question, a weighty one. She stands to lose the right "to stay and live and work in this land of freedom," *Bridges* v. *Wixon*, *supra*, at 154. Further, she may lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual. See, *e. g.*, *Moore* v. *City of East Cleveland*, 431 U. S. 494, 499, 503–504 (1977) (plurality opinion); *Stanley* v. *Illinois*, 405 U. S. 645, 651 (1972). The Government's interest in efficient administration of the immigration laws at the border also is weighty. Further, it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature. See, *e. g.*, *Fiallo*, *supra*, at 792–793; *Knauff*, *supra*, at 542–543; *The Japanese Immigrant Case*, *supra*, at 97. The role of the judiciary

is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy. Our previous discussion has shown that Congress did not intend to require the use of deportation procedures in cases such as this one. Thus, it would be improper simply to impose deportation procedures here because the reviewing court may find them preferable. Instead, the courts must evaluate the particular circumstances and determine what procedures would satisfy the minimum requirements of due process on the reentry of a permanent resident alien.

Plasencia questions three aspects of the procedures that the Government employed in depriving her of these interests. First, she contends that the Immigration Law Judge placed the burden of proof upon her. In a later proceeding in *Chew*, the Court of Appeals for the District of Columbia Circuit held, without mention of the Due Process Clause, that, under the law of the case, Chew was entitled to a hearing at which the INS was the moving party and bore the burden of proof. *Kwong Hai Chew* v. *Rogers*, 103 U. S. App. D. C. 228, 257 F. 2d 606 (1958). The BIA has accepted that decision, and although the Act provides that the burden of proof is on the alien in an exclusion proceeding, § 291, 8 U. S. C. § 1361 (1976 ed., Supp. V), the BIA has followed the practice of placing the burden on the Government when the alien is a permanent resident alien. See, *e. g.*, *In re Salazar*, 17 I. & N. Dec., at 169; *In re Kane*, 15 I. & N. Dec. 258, 264 (BIA 1975); *In re Becerra-Miranda*, 12 I. & N. Dec. 358, 363–364, 366 (BIA 1967). There is no explicit statement of the placement of the burden of proof in the Attorney General's regulations or in the Immigration Law Judge's opinion in this case and no finding on the issue below.

Second, Plasencia contends that the notice provided her was inadequate. She apparently had less than 11 hours' notice of the charges and the hearing. The regulations do not

require any advance notice of the charges against the alien in an exclusion hearing, and the BIA has held that it is sufficient that the alien have notice of the charges at the hearing, *In re Salazar*, *supra*, at 169. The United States has argued to us that Plasencia could have sought a continuance. It concedes, however, that there is no explicit statutory or regulatory authorization for a continuance.

Finally, Plasencia contends that she was allowed to waive her right to representation, § 292, 8 U. S. C. § 1362,[8] without a full understanding of the right or of the consequences of waiving it. Through an interpreter, the Immigration Law Judge informed her at the outset of the hearing, as required by the regulations, of her right to be represented. He did not tell her of the availability of free legal counsel, but at the time of the hearing, there was no administrative requirement that he do so. 8 CFR § 236.2(a) (1975). The Attorney General has since revised the regulations to require that, when qualified free legal services are available, the immigration law judge must inform the alien of their existence and ask whether representation is desired. 44 Fed. Reg. 4654 (1979) (codified at 8 CFR § 236.2(a) (1982)). As the United States concedes, the hearing would not comply with the current regulations. See Tr. of Oral Arg. 11.

If the exclusion hearing is to ensure fairness, it must provide Plasencia an opportunity to present her case effectively, though at the same time it cannot impose an undue burden on the Government. It would not, however, be appropriate for us to decide now whether the new regulation on the right to notice of free legal services is of constitutional magnitude or whether the remaining procedures provided comport with the Due Process Clause. Before this Court, the parties have devoted their attention to the entitlement to a deportation hearing rather than to the sufficiency of the procedures in the

[8] The statute provides a right to representation without expense to the Government. § 292, 8 U. S. C. § 1362. Plasencia has not suggested that she is entitled to free counsel.

exclusion hearing.[9] Whether the several hours' notice gave Plasencia a realistic opportunity to prepare her case for effective presentation in the circumstances of an exclusion hearing without counsel is a question we are not now in a position to answer. Nor has the Government explained the burdens that it might face in providing more elaborate procedures. Thus, although we recognize the gravity of Plasencia's interest, the other factors relevant to due process analysis—the risk of erroneous deprivation, the efficacy of additional procedural safeguards, and the Government's interest in providing no further procedures—have not been adequately presented to permit us to assess the sufficiency of the hearing. We remand to the Court of Appeals to allow the parties to explore whether Plasencia was accorded due process under all of the circumstances.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE MARSHALL, concurring in part and dissenting in part.

I agree that the Immigration and Nationality Act permitted the INS to proceed against respondent in an exclusion

[9] Thus, the question of Plasencia's entitlement to due process has been briefed and argued, is properly before us, and is sufficiently developed that we are prepared to decide it. Precisely what procedures are due, on the other hand, has not been adequately developed by the briefs or argument. The dissent undertakes to decide these questions, but, to do so, must rely heavily on an argument not raised by Plasencia: to wit, that she was not informed at the hearing that the alleged agreement to receive compensation and the meaningfulness of her departure were critical issues. Also, the dissent fails to discuss the interests that the Government may have in employing the procedures that it did. The omission of arguments raised by the parties is quite understandable, for neither Plasencia nor the Government has yet discussed what procedures are due. Unlike the dissent, we would allow the parties to explore their respective interests and arguments in the Court of Appeals.

proceeding. The question then remains whether the exclusion proceeding held in this case satisfied the minimum requirements of the Due Process Clause. While I agree that the Court need not decide the precise contours of the process that would be constitutionally sufficient, I would not hesitate to decide that the process accorded Plasencia was insufficient.[1]

The Court has already set out the standards to be applied in resolving the question. Therefore, rather than just remand, I would first hold that respondent was denied due process because she was not given adequate and timely notice of the charges against her and of her right to retain counsel and to present a defense.[2]

While the type of hearing required by due process depends upon a balancing of the competing interests at stake, due process requires "at a minimum . . . that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). See, *e. g.*, *Bell* v. *Burson*, 402 U. S. 535, 542 (1971). Permanent resident aliens who are detained upon reentry into this country clearly are entitled to adequate notice in advance of an exclusion proceeding.

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[1] Because the due process question was squarely addressed in the briefs and at oral argument, there is no doubt that the Court may now decide the issue. See *Vance* v. *Terrazas*, 444 U. S. 252, 258–259, n. 5 (1980), and cases cited therein. In fact, the Court has reached the threshold of deciding the constitutional question. It has identified the deficiencies in the exclusion hearing afforded Plasencia, and it has set forth the standards that it would apply to determine whether the procedures, as described, denied Plasencia due process. I do not see any interest to be served in declining to take the final step of applying these due process standards to the record before us, as the Court of Appeals would otherwise be required to do on remand.

[2] Because Plasencia did not receive constitutionally sufficient notice, I find it unnecessary to address the other constitutional deficiencies she asserts.

To satisfy due process, notice must "clarify what the charges are" in a manner adequate to apprise the individual of the basis for the government's proposed action. *Wolff* v. *McDonnell*, 418 U. S. 539, 564 (1974). Notice must be provided sufficiently in advance of the hearing to "give the charged party a chance to marshal the facts in his defense." *Id.*, at 563, 564 (prisoners charged with disciplinary violations must be given "advance written notice of the claimed violation"). See, *e. g.*, *Goldberg* v. *Kelly*, 397 U. S. 254, 267–268 (1970) (welfare recipients must be given "timely and adequate notice detailing the reasons for a proposed termination"); *In re Gault*, 387 U. S. 1, 33 (1967) (juvenile must be given notice of "the specific charge or factual allegations" to be considered at delinquency hearing "at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation").

Respondent was not given notice sufficient to afford her a reasonable opportunity to demonstrate that she was not excludable. The Immigration Judge's decision to exclude respondent was handed down less than 24 hours after she was detained at the border on the night of June 29, 1975. By notice in English dated June 30, 1975, she was informed that a hearing would be conducted at 11 o'clock on the morning of that same day, and that the Government would seek to exclude her on the ground that she had "wilfully and knowingly aided and abetted the entry of illegal aliens into the United States in violation of the law and for gain."[3] It was not until the commencement of the hearing that she was given notice in her native language of the charges against her and of her right to retain counsel and to present evidence.

The charges against Plasencia were also inadequately explained at the hearing itself.[4] The Immigration Judge did not explain to her that she would be entitled to remain in the

[3] It is unclear from the record whether respondent received the notice prior to the commencement of the hearing.

[4] The exclusion hearing was conducted with the aid of an interpreter.

country if she could demonstrate that she had not agreed to receive compensation from the aliens whom she had driven across the border.[5] Nor did the judge inform respondent that the meaningfulness of her departure was an issue at the hearing.

These procedures deprived Plasencia of a fair opportunity to show that she was not excludable under the standards set forth in the Immigration and Nationality Act. Because Plasencia was not given adequate notice of the standards for exclusion or of her right to retain counsel and present a defense, she had neither time nor opportunity to prepare a response to

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[5] The principal issue of fact at the hearing was whether Plasencia had transported the six aliens "for gain." Plasencia, who was called as the Government's first witness, denied repeatedly that any of the aliens had agreed to pay her for driving them into this country. The Government's trial attorney then called three of the six aliens as witnesses. One witness, Jose Alfredo Santillana, stated unequivocally that he was picked up by the Plasencias while hitchhiking and that, without making any mention of money, they agreed to drive him to Los Angeles. A second witness, Luis Polio-Medina, testified that there had not been any talk with Plasencia at any time about payment for transportation to Los Angeles, though there "was kind of an understanding" that "some people in Los Angeles" whom he "was going to look for" would pay her a "normal amount" on his behalf. Only the third witness, Eugenia Linares-Moreno, testified that she had an agreement to pay Plasencia for transportation into the country.

Given the weakness of the Government's evidence, Plasencia may well have been prejudiced by her inability to prepare for the hearing and to obtain counsel. The three aliens who did not testify at the hearing might have supported Plasencia's claim that she did not expect to receive financial compensation. The Immigration Judge's finding that Plasencia transported the aliens for gain must have depended on his acceptance of the testimony given by Linares-Moreno and Polio-Medina. The motives of these Government witnesses in testifying against Plasencia were open to question, since they were subject to criminal prosecution in this country. The credibility of Linares-Moreno, the Government's key witness, might also have been challenged on the grounds that she had contradicted herself on at least one key question during the course of her examination and that she had concededly lied to an INS officer by giving a false name. Vigorous cross-examination by a competent attorney might well have led the Immigration Judge to resolve the disputed issue of fact in Plasencia's favor.

the Government's case. The procedures employed here virtually assured that the Government attorney would present his case without factual or legal opposition.

When a permanent resident alien's substantial interest in remaining in this country is at stake, the Due Process Clause forbids the Government to stack the deck in this fashion. Only a compelling need for truly summary action could justify this one-sided proceeding. In fact, the Government's haste in proceeding against Plasencia could be explained only by its desire to avoid the minimal administrative and financial burden of providing her adequate notice and an opportunity to prepare for the hearing. Although the various other Government interests identified by the Court may be served by the exclusion of those who fail to meet the eligibility requirements set out in the Immigration and Nationality Act, they are not served by procedures that deny a permanent resident alien a fair opportunity to demonstrate that she meets those eligibility requirements.

I would therefore hold that respondent was denied due process.

WYRICK, WARDEN, MISSOURI STATE PENITENTIARY *v.* FIELDS

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

No. 82–158. Decided November 29, 1982

Respondent, a soldier stationed in Missouri, after being arrested on a charge of rape and after consulting with private counsel and with an attorney provided him by the Army, requested a polygraph examination. Immediately prior to the examination, which was conducted by an agent of the Army's Criminal Investigation Division (CID), respondent signed a consent document that included information of his rights under *Miranda* v. *Arizona*, 384 U. S. 436; the CID agent read to respondent a detailed statement that also explained his rights, including the right to stop answering questions at any time or to speak to a lawyer before answering further, even if he signed a waiver certificate; and respondent, in response to a question, stated that he did not want a lawyer present. At the conclusion of the polygraph examination, the CID agent told respondent that there had been some deceit, and asked him if he could explain why his answers were bothering him; respondent then admitted having intercourse with the victim, but said that it had been consensual; the agent asked whether respondent wished to discuss the matter further with another CID agent and with the local Police Chief; and respondent said that he did. The Police Chief read respondent his *Miranda* warnings once again before questioning him, and respondent repeated that his sexual contact with the victim had been consensual. Respondent was convicted after trial in a Missouri state court, which denied his motion to suppress the testimony of the two CID agents and the Police Chief as to his "confessions" to voluntary intercourse, holding that he had waived his rights. The Missouri Court of Appeals affirmed, and the Federal District Court denied respondent's subsequent petition for habeas corpus relief. However, the Federal Court of Appeals reversed, holding that although respondent had waived his Fifth Amendment right to have counsel present while the polygraph examination itself was being conducted, the State failed to prove that he knowingly and intelligently waived his right to the presence of counsel at the examining CID agent's "post-test interrogation." The court suggested that there would have been no violation if the agent merely had paused at the end of the polygraph examination to remind respondent of his rights.

Held: The Court of Appeals misconstrued *Edwards* v. *Arizona*, 451 U. S. 477, which establishes that where an accused, after invoking his right to counsel, initiates subsequent dialogue with the authorities, the question whether there was a valid waiver of the right to counsel as to any interrogation that occurs during such dialogue is controlled by the "totality of the circumstances," including the fact that the accused initiated the dialogue. Here, respondent initiated not just a meeting with the authorities, but interrogation, by requesting the polygraph examination. Respondent validly waived his right to have counsel present at "post-test" questioning, unless the circumstances changed so seriously that his answers no longer were voluntary, or unless he no longer was waiving his rights knowingly and voluntarily. To require new warnings merely because the examination had been discontinued and respondent was asked if he could explain the test's unfavorable results, would be unreasonable. The questions put to respondent after the examination would not have caused him to forget the rights of which he had been advised and which he had understood moments before.

Certiorari granted; 682 F. 2d 154, reversed and remanded.

PER CURIAM.

In this case, the United States Court of Appeals for the Eighth Circuit, over a dissent by Judge Ross, directed that respondent Edward Fields' petition for a writ of habeas corpus be granted; it did so on the ground that Fields had been convicted with evidence obtained in violation of his Fifth Amendment right to have counsel present at an interrogation. 682 F. 2d 154 (1982). We have concluded that the Court of Appeals' majority misconstrued this Court's recent decision in *Edwards* v. *Arizona*, 451 U. S. 477 (1981), and imposed a new and unjustified limit on police questioning of a suspect who voluntarily, knowingly, and intelligently waives his right to have counsel present.

I

Respondent, a soldier then stationed at Fort Leonard Wood, Mo., was charged with raping an 81-year-old woman on September 21, 1974. After his arrest on September 25, Fields was released on his own recognizance. He retained

private defense counsel. After discussing the matter with his counsel and with a military attorney provided him by the Army, Fields requested a polygraph examination. This request was granted and the examination was conducted on December 4 by an agent of the Army's Criminal Investigation Division (CID) at the fort.

Prior to undergoing the polygraph examination, Fields was given a written consent document, which he signed, informing him of his rights, as required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and of his rights under the Uniform Code of Military Justice and the Eighth Amendment. In addition, the CID agent read to Fields the following detailed statement:

> "Before I ask you any questions, you must understand your rights. You do not have to answer my questions or say anything. Anything you say or do can be used against you in a criminal trial. You have a right to talk to a lawyer before questioning or have a lawyer present with you during the questioning. This lawyer can be a civilian lawyer of your own choice, or a military lawyer, detailed for you at no expense to you. Also, you may ask for a military lawyer of your choice by name and he will be detailed for you if superiors determine he's reasonably available. *If you are now going to discuss the offense under investigation, which is rape, with or without a lawyer present, you have a right to stop answering questions at any time or speak to a lawyer before answering further, even if you sign a waiver certificate.* Do you want a lawyer at this time?" See *State* v. *Fields*, 538 S. W. 2d 348, 350, n. 1 (Mo. App. 1976) (emphasis added).

Fields answered: "No."

At the conclusion of the polygraph examination, which took less than two hours, the CID agent told Fields that there had been some deceit, and asked him if he could explain why his answers were bothering him. Fields then admitted having

intercourse with the victim on September 21, but said that she had instigated and consented to it. The agent asked Fields if he wished to discuss the matter further with another CID agent and with the Waynesville, Mo., Chief of Police. Fields said that he did. Then, in his turn, the Police Chief read Fields his *Miranda* warnings once again before questioning him. Fields repeated that he had had sexual contact with the victim, but that it had been consensual.

Respondent was tried before a jury in the Circuit Court, Pulaski County, Mo. He sought to suppress the testimony of the two CID agents and the Police Chief regarding his "confessions" to voluntary intercourse. The trial court denied the motion, ruling that Fields had waived his rights. The testimony was admitted. Fields was convicted, and was sentenced to 25 years in prison. The Missouri Court of Appeals affirmed the judgment on the ground that Fields "had been repeatedly and amply advised of his rights and . . . voluntarily, knowingly and intelligently waived his rights." 538 S. W. 2d, at 350.

Eventually, Fields sought a writ of habeas corpus in the United States District Court for the Eastern District of Missouri. The District Court, agreeing with the Missouri Court of Appeals that Fields had voluntarily, knowingly, and intelligently waived his right to counsel, denied respondent's petition. On appeal, however, the Eighth Circuit reversed and remanded the case with directions to order the State either to release Fields or to afford him a new trial. 682 F. 2d, at 162.

II

The Court of Appeals found that the police conduct in question contravened the "clear import" of this Court's decision in *Edwards* v. *Arizona:* "a defendant's right to have counsel present at custodial interrogations must be zealously guarded." 682 F. 2d, at 158. In *Edwards*, this Court had held that once a suspect invokes his right to counsel, he may not be subjected to further interrogation until counsel is pro-

vided unless the suspect himself initiates dialogue with the authorities. 451 U. S., at 484–487. The Eighth Circuit recognized that what it called the "per se rule" of *Edwards* "does not resolve the issue present here." 682 F. 2d, at 158. Fields and his counsel had agreed that Fields should take the polygraph examination, and Fields appeared voluntarily and stated that he did not want counsel present during the interrogation. Thus, the Court of Appeals conceded that "Fields thereby 'initiated' further dialogue with the authorities after his right to counsel had been invoked." *Ibid.*

When the suspect has initiated the dialogue, *Edwards* makes clear that the right to have a lawyer present can be waived:

> "If, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers will say or do something that clearly would be 'interrogation.' In that event, the question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." 451 U. S., at 486, n. 9.

Citing this language, the Eighth Circuit acknowledged—as it had to—that "[t]here is no question that Fields waived his right to have counsel present while the [polygraph] examination itself was being conducted." 682 F. 2d, at 160. Yet that court found that the State had failed to satisfy its burden of proving that "Fields knowingly and intelligently waived his right to have counsel present at the post-test interrogation." *Ibid.* The court suggested that had the CID agent merely "paus[ed] to remind the defendant" of his rights, thus

providing "*meaningfully timed Miranda* warnings" (emphasis in original), there would have been no violation. *Ibid.*

III

In reaching this result, the Court of Appeals did not examine the "totality of the circumstances," as *Edwards* requires. Fields did not merely initiate a "meeting." By requesting a polygraph examination, he initiated interrogation. That is, Fields waived not only his right to be free of contact with the authorities in the absence of an attorney, but also his right to be free of interrogation about the crime of which he was suspected. Fields validly waived his right to have counsel present at "post-test" questioning, unless the circumstances changed so seriously that his answers no longer were voluntary, or unless he no longer was making a "knowing and intelligent relinquishment or abandonment" of his rights. 451 U. S., at 482.

The Court of Appeals relied on two facts indicating the need for a new set of warnings: the polygraph examination had been discontinued, and Fields was asked if he could explain the test's unfavorable results. To require new warnings because of these two facts is unreasonable. Disconnecting the polygraph equipment effectuated no significant change in the character of the interrogation. The CID agent could have informed Fields during the examination that his answers indicated deceit; asking Fields, after the equipment was disconnected, why the answers were bothering him was not any more coercive. The Court of Appeals stated that there was no indication that Fields or his lawyer anticipated that Fields would be asked questions after the examination. But it would have been unreasonable for Fields and his attorneys to assume that Fields would not be informed of the polygraph readings and asked to explain any unfavorable result. Moreover, Fields had been informed that he could stop the questioning at any time, and could request at any time that

his lawyer join him. Merely disconnecting the polygraph equipment could not remove this knowledge from Fields' mind.*

The only plausible explanation for the court's holding is that, encouraged by what it regarded as a *per se* rule established in *Edwards*, it fashioned another rule of its own: that, notwithstanding a voluntary, knowing, and intelligent waiver of the right to have counsel present at a polygraph examination, and notwithstanding clear evidence that the suspect understood that right and was aware of his power to stop questioning at any time or to speak to an attorney at any time, the police again must advise the suspect of his rights before questioning him at the same interrogation about the results of the polygraph. The court indicated that this rule was needed because it thought that the use of polygraph "results" in questioning, although it does not necessarily render a response involuntary, is inherently coercive. But Courts of Appeals, including a different panel of the Eighth Circuit itself, and state courts, have rejected such a rule. See, *e. g.*, *United States* v. *Little Bear*, 583 F. 2d 411, 414 (CA8 1978); *Keiper* v. *Cupp*, 509 F. 2d 238, 241–242 (CA9 1975); *People* v. *Barreto*, 256 Cal. App. 2d 392, 64 Cal. Rptr. 211 (1967); *State* v. *Henry*, 352 So. 2d 643 (La. 1977). Cf. *Henry* v. *Dees*, 658 F. 2d 406 (CA5 1981) (waiver not voluntary, knowing, and intelligent in the total circumstances of the case, including mental retardation of suspect). The Eighth Circuit's rule certainly finds no support in *Edwards*, which emphasizes that the totality of the circumstances, including the fact that the suspect initiated the questioning, is controlling. Nor is the

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*The dissent suggests that, because the results of polygraph examinations are inadmissible in Missouri, Fields might reasonably have expected that he would not be subjected "to additional questioning that can produce admissible evidence." *Post*, at 51, n. 2. Although the results of the polygraph examination might not have been admissible evidence, the statements Fields made in response to questioning during the course of the polygraph examination surely would have been.

rule logical; the questions put to Fields after the examination would not have caused him to forget the rights of which he had been advised and which he had understood moments before. The rule is simply an unjustifiable restriction on reasonable police questioning.

IV

According to the dissent, a substantial question as to the admissibility of Fields' statements may be raised under the Sixth Amendment. *Post*, at 52–55. The Sixth Amendment issues raised by the dissent, however, are not before us. The Court of Appeals rested its judgment exclusively on the Fifth Amendment "right to have counsel present during a custodial interrogation" and on its interpretation of this Court's decision in *Edwards*. 682 F. 2d, at 158. That interpretation was flawed and the judgment of the Court of Appeals must be reversed. We express no view as to whether any constitutional safeguards not mentioned by the Court of Appeals bear on this case.

Because the Court of Appeals misapplied *Edwards* and created an unjustified *per se* rule, the petition for a writ of certiorari is granted and that court's judgment is reversed and the case is remanded.

It is so ordered.

JUSTICE STEVENS, concurring.

There is much force to what JUSTICE MARSHALL has written in dissent. I share his concern about the Court's practice of deciding cases summarily, partly because there is a special risk of error in summary dispositions and partly because the practice represents an unwise use of the Court's scarce resources. I do not, however, agree with JUSTICE MARSHALL's suggestion that we should invite the parties to submit briefs on the merits before a case is summarily decided. I fear that the institution of such a practice would tend to regularize and expand the number of our summary dispositions.

In this case I believe the correct procedure for the Court to have followed would have been simply to deny the petition for a writ of certiorari. No conflict has yet developed on the precise question presented and, as JUSTICE MARSHALL demonstrates, the Court of Appeals' conclusion is not without reasoned support. The Court, however, has granted the petition. Although I voted against that action, I am now persuaded that the Court's resolution of the merits is correct and therefore join its disposition.

JUSTICE MARSHALL, dissenting.

A summary reversal is an exceptional disposition. It should be reserved for situations in which the applicable law is settled and stable, the facts are not disputed, and the decision below is clearly in error.[1] Because I do not believe that this is such a case, I dissent.

I

I do not agree that respondent's consent to the polygraph examination necessarily constituted a waiver of his Fifth Amendment rights with respect to the postexamination interrogation. In my view, this case is not controlled by the footnote in *Edwards* v. *Arizona*, 451 U. S. 477, 486, n. 9 (1981), on which the Court relies. That footnote dealt with the hypothetical case, not before the Court in *Edwards*, of a suspect who initiates a meeting with the police. The Court indicated that, even if the police said or did something in the meeting that constituted interrogation, incriminating statements thereby elicited would be admissible if a knowing and intelligent waiver of the suspect's Fifth Amendment rights could be inferred in light of "*the totality of the circumstances*, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." *Ibid.* (Emphasis supplied.)

[1] See generally Brown, Foreword: Process of Law, 72 Harv. L. Rev. 77 (1958).

In this case, "the totality of the circumstances" includes the undisputed facts that respondent agreed only to submit to a polygraph examination, and that he was never told he would be subjected to a postexamination interrogation. Moreover, an agreement to submit to a polygraph examination differs in an important respect from the initiation of an ordinary conversation with the authorities. When a suspect commences a conversation with a policeman, he has reason to expect that, as in any conversation, there will be a give-and-take extending beyond the subject matter of his original remarks. It may therefore be appropriate to conclude that the suspect's waiver of his Fifth Amendment rights extends to the entire conversation. By contrast, a polygraph examination is a discrete test. It has a readily identifiable beginning and end. An individual who submits to such an examination does not necessarily have any reason whatsoever to expect that he will be subjected to a postexamination interrogation.[2] While in some cases the prosecution may be able to prove that a suspect knew there would be questioning after the test, here there is "no evidence that Fields or his lawyer anticipated that the CID officer would attempt to elicit incriminating statements from Fields after the examination was run." 682 F. 2d 154, 160 (CA8 1982).

In any event, I do not believe that this substantial constitutional question should be disposed of summarily. I recog-

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[2] Certainly no one would argue that a suspect who consented to a blood test, a lineup, or fingerprinting thereby consented to be questioned about the results of those procedures.

In this case, it is particularly inappropriate to assume that Fields must have realized that the CID agent would conduct a postexamination interrogation. The results of polygraph examinations are inadmissible in Missouri. See *State* v. *Biddle*, 599 S. W. 2d 182, 191 (Mo. 1980) (en banc); *State* v. *Weindorf*, 361 S. W. 2d 806, 811 (Mo. 1962). When a defendant, after consultation with his attorney, agrees to submit to an examination the results of which are inadmissible, the authorities have no justification for inferring that the defendant has also agreed to submit to additional questioning that can produce admissible evidence.

nize, of course, that this Court's expanding docket has increased the pressure to accelerate the disposition process. I cannot agree, however, that summary reversal is proper in a case that involves a significant issue not settled by our prior decisions. If the Court concludes that there are "special and important reasons," this Court's Rule 17.1, for granting certiorari but also concludes that this case should not be set for oral argument, the Court should at least give the parties notice that it is considering a summary disposition, so that they may have an opportunity to submit briefs on the *merits*. See Brown, Foreword: Process of Law, 72 Harv. L. Rev. 77, 94–95 (1958).

II

Today's decision holds only that the postexamination interrogation did not violate respondent's Fifth Amendment privilege against self-incrimination. The Court's ruling does not preclude the Court of Appeals from considering on remand whether the interrogation nevertheless violated his Sixth Amendment right to counsel.[3] See *Massiah* v. *United*

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[3] I do not share the majority's certainty that the Court of Appeals relied "exclusively on the Fifth Amendment." *Ante*, at 49. Although the opinion below does discuss *Edwards* v. *Arizona*, 451 U. S. 477 (1981), at considerable length, the court phrased its holding in terms of the "right to counsel" without referring specifically to the Fifth Amendment or the Sixth Amendment. See 682 F. 2d 154, 157 (CA8 1982) ("we conclude that Fields did not knowingly and intelligently waive his right to have counsel present at the interrogation"); *id.*, at 161 ("The government has simply introduced no evidence from which we can conclude that when Fields was confronted with the accusatory statement that the 'lie-detector' showed he was lying, he waived his right to the protection of counsel in this coercive situation"). See also *id.*, at 161, n. 12 (relying on *Brewer* v. *Williams*, 430 U. S. 387 (1977), a Sixth Amendment case). It is noteworthy that the Magistrate, whose report the District Court adopted, pointed to the Sixth Amendment problem by observing that it is "a somewhat empty gesture to appoint an attorney for an accused . . . and then pursue [an] interrogation . . . without his attorney." In addition, the petition for certiorari asserts that the decision below "expands the rights guaranteed an accused during

States, 377 U. S. 201 (1964). Because "the policies underlying the two constitutional protections are quite distinct," *Rhode Island* v. *Innis*, 446 U. S. 291, 300, n. 4 (1980), a suspect may waive his Fifth Amendment right to remain silent without waiving his Sixth Amendment right to counsel.

Where only the Fifth Amendment applies, the ultimate question is whether the conduct alleged to constitute a waiver demonstrates that, despite "the compulsion inherent in custodial surroundings," *Miranda* v. *Arizona*, 384 U. S. 436, 458 (1966), the suspect's statements were given voluntarily. To make the Fifth Amendment protection against compelled self-incrimination effective, this Court has held that a suspect has a right to have counsel present at any custodial interrogation. *Id.*, at 469–472. Once a suspect in custody asks to speak to a lawyer, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards* v. *Arizona*, 451 U. S., at 484–485. When a suspect has indicated that he needs legal advice before deciding whether to talk further, any subsequent statements made at the authorities' insistence without counsel being present are unlikely to be voluntary. See *Michigan* v. *Mosley*, 423 U. S. 96, 110, n. 2 (1975) (WHITE, J., concurring in result). If, on the other hand, the subsequent statements are made in a conversation initiated by the accused, they may well be voluntary. See *Edwards* v. *Arizona*, *supra*, at 486, n. 9. Since the underlying purpose of the privilege against self-incrimination is to prevent the State from coercing an individual to give evidence against himself, it makes sense to find

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interrogation under the Fifth *and Sixth Amendments*." Pet. for Cert. 7 (emphasis supplied).

In any event, since the Court today construes the Court of Appeals' opinion as resting solely on the Fifth Amendment, the Sixth Amendment issue remains open on remand.

a waiver of the privilege where a suspect's conduct provides assurance that his statements were made voluntarily.

The determination of whether there has been a valid waiver of the Sixth Amendment right to counsel has a different focus, for the values underlying that right are different. The purpose of the Sixth Amendment right to counsel is to provide the defendant with legal assistance during the critical stages of the criminal process. See, *e. g.*, *Brewer* v. *Williams*, 430 U. S. 387, 398 (1977); *Powell* v. *Alabama*, 287 U. S. 45, 57 (1932). To give effect to this protection, this Court has insisted that the State deal with a defendant through his attorney. Once the State has commenced adversary criminal proceedings against an individual, as Missouri did in this case more than two months before the polygraph examination was held, the Sixth Amendment forbids *all* efforts to elicit information from him in the absence of counsel, regardless of whether he is in custody, see *United States* v. *Henry*, 447 U. S. 264, 273–274, n. 11 (1980); *Massiah* v. *United States*, *supra*, and regardless of whether the technique used to extract information is in any way coercive, see *McLeod* v. *Ohio*, 381 U. S. 356 (1965).

To establish a waiver of the Sixth Amendment right to counsel, it is therefore not enough for the State to point to conduct—such as the initiation of a conversation—that demonstrates that the defendant's statements were made voluntarily. Since a Sixth Amendment violation does not depend upon coercion, the protection of the Sixth Amendment is not waived by conduct that shows only that a defendant's statements were not coerced. The State must show that the defendant intelligently and knowingly relinquished his right not to be questioned in the absence of counsel. The State can establish a waiver only by proving "'an intentional relinquishment or abandonment'" of the right to have counsel present. *Brewer* v. *Williams*, *supra*, at 404, quoting *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938).[4]

[4] *Edwards* v. *Arizona*, *supra*, addressed only the standard governing waiver of the Fifth Amendment privilege against self-incrimination.

Given the different policies underlying the Fifth and Sixth Amendments, it is not surprising that a number of courts have held that "'[w]arnings by law enforcement officers and subsequent action by the accused that might suffice to comply with Fifth Amendment strictures against testimonial compulsion [do] not necessarily meet . . . the higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment [right to counsel] has attached.'" *United States* v. *Mohabir*, 624 F. 2d 1140, 1147 (CA2 1980), quoting *United States* v. *Massimo*, 432 F. 2d 324, 327 (CA2 1970) (Friendly, J., dissenting) (majority did not reach the issue), cert. denied, 400 U. S. 1022 (1971).[5] Today's decision therefore does not foreclose the Court of Appeals from considering on remand whether the postexamination interrogation violated the Sixth Amendment.

Since the Court concluded that Edwards had been interrogated in violation of the Fifth Amendment, it had no occasion to consider whether the Sixth Amendment applied or whether, if so, Edwards had waived its protection. See *id.*, at 480, n. 7.

[5] See *United States ex rel. O'Connor* v. *New Jersey*, 405 F. 2d 632, 636 (CA3), cert. denied, 395 U. S. 923 (1969); *Hancock* v. *White*, 378 F. 2d 479, 482 (CA1 1967). See also *United States* v. *Springer*, 460 F. 2d 1344, 1354–1355 (CA7) (Stevens, J., dissenting), cert. denied, 409 U. S. 873 (1972); *People* v. *Arthur*, 22 N. Y. 2d 325, 330, 239 N. E. 2d 537, 539 (1968). See generally Note, 82 Colum. L. Rev. 363 (1982).

GRIGGS ET AL. *v.* PROVIDENT CONSUMER DISCOUNT CO.

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

No. 82–5082. Decided November 29, 1982

The District Court entered judgment for petitioners in their civil action against respondent, which then filed a timely motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59. While that motion was still pending, respondent filed a notice of appeal. Thereafter, the District Court denied the motion to alter or amend the judgment, and the Court of Appeals accepted jurisdiction of the appeal and reversed the District Court's judgment. The Court of Appeals held that, although Federal Rule of Appellate Procedure 4(a)(4) provides that a notice of appeal, filed before the disposition of a motion filed in the district court to alter or amend the judgment, "shall have no effect" and a new notice of appeal "must be filed" after entry of the order disposing of the motion, nevertheless an appellant who filed a premature notice of appeal could proceed unless the appellee showed prejudice resulting from the premature filing of the notice, which was not done here.

Held: The Court of Appeals' analysis of Rule 4(a)(4) is contrary to the language and purposes of the 1979 amendments to the Rules of Appellate Procedure. Prior to 1979, if a notice of appeal was filed pending disposition of a motion to vacate, alter, or amend the judgment it was generally held that the district court retained jurisdiction to decide the motion and the notice of appeal was adequate for purposes of beginning the appeals process. However, after the 1979 amendments, when a premature notice of appeal is filed, it is as if no notice of appeal were filed at all and thus the court of appeals lacks jurisdiction to act. The requirement of a timely notice of appeal is mandatory and jurisdictional.

Certiorari granted; 680 F. 2d 927, vacated and remanded.

PER CURIAM.

The petition for certiorari questions the validity of a notice of appeal filed after the entry of the District Court's judgment but while the appellant's motion to alter or amend that judgment remained pending in the District Court.

The petitioners brought this civil action in the United States District Court for the Eastern District of Pennsylvania, seeking statutory damages for an alleged violation of the Truth in Lending Act, 82 Stat. 146, as amended, 15 U. S. C. § 1601 *et seq.*, and Regulation Z of the Federal Reserve Board, 12 CFR § 226.1 *et seq.* (1982). On December 24, 1980, the District Court granted the petitioners' motion for summary judgment, finding that the respondent's disclosure of its security interests in after-acquired property had been inaccurate and misleading. 503 F. Supp. 246. On November 5, 1981, the District Court entered an order pursuant to Federal Rule of Civil Procedure 54(b) directing that a final judgment be entered. On November 12, the respondent filed a timely motion to alter or amend the judgment, pursuant to Federal Rule of Civil Procedure 59. On November 19, while that motion was still pending, the respondent filed a notice of appeal. On November 23, the District Court denied the motion to alter or amend the judgment. Neither the opinion below nor the response to the petition for a writ of certiorari indicates that any further notice of appeal was filed.

The United States Court of Appeals for the Third Circuit accepted jurisdiction of the appeal and reversed the District Court's judgment. 680 F. 2d 927 (1982). The Court of Appeals explained its decision to take jurisdiction as follows:

> "The Griggses urge that this matter is not appealable because Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides that '[a] notice of appeal filed before the disposition of any of the above motions shall have no effect.' Appellant did fail to satisfy Rule 4(a)(4) but though a premature notice of appeal is subject to dismissal, we have generally allowed appellant to proceed unless the appellee can show prejudice resulting from the premature filing of the notice. *Tose* v. *First Pennsylvania Bank, N.A.*, 648 F. 2d 879, 882 n. 2 (3d Cir.),

> *cert. denied*, [454] U. S. [893] . . . (1981); *Hodge* v. *Hodge*, 507 F. 2d 87, 89 (3d Cir. 1975); *accord Williams* v. *Town of Okoboji*, 599 F. 2d 238 (8th Cir. 1979). *See also* 9 Moore's Federal Practice ¶204.14 (2d ed. 1982). In our case, the Griggses have shown no prejudice by the premature filing of a notice of appeal." *Id.*, at 929, n. 2.

Because this analysis of Rule 4(a)(4) conflicts with the decisions of other Courts of Appeals[1] and is contrary to the language and purposes of the 1979 amendments to the Federal Rules of Appellate Procedure, we grant the petitioners' request for leave to proceed *in forma pauperis* and their petition for a writ of certiorari, and we reverse.

Even before 1979, it was generally understood that a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal. See, *e. g.*, *United States* v. *Hitchmon*, 587 F. 2d 1357 (CA5 1979). Cf. *Ruby* v. *Secretary of United States Navy*, 365 F. 2d 385, 389 (CA9 1966) (en banc) (notice of appeal from unappealable order does not divest district court of jurisdiction), cert. denied, 386 U. S. 1011 (1967). Under pre-1979 procedures, a district court lacked jurisdiction to entertain a motion to vacate, alter, or amend a judgment after a notice of appeal was filed. See *Hattersley* v. *Bollt*, 512 F. 2d 209 (CA3 1975); *Edmond* v.

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[1] See *United States* v. *Valdosta-Lowndes County Hospital Authority*, 668 F. 2d 1177, 1178, n. 2 (CA11 1982); *Beam* v. *Youens*, 664 F. 2d 1275 (CA5 1982); *Williams* v. *Bolger*, 633 F. 2d 410 (CA5 1980); *Century Laminating, Ltd.* v. *Montgomery*, 595 F. 2d 563 (CA10), cert. dism'd, 444 U. S. 987 (1979). Cf. *United States* v. *Jones*, 669 F. 2d 559, 561 (CA8 1982) (dictum); *Calhoun* v. *United States*, 647 F. 2d 6, 10 (CA9 1981); *United States* v. *Moore*, 616 F. 2d 1030, 1032, n. 2 (CA7) (dictum), cert. denied, 446 U. S. 987 (1980). But cf. *Laser Alignment, Inc.* v. *Warlick*, 32 Fed. Rules Serv. 2d 776 (CA4 1981).

Moore-McCormack Lines, 253 F. 2d 143 (CA2 1958). However, if the timing was reversed—if the notice of appeal was filed after the motion to vacate, alter, or amend the judgment—two seemingly inconsistent conclusions were generally held to follow: the district court retained jurisdiction to decide the motion, but the notice of appeal was nonetheless considered adequate for purposes of beginning the appeals process. *E. g.*, *Yaretsky* v. *Blum*, 592 F. 2d 65, 66 (CA2 1979), cert. denied, 450 U. S. 925 (1981); *Williams* v. *Town of Okoboji*, 599 F. 2d 238 (CA8 1979); *Alexander* v. *Aero Lodge No. 735*, 565 F. 2d 1364, 1371 (CA6 1977), cert. denied, 436 U. S. 946 (1978); *Dougherty* v. *Harper's Magazine Co.*, 537 F. 2d 758, 762 (CA3 1976); *Stokes* v. *Peyton's Inc.*, 508 F. 2d 1287 (CA5 1975); *Song Jook Suh* v. *Rosenberg*, 437 F. 2d 1098 (CA9 1971). Cf. *Foman* v. *Davis*, 371 U. S. 178 (1962). But see *Century Laminating, Ltd.* v. *Montgomery*, 595 F. 2d 563 (CA10), cert. dism'd, 444 U. S. 987 (1979). The reason this theoretical inconsistency was tolerable in practice was that the district courts did not automatically inform the courts of appeals when a notice of appeal had been filed, and there was therefore little danger a district court and a court of appeals would be simultaneously analyzing the same judgment.

In 1979, the Rules were amended to clarify both the litigants' timetable and the courts' respective jurisdictions. The new requirement that a district court "transmit forthwith" any valid notice of appeal to the court of appeals advanced the time when that court could begin processing an appeal. Fed. Rule App. Proc. 3(d). At the same time, in order to prevent unnecessary appellate review, the district court was given express authority to entertain a timely motion to alter or amend the judgment under Rule 59, even after a notice of appeal had been filed. Fed. Rule App. Proc. 4(a)(4). If these had been the only changes, the theoretical inconsistency noted above would have suddenly taken on practical significance. A broad class of situations would

have been created in which district courts and courts of appeals would both have had the power to modify the same judgment. The 1979 amendments avoided that potential conflict by depriving the courts of appeals of jurisdiction in such situations.

New Rule 4(a)(4) states:[2]

> "If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party . . . under Rule 59 . . . , the time for appeal for all parties shall run from the entry of the order denying . . . such motion. A notice of appeal filed before the disposition of [such motion] shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing."

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[2] The Advisory Committee on Appellate Rules explained the modification as follows:

"The proposed amendment would make it clear that after the filing of the specified post trial motions, a notice of appeal should await disposition of the motion. . . . [I]t would be undesirable to proceed with the appeal while the district court has before it a motion the granting of which would vacate or alter the judgment appealed from. . . . Under the present rule, since docketing may not take place until the record is transmitted, premature filing is much less likely to involve waste effort. See, e. g., *Stokes* v. *Peyton's Inc.*, 508 F. 2d 1287 (5th Cir. 1975). Further, since a notice of appeal filed before the disposition of a post trial motion, even if it were treated as valid for purposes of jurisdiction, would not embrace objections to the denial of the motion, it is obviously preferable to postpone the notice of appeal until after the motion is disposed of.

"The present rule [pre-1979], since it provides for the 'termination' of the 'running' of the appeal time, is ambiguous in its application to a notice of appeal filed prior to a post trial motion filed within the 10 day limit. The amendment would make it clear that in such circumstances the appellant should not proceed with the appeal during pendency of the motion but should file a new notice of appeal after the motion is disposed of." Notes of Advisory Committee on Appellate Rules, 28 U. S. C. App., p. 146 (1976 ed., Supp V).

Professor Moore has aptly described the post-1979 effect of a Rule 59 motion on a previously filed notice of appeal: "The appeal simply self-destructs." 9 J. Moore, B. Ward, & J. Lucas, Moore's Federal Practice ¶204.12[1], p. 4–65, n. 17 (1982). Moreover, a subsequent notice of appeal is also ineffective if it is filed while a timely Rule 59 motion is still pending. See 16 C. Wright, A. Miller, E. Cooper, & E. Gressman, Federal Practice and Procedure § 3950 (1982 Supp.).

The United States Court of Appeals for the Third Circuit has taken the position that, notwithstanding the 1979 amendments, it retains discretion under Federal Rule of Appellate Procedure 2 to waive the conceded defects in a premature notice of appeal. *Tose* v. *First Pennsylvania Bank, N.A.*, 648 F. 2d 879, 882, n. 2, cert. denied, 454 U. S. 893 (1981). We disagree. The notice of appeal filed in this case on November 19, 1980, was not merely defective; it was a nullity. Under the plain language of the current Rule, a premature notice of appeal "shall have no effect"; a new notice of appeal "must be filed." In short, it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act. It is well settled that the requirement of a timely notice of appeal is "'mandatory and jurisdictional.'" *Browder* v. *Director, Illinois Dept. of Corrections*, 434 U. S. 257, 264 (1978).[3]

The motion of petitioners for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[3] Rule 2 does not purport to vest unlimited discretion in the court of appeals. That Rule explicitly states that the discretion it authorizes is limited by Rule 26(b), which prohibits courts of appeals from enlarging the time for filing a notice of appeal.

JUSTICE MARSHALL, dissenting.

Without the benefit of briefing or argument on the merits, the majority—in a conclusory footnote—decides that a Court of Appeals cannot invoke Rule 2 of the Federal Rules of Appellate Procedure to waive a defect in a notice of appeal. The Court's exercise of its majestic power to decide this question is inappropriate in this case because an alternative ground for the lower court's disposition exists: respondent in fact filed an effective notice of appeal following the denial of its motion to amend the District Court's judgment.[1] In any event, the majority's interpretation of Rule 2 is inconsistent with the language of the Rule and with prior Court decisions, and the decision may have grave consequences for *pro se* litigants. At a minimum, the Court should allow the parties an opportunity to address these issues in a brief on the merits. I respectfully dissent.

I

While the majority describes respondent's filing of a premature notice of appeal, it fails to mention the subsequent actions taken by respondent in the Court of Appeals following the District Court's denial of the Federal Rule of Civil Procedure 59 motion on November 23, 1981. Respondent's actions within 30 days of November 23 amply satisfied the content requirements of Federal Rule of Appellate Procedure 3(c).

On December 4, the Court of Appeals docketed the appeal and the record from the District Court was filed. That same day, the Clerk for the Court of Appeals sent a letter to respondent's counsel with a copy to petitioners' counsel notifying them that the case had been docketed and the record

[1] Presumably, the majority's remand for "further proceedings" will allow the Court of Appeals to consider whether respondent filed an effective notice of appeal. Cf. *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263 (1982) *(per curiam)* (where the lower court lacks jurisdiction, Court reverses and remands with instructions to the Court of Appeals to dismiss the appeal); *Browder* v. *Director, Illinois Dept. of Corrections*, 434 U. S. 257 (1978) (Court simply reverses where Court of Appeals lacked jurisdiction due to untimely notice of appeal).

filed. The Clerk's letter noted that a brief on the merits of the appeal had already been filed by respondent, due to a prior misunderstanding.[2] The Clerk asked respondent's counsel to advise the court "in writing if it is your intention to rely on the briefs previously filed." See App. C to Pet. for Cert.

On December 12, respondent sent two letters to the Court of Appeals, both of which were received on December 15.[3] The first letter stated that respondent intended to file a new brief in the docketed case but would rely on the same appendix that had previously been filed. The letter also included a disclosure statement in order to comply with a local Third Circuit rule. The second letter provided, in accordance with Federal Rule of Appellate Procedure 30(b), a statement of the issues which respondent intended to present for review to the Court of Appeals and also a designation of the portions of the appendix on which respondent would rely. Copies of *both* of these letters were served on counsel for petitioners.

Under the circumstances of this case, viewed in their entirety, respondent clearly filed a timely notice of appeal as defined by Rule 3(c). That Rule was amended in 1979 to provide that "[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal." The Advisory Com-

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[2] Respondent filed a brief on appeal in early 1981 in the mistaken belief that a final summary judgment had been entered. On October 2, 1981, the Court of Appeals remanded the case to the District Court, which subsequently entered an order directing entry of final judgment pursuant to Federal Rule of Civil Procedure 54(b).

[3] The Clerk's Office for the Court of Appeals for the Third Circuit enters only pleadings on its docket sheet. It maintains a separate file for all correspondence relating to a docketed case. The letters sent by respondent are in the Court of Appeals correspondence file for case No. 81–2989, the Court of Appeals docket number for this case. The docket sheet for the Court of Appeals in No. 81–2989 states that on December 4, 1981, a notice of appeal by respondent's counsel was filed. This is apparently a reference to a certified copy of the premature notice of appeal, which the District Court transmitted along with the record.

mittee Notes explain the significance of the amendment as follows:

> "[I]t is important that the right to appeal not be lost by mistakes of mere form. In a number of decided cases it has been held that *so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with.* See, e. g., *Cobb* v. *Lewis* (C. A. 5th, 1974) 488 F. 2d 41; *Holley* v. *Capps* (C. A. 5th, 1972) 468 F. 2d 1366. The proposed amendment would give recognition to this practice." 28 U. S. C. App., p. 144 (1976 ed., Supp. V) (emphasis added).

The *Cobb* case cited by the Advisory Committee is particularly instructive. There, the Court of Appeals concluded that "the notice of appeal requirement may be satisfied by *any* statement, made either to the district court *or to the Court of Appeals*, that clearly evinces the party's intent to appeal." *Cobb* v. *Lewis*, 488 F. 2d 41, 45 (CA5 1974) (emphasis added). The court reasoned that such a statement "accomplishes the two basic objectives of the Rule 3 notice requirement: (1) to notify the Court of the taking of an appeal; and (2) to notify the opposing party of the taking of an appeal." *Ibid.*

The actions undertaken by respondent during the 30 days after November 23 amply satisfied the Rule's requirement of notice to the Court of Appeals[4] and to the opposing party.

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[4] The papers filed by respondent after November 23 were transmitted to the Court of Appeals rather than to the District Court. *Cobb* v. *Lewis*, 488 F. 2d, at 45, makes clear that the notice requirement may be satisfied by a statement made *either* to the District Court *or* to the Court of Appeals. In a similar vein, Federal Rule of Appellate Procedure 4(a)(1) states that if a notice of appeal "is mistakenly filed in the court of appeals," the clerk of that court should note the date of the notice, and the notice "shall be deemed filed in the district court on the date so noted." Thus, a mistaken filing in the Court of Appeals is clearly not a fatal defect under

Within 30 days after November 23, 1981, the Court of Appeals had before it the record of the case, respondent's previously filed brief on the merits, a letter from respondent indicating its intention to file a new brief on the merits and also containing a disclosure statement, and a letter from respondent stating precisely those issues which were to be raised on appeal and also providing designations of the portions of the previously filed appendix upon which respondent would rely. Similarly, petitioners had received a notice from the Court of Appeals that the case had been docketed and the record filed, and they had received from respondent copies of the letters sent to the Court of Appeals, which included a Rule 30(b) statement of the issues to be presented.

The specific actions taken by respondent after November 23 provided adequate notice of its intent to appeal. Any other conclusion would exalt empty form and ritual over common sense. As the court stated in *Cobb* v. *Lewis*, *supra*, a decision upon which the Advisory Committee relied in amending Rule 3(c), "'it would we think be a harking back to formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold the extremely simple procedure required by the Rule is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights.'" 488 F. 2d, at 45, quoting *Crump* v. *Hill*, 104 F. 2d 36, 38 (CA5 1939).

Because respondent filed an effective notice of appeal, the Court of Appeals was compelled to reach the merits of the appeal. The lower court's interpretation of its discretionary

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the Rules. In this case, respondent appears to have filed a notice of appeal as defined by Rule 3(c) with the Court of Appeals on December 15. By that date, the District Court had already transmitted the record and a certified copy of the premature notice of appeal to the Court of Appeals, and the appellate court had docketed the appeal. Under these circumstances, the Court of Appeals would have been the sensible place in which to file a new notice. Respondent should not have been expected to return to the District Court after December 4, when that court no longer had the record.

authority under Rule 2 of the Federal Rules of Appellate Procedure was thus unnecessary to the proper disposition of respondent's appeal. Consequently, I do not think this case is an appropriate vehicle for making new procedural law.

II

Even if this case warranted review, I would decline to join the majority in summarily rejecting the basis provided by the Court of Appeals for its decision to reach the merits of respondent's appeal. The court relied on Rule 2 of the Federal Rules of Appellate Procedure, which provides that for good cause "a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case . . . on its own motion . . . ." According to the Advisory Committee Notes, the Rule "contains a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result." 28 U. S. C. App., p. 352.

Invoking its discretionary authority under Rule 2, the Third Circuit declines to dismiss appeals based on Rule 4(a)(4) defaults in the absence of a showing of prejudice to the appellee. See *Tose* v. *First Pennsylvania Bank, N.A.*, 648 F. 2d 879, 882, n. 2, cert. denied, 454 U. S. 893 (1981); *Hodge* v. *Hodge*, 507 F. 2d 87, 89 (CA3 1975), cited in 680 F. 2d 927, 929, n. 2 (1982) (case below). On this ground, the Court of Appeals exercised its discretion in this case after concluding that petitioners had failed to show any prejudice.[5]

In a two-sentence footnote rejecting the lower court's interpretation of Rule 2, the majority notes only that the discretion granted in Rule 2 is explicitly limited by Federal Rule of Appellate Procedure 26(b), which states that a court of appeals "may not enlarge the time for filing a notice of appeal."

[5] The majority apparently does not dispute the Court of Appeals' conclusion that the dismissal of an appeal based on an appellant's failure to comply with the technical requirements of Rule 4(a)(4) would be a manifest injustice in the absence of prejudice to the appellee.

The majority does not explain the relevance of Rule 26(b) to this case. The common-sense meaning of the Rule is that a court may not recognize a *late* notice of appeal. See *United States* v. *Robinson*, 361 U. S. 220, 224 (1960). Rule 26 by its very title deals with an *extension* of time; in the words of the Advisory Committee Notes to Rule 2, "Rule 26(b) prohibits a court of appeals from *extending* the time for taking appeal or seeking review" (emphasis added). 28 U. S. C. App., p. 352. In similar fashion, the provisions of Federal Rule of Civil Procedure 6, on which Rule 26 is based,[6] discuss enlargement in terms of extending the *expiration* date of a period. In short, there is little question that a court of appeals may not—consistent with the mandate of Rule 26(b)—give effect to a late notice of appeal. But it is certainly debatable whether Rule 26(b) prohibits the recognition of a *premature* notice of appeal. Only Rule 4(a)(4) explicitly bars such recognition, but Rule 4(a)(4) does not serve as an express limitation on Rule 2.

The Court concludes that, because of respondent's failure to refile the same notice of appeal filed four days prematurely, the Court of Appeals was absolutely barred from addressing the merits of its appeal. This conclusion flies in the face of our previous declaration that it is "too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Foman* v. *Davis*, 371 U. S. 178, 181 (1962) (discussing a notice of appeal under Federal Rule of Civil Procedure 73(a), the predecessor of Federal Rule of Appellate Procedure 4). See also *Bankers Trust Co.* v. *Mallis*, 435 U. S. 381, 387 (1978) *(per curiam)* ("the technical requirements [imposed by the Rules of Appellate Procedure] for a notice of appeal were not mandatory where the notice 'did not mislead or prejudice'").

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[6] See 1967 Advisory Committee Note to Fed. Rule App. Proc. 26, 28 U. S. C. App., p. 367.

The Court's interpretation of Rule 4(a)(4) also creates new and serious pitfalls for *pro se* and other unsophisticated litigants. The reports are filled with cases in which litigants filed postjudgment motions to "reconsider," to "vacate," to "set aside," or to "reargue" adverse judgments. The lower courts have almost without exception treated these as Rule 59 motions, *regardless* of their label.[7] Indeed, even motions captioned under Rule 60(b), but filed within 10 days of judgment, are normally deemed Rule 59 motions.[8] According to the majority, a notice of appeal becomes a "nullity" if it is filed while a Rule 59 motion is pending. Thus, under the majority's approach, litigants could unwittingly file invalid notices of appeal simply because they had previously filed a motion questioning a district court judgment which, unbeknownst to them, is a Rule 59 motion. The mere failure to appreciate the distinction between a Rule 59 motion and a Rule 60(b) motion, when combined with the draconian application of Rule 4(a)(4) adopted by the majority, would *require* the dismissal of an appeal. See, *e. g.*, *Apel* v. *Wainwright*, 677 F. 2d 116 (CA11 1982) (on petition for rehearing), cert. pending, No. 82–5503.

III

If the Court believes, as I do not, that it is necessary in this case to examine the Court of Appeals' interpretation of Rule 2, I would at least notify the parties that the Court is consid-

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[7] See 9 J. Moore, B. Ward, & J. Lucas, Moore's Federal Practice ¶ 204.12[1], p. 4–67, and n. 26 (1982). In the Third Circuit alone, see, *e. g.*, *Richerson* v. *Jones*, 572 F. 2d 89, 93 (1978) (motion to reconsider judgment); *Sonnenblick-Goldman Corp.* v. *Nowalk*, 420 F. 2d 858, 859 (1970) (motion to vacate judgment); *Gainey* v. *Brotherhood of Railway & Steamship Clerks*, 303 F. 2d 716, 718 (1962) (motion for rehearing or reconsideration). Sometimes the characterization has resulted in the dismissal of an appeal.

[8] *E. g.*, *Dove* v. *Codesco*, 569 F. 2d 807 (CA4 1978); *Alley* v. *Dodge Hotel*, 179 U. S. App. D. C. 256, 551 F. 2d 442 (1977); *Sea Ranch Assn.* v. *California Coastal Zone Conservation Comm'ns*, 537 F. 2d 1058 (CA9 1976); *Woodham* v. *American Cystoscope Co.*, 335 F. 2d 551 (CA5 1964).

ering a summary disposition, so that they may have an opportunity to submit briefs on the merits. Without such briefing, the risk of error necessarily increases. I therefore dissent.

UNITED STATES *v.* SECURITY INDUSTRIAL BANK ET AL.

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

No. 81–184. Argued October 6, 1982—Decided November 30, 1982

A provision of the Bankruptcy Reform Act of 1978, 11 U. S. C. § 522(f)(2) (1976 ed., Supp. V), permits individual debtors in bankruptcy proceedings to avoid nonpossessory, nonpurchase-money liens on certain property, including household furnishings and appliances. Appellees loaned individual debtors money and obtained and perfected such liens on the debtors' household furnishings and appliances before the 1978 Act was enacted. Subsequently, these debtors instituted separate bankruptcy proceedings under the 1978 Act. Sections 522(b) and (d) exempt household items from the property included within debtors' estates. The debtors claimed these exemptions, relying on § 522(f)(2) to avoid the liens. The Bankruptcy Courts refused to apply § 522(f)(2) retroactively to abrogate the liens. The Court of Appeals in consolidated appeals affirmed, holding that, although the 1978 Act was intended to apply retrospectively and thus was designed to invalidate liens acquired before the enactment date, such an application violates the Takings Clause of the Fifth Amendment.

Held: Section 522(f)(2) was not intended to be applied retrospectively to destroy pre-enactment property rights. Pp. 74–82.

(a) Where there is substantial doubt whether retroactive destruction of appellees' liens would comport with the Fifth Amendment, the cardinal principle that this Court will first determine whether a construction of a statute is fairly possible by which the constitutional question may be avoided warrants a consideration of whether, as a matter of statutory construction, § 522(f)(2) must necessarily be applied retroactively. Pp. 74–78.

(b) No bankruptcy law shall be construed to eliminate property rights that existed before the law was enacted in the absence of an explicit command from Congress. In light of this principle, in the absence of a clear expression of Congress' intent to apply § 522(f)(2) to property rights established before the enactment date, the statute will not be construed in a manner that could call upon this Court to resolve difficult and sen-

sitive questions arising out of the guarantees of the Takings Clause. Pp. 81–82.

642 F. 2d 1193, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 82.

Alan I. Horowitz argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General McGrath*, and *Deputy Solicitor General Geller*.

Henry F. Field argued the cause for appellees. With him on the briefs for appellee Beneficial Finance of Kansas, Inc., were *Abe Fortas*, *Phil C. Neal*, and *Joseph M. Berl*. *Michael E. Katch* filed a brief for appellees Security Industrial Bank et al.

JUSTICE REHNQUIST delivered the opinion of the Court.

This case concerns the effect of 11 U. S. C. § 522(f)(2) (1976 ed., Supp. V), which permits individual debtors in bankruptcy proceedings to avoid liens on certain property. The Court of Appeals consolidated seven appeals from the Bankruptcy Courts for the Districts of Kansas and Colorado. In each case the debtor was an individual who instituted bankruptcy proceedings after the Bankruptcy Reform Act of 1978, Pub. L. 95–598, 92 Stat. 2549 (1978 Act), became effective on October 1, 1979. In each case one of the appellees had loaned the debtor money and obtained and perfected a lien on the debtor's household furnishings and appliances before the 1978 Act was enacted on November 6, 1978. None of these liens was possessory, and none secured purchase-money obligations.

Included within the personal property subject to the appellees' liens were household items that are exempt from the property included within the debtors' estates by virtue of

subsections (b) and (d) of § 522.[1] The debtors claimed these exemptions in their respective bankruptcy proceedings, relying on § 522(f)(2) to avoid the liens. That section provides:

> "Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—
>
> . . . . . .
>
> "(2) a nonpossessory, nonpurchase-money security interest in any—
>
> "(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical in-

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[1] The exemptions were designed to permit individual debtors to retain exempt property so that they will be able to enjoy a "fresh start" after bankruptcy.

Subsections (b) and (d) of § 522 provide in pertinent part:

"(b) [A]n individual debtor may exempt from property of the estate . . . —

"(1) property that is specified under subsection (d) of this section . . .

. . . . . .

"(d) The following property may be exempted under subsection (b)(1) of this section:

. . . . . .

"(3) The debtor's interest, not to exceed $200 in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family or household use of the debtor or a dependent of the debtor.

"(4) The debtor's aggregate interest, not to exceed $500 in value, in jewelry held primarily for the personal, family, or household use of the debtor or the dependent of the debtor.

. . . . . .

"(6) The debtor's aggregate interest, not to exceed $750 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

. . . . . .

"(9) Professionally prescribed health aids for the debtor or a dependent of the debtor."

struments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

"(B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

"(C) professionally prescribed health aids for the debtor or a dependent of the debtor."

The appellees asserted that application of § 522(f)(2) to liens acquired before the enactment date would violate the Fifth Amendment. The United States intervened in each case to defend the constitutionality of the federal statute,[2] but the Bankruptcy Courts in each case refused to apply § 522(f)(2) to abrogate liens acquired before the enactment date.[3]

The Court of Appeals consolidated the cases and affirmed the judgments of the Bankruptcy Courts. 642 F. 2d 1193 (CA10 1981). It held that the 1978 Act was intended to apply retrospectively, and thus was designed to invalidate liens acquired before the enactment date. It also held, however, that such an application violates the Fifth Amendment. The court stated that § 522(f)(2) effects a "complete taking of the secured creditors' property interests," and is thus invalid under *Louisville Joint Stock Land Bank* v. *Radford*, 295

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[2] See 28 U. S. C. § 2403(a).

[3] In *Schulte* v. *Beneficial Finance of Kansas, Inc.*, and *Hunter* v. *Beneficial Finance of Kansas, Inc.*, 8 B. R. 12 (1980), the Bankruptcy Court for the District of Kansas noted that retrospective application of § 522(f)(2) creates constitutional problems and held that it should be applied only prospectively. In *Jackson* v. *Security Industrial Bank*, and *Stevens* v. *Liberty Loan Corp.*, 4 B. R. 293 (1980), *Rodrock* v. *Security Industrial Bank*, and *Knezel* v. *Security Industrial Bank*, 3 B. R. 629 (1980), the Bankruptcy Court for the District of Colorado concluded that § 522(f)(2), as applied retrospectively, violates the Due Process Clause of the Fifth Amendment. In *Hoops* v. *Freedom Finance*, 3 B. R. 635 (1980), the Bankruptcy Court for the District of Colorado concluded that § 522(f)(2), as applied retrospectively, violates "substantive due process."

U. S. 555 (1935).[4] The United States appealed, and we noted probable jurisdiction. 454 U. S. 1122 (1981).

The appellees, of course, defend the judgment of the Court of Appeals.[5] The Government argues at some length that retrospective application of § 522(f)(2) to these liens would not violate the Fifth Amendment. It contends that the enactment is a "rational" exercise of Congress' bankruptcy power, that for "bankruptcy purposes" property interests are all but indistinguishable from contractual interests, and that these particular interests were "insubstantial" and therefore their destruction does not amount to a "taking" of property requiring compensation. We do not decide the constitutional question reached by the Court of Appeals. We address it only to determine whether the attack on the retrospective application of the statute raises substantial enough constitutional doubts to warrant the employment of the canon of statutory construction referred to *infra*, at 78–81.

It may be readily agreed that § 522(f)(2) is a rational exercise of Congress' authority under Art. I, § 8, cl. 4, and that this authority has been regularly construed to authorize the retrospective impairment of contractual obligations. *Hano-*

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[4] *In re Gifford*, 688 F. 2d 447 (CA7 1982) (en banc), holds that § 522(f)(2) constitutionally applies to liens created before the enactment date. *In re Webber*, 674 F. 2d 796 (CA9 1982), holds that § 522(f)(2) constitutionally applies to liens created before the Act became effective but after the enactment date. *In re Ashe*, 669 F. 2d 105 (CA3 1982), holds that § 522(f)(1), which permits avoidance of certain judicial liens, constitutionally applies to a cognovit note created before the enactment date.

[5] Appellee Beneficial Finance of Kansas, Inc., asserts that the judgments should be affirmed because the Act violates Art. III of the Constitution by granting judicial power to non-Art. III bankruptcy judges. See *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982) (plurality opinion of BRENNAN, J.); *id.*, at 90–91 (REHNQUIST, J., concurring in judgment). Because our decision in *Northern Pipeline* is prospective only, *id.*, at 87–89, and because we have stayed the issuance of our mandate in that case to December 24, 1982, *post*, p. 813, that decision does not affect the judgment in this case.

ver National Bank v. *Moyses*, 186 U. S. 181, 188 (1902). Such agreement does not, however, obviate the additional difficulty that arises when that power is sought to be used to defeat traditional property interests. The bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation. *Louisville Joint Stock Land Bank* v. *Radford*, *supra*. Thus, however "rational" the exercise of the bankruptcy power may be, that inquiry is quite separate from the question whether the enactment takes property within the prohibition of the Fifth Amendment.

The Government apparently contends (Brief for United States 30–32) that because cases such as *Arnett* v. *Kennedy*, 416 U. S. 134 (1974), and *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), defined "property" for purposes of the Due Process Clause sufficiently broadly to include rights which at common law would have been deemed contractual, traditional property rights are entitled to no greater protection under the Takings Clause than traditional contract rights. It argues that "bankruptcy principles do not support a sharp distinction between the rights of secured and unsecured creditors." Brief for United States 31. However "bankruptcy principles" may speak to this question, our cases recognize, as did the common law, that the contractual right of a secured creditor to obtain repayment of his debt may be quite different in legal contemplation from the property right of the same creditor in the collateral. Compare *Hanover National Bank* v. *Moyses*, *supra*, with *Louisville Joint Stock Land Bank* v. *Radford*, *supra*, and *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979).

Since the governmental action here would result in a complete destruction of the property right of the secured party, the case fits but awkwardly into the analytic framework employed in *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104 (1978), and *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), where governmental action

affected some but not all of the "bundle of rights" which constitute the "property" in question. The Government argues that the interest of a secured party such as was involved here is "insubstantial," apparently in part because it is a nonpurchase-money, nonpossessory interest in personal property. The "bundle of rights" which accrues to a secured party is obviously smaller than that which accrues to an owner in fee simple, but the Government cites no cases supporting the proposition that differences such as these relegate the secured party's interest to something less than property.[6] And our decisions in *Radford*, *supra*, and *Armstrong* v. *United States*, 364 U. S. 40 (1960), militate against such a proposition.

In *Radford*, we held that the Frazier-Lemke Act, 48 Stat. 1289, violated the Takings Clause. The bank held a nonpurchase-money mortgage on Radford's farm. Radford defaulted and instituted bankruptcy proceedings. The Frazier-Lemke Act, which by its terms applied only retrospectively, permitted the debtor to purchase the property for less than its fair market value.[7] We held the statute was

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[6] At oral argument the Government conceded that the liens at issue in this case are treated as property under state law. Tr. of Oral Arg. 21.

Both Kansas and Colorado have adopted the Uniform Commercial Code. Although under the Code the priority among secured parties is often affected by the purchase-money or possessory character of security interests, see, *e. g.*, § 9–312, 3 U. L. A. 531 (1981), these characterizations do not affect the nature of the security interest. See § 9–107 (defining "purchase money security interest"), § 9–305 (providing for perfection of security interests by possession).

Section 101(28) of the 1978 Act defines a lien as a "charge against or interest in property to secure payment of a debt or performance of an obligation." It does not make distinctions based on the purchase-money or possessory nature of a lien.

[7] The Frazier-Lemke Act permitted the farmer, if the mortgagee assented, to purchase the property at its then-appraised value on a deferred payment plan. If the mortgagee refused to assent, the court was required to stay all proceedings for five years, during which time the farmer could retain possession by paying a reasonable rent. After five years the property could be reappraised, but the farmer still had the right to purchase it

void because it effected a "taking of substantive rights in specific property acquired by the Bank prior to" its enactment. 295 U. S., at 590. In his opinion for the Court, Justice Brandeis stated:

> "[T]he Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public." *Id.*, at 602.

In *Armstrong*, materialmen delivered materials to a prime contractor for use in constructing Navy personnel boats. Under state law, they obtained liens in the vessels.[8] The prime contractor defaulted on his obligations to the United States, and the Government took title to and possession of the uncompleted hulls and unused materials, thus making it impossible for the materialmen to enforce their liens. We held that this constituted a taking:

> "The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure." 364 U. S., at 48.

The Government seeks to distinguish *Armstrong* on the ground that it was a classical "taking" in the sense that the Government acquired for itself the property in question,

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free and clear for the appraised value regardless of the amount of the lien. See *Radford*, 295 U. S., at 597–598. Given the interest rate of 1%, the present value of the deferred payments was much less than the value of the property. *Id.*, at 591–593.

[8] Under the Uniform Commercial Code definition, these statutory liens would be nonpossessory, nonpurchase-money liens in personal property. See n. 6, *supra*.

while in the instant case the Government has simply imposed a general economic regulation which in effect transfers the property interest from a private creditor to a private debtor. While the classical taking is of the sort that the Government describes, our cases show that takings analysis is not necessarily limited to outright acquisitions by the government for itself. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982); *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980); *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922).

The Government finally contends that because the resale value of household goods is generally low, and because creditors therefore view the principal value of their security as a lever to negotiate for reaffirmation of the debt rather than as a vehicle for foreclosure, the property interests involved here do not merit protection under the Takings Clause. While this contention cannot be dismissed out of hand, it seems to run counter to the State's characterization of the interest as property, see n. 6, *supra*, to our reliance in other "takings" cases on state-law characterizations, see, *e. g.*, *Kaiser Aetna* v. *United States*, 444 U. S., at 179, and also to at least some of the implications of *Radford*, *supra*, and *Armstrong*, *supra*.

The foregoing discussion satisfies us that there is substantial doubt whether the retroactive destruction of the appellees' liens in this case comports with the Fifth Amendment. We now consider whether, as a matter of statutory construction, § 522(f)(2) must necessarily be applied in that manner. We consider the statutory question because of the "'cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.'" *Lorillard* v. *Pons*, 434 U. S. 575, 577 (1978), quoting *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932).

The Court of Appeals thought § 522(f)(2) must apply retroactively, that is, to liens which attached before the enactment date, because "there would be *no* bankruptcy law applicable to cases [involving such liens if it did not]." 642 F. 2d, at

1197. The court apparently thought that if § 522(f)(2) does not apply to liens which came into existence before the enactment date, then no part of the 1978 Act could apply to cases involving such liens. This is not necessarily the case. The liens, of course, exist under state law independently of the 1978 Act. Although the 1978 Act, in general, is effective for all cases commenced after its effective date, Congress might have intended that provisions that destroy previously vested property rights apply only to interests that came into effect after the enactment date. If § 522(f)(2) is such a provision, the remainder of the 1978 Act would not affect the enforceability of these liens, but would still apply to these liens and these cases. We think that the analysis of the Court of Appeals did not adequately dispose of the question as to the retrospective effect of § 522(f), and we therefore pursue the inquiry further.

The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. Compare 1 C. Sands, Sutherland on Statutory Construction § 1.06 (4th ed. 1972), with *Linkletter* v. *Walker*, 381 U. S. 618, 622–625 (1965). This Court has often pointed out:

> "[T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past. . . . The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'" *Union Pacific R. Co.* v. *Laramie Stock Yards Co.*, 231 U. S. 190, 199 (1913) (citations omitted).

See, *e. g.*, *United States Fidelity & Guaranty Co.* v. *United States ex rel. Struthers Wells Co.*, 209 U. S. 306, 314 (1908) ("The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive

such a construction if it is susceptible of any other"); *United States* v. *Schooner Peggy*, 1 Cranch 103, 110 (1801).

This principle has been repeatedly applied to bankruptcy statutes affecting property rights. In *Holt* v. *Henley*, 232 U. S. 637 (1914), the Court had before it a new statute granting bankruptcy trustees the position of a lienholder with priority over sellers on conditional sales contracts. Act of June 25, 1910, ch. 412, § 8, 36 Stat. 840. This provision, like § 522(f)(2), could be read literally to divest property interests which had been created before it was enacted. The 1910 statute, like the 1978 Act, applied to all bankruptcy cases instituted after it became effective.[9] Nonetheless, the Court followed the lead of the lower courts in refusing to infer retroactivity absent an explicitly "expressed intent of Congress." *Arctic Ice Machine Co.* v. *Armstrong County Trust Co.*, 192 F. 114, 116 (CA3 1911). See also *In re Schneider*, 203 F. 589, 590 (ED Pa. 1913). In his opinion for the unanimous Court, Justice Holmes stated that "the reasonable and usual interpretation of [bankruptcy] statutes is to confine their effect, so far as may be, to property rights established after they were passed." 232 U. S., at 639. See *Auffm'ordt* v. *Rasin*, 102 U. S. 620, 622 (1881).

The Government nonetheless contends that bankruptcy statutes are usually construed to apply to pre-existing rights. This statement is unobjectionable in the context of traditional contract rights, *Hanover National Bank* v. *Moyses*, 186 U. S., at 188, but none of the cases cited by the Government extend it to property rights such as those involved here.[10]

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[9] The transition provisions of the 1910 statute, § 14, 36 Stat. 842, are, in substance, the same as those of the 1978 Act. Pub. L. 95–598, Title IV, §§ 402, 403(a), 92 Stat. 2682, 2683.

[10] *Claridge Apartments Co.* v. *Commissioner*, 323 U. S. 141 (1944), involved rights to certain tax benefits, not to property rights. *Dickinson Industrial Site, Inc.* v. *Cowan*, 309 U. S. 382, 383 (1940), dealt with the application of new procedural rules to a bankruptcy proceeding that was pending when the new statute was enacted. Allowing an appeal to the Circuit Court of Appeals rather than the District Court in that case did not

Neither these cases, nor any other that has come to our attention, casts doubt on the principle of statutory construction deducible from *Holt* and *Auffm'ordt:* No bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress. In light of this principle, the legislative history of the 1978 Act suggests that Congress may not have intended that § 522(f) operate to destroy pre-enactment property rights.

An early version of the 1978 Act contained an explicit requirement that all its provisions "shall apply in all cases or proceedings instituted after its effective date, regardless of the date of occurrence of any of the operative facts determining legal rights, duties, or liabilities hereunder." § 10–103(a), H. R. 31, 94th Cong., 1st Sess. (1975), reprinted in Bankruptcy Act Revision: Hearings on H. R. 31 and H. R. 32 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong., 1st Sess., Appendix 320–321 (1975). This provision may or may not have been deleted directly in response to the comments of witness William Plumb to the effect that retroactive invalidation of liens may be an unconstitutional taking. *Id.*, at 2066–2067. Nonetheless, Congress' elimination of an explicit command is some evidence that it did not intend to depart from the usual principle of construction. See *Bradley*

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eliminate any property rights. *Carpenter* v. *Wabash R. Co.*, 309 U. S. 23 (1940), involved a provision giving personal injury judgments the status of operating expenses and thus priority over mortgages in ongoing railroad reorganizations. Although that statute may have disadvantaged the mortgagees by reducing the amount of cash available to pay their notes, it did not affect their property right in the collateral securing the mortgages. *McFaddin* v. *Evans-Snider-Buel Co.*, 185 U. S. 505 (1902), considered a curative statute providing the methods by which valid mortgages could be created in the Indian Territory. The *Legal Tender Cases*, 12 Wall. 457, 549–550 (1871), decided only that debts could be paid in legal tender as defined by Congress at the time of payment without impairing the obligation of contracts.

v. *Richmond School Board*, 416 U. S. 696, 716, n. 23 (1974) ("we are reluctant to read into the statute the very . . . limitation that Congress eliminated").

"Accordingly, in the absence of a clear expression of Congress' intent to" apply § 522(f)(2) to property rights established before the enactment date,[11] "we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the" Takings Clause. *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 507 (1979).[12] The judgment of the Court of Appeals must therefore be

Affirmed.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in the judgment.

This case concerns the Bankruptcy Act of 1978, 11 U. S. C. § 101 *et seq.* (1976 ed., Supp. V), and, in particular, the exemption provisions of § 522 of that Act. Specifically at issue is the effect of certain of these exemption provisions upon nonpossessory, nonpurchase-money obligations given by debtors to small loan companies before the enactment of the

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[11] Because all of the liens at issue in this case were established before the enactment date we have no occasion to consider whether § 522(f)(2) should be applied to liens established after Congress passed the Act, but before it became effective.

[12] "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' . . . Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion. . . . A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown.'" *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 543–544 (1940) (footnotes omitted).

Act. The purported liens apply generally, not specifically, to property of the kind described and, as a practicable matter, there is nothing to prevent the debtor's selling the property and replacing it or not replacing it, just as he chooses.

Section 522, for the first time, established a set of federal exemptions for individual debtors. Concededly, the section, as all similar statutes, was enacted to protect the debtor's essential needs and to enable him to have a fresh start economically. Section 522(f)(2) permits the debtor to "avoid the fixing" of a nonpossessory, nonpurchase-money security interest in certain property, but the subsection does not extend to all property otherwise exempt under § 522(d). It is limited to certain personal items, such as household furnishings, wearing apparel, jewelry, tools of the debtor's trade, and professionally prescribed health aids.

The Court naturally struggles with the question of the application of the new exemption provisions to obligations created before the new Act. It notes its concern with constitutional problems and it also greets with obvious relief the possibility of construing the Act as being only prospective in its operation. It then quickly pursues the latter route in order to avoid any constitutional issue.

I understand and can sympathize with the Court's desire thus to resolve the case. It is usually much easier to construe a statute so as to avoid a constitutional issue than it is to resolve the constitutional issue itself. And, of course, the Court's cases have announced that, where feasible, this is the preferred method. See, *e. g.*, *Lorillard* v. *Pons*, 434 U. S. 575, 577 (1978).

Were we writing on a "clean slate," however, I would not pursue, in this case, that principle of construction-preference, for I think that the case would deserve consideration in greater depth. I see nothing in the statute with which we are concerned that speaks or hints of only prospective applicability, or that compels it, and I would find it necessary to reach the constitutional issue. I would then resolve that

issue in favor of the debtor and against the small-loan-company creditor. I would do so because the exemptions in question are limited as to kinds of property and as to values; because the amount loaned has little or no relationship to the value of the property; because these asserted lien interests come close to being contracts of adhesion; because repossessions by small loan companies in this kind of situation are rare; because the purpose of the statute is salutary and is to give the debtor a fresh start with a minimum for necessities; because there has been creditor abuse; because Congress merely has adjusted priorities, and has not taken for the Government's use or for public use; because the exemption provisions in question affect the remedy and not the debt; because the security interest seems to have little direct value and weight in its own right and appears useful mainly as a convenient tool with which to threaten the debtor to reaffirm the underlying obligation; because the statute is essentially economic regulation and insubstantial at that; and because there is an element of precedent favorable to the debtor to be found in such cases as *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978), and *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980).

But we are not writing on a clean slate. It seems to me that the case of *Holt* v. *Henley*, 232 U. S. 637 (1914), is precisely in point and, unless the Court chooses to overrule it, must control the present case. There, Holt and the eventual bankrupt signed an agreement in 1909 for the installation of an automatic sprinkler system on the property of the eventual bankrupt. The agreement specified that the system was to remain Holt's property until paid for and that he was to have a right to enter and remove it upon failure to pay as agreed. Thereafter, but also in 1909, a mortgage deed was executed covering the plant and what was "acquired and placed upon the said premises during the continuance of this trust." *Id.*, at 639. Section 8 of the Act of June 25, 1910, ch. 412, 36 Stat. 840, amended § 47a(2) of the then Bank-

ruptcy Act to give the trustee in bankruptcy, as to property coming into the custody of the bankruptcy court, the rights of a creditor holding a lien. Upon Holt's debtor's bankruptcy, the mortgagees claimed the sprinkler system.

Justice Holmes, writing for a unanimous Court, observed that before the amendment "Holt had a better title than the trustees would have got" and that the Court was of the opinion "that the act should not be construed to impair it." 232 U. S., at 639. He went on:

> "We do not need to consider whether or how far in any event the constitutional power of Congress would have been limited. It is enough that the reasonable and usual interpretation of such statutes is to confine their effect, so far as may be, to property rights established after they were passed. . . . That is a familiar and natural mode of interpretation . . . . We are of opinion that [Holt's title] was not affected by the enactment of later date than the conditional sale. The opposite construction would not simply extend a remedy but would impute to the act of Congress an intent to take away rights lawfully retained, and unimpeachable at the moment when they took their start." *Id.*, at 639–640.

The Court then ruled against the claim of the mortgagees because they had made no advance on the faith of the sprinkler system and were not purchasers for value as against Holt, and because removal "would not affect the integrity of the structure on which the mortgagees advanced." *Id.*, at 641.

Holt v. *Henley* thus also involved a pre-existing agreement, a subsequent change in the then Bankruptcy Act, and the Court's preservation of the pre-existing right. I see no way to distinguish that case from this one, and I would affirm the judgment of the Court of Appeals simply on the compelling authority of *Holt* v. *Henley*. See also *Auffm'ordt* v. *Rasin*, 102 U. S. 620, 622 (1881). I would much prefer to avoid in this way the dicta the Court enunciates with respect to "takings."

GILLETTE CO. *v.* MINER

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 81–1493. Argued November 10, 1982—Decided December 6, 1982

Certiorari dismissed for want of jurisdiction. Reported below: 87 Ill. 2d 7, 428 N. E. 2d 478.

Arthur R. Miller argued the cause for petitioner. With him on the briefs were *H. Blair White*, *Russell M. Baird*, *George A. Platz*, and *James P. Connolly*.

Robert S. Atkins argued the cause for respondent. With him on the brief were *Kenneth P. Ross*, *Paul Bernstein*, and *Harry G. Fins*.*

PER CURIAM.

There being no final judgment, the writ of certiorari is dismissed for want of jurisdiction.

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*Briefs of *amici curiae* urging reversal were filed by *Harold D. Shapiro* and *Duane C. Quaini* for the National Association of Independent Insurers et al.; by *Joseph D. Alviani* and *Wayne S. Henderson* for the New England Legal Foundation; and by *Thomas J. Brandi* and *C. Delos Putz, Jr.*, for the plaintiffs in the "Dalkon Shield" IUD Products Liability Litigation et al.

Briefs of *amici curiae* urging affirmance were filed by *Paul P. Biebel, Jr.*, First Assistant Attorney General of Illinois, and *Kathleen Nogan Morrison* and *William P. Oberhardt*, Assistant Attorneys General, for Tyrone C. Fahner, Attorney General of Illinois, et al.; and by *Alan B. Morrison* and *Frederic Townsend* for Public Citizen.

David B. Kahn, *William J. Harte*, and *Kevin M. Forde* filed a brief for the Consumer Coalition as *amicus curiae*.

Syllabus

BROWN ET AL. *v.* SOCIALIST WORKERS '74 CAMPAIGN COMMITTEE (OHIO) ET AL.

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

No. 81–776. Argued October 4, 1982—Decided December 8, 1982

Held: The disclosure provisions of the Ohio Campaign Expense Reporting Law requiring every candidate for political office to report the names and addresses of campaign contributors and recipients of campaign disbursements, cannot be constitutionally applied to appellee Socialist Workers Party (SWP), a minor political party that historically has been the object of harassment by Government officials and private parties. Pp. 91–102.

(a) The First Amendment prohibits a State from compelling disclosures by a minor political party that will subject those persons identified to the reasonable probability of threats, harassment, or reprisals. *Buckley* v. *Valeo*, 424 U. S. 1, 74. Moreover, minor parties must be allowed sufficient flexibility in the proof of injury. *Ibid.* These principles for safeguarding the First Amendment interests of minor parties and their members and supporters apply not only to the compelled disclosure of campaign contributors but also to the compelled disclosure of recipients of campaign disbursements. Pp. 91–98.

(b) Here, the District Court, in upholding appellees' challenge to the constitutionality of the Ohio disclosure provisions, properly concluded that the evidence of private and Government hostility toward the SWP and its members establishes a reasonable probability that disclosing the names of contributors and recipients will subject them to threats, harassment, and reprisals. Pp. 98–101.

Affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, and POWELL, JJ., joined, and in Parts I, III, and IV of which BLACKMUN, J., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 102. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST and STEVENS, JJ., joined, *post*, p. 107.

Gary Elson Brown, Assistant Attorney General of Ohio, argued the cause for appellants. With him on the briefs

were *William J. Brown*, Attorney General, *Thomas F. Staub*, Assistant Attorney General, and *James R. Rishel*.

Thomas D. Buckley, Jr., argued the cause for appellees. With him on the brief were *Gordon J. Beggs*, *Ben Sheerer*, and *Bruce Campbell*.

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether certain disclosure requirements of the Ohio Campaign Expense Reporting Law, Ohio Rev. Code Ann. § 3517.01 *et seq.* (1972 and Supp. 1981), can be constitutionally applied to the Socialist Workers Party, a minor political party which historically has been the object of harassment by government officials and private parties. The Ohio statute requires every political party to report the names and addresses of campaign contributors and recipients of campaign disbursements. In *Buckley* v. *Valeo*, 424 U. S. 1 (1976), this Court held that the First Amendment prohibits the government from compelling disclosures by a minor political party that can show a "reasonable probability" that the compelled disclosures will subject those identified to "threats, harassment, or reprisals." *Id.*, at 74. Employing this test, a three-judge District Court for the Southern District of Ohio held that the Ohio statute is unconstitutional as applied to the Socialist Workers Party. We affirm.

I

The Socialist Workers Party (SWP) is a small political party with approximately 60 members in the State of Ohio. The Party states in its constitution that its aim is "the abolition of capitalism and the establishment of a workers' government to achieve socialism." As the District Court found, the SWP does not advocate the use of violence. It seeks instead to achieve social change through the political process, and its members regularly run for public office. The SWP's candidates have had little success at the polls. In 1980, for example, the Ohio SWP's candidate for the United States Senate received fewer than 77,000 votes, less than 1.9% of the total

vote. Campaign contributions and expenditures in Ohio have averaged about $15,000 annually since 1974.

In 1974 appellees instituted a class action[1] in the District Court for the Northern District of Ohio challenging the constitutionality of the disclosure provisions of the Ohio Campaign Expense Reporting Law. The Ohio statute requires every candidate for political office to file a statement identifying each contributor and each recipient of a disbursement of campaign funds. § 3517.10.[2] The "object or pur-

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[1] The plaintiff class as eventually certified includes all SWP candidates for political office in Ohio, their campaign committees and treasurers, and people who contribute to or receive disbursements from SWP campaign committees. The defendants are the Ohio Secretary of State and other state and local officials who administer the disclosure law.

[2] Section 3517.10 provides in relevant part:

"(A) Every campaign committee, political committee, and political party which made or received a contribution or made an expenditure in connection with the nomination or election of any candidate at any election held in this state shall file, on a form prescribed under this section, a full, true, and itemized statement, made under penalty of election falsification, setting forth in detail the contributions and expenditures . . . .

. . . . . .

"(B) Each statement required by division (A) of this section shall contain the following information:

. . . . . .

"(4) A statement of contributions made or received, which shall include:

"(a) The month, day, and year of the contribution;

"(b) The full name and address of each person, including any chairman or treasurer thereof if other than an individual, from whom contributions are received. The requirement of filing the full address does not apply to any statement filed by a state or local committee of a political party, to a finance committee of such committee, or to a committee recognized by a state or local committee as its fund-raising auxiliary.

"(c) A description of the contribution received, if other than money;

"(d) The value in dollars and cents of the contribution;

"(e) All contributions and expenditures shall be itemized separately regardless of the amount except a receipt of a contribution from a person in the sum of twenty-five dollars or less at one social or fund-raising activity. An account of the total contributions from each such social or fund-raising activity shall be listed separately, together with the expenses incurred and

pose"[3] of each disbursement must also be disclosed. The lists of names and addresses of contributors and recipients are open to public inspection for at least six years. Violations of the disclosure requirements are punishable by fines of up to $1,000 for each day of violation. § 3517.99.

On November 6, 1974, the District Court for the Northern District of Ohio entered a temporary restraining order barring the enforcement of the disclosure requirements against the class pending a determination of the merits.[4] The case was then transferred to the District Court for the Southern District of Ohio, which entered an identical temporary restraining order in February 1975.[5] Accordingly, since 1974

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paid in connection with such activity. No continuing association which makes a contribution from funds which are derived solely from regular dues paid by members of the association shall be required to list the name or address of any members who paid such dues.

"(5) A statement of expenditures which shall include:

"(a) The month, day, and year of expenditure;

"(b) The full name and address of each person to whom the expenditure was made, including any chairman or treasurer thereof if a committee, association, or group of persons;

"(c) The object or purpose for which the expenditure was made;

"(d) The amount of each expenditure.

"(C) . . .

. . . . . .

". . . All such statements shall be open to public inspection in the office where they are filed, and shall be carefully preserved for a period of at least six years."

If the candidate is running for a statewide office, the statement shall be filed with the Ohio Secretary of State; otherwise, the statement shall be filed with the appropriate county board of elections. § 3517.11(A).

[3] § 3517.10(B)(5)(c).

[4] The order restrained various state officials from "applying to or enforcing against plaintiffs . . . the disclosure provisions of the Ohio Campaign Expense Reporting Law and the penalty provision of that law, the effect of which will be to postpone the beginning of any possible period of violation of that law by plaintiffs, . . . until such time as the case is decided by the three judge panel, which is hereby convened." (Citations omitted.)

[5] Apparently none of the parties throughout the 6-year period questioned whether the extended duration of the temporary restraining order

appellees have not disclosed the names of contributors and recipients but have otherwise complied with the statute. A three-judge District Court was convened pursuant to 28 U. S. C. § 2281. Following extensive discovery, the trial was held in February 1981. After reviewing the "substantial evidence of both governmental and private hostility toward and harassment of SWP members and supporters," the three-judge court concluded that under *Buckley* v. *Valeo*, 424 U. S. 1 (1976), the Ohio disclosure requirements are unconstitutional as applied to appellees.[6] We noted probable jurisdiction. 454 U. S. 1122 (1981).

II

The Constitution protects against the compelled disclosure of political associations and beliefs. Such disclosures "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley* v. *Valeo*, *supra*, at 64, citing *Gibson* v. *Florida Legislative Comm.*, 372 U. S. 539 (1963); *NAACP* v. *Button*, 371 U. S. 415 (1963); *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *Bates* v. *Little Rock*, 361 U. S. 516 (1960); *NAACP* v. *Alabama*, 357 U. S. 449 (1958). "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP* v. *Alabama*, *supra*, at 462. The right to privacy in one's political associations and beliefs will yield

conformed to the requirements of Rule 65(b) of the Federal Rules of Civil Procedure.

[6] Because it invalidated the Ohio statute as applied to the Ohio SWP, the District Court did not decide appellees' claim that the statute was facially invalid. The Ohio statute requires disclosure of contributions and expenditures no matter how small the amount. Ohio Rev. Code Ann. § 3517.10(B)(4)(e) (Supp. 1981). Appellees contended that the absence of a monetary threshold rendered the statute facially invalid since the compelled disclosure of nominal contributions and expenditures lacks a substantial nexus with any claimed government interest. See *Buckley* v. *Valeo*, 424 U. S., at 82–84.

The District Court's opinion is unreported.

only to a "'subordinating interest of the State [that is] compelling,'" *NAACP* v. *Alabama*, *supra*, at 463 (quoting *Sweezy* v. *New Hampshire*, 354 U. S. 234, 265 (1957) (opinion concurring in result)), and then only if there is a "substantial relation between the information sought and [an] overriding and compelling state interest." *Gibson* v. *Florida Legislative Comm.*, *supra*, at 546.

In *Buckley* v. *Valeo* this Court upheld against a First Amendment challenge the reporting and disclosure requirements imposed on political parties by the Federal Election Campaign Act of 1971. 2 U. S. C. § 431 *et seq.* 424 U. S., at 60–74. The Court found three government interests sufficient in general to justify requiring disclosure of information concerning campaign contributions and expenditures:[7] enhancement of voters' knowledge about a candidate's possible allegiances and interests, deterrence of corruption, and the enforcement of contribution limitations.[8] The Court stressed, however, that in certain circumstances the balance of interests requires exempting minor political parties from compelled disclosures. The government's interests in compelling disclosures are "diminished" in the case of minor parties. *Id.*, at 70. Minor party candidates "usually represent definite and publicized viewpoints" well known to the public, and the improbability of their winning reduces the dangers of corruption and vote-buying. *Ibid.* At the same time, the potential for impairing First Amendment interests is substantially greater:

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[7] Title 2 U. S. C. §§ 432, 434, and 438 (1976 ed., Supp. V) require each political committee to keep detailed records of both contributions and expenditures, including the names of campaign contributors and recipients of campaign disbursements, and to file reports with the Federal Election Commission which are made available to the public.

[8] The government interest in enforcing limitations is completely inapplicable in this case, since the Ohio law imposes no limitations on the amount of campaign contributions.

> "We are not unmindful that the damage done by disclosure to the associational interests of the minor parties and their members and to supporters of independents could be significant. These movements are less likely to have a sound financial base and thus are more vulnerable to falloffs in contributions. In some instances fears of reprisal may deter contributions to the point where the movement cannot survive. The public interest also suffers if that result comes to pass, for there is a consequent reduction in the free circulation of ideas both within and without the political arena." *Id.*, at 71 (footnotes omitted).

We concluded that in some circumstances the diminished government interests furthered by compelling disclosures by minor parties does not justify the greater threat to First Amendment values.

Buckley v. *Valeo* set forth the following test for determining when the First Amendment requires exempting minor parties from compelled disclosures:

> "The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.*, at 74.

The Court acknowledged that "unduly strict requirements of proof could impose a heavy burden" on minor parties. *Ibid.* Accordingly, the Court emphasized that "[m]inor parties must be allowed sufficient flexibility in the proof of injury." *Ibid.*

> "The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be

able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views." *Ibid.*

Appellants concede that the *Buckley* test for exempting minor parties governs the disclosure of the names of *contributors*, but they contend that the test has no application to the compelled disclosure of names of *recipients* of campaign disbursements.[9] Appellants assert that the State has a substantial interest in preventing the misuse of campaign funds.[10] They also argue that the disclosure of the names of

[9] We believe that the question whether the *Buckley* test applies to the compelled disclosure of recipients of expenditures is properly before us. Throughout this litigation Ohio has maintained that it can constitutionally require the SWP to disclose the names of both campaign contributors and recipients of campaign expenditures. In invalidating both aspects of the Ohio statute as applied to the SWP, the District Court necessarily held (1) that the *Buckley* standard, which permits flexible proof of the reasonable probability of threats, harassment, or reprisals, applies to both contributions and expenditures, and (2) that the evidence was sufficient to show a reasonable probability that disclosure would subject both contributors and recipients to public hostility and harassment. In their jurisdictional statement, appellants appealed from the entire judgment entered below and presented the following question for review:

"Whether, under the standards set forth by this Court in *Buckley* v. *Valeo*, 424 U. S. 1 (1976), the provisions of Sections 3517.10 and 3517.11 of the Ohio Revised Code, which require that the campaign committee of a candidate for public office file a report disclosing the full names and addresses of persons making contributions to or receiving expenditures from such committee, are consistent with the right of privacy of association guaranteed by the First and Fourteenth Amendments of the Constitution of the United States when applied to the committees of candidates of a minority party which can establish only isolated instances of harassment directed toward the organization or its members within Ohio during recent years." Juris. Statement i.

We think that the correctness of both holdings of the District Court is "fairly included" in the question presented in the jurisdictional statement. This Court's Rule 15.1(a). See *Procunier* v. *Navarette*, 434 U. S. 555, 559, n. 6 (1978) ("[O]ur power to decide is not limited by the precise terms of the question presented").

[10] This is one of three government interests identified in *Buckley*. Appellants do not contend that the other two interests, enhancing voters' abil-

recipients of campaign funds will have no significant impact on First Amendment rights, because, unlike a contribution, the mere receipt of money for commercial services does not affirmatively express political support.

We reject appellants' unduly narrow view of the minor-party exemption recognized in *Buckley*. Appellants' attempt to limit the exemption to laws requiring disclosure of contributors is inconsistent with the rationale for the exemption stated in *Buckley*. The Court concluded that the government interests supporting disclosure are weaker in the case of minor parties, while the threat to First Amendment values is greater. Both of these considerations apply not only to the disclosure of campaign contributors but also to the disclosure of recipients of campaign disbursements.

Although appellants contend that requiring disclosure of recipients of disbursements is necessary to prevent corruption, this Court recognized in *Buckley* that this concededly legitimate government interest has less force in the context of minor parties. The federal law considered in *Buckley*, like the Ohio law at issue here, required campaign committees to identify both campaign contributors and recipients of campaign disbursements. 2 U. S. C. §§ 432(c) and (d), and 434(a) and (b). We stated that "by exposing large contributions *and expenditures* to the light of publicity," disclosure requirements "ten[d] to 'prevent the corrupt use of money to affect elections.'" *Id.*, at 67 (emphasis added), quoting *Burroughs* v. *United States*, 290 U. S. 534, 548 (1934). We concluded, however, that because minor party candidates are unlikely to win elections, the government's general interest in "deterring the 'buying' of elections" is "reduced" in the case of minor parties. 424 U. S., at 70.[11]

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ity to evaluate candidates and enforcing contribution limitations, support the disclosure of the names of recipients of campaign disbursements.

[11] The partial dissent suggests that the government interest in the disclosure of recipients of expenditures is not significantly diminished in the case of minor political parties, since parties with little likelihood of electoral success might nevertheless finance improper campaign activities merely to

Moreover, appellants seriously understate the threat to First Amendment rights that would result from requiring minor parties to disclose the recipients of campaign disburse-

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gain recognition. *Post*, at 109–110. The partial dissent relies on JUSTICE WHITE's separate opinion in *Buckley*, in which he pointed out that "unlimited money tempts people to spend it on *whatever* money can buy to influence an election." 424 U. S., at 265 (emphasis in original).

An examination of the context in which JUSTICE WHITE made this observation indicates precisely why the state interest here is insubstantial. JUSTICE WHITE was addressing the constitutionality of ceilings on campaign expenditures applicable to all candidates. His point was that such ceilings "could play a substantial role in preventing unethical practices." *Ibid.* In the case of minor parties, however, their limited financial resources serve as a built-in expenditure ceiling which minimizes the likelihood that they will expend substantial amounts of money to finance improper campaign activities. See *id.*, at 71. For example, far from having "unlimited money," the Ohio SWP has had an average of roughly $15,000 available each year to spend on its election efforts. Most of the limited resources of minor parties will typically be needed to pay for the ordinary fixed costs of conducting campaigns, such as filing fees, travel expenses, and the expenses incurred in publishing and distributing campaign literature and maintaining offices. Thus JUSTICE WHITE's observation that "financing illegal activities is low on the campaign organization's priority list," *id.*, at 265, is particularly apposite in the case of minor parties. We cannot agree, therefore, that minor parties are as likely as major parties to make significant expenditures in funding dirty tricks or other improper campaign activities. See *post*, at 110. Moreover, the expenditure by minor parties of even a substantial portion of their limited funds on illegal activities would be unlikely to have a substantial impact.

Furthermore, the mere possibility that minor parties will resort to corrupt or unfair tactics cannot justify the substantial infringement on First Amendment interests that would result from compelling the disclosure of recipients of expenditures. In *Buckley*, we acknowledged the possibility that supporters of a major party candidate might channel money into minor parties to divert votes from other major party contenders, 424 U. S., at 70, and that, as noted by the partial dissent, *post*, at 110, and n. 5, occasionally minor parties may affect the outcomes of elections. We thus recognized that the distorting influence of large contributors on elections may not be entirely absent in the context of minor parties. Nevertheless, because we concluded that the government interest in disclosing contributors is substantially reduced in the case of minor parties, we held that minor parties

ments. Expenditures by a political party often consist of reimbursements, advances, or wages paid to party members, campaign workers, and supporters, whose activities lie at the very core of the First Amendment.[12] Disbursements may also go to persons who choose to express their support for an unpopular cause by providing services rendered scarce by public hostility and suspicion.[13] Should their involvement be publicized, these persons would be as vulnerable to threats, harassment, and reprisals as are contributors whose connection with the party is solely financial.[14] Even individuals

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are entitled to an exemption from requirements that contributors be disclosed where they can show a reasonable probability of harassment. 424 U. S., at 70. Because we similarly conclude that the government interest in requiring the disclosure of recipients of expenditures is substantially reduced in the case of minor parties, we hold that the minor-party exemption recognized in *Buckley* applies to compelled disclosure of expenditures as well.

[12] For example, the expenditure statements filed by the SWP contain a substantial percentage of entries designated as per diem, travel expenses, room rental, and so on. The Ohio statute makes it particularly easy to identify these individuals since it requires disclosure of the *purpose* of the disbursements as well as the identity of the recipients. Ohio Rev. Code Ann. § 3517.10(B)(5)(c) (Supp. 1981).

[13] "'[F]inancial transactions can reveal much about a person's activities, associations, and beliefs.'" *Buckley* v. *Valeo*, 424 U. S., at 66, quoting *California Bankers Assn.* v. *Shultz*, 416 U. S. 21, 78–79 (1974) (POWELL, J., concurring). The District Court found that the Federal Bureau of Investigation (FBI) at least until 1976 routinely investigated the financial transactions of the SWP and kept track of the payees of SWP checks.

[14] The fact that some or even many recipients of campaign expenditures may not be exposed to the risk of public hostility does not detract from the serious threat to the exercise of First Amendment rights of those who are so exposed. We cannot agree with the partial dissent's assertion that disclosures of disbursements paid to campaign workers and supporters will not increase the probability that they will be subjected to harassment and hostility. *Post*, at 111–112. Apart from the fact that individuals may work for a candidate in a variety of ways without publicizing their involvement, the application of a disclosure requirement results in a dramatic increase in public exposure. Under Ohio law a person's affiliation with the party will be recorded in a document that must be kept open to inspection

who receive disbursements for "merely" commercial transactions may be deterred by the public enmity attending publicity, and those seeking to harass may disrupt commercial activities on the basis of expenditure information.[15] Because an individual who enters into a transaction with a minor party purely for commercial reasons lacks any ideological commitment to the party, such an individual may well be deterred from providing services by even a small risk of harassment.[16] Compelled disclosure of the names of such recipients of expenditures could therefore cripple a minor party's ability to operate effectively and thereby reduce "the free circulation of ideas both within and without the political arena." *Buckley*, 424 U. S., at 71 (footnotes omitted). See *Sweezy* v. *New Hampshire*, 354 U. S., at 250–251 (plurality opinion) ("Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents").

We hold, therefore, that the test announced in *Buckley* for safeguarding the First Amendment interests of minor parties and their members and supporters applies not only to the compelled disclosure of campaign contributors but also to the compelled disclosure of recipients of campaign disbursements.

III

The District Court properly applied the *Buckley* test to the facts of this case. The District Court found "substantial evi-

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by any one who wishes to examine it for a period of at least six years. Ohio Rev. Code Ann. § 3517.10(C) (Supp. 1981). The preservation of unorthodox political affiliations in public records substantially increases the potential for harassment above and beyond the risk that an individual faces simply as a result of having worked for an unpopular party at one time.

[15] See, *e. g.*, *Socialist Workers Party* v. *Attorney General*, 458 F. Supp. 895, 904 (SDNY 1978) (FBI interference with SWP travel arrangements and speaker hall rental), vacated on other grounds, 596 F. 2d 58 (CA2), cert. denied, 444 U. S. 903 (1979).

[16] Moreover, it would be hard to think of many instances in which the state interest in preventing vote-buying and improper campaign activities

dence of both governmental and private hostility toward and harassment of SWP members and supporters." Appellees introduced proof of specific incidents of private and government hostility toward the SWP and its members within the four years preceding the trial. These incidents, many of which occurred in Ohio and neighboring States, included threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at an SWP office. There was also evidence that in the 12-month period before trial 22 SWP members, including 4 in Ohio, were fired because of their party membership. Although appellants contend that two of the Ohio firings were not politically motivated, the evidence amply supports the District Court's conclusion that "private hostility and harassment toward SWP members make it difficult for them to maintain employment."

The District Court also found a past history of Government harassment of the SWP. FBI surveillance of the SWP was "massive" and continued until at least 1976. The FBI also conducted a counterintelligence program against the SWP and the Young Socialist Alliance (YSA), the SWP's youth organization. One of the aims of the "SWP Disruption Program" was the dissemination of information designed to impair the ability of the SWP and YSA to function. This program included "disclosing to the press the criminal records of SWP candidates, and sending anonymous letters to SWP members, supporters, spouses, and employers."[17] Until at least 1976, the FBI employed various covert techniques to

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would be furthered by the disclosure of payments for routine commercial services.

[17] The District Court was quoting from Part I of the Final Report of Special Master Judge Breitel in *Socialist Workers Party* v. *Attorney General of the United States*, 73 Civ. 3160 (TPG) (SDNY, Feb. 4, 1980), detailing the United States Government's admissions concerning the existence and nature of the Government surveillance of the SWP.

obtain information about the SWP, including information concerning the sources of its funds and the nature of its expenditures. The District Court specifically found that the FBI had conducted surveillance of the Ohio SWP and had interfered with its activities within the State.[18] Government surveillance was not limited to the FBI. The United States Civil Service Commission also gathered information on the SWP, the YSA, and their supporters, and the FBI routinely distributed its reports to Army, Navy and Air Force Intelligence, the United States Secret Service, and the Immigration and Naturalization Service.

The District Court properly concluded that the evidence of private and Government hostility toward the SWP and its members establishes a reasonable probability that disclosing the names of contributors and recipients will subject them to threats, harassment, and reprisals.[19] There were numerous instances of recent harassment of the SWP both in Ohio and

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[18] The District Court also found the following:

"The Government possesses about 8,000,000 documents relating to the SWP, YSA . . . and their members. . . . Since 1960 the FBI has had about 300 informants who were members of the SWP and/or YSA and 1,000 nonmember informants. Both the Cleveland and Cincinnati FBI field offices had one or more SWP or YSA member informants. Approximately 21 of the SWP member informants held local branch offices. Three informants even ran for elective office as SWP candidates. The 18 informants whose files were disclosed to Judge Breitel received total payments of $358,648.38 for their services and expenses." (Footnotes omitted.)

[19] After reviewing the evidence and the applicable law, the District Court concluded: "[T]he totality of the circumstances establishes that, in Ohio, public disclosure that a person is a member of or has made a contribution to the SWP would create a reasonable probability that he or she would be subjected to threats, harassment or reprisals." The District Court then enjoined the compelled disclosures of either contributors' or recipients' names. Although the District Court did not expressly refer in the quoted passage to disclosure of the names of recipients of campaign disbursements, it is evident from the opinion that the District Court was addressing both contributors and recipients.

in other States.[20] There was also considerable evidence of past Government harassment. Appellants challenge the relevance of this evidence of Government harassment in light of recent efforts to curb official misconduct. Notwithstanding these efforts, the evidence suggests that hostility toward the SWP is ingrained and likely to continue. All this evidence was properly relied on by the District Court. *Buckley*, 424 U. S., at 74.

IV

The First Amendment prohibits a State from compelling disclosures by a minor party that will subject those persons identified to the reasonable probability of threats, harassment, or reprisals. Such disclosures would infringe the

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[20] Some of the recent episodes of threats, harassment, and reprisals against the SWP and its members occurred outside of Ohio. Anti-SWP occurrences in places such as Chicago (SWP office vandalized) and Pittsburgh (shot fired at SWP building) are certainly relevant to the determination of the public's attitude toward the SWP in Ohio. In *Buckley* we stated that "[n]ew parties that have no history upon which to draw may . . . offer evidence of reprisals and threats directed against individuals or organizations holding similar views." 424 U. S., at 74. Surely the Ohio SWP may offer evidence of the experiences of other chapters espousing the same political philosophy. See *1980 Illinois Socialist Workers Campaign* v. *State of Illinois Board of Elections*, 531 F. Supp. 915, 921 (ND Ill. 1981).

Appellants point to the lack of direct evidence linking the Ohio statute's disclosure requirements to the harassment of campaign contributors or recipients of disbursements. In *Buckley*, however, we rejected such "unduly strict requirements of proof" in favor of "flexibility in the proof of injury." 424 U. S., at 74. We thus rejected requiring a minor party to "come forward with witnesses who are too fearful to contribute but not too fearful to testify about their fear" or prove that "chill and harassment [are] directly attributable to the specific disclosure from which the exemption is sought." *Ibid.* We think that these considerations are equally applicable to the proof required to establish a reasonable probability that recipients will be subjected to threats and harassment if their names are disclosed. While the partial dissent appears to agree, *post*, at 112–113, n. 7, its "separately focused inquiry," *post*, at 112, and n. 7, in reality requires evidence of chill and harassment directly attributable to the expenditure-disclosure requirement.

First Amendment rights of the party and its members and supporters. In light of the substantial evidence of past and present hostility from private persons and Government officials against the SWP, Ohio's campaign disclosure requirements cannot be constitutionally applied to the Ohio SWP.

The judgment of the three-judge District Court for the Southern District of Ohio is affirmed.

It is so ordered.

JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

I join Parts I, III, and IV of the Court's opinion and agree with much of what is said in Part II. But I cannot agree, with the Court or with the partial dissent, that we should reach the issue whether a standard of proof different from that applied to disclosure of campaign contributions should be applied to disclosure of campaign disbursements. See *ante*, at 94, n. 9; *post*, at 112–113, n. 7.[1] Appellants did not suggest in the District Court that different standards might apply. Nor was the issue raised in appellants' jurisdictional statement or in their brief on the merits in this Court. Consequently, I would merely *assume* for purposes of our present decision—as appellants apparently have assumed throughout this litigation and as the District Court clearly assumed—that the flexible proof rule of *Buckley* v. *Valeo*, 424 U. S. 1 (1976), applies equally to forced disclosure of contributions and to forced disclosure of expenditures. I would leave for another day, when the issue is squarely presented, considered by the courts below, and adequately briefed here, the significant question that now divides the Court.

This Court's Rule 15.1(a) states: "Only the questions set forth in the jurisdictional statement or fairly included therein

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[1] Although the partial dissent agrees that this issue is not properly presented and therefore that the question should not be decided, *post*, at 112, n. 7, its result and reasoning endorse a different standard of proof. See n. 2, *infra*.

will be considered by the Court." Appellants' jurisdictional statement presented a single question:

> "Whether, under the standards set forth by this Court in *Buckley* v. *Valeo*, 424 U. S. 1 (1976), the provisions of Sections 3517.10 and 3517.11 of the Ohio Revised Code, which require that the campaign committee of a candidate for public office file a report disclosing the full names and addresses of persons making contributions to or receiving expenditures from such committee, are consistent with the right of privacy of association guaranteed by the First and Fourteenth Amendments of the Constitution of the United States when applied to the committees of candidates of a minority party which can establish only isolated instances of harassment directed toward the organization or its members within Ohio during recent years." Juris. Statement i.

The question *assumes* the applicability of *Buckley* to the entire case, and asks this Court to decide only whether the evidence presented to and facts found by the District Court were sufficient to support that court's conclusion that the *Buckley* test was satisfied.

Absent extraordinary circumstances, this Court does not decide issues beyond those it has agreed to review. *Mayor* v. *Educational Equality League*, 415 U. S. 605, 623 (1974); *United States* v. *Bass*, 404 U. S. 336, 339, n. 4 (1971); *General Talking Pictures Co.* v. *Western Electric Co.*, 304 U. S. 175, 178–179 (1938). According to the Court, however, the issue whether the flexible standard of proof established in *Buckley* applies to recipients of expenditures is "'fairly included' in the question presented." *Ante*, at 94, n. 9. But appellants' failure to present the issue was not a mere oversight in phrasing that question. That appellants did not invoke this Court's jurisdiction to review specifically the proper standard for disclosure of campaign expenditures is also apparent from appellants' arguments in their jurisdictional statement and their brief on the merits. In their juris-

dictional statement, under the heading "The Question is Substantial," appellants stated:

> "The standards governing the resolution of actions involving challenges to reporting requirements by minority parties were set forth by this Court in the case of *Buckley* v. *Valeo*, 424 U. S. 1 (1976). In *Buckley* the Court held that in order to receive relief from reporting requirements such as those at issue in this action a minority party must establish '. . . a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment or reprisals from either Government officials or private parties.' 424 U. S. at 74." Juris. Statement 10.

Appellants went on to state that the flexible standard of proof of injury established in *Buckley* applied to "disclosure requirements." Juris. Statement 12–13. Similar assertions are found in appellants' brief on the merits. See Brief for Appellants 12 ("Summary of Argument"); *id.*, at 18 ("While refusing to grant minority parties a blanket exemption from financial disclosure requirements, the Court in *Buckley* established a standard under which they may obtain relief . . .").

Thus, appellants' exclusive theme in the initial presentation of their case here was that the District Court erred in finding that the *Buckley* standard was satisfied. They did not suggest that the standard was inapplicable, or applied differently, to campaign expenditure requirements. It was not until their reply brief, submitted eight years after this suit was instituted and at a time when appellees had no opportunity to respond in writing, that appellants sought to inject this new issue into the case. See *Irvine* v. *California*, 347 U. S. 128, 129 (1954) (plurality opinion of Jackson, J.). In my view, it simply cannot be said that it was "fairly included" in the jurisdictional statement.

Moreover, "[w]here issues are neither raised before nor considered [by the court below], this Court will not ordinarily

consider them." *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 147, n. 2 (1970); *Lawn* v. *United States*, 355 U. S. 339, 362–363, n. 16 (1958). The District Court did not address the question whether some standard other than that developed in *Buckley* should apply to disclosure of campaign expenditures. The reason for this was that appellants conceded in the District Court, as they concede here, that the "flexibility in the proof of injury" applicable to disclosure of contributors governed the entire case. In their post-trial memorandum, for example, appellants did not even hint that a different standard should govern disclosure of the identities of recipients of expenditures. Instead, they quoted the *Buckley* test and granted that "evidence of past harassment may be presented by plaintiffs in cases such as the instant one." Defendants' Post-Trial Memorandum 4–5.

This case presents no extraordinary circumstances justifying deviation from this Court's Rule 15.1(a) and its long-established practice respecting issues not presented below. We have deviated from the Rule when jurisdictional issues have been omitted by the parties and lower courts, see, *e. g.*, *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, 197 (1956), or when the Court has noticed "plain error" not assigned, see *Carpenters* v. *United States*, 330 U. S. 395, 412 (1947). Obviously, the issue that divides the Court from the partial dissent is not jurisdictional. Nor, as the Court's opinion persuasively demonstrates, is application of the *Buckley* test to disclosure of campaign disbursements "plain error." Indeed, I consider it quite possible that, after full consideration, the Court would adopt the *Buckley* standard in this context for the reasons stated by the Court. I also consider it quite possible that, after full consideration, the Court might wish to revise the *Buckley* standard as applied to campaign disbursements—perhaps to take account of the different types of expenditures covered and their differing impacts on associational rights, or perhaps along the lines suggested in the partial dissent. But this significant con-

stitutional decision should not be made until the question is properly presented so that the record includes data and arguments adequate to inform the Court's judgment.

The Court's apparent reliance on *Procunier* v. *Navarette*, 434 U. S. 555, 560, n. 6 (1978), does not provide a rationale for deciding this issue at this time. The petitioner there had included in his petition for certiorari all the questions we eventually decided. Notwithstanding the fact that the *Court* limited its grant of the petition to a single question, the parties fully briefed the questions on which review had been denied. Deciding those questions, therefore, was neither unwise nor unfair. In this case, in contrast, appellants affirmatively excluded the point at issue in their jurisdictional statement and in their brief on the merits. By failing to raise it until their reply brief, appellants prevented appellees from responding to the argument in writing. There can be no question that, as the Court observes, "'our *power* to decide is not limited by the precise terms of the question presented.'" *Ante*, at 94, n. 9 (quoting *Procunier* v. *Navarette*, 434 U. S., at 560, n. 6) (emphasis supplied). But Rule 15.1(a) is designed, as a prudential matter, to prevent the possibility that such tactics will result in ill-considered decisions. It is cases like this one that show the wisdom of the Rule.

Thus, for purposes of this case, I would *assume*, as appellants' jurisdictional statement and brief on the merits assume, that the *Buckley* standard applies to campaign expenditures just as it applies to contributions.[2] Appellees

[2] The partial dissent says it agrees that "this is not the appropriate case to determine whether a different test or standard of proof should be employed in determining the constitutional validity of required disclosure of expenditures." *Post*, at 112, n. 7. If that is so, however, appellees' proof, which the partial dissent agrees established a reasonable probability of threats, harassment, or reprisals against contributors, likewise allowed the District Court to find a reasonable probability of threats, harassment, or reprisals against recipients of expenditures. The *Buckley* standard permits proof that a particular disclosure creates the requisite likelihood of harassment to be based on a showing of harassment directed at members of

presented "specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself," sufficient under the rule in *Buckley* to establish a "reasonable probability" that the Ohio law would trigger "threats, harassment, or reprisals" against contributors. 424 U. S., at 74. On this basis, I would affirm the judgment of the District Court in its entirety.

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST and JUSTICE STEVENS join, concurring in part and dissenting in part.

I concur in the judgment that the Socialist Workers Party (SWP) has sufficiently demonstrated a reasonable probability that disclosure of contributors will subject those persons to threats, harassment, or reprisals, and thus under *Buckley* v. *Valeo*, 424 U. S. 1 (1976), the State of Ohio cannot constitutionally compel the disclosure. Further, I agree that the broad concerns of *Buckley* apply to the required disclosure of recipients of campaign expenditures. But, as I view the record presented here, the SWP has failed to carry its burden of showing that there is a reasonable probability that disclosure of recipients of expenditures will subject the recipients themselves or the SWP to threats, harassment, or reprisals. Moreover, the strong public interest in fair and honest elections outweighs any damage done to the associational rights of the party and its members by application of the State's expenditure disclosure law.

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the party or at the organization itself. 424 U. S., at 74. Thus, I do not understand how the partial dissent's "separately focused inquiry" can "plainly require a different result," *post*, at 113, n. 7, or how it possibly can lead to the conclusion that "appellees did not carry their burden of production and persuasion insofar as they challenge the expenditure disclosure provisions," *post*, at 115—unless, despite the partial dissent's uncertain disclaimer, *post*, at 113, n. 7, its "separate focus" alters *Buckley*'s "reasonable probability" and "flexible proof" standards in the context of expenditures.

I

Buckley upheld the validity of the Federal Election Campaign Act of 1971, which requires the disclosure of names of both contributors to a campaign and recipients of expenditures from the campaign. *Buckley* recognized three major governmental interests in disclosure requirements: deterrence of corruption; enhancement of voters' knowledge about a candidate's possible allegiances and interests; and provision of the data and means necessary to detect violations of any statutory limitations on contributions or expenditures. The precise challenge that the *Buckley* Court faced, however, was the overbreadth of the Act's requirements "insofar as they apply to *contributions* to minor parties and independent candidates." *Id.*, at 68–69 (emphasis added).[1] Since the appellants in *Buckley* did not challenge the application to minor parties of requirements of disclosure of expenditures, the Court had no occasion to consider directly the First Amendment interests of a minor political party in preventing disclosure of expenditures, much less to weigh them against the governmental interests in disclosure. The test adopted by *Buckley*, quoted by the majority, *ante*, at 93, reflects this limitation, for it contemplates only assessing possible harassment of *contributors*, without a word about considering the harassment of recipients of expenditures if their names are disclosed or any effects this harassment may have on the party.

This is not to say that *Buckley* provides no guidance for resolving this claim. I agree with the majority that appellants

[1] Of course, the plaintiffs in *Buckley* challenged many aspects of the federal Act, including expenditure limitations and the disclosure requirements for *independent* contributions and expenditures. The Court upheld all disclosure requirements, including disclosure of independent expenditures "for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U. S., at 80. The plaintiffs in *Buckley* did not challenge, however, the federal requirement that all political parties, including minor political parties, disclose the recipients of their expenditures.

have overstated their argument in declaring that *Buckley* has no application to the disclosure of recipients of expenditures. Certainly, *Buckley* enunciates the general governmental interest in regulating minor parties, who, although unlikely to win, can often affect the outcome of an election. 424 U. S., at 70. *Buckley* also emphasizes the sensitive associational rights of minor parties.

Nevertheless, there are important differences between disclosure of contributors and disclosure of recipients of campaign expenditures—differences that the *Buckley* Court had no occasion to address, but that compel me to conclude that the balance should not necessarily be calibrated identically. First, unlike the government's interest in disclosure of contributions, its interest in disclosure of expenditures does not decrease significantly for small parties. The Court in *Buckley* recognized that knowing the identity of contributors would not significantly increase the voters' ability to determine the political ideology of the minor-party candidate, for the stance of the minor-party candidate is usually well known. *Ibid.*[2] Nor would identifying a minor party's contributors further the interest in preventing the "buying" of a candidate, because of the improbability of the minor-party candidate's winning the election. *Ibid.* Thus, these two major government interests in disclosure of contributions are significantly reduced for minor parties.[3]

In sharp contrast, however, the governmental interest in disclosure of expenditures remains significant for minor parties. The purpose of requiring parties to disclose expenditures is to deter improper influencing of voters. Corruption

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[2] Certainly, that is true in this instance. The general political stance of the SWP and its candidates is readily discernible from the most cursory glance at its constitution or literature.

[3] The majority is obviously correct in noting that the third governmental interest articulated in *Buckley*—using disclosures to police limitations on contributions and expenditures—has no application to either contributions or expenditures in Ohio, since the Ohio statute sets no limitations on them.

of the electoral process can take many forms: the actual buying of votes; the use of "slush funds;" dirty tricks; and bribes of poll watchers and other election officials. Certainly, a "persuasive" campaign worker on election day can corral voters for his minor-party candidate with even a modest "slush fund."[4] Even though such improper practices are unlikely to be so successful as to attract enough votes to elect the minor-party candidate, a minor party, whose short-term goal is merely recognition, may be as tempted to resort to impermissible methods as are major parties, and the resulting deflection of votes can determine the outcome of the election of other candidates.[5] The requirement of a *full* and *verifiable* report of expenditures is important in deterring such practices, for otherwise the party could hide the improper transactions through an accounting sleight of hand.[6]

On the other side of the balance, disclosure of recipients of expenditures will have a lesser impact on a minority party's First Amendment interests than will disclosure of contribu-

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[4] As JUSTICE WHITE noted in partial dissent in *Buckley*, 424 U. S., at 264–265, citing *Burroughs* v. *United States*, 290 U. S. 534 (1934):

"[T]he corrupt use of money by candidates is as much to be feared as the corrosive influence of large contributions. There are many illegal ways of spending money to influence elections. One would be blind to history to deny that unlimited money tempts people to spend it on *whatever* money can buy to influence an election." (Emphasis in original.)

[5] Certainly the SWP could have this effect. For example, appellants noted at oral argument that the SWP candidate in the 1974 Ohio gubernatorial election received some 95,000 votes. The Republican candidate's margin of victory over the Democratic candidate was only some 13,500 votes. Tr. of Oral Arg. 18. The impact of minor parties on elections in the United States is well documented. See generally W. Hesseltine, Third-Party Movements in the United States (1962).

[6] I therefore disagree with the majority's suggestion, *ante*, at 98–99, n. 16, that the government interest in deterring corruption is not furthered by disclosure of all expenditures, including those for commercial services. Even if improprieties are unlikely to occur in expenditures for commercial services, full and verifiable disclosure is needed to ensure that other, improper expenditures are not hidden in commercial accounts.

tors. As the majority states, *ante*, at 91, the First Amendment interest here is "[t]he right to privacy in one's political associations and beliefs." We have never drawn sharp distinctions between members and contributors, *Buckley*, 424 U. S., at 66. As we recognized in *Buckley*, the privacy rights of contributors are especially sensitive, since many seek to express their political views privately through their pocketbook rather than publicly through other means. Disclosure of contributors directly implicates the contributors' associational rights.

The impact on privacy interests arising from disclosure of expenditures is of a quite different—and generally lesser—dimension. Many expenditures of the minority party will be for quite mundane purposes to persons not intimately connected with the organization. Payments for such things as office supplies, telephone service, bank charges, printing and photography costs would generally fall in this category. The likelihood that such business transactions would dry up if disclosed is remote at best. Unlike silent contributors, whom disclosure would reveal to the public as supporters of the party's ideological positions, persons providing business services to a minor party are not generally perceived by the public as supporting the party's ideology, and thus are unlikely to be harassed if their names are disclosed. Consequently, the party's associational interests are unlikely to be affected by disclosure of recipients of such expenditures.

Other recipients of expenditures may have closer ideological ties to the party. The majority suggests that campaign workers receiving per diem, travel, or room expenses may fit in this category. *Ante*, at 97, n. 12. It is certainly conceivable that such persons may be harassed or threatened for their conduct. Laws requiring disclosure of recipients of expenditures, however, are not likely to contribute to this harassment. Once an individual has openly shown his close ties to the organization by campaigning for it, disclosure of receipt of expenditures is unlikely to increase the degree of

harassment so significantly as to deter the individual from campaigning for the party. Further, in striking the balance, the governmental concerns are greatest precisely for the actions of campaign workers that might improperly influence voters. Thus, whatever marginal deterrence that may arise from disclosure of expenditures is outweighed by the heightened governmental interest.

In sum, the heightened governmental interest in disclosure of expenditures and the reduced marginal deterrent effect on associational interests demand a separately focused inquiry into whether there exists a reasonable probability that disclosure will subject recipients or the party itself to threats, harassment, or reprisals.[7]

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[7] According to the majority, "the question whether the *Buckley* test applies to the compelled disclosure of recipients of expenditures is properly before us." *Ante*, at 94, n. 9. The majority declares that, in answering this question, "the District Court necessarily *held* (1) that the *Buckley* standard, which permits flexible proof of the reasonable probability of threats, harassment, or reprisals, applies to both contributions and expenditures, and (2) that the evidence was sufficient to show a reasonable probability that disclosure would subject both contributors and recipients to public hostility and harassment." *Ibid.* (emphasis added).

JUSTICE BLACKMUN, *ante*, at 102, however, more accurately characterizes the District Court's action as *assuming* that the *Buckley* standard applies to disclosure of expenditures and *holding* the evidence sufficient to meet this standard. The District Court's assumption is understandable, since appellants did not question it below. Thus, this is not the appropriate case to determine whether a different test or standard of proof should be employed in determining the constitutional validity of required disclosure of expenditures.

Even assuming the general applicability of the *Buckley* standard, though, the question presented here requires us to inquire whether the evidence of harassment establishes a "reasonable probability" that the Ohio law would trigger "threats, harassment, or reprisals" against *recipients* of expenditures that in turn may harm the party's associational interests. This inquiry is necessarily distinct from the inquiry whether the evidence establishes a reasonable probability that disclosure would trigger threats, harassment, or reprisals against *contributors*. Although the proof requirements guiding this separate inquiry remain flexible, and direct proof

II

Turning to the evidence in this case, it is important to remember that, even though proof requirements must be flexible, *Buckley*, *supra*, at 74, the minor party carries the burden of production and persuasion to show that its First Amendment interests outweigh the governmental interests. Additionally, the application of the *Buckley* standard to the historical evidence is most properly characterized as a mixed question of law and fact, for which we normally assess the record independently to determine if it supports the conclusion of unconstitutionality as applied.[8]

Here, there is no direct evidence of harassment of either contributors or recipients of expenditures. Rather, as the majority accurately represents it, the evidence concerns harassment and reprisals of visible party members, including violence at party headquarters and loss of jobs. I concur in the majority's conclusion that this evidence, viewed in its entirety, supports the conclusion that there will be a reasonable probability of harassment of contributors if their names are disclosed. This evidence is sufficiently linked to disclosure of contributors in large part because any person publicly known to support the SWP's unpopular ideological position may suffer the reprisals that this record shows active party members suffer, and the disclosure of contributors may lead the public to presume these people support the party's ideology.

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of harm from disclosure is not required, ultimately the party must prove that the harm to it from disclosure of recipients outweighs the governmental interest in disclosure. This separately focused inquiry does not necessarily alter *Buckley*'s "reasonable probability" test or "flexible proof" standard. It does, however, plainly require a different result.

[8] See *Pullman-Standard* v. *Swint*, 456 U. S. 273, 289, n. 19 (1982). The majority does not clearly articulate the standard of review it is applying. By determining that the District Court "properly concluded" that the evidence established a reasonable probability of harassment, *ante*, at 100, the majority seems to apply an independent-review standard.

In contrast, the record, read in its entirety, does not suggest that disclosure of recipients of expenditures would lead to harassment of recipients or reprisals to the party or its members. Appellees gave no breakdown of the types of expenditures they thought would lead to harassment if disclosed. The record does contain the expenditure statements of the SWP, which itemize each expenditure with its purpose while usually omitting the name and address of the recipient. The majority of expenditures, both in number and dollar amount, are for business transactions such as office supplies, food, printing, photographs, telephone service, and books. There is virtually no evidence that disclosure of the recipients of these expenditures will impair the SWP's ability to obtain needed services.[9] Even if we assume that a portion

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[9] The District Court admitted Exhibit 129 into the record, which is a certified copy of findings of fact made by the Federal Election Commission pursuant to a 1977 court order in *Socialist Workers 1974 National Campaign Committee* v. *Jennings*, No. 74–1338 (DC, stipulated judgment entered Jan. 3, 1979). The FEC in that case analyzed affidavits submitted by SWP members and other documentary evidence of public and private harassment of SWP members. In finding No. 126, the FEC accepted the SWP's proposed finding that in 1971 a landlady in San Francisco rejected the application of two SWP members for an apartment, because the FBI had visited the landlady and warned her of the dangers of the SWP. In finding No. 127, the FEC accepted the SWP's proposed finding that in 1974 a landlady in Chicago evicted a SWP member from her apartment. The landlady explained, "they told me all about you," refusing to identify who "they" were.

These two incidents are, of course, remote in time and place, and do not suggest that the party itself has had difficulty in finding office space. Nor do they suggest that the general public is likely to engage in similar activity. Moreover, the FBI's actions against the SWP have long been ended, see Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S. Rep. No. 94–755, Vol. 4–5, pp. 3–4 (1976), and Congress has since instituted more rigorous oversight of FBI and other intelligence activities, see 50 U. S. C. § 413 (1976 ed., Supp. IV). An inference from these two incidents that disclosure of recipients of expenditures would increase any difficulty the party might have in obtaining office space would be tenuous, and is plainly outweighed by the "substantial public interest in disclosure," *Buckley*, 424 U. S., at 72.

of expenditures went to temporary campaign workers or others whom the public might identify as supporting the party's ideology,[10] these persons have already publicly demonstrated their support by their campaign work. There is simply no basis for inferring that such persons would *thereafter* be harassed or threatened or otherwise deterred from working for the party by virtue of inclusion of their names in later expenditure reports, or that if any such remote danger existed, it would outweigh the concededly important governmental interests in disclosure of recipients of expenditures.

It is plain that appellees did not carry their burden of production and persuasion insofar as they challenge the expenditure disclosure provisions. I would therefore uphold the constitutionality of those portions of the Ohio statute that require the SWP to disclose the recipients of expenditures.[11]

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[10] As the majority notes, *ante*, at 97, n. 12, some entries in the expenditure forms are designated as per diem, travel expenses, and room rental. At least until 1978, the expenditure statements gave the names of persons receiving per diem funds from the SWP. Apparently, party treasurers and party candidates received per diem payments. There is no evidence that filing these statements with the Ohio Secretary of State caused any harassment of the named persons, and indeed it is highly unlikely that this disclosure would increase the exposure of persons already so publicly identified with the party.

[11] In holding a state statute unconstitutional as applied, a court must sever and apply constitutional portions unless the legislature would not have intended to have applied "'those provisions which are within its power, independently of that which is not . . . ,'" *Buckley*, *supra*, at 108 (severing constitutional portions of Federal Election Campaign Act after holding other portions unconstitutional on their face), quoting *Champlin Refining Co.* v. *Corporation Comm'n of Okla.*, 286 U. S. 210, 234 (1932). Clearly, the expenditure disclosure requirements of the Ohio statute should be severed and applied even though the contribution disclosure requirements cannot be applied in this instance, for the two requirements are analytically and practically distinct.

LARKIN ET AL. *v.* GRENDEL'S DEN, INC.

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

No. 81–878. Argued October 4, 1982—Decided December 13, 1982

A Massachusetts statute (§ 16C) vests in the governing bodies of schools and churches the power to prevent issuance of liquor licenses for premises within a 500-foot radius of the church or school by objecting to the license applications. Appellee restaurant operator's application for a liquor license was denied when a church located 10 feet from the restaurant objected to the application. Appellee then sued the licensing authorities in Federal District Court, claiming that § 16C, on its face and as applied, violated, *inter alia*, the Establishment Clause of the First Amendment. The District Court held that § 16C is facially unconstitutional under the Establishment Clause, and the Court of Appeals affirmed.

Held: Section 16C violates the Establishment Clause. Pp. 120–127.

(a) Section 16C is not simply a legislative exercise of zoning power but delegates to private, nongovernmental entities power to reject certain liquor license applications, a power ordinarily vested in governmental agencies. Under these circumstances, the deference normally due a legislative zoning judgment is not merited. Pp. 120–122.

(b) The valid secular objective of §16C in protecting schools and churches from the commotion associated with liquor outlets may readily be accomplished by other means. Pp. 123–124.

(c) The churches' power under §16C is standardless, calling for no reasons, findings, or reasoned conclusions, and can be seen as having a "primary" and "principal" effect of advancing religion. Pp. 125–126.

(d) Section 16C substitutes the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards on issues with significant economic and political implications, and thus enmeshes churches in the processes of government and creates the danger of "[p]olitical fragmentation and divisiveness on religious lines," *Lemon* v. *Kurtzman*, 403 U. S. 602, 623. Few entanglements could be more offensive to the spirit of the Constitution. Pp. 126–127.

662 F. 2d 102, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 127.

Gerald J. Caruso, Assistant Attorney General of Massachusetts, argued the cause *pro hac vice* for appellants. With him on the briefs for appellants Larkin et al. were *Francis X. Bellotti*, Attorney General, and *Paul W. Johnson*, Special Assistant Attorney General. *David B. O'Connor* and *Birge Albright* filed a brief for appellant Cambridge License Commission.

Laurence H. Tribe argued the cause and filed briefs for appellee.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented by this appeal is whether a Massachusetts statute, which vests in the governing bodies of churches and schools the power effectively to veto applications for liquor licenses within a 500-foot radius of the church or school, violates the Establishment Clause of the First Amendment or the Due Process Clause of the Fourteenth Amendment.

I

A

Appellee operates a restaurant located in the Harvard Square area of Cambridge, Mass. The Holy Cross Armenian Catholic Parish is located adjacent to the restaurant; the back walls of the two buildings are 10 feet apart. In 1977, appellee applied to the Cambridge License Commission for approval of an alcoholic beverages license for the restaurant.

Section 16C of Chapter 138 of the Massachusetts General Laws provides: "Premises . . . located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages if the governing body of such church or school files written objection thereto."[1]

**Charles S. Sims* and *John Reinstein* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

[1] Section 16C defines "church" as "a church or synagogue building dedicated to divine worship and in regular use for that purpose, but not a

Holy Cross Church objected to appellee's application, expressing concern over "having so many licenses *so* near" (emphasis in original).[2] The License Commission voted to deny the application, citing only the objection of Holy Cross Church and noting that the church "is within 10 feet of the proposed location."

On appeal, the Massachusetts Alcoholic Beverages Control Commission upheld the License Commission's action. The Beverages Control Commission found that "the church's objection under Section 16C was the only basis on which the [license] was denied."

Appellee then sued the License Commission and the Beverages Control Commission in United States District Court. Relief was sought on the grounds that § 16C, on its face and as applied, violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the Establishment Clause of the First Amendment, and the Sherman Act.

The suit was voluntarily continued pending the decision of the Massachusetts Supreme Judicial Court in a similar challenge to § 16C, *Arno* v. *Alcoholic Beverages Control Comm'n*, 377 Mass. 83, 384 N. E. 2d 1223 (1979). In *Arno*, the Massachusetts court characterized § 16C as delegating a

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chapel occupying a minor portion of a building primarily devoted to other uses." "School" is defined as "an elementary or secondary school, public or private, giving not less than the minimum instruction and training required by [state law] to children of compulsory school age." Mass. Gen. Laws. Ann., ch. 138, § 16C (1974).

Section 16C originally was enacted in 1954 as an absolute ban on liquor licenses within 500 feet of a church or school, 1954 Mass. Acts, ch. 569, § 1. A 1968 amendment modified the absolute prohibition, permitting licenses within the 500-foot radius "if the governing body of such church assents in writing," 1968 Mass. Acts, ch. 435. In 1970, the statute was amended to its present form, 1970 Mass. Acts, ch. 192.

[2] In 1979, there were 26 liquor licensees in Harvard Square and within a 500-foot radius of Holy Cross Church; 25 of these were in existence at the time Holy Cross Church objected to appellee's application. See App. 69–72.

"veto power" to the specified institutions, *id.*, at 89, 384 N. E. 2d, at 1227, but upheld the statute against Due Process and Establishment Clause challenges. Thereafter, the District Court denied appellants' motion to dismiss.

On the parties' cross-motions for summary judgment, the District Court declined to follow the Massachusetts Supreme Judicial Court's decision in *Arno*, *supra*. The District Court held that § 16C violated the Due Process Clause and the Establishment Clause and held § 16C void on its face, *Grendel's Den, Inc.* v. *Goodwin*, 495 F. Supp. 761 (Mass. 1980). The District Court rejected appellee's equal protection arguments, but held that the State's actions were not immune from antitrust review under the doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943). It certified the judgment to the Court of Appeals for the First Circuit pursuant to 28 U. S. C. § 1292, and the Court of Appeals accepted certification.

A panel of the First Circuit, in a divided opinion, reversed the District Court on the Due Process and Establishment Clause arguments, but affirmed its antitrust analysis, *Grendel's Den, Inc.* v. *Goodwin*, 662 F. 2d 88 (1981).

Appellee's motion for rehearing en banc was granted and the en banc court, in a divided opinion, affirmed the District Court's judgment on Establishment Clause grounds without reaching the due process or antitrust claims, *Grendel's Den, Inc.* v. *Goodwin*, 662 F. 2d 102 (1981).

B

The Court of Appeals noted that appellee does not contend that § 16C lacks a secular purpose, and turned to the question of "whether the law 'has the *direct* and *immediate* effect of advancing religion' as contrasted with 'only a *remote* and *incidental* effect advantageous to religious institutions,'" *id.*, at 104 (emphasis in original), quoting *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 783, n. 39 (1973). The court concluded that § 16C confers a direct and substantial

benefit upon religions by "the grant of a veto power over liquor sales in roughly one million square feet . . . of what may be a city's most commercially valuable sites," 662 F. 2d, at 105.

The court acknowledged that § 16C "extends its benefits beyond churches to schools," but concluded that the inclusion of schools "does not dilute [the statute's] forbidden religious classification," since § 16C does not "encompass all who are otherwise similarly situated to churches in all respects except dedication to 'divine worship.'" *Id.*, at 106–107 (footnote omitted). In the view of the Court of Appeals, this "explicit religious discrimination," *id.*, at 105, provided an additional basis for its holding that § 16C violates the Establishment Clause.

The court found nothing in the Twenty-first Amendment to alter its conclusion, and affirmed the District Court's holding that § 16C is facially unconstitutional under the Establishment Clause of the First Amendment.

We noted probable jurisdiction, 454 U. S. 1140 (1982), and we affirm.

II

A

Appellants contend that the State may, without impinging on the Establishment Clause of the First Amendment, enforce what it describes as a "zoning" law in order to shield schools and places of divine worship from the presence nearby of liquor-dispensing establishments. It is also contended that a zone of protection around churches and schools is essential to protect diverse centers of spiritual, educational, and cultural enrichment. It is to that end that the State has vested in the governing bodies of all schools, public or private, and all churches,[3] the power to prevent the issu-

[3] Section 16C defines "church" as: "a church or synagogue building dedicated to *divine* worship" (emphasis added). Appellee argues that the statute unconstitutionally differentiates between theistic and nontheistic religions. We need not reach that issue. For purposes of this appeal, we

ance of liquor licenses for any premises within 500 feet of their institutions.

Plainly schools and churches have a valid interest in being insulated from certain kinds of commercial establishments, including those dispensing liquor. Zoning laws have long been employed to this end, and there can be little doubt about the power of a state to regulate the environment in the vicinity of schools, churches, hospitals, and the like by exercise of reasonable zoning laws.

We have upheld reasonable zoning ordinances regulating the location of so-called "adult" theaters, see *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 62–63 (1976); and in *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972), we recognized the legitimate governmental interest in protecting the environment around certain institutions when we sustained an ordinance prohibiting willfully making, on grounds adjacent to a school, noises which are disturbing to the good order of the school sessions.

The zoning function is traditionally a governmental task requiring the "balancing [of] numerous competing considerations," and courts should properly "refrain from reviewing the merits of [such] decisions, absent a showing of arbitrariness or irrationality." *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 265 (1977). See also, *e. g.*, *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, 7–9 (1974). Given the broad powers of states under the Twenty-first Amendment, judicial deference to the legislative exercise of zoning powers by a city council or other legislative zoning body is especially appropriate in the area of liquor

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assume, as did the original panel of the Court of Appeals, that the Massachusetts courts would apply the protections of § 16C to "any building primarily used as a place of assembly by a bona fide religious group," 662 F. 2d, at 97, and thereby avoid serious constitutional questions that would arise concerning a statute that distinguishes between religions on the basis of commitment to belief in a divinity. See *Torcaso* v. *Watkins*, 367 U. S. 488, 495 (1961); *Everson* v. *Board of Education*, 330 U. S. 1, 15 (1947).

regulation. See, *e. g.*, *California* v. *LaRue*, 409 U. S. 109 (1972); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 106–110 (1980).

However, § 16C is not simply a legislative exercise of zoning power. As the Massachusetts Supreme Judicial Court concluded, § 16C delegates to private, nongovernmental entities power to veto certain liquor license applications, *Arno* v. *Alcoholic Beverages Control Comm'n*, 377 Mass., at 89, 384 N. E. 2d, at 1227.[4] This is a power ordinarily vested in agencies of government. See, *e. g.*, *California* v. *LaRue*, *supra*, at 116, commenting that a "state agency . . . is itself the repository of the State's power under the Twenty-first Amendment." We need not decide whether, or upon what conditions, such power may ever be delegated to nongovernmental entities; here, of two classes of institutions to which the legislature has delegated this important decisionmaking power, one is secular, but one is religious. Under these circumstances, the deference normally due a legislative zoning judgment is not merited.[5]

B

The purposes of the First Amendment guarantees relating to religion were twofold: to foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion familiar in other 18th-century systems. Religion and government, each insulated from the other, could then coexist. Jefferson's idea of a "wall," see *Reynolds* v. *United States*, 98 U. S. 145, 164 (1879), quoting reply from Thomas Jefferson to an address by a committee of

[4] This recent construction of the statute by the highest court in Massachusetts is controlling on the meaning of § 16C. See *O'Brien* v. *Skinner*, 414 U. S. 524, 531 (1974).

[5] For similar reasons, the Twenty-first Amendment does not justify § 16C. The Twenty-first Amendment reserves power to states, yet here the State has delegated to churches a power relating to liquor sales. The State may not exercise its power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause of the First Amendment.

the Danbury Baptist Association (January 1, 1802), reprinted in 8 Writings of Thomas Jefferson 113 (H. Washington ed. 1861), was a useful figurative illustration to emphasize the concept of separateness. Some limited and incidental entanglement between church and state authority is inevitable in a complex modern society, see, *e. g.*, *Lemon* v. *Kurtzman*, 403 U. S. 602, 614 (1971); *Walz* v. *Tax Comm'n*, 397 U. S. 664, 670 (1970), but the concept of a "wall" of separation is a useful signpost. Here that "wall" is substantially breached by vesting discretionary governmental powers in religious bodies.

This Court has consistently held that a statute must satisfy three criteria to pass muster under the Establishment Clause:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon* v. *Kurtzman*, *supra*, at 612–613, quoting *Walz* v. *Tax Comm'n*, *supra*, at 674.

See also *Widmar* v. *Vincent*, 454 U. S. 263, 271 (1981); *Wolman* v. *Walter*, 433 U. S. 229, 236 (1977). Independent of the first of those criteria, the statute, by delegating a governmental power to religious institutions, inescapably implicates the Establishment Clause.

The purpose of § 16C, as described by the District Court, is to "protec[t] spiritual, cultural, and educational centers from the 'hurly-burly' associated with liquor outlets." 495 F. Supp., at 766. There can be little doubt that this embraces valid secular legislative purposes.[6] However, these valid

[6] In this facial attack, the Court assumes that § 16C actually effectuates the secular goal of protecting churches and schools from the disruption associated with liquor-serving establishments. The fact that Holy Cross Church is already surrounded by 26 liquor outlets casts some doubt on the effectiveness of the protection granted, however.

secular objectives can be readily accomplished by other means—either through an absolute legislative ban on liquor outlets within reasonable prescribed distances from churches, schools, hospitals, and like institutions,[7] or by ensuring a hearing for the views of affected institutions at licensing proceedings where, without question, such views would be entitled to substantial weight.[8]

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[7] See *California* v. *LaRue*, 409 U. S. 109, 120 (1972) (Stewart, J., concurring).

Section 16C, as originally enacted, consisted of an absolute ban on liquor licenses within 500 feet of a church or school, see n. 1, *supra;* and 27 States continue to prohibit liquor outlets within a prescribed distance of various categories of protected institutions, with certain exceptions and variations: Ala. Code § 28–3–17 (1977); Alaska Stat. Ann. § 04.11.410 (1980); Ark. Stat. Ann. § 48–345 (1977); Colo. Rev. Stat. § 12–47–138 (1978); Ga. Code Ann. § 3–3–21 (1982); Idaho Code §§ 23–303, 23–913 (1977); Ill. Rev. Stat., ch. 43, ¶ 127 (Supp. 1980); Ind. Code § 7.1–3–21–11 (1982); Kan. Stat. Ann. § 41–710 (1981); La. Rev. Stat. Ann. § 26–280 (West 1975); Md. Ann. Code, Art. 2B, §§ 46B, 47, 52A, 52C (1981 and Supp. 1982); Mich. Comp. Laws Ann. §§ 436.17a, 436.17c (1978 and Supp. 1982); Minn. Stat. Ann. § 340.14 (1972 and Supp. 1982); Miss. Code Ann. § 67–1–51 (Supp. 1982); Mont. Code Ann. § 16–3–306 (1981); Neb. Rev. Stat. § 53–177 (1978); N. H. Rev. Stat. Ann. § 177:1 (1978); N. M. Stat. Ann. § 60–6B–10 (1981); N. C. Gen. Stat. § 18A–40 (1978) (schools); Okla. Stat., Tit. 37, § 534 (1981); R. I. Gen. Laws § 3–7–19 (Supp. 1982); S. C. Code § 61–3–440 (1976); S. D. Codified Laws § 35–2–6.1 (Supp. 1982); Tex. Alco. Bev. Code Ann., § 109.33 (1978); Utah Code Ann. § 16–6–13.5 (Supp. 1981); W. Va. Code § 11–16–12 (1974); Wis. Stat. Ann. § 125.68 (West Supp. 1982–1983). The Court does not express an opinion as to the constitutionality of any statute other than that of Massachusetts.

[8] Eleven States have statutes or regulations directing the licensing authority to consider the proximity of the proposed liquor outlet to schools or other institutions in deciding whether to grant a liquor license: Cal. Bus. & Prof. Code Ann. § 23789 (West 1964); Conn. Gen. Stat. § 30–46 (1981); Del. Code Ann., Tit. 4, § 543 (1974 and Supp. 1980); Haw. Rev. Stat. § 281–56 (1976); Mich. Comp. Laws Ann. §§ 436.17a, 436.17c (1978 and Supp. 1982–1983) (certain classes of licenses); N. C. Gen. Stat. § 18A–40 (1978) (churches); Ohio Rev. Code Ann. § 4303.26 (Supp. 1981); Pa. Stat. Ann., Tit. 47, §§ 4–404, 4–432(d) (Purdon 1969 and Supp. 1982); Tenn. Code Ann. § 57–5–105 (Supp. 1982); Va. Code § 4–31 (Supp. 1982); Vt. Liquor Control Bd. Regs. ¶ 39 (1976).

Appellants argue that § 16C has only a remote and incidental effect on the advancement of religion. The highest court in Massachusetts, however, has construed the statute as conferring upon churches a veto power over governmental licensing authority. Section 16C gives churches the right to determine whether a particular applicant will be granted a liquor license, or even which one of several competing applicants will receive a license.

The churches' power under the statute is standardless, calling for no reasons, findings, or reasoned conclusions. That power may therefore be used by churches to promote goals beyond insulating the church from undesirable neighbors; it could be employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith. We can assume that churches would act in good faith in their exercise of the statutory power, see *Lemon* v. *Kurtzman*, *supra*, at 618–619, yet § 16C does not by its terms require that churches' power be used in a religiously neutral way. "[T]he potential for conflict inheres in the situation," *Levitt* v. *Committee for Public Education*, 413 U. S. 472, 480 (1973); and appellants have not suggested any "effective means of guaranteeing" that the delegated power "will be used exclusively for secular, neutral, and nonideological purposes." *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S., at 780.[9] In addition, the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to

[9] Appellants argue that the Beverages Control Commission may reject or ignore any objection made for discriminatory or illegal reasons. This contention appears flatly contradicted by the Massachusetts Supreme Judicial Court's own interpretation of the statute, see *Arno* v. *Alcoholic Beverages Control Comm'n*, 377 Mass. 83, 90, 92, and n. 23, 384 N. E. 2d 1223, 1228, 1229, and n. 23 (1979). In any event, an assumption that the Beverages Control Commission might review the decisionmaking of the churches would present serious entanglement problems. See *Lemon* v. *Kurtzman*, 403 U. S. 602, 619 (1971); *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490 (1979).

religion in the minds of some by reason of the power conferred. It does not strain our prior holdings to say that the statute can be seen as having a "primary" and "principal" effect of advancing religion.

Turning to the third phase of the inquiry called for by *Lemon* v. *Kurtzman*, we see that we have not previously had occasion to consider the entanglement implications of a statute vesting significant governmental authority in churches. This statute enmeshes churches in the exercise of substantial governmental powers contrary to our consistent interpretation of the Establishment Clause; "[t]he objective is to prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other." *Lemon* v. *Kurtzman*, 403 U. S., at 614. We went on in that case to state:

> "Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction *and churches excluded from the affairs of government*. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn." *Id.*, at 625 (emphasis added).

Our contemporary views do no more than reflect views approved by the Court more than a century ago:

> "'The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.'" *Watson* v. *Jones*, 13 Wall. 679, 730 (1872), quoting *Harmon* v. *Dreher*, 1 Speers Eq. 87, 120 (S. C. App. 1843).

As these and other cases make clear, the core rationale underlying the Establishment Clause is preventing "a fusion of governmental and religious functions," *Abington School Dis-*

trict v. *Schempp*, 374 U. S. 203, 222 (1963). See, *e. g.*, *Walz* v. *Tax Comm'n*, 397 U. S., at 674–675; *Everson* v. *Board of Education*, 330 U. S. 1, 8–13 (1947).[10] The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.

Section 16C substitutes the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications. The challenged statute thus enmeshes churches in the processes of government and creates the danger of "[p]olitical fragmentation and divisiveness on religious lines," *Lemon* v. *Kurtzman*, *supra*, at 623. Ordinary human experience and a long line of cases teach that few entanglements could be more offensive to the spirit of the Constitution.[11]

The judgment of the Court of Appeals is affirmed.

So ordered.

JUSTICE REHNQUIST, dissenting.

Dissenting opinions in previous cases have commented that "great" cases, like "hard" cases, make bad law. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 400–401 (1904) (Holmes, J., dissenting); *Nixon* v. *Administrator of General*

[10] At the time of the Revolution, Americans feared not only a denial of religious freedom, but also the danger of political oppression through a union of civil and ecclesiastical control. B. Bailyn, Ideological Origins of the American Revolution 98–99, n. 3 (1967). See *McDaniel* v. *Paty*, 435 U. S. 618, 622–623 (1978). In 18th-century England, such a union of civil and ecclesiastical power was reflected in legal arrangements granting church officials substantial control over various occupations, including the liquor trade. See, *e. g.*, 26 Geo. 2, ch. 31, § 2 (1753) (church officials given authority to grant certificate of character, a prerequisite for an alehouse license); S. Webb & B. Webb, The History of Liquor Licensing in England, Principally from 1700 to 1830, pp. 8, n. 1, 62–67, 102–103 (1903).

[11] Appellee also challenges the statute as a violation of due process. In light of our analysis we need not and do not reach that claim.

Services, 433 U. S. 425, 505 (1977) (BURGER, C. J., dissenting). Today's opinion suggests that a third class of cases—silly cases—also make bad law. The Court wrenches from the decision of the Massachusetts Supreme Judicial Court the word "veto," and rests its conclusion on this single term. The aim of this effort is to prove that a quite sensible Massachusetts liquor zoning law is apparently some sort of sinister religious attack on secular government reminiscent of St. Bartholemew's Night. Being unpersuaded, I dissent.

In its original form, § 16C imposed a flat ban on the grant of an alcoholic beverages license to any establishment located within 500 feet of a church or a school. 1954 Mass. Acts, ch. 569, § 1. This statute represented a legislative determination that worship and liquor sales are generally not compatible uses of land. The majority concedes, as I believe it must, that "an absolute legislative ban on liquor outlets within reasonable prescribed distances from churches, schools, hospitals, and like institutions," *ante*, at 124 (footnote omitted), would be valid. See *California* v. *LaRue*, 409 U. S. 109, 120 (1972) (Stewart, J., concurring).

Over time, the legislature found that it could meet its goal of protecting people engaged in religious activities from liquor-related disruption with a less absolute prohibition. Rather than set out elaborate formulae or require an administrative agency to make findings of fact, the legislature settled on the simple expedient of asking churches to object if a proposed liquor outlet would disturb them. Thus, under the present version of § 16C, a liquor outlet within 500 feet of a church or school can be licensed unless the affected institution objects. The flat ban, which the majority concedes is valid, is more protective of churches and more restrictive of liquor sales than the present § 16C.

The evolving treatment of the grant of liquor licenses to outlets located within 500 feet of a church or a school seems to me to be the sort of legislative refinement that we should encourage, not forbid in the name of the First Amendment. If a particular church or a particular school located within the

500-foot radius chooses not to object, the State has quite sensibly concluded that there is no reason to prohibit the issuance of the license. Nothing in the Court's opinion persuades me why the more rigid prohibition would be constitutional, but the more flexible not.

The Court rings in the metaphor of the "wall between church and state," and the "three-part test" developed in *Walz* v. *Tax Comm'n*, 397 U. S. 664 (1970), to justify its result. However, by its frequent reference to the statutory provision as a "veto," the Court indicates a belief that § 16C effectively constitutes churches as third houses of the Massachusetts Legislature. See *ante*, at 125–126. Surely we do not need a three-part test to decide whether the grant of actual legislative power to churches is within the proscription of the Establishment Clause of the First and Fourteenth Amendments. The question in this case is not whether such a statute would be unconstitutional, but whether § 16C is such a statute. The Court in effect answers this question in the first sentence of its opinion without any discussion or statement of reasons. I do not think the question is so trivial that it may be answered by simply affixing a label to the statutory provision.

Section 16C does not sponsor or subsidize any religious group or activity. It does not encourage, much less compel, anyone to participate in religious activities or to support religious institutions. To say that it "advances" religion is to strain at the meaning of that word.

The Court states that § 16C "advances" religion because there is no guarantee that objections will be made "in a religiously neutral way." *Ante*, at 125. It is difficult to understand what the Court means by this. The concededly legitimate purpose of the statute is to protect citizens engaging in religious and educational activities from the incompatible activities of liquor outlets and their patrons. The only way to decide whether these activities are incompatible with one another in the case of a church is to ask whether the activities of liquor outlets and their patrons may interfere with religious

activity; this question cannot, in any meaningful sense, be "religiously neutral." In this sense, the flat ban of the original § 16C is no different from the present version. Whether the ban is unconditional or may be invoked only at the behest of a particular church, it is not "religiously neutral" so long as it enables a church to defeat the issuance of a liquor license when a similarly situated bank could not do the same. The State does not, in my opinion, "advance" religion by making provision for those who wish to engage in religious activities, as well as those who wish to engage in educational activities, to be unmolested by activities at a neighboring bar or tavern that have historically been thought incompatible.

The Court is apparently concerned for fear that churches might object to the issuance of a license for "explicitly religious" reasons, such as "favoring liquor licenses for members of that congregation or adherents of that faith."* *Ante*, at 125. If a church were to seek to advance the interests of its members in this way, there would be an occasion to determine whether it had violated any right of an unsuccessful applicant for a liquor license. But our ability to discern a risk of such abuse does not render § 16C violative of the Establishment Clause. The State can constitutionally protect churches from liquor for the same reasons it can protect them from fire, see *Walz*, *supra*, at 671, noise, see *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972), and other harm.

The heavy First Amendment artillery that the Court fires at this sensible and unobjectionable Massachusetts statute is both unnecessary and unavailing. I would reverse the judgment of the Court of Appeals.

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*I doubt whether there exists a denomination that considers supporting the liquor license applications of its members to be a part of its theology. However else a church's goal in objecting to issuance of a liquor license on such a basis might be characterized, it would certainly be strictly temporal. I note in passing that § 16C does not confer on any church any power to obtain a liquor license for anyone.

Syllabus

BURLINGTON NORTHERN INC. ET AL. *v.* UNITED STATES ET AL.

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

No. 81–1008. Argued November 3, 1982—Decided December 13, 1982

In 1974, San Antonio, Tex., negotiated with petitioner railroads to transport to San Antonio coal purchased under long-term contracts in Wyoming for use in the city's coal-fired electricity generating plants. Because it was not satisfied with the railroads' quoted rate for moving the coal, San Antonio filed a complaint with the Interstate Commerce Commission (ICC). In 1976, the ICC issued a temporary order, subject to modification, establishing a rate of $10.93 per ton. In 1978, on petition of the railroads, the ICC ordered the rate raised to $16.12 per ton. But both San Antonio and the railroads were dissatisfied, and in 1979 the ICC issued a third order resulting in a rate of $17.23 per ton. The railroads then filed tariffs at this rate. Petitions for review of the 1978 and 1979 orders were filed by all parties in the Court of Appeals for the District of Columbia Circuit, which in 1980 decided that both orders were arbitrary and capricious, and accordingly vacated them and remanded to the ICC. The parties disagreed about the effect of this decision on the filed tariffs pending the ICC's decision on remand, the railroads continuing to treat the $17.23 rate as the one San Antonio was required to pay, and San Antonio claiming that the $10.93 rate was revived. The railroads then asked the Court of Appeals for clarification of its decision. Ultimately, after the parties, pending review, had carried on their controversy in other forums, including the ICC, which in 1981 vacated the 1976 order, the Court of Appeals later in 1981 held that since it was without authority to determine interim policy pending remand proceedings in the ICC, the effect of the court's 1980 decision was necessarily to reinstate the 1976 order, which was "revived" by the vacation of the 1978 and 1979 orders, and that therefore tariffs set in excess of the 1976 rate were "unlawful" for the period after the court vacated the 1978 and 1979 orders but before the ICC formally vacated the 1976 order.

Held: The Court of Appeals should have deferred to the ICC on questions concerning the applicable rates. Pp. 138–144.

(a) Under the Interstate Commerce Act, primary jurisdiction to determine the reasonableness of rates lies with the ICC. Federal-court authority to reject ICC rate orders extends to the orders alone and not

to the rates. Where there is a dispute about the appropriate rate, the equities favor allowing the carriers' rate to control pending a decision by the ICC, since under the Act the shipper may receive reparations for overpayment while the carrier can never be made whole after underpayment. Pp. 138–142.

(b) By declaring that the 1976 rate order was "revived" for the period indicated, the Court of Appeals did what a federal court may not do, *i. e.*, freeze the rate the railroads charge shippers prior to a decision by the ICC as to what a reasonable rate should be. This undermines the ICC's ability to exercise its primary jurisdiction to insure equitable and uniform rates. Moreover, the Court of Appeals' determination requires the railroads to accept a return that was considered temporary when it was approved in 1976, and "below a maximum reasonable rate" when it was modified in 1978. If the court was unsure about the continued vitality of the 1976 order, the more appropriate course would have been to remand to the ICC for explanation rather than to undertake itself to construe the order, and in so doing interfere with the ICC's primary jurisdiction. In striking the 1978 and 1979 orders, the court's action operated to leave in effect the rates filed under the ICC's authority pending the ICC's redetermination of a reasonable rate and subject to reparations to protect the shipper should the ICC find that these rates were too high. Pp. 142–144.

211 U. S. App. D. C. 111, 655 F. 2d 1341, reversed.

BURGER, C. J., delivered the opinion for a unanimous Court.

R. Eden Martin argued the cause for petitioners. With him on the briefs were *Howard J. Trienens* and *Thormund A. Miller.*

Elliott Schulder argued the cause for the federal respondents. With him on the briefs were *Solicitor General Lee*, *Deputy Solicitor General Shapiro*, *John Broadley*, *Kathleen M. Dollar*, *Robert S. Burk*, and *Timm L. Abendroth.* *William L. Slover* argued the cause for respondents City of San Antonio et al. With him on the brief for respondent San Antonio was *C. Michael Loftus.* *Mark White*, Attorney General, *John W. Fainter*, First Assistant Attorney General, *Richard E. Gray III*, Executive Assistant Attorney General, and *James R. Myers* and *Stuart Fryer*, Assistant Attorneys General, filed a brief for respondent State of Texas.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to clarify the allocation of authority, as between the federal courts and the Interstate Commerce Commission, to set and review rates for movements of coal by rail.

I

This case arose as a result of a 1972 decision of San Antonio, Tex., acting through its City Public Service Board, to substitute coal-generated electricity for natural gas. Toward that end, in 1974, San Antonio entered into long-term contracts to purchase coal from two suppliers in Campbell County, Wyo.; began to construct two coal-fired generating units; and initiated negotiations with Burlington Northern Inc. and Southern Pacific Transportation Co. for contracts to transport coal from Wyoming to the new plants. Although the railroads originally quoted San Antonio a rate of $7.90 per ton for moving coal from Campbell County to San Antonio, economic conditions, which were characterized by rapid inflation, required the railroads to raise the rate to $11.90 per ton. In May 1975, San Antonio filed a complaint with the Interstate Commerce Commission seeking prescription of a just and reasonable tariff.

In October 1976, the Commission rendered a decision, *San Antonio* v. *Burlington Northern, Inc.*, 355 I. C. C. 405 (1976) *(San Antonio I)*, establishing a rate of $10.93 per ton for the San Antonio movement. The Commission emphasized that the prescription was temporary by noting: "The public interest requires that, in view of the parties' inability to reach an agreement, a rate be prescribed at this time so that the movement may commence. As actual experience is gained, the parties may petition for modification of the prescription if circumstances warrant." *Id.*, at 417–418. The order was to "continue in full force and effect until the further order of the Commission." *Ibid.*

The railroads sought review in the United States Court of Appeals for the Eighth Circuit, claiming, *inter alia*, that the Commission had erred in not considering the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94–210, 90 Stat. 31 (4–R Act),[1] which became effective before *San Antonio I* was announced. The Court of Appeals affirmed the Commission, reasoning that since the rate was temporary and expressly subject to modification, the parties could return to the Commission when guidelines for implementing the 4–R Act were promulgated, *Burlington Northern, Inc.* v. *United States*, 555 F. 2d 637, 648 (1977).

In June 1977, after six months of operation at the *San Antonio I* rates, the railroads petitioned the Commission for a modification of the rate. In October 1977, the Commission reopened the San Antonio proceeding, and one year later, issued a new order, *San Antonio* v. *Burlington Northern, Inc.*, 359 I. C. C. 1 (1978) *(San Antonio II)*, finding that when compared to other similar movements, the *San Antonio I* $10.93 rate was "below a maximum reasonable rate and that modification of that rate [was] warranted." 359 I. C. C., at 7. After making extensive new cost findings and applying the ratemaking guidelines of the 4–R Act, the Commission set the maximum rate level at $16.12 per ton.

Both San Antonio and the railroads were dissatisfied with this rate and petitioned for reconsideration. In June 1979, a third order was issued, *San Antonio* v. *Burlington Northern, Inc.*, 361 I. C. C. 482 (1979) *(San Antonio III)*, which made certain modifications in the *San Antonio II* analysis that resulted in a new maximum rate of $17.23 per ton for the San

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[1] The 4–R Act changed the regulatory atmosphere in several key respects. Especially relevant here is § 205, which, as codified at 49 U. S. C. § 10704(a)(2) (1976 ed., Supp. IV), instructs the Commission to "make an adequate and continuing effort to assist . . . carriers in attaining revenue levels" that are "adequate, under honest, economical and efficient management, to cover total operating expenses . . . plus a reasonable and economic profit or return (or both) on capital employed in the business."

Antonio movement. The railroads then filed tariffs at the $17.23 rate.

Petitions for review of the *San Antonio II* and *San Antonio III* prescriptions were filed in the United States Court of Appeals for the District of Columbia Circuit by all the parties. Without expressing an opinion as to whether the rate was too high, as San Antonio claimed, or too low, as the railroads urged, in June 1980, the Court of Appeals decided that aspects of both the *San Antonio II* and the *San Antonio III* rate orders were "arbitrary and capricious" and without "defensible rationale." *San Antonio* v. *United States*, 203 U. S. App. D. C. 249, 269, 631 F. 2d 831, 851. The Commission's orders were vacated, and the case was remanded to the Commission.

It is at this point that the present controversy arose, for the parties sharply disagreed about the effect of the Court of Appeals' decision on the filed tariffs pending the Commission's decision on remand. Construing the decision as vacating only the Commission's orders in *San Antonio II* and *III* but not the rates that were filed, the railroads continued to treat the $17.23 rate as the one which San Antonio was required to pay pursuant to 49 U. S. C. § 10761 (1976 ed., Supp. IV). San Antonio, on the other hand, interpreted the Court of Appeals' decision as vacating the $17.23 rate and reviving the rate set by *San Antonio I*. Accordingly, the shipper unilaterally reduced its payments to the $10.93-per-ton rate set in 1976.[2]

Although we might have thought otherwise, it was not clear to the railroads what legal action should be taken to force San Antonio to pay the filed $17.23 tariff. Several maneuvers were attempted: in its first effort to reestablish *San Antonio III* as the rate applicable to this period, the carriers

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[2] For convenience, we continue to refer to the rates as "*San Antonio I*," "*San Antonio II*," and "*San Antonio III*." In actual fact, general rate increases, which are not in issue here, have taken effect significantly raising each of these rates. See Brief for Petitioners 9, n. 3.

filed a new tariff in early November 1980. That tariff, which would have required San Antonio to prepay at the $17.23 rate before coal service would be provided, was suspended by a division of the Commission which agreed with San Antonio that the Court of Appeals' decision precluded any rate except $10.93.

The railroads asked the Court of Appeals for clarification of its decision.[3] Pending review, however, the parties carried on their controversy in other forums. The railroads again attempted to file a tariff in conformity with *San Antonio III*. Although this time the tariff was not suspended or rejected by the Commission, San Antonio continued to pay at the *San Antonio I* rate even after the new tariff's December 1980 effective date; in addition, it filed a complaint to enforce the *San Antonio I* rate in the United States District Court for the Western District of Texas. Before the District Court could rule, the railroads countered by filing a petition asking the Commission to clarify its refusal to suspend or reject the new tariff by declaring that this action amounted to a modification of *San Antonio I*. In addition, the carriers filed a second prepayment tariff—which was also accepted by the Commission. Before the Commission could react to the railroads' request for clarification, however, the Texas District Court ruled in San Antonio's favor on an application to preliminarily enjoin the railroads from conditioning service on prepayment of rates that did not conform with *San Antonio I*. The railroads appealed to the Court of Appeals for the Fifth Circuit.

In April 1981, while the railroads' appeal was pending in the Fifth Circuit, the Commission finally took the step neces-

[3] Initially, the Commission took the position adopted by the panel, namely that the Court of Appeals' decision required the railroads to charge at *San Antonio I* rates. While the petition for clarification was pending, however, our decision in *Consolidated Rail Corp.* v. *National Assn. of Recycling Industries, Inc.*, 449 U. S. 609 (1981) *(per curiam)*, was handed down. At about this time, the Commission revised its view to espouse the railroads' position. The Federal Government has thus joined the railroads in asking us to overturn the decision of the Court of Appeals.

sary to end the controversy over what rate applied from the time of the June 1980 decision of the Court of Appeals for the District of Columbia Circuit. In the context of considering the railroads' request for clarification, the Commission formally vacated its *San Antonio I* prescription. The order stated that in a later proceeding, the Commission would determine "what the maximum reasonable rate should have been . . . for the period during which the vacated maximum rate prescriptions in *San Antonio II* and *III* were in effect." *San Antonio* v. *Burlington Northern, Inc.*, 364 I. C. C. 887, 894 (1981) *(San Antonio IV)*. Pursuant to 49 U. S. C. § 10327(h) (1976 ed., Supp. IV), this order became effective 30 days later, in May 1981.

It was at this point that the Fifth Circuit decided the railroads' appeal of the Texas District Court decision. In its holding, that court vacated the preliminary injunction on the ground that only the Commission had jurisdiction to enjoin railroads from collecting their filed tariff rate. In addition, that court denied an application by San Antonio for a stay of the Commission's *San Antonio IV* decision, *San Antonio* v. *Burlington Northern, Inc.*, 650 F. 2d 49, clarified, 652 F. 2d 422 (1981). Thus, when the Commission's *San Antonio IV* decision became effective in May 1981, San Antonio finally began to pay for the shipment of its coal at the carriers' tariff rate of $17.23 per ton.[4]

One month later, on June 30, 1981, the Court of Appeals for the District of Columbia Circuit issued the clarification of its 1980 holding. 211 U. S. App. D. C. 111, 655 F. 2d 1341. It is this clarification that is under review here. Citing *Consolidated Rail Corp.* v. *National Assn. of Recycling Industries, Inc.*, 449 U. S. 609 (1981) *(per curiam)*, and *Atchison,*

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[4] In the period in dispute, from June 1980, when the Court of Appeals vacated the *San Antonio II* and *III* orders, to May 1981, when the Commission formally vacated the *San Antonio I* prescription, San Antonio's failure to pay the tariff rate resulted in a savings to it—and a loss to the railroads—of over $19 million. See Brief for Federal Respondents 6.

T. & S. F. R. Co. v. *Wichita Board of Trade*, 412 U. S. 800 (1973), the Court of Appeals held that since it was without authority to determine interim policy pending remand proceedings in the Commission, the effect of the court's 1980 decision was necessarily to reinstate *San Antonio I*, which was "revived" by the vacation of *San Antonio II* and *III*. 211 U. S. App. D. C., at 114, 655 F. 2d, at 1344. Tariffs set in excess of the *San Antonio I* rate were therefore declared "unlawful" for the period after the court vacated *San Antonio II* and *III* but before the Commission formally vacated *San Antonio I*. 211 U. S. App. D. C., at 113, 655 F. 2d, at 1343. We granted certiorari. 455 U. S. 988 (1982).[5]

We agree that *Consolidated Rail* and *Wichita Board of Trade* control this case, but these holdings require federal courts to defer to the Commission on questions concerning the applicable rates; accordingly, we reverse.

II

In recent years, we have had four occasions to consider federal courts' authority to alter rail rates regulated by the Interstate Commerce Act. In the first of these, *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658 (1963), a railroad faced with declining revenues had attempted to lower its rates, and the issue before us was whether a Federal District Court had the power to enjoin this reduction at the request of competitors of the railroad and those who shipped by rail. Affirming the District Court's denial of an injunction, we held that Congress, in the Interstate Commerce Act, meant to "vest in the Commission the sole and exclusive power to suspend" the rates. *Id.*, at 667.

[5] San Antonio argues that the railroads' failure to petition for certiorari within 90 days after rehearing was denied on the June 1980 judgment deprives this Court of jurisdiction. Because the June 1981 decision "resolve[d] a genuine ambiguity in a judgment previously rendered" and dealt with a question which was not "plainly and properly settled with finality," *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206, 211–212 (1952) (footnote omitted), we plainly have jurisdiction.

We noted several reasons for this rule. First, a review of the legislative history of the 1910 amendments to the Interstate Commerce Act demonstrated that Congress was dissatisfied with the nonuniformity in rates and inequities that resulted from the 1887 Interstate Commerce Act's failure to give the Commission power to grant injunctive relief. We noted that the authority to suspend rates granted the Commission by the 1910 amendments would not cure the problem unless the suspension power was exclusive. *Id.*, at 664.

Second, we held that court-ordered injunctive relief would interfere with the careful way in which the Commission's suspension power takes into account the need of the carrier to receive a reasonable rate of return, and the desire of the shipper to pay only what is lawful. Unlike an injunction, a suspension order is limited to seven months' duration. *Id.*, at 665–666. The shippers, on the other hand, are fully protected by the reparation provision which requires carriers to reimburse shippers if the Commission later determines that the filed tariff was unreasonable. *Id.*, at 666.

Finally, we emphasized that court-ordered injunctions were inconsistent with the congressional intent to vest ratemaking decisions in the Commission, stating:

> "Congress meant to foreclose a judicial power to interfere with the *timing* of rate changes which would be out of harmony with the uniformity of rate *levels* fostered by the doctrine of primary jurisdiction." *Id.*, at 668. (Emphasis in original.)

Ten years later, we again considered a federal court's power to enjoin rail rates in *United States* v. *SCRAP*, 412 U. S. 669 (1973). There we reversed a three-judge District Court that had enjoined the Commission from permitting surcharges on shipments of recycled goods. We rejected the argument that injunctive relief could be granted under authority conferred by the National Environmental Policy Act, 42 U. S. C. § 4331 *et seq.*, stating that "to grant an injunction in the present context, *even though not based upon a substan-*

tive consideration of the rates, would directly interfere with the Commission's decision as to *when* the rates were to go into effect, and would ignore our conclusion in *Arrow*. . . ." 412 U. S., at 697. (First emphasis added; other in original.)

A third case, *Wichita Board of Trade*, *supra*, stated our position in even stronger terms. There the Commission had approved certain rate increases but failed, in the District Court's view, to explain its reasoning adequately. In addition to vacating the order and remanding the case for reconsideration by the Commission, the District Court enjoined the railroads from charging the rates that had been approved in the order. Although we affirmed the remand to the Commission, we nevertheless reversed as to the injunction, reiterating the views we expressed in *Arrow* that a federal court has no jurisdiction to enter an order that operates to fix rates.

> "The only consequence of suspending [an] order is that the railroads may not rely, in some subsequent proceeding, on a Commission finding that the proposed rates were just and reasonable. . . .
>
> "Carriers may put into effect any rate that the Commission has not declared unreasonable. . . . *Suspension of the Commission's order thus does not in itself preclude the carriers from implementing a new rate.*" 412 U. S., at 818–819. (Emphasis added.)

Again we noted that Congress channeled all rate decisions to the Commission in the first instance, *id.*, at 820; that court-ordered relief interferes with the delicate balance the Act strikes between the competing interests of shipper and carrier, *ibid.*; and that the equities favor allowing the railroads to charge more than the Commission may ultimately find reasonable because the Act gives the shippers a right to reparations while no such protection is given to the carriers, *id.*, at 823.

We now turn to our recent holding in *Consolidated Rail*, *supra*, which both parties appear to concede states the con-

trolling law. There the Commission fixed rates for recycled materials. On review, the Court of Appeals revoked the rate increases, remanded to the Commission to determine a rate structure incorporating the standards set forth in the 4–R Act, and enjoined new rates until after the Commission's reconsideration. In reversing this holding summarily, we held:

> "The authority to determine *when* any particular rate should be implemented is a matter which Congress has placed squarely in the hands of the Commission. *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658, 662–672 (1963). . . . [T]here is no basis in our prior decisions for the revocation order or for the injunction against further increases. 'If a reviewing court cannot discern [the Commission's] policies, it may remand the case to the agency for clarification and further justification. . . . When a case is remanded on the ground that the agency's policies are unclear, an injunction ordinarily interferes with the primary jurisdiction of the Commission.' *Atchison, T. & S. F. R. Co.* v. *Wichita Board of Trade*, 412 U. S. 800, 822 (1973). . . ." 449 U. S., at 612. (Emphasis added.)

To recapitulate, our cases stand for three propositions: (1) under the Interstate Commerce Act, primary jurisdiction to determine the reasonableness of rates lies with the Commission, see also *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 384 (1932); (2) federal-court authority to reject Commission rate orders for whatever reason extends to the orders alone, and not to the rates themselves, cf. 28 U. S. C. § 2349(a) ("The court of appeals . . . has exclusive jurisdiction to make . . . a judgment determining the validity of, and enjoining; . . . the *order* of the agency") (emphasis added); (3) where there is a dispute about the appropriate rate, the equities favor allowing the carrier's rate to control pending decision by the Commission, since under the Act, the shipper may receive reparations for overpayment while the carrier

can never be made whole after underpayment. 49 U. S. C. § 11705(b)(3) (1976 ed., Supp. IV).[6] Cf. *Atlantic Coast Line R. Co.* v. *Florida*, 295 U. S. 301 (1935).

III

We can discern no basis to distinguish this case from *Arrow*, *SCRAP*, *Wichita Board of Trade*, and *Consolidated Rail*, *supra*. By entering an order declaring that the *San Antonio I* rate order was "revived" for the period June 1980–May 1981, the Court of Appeals did that which we have said a federal court may not do: *i. e.*, freeze the rate that railroads charge shippers prior to a decision by the Commission as to what a reasonable rate should be. That approach undermines the Commission's ability to exercise the primary jurisdiction delegated to it by Congress to insure equitable and uniform rates. More important, the determination requires the railroads to accept a return that was considered temporary when it was approved in 1976, and "below a maximum reasonable rate" when it was modified in 1978. This result would be inequitable in the best of times, but the impact is particularly acute in a period of high inflation and changing regulatory standards.[7]

Because the reparations provisions do not apply to both shippers and carriers, losses suffered by the carriers cannot be recovered. Carriers are not adequately protected by their authority under §§ 10761 and 10762 to file a new rate or their right under § 10327(g) to petition the Commission to

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[6] Under § 207(d)(2) of the Staggers Rail Act of 1980, Pub. L. 96–448, 94 Stat. 1907, 49 U. S. C. § 10707(d)(2) (1976 ed., Supp. IV), the carrier can also receive reparations. This right is limited, however, to underpayments resulting from the *Commission's* suspension of a tariff; it does not apply where, as here, a *court* has prevented the carrier from collecting a higher tariff.

[7] See, *e. g.*, 4–R Act, discussed in n. 1, *supra;* Staggers Rail Act of 1980, Pub. L. 96–448, 94 Stat. 1895, *supra*. Both statutes are directly relevant in the determination of a reasonable rate for the San Antonio coal movement; neither was considered in *San Antonio I*.

modify its "revived" rate order, as San Antonio urges. It is arguable—and in other proceedings, San Antonio has so claimed, see Brief for Petitioners 38–39—that before either action can take effect, the party adversely affected may ask for a hearing pursuant to *Arizona Grocery*, *supra*. A plenary hearing necessarily causes delay, and even if it did not, action by the Commission usually will not be effective until 30 days have elapsed after its order is served, § 10327(h).

The claim is made that the Court of Appeals was powerless to achieve a different result because, under § 10704(a)(1), the only rate the railroads could legally charge was the rate prescribed by the Commission. Since the Commission prescribed a rate in *San Antonio I*, the argument is that this is the rate the railroads must charge. We disagree. *San Antonio I* was by its terms limited to "continue in full force and effect until . . . further order of the Commission," 355 I. C. C., at 418. Absent a contrary indication from the Commission, *San Antonio II* terminated the vitality of *San Antonio I*.[8]

Moreover, if the court was unsure about the continued vitality of *San Antonio I*, the more appropriate course would have been to remand to the Commission for explanation rather than to undertake itself to construe the order, and in so doing to interfere with the Commission's primary jurisdiction, contrary to important congressional policies.[9]

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[8] San Antonio makes much of the dictionary definitions of "modify" and "vacate." While ordinary meanings are not insignificant in statutory construction, San Antonio has not cited a single case under the Interstate Commerce Act making this distinction.

[9] Another way in which the Court of Appeals might have minimized interference with congressional objectives would have been to construe its own opinion as vacating only the Commission's new rate calculations and not the Commission's conclusion that the *San Antonio I* rate was too low. See 28 U. S. C. § 2349(a), allowing the court to enjoin or set aside "in whole or part, the order of the agency." Cf. *Atchison, T. & S. F. R. Co.* v. *Wichita Board of Trade*, 412 U. S. 800, 822 (1973).

The existence of a 1976 rate prescription does not require a result different from the result reached in *Consolidated Rail*. *San Antonio II* and *III* each in turn vacated the prescription which preceded it. In striking the orders in *San Antonio II* and *III*, the court's action operated to leave in effect the rates filed under the Commission's authority pending the Commission's redetermination of a reasonable rate and subject always to reparations to protect the shipper should the Commission find that these rates were too high.[10]

The June 30, 1981, judgment of the Court of Appeals is

Reversed.

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[10] Because we find that *Consolidated Rail* mandates this result, we need not reach the railroads' claim that the decision of the Court of Appeals is inconsistent with the filed rate doctrine.

XEROX CORP. v. COUNTY OF HARRIS, TEXAS, ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS, FIRST SUPREME JUDICIAL DISTRICT

No. 81–1489. Argued November 10, 1982—Decided December 13, 1982

Appellant, a New York corporation that manufactures and sells copying machines, shipped machine parts manufactured in this country to Mexico City, Mexico, for assembly by its affiliate there. After assembly, the copiers were transported by a customs bonded trucking company to a customs bonded warehouse in Houston, Tex., where they were segregated from other merchandise and stored while awaiting sale and shipment to appellant's affiliates in Latin America. None of these copiers were ever sold to customers for domestic use, but remained under the continuous control and supervision of the United States Customs Service from the time they entered the warehouse until they cleared United States Customs at their export ports. In 1977, both the city of Houston and Harris County (appellees) assessed ad valorem personal property taxes on the copiers stored in the Houston warehouse. Appellant sought declaratory and injunctive relief in state court, claiming that the taxes were unconstitutional. Appellees counterclaimed for the taxes assessed. The trial court entered judgment for appellant, holding that the taxes violated the Import-Export and Commerce Clauses of the Constitution. The Texas Court of Civil Appeals reversed and granted judgment to appellees on their counterclaims, holding that the taxes violated neither Clause of the Constitution and, alternatively, that the trial court had violated state law in granting injunctive relief.

Held:

1. This Court has jurisdiction over the appeal under 28 U. S. C. § 1257(2). Notwithstanding appellees' argument that this Court lacks jurisdiction because the Court of Civil Appeals' decision reversing the grant of an injunction rested on an independent and adequate state ground, an indispensable predicate to the award of judgment to appellees on their counterclaims was a determination that the taxes were permissible under the Federal Constitution. P. 149.

2. State property taxes, such as those involved here, on goods stored under bond in a customs warehouse are pre-empted by Congress' comprehensive regulation of customs duties. Under the customs system, established pursuant to Congress' powers under the Commerce Clause, imports may be stored duty free in Government-supervised bonded

warehouses for prescribed periods, and during such periods may be withdrawn and reexported without payment of duty. Only if the goods are withdrawn for domestic sale or stored beyond the prescribed period does any duty become due. Congress created such duty-free enclaves under federal control in order to encourage merchants here and abroad to make use of American ports as transshipment centers for goods in foreign trade. It would not be compatible with the comprehensive scheme Congress enacted to effect these goals if the states were free to tax such goods while they were lodged temporarily in Government-regulated bonded storage in this country. Cf. *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414. Pp. 150–154.

619 S. W. 2d 402, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed a dissenting opinion, *post*, p. 155.

Alfred H. Hoddinott, Jr., argued the cause and filed briefs for appellant.

Cheryl Helena Chapman argued the cause for appellees. With her on the brief for appellee City of Houston was *Jay D. Howell, Jr.* *John J. Greene* filed a brief for appellee County of Harris.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We noted probable jurisdiction to decide whether a state may impose nondiscriminatory ad valorem personal property taxes on imported goods stored under bond in a customs warehouse and destined for foreign markets. The Texas Court of Civil Appeals held such taxes constitutional.

I

Appellant Xerox Corp. is a New York corporation engaged in the business of manufacturing and selling business machines. Its operations span the globe, and it has established

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**James F. Gossett* filed a brief for the International Association of Assessing Officers as *amicus curiae*.

affiliates in foreign countries to facilitate foreign sales. It has assembly plants and production facilities in Mexico.

Xerox manufactured parts for copying machines in Colorado and New York which were shipped to Mexico City, Mexico, for assembly by its affiliate there. The copiers assembled in Mexico were designed for sale in the Latin American market, and all printing on the machines and instructions accompanying them were in Spanish or Portuguese. Most of the copiers operated on electric current of 50 cycles per second, rather than the 60 cycles per second that is standard in the United States. Many of the copiers assembled by appellant's affiliate in Mexico City were not approved by either United Laboratories or the Canadian Standards Association, as required for sale in the United States. To convert the copiers for domestic sale would have cost approximately $100 per copier.

After assembly in Mexico, the copiers were transported by a customs bonded trucking company to the Houston Terminal Warehouse in Houston, Tex.,[1] a Class 3 customs bonded warehouse. There they were stored for periods ranging from a few days to three years while awaiting sale and shipment to Xerox affiliates in Latin America. The copiers remained in the warehouse, segregated from other merchandise, until a shipment order was received. When Xerox received an order, it would transport the copiers under bond to either the Port of Houston or the Port of Miami, where they were loaded on board vessels for shipment to Latin America. The copiers remained under the continuous control and supervision of the United States Customs Service from the time they entered the bonded warehouse until they cleared

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[1] Until 1974, Xerox shipped its Mexican-assembled copiers to the Free Trade Zone of Panama, where they were stored tax free. In 1974, rising anti-American sentiment in Panama led Xerox to seek another storage facility. It settled on the Houston warehouse because of the excellent port facilities in the Port of Houston.

United States Customs at the Port of Houston or the Port of Miami for export.[2]

None of the copiers assembled in Mexico and stored in Houston were ever sold to customers for domestic use; all were ultimately sold abroad. Consequently, Xerox paid no import duties on them.[3]

The local authorities did not assess any taxes on the copiers stored under customs bond in 1974 and 1975. In 1977, the city of Houston[4] assessed ad valorem personal property taxes of $156,728 on the copiers stored in the Houston warehouse during 1977.[5] The County of Harris[6] followed suit, assessing $55,969 in taxes for 1977 and also assessing $48,426 in back taxes for 1976, for a total of $104,395.

As soon as Xerox learned that the local authorities intended to tax its Mexican-assembled copiers, it shipped all the machines to a foreign trade zone in Buffalo, N. Y., from which it continued to fill orders for shipment to Latin America.

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[2] Goods stored in customs bonded warehouses are under the "joint custody" of the warehouse proprietor and the United States Customs Service. The United States Customs Service is "in charge" of the warehouse and all work performed there is under its "supervision." 19 U. S. C. § 1555.

[3] At the time in question, 19 U. S. C. § 1557(a) permitted the storage of imported goods for up to three years in a customs bonded warehouse without payment of an import duty. The importer was required to post a bond for the value of the duty. At the end of the three years, the goods could be withdrawn for domestic sale upon payment of the duty owed, or could be withdrawn for reexport without payment of any duty. In 1978, the time limit on the storage period was extended from three years to five years. Customs Procedural Reform and Simplification Act of 1978, Pub. L. 95–410, § 108(b)(1), 92 Stat. 892, 19 U. S. C. § 1557(a) (1976 ed., Supp. V).

[4] Houston assesses and collects taxes for itself and the Houston Independent School District.

[5] In 1976 and 1977, Xerox paid a total of approximately $1,817,000 in ad valorem taxes to appellees for copiers located in Texas for domestic use.

[6] Harris County assesses and collects taxes for itself, the State of Texas, and other local taxing authorities.

Declaratory and injunctive relief was sought in state court both from the taxes already assessed and such taxes as appellees might impose in the future. Xerox claimed that the taxes in question were unconstitutional because they violated the Import-Export Clause and the Commerce Clause of the Constitution. Art. I., § 10, cl. 2; Art. I, § 8, cl. 3. Appellees counterclaimed for the taxes assessed.

The trial court held that the taxes assessed by appellees violated both the Import-Export and Commerce Clauses, and it granted judgment to Xerox. The Texas Court of Civil Appeals, First District, reversed, holding that the taxes violated neither the Import-Export Clause nor the Commerce Clause. 619 S. W. 2d 402 (1981). Alternatively, it held that the trial court had violated Texas Rule of Civil Procedure 683 in granting injunctive relief. Finally, it granted judgment to appellees on their counterclaims in the amount of $131,311 plus penalties and interest to Harris County and $156,728 plus penalties and interest to the city of Houston. The Texas Supreme Court denied Xerox's application for a writ of error and this appeal followed. We noted probable jurisdiction, 456 U. S. 913 (1982), and we reverse.

II

A

A preliminary question is whether this Court has jurisdiction over the appeal. Appellees argue that this Court lacks jurisdiction since the decision of the Texas court reversing the grant of an injunction rested on an independent and adequate state ground. However, an indispensable predicate to an award of judgment to the appellees on their counterclaims was a determination that the taxes at issue were permissible under the United States Constitution; the Texas Court of Civil Appeals so held. It is not claimed that any independent and adequate state-law ground supports that holding. We therefore have jurisdiction to review that judgment. 28 U. S. C. § 1257(2).

B

Pursuant to its powers under the Commerce Clause, Congress established a comprehensive customs system which includes provisions for Government-supervised bonded warehouses where imports may be stored duty free for prescribed periods. At any time during that period the goods may be withdrawn and reexported without payment of duty. Only if the goods are withdrawn for domestic sale or stored beyond the prescribed period does any duty become due. 19 U. S. C. § 1557(a) (1976 ed., Supp. V). While the goods are in bonded warehouses they are in the joint custody of the United States Customs Service and the warehouse proprietor and under the continuous control and supervision of the local customs officers. 19 U. S. C. § 1555. Detailed regulations control every aspect of the manner in which the warehouses are to be operated. 19 CFR §§ 19.1–19.6 (1982).

Government-regulated, bonded warehouses have been a link in the chain of foreign commerce since "a very early period in our history." *Fabbri* v. *Murphy*, 95 U. S. 191, 197 (1877). A forerunner of the present statute was the Warehousing Act of 1846, 9 Stat. 53. A major objective of the warehousing system was to allow importers to defer payment of duty until the goods entered the domestic market or were exported. The legislative history explains that Congress sought to reinstate

> "the sound though long neglected maxim of Adam Smith, 'That every tax ought to be levied at the time and in the manner most convenient for the contributor to pay it;' [by providing] that the tax shall only be paid when the imports are entered for consumption . . . ." H. R. Rep. No. 411, 29th Cong., 1st Sess., 3 (1846).

The Act stimulated foreign commerce by allowing goods in transit in foreign commerce to remain in secure storage, duty free, until they resumed their journey in export. The geographic location of the country made it a convenient place for

transshipment of goods within the Western Hemisphere and across both the Atlantic and the Pacific. A consequence of making the United States a center of world commerce was that

> "our carrying trade would be vastly increased; that shipbuilding would be stimulated; that many foreign markets would be supplied, wholly or in part, by us with merchandise now furnished from the warehouses of Europe; that the industry of our seaports would be put in greater activity; [and] that the commercial transactions of the country would be facilitated . . . ." Cong. Globe, 29th Cong., 1st Sess., App. 792 (1846) (remarks of Sen. Dix).

To these ends, Congress was willing to waive all duty on goods that were reexported from the warehouse, and to defer, for a prescribed period, the duty on goods destined for American consumption. This was no small sacrifice at a time when customs duties made up the greater part of federal revenues,[7] but its objective was to stimulate business for American industry and work for Americans.

In short, Congress created secure and duty-free enclaves under federal control in order to encourage merchants here and abroad to make use of American ports. The question is whether it would be compatible with the comprehensive scheme Congress enacted to effect these goals if the states were free to tax such goods while they were lodged temporarily in Government-regulated bonded storage in this country.

In *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414 (1940), the City of New York sought to impose a sales tax on imported petroleum that was refined into fuel oil in New York and sold as ships' stores to vessels bound abroad. The crude oil was

[7] In 1846, approximately 90% of all federal revenues were derived from customs duties. U. S. Bureau of Census, Historical Statistics of the United States, Colonial Times to 1970, Part 2, p. 1106 (Bicentennial ed. 1975) (customs accounted for $26,713,000 out of total federal revenues of $29,700,000).

imported under bond and refined in a customs bonded manufacturing warehouse and was free from all duties. We struck down the state tax, finding it pre-empted by the congressional scheme. *Id.*, at 429.

The Court determined that the purpose of the exemption from the tax normally laid upon importation of crude petroleum was "to encourage importation of the crude oil for [refinement into ships' stores] and thus to enable American refiners to meet foreign competition and to recover trade which had been lost by the imposition of the tax." *Id.*, at 427; see also *id.*, at 428. The Court went on to note that, in furtherance of this purpose,

> "Congress provided for the segregation of the imported merchandise from the mass of goods within the state, prescribed the procedure to insure its use for the intended purpose, and by reference confirmed and adopted customs regulations prescribing that the merchandise, while in bonded warehouse, should be free from state taxation." *Id.*, at 428–429.

The Court concluded that

> "the purpose of the Congressional regulation of the commerce would fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred on the importer by Congress, and which might equal or exceed the remitted import duty." *Id.*, at 429.

In so deciding, the Court expressly declined to rely on the customs regulation "prescribing the exemption from state taxation," holding that the regulation merely stated "what is implicit in the Congressional regulation of commerce presently involved." *Ibid.*[8]

[8] Here, a footnote in the regulations governing customs bonded warehouses specifically provided that "[i]mported goods in bonded warehouses are exempt from taxation or judicial process of any State or subdivision thereof." 19 CFR § 19.6(c), n. 11 (1982). A recent amendment to the regulations deleted this footnote on November 1, 1982, effective Decem-

The analysis in *McGoldrick* applies with full force here. First, Congress sought, in the statutory scheme reviewed in *McGoldrick*, to benefit American industry by remitting duties otherwise due. The import tax on crude oil was remitted to benefit oil refiners employing labor at refineries within the United States, whose products would not be sold in domestic commerce. Here, the remission of duties benefited those shippers using American ports as transshipment centers. Second, the system of customs regulation is as pervasive for the stored goods in the present case as it was in *McGoldrick* for the refined petroleum. In both cases, the imported goods were segregated in warehouses under continual federal custody and supervision. Finally, the state tax was large enough in each case to offset substantially the very benefits Congress intended to confer by remitting the duty.[9] In short, freedom from state taxation is as necessary to the congressional scheme here as it was in *McGoldrick*.

Although there are factual distinctions between this case and *McGoldrick*, they are distinctions without a legal difference. We can discern no relevance to the issue of congressional intent in the fact that the fuel oil in *McGoldrick* could be sold only as ships' stores whereas Xerox had the option to pay the duty and withdraw the copiers for domestic sale, or that in *McGoldrick* the city sought to impose a sales tax and here appellees assessed a property tax.

A similar conclusion was reached in *District of Columbia* v. *International Distributing Corp.*, 118 U. S. App. D. C. 71, 331 F. 2d 817 (1964). There, the Court of Appeals held that a wholesaler of imported alcoholic beverages was not liable

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ber 1, 1982. 47 Fed. Reg. 49370. The Treasury Department offered no explanation for the amendment. The deletion of footnote 11 without explanation does not alter our conclusion that the ad valorem taxes here are pre-empted by the statutory scheme.

[9] The fair market value of the copiers located in the Houston warehouse on January 1, 1977, was $9,015,690. The duty remitted by the United States on these copiers amounted to $540,000. By comparison, the appellees here sought to impose taxes on the copiers for the year 1977 amounting to $211,112. App. 12a–15a, 25a.

for District of Columbia excise taxes on the sale of such beverages to foreign embassies while the beverages were stored in a customs bonded warehouse. The court reasoned that Congress intended to make customs bonded warehouses federal enclaves free of state taxation and that although the imported goods were physically within the District of Columbia, they were not subject to its taxing jurisdiction until they were removed from the warehouse. Since the sales took place prior to removal, the District could not tax those sales. The Court of Appeals quoted with approval the following language of the Tax Court:

> "'The idea of bonded warehouses and their use by the United States custom authorities negatives the proposition that at the time of sale the alcoholic beverages were in the possession of the petitioner [the corporation]. True it is that the private bonded warehouse was physically in the District of Columbia; and the liquors were stored therein; and in that sense they were in the District. In law, however, they were still without that jurisdiction, and did not become subject thereto until they had been withdrawn from the private bonded warehouse and removed from the control of the customs official.'" *Id.*, at 73–74, 331 F. 2d, at 819–820.

International Distributing Corp. merely confirms what this Court said in 1877 in *Fabbri* v. *Murphy*, 95 U. S., at 197–198: "Congress did not regard the importation as complete while the goods remained in the custody of the proper officers of customs."

Accordingly, we hold that state property taxes on goods stored under bond in a customs warehouse are pre-empted by Congress' comprehensive regulation of customs duties.

III

It is unnecessary for us to consider whether, absent congressional regulation, the taxes here would pass muster under the Import-Export Clause or the Commerce Clause.

The judgment of the Texas Court of Civil Appeals is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

JUSTICE POWELL, dissenting.

Since 1799 the United States has permitted importers to post a customs bond in lieu of immediate payment of customs duties on imported goods. Today the Court holds that these goods stored in customs-bonded warehouses also are exempt from state property taxation. This holding would be unremarkable were it based on any evidence of congressional intent, but such support is lacking. The Court instead finds that state taxation is incompatible with the purposes of the federal customs-bonded warehousing system.

Customs-bonded storage enables importers to defer paying customs duties until the goods are ready for domestic sale or to avoid paying duties altogether if the goods are reexported. The Court correctly observes that Congress' ultimate purpose has been to encourage imports and enhance the position of the United States as a center of international trade. I am not persuaded, however, that nondiscriminatory state taxation of customs-bonded goods is incompatible with this purpose.

The Court attributes significance to the "pervasive" system of customs regulation of stored goods, *ante*, at 153, but fails to explain how this affects a State's power to tax. The purpose of the regulation is to guarantee the security of federal revenues. The owner of customs-bonded goods eventually must pay the customs duties or reexport the goods. The warehousing system enables the Federal Government to monitor the removal of bonded goods for sale or export and ensure that duties are paid when due. A State's imposition of an ad valorem tax does not impair this function. The "pervasive" regulation of the manner in which customs-bonded goods are stored and withdrawn, therefore, is simply immaterial to the validity of state taxation of those goods.

The Court also argues that state taxation of customs-bonded goods would frustrate the congressional purpose of encouraging foreign trade with the United States. It asserts that appellees' taxes are large enough "to offset substantially the very benefits Congress intended to confer by remitting the duty." *Ibid.* It seems to me that the word "offset" in this context is misused. If a State were to impose a *special* tax on property stored in customs-bonded warehouses, perhaps such a tax could be viewed as "offsetting" the benefits of storage. An importer deciding whether to use the warehouses would weigh the amount saved through remission of duties against the amount expended to pay the property tax. In this case, however, the county and city, acting pursuant to state law, impose the same ad valorem taxes no matter where the property is stored. An importer deciding whether to bring imported goods into Texas therefore knows that while the goods are in storage he will have to pay the property tax whether or not he uses a customs-bonded warehouse. The value to him of using customs-bonded storage is the full amount of the savings from deferral or avoidance of duties—precisely the benefit Congress expressly has provided in order to encourage merchants to bring business to the United States.

The Court accepts appellant's argument that a tax exemption for goods in customs-bonded warehouses reduces importers' costs and thereby furthers the federal interest in encouraging trade. But the Court itself acknowledges that state legislation should be pre-empted only where "necessary" to achieve a congressional purpose. *Ibid.* No showing has been made that this standard is met here. Duty-free storage and exemption from state property taxation are independent policies for promoting foreign trade. Congress quite reasonably may choose one policy, as it has done, without choosing the other.

The Court relies primarily on *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414 (1940), in which the Court invalidated a

city tax on the sale of fuel oil from a customs-bonded manufacturing warehouse to foreign-bound vessels. *McGoldrick* does not control this case. As the Court concedes, see *ante*, at 152, *McGoldrick* did not hold that the warehousing system and customs regulations alone mandated pre-emption of state taxation. Rather, a key factor was that Congress expressly had exempted from federal taxation the imported petroleum that was refined in the bonded warehouses for sale to foreign-bound vessels as ships' stores. The explicit congressional purpose "to enable American refiners to meet foreign competition," 309 U. S., at 427, provided a basis on which to infer congressional intent to pre-empt state taxation. There is no analogous federal tax exemption here, nor any evidence of congressional intent to encourage meeting of foreign competition. All that exists is the warehousing system itself, and for the reasons stated above I find this insufficient.

Nor do I find merit in appellant's constitutional arguments. Appellees' taxes do not violate the Commerce Clause, as they are "applied to an activity with a substantial nexus with the taxing State, [are] fairly apportioned, [do] not discriminate against interstate commerce, and [are] fairly r lated to the services provided by the State." *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279 (1977). Nor do these nondiscriminatory ad valorem taxes violate the Import-Export Clause, Art. I, § 10, cl. 2. See *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276 (1976).

Appellant notes that *Michelin Tire* left open the possibility that even nondiscriminatory property taxes may not be imposed on goods that still are in transit. But appellant's copiers were stored for up to three years, and under current law they could have been stored for up to five years. 19 U. S. C. § 1557(a) (1976 ed., Supp. V). The only conceivable basis for the view that these goods remain "in transit" is that Congress has so provided. I cannot agree that Congress has endowed customs-bonded goods with indefinite immunity from nondiscriminatory state-authorized local property taxation.

During their prolonged period of storage, appellant's goods benefited from police and fire protection and the various other services provided by the county and city. "[T]he State is simply making the imported goods pay their own way, as opposed to exacting a fee merely for 'the privilege of moving through a State.'" *Washington Revenue Dept.* v. *Association of Washington Stevedoring Cos.*, 435 U. S. 734, 764 (1978) (POWELL, J., concurring in part and concurring in result) (quoting *Michelin Tire Corp.* v. *Wages*, *supra*, at 290). The Import-Export Clause never was intended to exempt imported goods in these circumstances.

I would affirm the judgment of the Texas Court of Civil Appeals.

Syllabus

CITY OF PORT ARTHUR, TEXAS *v.* UNITED STATES ET AL.

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

No. 81–708. Argued October 6, 1982—Decided December 13, 1982

Under § 5 of the Voting Rights Act of 1965, a covered State or political subdivision, such as appellant city of Port Arthur, must obtain federal preclearance of a change in its voting practices or procedures either from the Attorney General or by obtaining a declaratory judgment from the District Court for the District of Columbia that the proposed change has neither the purpose nor the effect of denying the right to vote on account of race. In 1977 and 1978, Port Arthur was consolidated with two neighboring cities and annexed an incorporated area, with the result that the percentage of the black population within Port Arthur's borders decreased from 45.21% to 40.56%. Appellant ultimately filed a § 5 suit in the District Court, seeking approval of the consolidations and the annexation, and of a proposed expansion of its City Council from seven members (including a mayor), who had been previously elected at large by majority vote, to a nine-member Council. After the rejection of earlier electoral plans, appellant submitted a plan involving election of councilmen from four single-member districts, two of which included black majorities; election of two members from two other districts, each of which consisted of two of the four single-member districts, and one of which had a black majority; and at-large election of two other members from the latter two districts and of the mayor. All Council seats would be governed by a majority-vote rule, requiring runoffs if none of the candidates received a majority of the votes cast. Although concluding that the expansion of Port Arthur's borders could not be denied preclearance as being discriminatory in purpose, the District Court held that the electoral plan could not be approved under § 5 because it insufficiently neutralized the adverse impact upon minority voting strength that resulted from the expansion. However, the court stated that if the plan were modified to eliminate the majority-vote requirement with respect to the two nonmayoral, at-large candidates, and to permit election to those two seats to be made by a plurality vote, the court would consider the defect remedied and would offer its approval.

Held: The District Court did not exceed its authority in conditioning clearance of the electoral plan on the elimination of the majority-vote requirement. Pp. 165–168.

(a) Section 5 does not forbid all expansion of municipal borders that dilute the voting power of particular groups in the community. However, such an expansion can be approved only if modifications in the electoral plan, calculated to neutralize to the extent possible any adverse effect on the political participation of minority groups, are adopted. Pp. 165–166.

(b) The District Court did not err in holding that the majority-vote requirement as to the nonmayoral, at-large council seats must be eliminated in order to sufficiently dispel the impact of Port Arthur's expansion on the relative political strength of the black community. Whether the plan adequately reflected black political strength in the enlarged city is not an issue that is determinable with mathematical precision. Since the plan undervalued to some extent the political strength of the black community, eliminating the majority-vote requirement was an understandable adjustment. And, even if the electoral scheme might otherwise be said to reflect the political strength of the minority community, elimination of the majority-vote element was a reasonable hedge against the possibility that the scheme contained a purposefully discriminatory element. Pp. 166–168.

Affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 169.

Robert Q. Keith argued the cause for appellant. With him on the briefs was *James Douglas Welch.*

Carter G. Phillips argued the cause for appellees. With him on the brief for the United States were *Solicitor General Lee*, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Wallace*, *Jessica Dunsay Silver*, and *Marie E. Klimesz*. *Elizabeth K. Julian*, *Michael M. Daniel*, *William L. Robinson*, *Norman J. Chachkin*, *Elizabeth C. Petit*, and *Don Floyd* filed a brief for appellees Douglas et al.

JUSTICE WHITE delivered the opinion of the Court.

Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c, requires that when a State or

political subdivision covered by the Act[1] adopts or seeks to administer any change in its standards, practices, or procedures with respect to voting, it must obtain a preclearance either from the Attorney General of the United States or by obtaining a declaratory judgment from the District Court for the District of Columbia that the proposed change has neither the purpose nor the effect of denying or abridging the right to vote on account of race.[2] *Perkins* v. *Matthews*, 400 U. S. 379 (1971), held that changes in the boundary lines of a city by annexations that enlarge the number of eligible voters are events covered by § 5. The question in this case is whether the District Court for the District of Columbia cor-

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[1] It is undisputed that the city of Port Arthur is a political subdivision to which § 5 is applicable. See 28 CFR, p. 461, Appendix (1982).

[2] Section 5, as set forth in 42 U. S. C. § 1973c, in relevant part provides as follows:

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate tate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made."

rectly held that the electoral plan for the Port Arthur, Tex., City Council could not be approved under § 5 because it insufficiently neutralized the adverse impact upon minority voting strength that resulted from the expansion of the city's borders by two consolidations and an annexation.

I

In December 1977, the city of Port Arthur, Tex., consolidated with the neighboring cities of Pear Ridge and Lake View. Six months later, the city annexed Sabine Pass, an incorporated area. As a result of these expansions of the city's borders, the percentage of the black population in Port Arthur decreased from 45.21% to 40.56%. Blacks of voting age constituted 35% of the population of the enlarged city.[3]

Prior to the expansions, the city was governed by a seven-member Council, including a mayor, each member being elected at large by majority vote. Each member except the mayor was required to reside in a specific district of the city. Members were elected for staggered terms. Following the two consolidations, the City Council passed an ordinance adding an eighth member to the Council, while retaining the at-large system with residency requirements. After the annexation of Sabine Pass, the city further proposed that the Council be expanded to nine members, with at-large elections as before. The two consolidations and the annexation, together with the proposed changes in the governing system, were submitted to the Attorney General for preclearance

[3] The preannexation and postannexation percentages are based on the 1980 census. The figure for the percentage of blacks in the voting age population is an estimate, which the District Court derived by extrapolating from the 1970 census data. The 1970 census showed that at that time 34.6% of the voting age population was black while 40.01% of the general population was black. The District Court itself noted the dangers of extrapolation, but explained that both parties had suggested the procedure for determining the percentage of the current voting age population that is black. Port Arthur also has a Hispanic community, which comprises 6.30% of the enlarged city's population.

pursuant to § 5 of the Voting Rights Act. The Attorney General refused preclearance, suggesting, however, that he would reconsider if the Council members were elected from fairly drawn single-member districts.

As § 5 permitted it to do, the city then filed suit in the United States District Court for the District of Columbia seeking a declaratory judgment that the expansions and the nine-member plan did not have the purpose or effect of denying or abridging the right to vote on account of color or race within the meaning of § 5. While that suit was pending, the city approved by referendum the "4–4–1" plan, calling for four members to be elected from single-member districts, four to be elected at large from residency districts identical to the single-member districts, and the ninth member, the mayor, to be elected at large without any residency requirement.[4] That plan, like the previous plans, required a majority vote to elect each Council member. The city then moved to amend its complaint so as to seek a declaratory judgment as to the legality of the 4–4–1 plan.

The District Court concluded that because there were legitimate purposes behind the annexation and the consolidations, those actions, under *City of Richmond* v. *United States*, 422 U. S. 358 (1975), could not be denied preclearance as discriminatory in purpose. 517 F. Supp. 987 (1981). Because the expansions had substantially reduced the relative political strength of the black population, however, it was necessary for preclearance that the postexpansion electoral system be found to satisfy the requirements of § 5. The District Court held that neither the first nine-member plan nor the 4–4–1 plan measured up, not only because each was adopted with a discriminatory purpose, but also because in the context of the severe racial bloc voting characteristic of the recent past in the city neither plan adequately reflected

[4] The United States unsuccessfully sought to enjoin the referendum election before a three-judge court in the Eastern District of Texas. *United States* v. *City of Port Arthur*, No. B–80–216–CA (Sept. 5, 1980).

the minority's potential political strength in the enlarged community as required under *City of Rome* v. *United States*, 446 U. S. 156 (1980); *City of Richmond* v. *United States*, *supra;* and *City of Petersburg* v. *United States*, 354 F. Supp. 1021 (DC 1972), summarily aff'd, 410 U. S. 962 (1973).

Soon after this decision, the city and the United States jointly submitted to the court for approval the "4–2–3" electoral plan. Under this scheme, the city would be divided into four single-member districts, Districts 1 through 4. District 5, comprising Districts 1 and 4 would elect another member, as would District 6, which combined Districts 2 and 3. Three additional members would be elected at large, one each from Districts 5 and 6, the third at-large seat to be occupied by the mayor and to have no residency requirement. All Council seats would be governed by the majority-vote rule, that is, runoffs would be required if none of the candidates voted on received a majority of the votes cast. Blacks constituted a majority in Districts 1 and 4, 79% and 62.78% respectively, as well as a 70.83% majority of the fifth district combining the two majority black districts. The sixth district was 10.98% black. Although the United States expressed reservations about the at-large and majority-vote features, its position was that neither of these aspects of the plan warranted a denial of preclearance.

After response to and oral argument upon the submission, the District Court concluded "that the proposed plan insufficiently neutralizes the adverse impact upon minority voting strength which resulted from the expansion of Port Arthur's borders." App. 87a. The court added, however, that if the plan were modified to eliminate the majority-vote requirement with respect to the two nonmayoral, at-large candidates, and to permit election to these two seats to be made by a plurality vote, the court "would consider the defect remedied and offer our approval." *Id.*, at 87a–88a. This appeal followed, the basic submission being that under § 5 and the controlling cases the District Court exceeded its authority in

conditioning clearance of the 4–2–3 plan on the elimination of the majority-vote requirement.[5] We noted probable jurisdiction. 455 U. S. 917 (1982).

II

Perkins v. *Matthews*, 400 U. S. 379 (1971), held that annexations by a city are subject to § 5 preclearance because increasing the number of eligible voters dilutes the weight of the votes of those to whom the franchise was limited before the annexation and because the right to vote may be denied by dilution or debasement just as effectively as by wholly prohibiting the franchise. It soon became clear, however, that § 5 was not intended to forbid all expansions of municipal borders that could be said to have diluted the voting power of particular groups in the community. In *City of Petersburg* v. *United States*, *supra*, the annexation of an area with a heavy white majority resulted in reducing the black community from majority to minority status. The District Court held that the annexation could nevertheless be approved but "only on the condition that modifications [in the electoral plan] calculated to neutralize to the extent possible any adverse effect upon the political participation of black voters are adopted, i. e., that the [city] shift from an at-large to a ward system of electing its city councilmen." 354 F. Supp., at 1031. We affirmed summarily. 410 U. S. 962 (1973).

Later, in *City of Richmond* v. *United States*, *supra*, we expressly reaffirmed *Petersburg*, recognizing that the Petersburg annexation enhanced the power of the white majority to

[5] The city argues that the District Court was required to approve a plan jointly submitted by the city and the Attorney General. The Voting Rights Act, however, assigns primary responsibility to the District Court to determine whether a change in voting procedures violates § 5. Preclearance by the Attorney General may obviate a court suit, but here the Attorney General was acting in the capacity of a litigant when he joined the city in submitting a plan for the court's consideration. In that posture, neither the Attorney General, the city, nor both of them together could dictate the court's conclusion as to the acceptability of the plan under § 5.

exclude Negroes from the city council but stating that such a consequence "would be satisfactorily obviated if at-large elections were replaced by a ward system of choosing councilmen." 422 U. S., at 370. It was our view that a fairly designed ward plan "would not only prevent the total exclusion of Negroes from membership on the council but would afford them representation reasonably equivalent to their political strength in the enlarged community." *Ibid.* We applied these principles in *City of Richmond.* There, the annexation of a heavily white area reduced the black population of the city from 52% to 42%, and the electoral proposal submitted for preclearance replaced the prior system of at-large elections with a single-member plan under which blacks would be in a substantial majority in four of the nine councilmanic districts. We held that as long as the ward system fairly reflected the strength of the Negro community as it existed after the annexation, preclearance under § 5 should be granted. Under such a plan, "Negro power in the new city [would not be] undervalued, and Negroes [would] not be underrepresented on the council." *Id.*, at 371. The annexation could not, therefore, be said to have the effect of denying or abridging the right to vote on account of race within the meaning of § 5.

In the case before us, Port Arthur was a party to two consolidations and an annexation. Because the areas taken into the city were predominantly white, the relative percentage of blacks in the enlarged city was substantially less than it was before the expansions. The District Court refused preclearance because in its view the postexpansion electoral system did not sufficiently dispel the adverse impact of the expansions on the relative political strength of the black community in Port Arthur. The city submits that this judgment was in error under *Petersburg* and *Richmond.*

Richmond, however, involved a fairly drawn, single-member district system that adequately reflected the political strength of the black community in the enlarged city. The

plan was consequently an acceptable response to the annexation's adverse impact on minority voting potential. It does not necessarily follow that the mixed single-member and at-large system at issue in this case sufficiently dispelled the impact of Port Arthur's expansions on the relative political strength of the black community. The District Court concluded that although the 4–2–3 system provided a black majority in three councilmanic districts, it was necessary also to eliminate the majority-vote requirement with respect to the two nonmayoral at-large council positions. For several reasons, we cannot say that the District Court erred in this respect.

First, whether the 4–2–3 plan adequately reflected the political strength of the black minority in the enlarged city is not an issue that is determinable with mathematical precision. Because reasonable minds could differ on the question and because the District Court was sitting as a court of equity seeking to devise a remedy for what otherwise might be a statutory violation, we should not rush to overturn its judgment. Cf. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15 (1971).

Second, the 4–2–3 plan undervalued to some extent the political strength of the black community: one-third of the Council seats was to be elected from black majority districts, but blacks constituted 40.56% of the population of the enlarged city and 35% of the voting age population. In light of this fact, eliminating the majority-vote requirement was an understandable adjustment. As the District Court well understood, the majority-vote rule, which forbade election by a plurality, would always require the black candidate in an at-large election, if he survived the initial round, to run against one white candidate. In the context of racial bloc voting prevalent in Port Arthur, the rule would permanently foreclose a black candidate from being elected to an at-large seat. Removal of the requirement, on the other hand, might enhance the chances of blacks to be elected to the two at-large

seats affected by the District Court's conditional order but surely would not guarantee that result. Only if there were two or more white candidates running in a district would a black have any chance of winning election under a plurality system. We cannot say that insisting on eliminating the majority-vote rule in the two at-large districts would either overvalue black voting strength in Port Arthur or be inconsistent with *Richmond*.

Third, even if the 4–2–3 electoral scheme might otherwise be said to reflect the political strength of the minority community, the plan would nevertheless be invalid if adopted for racially discriminatory purposes, *i. e.*, if the majority-vote requirement in the two at-large districts had been imposed for the purpose of excluding blacks from any realistic opportunity to represent those districts or to exercise any influence on Council members elected to those positions. *City of Richmond* v. *United States*, 422 U. S., at 378–379. The District Court made no finding that the 4–2–3 plan was tainted by an impermissible purpose; but it had found that the two preceding plans, the first nine-member plan and the 4–4–1 plan, had been adopted for the illicit purpose of preventing black candidates from winning election. The court had also found that the majority-vote requirement was a major means of effectuating this discriminatory end. When it was then presented with the 4–2–3 plan retaining the requirement for the two nonmayoral at-large seats, the Court conditioned approval on eliminating the majority-vote element. It seems to us that in light of the prior findings of discriminatory purpose such action was a reasonable hedge against the possibility that the 4–2–3 scheme contained a purposefully discriminatory element. On balance, we cannot fault the judgment of the District Court.

The judgment of the District Court is accordingly

Affirmed.

JUSTICE POWELL, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

The Court affirms the District Court's order, concluding that although the 4–2–3 plan ensures proportional representation for the black voting age population, a district court nevertheless is free under § 5—in the exercise of a newly perceived equitable jurisdiction—to require a city to "enhance" the chances of increased minority representation on a city's governing body. In this case, the perceived enhancement would be that a plurality, rather than a majority election requirement, would give black citizens a better chance of capturing—in addition to the three district seats assured them—the two at-large seats. *Ante*, at 167–168.[1] Because the Court's decision is irreconcilable with *City of Richmond* v. *United States*, 422 U. S. 358 (1975), and authorizes a standardless equitable jurisdiction in district courts, I dissent.

I

In *City of Richmond*, the city annexed territory reducing the percentage of the city's black population from 52% to 42%. After the Attorney General refused to preclear submitted election plans, he and the city came to an agreement and jointly submitted a plan for approval to the District Court for the District of Columbia. The District Court rejected this plan, because the city had failed to "minimiz[e] the dilution of black voting power to the greatest possible extent." *Id.*, at 367. This Court, in an opinion by JUSTICE WHITE, vacated the District Court's order, holding that a district court must accept a new electoral plan for the enlarged municipality as long as it "fairly reflects the strength of the Negro community as it exists after the annexation" and

[1] The Court has recognized that a majority-vote requirement in at-large elections, unless adopted as a change for discriminatory purposes, is a valid and long-accepted practice "that is followed by literally thousands of municipalities and other local governmental units throughout the Nation." See *City of Mobile* v. *Bolden*, 446 U. S. 55, 60 (1980) (plurality opinion).

"would afford [it] representation reasonably equivalent to [its] political strength in the enlarged community." *Id.*, at 370–371. See *City of Rome* v. *United States*, 446 U. S. 156, 187 (1980), aff'g 472 F. Supp. 221, 245 (DC 1979); *City of Rome*, *supra*, at 188 (BLACKMUN, J., concurring); *United Jewish Organizations* v. *Carey*, 430 U. S. 144, 160 (1977) (opinion of WHITE, J.); *Beer* v. *United States*, 425 U. S. 130, 139, n. 11 (1976). In dissent, JUSTICE BRENNAN stated that he would find the dilutive effect of an annexation cured only by an election plan "calculated to neutralize to the extent possible any adverse effect upon the political participation of black voters." 422 U. S., at 389.

In this case, the city expanded its boundaries by annexation and consolidation.[2] This resulted in reducing the percentage of its black population from 45.21% to 40.56%. The electoral plan for the enlarged city, submitted to the Attorney General under § 5 of the Voting Rights Act of 1965, was disapproved both by the Attorney General and then by the District Court for the District of Columbia. Following negotiations, the Attorney General and the city reached agreement

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[2] The District Court acknowledged benefits for the entire population from consolidation:

"Port Arthur . . . was extremely interested in maintaining a population in excess of 50,000 so as to remain entitled as a matter of right to funds from federal agencies including the Department of Housing and Urban Development ('HUD'). Were the population to decrease below the 50,000 level, HUD would diminish the amount of the direct grant by one-third each year; in the fourth year, the City would have to [compete] with other applicants for discretionary awards. Since 1975, . . . there was evidence that the municipal population was [declining towards] the 50,000 mark. . . . Having already annexed all of the adjacent black communities, the City turned to Pear Ridge, Lakeview and Griffing Park.

". . . Although the City would be required to provide services to the new residents, it was anticipated that the additional cost would be minimal and greatly outweighed by the increased tax revenue. . . . Furthermore, Port Arthur hoped that the increased visibility resulting from consolidation would attract new businesses and thereby create new jobs." 517 F. Supp. 987, 999 (1981) (footnote omitted).

that the 4–2–3 electoral plan—at issue in this case—complied with the requirements of the Voting Rights Act. Accordingly, the plan was jointly submitted by the Attorney General and the city to the District Court for its approval. Under this plan, the city's 35% black voting age population was assured of 33% of the City Council positions, *i. e.*, three of nine members.

The District Court rejected the agreed upon plan in a brief order because, in words reminiscent of JUSTICE BRENNAN's dissent in *City of Richmond*, it "insufficiently neutralizes the adverse impact upon minority voting strength." App. 87a. The court added, however, that it would approve the plan were it modified "so as to provide for the election of the two non-mayoral, at-large representatives by plurality vote," *ibid.*, a condition to approval that the Attorney General had expressly considered and found not to be required by the Act.

I find the Court's decision in *City of Richmond* and in this case fundamentally inconsistent, because the proportional representation assured by the 4–2–3 plan must, by definition, "afford [blacks] representation reasonably equivalent to their political strength in the enlarged community." 422 U. S., at 370–371. Cf. *United Jewish Organizations*, *supra*, at 169 (BRENNAN, J., concurring in part) ("[T]he very definition of proportional representation precludes either underrepresentation or overrepresentation . . ."). Apparently in an effort to justify its decision, the Court states that the agreed 4–2–3 plan "undervalued to some extent the political strength of the black community." *Ante*, at 167. No support for this statement is cited, and none is found in the record.[3] The District

[3] In interim elections held in 1981, the city's electorate chose three black Council members. In fact, the city notes that it is now governed by a Council consisting of four blacks and five whites. Reply Brief for Appellant 6.

The Court seems to rely on two factors for its conclusion: a slight differential between the percentage of black seats and the percentage of black

Court made no such finding and the Government, in its submission to the District Court, expressly asserted that the city's plan "would appear to provide the minority community with a fair opportunity to obtain 'representation reasonably equivalent to their political strength in the enlarged community.' *City of Richmond* v. *United States*, 422 U. S. 358, 370 (1975)." App. 79a–80a. The black intervenors also agreed at the time of the submission that "the plan does approach affording blacks representation reasonably equivalent to their voting strength in the at-large community . . . ." *Id.*, at 83a.

II

Furthermore, the Court's decision finds no support in *any* prior decision of this Court. The theory that political

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voting age population; and a larger differential between the percentage of black seats and the percentage of the black population. There is a preference for voting age population statistics, see *United Jewish Organizations* v. *Carey*, 430 U. S. 144, 164, n. 23 (1977) (opinion of WHITE, J.), because they are more "probative" of the "electoral potential of the minority community," *City of Rome* v. *United States*, 446 U. S. 156, 186, n. 22 (1980), than population statistics. Even if the Court were to rely on population statistics here, this Court's formulations reflect the recognition that it would be unreasonable, if not impossible, to require cities to devise voting plans that afford minorities representation *precisely* proportional to their political strength in the jurisdiction. Indeed, the Court has indicated that proportional representation would be found in circumstances quite similar to those presented here. See *Beer* v. *United States*, 425 U. S. 130, 159, n. 19 (1976) (MARSHALL, J., dissenting) (approving representation/voting age population differential of 6%).

Moreover, the Court's conclusion that the 4–2–3 plan will "permanently foreclose" blacks from being elected to either of the at-large seats, *ante*, at 167, ignores the dynamics of the region, to which the facts of this case attest. With 35% of the voting age population composed of black citizens, it is politically naive to think that these citizens will not have significant—and indeed often decisive—influence in the election of at-large Council members. The results in numerous state and local elections demonstrate the political power of such a large and cohesive segment of the electorate. See J. Wilkinson, Harry Byrd and the Changing Face of Virginia Politics, 1945–1966, p. 346 (1968) ("By the middle of the 1960's . . . Negroes provided balance-of-power ballots [in Virginia and] elsewhere in the South . . .").

strength should be enhanced, rather than preserved, is new doctrine. It is a view Congress has never embraced, and indeed one that the 1982 extension of the Voting Rights Act fairly can be viewed as rejecting.[4] Moreover, although I do not question the power of a district court to disagree with the Attorney General's construction of the Act, it does not follow that the District Court was "sitting as a court of equity," *ante*, at 167, and had the power to require political enhancement. We are interpreting and applying a statute that vests no such open-ended jurisdiction in *any* court.

In the first six months of this year, the Department of Justice received approximately 8,709 applications for preclearance of voting changes under § 5, an average of 66 per working day.[5] Congress, with the approval of the President, has recently reaffirmed the authority of Department of Justice personnel to exercise this extensive control over state and local *political* decisions. The sheer volume of applications for preclearance makes imperative the prescribing of predictable standards. Proportional representation, whatever its theoretical and practical limitations may be in a nation with populations as diverse and mobile as that of the United States, is at least an objective standard, and when it

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[4] Section 3 of the Voting Rights Act Amendments of 1982, Pub. L. 97–205, 96 Stat. 131, 42 U. S. C. § 1973b (1982 ed.), states that a violation has been established if it is shown, "based on the totality of circumstances," that the political processes "are not equally open to [blacks]." The amendment expressly provides that "[t]he extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered . . . ." The Senate Committee Report stated:

"Electoral devices, including at-large elections, per se would not be subject to attack under Section 2. They would only be vulnerable if, in the totality of circumstances, they resulted in the denial of equal access to the electoral process. [T]he presence of minority elected officials is a recognized indicator of access to the process . . . ." S. Rep. No. 97–417, p. 16 (1982).

[5] See U. S. Dept. of Justice, Civil Rights Division, Voting Rights Section, Number of Changes Submitted under Section 5 and Reviewed by the Department of Justice, By State and Year, 1965—June 30, 1982 (unpublished).

is found to exist in a § 5 case—whether deemed necessary under the Act or not—it should be dispositive. The Court today, however, finds for the first time a standardless equitable discretion in the District Court for the District of Columbia to impose requirements *in addition* to proportional representation. This leaves the responsible authorities in the State and communities under the Act—as well as the Attorney General—without guidance as to the requirements of § 5.

III

The Court's discussion of discriminatory purpose as providing some support for the District Court's "effects" determination is disquieting for a number of reasons. First, as the Court notes, the District Court made no finding that the 4–2–3 plan was tainted by an impermissible purpose. Second, the District Court expressly found that no discriminatory motive prompted the city's annexation of the three jurisdictions involved. 517 F. Supp. 987, 1019–1021 (DC 1981). Third, the factors that led the District Court to conclude that the earlier 8–0–1 and 4–4–1 plans had been adopted for a discriminatory purpose have no bearing on the question whether the city was similarly motivated when it adopted the 4–2–3 plan at a later time and pursuant to good-faith negotiations with the Attorney General. Finally, the Government concedes that purpose is not a factor in this case.[6] Indeed, the Court fails to explain—nor can it explain satisfactorily—how a plan negotiated with and acceptable to the Attorney General was adopted for a discriminatory purpose.

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[6] The following exchange took place at oral argument:

"[The Court]: And may I get clear, is purpose still in this case at this level?

"[The Government]: Not in terms of the submission to this Court, no, Your Honor.

"[The Court]: So we consider only the effect?

"[The Government]: Yes, Your Honor. I don't believe that the district court's opinion or order can fairly be read to cast any doubt on the purpose of the plan as adopted." Tr. of Oral Arg. 30.

In my opinion, the city has shown that its 4–2–3 plan has satisfied fully § 5's effect-and-purpose test and the standard adopted in *City of Richmond.* We now should demand no more. I would reverse the District Court's order.

COLORADO *v.* NEW MEXICO ET AL.

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 80, Orig. Argued October 4, 1982—Decided December 13, 1982

The Vermejo River—which originates in southern Colorado but is located primarily in New Mexico—is at present fully appropriated by users in New Mexico. Colorado seeks an equitable apportionment of the river's water in order to divert water for proposed uses. The Special Master, after a trial, recommended in his report that Colorado be permitted a diversion of 4,000 acre-feet per year. The Special Master recognized that strict application of the rule of prior appropriation would not permit any diversion. In applying the principle of equitable apportionment, however, he did not focus exclusively on the rule of priority, but apparently rested his recommendation on the alternative grounds that New Mexico could compensate for some or all of the Colorado diversion through reasonable water conservation measures, and that the injury, if any, to New Mexico would be outweighed by the benefit to Colorado from the diversion. New Mexico filed exceptions to the Special Master's report.

Held:

1. The flexible principle of equitable apportionment applies to a State's claim to divert water for future uses, and the criteria relied upon by the Special Master comport with this Court's prior cases. Pp. 183–188.

(a) When, as in this case, both States recognize the doctrine of prior appropriation, priority becomes the guiding principle, but not the sole criterion, in determining an equitable apportionment. Pp. 183–184.

(b) While the equities supporting the protection of established, senior uses are substantial, it is also appropriate to consider additional factors relevant to a just apportionment, such as the conservation measures available to both States here and the balance of harms and benefits to the States that might result from the diversion sought by Colorado. Pp. 184–187.

(c) A State seeking a diversion for future uses must demonstrate by clear and convincing evidence that the benefits of the diversion substantially outweigh the harm that might result. Pp. 187–188.

2. However, the Special Master's report does not contain sufficient factual findings to enable this Court to assess the correctness of his application of the principle of equitable apportionment to the facts of this

case. Accordingly, this Court remands for additional findings, including specific findings relating to the Special Master's reliance on the factors of the availability of conservation measures and the weighing of the harms and benefits that would result from the diversion. Pp. 189–190.

Remanded for further findings.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. BURGER, C. J., filed a concurring opinion, in which STEVENS, J., joined, *post*, p. 190. O'CONNOR, J., filed an opinion concurring in the judgment, in which POWELL, J., joined, *post*, p. 191.

Richard A. Simms, Special Assistant Attorney General of New Mexico, argued the cause for defendants. With him on the briefs were *Jeff Bingaman*, Attorney General, and *Jay F. Stein*, Special Assistant Attorney General.

Robert F. Welborn, Special Assistant Attorney General of Colorado, argued the cause for plaintiff. With him on the briefs were *J. D. MacFarlane*, Attorney General, *Richard F. Hennessey*, Deputy Attorney General, *Mary J. Mullarkey*, Solicitor General, and *William A. Paddock* and *Dennis M. Montgomery*, Assistant Attorneys General.*

JUSTICE MARSHALL delivered the opinion of the Court.

This case concerns the proper apportionment between New Mexico and Colorado of the water of an interstate river. The water of the Vermejo River is at present fully appropriated by users in New Mexico. Colorado seeks to divert water for future uses. Invoking this Court's original jurisdiction under Art. III, § 2, of the Constitution, Colorado brought this action for an equitable apportionment of the water of the Vermejo River. A Special Master appointed by the Court recommended that Colorado be permitted a diversion of 4,000 acre-feet per year. The case is before us on New Mexico's exceptions to the Special Master's report.

**Burton M. Apker* filed a brief for Kaiser Steel Corp. et al. as *amici curiae*.

I

The Vermejo River is a small, nonnavigable river that originates in the snow belt of the Rocky Mountains in southern Colorado and flows southeasterly into New Mexico for a distance of roughly 55 miles before it joins the Canadian River. The major portion of the river is located in New Mexico. The Colorado portion consists of three main tributaries that combine to form the Vermejo River proper approximately one mile below the Colorado-New Mexico border. At present there are no uses of the water of the Vermejo River in Colorado, and no use or diversion has ever been made in Colorado. In New Mexico, by contrast, farmers and industrial users have diverted water from the Vermejo for many years. In 1941 a New Mexico state court issued a decree apportioning the water of the Vermejo River among the various New Mexico users.[1]

In 1975, a Colorado corporation, Colorado Fuel and Iron Steel Corp. (C. F. & I.), obtained in Colorado state court a conditional right to divert 75 cubic feet per second from the headwaters of the Vermejo River.[2] C. F. & I. proposed a transmountain diversion of the water to a tributary of the Purgatoire River in Colorado to be used for industrial development and other purposes. Upon learning of this decree, the four principal New Mexico users—Phelps Dodge Corp. (Phelps Dodge), Kaiser Steel Corp. (Kaiser Steel), Vermejo Park Corp. (Vermejo Park), and the Vermejo Conservancy District (Conservancy District)—filed suit in the United States District Court for the District of New Mexico, seeking to enjoin any diversion by C. F. & I. that would violate their senior rights. On January 16, 1978, the District Court enjoined C. F. & I. from diverting any water from the Vermejo River in derogation of the senior water rights of New Mexico

[1] *Phelps Dodge Corp.* v. *W. S. Land and Cattle Co.*, No. 7201 (Dist. Ct. Colfax Cty., Nov. 13, 1941).

[2] *In re Application for Water Rights of C. F. & I. Corp.*, No. W–3961 (Dist. Ct., W. Div. No. 2, June 20, 1975).

users.[3] The court found that under the doctrine of prior appropriation, which both New Mexico and Colorado recognize,[4] the New Mexico users were entitled to have their needs fully satisfied because their appropriation was prior in time. C. F. & I. filed a notice of appeal, and the Court of Appeals for the Tenth Circuit has stayed its proceedings during the pendency of this case before us.

In June 1978 Colorado moved for leave to file an original complaint in this Court. New Mexico opposed the motion. On April 16, 1979, we granted Colorado's motion and ap-

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[3] *Kaiser Steel Corp.* v. *C. F. & I. Steel Corp.*, Civ. No. 76–244 (NM 1978). The injunction was not based on a determination of the right of the two States under the law of equitable apportionment, since neither Colorado nor New Mexico was a party to the action.

[4] N. M. Const., Art. XVI, § 2; Colo. Const., Art. XVI, §§ 5, 6. The administration of water rights in each State is governed by statute. Colo. Rev. Stat. § 37–92–101 *et seq.* (1973 and Supp. 1982); N. M. Stat. Ann. § 72–1–1 *et seq.* (1978 and Supp. 1982).

The prior appropriation doctrine and the riparian doctrine are the two basic doctrines governing the rights to the use of water. Under the prior appropriation doctrine, recognized in most of the Western States, water rights are acquired by diverting water and applying it for a beneficial purpose. A distinctive feature of the prior appropriation doctrine is the *rule of priority*, under which the relative rights of water users are ranked in the order of their seniority. Under the riparian doctrine, recognized primarily in the Eastern, Midwestern and Southern States, the owner of land contiguous to a watercourse is entitled to have the stream flow by or through his land undiminished in quantity and unpolluted in quality, except that any riparian proprietor may make whatever use of the water that is reasonable with respect to the needs of other appropriators.

Appropriative rights do not depend on land ownership and are acquired and maintained by actual use. Riparian rights, by contrast, originate from land ownership and remain vested even if unexercised. Appropriative rights are fixed in quantity; riparian rights are variable depending on streamflow and subject to the reasonable uses of others. See generally 1 R. Clark, Waters and Water Rights (1967); W. Hutchins, Selected Problems in the Law of Water Rights in the West (U. S. Dept. of Agriculture, Misc. Pub. No. 418, 1942); 1 W. Hutchins, Water Rights Laws in the Nineteen Western States (U. S. Dept. of Agriculture, Misc. Pub. No. 1206, 1971).

pointed the Honorable Ewing T. Kerr, Senior Judge of the United States District Court for the District of Wyoming, as Special Master in this case. 441 U. S. 902. After a lengthy trial involving an extensive presentation of evidence, the Special Master submitted a report to the Court on January 9, 1982. The report was accepted for filing on February 22, 1982. 455 U. S. 932.

The Special Master found that most of the water of the Vermejo River is consumed by the New Mexico users and that very little, if any, reaches the confluence with the Canadian River. He thus recognized that strict application of the rule of priority would not permit Colorado any diversion since the entire available supply is needed to satisfy the demands of appropriators in New Mexico with senior rights. Nevertheless, applying the principle of equitable apportionment established in our prior cases, he recommended permitting Colorado a transmountain diversion of 4,000 acre-feet[5] of water per year from the headwaters of the Vermejo River. He stated:

> "It is the opinion of the Master that a transmountain diversion would not materially affect the appropriations granted by New Mexico for users downstream. A thorough examination of the existing economies in New Mexico convinces the Master that the injury to New Mexico, if any, will be more than offset by the benefit to Colorado." Report of Special Master 23.

Explaining his conclusion, the Special Master noted that any injury to New Mexico would be restricted to the Conservancy District, the user in New Mexico furthest downstream, since there was sufficient water in the Vermejo River for the three other principal New Mexico water users, Vermejo

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[5] An acre-foot is a volumetric measurement which means the amount of water required to cover one acre of ground one foot deep. One acre-foot equals 43,560 cubic feet or 325,900 gallons of water.

Park, Kaiser Steel, and Phelps Dodge.[6] He further found that the "Vermejo Conservancy District has never been an economically feasible operation." *Ibid.*

The Special Master's recommendation appears to rest on two alternative grounds: first, that New Mexico could compensate for some or all the Colorado diversion through reasonable water conservation measures;[7] and second, that the injury, if any, to New Mexico would be outweighed by the benefit to Colorado from the diversion.[8] In its various exceptions to his report, New Mexico challenges the Special Master's interpretation of the law of equitable apportionment. New Mexico maintains that the rule of priority should be strictly applied in this case to preclude Colorado

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[6] The Conservancy District is the largest user of water from the Vermejo River in New Mexico. It consists of over 60 farms irrigated by an extensive system of canals and reservoirs. The United States Maxwell Wildlife Refuge is also located within the District. In the early 1950's the District was part of a large reclamation project funded by the Federal Government.

Vermejo Park diverts water primarily to irrigate land used to grow hay for its cattle operation. Kaiser Steel uses water primarily for its coal facilities. Phelps Dodge leases its rights to Kaiser Steel and to the C. S. Springer Cattle Co.

[7] This is a fair reading of the Special Master's conclusion that New Mexico users would not be "materially affected" by the recommended diversion. While the report does not expressly state that Colorado's diversion might be offset by reasonable conservation efforts, it does refer specifically to the waste and inefficiency of the Conservancy District's system of water canals. Report of Special Master 8, 23. In addition, in its second exception to the report New Mexico acknowledges that the Special Master based his conclusion that New Mexico users would not be materially affected on certain findings concerning waste and inefficiency within the Conservancy District.

[8] New Mexico contends that the Special Master relied on a third ground, namely, that the mere fact that the Vermejo River originates in Colorado automatically entitles Colorado to a share of the water of the Vermejo River. See *id.*, at 8. To the extent that the Special Master applied such a *per se* rule of apportionment, we reject it as inconsistent with our emphasis on flexibility in equitable apportionment.

from diverting any water from the Vermejo River. New Mexico also challenges the factual bases of the Special Master's conclusions that the recommended diversion would not materially affect New Mexico users and that any harm to New Mexico would be offset by the benefits to Colorado.[9]

We conclude that the criteria relied upon by the Special Master comport with the doctrine of equitable apportionment as it has evolved in our prior cases. We thus reject New

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[9] New Mexico also contends that Colorado is improperly suing directly and solely for the benefit of a private individual—C. F. & I.—in violation of the Eleventh Amendment, and that Colorado's suit is barred by laches. We find no merit to these claims.

Because the State of Colorado has a substantial interest in the outcome of this suit, New Mexico may not invoke its Eleventh Amendment immunity from federal actions by citizens of another State. The portion of the Vermejo River in Colorado is owned by the State in trust for its citizens. Colo. Const., Art. XVI, § 5. While C. F. & I. will most likely be the primary user of any water diverted from the Vermejo River, other Colorado citizens may jointly use the water or purchase water rights in the future. In any event, Colorado surely has a sovereign interest in the beneficial effects of a diversion on the general prosperity of the State. Faced with a similar set of circumstances in *Kansas* v. *Colorado*, 206 U. S. 46, 99 (1907), we concluded that "[t]he controversy rises . . . above a mere question of local private right and involves a matter of state interest and must be considered from that standpoint."

We also conclude that Colorado is not barred by laches from seeking an equitable apportionment. For the reasons that we elaborate *infra*, at 186–188, we hold that under some circumstances the countervailing equities supporting a diversion of water for a future use in one State may justify the detriment suffered by existing users in another State. Therefore the mere fact that Colorado has no existing uses of the waters of the Vermejo River and that current users in New Mexico may suffer some detriment from a diversion does not bar Colorado's suit for an equitable apportionment for future uses. These circumstances, however, do bear on the burden of proof that Colorado must satisfy to justify the possible disruption of existing uses. See *infra*, at 187–188, and n. 13. A contrary conclusion is not dictated by *Washington* v. *Oregon*, 297 U. S. 517, 528 (1936), or *Colorado* v. *Kansas*, 320 U. S. 383, 394 (1943) (dictum), which merely require established users or holders of water rights to exercise diligence in protecting their rights and putting them to beneficial uses. See *infra*, at 184.

Mexico's contention that the Special Master was required to focus exclusively on the rule of priority. However, the report of the Special Master does not contain sufficient factual findings to enable us to assess the correctness of the Special Master's application of the principle of equitable apportionment to the facts of this case. We therefore remand with instructions to the Special Master to make further findings of fact.

II

Equitable apportionment is the doctrine of federal common law that governs disputes between States concerning their rights to use the water of an interstate stream. *Kansas* v. *Colorado*, 206 U. S. 46, 98 (1907); *Connecticut* v. *Massachusetts*, 282 U. S. 660, 670–671 (1931). It is a flexible doctrine which calls for "the exercise of an informed judgment on a consideration of many factors" to secure a "just and equitable" allocation. *Nebraska* v. *Wyoming*, 325 U. S. 589, 618 (1945). We have stressed that in arriving at "the delicate adjustment of interests which must be made," *ibid.*, we must consider all relevant factors, including:

> "physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former." *Ibid.*

Our aim is always to secure a just and equitable apportionment "without quibbling over formulas." *New Jersey* v. *New York*, 283 U. S. 336, 343 (1931).

The laws of the contending States concerning intrastate water disputes are an important consideration governing equitable apportionment. When, as in this case, both States recognize the doctrine of prior appropriation, priority be-

comes the "guiding principle" in an allocation between competing States. *Nebraska* v. *Wyoming*, *supra*, at 618. But state law is not controlling. Rather, the just apportionment of interstate waters is a question of federal law that depends "upon a consideration of the pertinent laws of the contending States and *all other relevant facts*." *Connecticut* v. *Massachusetts*, *supra*, at 670–671 (emphasis added).

In reaching his recommendation the Special Master did not focus exclusively on the rule of priority, but considered other factors such as the efficiency of current uses in New Mexico and the balance of benefits to Colorado and harm to New Mexico. New Mexico contends that it is improper to consider these other factors. It maintains that this Court has strictly applied the rule of priority when apportioning water between States adhering to the prior appropriation doctrine, and has departed from that rule only to protect an existing economy built upon junior appropriations. Since there is no existing economy in Colorado dependent upon the use of water from the Vermejo River, New Mexico contends that the rule of priority is controlling. We disagree with this inflexible interpretation of the doctrine of equitable apportionment.

Our prior cases clearly establish that equitable apportionment will protect only those rights to water that are "reasonably required and applied." *Wyoming* v. *Colorado*, 259 U. S. 419, 484 (1922). Especially in those Western States where water is scarce, "[t]here must be no waste . . . of the 'treasure' of a river. . . . Only diligence and good faith will keep the privilege alive." *Washington* v. *Oregon*, 297 U. S. 517, 527 (1936). Thus, wasteful or inefficient uses will not be protected. See *ibid.*; *Nebraska* v. *Wyoming*, *supra*, at 618. Similarly, concededly senior water rights will be deemed forfeited or substantially diminished where the rights have not been exercised or asserted with reasonable diligence. *Washington* v. *Oregon*, *supra*, at 527–528; *Colorado* v. *Kansas*, 320 U. S. 383, 394 (1943).

We have invoked equitable apportionment not only to require the reasonably efficient use of water, but also to impose on States an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream. In *Wyoming* v. *Colorado*, Wyoming brought suit to prevent a *proposed* diversion by Colorado from the Laramie River. This Court calculated the dependable supply available to both States, subtracted the senior Wyoming uses, and permitted Colorado to divert an amount not exceeding the balance.[10] In calculating the dependable supply we placed on each State the duty to employ "financially and physically feasible" measures "adapted to *conserving and equalizing* the natural flow." 259 U. S., at 484 (emphasis added). Adopting a position similar to New Mexico's in this case, Wyoming objected to a requirement that it employ conservation measures to facilitate Colorado's proposed uses. The answer we gave is especially relevant to this case:

> "The question here is not what one State should do for the other, but how each should exercise her relative rights in the waters of this interstate stream. . . . Both States recognize that conservation within practicable limits is essential in order that needless waste may be prevented and the largest feasible use may be secured. This comports with the all-pervading spirit of the doc-

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[10] This description is only roughly accurate, since we did not rigidly follow this procedure in apportioning the Laramie River, but instead departed from a strict application of the rule of priority in numerous respects. For instance, our decree in *Wyoming* v. *Colorado* granted Colorado an unqualified right to divert 22,500 acre-feet, even though there were Wyoming appropriations senior to the Colorado appropriations underlying the 22,500 acre-feet grant. 259 U. S., at 489–490. In addition, we granted to Colorado priority to divert a total of 37,750 acre-feet, even though some of the underlying appropriations were junior to a number of Wyoming appropriations. *Id.*, at 495–496. The effect was to guarantee water to junior appropriators in Colorado to the potential detriment of senior appropriators downstream in Wyoming. See 2 R. Clark, Waters and Water Rights § 132.4 (1967).

trine of appropriation and takes appropriate heed of the natural necessities out of which it arose. We think that doctrine lays on each of these States a duty to exercise her right reasonably and in a manner calculated to conserve the common supply." *Ibid.*[11]

We conclude that it is entirely appropriate to consider the extent to which reasonable conservation measures by New Mexico might offset the proposed Colorado diversion and thereby minimize any injury to New Mexico users. Similarly, it is appropriate to consider whether Colorado has undertaken reasonable steps to minimize the amount of diversion that will be required.

In addition, we have held that in an equitable apportionment of interstate waters it is proper to weigh the harms and benefits to competing States. In *Kansas* v. *Colorado*, where we first announced the doctrine of equitable apportionment, we found that users in Kansas were injured by Colorado's upstream diversions from the Arkansas River. 206 U. S., at 113–114, 117. Yet we declined to grant any relief to Kansas on the ground that the great benefit to Colorado outweighed the detriment to Kansas. *Id.*, at 100–101, 113–114, 117. Similarly, in *Nebraska* v. *Wyoming*, we held that water rights in Wyoming and Nebraska, which under state law were senior, had to yield to the "countervailing equities" of an established economy in Colorado even though it was based on junior appropriations. 325 U. S., at 622. We noted that the rule of priority should not be strictly applied where it "would work more hardship" on the junior user "than it would bestow benefits" on the senior user. *Id.*, at 619. See also *Washington* v. *Oregon*, *supra*, at 522. The same principle is applicable in balancing the benefits of a diversion for *proposed* uses against the possible harms to exist-

[11] We thus required Wyoming to enhance and equalize the water supply through "practicable storage and conservation" measures, such as the use of storage facilities similar to those already in use in Wyoming. 259 U. S., at 485.

ing uses. See, *e. g.*, *Wyoming* v. *Colorado*, *supra* (placing upon Wyoming, the State with senior water rights, a duty to conserve water in order to facilitate a diversion for a proposed use in Colorado); *Connecticut* v. *Massachusetts*, 282 U. S. 660 (1931); *New Jersey* v. *New York*, 283 U. S. 336 (1931).[12]

We recognize that the equities supporting the protection of existing economies will usually be compelling. The harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote. Under some circumstances, however, the countervailing equities supporting a diversion for future use in one State may justify the detriment to existing users in another State. This may be the case, for example, where the State seeking a diversion demonstrates by clear and convincing evidence that the benefits of the diversion substantially outweigh the harm that might result.[13] In the determination of whether the State

[12] In *Connecticut* v. *Massachusetts* we declined to enjoin Massachusetts' proposed diversion for future uses. We took into account the impending "serious water shortage" in the Boston area and the absence of "real or substantial injury or damage" to Connecticut. 282 U. S., at 664, 672. Although *Connecticut* v. *Massachusetts*, as well as *New Jersey* v. *New York*, involved States that follow the riparian rather than the prior appropriation doctrine, see n. 4, *supra*, our allocation of water for future uses rested on the federal common law of equitable apportionment, which, as we made clear, "is not governed by the same rules of [state] law that are applied . . . for the solution of similar questions of private right." *Connecticut* v. *Massachusetts*, 282 U. S., at 670; see also *New Jersey* v. *New York*, 283 U. S., at 342–343. Nothing in those two cases suggested that the apportionment of water for future uses in any way depended on the adherence of both States to the riparian doctrine.

[13] Our cases establish that a State seeking to prevent or enjoin a diversion by another State bears the burden of proving that the diversion will cause it "real or substantial injury or damage." *Connecticut* v. *Massachusetts*, *supra*, at 672. See also *New Jersey* v. *New York*, *supra*, at 344–345; *Kansas* v. *Colorado*, 206 U. S., at 117; *Colorado* v. *Kansas*, 320 U. S., at 393–394. This rule applies even if the State seeking to prevent or enjoin a diversion is the nominal defendant in a lawsuit. In *Colorado* v. *Kansas*,

proposing the diversion has carried this burden, an important consideration is whether the existing users could offset the diversion by reasonable conservation measures to prevent waste. This approach comports with our emphasis on flexibility in equitable apportionment and also accords sufficient protection to existing uses.

We conclude, therefore, that in the determination of an equitable apportionment of the water of the Vermejo River the rule of priority is not the sole criterion. While the equities supporting the protection of established, senior uses are substantial, it is also appropriate to consider additional factors relevant to a just apportionment, such as the conservation measures available to both States and the balance of harm and benefit that might result from the diversion sought by Colorado.

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for instance, Colorado sued Kansas seeking to enjoin further lawsuits by Kansas water users against Colorado users. Although Kansas was the defendant, we granted Colorado an injunction based on Kansas' failure to sustain the burden of showing that the Colorado diversions had "worked a serious detriment to the substantial interests of Kansas." *Id.*, at 400; see also *id.*, at 389–390.

New Mexico must therefore bear the initial burden of showing that a diversion by Colorado will cause substantial injury to the interests of New Mexico. In this case New Mexico has met its burden since *any* diversion by Colorado, unless offset by New Mexico at its own expense, will necessarily reduce the amount of water available to New Mexico users.

The burden has therefore shifted to Colorado to establish that a diversion should nevertheless be permitted under the principle of equitable apportionment. Thus, with respect to whether reasonable conservation measures by New Mexico will offset the loss of water due to Colorado's diversion, or whether the benefit to Colorado from the diversion will substantially outweigh the possible harm to New Mexico, Colorado will bear the burden of proof. It must show, in effect, that without such a diversion New Mexico would be using "more than its equitable share of the benefits of a stream." *Id.*, at 394. Moreover, Colorado must establish not only that its claim is of a "serious magnitude," but also that its position is supported by "clear and convincing evidence." *Connecticut* v. *Massachusetts*, *supra*, at 669. See also *Colorado* v. *Kansas*, *supra*, at 393; *Washington* v. *Oregon*, 297 U. S., at 522.

III

Applying the doctrine of equitable apportionment, the Special Master recommended that Colorado be permitted to divert 4,000 acre-feet of water per year from the headwaters of the Vermejo River. Because all of the water of the Vermejo River is currently consumed by New Mexico appropriators, the recommended diversion would necessarily reduce the amount of water available to New Mexico.

In explaining the basis for his recommendation, the Special Master stated that the diversion would not "materially affect" existing New Mexico appropriations. This conclusion appears to reflect certain assumptions about the ability of New Mexico users to implement water conservation measures. See *supra*, at 181, and n. 7. The Special Master also concluded that any injury to New Mexico would be "more than offset" by the benefits to Colorado. Report of Special Master 23. Both the availability of conservation measures and a weighing of the harm and benefits that would result from the diversion are factors relevant to the determination of a just and equitable apportionment. However, the Special Master did not clearly state the factual findings supporting his reliance on these factors. Accordingly, we remand for additional factual findings. In particular, we request specific findings concerning the following areas:

(1) the existing uses of water from the Vermejo River, and the extent to which present levels of use reflect current or historical water shortages or the failure of existing users to develop their uses diligently;

(2) the available supply of water from the Vermejo River, accounting for factors such as variations in streamflow, the needs of current users for a continuous supply, the possibilities of equalizing and enhancing the water supply through water storage and conservation, and the availability of substitute sources of water to relieve the demand for water from the Vermejo River;

(3) the extent to which reasonable conservation measures in both States might eliminate waste and inefficiency in the use of water from the Vermejo River;

(4) the precise nature of the proposed interim and ultimate use in Colorado of water from the Vermejo River, and the benefits that would result from a diversion to Colorado;

(5) the injury, if any, that New Mexico would likely suffer as a result of any such diversion, taking into account the extent to which reasonable conservation measures could offset the diversion.[14]

IV

The flexible doctrine of equitable apportionment clearly extends to a State's claim to divert water for future uses. Whether such a diversion should be permitted will turn on an examination of all factors relevant to a just apportionment. It is proper, therefore, to consider factors such as the extent to which reasonable conservation measures by existing users can offset the reduction in supply due to diversion, and whether the benefits to the State seeking the diversion substantially outweigh the harm to existing uses in another State. We remand for specific factual findings relevant to determining a just and equitable apportionment of the water of the Vermejo River between Colorado and New Mexico.

It is so ordered.

CHIEF JUSTICE BURGER, with whom JUSTICE STEVENS joins, concurring.

This case arises from an understandably intense competition between two States over rights to a small, nonnavigable, interstate river. Because on the record before it this

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[14] The Special Master may make any other factual findings that he considers relevant. Additional hearings may be held, although they may be unnecessary in light of the extensive evidence already presented at trial. Upon remand, the Special Master is free to reaffirm his original recommendation or make a different recommendation on the basis of the evidence and applicable principles of equitable apportionment.

Court cannot make an appropriate apportionment of the water, the Court remands the case to the Special Master for further factual findings.

I emphasize that under our prior holdings these two States come to the Court on equal footing. See *Kansas* v. *Colorado*, 206 U. S. 46 (1907). Neither is entitled to any special priority over the other with respect to use of the water. Colorado cannot divert all of the water it may need or can use simply because the river's headwaters lie within its borders, *Wyoming* v. *Colorado*, 259 U. S. 419, 466 (1922). Nor is New Mexico entitled to any particular priority of allocation or undiminished flow simply because of first use. See, *e. g.*, *Colorado* v. *Kansas*, 320 U. S. 383, 393 (1943). Each state through which rivers pass has a right to the benefit of the water but it is for the Court, as a matter of discretion, to measure their relative rights and obligations and to apportion the available water equitably. As the Court's opinion states, in the process of apportioning the water, prior dependence and inefficient uses may be considered in balancing the equities. But no state has any priority over any other state. It is on this understanding of the Court's holding that I join the opinion and the judgment.

JUSTICE O'CONNOR, with whom JUSTICE POWELL joins, concurring in the judgment.

The doctrine of prior appropriation includes the requirement that the appropriator's use of water be beneficial and reasonable. What is reasonable, of course, does not admit of ready definition, being dependent upon the particular facts and circumstances of each case. In this case, the Special Master has cast an accusatory finger at the Vermejo Conservancy District, concluding that "[t]he system of canals used to transport the water to the fields is inefficient." Report of Special Master 8.

Undoubtedly, there is evidence in the record indicating that large losses of water occur through seepage and evaporation in transporting waters of the Vermejo through open

ditches for irrigation and stock watering. Tr. 1315. It is a leap, however, from observing that large losses occur to concluding, as Colorado would have the Court do, that the practices of the Conservancy District are wasteful or unreasonable. As the Court observes, *ante*, at 185, the extent of the duty to conserve that may be placed upon the user is limited to measures that are "financially and physically feasible," *Wyoming* v. *Colorado*, 259 U. S. 419, 484 (1922), and "within practicable limits." *Ibid.*[1] Nevertheless, in concluding that the Conservancy District's distribution system is "inefficient," the Special Master made no factual finding that improved economy in that system is within the practicable means available to the District.[2]

Colorado would have the Court assess the Conservancy District's "waste" and "inefficiency" by a new yardstick—*i. e.*, not by comparing the economic gains to the District with the costs of achieving greater efficiency, but by comparing the "inefficiency" of New Mexico's uses with the relative benefits to Colorado of a new use. The Special Master has succumbed to this suggestion. His recommendation that

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[1] It is significant to note that in *Wyoming* v. *Colorado*, upon which the Court relies for the proposition that an affirmative duty to conserve may be imposed on the States, *ante*, at 185, the Wyoming appropriators *already* had storage facilities in place for equalizing the river's natural flow. In answering Wyoming's objection that it should not be burdened with conservation measures in order to permit a diversion by Colorado, the Court observed:

"We think [the] doctrine [of appropriation] lays on each of these States a duty to exercise her right reasonably and in a manner calculated to conserve the common supply. Notwithstanding her present contention, Wyoming has in fact proceeded on this line, for, as the proof shows, her appropriators, with her sanction, *have provided and have in service* reservoir facilities which are adapted for the purpose and reasonably sufficient to meet its requirements." 259 U. S., at 484–485 (emphasis added).

[2] Evidence in the record indicates that the Conservancy District has employed an engineering firm to investigate the feasibility of constructing an enclosed system to deliver stock water to the District's landowners. Tr. 1318.

Colorado be permitted a diversion embodies the judgment that, because Colorado can, in some *unidentified* sense, make "better" use of the waters of the Vermejo, New Mexico may be forced to change its present uses.

Today the Court has also gone dangerously far toward accepting that suggestion. The Court holds, *ante*, at 186, that it is appropriate in equitable apportionment litigation to weigh the harms and benefits to the competing States. It does so notwithstanding its recognition, *ante*, at 187, that the potential benefits from a *proposed* diversion are likely to be speculative and remote, and therefore difficult to balance against any threatened harms, and its concession, *ibid.*, that the equities supporting protection of an existing economy will usually be compelling.

In equitable apportionment litigation between two prior appropriation States concerning the waters of a fully appropriated river, this Court has never undertaken that balancing task outside the concrete context of either two established economies in the competing States dependent upon the waters to be apportioned[3] or of a proposed diversion in one State to satisfy a demonstrable need for a potable supply of drinking water.[4] In the former context, the Court may assess the relative benefit and detriment by reference to the

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[3] See *Nebraska* v. *Wyoming*, 325 U. S. 589 (1945); *Washington* v. *Oregon*, 297 U. S. 517 (1936); *Kansas* v. *Colorado*, 206 U. S. 46 (1907).

[4] See *New Jersey* v. *New York*, 283 U. S. 336 (1931); *Connecticut* v. *Massachusetts*, 282 U. S. 660 (1931). It is also significant to note that these disputes occurred between two riparian States.

Wyoming v. *Colorado*, *supra*, does not represent an exception to the pattern stated in the text. The Court did not engage in any wholesale balancing of the relative harms and benefits to the two States from the proposed diversion. Rather, the Court imposed a very limited duty on Wyoming to make use of the storage facilities its appropriators already had in place, see n. 1, *supra*, for the purpose of calculating the dependable supply of water available to Wyoming. 259 U. S., at 484. The Court was thereby able to determine that the waters of the Laramie River were not fully appropriated and that a share of the waters was available for Colorado's proposed use.

actual fruits of use of the waters in the respective States.[5] In the latter context, the compelling nature of the proposed use reduces the speculation that might otherwise attend assessment of the benefits of a proposed diversion. Where, as here, however, no existing economy in Colorado depends on

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[5] For example, in *Kansas* v. *Colorado*, *supra*, Kansas sought to restrain Colorado from diverting waters of the Arkansas River for the irrigation of lands in Colorado. Colorado had diverted waters from the river since the 1880's. As a result of irrigation, the population of the irrigated areas, the number of acres cultivated, and the value of farm products produced in these areas escalated dramatically. 206 U. S., at 108–109. The Court compared this demonstrated salutary effect of the irrigation on the economy of Colorado with the corresponding population changes and changes in acreage and production of corn and wheat in the affected Kansas counties for the same period. *Id.*, at 110–113. Using these concrete data, the Court was able to discern some minimal injury to Kansas as a result of the diminution of the flow of the Arkansas River. *Id.*, at 113–114. Viewing the overall impact of the available water on the two economies, however, the Court concluded:

"[W]hen we compare the amount of this detriment [to Kansas] with the great benefit which has obviously resulted to the counties in Colorado, it would seem that equality of right and equity between the two States forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation." *Ibid.*

Quite clearly, the Court was not forced to speculate about the benefit and detriment of the diversion to the competing States.

Similarly, in *Washington* v. *Oregon*, *supra*, the Court was equipped to assess the balance of harm and benefit to the economies from the diversion at issue. Washington sought an injunction against Oregon's diversion of waters of the Walla Walla River for irrigation in Oregon. On the one hand, Oregon had an existing agricultural economy dependent upon irrigation from the Walla Walla. On the other hand, the evidence revealed that there would be absolutely no benefit to Washington in prohibiting Oregon's diversion during periods of water shortage; the nature of the river channel was such that even if the water was not diverted by Oregon users, it would be absorbed by the gravel beneath the channel and never reach Washington users. 297 U. S., at 522–523. The Court therefore concluded that "[t]o limit the long established use in Oregon would materially injure Oregon users without a compensating benefit to Washington users." *Id.*, at 523.

the waters of the Vermejo and the actual uses in New Mexico rank in equal importance with the proposed uses in Colorado,[6] the difficulty of arriving at the proper balance is especially great.

This case therefore highlights the restraint with which the Court should proceed in apportioning interstate waters between a State seeking a *future* use and a State with an existing economy dependent upon the waters to be apportioned. The Court can only invite litigation within its original jurisdiction if it permits one State to obtain a diversion for a new use upon that State's allegation that the second State is engaging in "wasteful" practices or that it can make "better" use of the waters, even if the second State's uses are entirely reasonable.

I do not suggest, of course, that the Court must blind itself to *compelling* evidence of waste by one State. Protection of existing economies does not require that users be permitted to continue in unreasonably wasteful or inefficient practices. But the Court should be moved to exercise its original jurisdiction to alter the status quo between States only where there is *clear and convincing evidence*, *ante*, at 188, n. 13, that one State's use is unreasonably wasteful. To allow Colorado a diversion upon a lesser showing comports neither with the equality of rights of the litigants before us, see *Connecticut* v. *Massachusetts*, 282 U. S. 660, 670 (1931), nor with the sparing use that should be made of the Court's equitable powers, see *id.*, at 669. Further, such action would seriously undermine the Court's affirmation, *ante*, at 184, that priority of appropriation is the "guiding principle" in allocating waters between two prior appropriation States.

The Court's remand reflects its judgment that the paucity of the factual findings before us furnishes an inadequate basis

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[6] According to Colorado, the diverted water would be used "in industrial operations at coal mines, agriculture, timbering, power generation, domestic needs and other industrial operations . . . ." Reply Brief for Colorado 8.

upon which to make "the delicate adjustment of interests" at stake, *Nebraska* v. *Wyoming*, 325 U. S. 589, 618 (1945). I concur in that disposition insofar as the Special Master's findings and conclusions do not provide a basis for determining whether Colorado has demonstrated by clear and convincing evidence that the Conservancy District has engaged in unreasonably wasteful practices.

Syllabus

FEDERAL ELECTION COMMISSION ET AL. *v.* NATIONAL RIGHT TO WORK COMMITTEE ET AL.

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

No. 81–1506. Argued November 1, 1982—Decided December 13, 1982

The Federal Election Campaign Act of 1971, 2 U. S. C. § 441b(a), prohibits corporations and labor unions from making contributions or expenditures in connection with federal elections. The section, however, permits some participation by unions and corporations in the federal electoral process by allowing these organizations to establish and pay the expenses of "separate segregated funds" which may be used for political purposes during federal elections. The Act restricts the operations of such segregated funds in several respects. Of most relevance here, 2 U. S. C. §§ 441b(b)(4)(A) and 441b(b)(4)(C) provide that a corporation without capital stock may solicit contributions to a fund it has established only from "members" of the corporation. During 1976 respondent National Right to Work Committee (NRWC), a corporation without capital stock, solicited some 267,000 persons for contributions to a separate segregated fund that it sponsored. Petitioner Federal Election Commission determined that NRWC's solicitation violated § 441b(b)(4)(C), because the persons it had solicited were not its members. Among other things, NRWC's solicitation letters did not mention membership, its articles of incorporation disclaim the existence of members, and members play no part in the operation or administration of the corporation.

Held:

1. The persons solicited by NRWC were insufficiently attached to the corporation to qualify as members under § 441b(b)(4)(C). This interpretation of the Act does not raise constitutional difficulties. Pp. 201–207.

2. The First Amendment associational rights asserted by NRWC are overborne by the interests Congress has sought to protect in enacting § 441b. The provision marks the culmination of a careful legislative adjustment of the federal electoral laws to prevent both actual and apparent corruption and reflects a legislative judgment that the special characteristics of corporations require prophylactic measures. Pp. 207–211.

214 U. S. App. D. C. 215, 665 F. 2d 371, reversed.

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

Charles N. Steele argued the cause for petitioners. With him on the briefs were *Richard B. Bader*, *Miriam Aguiar*, and *Jeffrey H. Bowman*.

Richard H. Mansfield III argued the cause for respondents. With him on the brief were *George D. Webster*, *Edith D. Hakola*, and *Richard J. Clair*.*

JUSTICE REHNQUIST delivered the opinion of the Court.

The question in the case ultimately comes down to whether respondent National Right to Work Committee (NRWC or respondent) limited its solicitation of funds to "members" within the meaning of 2 U. S. C. § 441b(b)(4)(C).[1]

In April 1977, petitioner Federal Election Commission (Commission)[2] determined that there was probable cause to

J. Albert Woll, *Laurence Gold*, and *Margaret E. McCormick* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

H. Richard Mayberry, Jr., filed a brief for the Public Service Research Council et al. as *amici curiae* urging affirmance.

[1] As will appear from the following discussion, the phrasing of this question is but the tip of the statutory iceberg. The Federal Election Campaign Act of 1971 (Act) makes it "unlawful for . . . any corporation . . . to make a contribution or expenditure in connection with" certain federal elections. 90 Stat. 490, 2 U. S. C. § 441b(a). The term "contribution" is defined broadly, 2 U. S. C. § 441b(b)(2)(C), to include any sort of transfer of money or services to various political entities, but excluded from that definition is "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a . . . corporation without capital stock." The Act goes on to make it unlawful, except as thereinafter provided, "for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families . . . ." 2 U. S. C. § 441b(b)(4)(A). Finally, 2 U. S. C. § 441b(b)(4)(C) states that the prohibition just quoted "shall not prevent a . . . corporation without capital stock, or a separate segregated fund established by a . . . corporation without capital stock, from soliciting contributions to such a fund from members of such . . . corporation without capital stock."

[2] The Commission is an independent administrative agency vested with exclusive jurisdiction over civil enforcement of the Act. See 2 U. S. C. §§ 437c(b)(1) and 437d(a) and (e) (1976 ed., Supp. V).

believe that NRWC had violated the above-cited provisions of the Act by soliciting contributions from persons who were not its "members." Shortly thereafter, respondent filed a complaint in the United States District Court for the Eastern District of Virginia seeking injunctive and declaratory relief against the Commission. One month later, the Commission filed an enforcement proceeding against respondent in the United States District Court for the District of Columbia, seeking to establish respondent's violation of 2 U. S. C. § 441b. The actions were consolidated in the latter court, which granted summary judgment in favor of the Commission on the basis of stipulated facts. 501 F. Supp. 422 (1980).[3] The judgment of the District Court was reversed by the Court of Appeals for the District of Columbia Circuit, 214 U. S. App. D. C. 215, 665 F. 2d 371 (1981), and we granted certiorari. 456 U. S. 914 (1982).

Respondent NRWC is a nonprofit corporation without capital stock organized under the laws of the Commonwealth of Virginia. Given the central role of the congressional use of the word "member" in this litigation, it is useful to set forth respondent's organizational history in some detail. In 1975, respondent's predecessor and another corporation merged; the articles of merger filed in the District of Columbia by the successor corporation stated that NRWC "shall not have members." A similar statement is contained in the articles of incorporation of NRWC that are presently filed in Virginia. Likewise, respondent's bylaws make no reference to members or to membership in the corporation. The stated purpose of NRWC, according to its Virginia articles of incorporation, is "[t]o help make the public aware of the fact that American citizens are being required, against their will, to join and pay dues to labor organizations in order to earn a liv-

[3] The relief awarded the Commission by the District Court included a declaratory judgment that 2 U. S. C. § 441b(b)(4) is not unconstitutional, an order that NRWC refund to contributors the funds it had obtained from unlawful solicitations, and an order that the corporation pay a $10,000 civil penalty. App. to Pet. for Cert. 54a.

ing." App. to Pet. for Cert. 17a. In pursuance of this objective, NRWC regularly mails messages to millions of individuals and businesses whose names have found their way onto commercially available mailing lists that the organization has purchased or rented. The letters do not mention membership in NRWC, but seek donations to help NRWC publicize its opposition to compulsory unionism and frequently contain a questionnaire that the recipient is requested to answer and return.

In late 1975, in order to comply with § 441b, NRWC established a separate segregated fund, see § 441b(b)(4)(C),[4] "to receive and make contributions on behalf of federal candidates." The fund was denominated the "Employees Rights Campaign Committee" (ERCC); its operation was completely subsidized from the NRWC treasury, which paid all the expenses of establishing and administering the fund, and of soliciting contributions. During part of 1976, NRWC sent letters to some 267,000 individuals, who had at one time contributed to it, soliciting contributions to ERCC. As a result of these solicitations, the fund received some $77,000 in contributions.

In October 1976, another lobbying group, the Committee for an Effective Congress, filed a complaint against ERCC with the Commission, alleging violation of 2 U. S. C. § 441b(b)(4). The complaint asserted that NRWC had violated this section of the Act by using corporate funds to solicit contributions to ERCC from persons who were not NRWC's stockholders, executive or administrative personnel, or their families. NRWC did not deny these assertions, but took

[4] The separate segregated fund may be completely controlled by the sponsoring corporation or union, whose officers may decide which political candidates contributions to the fund will be spent to assist. The "fund must be separate from the sponsoring union [or corporation] only in the sense that there must be a strict segregation of its monies" from the corporation's other assets. *Pipefitters* v. *United States*, 407 U. S. 385, 414–417 (1972). See also *Buckley* v. *Valeo*, 424 U. S. 1, 28, n. 31 (1976).

the position that the recipients of its solicitation letters were "members" of NRWC within the proviso set forth in § 441b(b)(4)(C). The Commission found probable cause to believe that a violation had occurred, and after completing the investigative procedures set out in the statute and unsuccessfully attempting to resolve the matter through conciliation, see 2 U. S. C. § 437g (1976 ed., Supp. V), it authorized the filing of a civil enforcement suit. This litigation followed.

Essential to the proper resolution of the case is the interpretation of § 441b(b)(4)(C)'s statement that the prohibition against corporate solicitation contained in § 441b(b)(4)(A) shall not prevent "a . . . corporation without capital stock . . . from soliciting contributions to [a separate segregated fund established by a corporation without capital stock] *from members of such . . . corporation . . . .*" (Emphasis added.) The Court of Appeals rejected the Commission's contentions regarding the meaning of "member," and went on to hold that the term "embraces at least those individuals whom NRWC describes as its active and supporting members." 214 U. S. App. D. C., at 220, 665 F. 2d, at 376. The opinion of the Court of Appeals indicates that this construction was reached at least in part because of concern for the constitutional implications of any narrower construction. *Id.*, at 218–220, 665 F. 2d, at 374–376. As explained below, we reject this construction.

The statutory purpose of § 441b, as outlined above, is to prohibit contributions or expenditures by corporations or labor organizations in connection with federal elections. 2 U. S. C. § 441b(a). The section, however, permits some participation of unions and corporations in the federal electoral process by allowing them to establish and pay the administrative expenses of "separate segregated fund[s]," which may be "utilized for political purposes." 2 U. S. C. § 441b(b)(2)(C). The Act restricts the operations of such segregated funds, however, by making it unlawful for a cor-

poration to solicit contributions to a fund established by it from persons other than its "stockholders and their families and its executive or administrative personnel and their families." 2 U. S. C. § 441b(b)(4)(A). Finally, and of most relevance here, the section just quoted has its own proviso, which states in pertinent part that "[t]his paragraph shall not prevent a . . . corporation without capital stock, or a separate segregated fund established by a . . . corporation without capital stock, from soliciting contributions to such a fund from members" of the sponsoring corporation. 2 U. S. C. § 441b(b)(4)(C). The effect of this proviso is to limit solicitation by nonprofit corporations to those persons attached in some way to it by its corporate structure. *Ibid.*

The Court of Appeals, as we have noted, construed the term "member" in § 441b to embrace "at least those individuals whom NRWC describes as its active and supporting members." 214 U. S. App. D. C., at 220, 665 F. 2d, at 376. The two categories of members recognized by NRWC were described in the following terms by the Court of Appeals:

> "NRWC attracts members by publicizing its position on issues relating to compulsory unionism through advertisements, personal contacts, and, primarily, letters. These letters describe the purpose of NRWC, urge the recipient to assist NRWC (by, for example, writing to legislators), request financial support, and ask the recipient to respond to a questionnaire that will determine whether that person shares a similar political philosophy. A person who, through his response, evidences an intention to support NRWC in promoting voluntary unionism qualifies as a member. A person who responds without contributing financially is considered a supporting member; a person who responds and also contributes is considered an active member. NRWC sends an acknowledgement and a membership card to both classes. In the regular course of operations, NRWC's members receive newsletters, action alerts, and re-

> sponses to individual requests for information. They respond to issue surveys and are asked to communicate with their elected representatives when appropriate. *See* Joint App., vol. II, at 387 *et seq.*" *Id.*, at 217, n. 1, 665 F. 2d, at 373, n. 1.

In respondent's view, both categories satisfy the membership requirement of § 441b(b)(4)(C).

The Commission, however, insists that these standards of "membership" are too fluid and insubstantial to come within the statutory term "member," and argues further that they do not comply with the Commission's regulation defining the term:

> "(e) 'Members' means all persons who are currently satisfying the requirements for membership in a membership organization, trade association, cooperative, or corporation without capital stock . . . . A person is not considered a member under this definition if the only requirement for membership is a contribution to a separate segregated fund." Federal Election Commission Regulations, 11 CFR § 114.1(e) (1982).

The Commission also contends that NRWC's Virginia articles of incorporation, filed by respondent, which state that respondent has no members, are dispositive. While we do not feel sufficiently informed at this time to attempt an exegesis of the statutory meaning of the word "members" beyond that necessary to decide this case, we find it relatively easy to dispose of these arguments that respondent's solicitation was limited to its "members," since in our view this would virtually excise from the statute the restriction of solicitation to "members."

Section 441b(b)(4)(C) was one of several amendments to the Act enacted in 1976. The entire legislative history of the subsection appears to be the floor statement of Senator Allen who introduced the provision in the Senate and explained the purpose of his amendment in this language:

> "Mr. President, all this amendment does is to cure an omission in the bill. It would allow corporations that do not have stock but have a membership organization, such as a cooperative or other corporations without capital stock and, hence, without stockholders, to set up separate segregated political funds as to which it can solicit contributions from its membership; since it does not have any stockholders to solicit, it should be allowed to solicit its members. That is all that the amendment provides. It does cover an omission in the bill that I believe all agree should be filled." 122 Cong. Rec. 7198 (1976).

This statement suggests that "members" of nonstock corporations were to be defined, at least in part, by analogy to stockholders of business corporations and members of labor unions. The analogy to stockholders and union members suggests that some relatively enduring and independently significant financial or organizational attachment is required to be a "member" under § 441b(b)(4)(C). The Court of Appeals' determination that NRWC's "members" include anyone who has responded to one of the corporation's essentially random mass mailings would, we think, open the door to all but unlimited corporate solicitation and thereby render meaningless the statutory limitation to "members."

We also assume, since there is no body of federal law of corporations, see *Burks* v. *Lasker*, 441 U. S. 471, 477 (1979), that Congress intended at least some reference to the laws of the various States dealing with nonprofit corporations. In an analogous situation, where Congress had authorized state taxation of "real property" of subsidiaries of the Reconstruction Finance Corporation, the Court said:

> "We think the congressional purpose can best be accomplished by application of settled state rules as to what constitutes 'real property,' so long as it is plain, as it is here, that the state rules do not effect a discrimination against the Government, or patently run counter to

> the terms of the Act." *RFC* v. *Beaver County*, 328 U. S. 204, 210 (1946).

Like property, the structure and powers of nonprofit corporations are defined principally by state law; as in the case of property, state law provides some guidance in deciding whether NRWC's solicitation was confined to its "members."

Most States apparently permit nonprofit corporations to have "members" similar to shareholders in a business corporation, although state statutes generally do not seem to require this form of organization, see, *e. g.*, ALI-ABA, Model Nonprofit Corporation Act § 11 (1964); in many States the board of directors of a nonprofit corporation may be an autonomous, self-perpetuating body.[5] Given the wide variety of treatment of the subject of membership in state incorporation laws, and the focus of the Commission's regulation on the corporation's own standards, we think it was entirely permissible for the Commission in this case to look to NRWC's corporate charter under the laws of Virginia and the bylaws adopted in accordance with that charter.

Applying the statutory language as we interpret it to the facts of this case,[6] we think Congress did not intend to allow the 267,000 individuals solicited by NRWC during 1976 to

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[5] One commentator has stated:

"The license provided by the statutes in this respect is further enhanced by their loose use of the term 'member.' The New York statute and the Model Act, for example, offer no meaningful definition of 'member' at all, but instead provide that a corporation's articles or bylaws may designate anybody or nobody as members, or may designate different classes of members, and may freely specify the rights, if any, of the corporation's members or classes of members. The California Act is a bit more carefully drawn in this regard, defining a member, essentially, as anyone entitled to vote in elections either for the corporation's board of directors or for certain fundamental corporate changes." Hansmann, Reforming Nonprofit Corporation Law, 129 U. Pa. L. Rev. 497, 578 (1981) (footnote omitted).

[6] We assume, as have the parties and courts below, that ERCC satisfies the statutory requirements of a "separate segregated fund" and that NRWC is a corporation covered by § 441b.

come within the exclusion for "members" in 2 U. S. C. § 441b(b)(4)(C). Although membership cards are ultimately sent to those who either contribute or respond in some other way to respondent's mailings, the solicitation letters themselves make no reference to members. Members play no part in the operation or administration of the corporation; they elect no corporate officials, and indeed there are apparently no membership meetings. There is no indication that NRWC's asserted members exercise any control over the expenditure of their contributions. Moreover, as previously noted, NRWC's own articles of incorporation and other publicly filed documents explicitly disclaimed the existence of members. We think that under these circumstances, those solicited were insufficiently attached to the corporate structure of NRWC to qualify as "members" under the statutory proviso.

Unlike the Court of Appeals, we do not think this construction of the statute raises any insurmountable constitutional difficulties. The Court of Appeals expressed the view that the sort of solicitations involved here would neither corrupt officials nor coerce members of the corporation holding minority political views, the two goals which it believed Congress had in mind in enacting the statutory provisions at issue. That being so, the Court of Appeals apparently thought, and respondent argues here, that the term "members" must be given an elastic definition in order to prevent impermissible interference with the constitutional rights enunciated in cases such as *NAACP* v. *Button*, 371 U. S. 415 (1963), and *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620 (1980). Similarly, respondent places considerable reliance on our statement in *Buckley* v. *Valeo*, 424 U. S. 1, 25 (1976):

> "The Court's decisions involving associational freedoms establish that the right of association is a 'basic constitutional freedom,' *Kusper* v. *Pontikes*, 414 U. S., at 57, that is 'closely allied to freedom of speech and a right

> which, like free speech, lies at the foundation of a free society.' *Shelton* v. *Tucker*, 364 U. S. 479, 486 (1960). See, *e. g.*, *Bates* v. *Little Rock*, 361 U. S. 516, 522–523 (1960); *NAACP* v. *Alabama*, [357 U. S.], at 460–461; *NAACP* v. *Button*, *supra*, at 452 (Harlan, J., dissenting). In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.' *NAACP* v. *Alabama*, *supra*, at 460–461."

Under this standard, respondent asserts, the Act's restriction of its solicitation cannot be upheld.

While we fully subscribe to the views stated in *Buckley*, in the very next sentence to the passage quoted by the respondent, the Court went on to say:

> "Yet, it is clear that '[n]either the right to associate nor the right to participate in political activities is absolute.' *CSC* v. *Letter Carriers*, 413 U. S. 548, 567 (1973)." *Ibid.*

In this case, we conclude that the associational rights asserted by respondent may be and are overborne by the interests Congress has sought to protect in enacting § 441b.

To place respondent's constitutional claims in proper perspective, we repeat language used in *Buckley* v. *Valeo*, *supra*, at 13:

> "The constitutional power of Congress to regulate federal elections is well established and is not questioned by any of the parties in this case."

The first purpose of § 441b, petitioners state, is to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political "war chests" which could be used to incur political debts from legislators who are aided by the contributions. See *United States* v. *Automobile Workers*, 352 U. S. 567, 579 (1957). The second purpose

of the provisions, petitioners argue, is to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed. See *United States* v. *CIO*, 335 U. S. 106, 113 (1948).

We agree with petitioners that these purposes are sufficient to justify the regulation at issue. Speaking of corporate involvement in electoral politics, we recently said:

> "The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted." *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 788, n. 26 (1978) (citations omitted).

Likewise, in *Buckley* v. *Valeo*, *supra*, at 26–27, we specifically affirmed the importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption. These interests directly implicate "the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process." *United States* v. *Automobile Workers*, *supra*, at 570.

We are also convinced that the statutory prohibitions and exceptions we have considered are sufficiently tailored to these purposes to avoid undue restriction on the associational interests asserted by respondent. The history of the movement to regulate the political contributions and expenditures of corporations and labor unions is set forth in great detail in *United States* v. *Automobile Workers*, *supra*, at 570–584, and we need only summarize the development here. Seventy-five years ago Congress first made financial contributions to federal candidates by corporations illegal by enacting the

Tillman Act, ch. 420, 34 Stat. 864. Within the next few years Congress went further and required financial disclosure by federal candidates following election, Act of June 25, 1910, ch. 392, 36 Stat. 822, and the following year required pre-election disclosure as well. Act of Aug. 19, 1911, ch. 33, 37 Stat. 25. The Federal Corrupt Practices Act, passed in 1925, extended the prohibition against corporate contributions to include "anything of value," and made acceptance of a corporate contribution as well as the giving of such a contribution a crime. 43 Stat. 1070.

The first restrictions on union contributions were contained in the second Hatch Act, 54 Stat. 767, and later, in the War Labor Disputes Act of 1943, § 9, 57 Stat. 167, union contributions in connection with federal elections were prohibited altogether. These prohibitions on union political activity were extended and strengthened in the Taft-Hartley Act, 61 Stat. 136, which broadened the earlier prohibition against contributions to "expenditures" as well. Congress codified most of these provisions in the Federal Election Campaign Act of 1971, 86 Stat. 3, and enacted later amendments in 1974, 88 Stat. 1263, in 1976, 90 Stat. 475, and in 1980, 93 Stat. 1339. Section 441b(b)(4)(C) is, as its legislative history indicates, merely a refinement of this gradual development of the federal election statute.

This careful legislative adjustment of the federal electoral laws, in a "cautious advance, step by step," *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46 (1937), to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference, see *Rostker* v. *Goldberg*, 453 U. S. 57, 64, 67 (1981). As we discuss below, it also reflects a permissible assessment of the dangers posed by those entities to the electoral process.

In order to prevent both actual and apparent corruption, Congress aimed a part of its regulatory scheme at corporations. The statute reflects a legislative judgment that the special characteristics of the corporate structure require par-

ticularly careful regulation. See *United States* v. *Morton Salt Co.*, 338 U. S. 632, 652 (1950). While § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress' judgment that it is the potential for such influence that demands regulation. Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared. As we said in *California Medical Assn.* v. *FEC*, 453 U. S. 182, 201 (1981), the "differing structures and purposes" of different entities "may require different forms of regulation in order to protect the integrity of the electoral process."[7]

To accept the view that a solicitation limited only to those who have in the past proved "philosophically compatible" to the views of the corporation *must* be permitted under the statute in order for the prohibition to be constitutional would ignore the teachings of our earlier decisions. The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized, *First National Bank of Boston* v. *Bellotti*, *supra*, at 788, n. 26, and there is no reason why it may not in this case be accomplished by treating unions, corporations,

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[7] Our decision in *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), is entirely consistent with our conclusion here. *Bellotti* struck down a prohibition against corporate expenditures and contributions in connection with state referenda. *Id.*, at 768. The Court explicitly stated that its decision did not involve "the constitutionality of laws prohibiting or limiting corporate contributions to political candidates or committees, or other means of influencing *candidate elections*." *Id.*, at 788, n. 26 (emphasis added). In addition, following its citation of *Pipefitters* v. *United States*, 407 U. S. 385 (1972); *United States* v. *Automobile Workers*, 352 U. S. 567 (1957); and *United States* v. *CIO*, 335 U. S. 106 (1948), the Court specifically pointed out that in elections of candidates to public office, unlike in referenda on issues of general public interest, there may well be a threat of real or apparent corruption. As discussed in text, Congress has relied on just this threat in enacting § 441b.

and similar organizations differently from individuals. *California Medical Assn.* v. *FEC*, *supra*, at 201.

Respondent also asserts a claim of unconstitutional vagueness, relying on such additional cases as *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926); *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972); *Speiser* v. *Randall*, 357 U. S. 513 (1958); and *Smith* v. *California*, 361 U. S. 147 (1959). We think the vagueness claim is adequately answered by the language quoted earlier from *CSC* v. *Letter Carriers*, 413 U. S. 548, 567 (1973). There may be more than one way under the statute to go about determining who are "members" of a nonprofit corporation, and the statute may leave room for uncertainty at the periphery of its exception for solicitation of "members." However, on this record we are satisfied that NRWC's activities extended in large part, if not *in toto*, to people who would not be members under any reasonable interpretation of the statute. See *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973).[8]

The judgment of the Court of Appeals is reversed.

It is so ordered.

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[8] We also reject as meritless NRWC's claim that the Commission's actions prior to and during conciliation were so misleading and arbitrary as to constitute a deprivation of due process. We leave open for consideration upon remand, *inter alia*, the propriety of the Commission's imposition of a $10,000 civil penalty against respondent.

BOWEN *v.* UNITED STATES POSTAL SERVICE ET AL.

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

No. 81–525. Argued October 6, 1982—Decided January 11, 1983

After petitioner employee was discharged by respondent United States Postal Service (USPS) as a result of an altercation with another employee, he filed a grievance with respondent Union as provided by the applicable collective-bargaining agreement. When the Union declined to take his grievance to arbitration, petitioner sued respondents in Federal District Court, claiming that he had been wrongfully discharged and seeking damages and injunctive relief. Entering judgment on a jury verdict against both respondents, the District Court held that the USPS had discharged petitioner without just cause and that the Union had handled his grievance in an arbitrary manner. Accordingly, the court upheld the jury's apportionment of damages between the USPS and the Union. The Court of Appeals affirmed except for the award of damages against the Union, holding that because petitioner's compensation was payable only by the USPS, reimbursement for his lost earnings continued to be the USPS's exclusive obligation, and that hence no portion of the deprivations was chargeable to the Union.

Held: Where the District Court's findings, accepted by the Court of Appeals, established that petitioner's damages were caused initially by the USPS's unlawful discharge and were increased by the Union's breach of its duty of fair representation, apportionment of the damages was required. *Vaca* v. *Sipes*, 386 U. S. 171. Pp. 218–230.

(a) The governing principle of *Vaca* is that where an employee proves that his employer violated the collective-bargaining agreement and that his union breached its duty of fair representation, liability is to be apportioned between the employer and the union according to the damages caused by the fault of each. To interpret this principle as requiring that an employer be solely liable for damages resulting from a wrongful discharge treats the relationship between the employer and employee, created by the collective-bargaining agreement, as if it were a simple contract of hire governed by traditional common-law principles. Such a reading fails to recognize that a collective-bargaining agreement is much more than traditional common-law employment terminable at will. Rather, it is an agreement creating relationships and interests under the federal common law of labor policy. Pp. 218–220.

(b) Of paramount importance is the right of the employee, who has been injured by both the employer's and the union's breach, to be made whole. Even though both the employer and the union have caused the damage suffered by the employee, the union is responsible for the increase in damages resulting from breach of its duty of fair representation having caused the grievance procedure to malfunction, and, as between the two wrongdoers, the union should bear its portion of the damages. Pp. 220–224.

(c) When the union, as the employee's exclusive agent, waives arbitration or fails to seek review of an adverse decision, the employer should be in substantially the same position as if the employee had had the right to act on his own behalf and had done so. In the absence of damages apportionment where the default of both the employer and the union contributes to the employee's injury, incentives to comply with the grievance proceeding would be diminished, and to impose total liability solely on the employer could affect the willingness of employers to agree to arbitration clauses. To require the union to pay damages does not impose a burden on the union inconsistent with national labor policy, but rather provides an additional incentive for the union to process its members' claims where warranted. Pp. 224–228.

(d) *Czosek* v. *O'Mara*, 397 U. S. 25, is not inconsistent with *Vaca*'s recognition that each party should bear the damages attributable to its fault. Pp. 228–230.

642 F. 2d 79, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the judgment in part and dissenting in part, in which MARSHALL and BLACKMUN, JJ., joined, and in all but Part IV of which REHNQUIST, J., joined, *post*, p. 230. REHNQUIST, J., filed a dissenting opinion, *post*, p. 246.

William B. Poff argued the cause for petitioner. With him on the briefs were *Baynard E. Harris* and *John D. Eure*.

Barbara E. Etkind argued the cause for the federal respondent. With her on the briefs were *Solicitor General Lee*, *Assistant Attorney General McGrath*, *Deputy Solicitor General Geller*, *Leonard Schaitman*, *Michael Jay Singer*, and *Stephen E. Alpern*. *Asher W. Schwartz* argued the cause for respondent Union. With him on the brief were

Darryl J. Anderson, Anton G. Hajjar, Laurence Gold, and *Marsha Berzon.**

JUSTICE POWELL delivered the opinion of the Court.

The issue is whether a union may be held primarily liable for that part of a wrongfully discharged employee's damages caused by his union's breach of its duty of fair representation.

I

On February 21, 1976, following an altercation with another employee, petitioner Charles V. Bowen was suspended without pay from his position with the United States Postal Service. Bowen was a member of the American Postal Workers Union, AFL–CIO, the recognized collective-bargaining agent for Service employees. After Bowen was formally terminated on March 30, 1976, he filed a grievance with the Union as provided by the collective-bargaining agreement. When the Union declined to take his grievance to arbitration, he sued the Service and the Union in the United States District Court for the Western District of Virginia, seeking damages and injunctive relief.

Bowen's complaint charged that the Service had violated the collective-bargaining agreement by dismissing him without "just cause" and that the Union had breached its duty of fair representation. His evidence at trial indicated that the responsible Union officer, at each step of the grievance process, had recommended pursuing the grievance but that the national office, for no apparent reason, had refused to take the matter to arbitration.

Following the parties' presentation of evidence, the court gave the jury a series of questions to be answered as a special verdict.[1] If the jury found that the Service had discharged

**Eugene B. Granof* and *Stephen A. Bokat* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging reversal.

[1] The jury sat only as an advisory panel on Bowen's claims against the Service. See 28 U. S. C. § 2402 ("Any action against the United States under section 1346 shall be tried by the court without a jury").

Bowen wrongfully and that the Union had breached its duty of fair representation, it was instructed to determine the amount of compensatory damages to be awarded and to apportion the liability for the damages between the Service and the Union.[2] In explaining how liability might be apportioned, the court instructed the jury that the issue was left primarily to its discretion. The court indicated, however, that the jury equitably could base apportionment on the date of a hypothetical arbitration decision—the date at which the Service would have reinstated Bowen if the Union had fulfilled its duty. The court suggested that the Service could be liable for damages before that date and the Union for damages thereafter. Although the Union objected to the instruction allowing the jury to find it liable for any compensatory damages, it did not object to the manner in which the court instructed the jury to apportion the damages in the event apportionment was proper.[3]

Upon return of a special verdict in favor of Bowen and against both defendants, the District Court entered judg-

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[2] Question 3 of the special verdict stated: "If [you find that the Union breached its duty of fair representation and/or the Service discharged Bowen without just cause], state from a preponderance of the evidence or with reasonable certainty the amount of compensatory damages to which [Bowen] is entitled." App. to Pet. for Cert. A21–A22.

Question 8 stated: "If compensatory damages are awarded by your answer to Question 3, state the amount, if any, that should be attributable to the defendant Union and the amount, if any, that should be attributable to the defendant Postal Service." *Id.*, at A22.

[3] Counsel for the Union stated: "Your Honor, in respect to this special verdict form, the [Union] would object to any verdict or any question here which would allow the jury to return a judgement against the [Union] for any form . . . of wages. Traditionally, the Union does not pay wages. And these damages are wholly assessable to the [Service], if at all." 3 Record 611–612.

In a motion for judgment notwithstanding the verdict, counsel for the Union reasserted that the "amount of back wages awarded [Bowen] by the jury against the [Union] is as a matter of law wholly assess[a]ble against the employer." 1 Record, Item 37, ¶ 2.

ment, holding that the Service had discharged Bowen without just cause and that the Union had handled his "apparently meritorious grievance . . . in an arbitrary and perfunctory manner . . . ." 470 F. Supp. 1127, 1129 (1979). In so doing, both the Union and the Service acted "in reckless and callous disregard of [Bowen's] rights."[4] *Ibid.* The court found that Bowen could not have proceeded independently of the Union[5] and that if the Union had arbitrated Bowen's grievance, he would have been reinstated. *Ibid.*

The court ordered that Bowen be reimbursed $52,954 for lost benefits and wages. Although noting that "there is authority suggesting that only the employer is liable for dam-

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[4] The District Court had instructed the jury that both the Union and the Service could be liable for punitive damages if either had acted "maliciously or recklessly or in callous disregard of the rights of the Plaintiff [Bowen]." 3 Record 597. The jury found that the Service and the Union were liable for punitive damages of $30,000 and $10,000, respectively. App. to Pet. for Cert. A22. The District Court determined, however, that punitive damages could not be assessed against the Service because of sovereign immunity. 470 F. Supp., at 1131. Although the court found that the Union's actions supported the jury's award of punitive damages, it set the award aside. It concluded that it would be unfair to hold the Union liable when the Service was immune. *Ibid.* Bowen did not appeal the District Court's decision on this point.

[5] The grievance-arbitration clause contained in the contract between the Service and the Union provides for a four-step grievance procedure. The employee may initiate the grievance by discussing it with his supervisor. The Union has discretion to appeal on the employee's behalf and can elect to pursue the grievance through the next three steps. If the grievance is not settled, the Union may refer the grievance to arbitration. See 1 Record, Item 25, Exhibit 1.

Although Bowen could have appealed his discharge to the Civil Service Commission, his right to do so expired 15 days after notice of the Service's action. Moreover, by choosing to pursue his administrative remedies, Bowen would have "waive[d] access to any procedures under the National Agreement beyond Step 2B of the Grievance-Arbitration Procedures." App. 90–91. By choosing the remedy provided by the grievance procedure, he was prevented from presenting his claim to the Civil Service Commission.

ages in the form of backpay," it observed that "this is a case in which both defendants, by their illegal acts, are liable to plaintiff. . . . The problem in this case is not one of liability but rather one of apportionment . . . ." *Id.*, at 1130–1131. The jury had found that the Union was responsible for $30,000 of Bowen's damages. The court approved that apportionment, ordering the Service to pay the remaining $22,954.[6]

On appeal by the Service and the Union, the Court of Appeals for the Fourth Circuit overturned the damages award against the Union. 642 F. 2d 79 (1981). It accepted the District Court's findings of fact, but held as a matter of law that, "[a]s Bowen's compensation was at all times payable only by the Service, reimbursement of his lost earnings continued to be the obligation of the Service exclusively. Hence, no portion of the deprivations . . . was chargeable to the Union. Cf. *Vaca* v. *Sipes*, 386 U. S. 171, 195 . . . (1967)." *Id.*, at 82 (footnote omitted). The court did not alter the District Court's judgment in any other respect, but "affirmed [it] throughout" except for the award of damages against the Union. *Id.*, at 83.

Thus, the Court of Appeals affirmed the District Court's apportionment of fault and its finding that both the Union and the Service had acted "in reckless and callous disregard of [Bowen's] rights."[7] Indeed, the court accepted the Dis-

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[6] The District Court found as a fact that if Bowen's grievance had been arbitrated he would have been reinstated by August 1977. Lost wages after that date were deemed the fault of the Union: "While the [Service] set this case in motion with its discharge, the [Union's] acts, upon which [Bowen] reasonably relied, delayed the reinstatement of [Bowen] and it is a proper apportionment to assign fault to the [Union] for approximately two-thirds of the period [Bowen] was unemployed up to the time of trial." 470 F. Supp., at 1131.

[7] In a footnote added after the opinion was first filed, the court noted that it made "no revision in the judgment of $22,954.12 against the Postal Service. In this connection we note that no appeal was entered by

trict Court's apportionment of fault so completely that it refused to increase the $22,954 award against the Service to cover the whole of Bowen's injury. Bowen was left with only a $22,954 award, whereas the jury and the District Court had awarded him lost earnings and benefits of $52,954—the undisputed amount of his damages.

II

In *Vaca* v. *Sipes*, 386 U. S. 171 (1967), the Court held that an employee such as Bowen, who proves that his employer violated the labor agreement and his union breached its duty of fair representation, may be entitled to recover damages from both the union and the employer. The Court explained that the award must be apportioned according to fault:

> "The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer." *Id.*, at 197–198.

Although *Vaca*'s governing principle is well established, its application has caused some uncertainty.[8] The Union ar-

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[Bowen] from the judgment against the Service in the amount of $22,954.12." 642 F. 2d, at 82, n. 6.

The court's view that the judgment against the Service could not be increased because of Bowen's failure to appeal is erroneous. Bowen won an unambiguous victory in the District Court. He established that he had been discharged by the employer without just cause and that the Union had breached its duty of fair representation. The amount of lost wages and benefits was not in dispute, and the jury and the District Court awarded him all of his damages, apportioning them between the Union and the Service. Bowen had no reason to be unhappy with the award and should not have been deprived of the full amount of his compensatory damages because of his failure to cross-appeal.

[8] JUSTICE WHITE's dissent asserts that the "rationale" of apportioning damages, applied by the Court today, "has been rejected by every Court of

gues that the Court of Appeals correctly determined that it cannot be charged with any damages resulting from a wrongful discharge. *Vaca*'s "governing principle," according to

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Appeals that has squarely considered it." See *post*, at 231, and n. 1. Apart from the fact that we apply the rationale—the "governing principle"—articulated in *Vaca*, few Courts of Appeals have stated a rationale nor has there been the consistency in result perceived by the dissent. Only one case cited by the dissent has declined to apportion damages after considering the issue fully. See *Seymour* v. *Olin Corp.*, 666 F. 2d 202 (CA5 1982). Others, such as the opinion below, have rejected apportionment after giving the issue only minimal consideration. See 642 F. 2d 79, 82 (CA4 1981) (simply citing *Vaca*, but not *Vaca*'s governing principle); *Milstead* v. *International Brotherhood of Teamsters, Local Union 957*, 649 F. 2d 395, 396 (CA6 1981) (finding that damages may not be apportioned on the basis of *St. Clair* v. *Local 515*, 422 F. 2d 128 (CA6 1969), which found that damages may be apportioned). Some courts have not apportioned damages, but have articulated apparently conflicting rationales. See *Wyatt* v. *Interstate & Ocean Transport Co.*, 623 F. 2d 888, 892–893 (CA4 1980) (refusing to hold union liable for portion of damages caused by its breach but stating that damages can be apportioned when the union "exacerbate[s the employee's] loss or diminution of wages, beyond that for which the employer could be charged"); *De Arroyo* v. *Sindicato de Trabajadores Packinghouse*, 425 F. 2d 281, 289–290 (CA1) (refusing to hold union liable for portion of damages caused by its default but stating that apportionment would be proper where there was evidence "that but for the Union's conduct the plaintiffs would have been reinstated or reimbursed at an earlier date"), cert. denied, 400 U. S. 877 (1970). While it is true these cases reach the same result as the dissent, they do not represent an affirmation of its reasoning.

Other cases have recognized that damages should be apportioned between the union and the employer. See *Smart* v. *Ellis Trucking Co.*, 580 F. 2d 215, 219, n. 6 (CA6 1978) (on remand, trial court to determine "the extent to which the employer's liability for any backpay may be limited" because of its reliance on arbitration proceeding); *Harrison* v. *Chrysler Corp.*, 558 F. 2d 1273, 1279 (CA7 1977) ("union which breaches its duty of fair representation may be sued by an employee for lost pay attributable to the breach"); *Ruzicka* v. *General Motors Corp.*, 523 F. 2d 306, 312 (CA6 1975) ("Union . . . liable for that portion of Appellant's injury representing 'increases if any in those damages [chargeable to the employer] caused by the union's refusal to process the grievance'") (brackets in Court of Appeals opinion); *St. Clair* v. *Local 515*, *supra*, at 132 (holding union "liable for nothing more [than damages measured by backpay] and perhaps for

the Union, requires that the employer be solely liable for such damages. The Union views itself as liable only for Bowen's litigation expenses resulting from its breach of duty. It finds support for this view in *Vaca*'s recognition that a union's breach of its duty of fair representation does not absolve an employer of all the consequences of a breach of the collective-bargaining contract. See *id.*, at 196. The Union contends that its unrelated breach of the duty of fair representation does not make it liable for any part of the discharged employee's damages; its default merely lifts the bar to the employee's suit on the contract against his employer.

The difficulty with this argument is that it treats the relationship between the employer and employee, created by the collective-bargaining agreement, as if it were a simple contract of hire governed by traditional common-law principles. This reading of *Vaca* fails to recognize that a collective-bargaining agreement is much more than traditional common-law employment terminable at will. Rather, it is an agreement creating relationships and interests under the federal common law of labor policy.

A

In *Vaca*, as here, the employee contended that his employer had discharged him in violation of the collective-bargaining agreement and that the union had breached its duty of fair representation by refusing to take his claim to arbitration. He sued the union in a Missouri state court for breach of its duty. On finding that both the union and the employer

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less" because *Vaca* requires those damages to be apportioned between the employer and union according to each party's fault). See also Feller, A General Theory of the Collective Bargaining Agreement, 61 Calif. L. Rev. 663, 817–824 (1973) (employer's liability should not be increased by union's default); Comment, Apportionment of Damages in DFR/Contract Suits: Who Pays for the Union's Breach, 1981 Wis. L. Rev. 155 (same). In sum, a fair reading of these cases reveals that, contrary to the dissent's assertion, the Courts of Appeals have been far from unanimous in either their results or their rationales.

were at fault, the jury decided—and the Missouri Supreme Court agreed—that the union was entirely liable for the employee's lost backpay. See *id.*, at 195.

On appeal, this Court was required to resolve a number of issues. One was whether an employee who had failed to exhaust the grievance procedure prescribed in the bargaining agreement could bring suit for a breach of that agreement.[9] In *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965), the Court had held that "federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress."[10] *Id.*, at 652 (emphasis in original; footnote omitted). Because the employee in *Republic Steel* had made no attempt to exhaust the grievance procedure, it was necessary for the Court to consider only the union's interest in participating in the administration of the contract and the employer's interest in limiting administrative remedies. The Court noted, however, that if "the union refuses to press or only perfunctorily presses the individual's claim," federal labor policy might require a different result. *Ibid.*

Vaca presented such a situation. The union, which had the "sole power under the contract to invoke the higher stages of the grievance procedure," had chosen not to take the employee's claim to arbitration. See 386 U. S., at 185. Thus the Court faced a strong countervailing interest: the

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[9] The Court had previously held in *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962), that an employee may sue his employer for a breach of the collective-bargaining agreement under § 301 of the Labor Management Relations Act. See 29 U. S. C. § 185. Because the contract in *Smith* did not contain a grievance-arbitration procedure that required exhaustion, *Smith* did not reach the issue presented in *Vaca*. See 371 U. S., at 196, n. 1.

[10] The Court based its decision on Congress' express approval of contract grievance procedures as a preferred method of settling disputes, the union's interest in actively participating in the continuing administration of the contract, and the employer's interest in limiting the choice of remedies available to aggrieved employees. See 379 U. S., at 653.

employee's right to vindicate his claim. *Vaca* resolved these conflicting interests by holding that an employee's failure to exhaust the contractual grievance procedures would bar his suit except when he could show that the union's breach of its duty of fair representation had prevented him from exhausting those remedies. See *ibid.* The *Vaca* Court then observed:

> "It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement. But the employer has committed a wrongful discharge in breach of that agreement, a breach which could be remedied through the grievance process to the employee-plaintiff's benefit were it not for the union's breach of its statutory duty of fair representation to the employee. To leave the employee remediless in such circumstances would, in our opinion, be a great injustice." *Id.*, at 185–186.

The interests thus identified in *Vaca* provide a measure of its principle for apportioning damages. Of paramount importance is the right of the employee, who has been injured by both the employer's and the union's breach, to be made whole. In determining the degree to which the employer or the union should bear the employee's damages, the Court held that the employer should not be shielded from the "natural consequences" of its breach by wrongful union conduct. *Id.*, at 186. The Court noted, however, that the employer may have done nothing to prevent exhaustion. Were it not for the union's failure to represent the employee fairly, the employer's breach "could [have been] remedied through the grievance process to the employee-plaintiff's benefit." The fault that justifies dropping the bar to the employee's suit for damages also requires the union to bear some responsibility for increases in the employee's damages resulting from its breach. To hold otherwise would make the employer alone liable for the consequences of the union's breach of duty.

Hines v. *Anchor Motor Freight, Inc.*, 424 U. S. 554 (1976), presented an issue analogous to that in *Vaca:* whether proof of a breach of the duty of fair representation would remove the bar of finality from an arbitral decision. We held that it would, in part because a contrary rule would prevent the employee from recovering

> "even in circumstances where it is shown that a union has manufactured the evidence and knows from the start that it is false; or even if, unbeknownst to the employer, the union has corrupted the arbitrator to the detriment of disfavored union members." 424 U. S., at 570.

It would indeed be unjust to prevent the employee from recovering in such a situation. It would be equally unjust to require the employer to bear the increase in the damages caused by the union's wrongful conduct.[11] It is true that the employer discharged the employee wrongfully and remains liable for the employee's backpay. See *Vaca*, 386 U. S., at 197. The union's breach of its duty of fair representation, however, caused the grievance procedure to malfunction resulting in an increase in the employee's damages. Even though both the employer and the union have caused the damage suffered by the employee, the union is responsible for the increase in damages and, as between the two wrongdoers, should bear its portion of the damages.[12]

Vaca's governing principle reflects this allocation of responsibility. As the Court stated, "damages attributable *solely* to the employer's breach of contract should not be charged to the union, but *increases* if any in those damages

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[11] We note that this is not a situation in which either the union or the employer has participated in the other's breach. See *Vaca*, 386 U. S., at 197, n. 18.

[12] Although the union remains primarily responsible for the portion of the damages resulting from its default, *Vaca* made clear that the union's breach does not absolve the employer of liability. Thus if the petitioner in this case does not collect the damages apportioned against the Union, the Service remains secondarily liable for the full loss of backpay.

caused by the union's refusal to process the grievance should not be charged to the employer." *Id.*, at 197–198 (emphasis added). The Union's position here would require us to read out of the *Vaca* articulation of the relevant principle the words emphasized above.[13] It would also ignore the interests of all the parties to the collective agreement—interests that *Vaca* recognized and *Hines* illustrates.

B

In approving apportionment of damages caused by the employer's breach of the collective-bargaining agreement and the union's breach of its duty of fair representation, *Vaca* did not apply principles of ordinary contract law. For, as the Court has noted, a collective-bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 578 (1960). In defining the relationships created by such an

[13] In *Vaca*, the jury had found the union responsible for the entire amount of damages suffered by the employee. The judgment upholding the verdict therefore was reversed. JUSTICE WHITE's dissent reasons that because *Vaca* found that the employer is not absolved from liability by the union's breach, the employer must be solely responsible. The first proposition, however, does not require the second. Thus, *Vaca*'s recognition that the employer "may not hide behind the union's wrongful act" does not answer the question posed by this case, how damages should be apportioned as between the two wrongdoers, the union and the employer. On this point, the explicit language of *Vaca*'s governing principle makes clear that the union is responsible for increases in the employee's damages flowing from the wrongful discharge, a point which the dissent glosses over.

Although the Court in *Vaca* concluded that the union had not breached its duty, it observed that "[i]n this case, even if the Union had breached its duty, all or almost all of [the employee's] damages would still be attributable to his allegedly wrongful discharge." *Id.*, at 198. Assuming that such a breach did occur, the facts are not sufficiently clear to determine when the breach would have occurred or the portion of damages attributable to each party's fault. Thus this speculative observation is not inconsistent with the Court's precisely worded statement of the governing principle.

agreement, the Court has applied an evolving federal common law grounded in national labor policy. See *Steelworkers* v. *American Manufacturing Co.*, 363 U. S. 564, 567 (1960); *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 456–457 (1957).

Fundamental to federal labor policy is the grievance procedure. See *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 549 (1964); *Warrior & Gulf Navigation Co.*, *supra*, at 578. It promotes the goal of industrial peace by providing a means for labor and management to settle disputes through negotiation rather than industrial strife. See *John Wiley & Sons, Inc.*, *supra*, at 549. Adoption of a grievance procedure provides the parties with a means of giving content to the collective-bargaining agreement and determining their rights and obligations under it. See *Warrior & Gulf Navigation Co.*, *supra*, at 581.

Although each party participates in the grievance procedure, the union plays a pivotal role in the process since it assumes the responsibility of determining whether to press an employee's claims.[14] The employer, for its part, must rely on the union's decision not to pursue an employee's grievance. For the union acts as the employee's exclusive representative in the grievance procedure, as it does in virtually all matters

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[14] The parties to the collective-bargaining agreement, of course, may choose not to include a grievance procedure supervised by the union or, if they do, may choose not to make the procedure exclusive. See *Vaca*, *supra*, at 184, n. 9; *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, 657–658 (1965); cf. 29 U. S. C. § 159(a) (employee may present grievances to his employer "without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect . . ."). Most collective-bargaining agreements, however, contain exclusive grievance-arbitration procedures and give the union power to supervise the procedure. See Feller, *supra* n. 8, at 742, 752–753. When the collective-bargaining agreement provides the union with sole authority to press an employee's grievance, the union acts as the employee's exclusive representative in the grievance-arbitration procedure. See *Vaca*, *supra*, at 191–192.

involving the terms and conditions of employment. Just as a nonorganized employer may accept an employee's waiver of any challenge to his discharge as a final resolution of the matter, so should an organized employer be able to rely on a comparable waiver by the employee's exclusive representative.

There is no unfairness to the union in this approach. By seeking and acquiring the exclusive right and power to speak for a group of employees, the union assumes a corresponding duty to discharge that responsibility faithfully—a duty which it owes to the employees whom it represents and on which the employer with whom it bargains may rely. When the union, as the exclusive agent of the employee, waives arbitration or fails to seek review of an adverse decision, the employer should be in substantially the same position as if the employee had had the right to act on his own behalf and had done so. Indeed, if the employer could not rely on the union's decision, the grievance procedure would not provide the "uniform and exclusive method for [the] orderly settlement of employee grievances," which the Court has recognized is essential to the national labor policy.[15] See *Clayton* v. *Automobile Workers*, 451 U. S. 679, 686–687 (1981).

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[15] Under the analysis of JUSTICE WHITE's dissent, the employer may not rely on the union's decision not to pursue a grievance. Rather it can prevent continued liability only by reinstating the discharged employee. See *post*, at 238–239. This leaves the employer with a dubious option: it must either reinstate the employee promptly or leave itself exposed to open-ended liability. If this were the rule, the very purpose of the grievance procedure would be defeated. It is precisely to provide the exclusive means of resolving this kind of dispute that the parties agree to such a procedure and national labor policy strongly encourages its use. See *Republic Steel*, *supra*, at 653.

When the union has breached its duty of fair representation, the dissent justifies its rule by arguing that "only the employer ha[s] the continuing ability to right the wrong . . . by reinstating" the employee, an ability that the union lacks. See *post*, at 239. But an employer has no way of knowing that a failure to carry a grievance to arbitration constitutes a breach of duty. Rather than rehiring, as the dissent suggests, the employer reasonably could assume that the union had concluded the discharge was justi-

The principle announced in *Vaca* reflects this allocation of responsibilities in the grievance procedure—a procedure that contemplates that both employer and union will perform their respective obligations. In the absence of damages apportionment where the default of both parties contributes to the employee's injury, incentives to comply with the grievance procedure will be diminished. Indeed, imposing total liability solely on the employer could well affect the willingness of employers to agree to arbitration clauses as they are customarily written.

Nor will requiring the union to pay damages impose a burden on the union inconsistent with national labor policy.[16] It will provide an additional incentive for the union to process its members' claims where warranted. See *Vaca*, 386 U. S., at 187. This is wholly consistent with a union's interest. It is a duty owed to its members as well as consistent with the

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fied. The union would have the option, if it realized it had committed an arguable breach of duty, to bring its default to the employer's attention. Our holding today would not prevent a jury from taking such action into account. See n. 19, *infra*.

Moreover, the rule urged by the dissenting opinion would allow the union and the employee, once the case goes to trial, to agree to a settlement pursuant to which the union would acknowledge a breach of its duty of fair representation in exchange for the employee's undertaking to look to his employer for his entire recovery. Although we may assume that this would not occur frequently, the incentive the dissent's rule would provide to agree to such a settlement demonstrates its unsoundness.

[16] Requiring the union to pay its share of the damages is consistent with the interests recognized in *Electrical Workers* v. *Foust*, 442 U. S. 42 (1979). In *Foust*, we found that a union was not liable for punitive damages. The interest in deterring future breaches by the union was outweighed by the debilitating impact that "unpredictable and potentially substantial" awards of punitive damages would have on the union treasury and the union's exercise of discretion in deciding what claims to pursue. *Id.*, at 50–52. An award of compensatory damages, however, normally will be limited and finite. Moreover, the union's exercise of discretion is shielded by the standard necessary to prove a breach of the duty of fair representation. Thus, the threat that was present in *Foust* is absent here.

union's commitment to the employer under the arbitration clause. See *Republic Steel*, 379 U. S., at 653.

III

The Union contends that *Czosek* v. *O'Mara*, 397 U. S. 25 (1970), requires a different reading of *Vaca* and a different weighing of the interests our cases have developed. *Czosek*, however, is consistent with our holding today.[17] In *Czosek*, employees of the Erie Lackawanna Railroad were placed on furlough and not recalled. They brought suit against the railroad for wrongful discharge and against their union for breaching its duty of fair representation. They alleged that the union had arbitrarily and capriciously refused to process their claims against the railroad. See 397 U. S., at 26. The District Court dismissed the claim against the railroad because the employees had not pursued the administrative rem-

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[17] In cases following *Vaca* and *Czosek*, the Court has not had occasion to address the question presented here. In *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S. 554 (1976), we held that proof of a breach of the duty of fair representation will remove the bar of finality from arbitral decisions. We did not consider the scope of the remedy available, but stated that if the employer had wrongfully discharged the employee and the union had breached its duty, the employee was "entitled to an appropriate remedy against the employer as well as the Union." *Id.*, at 572. In *Foust*, we reviewed the principles announced in *Vaca* as bearing on the question of whether a union can be held liable for punitive damages. Although *Foust*'s discussion of *Vaca* could be read as suggesting a contrary principle to that stated in *Vaca*, the holding in *Foust*—that a union may not be held liable for punitive damages—is consistent with our holding here. Finally, in *Clayton* v. *Automobile Workers*, 451 U. S. 679, 690, n. 15 (1981), the Court reiterated *Vaca*'s governing principle. Although the Court did not apply that principle, the context in which it was discussed bears on the question presented here. In considering whether the remedies available to the employee in an internal union procedure were equivalent to the remedies available to an employee in a § 301 suit, the Court found it significant that the union procedures allowed an employee to recover backpay against the union. This was a recognition of *Vaca*'s explicitly announced governing principle.

edies provided by the Railway Labor Act.[18] It dismissed the claim against the union because the employees' ability to pursue an administrative remedy on their own absolved the union of any duty. The Court of Appeals for the Second Circuit affirmed the dismissal of the claim against the railroad but found that the employees had stated a claim against the union. Even though the employees had a right to seek full redress from an administrative board, the union still had a duty to represent them fairly. See *Conley* v. *Gibson*, 355 U. S. 41 (1957).

This Court affirmed. In so doing, it addressed the union's concern that if the railroad were not joined as a party, the union might be held responsible for damages for which the railroad was wholly or partly responsible. The Court stated:

> "[J]udgment against [the union] can in any event be had only for those damages that flowed from [its] own conduct. Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the union and a subsequent discriminatory refusal by the union to process grievances based on the discharge, damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer." 397 U. S., at 29 (footnote omitted).

Although the statement is broadly phrased, it should not be divorced from the context in which it arose. The Railway Labor Act provided the employees in *Czosek* with an alternative remedy, which they could have pursued when the union refused to process their grievances. Because the union's actions did not deprive the employees of immediate access to a

[18] See 45 U. S. C. §§ 153 First (i), (j). These sections provide that an employee who is unsuccessful at the grievance level can seek relief on his own from the National Railroad Adjustment Board. The Board is authorized to provide remedies similar to those available in a court suit. See *Republic Steel*, 379 U. S., at 657, n. 14.

remedy, it did not increase the damages that the employer otherwise would have had to pay. The Court therefore stated that the only damages flowing from the union's conduct were the added expenses the employees incurred. This is consistent with *Vaca*'s recognition that each party should bear the damages attributable to its fault.

IV

In this case, the findings of the District Court, accepted by the Court of Appeals, establish that the damages sustained by petitioner were caused initially by the Service's unlawful discharge and increased by the Union's breach of its duty of fair representation. Accordingly, apportionment of the damages was required by *Vaca*.[19] We reverse the judgment of the Court of Appeals and remand for entry of judgment allocating damages against both the Service and the Union consistent with this opinion.

It is so ordered.

JUSTICE WHITE, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE REHNQUIST (except as to Part IV) join, concurring in the judgment in part and dissenting in part.

The Court holds that an employer who wrongfully discharges an employee protected by a collective-bargaining agreement with an arbitration clause is only responsible for backpay that accrues prior to the hypothetical date upon which an arbitrator would have issued an award had the employee's union taken the matter to arbitration. All backpay damages that accrue after this time are the sole responsibil-

[19] We need not decide whether the District Court's instructions on apportionment of damages were proper. The Union objected to the instructions only on the ground that no back wages at all could be assessed against it. It did not object to the manner of apportionment if such damages were to be assessed. Nor is it necessary in this case to consider whether there were degrees of fault, as both the Service and the Union were found to have acted in "reckless and callous disregard of [Bowen's] rights."

ity of the union, even where, as here, the union is in no way responsible for the employer's decision to terminate the employee. This rationale, which heretofore has been rejected by every Court of Appeals that has squarely considered it,[1] does not give due regard to our prior precedents, to equitable principles, or to the national labor policy. I therefore re-

[1] In addition to the opinion below in the present case, 642 F. 2d 79 (CA4 1981), see *Seymour* v. *Olin Corp.*, 666 F. 2d 202 (CA5 1982), and *Milstead* v. *International Brotherhood of Teamsters, Local Union 957*, 649 F. 2d 395 (CA6), cert. denied, 454 U. S. 896 (1981). These three are the only Court of Appeals decisions rendering square holdings on the issue. However, also consistent with the view advanced in this dissent are *Wyatt* v. *Interstate & Ocean Transport Co.*, 623 F. 2d 888 (CA4 1980) (assessing the employer for all backpay), and *Soto Segarra* v. *Sea-Land Service, Inc.*, 581 F. 2d 291, 298 (1978), where the First Circuit specifically noted that, in accordance with *Vaca* v. *Sipes*, 386 U. S. 171 (1967), and *Czosek* v. *O'Mara*, 397 U. S. 25 (1970), the District Court "did not charge the union for any of the back pay due appellee but instead awarded $5,750 in attorney's fees proximately caused by the Union's failure to process his grievance." See also *De Arroyo* v. *Sindicato de Trabajadores Packinghouse*, 425 F. 2d 281, 289–290 (CA1), cert. denied, 400 U. S. 877 (1970), where the employer was held liable for all backpay, even though a jury had found that 40% of this amount accrued because of the union's wrongful conduct. See Feller, A General Theory of the Collective Bargaining Agreement, 61 Calif. L. Rev. 663, 671–672 (1973).

The Court incorrectly states, *ante*, at 218–220, n. 8, that the Courts of Appeals have not been consistent on this issue. No Court of Appeals has ever required a union to pay backpay in a case such as this. In fact, the only two cases the Court cites that even suggest the possibility of union liability for backpay are *St. Clair* v. *Local No. 515*, 422 F. 2d 128 (CA6 1969), and *Harrison* v. *Chrysler Corp.*, 558 F. 2d 1273 (CA7 1977). In *St. Clair*, the court did not purport to decide the issue; it stated only that the union certainly would not be liable for anything more than backpay less interim earnings, "and perhaps for less," because, in light of *Vaca*, "the Supreme Court has strongly implied that . . . the increment of damages caused by the union's breach of duty is virtually *de minimis*." 422 F. 2d, at 132. In *Harrison*, the court did make the comment that "a union which breaches its duty of fair representation may be sued by an employee for lost pay attributable to the breach," 558 F. 2d, at 1279, but no union was even a party to the litigation, so this dicta can hardly be regarded as authoritative.

spectfully dissent. For the following reasons, I believe that the employer should be primarily liable for all backpay.

I

In *Smith* v. *Evening News Assn.*, 371 U. S. 195, 200–201 (1962), we held for the first time that an individual employee may bring a § 301[2] suit against his employer for breach of a collective-bargaining agreement. If, as in *Smith*, the agreement does not contain an arbitration provision, the employee's right to bring suit is unqualified, and, in such a case, the employer unquestionably is liable for any and all backpay that is due.

On the other hand, if, as in the present case, the agreement does contain an arbitration provision, it is much more difficult for an employee to maintain a § 301 action against his employer for any backpay whatsoever. This is because *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965), established that contractual grievance and arbitration procedures must be exhausted before an employee files a § 301 suit. The *Republic Steel* rule was adopted to protect the integrity of the collective-bargaining process, and to further the national labor policy of encouraging private resolution of disputes arising over the interpretation and implementation of collective-bargaining agreements. See *Clayton* v. *Automobile Workers*, 451 U. S. 679, 686–687 (1981).

Noting that contractual remedies sometimes prove to be "unsatisfactory or unworkable for the individual grievant," we considered in *Vaca* v. *Sipes*, 386 U. S. 171, 185 (1967), the question "under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim de-

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[2] § 301 of the Labor Management Relations Act, 29 U. S. C. § 185. Because the employer in the present case is the United States Postal Service, petitioner Bowen's action technically arises under § 2 of the Postal Reorganization Act, 39 U. S. C. § 1208(b), which is identical to § 301 in all relevant respects.

spite his failure to secure relief through the contractual remedial procedures." We found that one situation in which "the employee may seek judicial enforcement of his contractual rights" is where the union has the sole power to invoke the higher stages of the grievance procedure, *and* "the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's *wrongful* refusal to process the grievance." *Ibid.* An employee may maintain a § 301 suit under these circumstances because, in enacting the laws imposing a duty of fair representation on unions, Congress did not intend "to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements." *Id.*, at 186.

Vaca made clear that, with respect to an *employer*, the only consequence of a union's breach of a fair-representation duty to an *employee* is that it provides the employee with the means of defeating the employer's "defense based upon the failure to exhaust contractual remedies," *ibid.*, in a § 301 suit. The Court explicitly stated that the union's violation of its statutory duty in no way "exempt[ed] the employer from contractual damages which he would otherwise have had to pay," *id.*, at 196, and that the employer could not "hide behind the union's wrongful failure to act." *Id.*, at 197.

In *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S. 554 (1976), we reiterated that a union's breach of duty to an employee does not shield an employer from damages that it would otherwise owe. *Hines* involved employees whose grievances had been fully arbitrated. The arbitrator had upheld the discharge as rightful. Nevertheless, the Court held that the employee might still maintain a § 301 action *if* he could establish that his union had breached its duty of representing him fairly during the arbitral proceedings, even though the employer was in no way responsible for the alleged union malfeasance. *Id.*, at 569. The employer pro-

tested that, since its conduct during the arbitration was blameless, it should be able to rely on the finality of the arbitral award. We rejected this argument, pointing out that the employer had "surely played its part in precipitating [the] dispute" by discharging the plaintiff-employee in the first place. *Ibid.* As in *Vaca*, with respect to the employer, the only consequence of the union's breach was that it "remove[d] the bar" to the employee's right to bring a § 301 action.[3] 424 U. S., at 567.

Thus, under our previous holdings, as far as the employer is concerned, a union's breach of a fair-representation duty does no more than remove the procedural exhaustion-of-remedies bar to a § 301 suit by an aggrieved employee. The union's breach does not affect the employer's potential liability, including backpay liability, if the employee prevails in the § 301 judicial proceedings by showing that the employer had breached its contract in discharging him.

That the union is not primarily liable for backpay is readily apparent upon close inspection of the facts in *Vaca*. The employee in that case had been discharged in January 1960. Sometime after February 1961, the union refused to take the matter to arbitration, and, in February 1962, the employee filed suit, claiming that the union's refusal to go to arbitration violated his rights. The trial began in June 1964, and the matter was not finally adjudicated until this Court rendered its decision in February 1967. See *Vaca*, 386 U. S., at 173–176. Had the union opted in favor of arbitration, an

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[3] Justice Stewart filed a two-paragraph concurring opinion in *Hines*, in which he stated that the employer should not be liable for backpay accruing between the time of the "tainted" arbitral decision and a subsequent "untainted" determination that the discharges were, after all, wrongful. 424 U. S., at 572–573. No other Member of the Court joined Justice Stewart's observations, and his opinion was founded on the employer's good-faith reliance on a favorable arbitral decision. Here, the Court goes far beyond Justice Stewart and grants the employer the right to rely on a nonexistent arbitration, even though the union is by no means under a duty to the employer to take any grievances to arbitration. See *infra*, at 239–241.

award almost certainly would have been forthcoming long before the judicial suit had even proceeded to trial.[4] Nevertheless, the *Vaca* Court commented that "all or almost all" of the employee's damages would be attributable to the employer, not the union. *Id.*, at 198. Had the Court intended to hold the union responsible for backpay accruing after the hypothetical arbitration date, presumably well over half of this liability would have been attributed to the union.

Of course, this does not mean that the union escapes liability for the "natural consequences," *Vaca*, *supra*, at 186, of *its* wrongful conduct. The damages that an employee may recover upon proof that his union has breached its duty to represent him fairly are simply of a different nature than those recoverable from the employer. This is why we found in *Vaca* that "damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer." 386 U. S., at 197–198.

What, then, is the proper measure of the union's damages in a hybrid § 301/breach-of-duty suit? We considered this question in *Czosek* v. *O'Mara*, 397 U. S. 25, 29 (1970), and concluded that, under the *Vaca* rule, the union is liable in damages to the extent that its misconduct "add[s] to the

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[4] Statistics developed by the Federal Mediation and Conciliation Service (FMCS) show that, in 1981, the average time between the filing of a grievance and the rendering of an arbitral award was 230.26 days. For the years between 1972 and 1980, the average varied from a high of 268.3 in 1977 to a low of 223.5 in 1975 and 1978. 34 FMCS Ann. Rep. 39 (1981). See generally Ross, The Well-Aged Arbitration Case, 11 Ind. & Lab. Rel. Rev. 262 (1958); Seitz, Delay: The Asp in the Bosom of Arbitration, 36 Arb. J.(n. s.) 29 (Sept. 1981). Also, in some industries, labor and management have agreed to expedited arbitral proceedings that can further reduce the average time. See Sandver, Blaine, & Woyar, Time and Cost Savings through Expedited Arbitration Procedures, 36 Arb. J.(n. s.) 11 (Dec. 1981).

difficulty and expense of collecting from the employer."[5] *Czosek* reassured unions that they would not be forced to pay damages "for which the employer is wholly *or partly* responsible." 397 U. S., at 28–29 (emphasis added).

It is true that, under the *Vaca-Czosek* rule, the union may sometimes only have *de minimis* liability, and we unanimously acknowledged this fact in *Electrical Workers* v. *Foust*, 442 U. S. 42, 48, 50 (1979). "[T]he damages a union will be forced to pay in a typical unfair representation suit are minimal; under *Vaca*'s apportionment formula, the bulk of the award will be paid by the employer, the perpetrator of the wrongful discharge, in a parallel § 301 action." *Id.*, at 57 (BLACKMUN, J., concurring in result, joined by BURGER, C. J., and REHNQUIST and STEVENS, JJ.). The *Foust* majority nevertheless reaffirmed *Vaca* and, moreover, further insulated unions from liability by holding that punitive damages could not be assessed in an action for breach of the duty of fair representation. In reaching these conclusions, the Court relied on the policy of affording individual employees redress for injuries caused by union misconduct without compromising the collective interests of union members in protecting limited union funds. As in *Vaca*, considerations of deterrence were deemed insufficient to risk endangering union "financial stability." 442 U. S., at 50–51.[6]

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[5] *Czosek* arose under the Railway Labor Act (RLA), 45 U. S. C. § 151 *et seq.* (1976 ed. and Supp. IV), which permits an employee whose union fails to process his grievance to press it himself. §§ 153 First (i), (j) (1976 ed., Supp. IV). The Court seeks to limit *Czosek* to the RLA context, on the theory that, because the employee in *Czosek* could have filed a grievance without union assistance, the union's default in that case did not "increase the damages that the employer otherwise would have had to pay." *Ante*, at 228–230. However, the *Czosek* opinion nowhere suggests that this distinction is relevant, and it cites only *Vaca* in support of its finding on this point. We reaffirmed in *Electrical Workers* v. *Foust*, 442 U. S. 42, 50, n. 13 (1979), that the *Czosek* rule was an application of "*Vaca*'s apportionment principle."

[6] Even though *Foust* requires that punitive damages not be assessed against a union, the *Vaca* rule nevertheless provides for a credible deterrent against wrongful union conduct. Attorney's fees and other litigation

II

Our precedents notwithstanding, the Court today abandons the *Vaca* rationale and holds that a union's breach of duty does far more than simply remove the exhaustion defense in an employee's § 301 suit against his employer. The union's breach, even if totally unrelated to the employer's decision to terminate the employee, now serves to insulate the employer from further backpay liability, as of the hypothetical arbitration date, even though the employer, unlike the union, can stop backpay accretion at any moment it desires, simply by reinstating the discharged employee.

It cannot be denied that, contrary to *Vaca* and its progeny, under the Court's new rule, the "bulk of the award" for backpay in a hybrid § 301/breach-of-duty suit will have to be borne by the union, not the employer. In the present case, for example, the jury, which was instructed in accordance with the Court's new test, assessed $30,000 in compensatory damages against the union, and only $17,000 against the employer. The union should well consider itself fortunate that this dispute proceeded to trial less than three years after the cessation of petitioner Bowen's employment. Most of the cases of this nature that have been reviewed by this Court have taken the better part of a decade to run their course.[7]

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expenses have been assessed as damages against unions, because such damages measure the extent by which the union's breach of duty adds to the difficulty and expense of collecting from the employer. See, *e. g.*, *Seymour* v. *Olin Corp.*, 666 F. 2d, at 215; *Scott* v. *Teamsters Local 377*, 548 F. 2d 1244 (CA6), cert. denied, 431 U. S. 968 (1977).

[7] See, *e. g.*, *Clayton* v. *ITT Gilfillan*, 623 F. 2d 563, 565 (CA9 1980), rev'd in part *sub nom. Clayton* v. *Automobile Workers*, 451 U. S. 679 (1981) (discharge in February 1975; we remand for trial in May 1981); *Electrical Workers* v. *Foust*, *supra*, at 43–45 (discharge in February 1971; trial in May 1976; Court of Appeals' judgment in 1978; this Court rules in 1979); *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S., at 556–559 (discharges in 1967; District Court grants summary judgment in 1973; we remand for trial in March 1976); *Czosek* v. *O'Mara*, 397 U. S., at 26 (discharge in 1962; we remand for trial in February 1970); *Vaca* v. *Sipes*, 386 U. S., at 175–176 (discharge in January 1960; trial begins in June 1964).

Because the hypothetical arbitration date will usually be less than one year after the discharge, see n. 4, *supra*, it is readily apparent that, under the Court's rule, in many cases the union will be subject to large liability, far greater than that of the employer, the extent of which will not be in any way related to the union's comparative culpability. Nor will the union have any readily apparent way to limit its constantly increasing liability.[8]

Bowen and the Postal Service argue that the employer is not the "cause" of an employee's lost earnings after the date on which an arbitral decision would have reinstated or otherwise compensated the employee. In the "but for" sense, of course, this is patently false, as the Court concedes. *Ante*, at 223. But for the employer's breach of contract, there would be no occasion for *anyone* to reimburse the plaintiff for lost wages accumulated either before or after a hypothetical arbitration. Furthermore, the consequences of the breach—the discharge without cause—continue to accumulate as long as the employer refuses to reinstate. The union's failure to arbitrate does not make the discharge and the refusal to reinstate any less wrongful.

Thus, there is no reason why the matter should not be governed by the traditional rule of contract law that a breaching defendant must pay damages equivalent to the total harm suffered, "even though there were contributing factors other than his own conduct." 5 A. Corbin, Contracts § 999 (1964). The plaintiff need not show the proportionate part played by the defendant's breach of contract among all the contributing factors causing the injury, and his loss need not be "segregated proportionately." *Ibid.* We followed this rule in *Czosek*, when we determined that an employer must pay the damages if it is "wholly or partly" responsible for the

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[8] While remaining disturbingly vague about the point, the Court at least concedes that a union may shift some or all backpay responsibility back to the employer by "bring[ing] its default to the employer's attention." *Ante*, at 227, n. 15.

plaintiff-employee's loss. 397 U. S., at 29. Even if the union did not stop the employer from persisting in its breach of contract, as it might have done, conduct of this nature is hardly sufficient to exonerate the employer.

It bears reemphasizing that both before and after the hypothetical arbitration date, the union did not in any way prevent the employer from reinstating Bowen, and that the employer could reinstate him. Under these circumstances, it is bizarre to hold, as the Court does, that the relatively impotent union is *exclusively* liable for the bulk of the backpay. The Court, in effect, sustains the employer's protest to the union that "you should be liable for all damages flowing from my wrong from and after a certain time, because you should have caught and rectified my wrong by that time." *Seymour* v. *Olin Corp.*, 666 F. 2d 202, 215 (CA5 1982). The employer's wrongful conduct clearly was the generating cause of Bowen's loss, and only the employer had the continuing ability to right the wrong and limit liability by reinstating Bowen. The employer has the sole duty to pay wages, and it should be responsible for all back wages to which Bowen is entitled.

The Court finds that its apportionment rule is "consistent with the union's commitment to the employer under the arbitration clause" of the collective-bargaining agreement. *Ante*, at 227–228. However, the Court in no way identifies a legitimate source of the union's "commitment under the arbitration clause" that it will bear exclusive liability for post-arbitration-date backpay. The Court's finding is grounded on the assumption that the collective-bargaining agreement somehow entitles the employer to rely on the union to bring any wrongful discharge to its attention within the context of the grievance machinery. But the typical collective agreement, including the one here, contains no language entitling the employer to such reliance. The agreement gives the union the *right* to raise grievances, but it does not *obligate* it to do so. And, most assuredly, the agreement in no way ex-

pressly or impliedly grants the employer any rights against the union if the union fails to bring a meritorious grievance to its attention.

Indeed, it is only the union's *statutory* duty—implied by the judiciary[9]—to *employees* to provide them with fair representation that in any way obliges the union to take certain grievances to the employer for consideration. The duty of fair representation obliges a union "to make an honest effort to serve the interests of all [bargaining unit] members" fairly and impartially. *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 337 (1953); *Wallace Corp.* v. *NLRB*, 323 U. S. 248, 255 (1944); *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 202–203 (1944). It serves as a "bulwark to prevent arbitrary union conduct *against individuals* stripped of traditional forms of redress by the provisions of federal labor law." *Vaca*, 386 U. S., at 182 (emphasis added). The union owes this duty of fair representation to the employees it represents—the duty does not run to the employer, and the Court does not contend otherwise.

Accordingly, neither the collective-bargaining agreement nor the union's duty of fair representation provides any support for the Court's conclusion that the union has somehow committed itself to protect the employer, and that the employer has the right to rely on the union to cut off its liability. Contrary to our past cases construing the federal labor law, the Court in effect reads an indemnification provision into the collective-bargaining agreement, even though the employer can and more properly should be required to bargain for such

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[9] Although no statute expressly imposes a duty of fair representation upon unions, we have held, beginning with *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944), that "the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca*, 386 U. S., at 177. See generally Aaron, The Duty of Fair Representation: An Overview, in The Duty of Fair Representation 8 (J. McKelvey ed. 1977).

a provision, if desired.[10] It is a basic tenet of national labor policy that "when neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract." *United Mine Workers Health & Retirement Funds* v. *Robinson*, 455 U. S. 562, 576 (1982). See also *Carbon Fuel Co.* v. *Mine Workers*, 444 U. S. 212, 218–219 (1979); *Porter Co.* v. *NLRB*, 397 U. S. 99, 108 (1970).[11]

The Court also contends, *ante*, at 226–227, that its rule will better enable grievance procedures to provide the uniform and exclusive method for the orderly settlement of employee grievances, because a contrary rule "could well affect the willingness of employers to agree to arbitration clauses as they are customarily written." Why the Court's rule will not "affect the willingness" of *unions* to agree to such clauses is left unexplained. More importantly, since the practical consequence of today's holding is that unions will take many unmeritorious grievances to arbitration simply to avoid expo-

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[10] See Edwards, Employers' Liability for Union Unfair Representation: Fiduciary Duty or Bargaining Reality?, 27 Lab. L. J. 686, 691–692 (1976).

[11] The Court correctly reaffirms, *ante*, at 224, that a collective-bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 578 (1960). This means that "[g]aps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement," because "[m]any of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators." *Id.*, at 580–581. The Court does not suggest that the union is obliged by any "industry practice" to protect the employer from backpay liability, or that such an obligation can be inferred in any other way from the "gaps" in the agreement. The Court's holding therefore inserts a new substantive term into the agreement, which is precisely what we have forbidden the lower courts to do in our previous holdings. The Court's mere belief that an employer "should" be able to rely on the union because there is "no unfairness to the union in this approach," *ante*, at 226, is not a valid justification for the holding.

sure to the new breach-of-duty liability, the Court's rule actually impairs the ability of the grievance machinery to provide for orderly dispute resolution.

I thus cannot agree with the Court's judgment imposing backpay liability on the union. Lost wages are among the "natural consequences," *Vaca*, *supra*, at 186, of an employer's wrongful discharge of an employee. Precedent, equity, and national labor policy do not impose on the union primary responsibility for all backpay accruing after its failure to arbitrate.[12]

III

There are at least two situations in which a union should bear some liability for backpay. First, as recognized in *Vaca*, the union and the employer may be jointly and severally liable where the union has affirmatively induced the employer to commit the alleged breach of contract. 386 U. S., at 197, n. 18. Second, even in a case such as this one, in which the union is not responsible for the discharge, the union should be secondarily liable. That is, if, due to a breach of duty by his union, an employee is unable to collect the backpay to which he is entitled from his employer, the entity primarily liable, he should then be entitled to collect from the union.[13]

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[12] The Court asserts, *ante*, at 227, n. 15, that the view advanced in this dissent would allow the union and the employee "to agree to a settlement pursuant to which the union would acknowledge a breach of its duty of fair representation in exchange for the employee's undertaking to look to his employer for his entire recovery." I seriously doubt, however, that a union will lightly "concede" a breach of its fair-representation duty to bargaining unit employees, particularly since it may be liable for the plaintiff's costs of collection, including attorney's fees in not inconsiderable amounts. See n. 6, *supra*. Furthermore, the Court's position, by exposing the union to even greater liability, may well exert correspondingly greater pressure on the union to settle, with or without an acknowledgment of breach of duty, leaving the employer to defend the action alone.

[13] The Court takes the exact opposite tack. It holds that the union is primarily responsible for post-hypothetical-arbitration-date backpay, and that the employer is secondarily liable for this amount. *Ante*, at 223, n. 12.

This rule of primary and secondary liability prevails in the law of trusts, and should be equally applicable in the present context.[14] Just as an individual employee may bring a suit for breach of contract against his employer if, but only if, the union has breached its duty of fair representation in determining not to pursue the grievance on the employee's behalf, a trust beneficiary may sue to enforce a contract entered into on his behalf by the trustee if, but only if, the trustee "improperly refuses or neglects to bring an action against the third person." Restatement (Second) of Trusts § 282(2) (1959); G. Bogert & G. Bogert, Law of Trusts and Trustees § 869 (2d ed. 1982); 4 A. Scott, Law of Trusts § 282.1 (3d ed. 1967). If the beneficiary is able to collect in full from the primary obligor, the trustee should not be monetarily liable. See, *e. g.*, *Pollard* v. *Pollard*, 166 Cal. App. 2d 698, 701, 333 P. 2d 356, 357 (1959). However, the trustee must pay if his wrongful action causes a loss to the beneficiary, such as where the claim was originally enforceable, but the obligor has become insolvent, or where the claim has become barred by the statute of limitations. 2 Scott, *supra*, § 177.

The Court of Appeals for the Fourth Circuit correctly applied a similar rule in the labor context in *Harrison* v. *United Transportation Union*, 530 F. 2d 558 (1975), cert. denied, 425 U. S. 958 (1976). In that case, the plaintiff-employee's union breached its duty of fair representation by allowing the plaintiff's claim against the employer to become time-barred. The court held that, under these circumstances, the union should be responsible for the lost wages the plaintiff might have recovered from the employer but for the union's mis-

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[14] It is not always proper to import common-law principles into federal labor law. See *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 120–129 (1944). In the present context, however, the trust analogy appears to be appropriate. See Cox, Rights under a Labor Agreement, 69 Harv. L. Rev. 601, 652 (1956); *Jenkins* v. *Wm. Schluderberg-T. J. Kurdle Co.*, 217 Md. 556, 559–560, 144 A. 2d 88, 90 (1958).

conduct. 530 F. 2d, at 562. See also *Nedd* v. *United Mine Workers of America*, 400 F. 2d 103, 106–107 (CA3 1968).

No such exception to the rule I would apply is applicable in this case. The union did not incite Bowen's discharge, and Bowen is able to recover in full from the Postal Service. Therefore, I would affirm the judgment of the Court of Appeals to the extent that it holds the union not liable for the backpay to which Bowen is entitled.

IV

I disagree with the Court of Appeals, however, to the extent that it holds the Service not liable for the $30,000 assessed by the District Court against the union, thus precluding Bowen from recovering this amount from either defendant. The parties stipulated that Bowen lost approximately $47,000 in wages prior to trial.[15] The District Court, based upon the jury's special verdict,[16] found the employer liable for $17,000 of these damages, and the union liable for the remainder. Although the Court of Appeals held that Bowen's lost earnings were an exclusive obligation of the Service, the court, in a footnote belatedly added to its opinion, refused to amend the judgment and assess the Service for the $30,000 that the District Court erroneously charged against the union. This was done on the erroneous ground that Bowen did not file a cross-appeal against the Postal Service for the $30,000. 642 F. 2d 79, 82, n. 6 (CA4 1981).

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[15] The parties stipulated that Bowen lost $45,389.87 in back wages and fringe benefits from the time of discharge until trial. 3 Record 315. Bowen's counsel misstated this figure as $47,000 in his closing argument, and the jury apparently acted on this basis. *Id.*, at 550. No party has complained of the $1,610.13 discrepancy.

[16] The union timely objected to the District Court's instructions to the extent they allowed the jury to apportion *any* compensatory damages to the union. *Id.*, at 611–612. The union renewed its objection in its motion for judgment notwithstanding the verdict, or in the alternative to alter or amend the judgment. 1 Record, Item 37, ¶ 2. The Court quotes the relevant material. See *ante*, at 215, n. 3.

The purport of *Vaca* v. *Sipes* is to provide employees with effective remedies to make them whole. 386 U. S., at 185–186. See *Electrical Workers* v. *Foust*, 442 U. S., at 48–49; *id.*, at 54 (BLACKMUN, J., concurring in result). The footnote added by the Court of Appeals had exactly the opposite effect: it deprived Bowen of his full recovery and did so in a procedurally questionable manner. The Court of Appeals found no infirmity in the total quantum of the District Court's judgment in Bowen's favor. It reversed only that aspect of the judgment that was of no real concern to Bowen, the apportionment of the burden of the award between the union and the Postal Service. Yet the Court of Appeals frustrated Bowen's entitlement to complete recovery by holding that Bowen's failure to appeal prevented the reopening of the award against the Postal Service.

Bowen had no cause to challenge this judgment. Under the law, he had no right to a joint and several liability award against the defendants. Because the "Union played no part in [the Postal Service's] alleged breach of contract and since [the Postal Service] took no part in the Union's alleged breach of duty, joint liability for either wrong would be unwarranted." *Vaca* v. *Sipes*, 386 U. S., at 197, n. 18. Thus, from Bowen's standpoint, apart from collectibility, the legal effect of the judgment could not have been improved. Whether or not he had some technical basis for appealing a judgment in his favor, neither the facts of this case nor the concerns of national labor policy required him to appeal to protect his judgment. To rule otherwise would impose upon appellate courts the burden of additional appeals from favorable decisions prosecuted by litigants attempting to insulate their judgments from actions like that taken here by the Court of Appeals. In this respect, the Court and I are in agreement. See *ante*, at 217–218, n. 7.

Accordingly, I would affirm the Court of Appeals' judgment that the union was not liable for backpay damages, but I would reverse the remainder of the judgment and remand

the case with instructions that the District Court be directed to enter judgment against the Postal Service for the entire amount of Bowen's backpay loss.

JUSTICE REHNQUIST, dissenting.

I have joined Parts I, II, and III of JUSTICE WHITE's opinion. However I have some doubt about the proposition advanced by Part IV of that opinion and by the Court, *ante*, at 217–218, n. 7.

The District Court entered judgment for Bowen in the amount of $52,954. It apportioned $30,000 of this amount against the Union, and $22,954 against the Postal Service. When it reversed the judgment against the Union, the Court of Appeals declined to increase the award against the Postal Service or to remand for a new trial. Because this Court has reversed the judgment of the Court of Appeals, its assertion that Bowen "should not have been deprived of the full amount of his compensatory damages because of his failure to cross-appeal," *ante*, at 218, n. 7, is *dictum*. Although the issue is not before us, I am writing separately to express my doubts about the soundness of this proposition.

The District Court observed that "there is authority suggesting that only the employer is liable for damages in the form of back pay," 470 F. Supp. 1127, 1130 (WD Va. 1979), and the decisions of the Courts of Appeals discussed both in JUSTICE WHITE's opinion and in the Court's opinion show at the very least that there was substantial doubt that a union could be held liable for damages such as those awarded by the District Court. Under these circumstances, Bowen could not reasonably think that he was in the sort of "safe harbor" which the Court's opinion and JUSTICE WHITE's opinion suggest. Appellate courts review judgments, and Bowen's judgment against the Postal Service was for $22,954.

Prudent plaintiff's counsel would have filed a conditional cross-appeal, seeking to increase the amount of that judgment if the Union were held not liable. This is because an "appellee may not attack the decree with a view either to en-

larging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435 (1924).

It is not clear to me, and in light of the Court's disposition of the case I need not decide, whether the Court of Appeals acted properly in refusing to alter the judgment against the Postal Service, or whether it should have remanded to the District Court for further proceedings on the damages issue. It seems to me, however, that the disposition suggested by the Court and by Part IV of JUSTICE WHITE's opinion would permit plaintiffs to "attack" the judgment of the Court of Appeals in a way prohibited by authorities such as *American Railway Express*, *supra*.

PILLSBURY CO. ET AL. *v.* CONBOY

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

No. 81–825. Argued October 6, 1982—Decided January 11, 1983

Title 18 U. S. C. § 6002 provides that "no testimony or other information compelled under the order [of a federal court] (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case." When respondent appeared before a grand jury investigating price-fixing activities in the corrugated container industry, he was granted use immunity pursuant to § 6002 for his testimony. Subsequently, in civil antitrust actions brought in Federal District Court by petitioner purchasers of corrugated containers, respondent appeared, pursuant to a subpoena, for a deposition. At the deposition, questions were read from the transcript of his immunized grand jury testimony and rephrased to include the transcript answer, and then respondent was asked if he had "so testif[ied]" before the grand jury. He refused to answer each question, asserting his Fifth Amendment privilege against self-incrimination. Granting petitioners' motion to compel respondent to answer, the District Court held him in contempt when he continued to claim his privilege. The Court of Appeals reversed, holding that respondent was entitled to assert his Fifth Amendment privilege, since his deposition testimony was not protected under § 6002 but could be used against him in a subsequent criminal action.

Held: A deponent's civil deposition testimony, such as that in question in this case, repeating verbatim or closely tracking his prior immunized testimony, is not, without duly authorized assurance of immunity at the time, immunized testimony within the meaning of § 6002, and therefore may not be compelled over a valid assertion of his Fifth Amendment privilege. Pp. 252–264.

(a) To construe § 6002, as petitioners urge, so as to hold that the grant of immunity compelled respondent to give testimony at the civil deposition that repeats verbatim or closely tracks his prior testimony sweeps further than Congress intended and could hinder the Government's enforcement of its criminal laws by turning use immunity into a form of transactional immunity for subjects examined in the immunized proceeding. Use immunity is intended to immunize and exclude from a subsequent criminal trial only that information to which the Government expressly has surrendered future use. The purpose of § 6002 is to limit the

scope of immunity to a constitutionally required level, as well as to limit the use of immunity to those cases in which the Government determines that gaining the witness' testimony outweighs the loss of the opportunity for criminal prosecution of that witness. Pp. 255–261.

(b) Petitioners' proposed construction of § 6002 also could put the deponent to some risk unless he receives an assurance of immunity or exclusion that the courts cannot properly give. Silence, on the other hand, preserves the deponent's rights and the Government's interests, as well as the judicial resources that otherwise would be required to make the many difficult judgments that petitioners' interpretation of § 6002 would require. Pp. 261–263.

661 F. 2d 1145, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, and REHNQUIST, JJ., joined. MARSHALL, J., filed a concurring opinion, *post*, p. 264. BRENNAN, J., *post*, p. 271, and BLACKMUN, J., *post*, p. 272, filed opinions concurring in the judgment. STEVENS, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 282.

Francis J. McConnell argued the cause for petitioners. With him on the briefs was *Edward F. Ruberry*.

Michael W. Coffield argued the cause for respondent. With him on the brief was *Kevin M. Flynn*.*

JUSTICE POWELL delivered the opinion of the Court.

Pursuant to the federal use immunity provisions, 18 U. S. C. §§ 6001–6005, a United States Attorney may request an order from a federal court compelling a witness to testify even though he has asserted his privilege against self-incrimination. Section 6002 provides, however, that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . . ." The issue presented in this case is whether a deponent's civil deposition testimony, repeating

**Jerry G. Hill* and *Frank V. Ghiselli, Jr.*, filed a brief for Philip L. Barnum et al. as *amici curiae* urging affirmance.

Harold F. Baker, Alan Wiseman, and *Ann I. Killilea* filed a brief for Mead Corp. as *amicus curiae*.

verbatim or closely tracking his prior immunized testimony, is immunized "testimony" that can be compelled over the valid assertion of his Fifth Amendment privilege.

I

Respondent John Conboy is a former executive of a defendant in *In re Corrugated Container Antitrust Litigation*, M. D. L. 310 (SD Tex.). In January 1978, United States Department of Justice attorneys interviewed Conboy following a promise of use immunity. Conboy subsequently appeared before a grand jury investigating price-fixing activities and, pursuant to 18 U. S. C. § 6002, was granted formal use immunity for his testimony.

Following the criminal indictment of several companies, numerous civil antitrust actions were filed in various United States District Courts. Those actions were consolidated for discovery in the District Court for the Southern District of Texas. Petitioners here are purchasers of corrugated containers who elected to opt out of the class-action proceedings and pursue their own causes of action against manufacturers. The District Court ordered that portions of the immunized Government interview and grand jury testimony of certain witnesses, including that of Conboy, be made available to lawyers for the class and opt-outs.[1]

Pursuant to a subpoena issued by the District Court for the Northern District of Illinois, Conboy appeared in Chicago for a deposition at which he, his counsel, and petitioners' counsel had copies of his immunized testimony. The transcripts were marked as deposition exhibits so that all could follow the intended examination. The questioning fell into the following pattern: a question was read from the transcript; it then was rephrased to include the transcript answer (*i. e.*,

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[1] The propriety of the District Court's release of grand jury materials to the civil parties is not before the Court.

"Is it not the fact that . . ."); finally, Conboy was asked if he had "so testif[ied]" in his immunized interview and grand jury examination.[2] Conboy refused to answer each question, asserting his Fifth Amendment privilege against self-incrimination.

The District Court granted petitioners' motion to compel Conboy to answer the questions.[3] When Conboy continued to claim his privilege, the District Court held him in contempt, but stayed its order pending appeal. A panel of the Court of Appeals for the Seventh Circuit affirmed the contempt order, holding that, "[b]ecause the questions asked in this deposition were taken verbatim from or closely tracked the transcript of Conboy's grand jury testimony, we believe that his answers at the deposition would be 'derived from' the prior immunized [testimony] and therefore unavailable for use in any subsequent criminal prosecution." *In re Corrugated Container Antitrust Litigation, Appeal of Conboy*, 655 F. 2d 748, 751 (1981).

On rehearing en banc, the Court of Appeals reversed the District Court. 661 F. 2d 1145 (1981). It first determined that Conboy's alleged fear of prosecution was more than "fanciful," *id.*, at 1152, and that Conboy therefore was entitled to assert his Fifth Amendment privilege unless his deposition

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[2] An example of this three-question pattern is as follows:

"Q. Who did you have price communications with at Alton Box Board?

. . . . . .

"Q. Is it not the fact that you had price communications with Fred Renshaw and Dick Herman . . . ?

. . . . . .

"Q. Did you not so testify in your government interview statement of January 10, 1978?" App. 29–31.

[3] Chief Judge John V. Singleton, Jr., of the District Court for the Southern District of Texas expressly exercised the powers of the District Court for the Northern District of Illinois pursuant to 28 U. S. C. § 1407(b). The contempt hearing was conducted by telephone with his chambers in Houston.

testimony could not be used against him in a subsequent criminal action, see *id.*, at 1153.[4] The court then held that under § 6002, absent a separate and independent grant of immunity,[5] a deponent's civil deposition testimony that repeats verbatim or closely tracks his prior immunized testimony is not protected. While acknowledging that verbatim questions "of course [would be] derived" from the immunized testimony, the court reasoned that the answers to such questions "are derived from the deponent's *current*, independent memory of events" and thus "necessarily create a *new* source of evidence" that could be used in a subsequent criminal prosecution against Conboy. *Id.*, at 1155 (emphasis in original).

We granted certiorari to resolve the conflict in the Courts of Appeals,[6] 454 U. S. 1141 (1982), and now affirm.

II

It is settled that government must have the power to compel testimony "to secure information necessary for effective law enforcement." *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 79 (1964).[7] For many years, however, a person who was compelled to testify under a grant of governmental

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[4] The correctness of the Court of Appeals' conclusion that Conboy could assert a Fifth Amendment privilege, absent some immunity, is not before us.

[5] A United States Attorney declined to authorize immunity grants in connection with the civil depositions here.

[6] Compare *In re Corrugated Container Antitrust Litigation, Appeal of Fleischacker*, 644 F. 2d 70, 75 (CA2 1981) (deposition answers immunized), and *Little Rock School District* v. *Borden, Inc.*, 632 F. 2d 700, 705 (CA8 1980) (same), with *In re Corrugated Container Anti-Trust Litigation, Appeal of Franey*, 620 F. 2d 1086, 1095 (CA5 1980) (answers not immunized), cert. denied, 449 U. S. 1102 (1981).

[7] *See United States* v. *Calandra*, 414 U. S. 338, 345 (1974); *United States* v. *Mara*, 410 U. S. 19, 41 (1973) (MARSHALL, J., dissenting); *Kastigar* v. *United States*, 406 U. S. 441, 443–444 (1972); *Murphy*, 378 U. S., at 93–94 (WHITE, J., concurring); *Blackmer* v. *United States*, 284 U. S. 421, 438 (1932); *Blair* v. *United States*, 250 U. S. 273, 281 (1919); *Brown* v. *Walker*, 161 U. S. 591, 600 (1896).

immunity could not be prosecuted for any conduct about which he had testified. See *New Jersey* v. *Portash*, 440 U. S. 450, 457 (1979). Prosecutors therefore were reluctant to grant such "transactional" immunity to potential targets of criminal investigations. See S. Rep. No. 91–617, p. 53 (1969).

The "major purpose" of the Organized Crime Control Act of 1970, Pub. L. 91–452, 84 Stat. 922, of which § 6002 was a key provision, was "to provide the criminal justice system with the necessary legal tools to . . . strengthe[n] the evidence gathering process and insur[e] that the evidence will then be available and admissible at trial." 116 Cong. Rec. 35200 (1970) (statement of Rep. St Germain). Congress sought to make the grant of immunity more useful for law enforcement officers through two specific changes. First, Congress made the grant of immunity less expansive[8] by repealing the authority for transactional immunity and providing for the less comprehensive use immunity authorized in § 6002.[9] Second, Congress gave certain officials in

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[8] In *Murphy*, JUSTICE WHITE stated that "[i]mmunity must be as broad as, but not harmfully and wastefully broader than, the privilege against self-incrimination." 378 U. S., at 107 (concurring opinion) (quoted with approval in 116 Cong. Rec. 35291 (1970) (statement of Rep. Poff)). In its Committee Report, the House explained that § 6002 was not to provide an "immunity bath," but was to be "no broader than" the Fifth Amendment privilege. H. R. Rep. No. 91–1549, p. 42 (1970).

[9] Section 6002 provides:

"Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

"(1) a court or grand jury of the United States,

"(2) an agency of the United States, or

"(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information

the Department of Justice[10] exclusive authority to grant immunities.[11]

The Court upheld the constitutionality of the use immunity statute in *Kastigar* v. *United States*, 406 U. S. 441 (1972). The power to compel testimony is limited by the Fifth Amendment, and we held that any grant of immunity must be coextensive with the privilege. We were satisfied, how-

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directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

Section 6001(2) defines "other information" to include "any book, paper, document, record, recording, or other material."

[10] Section 6003 states:

"(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

"(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

"(1) the testimony or other information from such individual may be necessary to the public interest; and

"(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination."

[11] Congress foresaw the courts as playing only a minor role in the immunizing process: "The court's role in granting the order is merely to find the facts on which the order is predicated." H. R. Rep. No. 91–1549, *supra*, at 43; H. R. Rep. No. 91–1188, p. 13 (1970). See 116 Cong. Rec. 35291 (1970) (statement of Rep. Poff). Cf. President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 141 (1967) (recommending that "[i]mmunity should be granted only with the prior approval of the jurisdiction's chief prosecuting officer").

ever, that § 6002 provided this measure of protection and thus "removed the dangers against which the privilege protects." *Id.*, at 449. In rejecting the argument that use and derivative-use immunity would not adequately protect a witness from various incriminating uses of the compelled testimony, we emphasized that "[t]he statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom . . . ." *Id.*, at 460. We added that once a defendant establishes that he has testified under a grant of immunity, "the prosecution [has] the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Ibid.* Thus, "immunity from use and derivative use 'leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege' in the absence of a grant of immunity." *Id.*, at 458–459 (quoting *Murphy*, 378 U. S., at 79).

III

With the foregoing statutory history and relevant principles in mind, we turn now to this case. It is not disputed that the *questions* asked of Conboy were directly or indirectly derived from his immunized testimony. The issue as presented to us is whether the causal connection between the questions and the answers is so direct that the *answers* also are derived from that testimony and therefore should be excluded under the grant of immunity.

Petitioners' argument is based on the language of § 6002 and on a common understanding of the words "derived from." The questions formulated on the basis of immunized testimony are clearly "derived from" the prior testimony. Thus, the answers that repeat verbatim or closely track a deponent's testimony are necessarily also "derived from" and "tainted by" such testimony. Petitioners therefore find no basis for the distinction made by the Court of Appeals between questions and answers responsive to those same ques-

tions. An answer by its very nature is evoked by and responds to information contained in a question.

Conboy's position is also straightforward: Questions do not incriminate; answers do. Unlike the questions, answers are not directly or indirectly derived from the immunized grand jury or interview transcripts, but from the deponent's current, independent memory of events. Even when a deponent's deposition answers are identical to those he gave to the grand jury, he is under oath to tell the truth, not necessarily as he told it before the grand jury, but as he knows it now. Each new statement of the deponent creates a new "source." In sum, the initial grant of immunity does not prevent the prosecutor from prosecuting; it merely limits his sources of evidence.

Although the parties make their arguments in terms tracking those of the statute—whether the deposition testimony is "derived from" the prior testimony—it is clear that the crux of their dispute is whether the earlier grant of immunity itself compelled Conboy to talk.[12] Petitioners contend that the prior grant of immunity *already* had supplanted Conboy's Fifth Amendment privilege at the time of the civil deposition. Petitioners would limit this immunity, of course, to testimony that "closely tracks" his prior immunized testimony. It is argued that this would not threaten the Government's need for admissible evidence or the individual's interest in avoiding self-incrimination. In the absence of such a threat, admissible evidence should be available to civil antitrust plaintiffs. But we cannot accept the assumptions upon which petitioners' conclusion rests. In our view, a District Court cannot compel Conboy to answer deposition questions over a

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[12] See Brief for Petitioners 9 ("Conboy had no Fifth Amendment privilege to assert because of the coextensive protection provided by the immunity statute"); Reply Brief for Petitioners 12 ("[R]equiring a witness to answer questions a second time that were previously answered under a grant of immunity does not result in an expansion of the original immunity grant").

valid assertion of his Fifth Amendment right, absent a duly authorized assurance of immunity at the time.[13]

We note at the outset that although there may be practical reasons for not testifying,[14] as far as the deponent's Fifth Amendment right is concerned he should be indifferent between the protection afforded by silence and that afforded by immunity. A deponent's primary interest is that the protection be certain. The Government's interest, however, may be affected seriously by whether the deponent relies at the civil deposition on his Fifth Amendment privilege or on his prior grant of immunity. With due recognition of petition-

[13] JUSTICE BLACKMUN, concurring in the Court's judgment, assumes that Conboy had a *right* to remain silent at the deposition, which by definition assumes the immunity order itself does not compel a witness to testify at a civil deposition. He discusses the "fruits" doctrine where a witness' testimony at a deposition is "an independent act of free will" and concludes that "had Conboy answered the deposition questions, his testimony would not have been protected by the original immunity grant . . . ." *Post*, at 280. We have no occasion to address this hypothetical. The issue is whether Conboy can be compelled to testify—*i. e.*, whether the immunity order compels him to track his prior testimony at the civil deposition—over the assertion of his Fifth Amendment rights. If, as we conclude, the original grant of immunity does not extend to the subsequent civil proceeding, then the trial judge lacks authority to compel Conboy to testify over the assertion of his Fifth Amendment privilege. This is so irrespective of whether, had he testified at the deposition rather than asserting the privilege, his answers could have been admitted against him at a criminal trial. We therefore need not now decide the extent to which civil deposition testimony, freely given by a witness in Conboy's position, is "directly or indirectly derived" from prior grand jury testimony.

As JUSTICE BLACKMUN's opinion makes a factual analysis under the "fruits" doctrine, it appears to leave open the possibility that the outcome in a subsequent criminal prosecution of the deponent may be different in a future case because of differences in the factual record. He nevertheless concludes, as do we, that district courts are without power to compel a civil deponent to testify over a valid assertion of his Fifth Amendment right, absent a separate grant of immunity pursuant to § 6002.

[14] Besides the costs of testifying against close associates, any witness increases the risk of committing perjury the more he talks. Cf. 18 U. S. C. § 6002 (perjured testimony not immunized).

ers' need for admissible evidence, our inquiry then is whether this need can be met without jeopardizing the Government's interest in limiting the scope of an immunity grant or encroaching upon the deponent's certainty of protection.

A

Questions taken verbatim from a transcript of immunized testimony could evoke one of several responses from a deponent: (i) he could repeat or adopt his immunized answer;[15] (ii) he could affirm that the transcript of his immunized answers accurately reflects his prior testimony; (iii) he could recall additional information responsive to the question but not disclosed in his immune testimony; or (iv) he could disclose information that is not responsive to the question. Petitioners do not contend, nor could they, that the prior grant of use immunity affords protection for *all* self-incriminating information disclosed by the immunized witness on *any* occasion after the giving of the immunized testimony. Rather, petitioners argue that only the first three responses would be "derived from" his immune testimony and therefore would be unavailable for use against the deponent in any subsequent criminal prosecution.

Petitioners' premise is that the deposition of Conboy is designed not to discover new information,[16] but to obtain evi-

[15] The extreme case would be where petitioners read the entire immunized grand jury transcript; then ask the witness if that is his testimony; and he answers simply "Yes."

[16] Direct examination may not be as limited as petitioners assume. The District Court's civil contempt order stated that the questions asked in the deposition "were taken directly" from the immunized transcripts, but did not define exactly what deposition questions petitioners could ask. Other Courts of Appeals have permitted direct questioning to go beyond mere restatements of the prior testimony. See *In re Corrugated Container Antitrust Litigation, Appeal of Fleischacker*, 644 F. 2d, at 79 (compelling answers to questions "concerning specific subjects that actually were touched upon by questions appearing in the transcript of the immunized testimony"); *Little Rock School District* v. *Borden, Inc.*, 632 F. 2d, at 705 (compelling answers as long as deposition questions confined to " 'the same

dence that simply repeats the statements in the immunized transcript.[17] Because there will be little opportunity for the grant of immunity to sweep in statements on direct examination that the Government did not intend to immunize, or for the deponent to give responses that may fall outside of the grant of immunity and later be used against him in a subsequent criminal prosecution, petitioners argue that Conboy's deposition will yield only a carbon copy of the grand jury transcript. In such a situation, it would be desirable for civil plaintiffs, particularly those bringing private suits that supplement the criminal enforcement of the federal antitrust laws, to have access to the available, probative information.

But even if the direct examination is limited to the questions and answers in the immunized transcript, there remains the right of cross-examination,[18] a right traditionally relied upon expansively to test credibility as well as to seek the truth. Petitioners recognize this problem, but maintain that the antitrust defendants "would be entitled to test the accu-

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time, geographical and substantive frame work as the [witness' immunized] grand jury testimony' ") (quoting *Appeal of Starkey*, 600 F. 2d 1043, 1048 (CA8 1979)). The dissenting opinion of JUSTICE STEVENS apparently does not attempt to indicate when questioning will exceed proper limits.

[17] For purposes of this case, we assume that the grand jury transcripts are inadmissible as evidence in a civil trial because the testimony is not subject to cross-examination. Cf. Fed. Rule Evid. 803(8) (hearsay exception for certain public records); Fed. Rule Evid. 804(a)(1) (witness unavailable when exempted from testifying on ground of privilege); Fed. Rule Evid. 804(b)(1) (former testimony admissible when witness unavailable *and* the party against whom the testimony is now offered had an opportunity for cross-examination).

[18] Cf. Fed. Rule Civ. Proc. 26(b)(1) (stating that depositions may be taken "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence"); Fed. Rule Civ. Proc. 30(c) (allowing cross-examination at depositions); Fed. Rule Civ. Proc. 32(a) (deposition "admissible under the rules of evidence applied as though the witness were then present and testifying"); Fed. Rule Evid. 804(b)(1) (deposition admissible if the party against whom the testimony is now offered in a civil action had an opportunity to develop testimony by cross-examination).

racy and truthfulness of Conboy's repeated immunized testimony without going beyond the confines of that testimony." Reply Brief for Petitioners 14–15. Regardless of any limitations that may be imposed on its scope,[19] however, cross-examination is intended to and often will produce information not elicited on direct. We must assume that, to produce admissible evidence, the scope of cross-examination at the deposition cannot easily be limited to the immunized testimony. This assumption implicates both the Government's and the individual's interests embodied in § 6002.

B

Use immunity was intended to immunize and exclude from a subsequent criminal trial only that information to which the Government expressly has surrendered future use. If the Government is engaged in an ongoing investigation of the particular activity at issue, immunizing new information (*e. g.*, the answers to questions in a case like this one) may make it more difficult to show in a subsequent prosecution that similar information was obtained from wholly independent sources. If a district court were to conclude in a subsequent civil proceeding that the prior immunity order extended to civil deposition testimony closely tracking the immunized testimony, it in effect could invest the deponent with transactional immunity on matters about which he testified at the immunized proceedings. This is precisely the kind of immunity Congress intended to prohibit. The purpose of § 6002 was to limit the scope of immunity to the level that is constitutionally required, as well as to limit the use of

[19] See *United States* v. *Cardillo*, 316 F. 2d 606, 611 (CA2 1963) (in determining whether testimony of a witness who invokes the privilege during cross-examination may be used against defendant, court draws a distinction between cases in which the assertion of the privilege merely precludes inquiry into collateral matters that bear on credibility of witnesses and those in which assertion prevents inquiry into matters about which witness testified on direct).

immunity to those cases in which the Attorney General, or officials designated by him, determine that gaining the witness' testimony outweighs the loss of the opportunity for criminal prosecution of that witness.[20]

C

Petitioners' interpretation of § 6002 also places substantial risks on the deponent.[21] Unless the grant of immunity assures a witness that his incriminating testimony will not be used against him in a subsequent criminal prosecution, the witness has not received the certain protection of his Fifth Amendment privilege that he has been forced to exchange. No court has authority to immunize a witness. That responsibility, as we have noted, is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity. See 18 U. S. C. §§ 6002, 6003. Nor should a court, at the time of the civil testimony, predetermine the decision of the court in a subsequent criminal prosecution on the question whether the Government has met its burden of proving that "the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar*, 406 U. S., at 460. Yet in holding Conboy in contempt for his Fifth Amendment silence, the District Court below essentially predicted that a court in any future criminal prosecution of Conboy will be obligated to protect against evidentiary use of the deposition testimony petitioners seek. We do not think such a predictive judgment is enough.

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[20] We need not decide whether United States Attorneys, when designated by the Attorney General, presently have authority to immunize the testimony of a witness in a civil proceeding when the Government determines that the public interest would be served.

[21] None of the tests set forth by Courts of Appeals that have adopted petitioners' interpretation of § 6002 provides deponents with certain guidance as to when they *must* talk and when they must *not*. See n. 16, *supra*.

Petitioners' interpretation of § 6002 imposes risks on the deponent whether or not the deposition testimony properly can be used against him in a subsequent criminal prosecution.[22] Accordingly, the District Court's compulsion order in this case, in the absence of statutory authority or a new grant of immunity by the United States Attorney, cannot be justified by the subsequent exclusion of the compelled testimony. As JUSTICE MARSHALL notes in his concurring opinion: "Whatever justification there may be for requiring a witness to give incriminating testimony in aid of a criminal investigation after the Government has granted use immunity, there is no similar justification for compelling a witness to give incriminating testimony for the benefit of a private litigant when the Government has *not* chosen to grant immunity." *Post*, at 267.

The result of compelling testimony—whether it is immunized or excluded—is that the Government's interests, as well as the witness', suffer. Reliance on judicial exclusion of nonimmunized testimony would be inconsistent with the congressional policy of leaving the granting of immunity to the Executive Branch.

As the Court stated in *Maness* v. *Meyers*, 419 U. S. 449 (1975), compelling a witness to testify in "reliance upon a later objection or motion to suppress would 'let the cat out' with no assurance whatever of putting it back." *Id.*, at 463. We believe Conboy acted properly in maintaining his silence in the face of the District Court's compulsion order and by testing the validity of his privilege on appeal.

IV

This Court has emphasized the importance of the private action as a means of furthering the policy goals of certain fed-

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[22] Cf. *post*, at 268 (MARSHALL, J., concurring) ("Further incriminating evidence that is derived from compelled testimony cannot always be traced back to its source"); n. 14, *supra* (increasing risk of harm and perjury); n. 23, *infra* (increasing exposure to civil liability).

eral regulatory statutes, including the federal antitrust laws. See, *e. g.*, *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 139 (1968); *United States* v. *Borden Co.*, 347 U. S. 514, 518–519 (1954). But private civil actions can only supplement, not supplant, the primary responsibility of government. Petitioners' proposed construction of § 6002 sweeps further than Congress intended and could hinder governmental enforcement of its criminal laws by turning use immunity into a form of transactional immunity for subjects examined in the immunized proceeding. It also puts the deponent in some danger of criminal prosecution unless he receives an assurance of immunity or exclusion that the courts cannot properly give. Silence, on the other hand, preserves the deponent's rights and the Government's interests, as well as the judicial resources that otherwise would be required to make the many difficult judgments that petitioners' interpretation of § 6002 would require.[23]

V

We hold that a deponent's civil deposition testimony, closely tracking his prior immunized testimony, is not, without duly authorized assurance of immunity at the time, immunized testimony within the meaning of § 6002, and there-

[23] The dissent minimizes the enforcement interest that our construction of § 6002 protects, *post*, at 288–290, contending that we "misunderst[ood] the prosecutorial interest," *post*, at 288. We note, however, that by conceding that there is some "risk" that the deponent's testimony may hamper a prosecution, *post*, at 293, the dissent concedes that its interpretation of § 6002 provides at least somewhat broader immunity than Congress intended. Moreover, the dissent overlooks the possible difficulty of securing the cooperation of individuals such as Conboy who may be more reluctant to testify in the immunized proceedings if they know that later deposition testimony may increase their exposure to civil liability. Finally, in the dissent's judgment, "the theoretical risk that compelled testimony could hamper a potential prosecution [is] plainly outweighed by the enforcement interest in allowing the deposition to go forward." *Ibid.* See also *post*, at 289. This, however, is a judgment reserved for officials of the Department of Justice, not the federal courts, to make on a case-by-case basis.

fore may not be compelled over a valid assertion of his Fifth Amendment privilege.[24] The judgment of the Court of Appeals accordingly is

Affirmed.

JUSTICE MARSHALL, concurring.

I join the Court's decision that a witness who has given immunized testimony may invoke the Fifth Amendment privilege at a later proceeding in response to questions based on his immunized testimony. Permitting a civil litigant to rely on prior immunized testimony to defeat an otherwise valid claim of privilege would be inconsistent with the purposes of the use-immunity statute, regardless of whether, had the witness answered voluntarily, his answers could have been used against him in a later criminal trial. The Court's decision today does not reach the question whether such answers could later be admitted against the witness. In his dissenting opinion, JUSTICE STEVENS argues that Conboy may not assert the Fifth Amendment privilege precisely because his answers could not properly be used against him in a later criminal trial. Because I agree with JUSTICE STEVENS that such answers could *not* be properly used in a subsequent criminal trial, I write separately to explain why I believe respondent nevertheless retained his Fifth Amendment privilege.

If Conboy had voluntarily answered petitioners' deposition questions, his answers would have been "directly or indirectly derived from" his prior testimony before the grand jury. The questions were based solely on the transcript of respondent's grand jury testimony. There is no suggestion that the same or similar questions would have been asked had petitioners' attorneys not obtained a transcript of the grand jury testimony. Thus, if respondent had answered the ques-

[24] Our holding is limited to precluding district courts from compelling testimony in a civil deposition over a valid assertion of the Fifth Amendment privilege, absent a specific assurance of immunity for such testimony.

tions, his answers would not have been "derived from a legitimate source wholly independent of the compelled testimony." *Kastigar* v. *United States*, 406 U. S. 441, 460 (1972).

The admission of such answers at a subsequent criminal prosecution would represent a substantial departure from the fundamental premise of this Court's decision in *Kastigar*. In upholding the use-immunity statute against an attack based upon the Fifth Amendment privilege against self-incrimination, the Court concluded that use immunity affords a witness protection "as comprehensive as the protection afforded by the privilege." *Id.*, at 449. The Court stated that the statute "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect," *id.*, at 453 (emphasis in original), and that it "provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom," *id.*, at 460. If the prosecution could introduce answers elicited from a witness by questions that would not have been asked but for the witness' immunized testimony, the protection afforded by use immunity would *not* be "as comprehensive as the protection afforded by the privilege." *Id.*, at 449.

I therefore agree with my Brother STEVENS that answers to the questions posed by petitioners' attorneys could not properly have been used at a subsequent criminal trial. It does not follow, however, that respondent can be compelled to answer. In this case it is conceded that, had respondent never given the immunized testimony before the grand jury, he would have been entitled to invoke the Fifth Amendment privilege in response to questions concerning the same subject matter as the questions asked at the deposition. The only question is whether respondent is barred from asserting the Fifth Amendment privilege because he previously testified under a statutory grant of immunity and because his answers to the deposition questions would be "directly or indirectly derived" from his prior immunized testimony.

In my view, a trial judge may not constitutionally compel a witness to give incriminating testimony solely upon a finding that the witness' answers could not properly be used against him in a later criminal proceeding.[1] This Court's decision in

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[1] A witness is generally entitled to invoke the Fifth Amendment privilege against self-incrimination whenever there is a realistic possibility that his answer to a question can be used in any way to convict him of a crime. It need not be probable that a criminal prosecution will be brought or that the witness' answer will be introduced in a later prosecution; the witness need only show a realistic possibility that his answer will be used against him. Moreover, the Fifth Amendment forbids not only the compulsion of testimony that would itself be admissible in a criminal prosecution, but also the compulsion of testimony, whether or not itself admissible, that may aid in the development of other incriminating evidence that can be used at trial. See *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951).

The privilege is inapplicable only "if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness." *Brown* v. *Walker*, 161 U. S. 591, 597 (1896). It has long been recognized that the court may require a witness to give testimony, including testimony that admits to involvement in a criminal act, when there is no possibility of future criminal charges being brought against the witness. For example, a witness may be compelled to testify concerning his involvement in a crime when he is protected from later prosecution by the Double Jeopardy Clause, see, *e. g.*, *Reina* v. *United States*, 364 U. S. 507, 513 (1960) (dictum), by the applicable statute of limitations, see, *e. g.*, *United States* v. *Goodman*, 289 F. 2d 256, 259 (CA4 1961), or by a pardon, see *Brown* v. *Walker*, *supra*, at 599–600. As JUSTICE BRENNAN indicated in his dissenting opinion in *Piccirillo* v. *New York*, 400 U. S. 548, 564–565 (1971) (dissenting from dismissal of certiorari), this limitation upon the privilege against self-incrimination is derived from the language of the Fifth Amendment:

"Implicitly, of course, 'in any criminal case' suggests a limitation upon the reach of the privilege . . . . [I]f there is no possibility of a criminal case, then the privilege would not apply. And that is precisely the basis on which this Court has consistently upheld grants of immunity from *Brown* v. *Walker*, 161 U. S. 591 (1896), to *Ullman* v. *United States*, 350 U. S. 422 (1956)."

It has also been recognized that a court may compel a witness to testify when his answers could neither implicate him in any criminal conduct nor possibly lead to the discovery of past criminal conduct. See *Hoffman* v.

Kastigar v. *United States*, *supra*, does not support such compulsion. In *Kastigar* the Court was concerned with a federal statute that permits a United States Attorney, a federal agency, or a duly authorized representative of Congress to grant use immunity and thereby compel a witness to give incriminating testimony. See 18 U. S. C. §§ 6002–6005. *Kastigar* itself involved a grant of use immunity conferred upon a witness called to testify before a grand jury. In upholding the use-immunity statute against constitutional attack, the Court held only that, pursuant to statutory authority to confer such immunity, the *Government* may constitutionally compel incriminating testimony in exchange for immunity from use or derivative use of that testimony. 406 U. S., at 462. *Kastigar* does not hold that a trial judge, acting without statutory authority to grant immunity, may rely on prior immunized testimony to overrule an otherwise valid assertion of the Fifth Amendment privilege by a deponent in a civil case.

Whatever justification there may be for requiring a witness to give incriminating testimony in aid of a criminal investigation after the Government has granted use immunity, there is no similar justification for compelling a witness to give incriminating testimony for the benefit of a private litigant when the Government has *not* chosen to grant immunity. Any interest served by compelling the testimony

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United States, *supra*; *Heike* v. *United States*, 227 U. S. 131, 142–145 (1913). This limitation, too, is implicit in the language of the constitutional guarantee, since a witness who has been forced to provide testimony that cannot incriminate him has not in any meaningful sense been "compelled in any criminal case to be a witness against himself."

In this case, the Fifth Amendment privilege is fully applicable. Respondent remains subject to criminal prosecution, and his answers to the deposition questions asked by petitioners' attorneys would both implicate him in criminal conduct and tend to lead to further incriminating information.

is insufficient to justify subjecting the witness to the risks that attend the compulsion of incriminating testimony.

Whenever a witness is forced to give incriminating testimony, there is a significant risk that fruits of that testimony will later be used against him. Further incriminating evidence that is derived from compelled testimony cannot always be traced back to its source:

> "A witness who suspects that his compelled testimony was used to develop a lead will be hard pressed indeed to ferret out the evidence necessary to prove it. And of course it is no answer to say he need not prove it, for though the Court puts the burden of proof on the government, the government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence. The good faith of the prosecuting authorities is thus the sole safeguard of the witness' rights. [E]ven their good faith is not a sufficient safeguard. For the paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony." *Kastigar* v. *United States*, 406 U. S., at 469 (MARSHALL, J., dissenting).

See also *Piccirillo* v. *New York*, 400 U. S. 548, 567–568 (1971) (BRENNAN, J., dissenting from dismissal of certiorari); *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958). If respondent is not allowed to assert the Fifth Amendment privilege, he may undergo numerous civil depositions, he may be forced to elaborate upon his original testimony,[2] and his testimony

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[2] The questioning at the deposition went well beyond mere ratification of the accuracy of the grand jury transcript. Conboy was also called upon to answer again the identical questions asked before the grand jury. While it may be true that petitioners expected Conboy "only to ratify or

may be broadly disseminated. As a result, he may face a much greater risk that tainted evidence will be used against him than he initially faced following the compulsion of the grand jury testimony. The opportunity to seek exclusion of tainted evidence is an incomplete protection, for "a court, at the time of the civil testimony, [cannot] predetermine the decision of the court in a subsequent criminal prosecution on the question whether the Government has met its burden of proving that 'the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.'" *Ante*, at 261 (quoting *Kastigar* v. *United States*, *supra*, at 460). Cf. *Maness* v. *Meyers*, 419 U. S. 449, 461–463 (1975).

It may be appropriate to subject a witness to these risks when the Government has conferred use immunity pursuant to statutory authorization, but the interests supporting compulsion of the testimony are far weaker here. In *Kastigar* the Court noted that the use-immunity statute advanced the Government interests in compelling incriminating testimony, 406 U. S., at 443–444, 446–447, and in leaving open the possibility of prosecuting the witness on the basis of "evidence from legitimate independent sources," *id.*, at 461. In this case, however, neither Congress nor the United States Attorney has made a similar expression of Government interest.[3] The only public interest that would be served by forcing respondent to testify would be that of obtaining testi-

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confirm facts that were already known," *post*, at 295 (STEVENS, J., dissenting), there was no assurance in this case that Conboy's answers, based upon his current recollection of events, would not provide details that were absent from his prior grand jury testimony.

[3] As the Court observes, the Government interests that supported the compulsion of incriminating testimony in *Kastigar* would be undermined by the compulsion of respondent's testimony in this case. The Government interest in preserving the chance to prosecute respondent in the future based on "legitimate independent" evidence would be compromised by the creation of additional immunized testimony. *Ante*, at 260–261.

mony relevant to a private antitrust suit.[4] Even that interest would not be substantially served.[5]

If he were compelled to answer petitioners' deposition questions, Conboy would face a realistic risk that his testimony would lead to further incriminating evidence that he would be unable to exclude at a subsequent criminal prosecution. The interests underlying the use-immunity statute have no application here, and in my view the general interest in obtaining testimony cannot be considered an adequate substitute for those interests. I therefore join the Court in concluding that the Fifth Amendment does not permit a trial judge in a civil case to compel incriminating testimony solely upon a finding that the testimony would be "directly or

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[4] Even if the United States Attorney consented to the trial judge's compulsion of respondent's answers, the judge's action might be improper. As the Court notes, it is an open question whether the Government has statutory authority "to immunize the testimony of a witness in a *civil* proceeding when the Government determines that the public interest would be served." *Ante*, at 261, n. 20 (emphasis added). Moreover, the constitutionality of such a statutory authorization remains open to doubt. Cf. *Garrity* v. *New Jersey*, 385 U. S. 493, 496 (1967) (declining to consider constitutionality of forfeiture-of-office statute which, in effect, allowed the authorities to compel a public officer, under threat of removal from office, to provide incriminating testimony in exchange for immunity from use or derivative use of that testimony at a criminal proceeding).

Indeed, this Court has not yet spoken as to the circumstances under which a trial court in a *criminal* case may compel a defense witness to testify concerning questions as to which he had previously testified before the grand jury or may compel the Government to secure such a witness' testimony by granting him immunity. Cf. *United States* v. *Praetorius*, 622 F. 2d 1054, 1064 (CA2 1980); *United States* v. *Morrison*, 535 F. 2d 223, 229 (CA3 1976); *United States* v. *Alessio*, 528 F. 2d 1079 (CA9 1976); *Earl* v. *United States*, 124 U. S. App. D. C. 77, 80, n. 1, 361 F. 2d 531, 534, n. 1 (1966) (Burger, J.).

[5] It is questionable whether the deposition testimony would be admissible at trial, in light of the limits that might have to be placed on cross-examination by the other civil litigants. *Ante*, at 259–260. Nor would respondent's answers help petitioners obtain further relevant information, since petitioners already have access to respondent's grand jury testimony.

indirectly derived from" the witness' previously immunized testimony.

JUSTICE BRENNAN, concurring in the judgment.

The Court today holds that

> "a deponent's civil deposition testimony, closely tracking his prior immunized testimony, is not, without duly authorized assurance of immunity at the time, immunized testimony within the meaning of § 6002, and therefore may not be compelled over a valid assertion of his Fifth Amendment privilege." *Ante*, at 263–264 (footnote omitted).

JUSTICE BLACKMUN's opinion concurring in the judgment likewise states:

> "In this case, we are asked to decide whether a witness who has testified before a federal grand jury pursuant to a grant of use immunity, 18 U. S. C. §§ 6001–6005, may be forced to testify about the same events in a subsequent civil deposition, despite his assertion of his Fifth Amendment privilege against self-incrimination. I agree with the Court's conclusion that he may not be forced so to testify." *Post*, at 272.

I understand these to be two statements of the same rule,* and I completely agree with both of them. For this reason, I concur in the judgment of the Court.

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*While the majority's statement of the holding is formally limited to the situation where a deponent's deposition testimony "closely track[s] his prior immunized testimony," *ante*, at 263, I do not take that to be a substantive difference between its formulation and that of JUSTICE BLACKMUN. As both the majority's opinion and JUSTICE STEVENS' dissenting opinion, *post*, p. 282, make clear, the "closely tracking" situation is the strongest possible case for finding that the deposition testimony is derived from the prior immunized testimony. Hence, to hold that a deponent may assert his privilege in this case is necessarily to hold that he may do so in all cases, as JUSTICE BLACKMUN states explicitly.

I am not in entire agreement with everything in the majority opinion or in JUSTICE BLACKMUN's opinion. My differences with them, however, are over small matters of approach, and do not go to the substance of their conclusions. Moreover, this case arises in the rather specialized legal setting of use immunity statutes and does not require any broad-ranging analysis beyond the scope of the problem here presented. With these considerations in mind, I do not think it worthwhile to file a lengthy separate opinion setting forth these differences in detail.

JUSTICE BLACKMUN, concurring in the judgment.

In this case, we are asked to decide whether a witness who has testified before a federal grand jury pursuant to a grant of use immunity, 18 U. S. C. §§ 6001–6005, may be forced to testify about the same events in a subsequent civil deposition, despite his assertion of his Fifth Amendment privilege against self-incrimination. I agree with the Court's conclusion that he may not be forced so to testify. Because I reach this conclusion only by a different route, I write separately to explain my views.

I

The statute authorizing grants of use immunity, 18 U. S. C. § 6002, provides that a witness may be ordered to testify despite his claim of a Fifth Amendment privilege, but "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case" (with stated limited exceptions). The Court notes that the parties in this case "make their arguments in terms tracking those of the statute—whether the deposition testimony is 'derived from' the prior testimony." *Ante*, at 256. In the Court's view, however, "the crux of their dispute is whether the earlier grant of immunity itself compelled Conboy to talk." *Ibid.* It seems to me that by characterizing the issue in this way, the Court

begs the question now before us. The earlier grant of immunity, by itself, obviously does not compel Conboy to testify at a later deposition. It is the District Court that has sought to compel Conboy's testimony. Whether that court may do so is certainly the ultimate issue the Court must decide. But the Court's rephrasing does not bring us closer to the answer.

It is, of course, black-letter law that a witness cannot assert a Fifth Amendment privilege not to testify "if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness." *Brown* v. *Walker*, 161 U. S. 591, 597 (1896); see *Mason* v. *United States*, 244 U. S. 362, 365–366 (1917). In this case, however, the Court concludes that Conboy has a valid Fifth Amendment privilege "irrespective of whether . . . his [deposition] answers could have been admitted against him at a criminal trial." *Ante*, at 257, n. 13. The Court never explains the basis for this conclusion, and it seems to me that it is plainly wrong. If Conboy's deposition testimony cannot be used against him in a subsequent criminal prosecution, he cannot assert a Fifth Amendment privilege at his deposition and the District Court may compel him to testify. We must turn to § 6002 to determine whether the testimony can be so used. Section 6002 informs us that when immunity has been granted, the witness is protected against use of "information directly or indirectly derived from [the immunized] testimony." Whether Conboy's deposition testimony is so derived is the real issue before the Court.

The Court finds this statutory language irrelevant to its analysis. The Court asserts that petitioners have a "need for admissible evidence," the Government has an "interest in limiting the scope of an immunity grant," and respondent Conboy has an "interest . . . that [his Fifth Amendment] protection be certain." *Ante*, at 258, 257. The Court then seeks to adjust these interests and arrive at a solution satisfactory to all. While this may be appropriate as a means of

setting public policy,[1] I cannot agree that it is an appropriate method of statutory interpretation.

As with every case involving the construction of a statute, "our starting point must be the language employed by Congress." *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 337 (1979). If we were forced to examine the language of § 6002 without reference to its background and legislative history, the words of the statute might be sufficiently ambiguous so as to require resort to the policy concerns addressed by the Court. In this case, however, "regard for the specific history of the legislative process that culminated in the Act now before us affords more solid ground for giving it appropriate meaning." *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 222 (1952).

II

A

This Nation's first use immunity statute was passed by Congress in 1868. It provided that "no answer or other pleading of any party, and no discovery, or evidence obtained by means of any judicial proceeding from any party or witness . . . , shall be given in evidence, or in any manner used against such party or witness . . . , in any court of the United States . . . , in respect to any crime." Act of Feb. 25, 1868, ch. 13, § 1, 15 Stat. 37. In *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892), this Court held that immunity of this type could not be used to compel a witness to testify against himself, because it did not provide protection coextensive with the Fifth Amendment. The *Counselman* Court reasoned that the statute

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[1] As JUSTICE STEVENS' dissent demonstrates, the interests of the Government and the parties are not at all as clear as the Court asserts. Reliance on these interests is particularly inappropriate in a case such as this one, where the Government is not a party and we can only speculate about which interpretation of the statute would best serve the Government's interest in law enforcement.

> "protected [the witness] against the use of his testimony against him . . . in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him . . . . It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted." *Id.*, at 564.

In concluding, the Court stated that "no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States." *Id.*, at 585.

Due to this latter statement in the *Counselman* opinion, Congress and the lower courts assumed that only a broad "transaction" immunity would satisfy the requirements of the Fifth Amendment. Thus, beginning in 1893, Congress enacted a series of statutes giving a witness complete immunity from prosecution for any crime divulged in compelled testimony. This reliance on transaction immunity continued until 1970, when Congress enacted § 6002 as part of the Organized Crime Control Act of 1970, Pub. L. 91–452, 84 Stat. 927.

In the meantime, however, the Court decided several cases suggesting that some forms of use immunity would be constitutionally permissible. In *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964), the Court held that a state witness could not be compelled to give testimony that could be incriminating under federal law "unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." *Id.*, at 79. In a footnote, the Court added that once a defendant had been immunized in a state proceeding, "the federal authori-

ties have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Id.*, at 79, n. 18. Several years later, in *Gardner* v. *Broderick*, 392 U. S. 273, 276 (1968), the Court stated that "[a]nswers may be compelled regardless of the [Fifth Amendment] privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying." And shortly thereafter, in *People* v. *La Bello*, 24 N. Y. 2d 598, 602, 249 N. E. 2d 412, 414 (1969), the New York Court of Appeals interpreted *Murphy* and *Gardner* to hold that *Counselman* did not bar use immunity statutes, so long as they protected the immunized witness "from the use of his testimony or the fruits thereof."

B

It was in this context that Congress in 1969 began considering a new type of immunity statute. The House and Senate Reports accompanying the Organized Crime Control Act of 1970 make clear that Congress was persuaded by the reasoning of these cases. After quoting from *La Bello* and discussing *Counselman* and *Murphy* at length, see S. Rep. No. 91–617, pp. 52–55 (1969); H. R. Rep. No. 91–1188, pp. 8–11 (1970), the Reports state that the statutory immunity provided by § 6002 "is intended to be as broad as, but no broader than, the privilege against self-incrimination. . . . It is designed to reflect the use-restriction immunity concept of *Murphy* . . . rather [than] the transaction immunity concept of *Counselman*." S. Rep. No. 91–617, at 145; H. R. Rep. No. 91–1188, at 12; see H. R. Rep. No. 91–1549, p. 42 (1970).

Section 6002's prohibition against the use of compelled testimony or "any information directly or indirectly derived from such testimony" reflected Congress' view of the extent of the Fifth Amendment privilege. According to the House and Senate Reports, the phrase was chosen to conform to "present law" on "the use of evidence derivatively obtained."

The Reports then cite *Wong Sun* v. *United States*, 371 U. S. 471 (1963), the seminal case on what is commonly known as the "fruits" doctrine, as representing "present law." See S. Rep. No. 91–617, at 145; H. R. Rep. No. 91–1188, at 12; H. R. Rep. No. 91–1549, at 42. In *Murphy* and *Gardner*, upon which Congress relied, the Court had used the term "fruits" to describe the constitutional limits on use immunity. References to the "fruits" doctrine are scattered throughout the legislative history, whenever the boundaries of the use immunity statute are discussed.[2] In *Kastigar* v. *United States*, 406 U. S. 441, 461 (1972), we recognized that the immunity § 6002 provides is "analogous to the Fifth Amendment requirement in cases of coerced confessions." We noted that § 6002 was modeled on a recommendation from the National Commission on Reform of Federal Criminal Laws, and we quoted with approval a Commission report stating: "'The proposed immunity is . . . of the same scope as that frequently, even though unintentionally, conferred as the result of constitutional violations by law enforcement officers.'" *Id.*, at 452, n. 36 (quoting Second Interim Report of the National Commission on Reform of Federal Criminal Laws, Mar. 17, 1969, Working Papers of the Commission 1446 (1970)).

In light of this evidence of legislative intent, the phrase "directly or indirectly derived from" in § 6002 cannot be re-

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[2] See, *e. g.*, S. Rep. No. 91–617, p. 108 (1969) (§ 6002 "is a restriction against use of incriminating disclosures or their fruits"); Hearings on S. 30 et al. before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 216 (1969) (report of New York County Lawyers' Association) (under § 6002, the "testimony so compelled or its fruits may not be used against the witness"); *id.*, at 281 (statement of Rep. Poff) (rule of § 6002 is "similar to the exclusionary rule which is now applied to evidence assembled in violation of various constitutional rights"); *id.*, at 506 (statement of Sen. McClellan) (use immunity statutes can be made constitutional "through the use of the fruit of the poisonous tree process of derivative suppression, an analogy borrowed from fourth amendment illegally obtained evidence cases").

garded as ambiguous or lacking in meaning. It seems to me that Congress made its intent clear. First, it intended to grant only the minimum protection required by the Constitution. Second, it believed that the protection constitutionally required in cases of compelled testimony was identical to the protection required in cases of coerced statements or evidence otherwise illegally obtained.

Respondent Conboy's interpretation of § 6002 is obviously narrower than that offered by petitioners; deposition testimony involving the same subject matter as prior immunized testimony would be protected by the prior grant of use immunity under petitioners' interpretation, but not under Conboy's. Because Congress intended grants of use immunity to be as narrow as possible, we must accept Conboy's interpretation if it is consistent with the Constitution. The question before us, then, is whether a witness' Fifth Amendment rights would be violated if testimony given at a subsequent deposition were not covered by his grant of use immunity.

When an incriminating statement has been obtained through coercion, the Fifth Amendment prohibits use of the statement or its "fruits." Congress understood this when it enacted § 6002, and, as the legislative history demonstrates, Congress intended to incorporate the "fruits" doctrine into the statute by use of the phrase "directly or indirectly derived." In order to ascertain whether respondent Conboy's deposition testimony would be "directly or indirectly derived" from his immunized grand jury testimony, and consequently whether Conboy's interpretation of the statute is constitutional, we must determine whether the deposition testimony would be "fruits" as that concept is understood in the context of the Fourth and Fifth Amendments.[3]

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[3] The considerations underlying the Fifth Amendment "fruits" doctrine are not necessarily the same as those relevant in the Fourth Amendment context. With respect to the issue before us, however, Fourth Amendment "fruits" cases provide us with guidance in determining whether a wit-

III

In *Wong Sun* v. *United States*, *supra*, the Court held that a statement following an illegal arrest must be suppressed as "fruits" of the arrest unless it results from "an intervening independent act of a free will," and is "sufficiently an act of free will to purge the primary taint of the unlawful invasion." 371 U. S., at 486. In *Harrison* v. *United States*, 392 U. S. 219, 222–224 (1968), the Court applied a similar standard to statements following an illegally obtained confession. Our more recent cases have adhered to this test. See, *e. g.*, *Rawlings* v. *Kentucky*, 448 U. S. 98, 107–110 (1980); *Brown* v. *Illinois*, 422 U. S. 590, 600–604 (1975). In determining whether this standard is met, we examine a range of factors including the speaker's knowledge of his Fifth Amendment rights; the temporal proximity of the constitutional violation and the subsequent statement; the nature of the violation and of the Government's involvement; and, of course, the voluntariness of the statement. See *id.*, at 603–604. In brief, the issue is whether the speaker has voluntarily chosen to make the later statement, uninfluenced by the fact that prior statements have been compelled.[4]

I find little difficulty in concluding that if a witness in Conboy's position were to testify during his civil deposition, his statements would not be "fruits" of his previous immunized testimony.[5] In this case, Conboy attended his deposi-

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ness' deposition testimony is "derived from" prior immunized testimony within the meaning of § 6002.

[4] In *Kastigar* v. *United States*, 406 U. S. 441, 459 (1972), we recognized that Congress intended § 6002 to provide the minimum protection required by the Constitution. *Wong Sun* and its progeny establish that the "fruits" doctrine provides all the protection the Constitution requires. Thus, although my analysis is framed in terms of constitutional standards, the issue here of what the Constitution requires is not different from the issue of what Congress intended.

[5] My analysis is necessarily limited to the choices facing a witness prior to the threat of contempt by the district court. The witness cannot be held in contempt unless the testimony sought is protected by the grant of

tion accompanied by a lawyer. He was obviously aware of his Fifth Amendment rights, and he asserted them with vigor. There is no suggestion that Conboy was under a misapprehension about the relationship between his immunized testimony and his civil deposition. The deposition took place long after the conclusion of the immunized testimony, and Conboy did not remain under the impression that his testimony was being compelled by the Justice Department. From his past experience before the grand jury, Conboy knew that each time the Justice Department required his testimony, it provided a fresh grant of use immunity. Government attorneys were not involved in this civil case, and no fresh grant of immunity had been obtained. Under the circumstances, there was no danger that Conboy would inadvertently incriminate himself under some lingering compulsion of the prosecuting authorities. Any statement he made would have been an independent act of free will. Consequently, had Conboy answered the deposition questions, his testimony would not have been protected by the original immunity grant because it would not have been directly or indirectly derived from his immunized testimony.

In my view, a prior grant of use immunity could never justify compelling a witness' testimony over a claim of Fifth Amendment privilege at a subsequent civil deposition. Although not every witness will be as well informed as Conboy, any witness who asserts the privilege necessarily engages in an independent act of free will. The assertion of the privilege should signal the judge supervising the civil proceedings that the testimony may well not be "derived from" the immunity grant.[6] Although the compelled testimony would be in-

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use immunity or, in other words, unless it would be "fruits." The question *whether* the testimony would be "fruits" thus cannot turn on whether the district court has issued a contempt order.

[6] I agree with JUSTICE STEVENS that the existence of a witness' Fifth Amendment privilege does not depend on his decision to assert the privilege. See *post*, at 287, n. 7. Nevertheless, the state of mind of the

admissible at a subsequent criminal trial,[7] I agree with the Court that a witness should not be forced to rely upon the uncertainties of a later motion to suppress. This would indeed "'"let the cat out" with no assurance whatever of putting it back.'" *Ante*, at 262 (quoting *Maness* v. *Meyers*, 419 U. S. 449, 463 (1975)).

I do not mean to suggest, however, that whenever a witness immunized in prior proceedings testifies at a civil deposition *without* asserting a Fifth Amendment privilege, his testimony automatically should be admissible against him in a subsequent criminal prosecution. If there is a subsequent prosecution and the Government seeks to introduce deposition testimony of this sort, the judge in the criminal case should determine whether, under the circumstances, the deposition testimony is inadmissible as "derived from" the prior immunized statements. If the witness reasonably believed that his prior grant of immunity protected his testimony, the testimony might well be derived from the immunity grant under the standards I have set forth above. If, on the other hand, the deposition testimony was a truly independent act of free will, it would be admissible in any later prosecution.

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witness is relevant to a "fruits" inquiry, because a witness' statements are "fruits" only if they do not result from an independent act of free will. Cf. *Harrison* v. *United States*, 392 U. S. 219, 222–224 (1968). A witness' assertion of the privilege is strong evidence of that state of mind; the witness has demonstrated that he feels free to decide whether or not to speak.

[7] It seems to me beyond question that deposition testimony compelled by means of a contempt order, over the assertion of a Fifth Amendment privilege, would be inadmissible at a subsequent criminal trial whether or not it was later held to be within the scope of the original grant of immunity. If the testimony was within the grant of immunity (*i. e.*, if it was "fruits"), it would be inadmissible under § 6002. If the testimony was not within the grant of immunity, the witness should have been permitted to assert his privilege and the testimony wrongfully compelled should be excluded. See *Maness* v. *Meyers*, 419 U. S. 449, 474 (1975) (WHITE, J., concurring in result).

JUSTICE STEVENS, with whom JUSTICE O'CONNOR joins, dissenting.

A witness in a judicial proceeding has a duty to answer proper questions. The witness cannot, however, be compelled to incriminate himself. If a witness believes a truthful response to a question could be used against him in a subsequent criminal proceeding, or might lead to the discovery of incriminating evidence, he may assert his constitutional right to remain silent. When such an assertion is made, a judge must evaluate the asserted risk. If it clearly appears that the answer could not be used against the witness in a subsequent criminal proceeding and could not provide a prosecutor with any information that he does not already have, the witness must speak. This case concerns a witness' refusal to give answers that could not incriminate him.

The Court today holds that the existence of a valid Fifth Amendment privilege does not depend on whether a truthful answer would be incriminating. The Court does not dispute the fact that neither the respondent's answers during the deposition in this case, nor any information discovered on the basis of those answers, could be used against him in a subsequent criminal proceeding. *Ante*, at 257, n. 13. Nevertheless, the Court holds that the Fifth Amendment empowers the respondent to refuse to testify. The opinion of the Court stresses two interests: "the Government's need for admissible evidence" in a future effort to prosecute the respondent, and "the individual's interest in avoiding self-incrimination." *Ante*, at 256. It holds that potential threats to those interests create a Fifth Amendment privilege in this case.

I am frankly puzzled by this analysis. The Government's supposed desire to introduce evidence in a future proceeding should be irrelevant if the Government has *already* forsworn the right to introduce that evidence by a prior grant of immunity. And, as far as the deponent's interest in avoiding self-incrimination is concerned, "he should be indifferent between the protection afforded by silence and that afforded by immu-

nity," *ante*, at 257. Thus, whether analyzed from the point of view of the prosecutor or the witness, the same question must be answered: whether the statutory immunity that has already attached to respondent's grand jury testimony precludes the Government, or any other prosecutor, from using the respondent's deposition answers against him in any criminal case. That question requires an analysis not of whether the deposition answers are "immunized 'testimony,'" *ante*, at 250, but rather of whether the answers would be "directly or indirectly derived from [his grand jury] testimony" within the meaning of the use-immunity statute. Because I think it clear that they would be so derived, I respectfully dissent.

I

Respondent has been a witness in two separate proceedings. In January 1978, he was subpoenaed to testify before a federal grand jury investigating a violation of the Sherman Act. Because he was a participant in the price-fixing arrangements under review, he asserted his constitutional privilege against being compelled to be a witness against himself.[1] The prosecutor then invoked his authority under the Organized Crime Control Act of 1970,[2] and a federal judge ordered the respondent to testify in exchange for a grant of immunity.

In May 1981, respondent was subpoenaed to appear in a second proceeding.[3] At that deposition proceeding, respond-

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[1] The Fifth Amendment provides:

"No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

[2] See 18 U. S. C. §§ 6002, 6003, quoted by the Court, *ante*, at 253–254, nn. 9 and 10.

[3] This second proceeding happens to have been a pretrial deposition in a civil case, but the issue before us would be no different if the second proceeding had been a criminal trial of respondent's co-conspirators, or a coroner's inquest. Respondent happens to have been represented by able counsel at the second proceeding, but again the scope of his immunity would be no different if he had not had a lawyer and had simply answered the questions that were propounded. Moreover, the fact that respondent

ent was asked the same questions that he had been asked before the grand jury. Everyone agrees that the questions were derived from the transcript of his grand jury testimony, and no one disputes the fact that truthful answers to those questions would merely have confirmed information that was already recorded in the grand jury transcript.[4] It is therefore logical to inquire, as the court below did, whether ratification of the prior immunized testimony would subject the respondent to a new risk of prosecution.

The plain language of the Organized Crime Control Act protects the witness from that risk. The law provides:

> "[N]o testimony or other information compelled under the order *(or any information directly or indirectly derived from such testimony or other information)* may be used against the witness in any criminal case . . . ." 18 U. S. C. § 6002 (emphasis added).

When a witness appears at a second proceeding and is asked whether the information that he was previously compelled to disclose to the grand jury was true, his responses are quite plainly "information directly or indirectly derived from such testimony." This seems particularly obvious when the in-

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asserted his privilege against self-incrimination has nothing to do with the availability of the privilege—a matter which is dependent entirely on whether the content of a truthful answer to the questions that were propounded could be used against him in a later criminal trial. His reluctance or willingness to testify would determine whether he elected to assert his privilege or to waive it, but has nothing to do with the existence or nonexistence of the privilege itself.

[4] One insignificant nonincriminating fact would be added. The grand jury transcript establishes (1) that respondent had price communications with Fred Renshaw and Dick Herman and (2) that he remembered those communications at the time of his grand jury testimony; an answer to the deposition question would establish the additional fact that respondent still remembers those communications. That additional fact is not itself incriminating and certainly is information indirectly derived from the grand jury transcript within the meaning of the statute.

terrogator's only basis for his questions is the transcript of the grand jury proceeding.

This natural construction of the statute was endorsed by the Government immediately after the Organized Crime Control Act took effect. In a memorandum explaining the statute to United States Attorneys, the Assistant Attorney General in charge of the Criminal Division explained that it allowed an immunized witness to be prosecuted "if it can be clearly established that independent evidence standing alone is in fact the sole basis of the contemplated prosecution." Dept. of Justice Memo No. 595, Supp. 1, Sept. 2, 1971, p. 5. He emphasized that, "[a]lthough the government may prosecute the witness on the basis of similar evidence obtained independently of the witness's testimony in a rare case where such an independent source develops, as a practical matter it will be difficult for the government to prove an independent derivation, especially if the information *first* was divulged in the witness's testimony." *Id.*, at 5, n. 4 (emphasis in original). And when the Solicitor General of the United States later appeared before this Court to defend the Act's constitutionality, he based his argument in part on the proposition that the words "directly or indirectly derived" were intended to create an "extended use immunity" and should be construed broadly.[5]

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[5] In relevant part, the argument reads:

"[MR. GRISWOLD:] . . . As to evidence first discovered after immunity has been granted, there should be a heavy burden on the government to show that any such evidence is not the fruit of a lead or clue resulting from or uncovered by the compelled testimony. This should not be a conclusive presumption because there can be cases where the government can demonstrate that such evidence was independently derived. It comes in the mail, for example, the day after the testimony was given and it had been postmarked in France a week before.

. . . . . .

"Q. Well, Mr. Solicitor General, what about the situation . . . where the government does compel a testimony and the testimony is given and this induces the prosecutor not to use the testimony except to launch an investi-

This Court accepted the Solicitor General's argument. It upheld the use immunity statute after construing it to provide protection commensurate with the protection resulting from the invocation of the privilege itself:[6]

> "The statute provides a sweeping prohibition of any use, direct or indirect, of the compelled testimony and any information derived therefrom . . . .
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> . . . . . .
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> "[The] burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from *a legitimate source wholly independent of the compelled testimony*." *Kastigar* v. *United States*, 406 U. S. 441, 460 (emphasis added).

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gation and by independent means, wholly unrelated to the testimony except by the fact that it was given, search out, independently—

"MR. GRISWOLD: That is a hard question, but I think if it does appear that the investigation was the consequence of the evidence being given, that then the evidence is something which was indirectly derived as a result of the testimony given.

"Q. Would you—

"MR. GRISWOLD: I would construe directly and indirectly quite broadly and I would put the burden on the government with respect to evidence derived after the testimony is given.

"Q. So 'but for,' you put on a 'but for' test in the sense that except for the testimony the government would never have had it?

"MR. GRISWOLD: Almost, Mr. Justice. On the other hand, I hate very much to give conclusions about purely hypothetical cases, knowing full well the practical situations that can arise which will make it look differently, but I'm perfectly free to say that I think there should be a heavy burden on the government to show that the evidence it wants to use was not directly or indirectly derived from the testimony." Tr. of Oral Arg. in *Kastigar* v. *United States*, O. T. 1971, No. 70–117, pp. 30–32.

See also the Solicitor General's brief in *Kastigar*, quoted in nn. 8, 9, 12, *infra*.

[6] If the grant were not at least that broad, a witness obviously could not be compelled to testify before a grand jury. See *Counselman* v. *Hitchcock*, 142 U. S. 547; *Ullmann* v. *United States*, 350 U. S. 422, 436–438.

We held that evidence may be used in a subsequent prosecution only if the Government successfully demonstrates that it would have obtained that evidence even if the witness had never testified before the grand jury. See *id.*, at 458–459; *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 79.

The questions that were propounded to the respondent at his deposition in this case called for answers that were presumptively within the scope of the statutory immunity. That presumption would protect him from the use in a subsequent criminal prosecution of any of the information contained in his answers unless it could be shown that the information would have been obtained even if the witness had never testified before the grand jury. Nothing in this record suggests that answers to questions based entirely on the grand jury transcript were not "fruits" of the prior testimony.[7]

The District Judge properly ruled that the respondent's answers could not have been introduced against him at a subsequent criminal prosecution any more than the original testimony could have been. Moreover, if the respondent's answers would be a necessary link in a chain that led to other information, then that information would also be "derived" from the prior testimony and likewise could not be used at a subsequent criminal prosecution. The witness therefore had no greater right to assert a constitutional privilege against

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[7] Cf. *Harrison* v. *United States*, 392 U. S. 219. In his opinion concurring in the judgment JUSTICE BLACKMUN seems to assume that the "fruits" inquiry focuses on the state of mind of the deposition witness rather than on the historical derivation of the evidence. He suggests that if the witness "elects" to answer a question, his response is not a fruit and therefore is not directly or indirectly derived from the prior testimony. Even under that approach, however, I would think the question is whether the witness has any choice in the matter. He is being asked about incriminating testimony that, by hypothesis, he would prefer not to repeat. Nevertheless, since he is under subpoena, he must speak unless he has a valid Fifth Amendment privilege, and neither the Constitution nor the statute vests *him* with any power to decide whether he does.

self-incrimination in the second proceeding than he had in the grand jury proceeding itself.

II

Although the Court does not dispute the fact that respondent's answers were within the scope of the immunity grant, *ante*, at 257, n. 13, it nevertheless places a great deal of reliance on "the Government's interest in limiting the scope of an immunity grant," *ante*, at 258. In my judgment the Court commits a triple error in this analysis. First, it uses policy judgments that could at most affect an interpretation of the use immunity statute in other cases to justify its erroneous interpretation of the Fifth Amendment in this case. Second, it misunderstands the prosecutorial interest in how the statute should be interpreted in those other cases. And third, it overlooks the obvious enforcement costs of its holding in *this* case. The first error does not need elaboration; the second two do.

A federal prosecutor does not offer immunity to a suspected criminal unless he expects to obtain important testimony that would not otherwise be available. The prosecutor realizes that, in almost all cases, an offer of immunity—even of use immunity—means sacrificing the chance to prosecute the witness for his own role in the criminal enterprise.[8] The

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[8] As the Solicitor General assured us in *Kastigar:* "The immunity provision involved in this case was not passed for the purpose of enabling law enforcement officials to compel self-incriminating information from witnesses and then prosecute them for routine matters." Brief for United States in *Kastigar* v. *United States*, O. T. 1971, No. 70–117, pp. 32–33.

This fact was emphasized to the Congress that passed the use immunity provision. The Assistant Attorney General in charge of the Criminal Division of the Department of Justice testified that, "[a]s a practical matter, where the witness has elected to testify under this statute, and he has been used, it would be a most unusual circumstance for the Government that used him to turn around and prosecute him." Hearings on H. R. 11157 and H. R. 12041 before Subcommittee No. 3 of the House Committee on the Judiciary, 91st Cong., 1st Sess., 47 (1969) (statement of Will Wilson).

question is what kind of return society will get on the prosecutor's investment in immunity. Once the prosecutor pays the immunity price, he will normally wish to probe deeply for evidence that will implicate the witness' criminal associates as thoroughly as possible. The primary law enforcement interest is to maximize the amount of information that the witness provides. A broad construction of the immunity grant serves that purpose; a narrow construction can only motivate witnesses to be as unresponsive as possible.[9]

Yet the Court suggests that the Government prosecutors take a different attitude towards immunized witnesses. Even though the Government itself has not promoted such a view

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And a member of the Commission on Reform of the Federal Criminal Law, testifying in support of the statute, stated:

"I think there is one other thing about this that probably ought to be pointed out and that is that in most instances a grant of immunity is going to be made to a willing witness who isn't going to be prosecuted at all. That is probably the most important aspect of the whole matter. The prosecution will have just as much of an interest in protecting the interests of the person who has served the purposes of law enforcement in that regard as can be. As a consequence fears for the person who has willingly cooperated under the grant of immunity are, I think, probably more fanciful than real." *Id.*, at 53–54 (statement of Judge George Edwards).

As of October 1, 1976, these predictions had proved true. On that date, the Attorney in Charge at the Freedom of Information Privacy Unit of the Criminal Division of the Department of Justice wrote a letter to a research scholar. The letter reported that, while the Immunity Unit did not maintain statistics on the number of times witnesses had been subsequently prosecuted for matters disclosed in their immunized testimony, "if any such instances exist, they are rare." Note, 14 Am. Crim. L. Rev. 275, 282, n. 46 (1976).

[9] The Solicitor General made this point in a slightly different manner in his *Kastigar* brief:

"A practical reason for refraining from subsequent prosecution of a person who provides information is that the government has a vital interest in assuring the continued and unimpeded flow of information concerning criminal activities, and this interest may be furthered if a witness believes he will not be prosecuted." Brief for United States in *Kastigar* v. *United States*, O. T. 1971, No. 70–117, p. 34.

in the deposition proceedings in this case or by argument in this Court,[10] the opinion of the Court suggests that when a prosecutor immunizes a witness in order to obtain particular information, he harbors an intent to indict the witness afterwards and would therefore prefer that the witness remain in the same peril of prosecution as before being immunized.[11] Yet it defies human nature to presume that the witness would be just as cooperative during a 24-hour truce, knowing that hostilities will resume immediately thereafter, as he would be after signing a peace treaty.

Nor does the Court explain its assertion that applying the statute as it is written and as it was construed in *Kastigar* "in effect could invest the deponent with transactional immunity." *Ante*, at 260. Transactional immunity is not at all the issue here. Transactional immunity would require the prosecutor to forfeit an open-and-shut case that he had already built *independently*. Use immunity, as explained in *Kasti-*

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[10] The Solicitor General regularly provides us with briefs *amicus curiae* in cases in which the Government's enforcement interests are implicated. He filed no such brief in this case and apparently asserted no objection to petitioners' use of the grand jury transcript as a basis for questioning of deposition witnesses, including respondent.

[11] See *ante*, at 260. The testimony quoted in n. 8, *supra*, describes this suggestion as "more fanciful than real." For a view that is more real than fanciful, see the testimony of the Assistant Attorney General for the Criminal Division of the Department of Justice in Hearings on H. R. 11157 and H. R. 12041, *supra* n. 8, at 41–42 (statement of Will Wilson). That testimony identified the prototypical situations where use immunity would be valuable: where the prosecutor wants to induce someone who is already in prison to testify about a different conspiracy in exchange for a reduction in the existing sentence; where a suspect's attorney offers his client's assistance "in exchange for some type of immunity from that crime which we are investigating"; where the prosecutor's investigation has focused on an agent of a principal "and we decide as a matter of policy that it is more important to prosecute the principal than the agent"; and where a minor actor refuses to testify out of loyalty to a major actor, as in the case of a bookie's customers—"[o]bviously the Government isn't interested in extensive prosecution of 200 or 300 people who simply placed bets, so you use the immunity grant there to make the case against the central person."

gar and as granted to the respondent, allows the prosecutor to retain that case.[12] I have found absolutely no evidence, and the Court cites none today, to support the implicit suggestion that Congress substituted "use immunity" for "transactional immunity" in order to allow prosecutors to take advantage of subsequent repetitions of immunized testimony.[13]

The Court's reference to "transactional immunity" suggests a fear that ordering the respondent to answer a deposition question may somehow jeopardize legitimate efforts to prosecute him. Consideration of the facts of this particular case demonstrates that the Court's apparent fear is baseless. Unless some prosecutor already has an independent basis for prosecuting the respondent—and nothing in the record suggests that any such independent basis exists—the Government has already agreed that he will not be prosecuted for engaging in illegal price discussions with Fred Renshaw and Dick Herman of the Alton Box Board. If, at the deposition, he is required to confirm that such discussions took place,

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[12] As the Solicitor General explained in *Kastigar*, there may be occasions in which an immunized witness is led unexpectedly (by cross-examination at trial, or by grand juror questions) to testify about a new crime, "with respect to which the prosecution may possess overwhelming evidence." Brief for United States in *Kastigar* v. *United States*, O. T. 1971, No. 70–117, p. 36. Although the Government was willing to give " 'absolute immunity' as to any matter to which the witness testifie[d]" in "a limited area," the Government should not be made to abandon an independent case. *Ibid.*

[13] The United States Attorneys' Manual, Title I, Ch. 11, p. 2 (revised Dec. 15, 1981), explains the real reasons why the Government prefers use immunity to transactional immunity:

"[T]hey have, under appropriate circumstances, significant advantages over former 'transactional immunity' statutes in that they provide no gratuity to a testifying witness, they encourage the giving of more complete testimony by proscribing [the] use of everything the witness relates, and they still permit a prosecution of the witness in the rare case where it can be shown that the supporting evidence clearly was obtained only from independent sources."

how can that confirmation affect his criminal liability? If some prosecutor has a demonstrably independent basis for proving the respondent's participation in the discussions, his confirmation will not make that basis any less demonstrably independent.[14] And if that prosecutor has an independent basis for showing that the respondent participated in the discussions, that basis will be no less demonstrably independent if the respondent is required to identify the time, place, and other persons who participated in the discussions.

Furthermore, one should not overlook the societal costs—law enforcement costs—of the Court's expansion of the Fifth Amendment. The public interest in obtaining the full and candid testimony of a witness with knowledge of the inner workings of a price-fixing conspiracy is both real and significant.[15] Conceivably, a relatively brief account of the basic structure of the conspiracy might have been sufficient to persuade the grand jury to indict other parties and also to persuade those defendants to plead guilty or to enter into some other settlement with the Government.[16] Even if a grand jury transcript is confined to a brief description of a price-

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[14] In his argument in *Kastigar*, the Solicitor General seemed to assume that an adequate demonstration that evidence had an independent source would normally involve proof that the source antedated the grand jury testimony. See n. 5, *supra*. In this case respondent's grand jury testimony was given in 1978 and the deposition was taken in 1981. It would be much easier to prove that the basis for a possible future prosecution had a pre-1981 source than a pre-1978 source.

[15] The enforcement interest described in the text supplements the general public interest in accurate factfinding, an interest that is also hindered by the Court's holding. Cf. Lord Chancellor Hardwicke's oft-quoted phrase, "the public has a right to every man's evidence," 12 T. Hansard, Parliamentary History of England 675, 693 (1812), quoted in *Kastigar* v. *United States*, 406 U. S. 441, 443.

[16] It is not unusual to accept a civil consent decree or a modest penalty in exchange for the dismissal of criminal charges under the antitrust laws.

fixing arrangement, for example, the public interest may well be served by allowing private parties who have been injured thereby to inquire into the details of the arrangement.[17]

The Court assumes that the scope of the Fifth Amendment privilege in this case should be expanded in order to serve society's law enforcement interests. I do not accept this mode of Fifth Amendment interpretation. But even if I did, I would find the theoretical risk that compelled testimony could hamper a potential prosecution to be plainly outweighed by the enforcement interest in allowing the deposition to go forward. And, significantly, even the slight theoretical risk that concerns the Court is not presented by *this case*, in which no new incriminating information is called for by the deposition questions.

III

The Court makes the curious argument that the Fifth Amendment privilege must extend to testimony that could not incriminate a witness because otherwise the witness will be put to the risk of "predicting" whether a court in a later criminal proceeding would agree that the testimony was

[17] The Court suggests, *ante*, at 259–260, that cross-examination somehow poses unique problems in this case. Yet it concedes that it is not unusual for a valid assertion of a Fifth Amendment privilege to inhibit cross-examination as to collateral matters such as credibility. *Ante*, at 260, n. 19. It is thus concerned only that cross-examination might not be allowed on matters about which the witness testified on direct examination because such cross-examination will produce information not elicited on direct. I do not understand why such cross-examination would not be allowed; even if the information were not itself elicited on direct, it would concern a matter about which the witness was required to testify on direct and would thus be derived from the prior immunized testimony in the same way as the direct examination. But even if it were possible that a valid assertion of the Fifth Amendment privilege might so restrict cross-examination that a deposition answer would be inadmissible at trial, that is surely not a sufficient reason to establish a *constitutional* privilege against giving the direct testimony.

within the scope of the immunity. *Ante*, at 261–262. I do not agree that the "risk" that troubles the Court is entitled to protection under the Fifth Amendment.

A witness in the respondent's chair at a deposition can do one of two things: he can answer or he can assert a Fifth Amendment privilege. If he answers, he is obviously more "at risk" under JUSTICE BLACKMUN's narrow view of the use immunity statute than under the broad one adopted in *Kastigar*. For that reason, the Court does not dispute the fact that if the respondent had answered the deposition questions in this case, his answers could not be used against him.[18] The Court and I part company, however, in reacting to the risks that the witness faces if he asserts a Fifth Amendment privilege.

If the court supervising the deposition concludes that an answer is not "directly or indirectly derived" from prior immunized testimony, it must uphold the assertion of the Fifth Amendment privilege under both my analysis and the Court's. If, on the other hand, the supervising court concludes that the answer is "directly or indirectly derived" from immunized testimony, I believe it must reject the asserted privilege. The Court disagrees, for two analytically distinct reasons.

First, the Court suggests that the supervising court might make a mistake in deciding whether the testimony is directly or indirectly derived. It suggests that in this case Judge Singleton might not have been able to "predetermine the decision of the court in a subsequent criminal prosecution on the

[18] It is true, of course, that a witness will risk having his extended testimony used against him later if he makes statements that are not derived from his grand jury testimony. But the assumption that counsel would not be able to identify those "danger areas" demeans the competence of our trial bar. The problem raised by such testimony is essentially the same as the problem presented when any witness testifies in a manner that might be exploited to uncover evidence against him. When in doubt, prudent counsel can always obtain an authoritative court ruling by having the witness assert the Fifth Amendment privilege.

question whether the Government has met its burden of proving that 'the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.'" *Ante*, at 261. The Court does not explain what sort of evidence the prosecutor might subsequently be able to produce that would show the answers to be "wholly independent"; indeed, it is difficult to conceive how such evidence could possibly exist in this case. More importantly, the Court does not explain why the risk of error in this situation is different from the identical risk that exists whenever a privilege is asserted. The Court's argument would require every trial judge always to honor a claim of privilege, no matter how obvious it may be that the claim lacks merit, to guard against being found wrong later.[19]

Second, the Court suggests, with JUSTICE MARSHALL, that it would be unfair to require the witness to answer because "'[f]urther incriminating evidence that is derived from compelled testimony cannot always be traced back to its source.'" *Ante*, at 262, n. 22, quoting *ante*, at 268. Yet such an argument applies with equal force to the entire concept of use immunity. Our holding in *Kastigar* rests squarely on the proposition that one may not assert a Fifth Amendment privilege on the basis of the risk that evidence might not be traced back to its source. Cf. *Kastigar*, 406 U. S., at 468–471 (MARSHALL, J., dissenting). Even if the Court were now prepared to retreat from that proposition, this case is surely not the proper vehicle. The respondent here was asked only to ratify or confirm facts that were already known. On this record, it clearly appears that the

[19] The Court is somewhat misleading when it discusses the risk that a trial judge may erroneously reject an assertion of a Fifth Amendment privilege in a paragraph that discusses risks borne by the witness. Such a risk is obviously borne by the government, which may not make use of testimony that is "wrongfully compelled" by a judge. *Maness* v. *Meyers*, 419 U. S. 449, 474 (WHITE, J., concurring in result). Cf. *Garrity* v. *New Jersey*, 385 U. S. 493, 500 (government may not use statements obtained under threat of removal from public office).

answers to the specific questions asked could not possibly provide any basis for prosecution, or even for investigation, beyond what was already provided by the grand jury testimony.[20]

In summary, it is perfectly clear on this record that the respondent's deposition testimony (a) would be protected by the statutory immunity; (b) could not be used against respondent in a subsequent criminal proceeding; and (c) could not provide a prosecutor with any information he does not already have. A concern that a court might not decide some other case correctly cannot justify an incorrect disposition of the case before us.

I respectfully dissent.

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[20] The Court also notes that requiring the respondent to speak increases the risk that he may reveal that he perjured himself before the grand jury, as well as the risk that he may be exposed to civil liability for his misdeeds. *Ante*, at 262, n. 22. But potential civil liability has never been held to establish a Fifth Amendment privilege. Cf. *Ullmann* v. *United States*, 350 U. S., at 430–431; *Brown* v. *Walker*, 161 U. S. 591, 605–606. And respondent has never suggested that he asserted the privilege to avoid the risk of prosecution for perjury; the Court does not explain why that risk could not be evaluated case by case when and if it is asserted.

Syllabus

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR *v.* PERINI NORTH RIVER ASSOCIATES ET AL.

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

No. 81–897. Argued October 4, 1982—Decided January 11, 1983

Before 1972, coverage under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act) extended only to injuries sustained by workers on the actual "navigable waters of the United States (including any dry dock)." In 1972, the Act was amended by expanding the "navigable waters" situs to include certain adjoining land and by adding a status requirement that employees covered by the Act be "engaged in maritime employment" within the meaning of § 2(3) of the Act. In this case, an employee (Churchill) of respondent construction firm was injured while performing his job on the deck of a cargo barge being used in the construction of a sewage treatment plant extending over the Hudson River in New York. Churchill's claim for compensation under the LHWCA was administratively denied on the ground that he was not "engaged in maritime employment" under § 2(3). On Churchill's petition for review, in which the Director of the Office of Workers' Compensation Programs (Director) (petitioner here) participated as respondent in support of Churchill, the Court of Appeals held that Churchill was not in "maritime employment" because his employment lacked a "significant relationship to navigation or to commerce on navigable waters."

Held:

1. Where Churchill is a party respondent under this Court's Rule 19.6 and has filed a brief arguing for his coverage under the Act, there is a justiciable controversy before the Court. Accordingly, it is unnecessary to consider whether the Director, as the official responsible for administration and enforcement of the Act, has Art. III standing as an aggrieved party to seek review of the decision below. The Director's petition under 28 U. S. C. § 1254(1) brings Churchill before the Court, and he, as the injured employee, has a sufficient interest in the question at issue to give him standing to urge consideration of the merits of the Court of Appeals' decision. Pp. 302–305.

2. Churchill, as a marine construction worker injured while performing his job upon actual navigable waters, was "engaged in maritime em-

ployment" within the meaning of § 2(3), and thus was covered by the amended Act. Pp. 305–325.

(a) There is no doubt that Churchill would have been covered by the Act before it was amended in 1972. Pp. 305–312.

(b) There is nothing in the legislative history or in the 1972 Amendments themselves to indicate that Congress intended to withdraw coverage from employees injured on navigable waters in the course of their employment as that coverage existed before the 1972 Amendments, or that it intended the status language of § 2(3) to require that such an employee show that his employment possessed a direct or substantial relation to navigation or commerce in order to be covered. On the contrary, the legislative history indicates that Congress did not intend to "exclude employees traditionally covered." Moreover, Congress explicitly deleted language from the Act that was found in *Calbeck* v. *Travelers Insurance Co.*, 370 U. S. 114, to be responsible for the "jurisdictional dilemma" created by the "maritime but local" doctrine whereby a maritime worker was often required to make a perilous jurisdictional "guess" as to which of the two mutually exclusive compensation schemes, *i. e.*, the federal or the state scheme, was applicable to cover his injury. Pp. 313–325.

652 F. 2d 255, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed an opinion concurring in the judgment, *post*, p. 325. STEVENS, J., filed a dissenting opinion, *post*, p. 325.

Richard G. Wilkins argued the cause *pro hac vice* for petitioner. With him on the briefs were *Solicitor General Lee*, *Deputy Solicitor General Geller*, *T. Timothy Ryan, Jr.*, *Donald S. Shire*, *Kerry L. Adams*, *Mark C. Walters*, and *Joshua T. Gillelan II*.

Martin Krutzel argued the cause for respondents Perini North River Associates et al. With him on the brief for respondents Perini North River Associates et al. was *Richard A. Cooper*. *David MacRae Wagner* filed a brief for Raymond Churchill, respondent under this Court's Rule 19.6.

JUSTICE O'CONNOR delivered the opinion of the Court.

In 1972, Congress amended the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. (part 2) 1424, as

amended, 33 U. S. C. § 901 *et seq.* (1976 ed. and Supp. V) (hereinafter LHWCA or Act). Before 1972, LHWCA coverage extended only to injuries sustained on the actual "navigable waters of the United States (including any dry dock)." 44 Stat. (part 2) 1426. As part of its 1972 Amendments of the Act, Congress expanded the "navigable waters" *situs* to include certain adjoining land areas, § 3(a), 86 Stat. 1251, 33 U. S. C. § 903(a). At the same time, Congress added a *status* requirement that employees covered by the Act must be "engaged in maritime employment" within the meaning of § 2(3) of the Act.[1] We granted certiorari in this case, 455 U. S. 937 (1982), to consider whether a marine construction worker, who was injured while performing his job upon actual navigable waters,[2] and who would have been covered by the Act before 1972, is "engaged in maritime employment" and thus covered by the amended Act.[3] We hold that the worker is "engaged in maritime employment" for purposes of

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[1] Section 2(3) of the Act, 86 Stat. 1251, 33 U. S. C. § 902(3), provides: "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

[2] We use the expression "actual navigable waters" to describe the covered situs as it existed in the 1927 LHWCA, 44 Stat. (part 2) 1424: "navigable waters of the United States (including any dry dock)." *Id.*, at 1426. As explained below, the 1972 Amendments to the LHWCA expanded the concept of "navigable waters" to include certain adjoining shoreside areas. § 3(a), 33 U. S. C. § 903(a).

[3] In *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249 (1977), we examined the scope of the § 2(3) *status* requirement as it applied to injuries that occurred on the newly covered landward *situs*. In that case, we expressly declined to speculate whether congressional addition of the *status* requirement meant that "Congress excluded people who would have been covered before the 1972 Amendments; that is, workers who are injured on the navigable waters as previously defined." *Id.*, at 265, n. 25.

coverage under the amended LHWCA. Accordingly, we reverse the decision below.

I

The facts are not in dispute. Respondent Perini North River Associates (Perini) contracted to build the foundation of a sewage treatment plant that extends approximately 700 feet over the Hudson River between 135th and 145th Streets in Manhattan. The project required that Perini place large, hollow circular pipes called caissons in the river, down to embedded rock, fill the caissons with concrete, connect the caissons together above the water with concrete beams, and place precast concrete slabs on the beams. The caissons were delivered by rail to the shore, where they were loaded onto supply barges and towed across the river to await unloading and installation.

The injured worker, Raymond Churchill, was an employee of Perini in charge of all work performed on a cargo barge used to unload caissons and other materials from the supply barges and to set caissons in position for insertion into the embedded rock. Churchill was on the deck of the cargo barge giving directions to a crane operator engaged in unloading a caisson from a supply barge when a line used to keep the caissons in position snapped and struck Churchill. He sustained injuries to his head, leg, and thumb.[4]

Churchill filed a claim for compensation under the LHWCA. Perini denied that Churchill was covered by the Act, and after a formal hearing pursuant to § 19 of the Act, 33 U. S. C. § 919 (1976 ed. and Supp. V), an Administrative Law Judge determined that Churchill was not "engaged in maritime employment" under § 2(3) of the Act because his job lacked "some relationship to navigation and commerce on navigable waters." App. to Pet. for Cert. 31a. Churchill and the Director, Office of Workers' Compensation Programs

[4] At the time Churchill was injured, he was working on a barge in actual navigable waters. There is no claim that he was standing on the foundation of the sewage treatment plant.

(Director), appealed to the Benefits Review Board, pursuant to § 21(b)(3) of the Act, 33 U. S. C. § 921(b)(3). The Board affirmed the Administrative Law Judge's denial of coverage, on the theory that marine construction workers involved in building facilities not ultimately used in navigation or commerce upon navigable waters are not engaged in "maritime employment." 12 BRBS 929, 933 (1980).[5] One Board Member dissented, arguing that "all injuries sustained in the course of employment by employees over 'navigable waters' as that term was defined prior to the 1972 Amendments, are covered under the [amended] Act." *Id.*, at 935.[6]

Churchill then sought review of the Board's decision in the Court of Appeals for the Second Circuit, under § 21(c) of the Act, 33 U. S. C. § 921(c).[7] The Director participated as respondent, and filed a brief in support of Churchill's position. The Second Circuit denied Churchill's petition, relying on its decision in *Fusco* v. *Perini North River Associates*, 622 F. 2d 1111 (1980), cert. denied, 449 U. S. 1131 (1981). According to the Second Circuit, Churchill was not in "maritime employment" because his employment lacked a "'significant relationship to navigation or to commerce on navigable waters.'" *Churchill* v. *Perini North River Associates*, 652 F. 2d 255, 256, n. 1 (1981). The Director now seeks review of the Second Circuit denial of Churchill's petition. The Director agrees with the position taken by the dissenting member of the Benefits Review Board: the LHWCA does not require

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[5] The Board also determined that Churchill's duties did not make him a "person engaged in longshoring operations" under § 2(3) of the LHWCA.

[6] The dissenting Board member also relied on this Court's decision in *Sun Ship, Inc.* v. *Pennsylvania*, 447 U. S. 715 (1980), to support his position.

[7] Title 33 U. S. C. 921(c) provides in pertinent part:

"(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. . . ."

that an employee show that his employment possesses a "significant relationship to navigation or to commerce," where, as here, the employee is injured while working upon the actual navigable waters in the course of his employment, and would have been covered under the pre-1972 LHWCA.[8]

II

Before we consider whether Churchill is covered by the Act, we must address Perini's threshold contention that the Director does not have standing to seek review of the decision below. According to Perini, the Director's only interest in this case is in furthering a different interpretation of the Act than the one rendered by the Administrative Law Judge, the Benefits Review Board, and the Court of Appeals.[9]

Perini's claim ignores the procedural posture in which this case comes before the Court. That posture makes it unnecessary for us to consider whether the Director, as the agency

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[8] The Ninth Circuit is in agreement with the Second Circuit position. See *Weyerhaeuser Co.* v. *Gilmore*, 528 F. 2d 957 (1975), cert. denied, 429 U. S. 868 (1976). The Fifth Circuit takes a position contrary to that of the Second Circuit and Ninth Circuit. See *Boudreaux* v. *American Workover, Inc.*, 680 F. 2d 1034 (1982) (en banc) (Tate, J.).

[9] Perini bases its standing argument on § 21(c) of the Act, 33 U. S. C. § 921(c). See n. 7, *supra*. According to Perini, the Director is not "adversely affected or aggrieved" by the decision below, and does not have standing before this Court. Perini relies on several Court of Appeals decisions which, in construing § 21(c), have held the Director to be without *statutory* standing in cases before the Courts of Appeals. See *Fusco* v. *Perini North River Associates*, 601 F. 2d 659 (CA2 1979), vacated and remanded on other grounds, 444 U. S. 1028, adhered to on remand, 622 F. 2d 1111 (CA2 1980), cert. denied, 449 U. S. 1131 (1981); *Director, OWCP* v. *Donzi Marine, Inc.*, 586 F. 2d 377 (CA5 1978); and *I. T. O. Corp. of Baltimore* v. *Benefits Review Board*, 542 F. 2d 903 (CA4 1976), vacated and remanded on other grounds *sub nom. Adkins* v. *I. T. O. Corp. of Baltimore*, 433 U. S. 904, adhered to on remand, 563 F. 2d 646 (1977).

Section 21(c) is not relevant to our present inquiry. Perini concedes that § 21(c) applies on its face to statutory review before the courts of appeals. Moreover, the cases on which Perini relies do not purport to address the Art. III standing issue.

official "responsible for the administration and enforcement" of the Act,[10] has standing as an aggrieved party to seek review of the decision below.[11] The Director is not alone in arguing that Churchill is covered under the LHWCA. Churchill, the injured employee, is before the Court as well. He has filed a brief in support of the Director's request for a writ of certiorari, and a brief addressing the merits of his claim, in which he presents the same arguments presented by the Director. But, for some reason that is not entirely clear, Churchill has not elected to seek review as a petitioner, and by virtue of the Rules of this Court, he is considered a party

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[10] 20 CFR § 802.410(b) (1982). Section 39 of the Act, as set forth in 33 U. S. C. § 939, provides that "the Secretary [of Labor] shall administer the provisions of this chapter, and for such purpose the Secretary is authorized (1) to make such rules and regulations . . . as may be necessary in the administration of this chapter." The Secretary has assigned enforcement and administration responsibilities to the Director.

[11] We acknowledge that on three occasions, this Court has granted petitions for certiorari to review cases brought by the Director. See *Director, OWCP* v. *Walter Tantzen, Inc.*, 446 U. S. 905 (1980), vacating and remanding *Walter Tantzen, Inc.* v. *Shaughnessy*, 601 F. 2d 670 (CA2 1979), revised on remand, 624 F. 2d 5 (1980); *Director, OWCP* v. *Rasmussen*, 436 U. S. 955 (1978); and *Director, OWCP* v. *Jacksonville Shipyards, Inc.*, 433 U. S. 904 (1977), vacating and remanding *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F. 2d 533 (CA5 1976), adhered to on remand, 575 F. 2d 79 (1978), cert. denied, 440 U. S. 967 (1979).

Tantzen and *Jacksonville Shipyards* were both summary dispositions, and *Rasmussen* was decided on the merits, see *Director, OWCP* v. *Rasmussen*, 440 U. S. 29 (1979). In none of these cases did we have occasion to consider whether the Director had standing in his own right to seek review of a decision of the Benefits Review Board *with which the Director disagreed.* In *Rasmussen*, the employer and the insurer also petitioned for certiorari, and the cases were consolidated. It was not necessary to consider the issue of the Director's standing in that case because a justiciable controversy was before the Court by virtue of the petition of the employer and insurer. In both *Tantzen* and *Jacksonville*, the Director had defended a Board decision in the Courts of Appeals as the federal respondent, and continued to defend the Board decision before this Court. See n. 13, *infra.*

respondent.[12] It is in this procedural context that Perini's challenge to Art. III standing must be considered. Perini concedes that the Director was a proper party respondent before the Court of Appeals in this litigation.[13] As party respondent below, the Director is entitled under 28 U. S. C. § 1254(1) to petition for a writ of certiorari. Although the Director has statutory authority to seek review in this Court, he *may* not have Art. III standing to argue the merits of Churchill's claim because the Director's presence does not guarantee the existence of a justiciable controversy with respect to the merits of Churchill's coverage under the LHWCA. However, the Director's petition makes Churchill an automatic respondent under our Rule 19.6, and in that capacity, Churchill "may seek reversal of the judgment of the Court of Appeals on any ground urged in that court." *O'Bannon* v. *Town Court Nursing Center*, 447 U. S. 773, 783–784, n. 14 (1980). The Director's petition, filed under 28

[12] This Court's Rule 19.6 provides in part: "All parties other than petitioners shall be respondents, but any respondent who supports the position of a petitioner shall meet the time schedule for filing papers which is provided for that petitioner . . . ."

Under Rule 19.6, Churchill is a party in this Court by virtue of his being a party in the proceedings below. Moreover, he has demonstrated his continued stake in the outcome of this case by filing in support of the Director at both the certiorari and merits stages of the proceedings.

[13] The fact that Perini concedes that the Director was a proper party respondent before the Court of Appeals in this case means that no question is thereby presented concerning whether the Director, as party respondent below, is a "party" for purposes of 28 U. S. C. § 1254(1), which states that a writ of certiorari may be "granted upon the petition of any party" below.

Given that the parties do not question the identity of the federal respondent, it is not necessary for us to decide the issue explicitly left open by the Court in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S., at 256, n. 11, as to whether the Director is a proper party respondent in the Court of Appeals. Although we declined to address this issue because the parties did not raise it in *Northeast Marine Terminal*, we noted that "[t]he Department of Labor has recently promulgated a regulation making it clear that the Director of OWCP is the proper federal party in a case of this nature. 42 Fed. Reg. 16133 (Mar. 1977)." *Ibid.*

U. S. C. § 1254(1), brings Churchill before this Court, and there is no doubt that Churchill, as the injured employee, has a sufficient interest in this question to give him standing to urge our consideration of the merits of the Second Circuit decision.

The constitutional dimension of standing theory requires, at the very least, that there be an "actual injury redressable by the court." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 39 (1976). This requirement is meant "to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action," as well as to assure "an actual factual setting in which the litigant asserts a claim of injury in fact." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982). The presence of Churchill as a party respondent arguing for his coverage under the Act assures that an admittedly justiciable controversy is now before the Court.

III

The question of Churchill's coverage is an issue of statutory construction and legislative intent. For reasons that we explain below, there is no doubt that Churchill, as a marine construction worker injured upon actual navigable waters in the course of his employment upon those waters, would have been covered by the LHWCA before Congress amended it in 1972. In deciding whether Congress intended to restrict the scope of coverage by adding the § 2(3) status requirement, we must consider the scope of coverage under the pre-1972 Act and our cases construing the relevant portions of that Act. We must then focus on the legislative history and purposes of the 1972 Amendments to the LHWCA to determine their effect on pre-existing coverage.

A

Beginning with our decision in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (1917), we held that there were certain circumstances in which States could not, consistently with Art. III, § 2, of the Constitution, provide compensation to injured maritime workers.[14] If the employment of an injured worker was determined to have no "direct relation" to navigation or commerce, and "the application of local law [would not] materially affect" the uniformity of maritime law, then the employment would be characterized as "maritime but local," and the State could provide a compensation remedy. *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469, 477 (1922). See also *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 242 (1921). If the employment could not be characterized as "maritime but local," then the injured employee would be left without a compensation remedy.

After several unsuccessful attempts to permit state compensation remedies to apply to injured maritime workers whose employment was not local,[15] Congress passed the LHWCA in 1927, 44 Stat. (part 2) 1424. Under the original statutory scheme, a worker had to satisfy five primary conditions in order to be covered under the Act. First, the worker had to satisfy the "negative" definition of "employee" contained in § 2(3) of the 1927 Act in that he could not be a "master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." *Id.*, at 1425.[16] Second, the

[14] Article III, § 2, extends the federal power "to all Cases of admiralty and maritime Jurisdiction." In *Jensen*, we held that state compensation Acts could not cover longshoremen injured seaward of the water's edge. The line of demarcation between land and water became known as the "*Jensen* line."

[15] See *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149 (1920); *Washington* v. *W. C. Dawson & Co.*, 264 U. S. 219 (1924).

[16] Section 3(a), 44 Stat. (part 2) 1426, also excluded from coverage "[a]n officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof."

worker had to suffer an "injury" defined by § 2(2) as "accidental injury or death arising out of and in the course of employment . . . ." *Ibid.* Third, the worker had to be employed by a statutory "employer," defined by § 2(4) as "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." *Ibid.*[17] Fourth, the worker had to meet a "situs" requirement contained in § 3(a) of the Act that limited coverage to workers whose "disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock)." *Id.*, at 1426. Fifth, § 3(a) precluded federal compensation unless "recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." *Ibid.*

Federal compensation under the LHWCA did not initially extend to all maritime employees injured on the navigable waters in the course of their employment. As mentioned, § 3(a) of the 1927 Act permitted federal compensation only if compensation "may not validly be provided by State law." *Ibid.* This language was interpreted to exclude from LHWCA coverage those employees whose employment was "maritime but local." See, *e. g.*, *Crowell* v. *Benson*, 285 U. S. 22 (1932). Application of the "maritime but local" doctrine required case-by-case determinations, and a worker was often required to make a perilous jurisdictional "guess" as to which of two mutually exclusive compensation schemes was applicable to cover his injury. Employers faced uncertainty as to whether their contributions to a state insurance fund would be sufficient to protect them from liability.

In *Davis* v. *Department of Labor*, 317 U. S. 249 (1942), this Court recognized that despite its many cases involving the

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[17] The 1927 Act did not contain any provision that an injured employee must be "engaged in maritime employment" at the time of injury in order to be covered. Rather, the Act employed the expression "maritime employment" only as part of the definition of a statutory "employer."

"maritime but local" doctrine, it had "been unable to give any guiding, definite rule to determine the extent of state power in advance of litigation . . . ." *Id.*, at 253. Employees and employers alike were thrust on "[t]he horns of [a] jurisdictional dilemma." *Id.*, at 255.[18] *Davis* involved an employee

[18] In *Davis*, our concern for the employer's dilemma was related to the fact that because the employer did not know with any certainty whether his employee would be covered under the LHWCA, "[t]he employer's contribution to a state insurance fund may therefore wholly fail to protect him against the liabilities for which it was specifically planned." 317 U. S., at 255. We resolved that dilemma in *Calbeck* v. *Travelers Insurance Co.*, 370 U. S. 114 (1962), by making it clear to employers that if they required their employees to work upon actual navigable waters, those employees would be covered by the LHWCA. The dissent takes this certainty in favor of LHWCA coverage to mean that in 1972 Congress wanted to ensure that employers like Perini would have only to pay for *state* compensation benefits, and would not have to obtain more costly LHWCA protection.

The dissent's concern about duplicative insurance seems exaggerated for two reasons. First, even under the dissent's view of coverage, both state and federal remedies are available to injured workers, and employers with employees working on the shore would have to contribute to state compensation funds in the event that an employee covered by the LHWCA's shoreside extension sought state compensation, or an employee was deemed for whatever reason not to be eligible for LHWCA relief. "[T]he 1972 extension of federal jurisdiction supplements, rather than supplants, state compensation law." *Sun Ship, Inc.* v. *Pennsylvania*, 447 U. S., at 720.

We also note that the dissent argues that before 1972, the financial burden of duplicative coverage was not heavy because LHWCA benefits were lower than they now are, and insurance carriers would cover LHWCA operations for a nominal addition to state compensation program premiums. There is nothing in the record in this case, in the legislative history, or, for that matter, in the dissent, concerning whether the relative spread between state and federal insurance premiums is higher now than before 1972.

Second, the dissent's view clearly does not result in any certainty whatsoever for employers like Perini with respect to whether those employers have to pay for LHWCA coverage. If any Perini employee (including Churchill) were to engage in loading, unloading, or repairing of the barge on which Churchill was working, the employee would be covered. Indeed,

who was injured while dismantling a bridge from a standing position on a barge. We upheld the application of the state compensation law in *Davis* not because the employee was engaged in "maritime but local" employment, but because we viewed the case as in a "twilight zone" of concurrent jurisdiction where LHWCA coverage was available and where the applicability of state law was difficult to determine. We held that doubt concerning the applicability of state compensation Acts was to be resolved in favor of the constitutionality of the state remedy. Relying in part on *Davis*, the Court in *Calbeck* v. *Travelers Insurance Co.*, 370 U. S. 114 (1962), created further overlap between federal and state coverage for injured maritime workers. In *Calbeck*, we held that the LHWCA was "designed to ensure that a compensation remedy existed for all injuries sustained by employees [of statutory employers] on navigable waters, and to avoid uncertainty as to the source, state or federal, of that remedy." *Id.*, at 124. Our examination in *Calbeck* of the "complete legislative history" of the 1927 LHWCA revealed that Congress did not intend to incorporate the "maritime but local" doctrine in the Act. *Id.*, at 120. "Congress used the phrase 'if recovery . . . may not validly be provided by State law' in a sense consistent with the delineation of coverage as reaching injuries occurring on navigable waters." *Id.*, at 126.[19]

Before 1972, there was little litigation concerning whether an employee was "in maritime employment" for purposes of being the employee of a statutory employer: "Workers who

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if Churchill himself had to make some minor mechanical adjustment on the barge and was injured while doing so, he would be covered under the dissent's view.

[19] We noted in *Sun Ship, Inc.* v. *Pennsylvania, supra*, that in extending LHWCA coverage into the "maritime but local" zone, *Calbeck* did not overturn *Davis* "by treating the federal statute as exclusive." 447 U. S., at 718–719. Rather, *Calbeck* eliminated the "jurisdictional dilemma" that resulted from the existence of two spheres of exclusive jurisdiction, by making injuries within the "maritime but local" sphere compensable under either state or federal law.

are not seamen but who nevertheless suffer injury on navigable waters are no doubt (or so the courts have been willing to assume) engaged in 'maritime employment.'" G. Gilmore & C. Black, Law of Admiralty 428 (2d ed. 1975) (Gilmore & Black). One case in which we did discuss the maritime employment requirement was *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244 (1941). In *Parker*, the injured worker, hired as a janitor, was drowned while riding in one of his employer's motorboats keeping lookout for hidden objects under the water. When the employee's beneficiary sought LHWCA compensation, the employer argued that the employment was "'so local in character'" that the State could validly have provided a remedy, and the § 3(a) language ("if recovery . . . may not validly be provided by State law") precluded federal relief. *Id.*, at 246. A unanimous Court rejected the employer's argument, and held that the employee was engaged in maritime employment and that LHWCA coverage extended to an employee injured on the navigable waters in the course of his employment, without any further inquiry whether the injured worker's employment had a direct relation to navigation or commerce.[20] In abolishing the "jurisdictional dilemma" created by the "maritime but local" doctrine, *Calbeck* relied heavily on *Parker*, see 370 U. S., at 127–128.

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[20] The majority opinion in *Davis* assumed that if the claimant in that case sought federal relief, and such relief was awarded at the administrative stage of the proceedings, the Court would have sustained the award under *Parker*. In his dissent in *Davis*, Chief Justice Stone argued that the federal Act applied to give exclusive relief in that case: "after our decision in *Parker* v. *Motor Boat Sales*, . . . [the *Davis* claimant's] right of recovery under the federal act can hardly be doubted." 317 U. S., at 260.

Professor Robertson has noted that "*Parker* should have meant the abolition of the 'maritime but local' exception," but that *Davis* indicated that the doctrine had continued vitality. D. Robertson, Admiralty and Federalism 210 (1970). Professor Robertson also states that if the claimant in *Davis* had sought federal, rather than state, compensation, "the *Parker* case would certainly have said that [the claimant] could get it." *Id.*, at 211.

It becomes clear from this discussion that the 1927 Act, as interpreted by *Parker*, *Davis*, and *Calbeck*, provided coverage to those employees of statutory "employers," injured while working upon navigable waters in the course of their employment. Indeed, the consistent interpretation given to the LHWCA before 1972 by the Director, the Deputy Commissioners, the courts, and the commentators was that (except for those workers specifically excepted in the statute), *any* worker injured upon navigable waters in the course of employment was "covered . . . without any inquiry into what he was doing (or supposed to be doing) at the time of his injury." Gilmore & Black, at 429–430.[21] As a marine con-

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[21] The dissent attempts to carve a new "maritime but local" area in which the exclusive remedy is state compensation. The dissent argues that Congress meant to exclude from LHWCA coverage all employees who are not longshoremen or harbor workers, and that only longshoremen and harbor workers possess the "direct link to maritime commerce" necessary for LHWCA coverage. According to the dissent, the pre-1972 case law, with the exception of *Parker*, supports its position. The dissent's view rests on a misreading of our decisions in *Davis* and *Calbeck*, and a failure to consider the impact of *Parker*, *Davis*, and *Calbeck* on the scope of pre-1972 coverage.

The dissent points out that *Davis* involved an employee who sought state compensation, and it concludes that *Davis* says nothing about LHWCA coverage. The employee in *Davis* was standing on a barge and assisting in the dismantling of a bridge, an activity that would clearly not have the "direct link to maritime commerce" that the dissent suggests is required. Although the *Davis* employee sought state compensation, both the *Davis* majority and the *Davis* dissent assumed that *if* the *Davis* employee sought LHWCA coverage, *Parker* would require that he get it. In *Calbeck*, the claimants were welders performing work on vessels, but our holding in *Calbeck* was clearly predicated on *Parker* and *Davis*, and cannot properly be characterized as a case where LHWCA coverage was predicated on the existence of some "direct link to maritime commerce" or "traditional" LHWCA employment. The dissent claims that since Churchill could be covered by a state compensation remedy, it is consistent with *Calbeck* to deny LHWCA coverage. This, of course, neglects the fact that *Calbeck* made clear that "Congress brought under the coverage of the Act all such injuries [suffered by employees working on the navigable waters] whether

struction worker required to work upon navigable waters, and injured while performing his duties on navigable waters, there can be no doubt that Churchill would have been covered under the 1927 LHWCA.

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or not a particular one was also within the constitutional reach of a state workmen's compensation law." 370 U. S., at 126–127.

Parker, *Davis*, and *Calbeck* were read by the lower federal and state courts not to limit LHWCA coverage only to "traditional" maritime activities, but to cover injuries that occurred on the navigable waters in the course of employment. See, *e. g.*, *Nalco Chemical Corp.* v. *Shea*, 419 F. 2d 572 (CA5 1969) (a pilot salesman traveling to offshore platform); *Interlake S.S. Co.* v. *Nielsen*, 338 F. 2d 879 (CA6 1964) (watchman), cert. denied, 381 U. S. 934 (1965); *Radcliff Gravel Co.* v. *Henderson*, 138 F. 2d 549 (CA5 1943) (workers who trimmed sand and gravel loaded on barges after being dredged from water bed), cert. denied, 321 U. S. 782 (1944); *Rex Investigative and Patrol Agency, Inc.* v. *Collura*, 329 F. Supp. 696 (EDNY 1971) (land-based employee sent temporarily onto vessel to act as watchman); *Standard Dredging Corp.* v. *Henderson*, 57 F. Supp. 770 (Ala. 1944) (employee engaged in dredging bed of intracoastal canal); *Ford* v. *Parker*, 52 F. Supp. 98 (Md. 1943) (night watchman); *Perry* v. *Baltimore Contractors, Inc.*, 202 So. 2d 694 (La. App. 1967) (worker injured while diving in order to assist in construction of a tunnel under intracoastal canal), cert. denied, 390 U. S. 1028 (1968). This list is by no means exhaustive, and does not include various administrative decisions.

In another case, *Pennsylvania R. Co.* v. *O'Rourke*, 344 U. S. 334 (1953), we held that a statutory "employer" existed as long as the employer had *any* employee engaged in "maritime employment," and that it was not necessary that the injured employee be the *one* employee that made his employer a statutory "employer." However, we also held in that case that the injured employee was, in fact, engaged in maritime employment when he was working as a railway brakeman, removing railroad cars from a car float by the use of an ordinary switch engine. *Id.*, at 340. Although *Pennsylvania R. Co.* involved a question as to which of two federal statutes applied to cover the employee's injury (the LHWCA or the Federal Employers' Liability Act), and did not involve an application of the "maritime but local" doctrine, the Deputy Commissioners had interpreted *Pennsylvania R. Co.* to mean "that injury over the water means, without much more inquiry, that they ought to grant [LHWCA] awards." Robertson, *supra* n. 20, at 220. In the two cases that came to us in *Calbeck*, the Deputy Commissioners had granted LHWCA awards on the basis of *Pennsylvania R. Co.* See Robertson, *supra* n. 20, at 219–220.

B

In its "first significant effort to reform the 1927 Act and the judicial gloss that had been attached to it," Congress amended the LHWCA in 1972. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249, 261 (1977). The purposes of the 1972 Amendments were to raise the amount of compensation available under the LHWCA, to extend coverage of the Act to include certain contiguous land areas, to eliminate the longshoremen's strict-liability seaworthiness remedy against shipowners, to eliminate shipowner's claims for indemnification from stevedores, and to promulgate certain administrative reforms. See S. Rep. No. 92–1125, p. 1 (1972) (hereinafter S. Rep.); H. R. Rep. No. 92–1441 (1972) (hereinafter H. R. Rep.).

For purposes of the present inquiry, the important changes effected by the 1972 Amendments concerned the definition of "employee" in § 2(3), 33 U. S. C. § 902(3), and the description of coverage in § 3(a), 33 U. S. C. § 903(a). These amended sections provide:

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." § 2(3), 33 U. S. C. § 902(3).
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> "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading,

repairing, or building a vessel) . . . ." § 3(a), as set forth in 33 U. S. C. § 903(a).[22]

"The 1972 Amendments thus changed what had been essentially only a 'situs' test of eligibility for compensation to one looking to both the 'situs' of the injury and the 'status' of the injured." *Northeast Marine Terminal Co., supra,* at 264–265. In expanding the covered situs in § 3(a), Congress also removed the requirement, present in § 3(a) of the 1927 Act, that federal compensation would be available only if recovery "may not validly be provided by State law." The definition of "injury" remained the same,[23] and the definition of "employer" was changed to reflect the new definition of "employee" in § 2(3).[24]

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[22] We note that the new coverage section still provides that no compensation shall be paid to "[a]n officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof." § 3(a)(2), 33 U. S. C. § 903(a)(2).

[23] "Injury" is defined in § 2(2), 33 U. S. C. § 902(2), as "accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment."

[24] "Employer" is defined in § 2(4), 33 U. S. C. § 902(4) as "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

The Reports also add: "[T]he Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i. e., a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters." S. Rep., at 13; H. R. Rep., at 11.

We note that there is an apparent inconsistency between the actual wording of § 2(4) and the expression in the legislative history. Section 2(4) defines an "employer" to be the employer of any employee engaged in mari-

The Director and Churchill claim that when Congress added the status requirement in § 3(a), providing that a covered employee must be "engaged in maritime employment," it intended to restrict or define the scope of the increased coverage provided by the expanded situs provision in § 3(a), but that Congress had no intention to exclude from coverage workers, like Churchill, who were injured upon actual navigable waters, *i. e.*, navigable waters as previously defined, in the course of their employment upon those waters.

According to Perini, Congress intended to overrule legislatively this Court's decision in *Calbeck*, and the status requirement was added to ensure that both the landward coverage *and* seaward coverage would depend on the nature of the employee's duties at the time he was injured. Perini's theory, adopted by the court below, is that all coverage under the amended LHWCA requires employment having a "significant relationship to navigation or to commerce on navigable waters."[25] Perini argues further that Churchill cannot meet the status test because he was injured while working on the construction of a foundation for a sewage treatment plant—an activity not typically associated with navigation or commerce on navigable waters.

We agree with the Director and Churchill. We are unable to find any congressional intent to withdraw coverage of the LHWCA from those workers injured on navigable waters in the course of their employment, and who would have been covered by the Act before 1972. As we have long held, "[t]his Act must be liberally construed in conformance with

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time employment on the "navigable waters" as defined by the 1972 Amendments to include the expanded landward situs. The legislative history, however, appears to contemplate that a statutory employer must have at least one employee working over the *actual* navigable waters before any employee injured on the new land situs can be covered.

[25] We see no real distinction between the "direct relationship" test used to articulate the "maritime but local" doctrine, and the "significant relationship" test urged by Perini. In support of the use of this test, Perini relies on the "maritime but local" cases.

its purpose, and in a way which avoids harsh and incongruous results." *Voris* v. *Eikel*, 346 U. S. 328, 333 (1953). See also *Baltimore & Philadelphia Steamboat Co.* v. *Norton*, 284 U. S. 408, 414 (1932); *Northeast Marine Terminal Co.*, 432 U. S., at 268.

It is necessary to consider the context in which the 1972 Amendments were passed, especially as that context relates directly to the coverage changes that were effected. Despite the fact that *Calbeck* extended protection of the LHWCA to all employees injured upon navigable waters in the course of their employment, LHWCA coverage still stopped at the water's edge—a line of demarcation established by *Jensen*. In *Nacirema Operating Co.* v. *Johnson*, 396 U. S. 212 (1969), we held that the LHWCA did not extend to longshoremen whose injuries occurred on the pier attached to the land. We recognized that there was much to be said for the uniform treatment of longshoremen irrespective of whether they were performing their duties upon the navigable waters (in which case they would be covered under *Calbeck*), or whether they were performing those same duties on a pier. We concluded, however, that although Congress could exercise its authority to cover land-based maritime activity, "[t]he invitation to move that *[Jensen]* line landward must be addressed to Congress, not to this Court." 396 U. S., at 224. See *Victory Carriers, Inc.* v. *Law*, 404 U. S. 202, 216 (1971).

"Congress responded with the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972." *P. C. Pfeiffer Co.* v. *Ford*, 444 U. S. 69, 73 (1979). The 1972 Amendments were enacted after Committees in both the House and Senate prepared full Reports that summarized the general purposes of the legislation and contained an analysis of the changes proposed for each section. See S. Rep., *supra;* H. R. Rep., *supra.* These legislative Reports indicate clearly that Congress intended to "*extend* coverage to protect *additional* workers." S. Rep., at 1 (emphasis

added).[26] Although the legislative history surrounding the addition of the status requirement is not as clear as that concerning the reasons for the extended situs, it is clear that "with the definition of 'navigable waters' expanded by the 1972 Amendments to include such a large geographical area, it became necessary to describe affirmatively the class of workers Congress desired to compensate." *Northeast Marine Terminal Co., supra*, at 264. This necessity gave rise to the status requirement: "The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." S. Rep., at 13; H. R. Rep., at 11. This comment

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[26] The reasons for the extended landward coverage are set forth in Report sections labeled "Extension of Coverage to Shoreside Areas":

"The present [1927] Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur 'upon the navigable waters of the United States.' Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

"To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate . . . .

. . . . . .

"The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

"The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. . . ." S. Rep., at 12–13; H. R. Rep., at 10–11.

indicates that Congress intended the status requirement to define the scope of the extended landward coverage.[27]

There is nothing in these comments, or anywhere else in the legislative Reports, to suggest, as Perini claims, that Congress intended the status language to require that an employee injured upon the navigable waters in the course of his employment had to show that his employment possessed a direct (or substantial) relation to navigation or commerce in

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[27] Perini argues that Congress' intent to eliminate the problem associated with movement from covered to noncovered areas will be frustrated by our holding because some employees may be deemed to satisfy the status test while working upon the navigable waters, but be deemed not to satisfy the status test when performing the same activity on land.

We have had two opportunities to examine the scope of landward coverage under the 1972 Amendments. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249 (1977), and *P. C. Pfeiffer Co.* v. *Ford*, 444 U. S. 69 (1979). In neither case did we interpret the "maritime employment" status provision to require an examination into whether the employment had a "direct" or "significant relationship to navigation or commerce." Rather, in both cases, we decided that the employees were covered because they were "engaged in longshoring operations," and thus fit one of the categories explicitly enumerated by Congress as part of "maritime employment." See 432 U. S., at 271, 273; 444 U. S., at 82.

We have had no occasion as yet to determine other possible applications of the status test to activities performed on the expanded landward situs. Although we do not maintain that landward coverage could never be determined by reference to anything but the explicitly enumerated categories of activities in the § 2(3) definition of "employee," we note that our cases to date have focused on these explicit categories because the legislative history indicates that Congress intended to extend landward coverage to those specifically included occupations. See S. Rep, at 13; H. R. Rep., at 10–11. See also *Northeast Marine Terminal Co.*, *supra*, at 273. Regardless of the potential difficulties that may arise in the future in applying the status test to land-based injuries, it is clear that in extending coverage landward, Congress sought to make available LHWCA compensation to those who, before the 1972 Amendments, regularly *did* move from covered to noncovered areas, but did not intend to withdraw coverage from those employees, traditionally covered by the Act, who were injured in the course of their employment on navigable waters as previously defined.

order to be covered. Congress was concerned with injuries on land, and assumed that injuries occurring on the actual navigable waters were covered, and would remain covered.[28] In discussing the added status requirement, the Senate Report states explicitly that the "maritime employment" requirement in § 3(a) was not meant to "exclude other employees traditionally covered." S. Rep., at 16. We may presume "that our elected representatives, like other citizens, know the law," *Cannon* v. *University of Chicago*, 441 U. S. 677, 696–697 (1979), and that their use of "employees tradi-

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[28] Ignoring the references in the Committee Reports to the fact that in 1972 Congress merely sought to extend benefits landward, the dissent focuses instead on passages in the legislative history which indicate that Congress wanted to extend benefits to certain employees who regularly *did* (in Congress' view) walk in and out of coverage, and who performed the same tasks on land as they performed over the actual navigable waters. The dissent concludes from this that Congress sought to withdraw coverage from those employees injured over the actual navigable waters in the course of employment who would have been covered before 1972 and who we now hold are "engaged in maritime employment" for purposes of the amended LHWCA. The fact that Congress desired to extend coverage landward for a certain group of employees does not tend to prove that Congress sought to withdraw coverage from another group of employees who were customarily covered before the 1972 Amendments. The dissent's view would relegate a number of employees to state compensation remedies in the face of express and extensive congressional findings that "most State Workmen's Compensation laws provide benefits which are inadequate." S. Rep., at 12–13; H. R. Rep., at 10.

The dissent claims that it "cannot find a single word" in the legislative history to support LHWCA coverage of any employee who is not a longshoreman or harbor worker. *Post*, at 330. The word that the dissent overlooks is "maritime" in § 2(3) of the Act. Before 1972, employees such as Churchill were considered to be engaged in "maritime" employment. In order to withdraw coverage from employees, such as Churchill, who are maritime employees injured in the course of their employment upon the actual navigable waters, Congress would have had to ignore the consistent interpretation given the Act before 1972, by the Director, the Deputy Commissioners, the courts, and the commentators. See n. 21, *supra*.

tionally covered" was intended to refer to those employees included in the scope of coverage under *Parker*, *Davis*, and *Calbeck*.[29]

Other aspects of the statutory scheme support our understanding of the "maritime employment" status requirement. Congress removed from § 3(a) the requirement that, as a prerequisite to federal coverage, there can be no valid recovery under state law.[30] As we noted in our discussion in Part

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[29] Perini cites our decision in *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U. S. 249 (1972), and argues that the LHWCA is premised upon admiralty jurisdiction, which requires a connection between an employee and traditional maritime activity. Perini's reliance on *Executive Jet* is misplaced. In that case, the only issue before the Court was whether federal admiralty jurisdiction extended to tort claims arising out of the crash of an airplane into navigable waters on a flight "within the continental United States, which [is] principally over land." *Id.*, at 266. Jurisdiction in *Executive Jet* was predicated on 28 U. S. C. § 1333(1), which provides that the federal district courts have original and exclusive jurisdiction of "[a]ny civil case of admiralty or maritime jurisdiction."

The explicit language of *Executive Jet* makes it clear that our discussion was occasioned by "the problems involved in applying a locality-alone test of admiralty tort jurisdiction to the crashes of aircraft" in a situation where "the fact that an aircraft happens to fall in navigable waters, rather than on land, is wholly fortuitous." 409 U. S., at 265, 266. Although the term "maritime" occurs both in 28 U. S. C. § 1333(1) and in § 2(3) of the Act, these are two different statutes "each with different legislative histories and jurisprudential interpretations over the course of decades." *Boudreaux* v. *American Workover, Inc.*, 680 F. 2d 1034, 1050 (CA5 1982) (footnote omitted). In addition, Churchill, as a marine construction worker, was by no means "fortuitously" on the water when he was injured.

[30] The dissent argues that it is "now perfectly clear" that Churchill (or any other "shore-based worker" injured upon actual navigable waters) could have received a state compensation award, and there should be no concern about such an employee being left without a remedy. This position is by no means "perfectly clear." See, *e. g.*, *Holcomb* v. *Robert W. Kirk and Associates, Inc.*, 655 F. 2d 589 (CA5 1981) (watchman injured while working on vessel sought compensation under state scheme, and was denied recovery because injury was covered under LHWCA—Court of Appeals granted LHWCA compensation, holding that when Congress passed the 1972 Amendments, it took for granted that injuries occurring on the actual

III–A, *supra*, the continued use of the "maritime but local" doctrine occurred after passage of the 1927 Act because the original coverage section contained this requirement that Congress explicitly deleted in 1972. Surely, if Congress wished to repeal *Calbeck* and other cases legislatively, it would do so by clear language and not by removing from the statute the exact phrase that *Calbeck* found was responsible for continued emphasis on the "maritime but local" doctrine.[31]

Congressional intent to adhere to *Calbeck* is also indicated by the fact that the legislative Reports clearly identified those decisions that Congress wished to overrule by the 1972 Amendments. As mentioned above, the 1972 Amendments had other purposes apart from an expansion of coverage to shoreside areas. Two other purposes involved the elimination of a strict-liability unseaworthiness remedy against a vessel owner afforded to longshoremen by *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946), and an indemnity claim against the stevedore by the vessel owner afforded by *Ryan*

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navigable waters were covered under *Parker*, *Davis*, *Pennsylvania R. Co.*, *Calbeck*, and the myriad lower court cases applying our decisions); *Rex Investigative and Patrol Agency*, 329 F. Supp., at 698 (the court found that the injured watchman's state compensation claim had been dismissed because the "claim properly belonged before a federal, rather than a [New York] state, agency").

[31] Certain comments made in the debates preceding passage of the 1972 Amendments in the House indicate support for our view that Congress intended to extend protection in 1972, and not to withdraw protection. For example, Representative Steiger posed the following question and answer to explain the coverage provision:

"Q. *The present law covers employees working on navigable waters. Do the amendments change the scope of coverage?*

"A. Yes. The present law's coverage is limited to employees working on navigable waters, including those working on dry docks. The amendments will extend coverage to wharfs, terminals, marine railways and other adjoining areas . . . ." 118 Cong. Rec. 36385 (1972) (emphasis in original).

See also *id.*, at 36270–36271 (remarks of Sen. Williams); *id.*, at 36381–36382 (remarks of Rep. Daniels).

Stevedoring Co. v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124 (1956). The legislative Reports explicitly identified these decisions as intended to be overruled legislatively by the 1972 Amendments. See S. Rep., at 8–12; H. R. Rep., at 4–8. It is, therefore, highly unlikely that Congress would have intended to return to the "jurisdictional monstrosity" that *Calbeck* sought to lay to rest without at least some indication of its intent to do so.

In considering the scope of the status test as applied to land-based employees in *Northeast Marine Terminal Co.*, we rejected the "point of rest" theory proposed by the employer, under which landward coverage under the 1972 Amendments would include only the portion of the unloading process that takes place before longshoremen place the cargo onto the dock. We reasoned that the "point of rest" concept is "[a] theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts the coverage of a remedial Act designed to extend coverage . . . ." The absence of the concept, "claimed to be so well known in the industry is both conspicuous and telling." 432 U. S., at 278–279, 275. In the same sense, the absence of even the slightest congressional allusion to the "maritime but local" doctrine, a concept that plagued maritime compensation law for over 40 years and that would have the effect of restricting coverage in the face of congressional intent not to "exclude other employees traditionally covered," is equally conspicuous and telling.

Finally, we note that our conclusion concerning the continued coverage of employees injured on actual navigable waters in the course of their employment is consistent with, and supported by, our recent decision in *Sun Ship, Inc.* v. *Pennsylvania*, 447 U. S. 715 (1980). In *Sun Ship*, the issue before the Court was whether extended shoreside coverage under the 1972 Amendments had the effect of displacing con-

current state remedies for landward injuries. After a review of the development of the "maritime but local" doctrine, and review of certain portions of the legislative history of the 1972 Amendments, we concluded that those Amendments were not intended to resurrect the dilemma, created by mutually exclusive spheres of jurisdiction, that *Calbeck* and *Davis* eliminated. Our reasoning was based, in part, on the removal by Congress of the language in the 1927 Act that made federal compensation available if recovery could not validly be provided by state law: "[T]he deletion of that language in 1972—if it indicates anything—may logically only imply acquiescence in *Calbec[k]* . . . ." 447 U. S., at 721.

Sun Ship held that with respect to land-based injuries, "the . . . extension of federal jurisdiction supplements, rather than supplants, state compensation law." *Id.*, at 720. If we were to hold that the addition of the status requirement was meant to exclude from coverage some employees injured on the actual navigable waters in the course of their employment, a most peculiar result would follow. Concurrent jurisdiction will exist with respect to the class of employees to whom Congress extended protection in 1972, while employees "traditionally covered" before 1972 would be faced with a hazardous pre-*Davis* choice of two exclusive jurisdictions from which to seek compensation. Such an anomalous result could not have been intended by Congress. We also note that a return to exclusive spheres of jurisdiction for workers injured upon the actual navigable waters would be inconsistent with express congressional desire to extend LHWCA jurisdiction landward in light of the inadequacy of most state compensation systems. See S. Rep., at 12; H. R. Rep., at 10.

In holding that we can find no congressional intent to affect adversely the pre-1972 coverage afforded to workers injured upon the actual navigable waters in the course of their employment, we emphasize that we in no way hold that Con-

gress meant for such employees to receive LHWCA coverage merely by meeting the situs test, and without any regard to the "maritime employment" language.[32] We hold only that when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § 2(3), and is covered under the LHWCA, providing, of course, that he is the employee of a statutory "employer," and is not excluded by any other provision of the Act.[33] We consider these employees to be "engaged in maritime employment" not simply because they are injured in a historically maritime locale, but because they are required to perform their employment duties upon navigable waters.[34]

[32] In both *Northeast Marine Terminal Co.*, 432 U. S., at 263–264, and *P. C. Pfeiffer Co.*, 444 U. S., at 78–79, we recognized that the status requirement is occupational and the situs test is geographic.

[33] See also, *e. g.*, 1A E. Benedict, Admiralty §§ 17, 19 (7th rev. ed. 1982); Gilmore & Black, at 428–430; Robertson, Injuries to Maritime Petroleum Workers: A Plea for Radical Simplification, 55 Texas L. Rev. 973, 986–987 (1977); Comment, Broadened Coverage under the LHWCA, 33 La. L. Rev. 683, 694 (1973); Note, 54 N. C. L. Rev. 925, 940 (1976). But see 4 A. Larson, Law of Workmen's Compensation §§ 89.27, 89.41 (1982); Tucker, Coverage and Procedure under the Longshoremen's and Harbor Workers' Compensation Act Subsequent to the 1972 Amendments, 55 Tulane L. Rev. 1056, 1062 (1981).

[34] Our holding, of course, extends only to those persons "traditionally covered" before the 1972 Amendments. We express no opinion whether such coverage extends to a worker injured while transiently or fortuitously upon actual navigable waters, or to a land-based worker injured on land who then falls into actual navigable waters. Our decision today should not be read as exempting water-based workers from the new status test. Rather, our holding is simply a recognition that a worker's performance of his duties upon actual navigable waters is necessarily a very important factor in determining whether he is engaged in "maritime employment."

Contrary to the suggestion by the dissent, *post*, at 342–343, n. 26, there is no inconsistency in our failing to decide the question of coverage as to these employees, and our reliance on *Parker*. In *Parker*, we held that the injured employee was engaged in "maritime employment" in a situation where we did not discuss whether the employer was a statutory "employer."

IV

In conclusion, we are unable to find anything in the legislative history or in the 1972 Amendments themselves that indicate that Congress intended to withdraw coverage from employees injured on the navigable waters in the course of their employment as that coverage existed before the 1972 Amendments. On the contrary, the legislative history indicates that Congress did not intend to "exclude other employees traditionally covered." Moreover, Congress explicitly deleted the language from § 3(a) that we found in *Calbeck* to be responsible for the "jurisdictional dilemma" caused by two mutually exclusive spheres of jurisdiction over maritime injuries. Accordingly, the decision of the Court of Appeals is hereby reversed, and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE REHNQUIST, concurring in the judgment.

At the time of his injury, Churchill was engaged in unloading materials from a supply barge to a cargo barge. This work is very much like the work of longshoremen, who typically load and unload vessels. Therefore Churchill was "engaged in maritime employment" within the meaning of § 2(3) of the Act, and was within its coverage. Accordingly, I concur in the judgment of the Court.

JUSTICE STEVENS, dissenting.

Neither the legislative history nor the judicial history on which the Court relies today justifies a departure from the language of the statute defining the post-1972 coverage of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA). Indeed, when the issue is viewed in its proper historical perspective, it becomes even more clear that a literal reading of the Act will avoid anomalies that troubled Congress in 1972 as well as unnecessary litigation and dupli-

cate insurance coverage in the post-1972 period. I shall first comment on the statutory language and then discuss its history.

I

The principal focus of the statute is identified by its title as well as its text. It provides workers' compensation benefits for injuries to longshoremen and harbor workers.[1] The coverage of the statute is defined by two basic tests—a *situs* test focusing on the place where the injury occurred, and a *status* test focusing on the character of the injured employee's occupation. An injured person is entitled to compensation under the Act only if he satisfied both tests at the time of the injury. The two tests work together to provide comprehensive coverage for a large class of workers who perform hazardous longshore and ship repair work.

The requisite occupational status is defined in § 2(3) of the Act. It provides:

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[1] By reason of several specific statutory enactments, the LHWCA's compensation scheme is, or has been, also applied to:

(a) employees on defense bases, Act of Aug. 16, 1941, ch. 357, § 1, 55 Stat. 622 (codified, as amended, at 42 U. S. C. §§ 1651–1654);

(b) employees of nonappropriated fund instrumentalities such as post exchanges, Act of June 19, 1952, Pub. L. 397, § 2, 66 Stat. 139 (codified, as amended, at 5 U. S. C. §§ 8171–8173);

(c) employees of Government contractors injured overseas by war-risk hazards, Act of Dec. 2, 1942, ch. 668, Title I, § 102, 56 Stat. 1031 (codified, as amended, at 42 U. S. C. § 1702);

(d) workers in the District of Columbia, Act of May 17, 1928, ch. 612, 45 Stat. 600, repealed by Act of July 1, 1980, D. C. Law 3–77, § 3, see D. C. Code § 36–301 (1981); and

(e) workers on oil drilling rigs on the Outer Continental Shelf, Act of Aug. 7, 1953, Pub. L. 212, § 4(c), 67 Stat. 463 (codified, as amended, at 43 U. S. C. § 1333(c)).

In this case, however, we are concerned with the coverage provided by the LHWCA itself.

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." 33 U. S. C. § 902(3).

The term "maritime employment" expressly includes two important subcategories, both of which are defined with reasonable clarity. The question of construction that is presented is what, if any, additional categories of employment are included within the term "maritime employment." There are several independent reasons for not giving the term an expansive, essentially open-ended reading.

First, one of the oldest and most respected rules of statutory construction teaches us that general terms should be construed in the light of the specific examples that are expressly identified as included therein. In this statute, the subcategories—longshoremen and harbor workers—are both described in detail, and no other subcategory is even mentioned, giving rise to an especially strong inference that Congress intended a snug fit between "maritime employment" and the two subcategories.[2]

This inference is corroborated by the fact that Congress took the trouble to add language making it clear that the stat-

[2] Coincidentally, two authors named Sutherland have made this point in language that is strikingly suitable to this case. See W. Sutherland, The Shipbuilder's Assistant 77 (1755) ("[T]he straiter and *snuger* the Sheer lies, the less Wind is held to hinder the Motion of the Ship") (emphasis added); J. Sutherland, Statutes and Statutory Construction § 273 (1891) (footnote omitted) ("The words 'other persons,' following in a statute the words 'warehousemen' and 'wharfinger,' must be understood to refer to other persons *ejusdem generis*, viz., those who are engaged in a like business, or who conduct the business of warehousemen or wharfingers with some other pursuit, such as shipping, grinding, or manufacturing").

utory concept of "maritime employment" was not intended to describe either the master or a member of the crew of any vessel.[3] In short, the ordinary meaning of the words "maritime employment" is actually excluded from the description of the occupational categories that Congress intended the LHWCA to cover.

It is also clear that the definition of "employee" is entirely unaffected by where he may be injured; if a worker is not an "employee" when ashore, he is not an "employee" when afloat. Therefore, it is critically significant that the definition of where "employees" are covered—the situs provision—reveals the same limited concern for the same key occupations as the status provision. An "employee" is covered only while on navigable waters and on "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area *customarily used by an employer in loading, unloading, repairing, or building a vessel.*" 33 U. S. C. § 903(a) (emphasis added).

If we ignore history, and merely concentrate on the text of this statute, the conclusion is inescapable that it merely provides coverage for people who do the work of longshoremen and harbor workers—amphibious persons who are directly involved in moving freight onto and off ships, or in building, repairing, or destroying ships. A "checker" is such a worker.[4] So are "terminal laborers," *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249 (1977), "cotton headers," *P. C. Pfeiffer Co.* v. *Ford*, 444 U. S. 69 (1979), and "warehousemen," *ibid.* A construction worker on a sewage treatment plant plainly lacks this direct link to maritime commerce, regardless of where he may have been working at the time of his injury.

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[3] Seamen are protected under the Jones Act. See 46 U. S. C. § 688.

[4] See H. R. Rep. No. 92–1441, p. 11 (1972); S. Rep. No. 92–1125, p. 13 (1972); *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249 (1977).

II

If we examine the legislative history of the 1972 Amendments[5]—without regard to the text of the statute or judicial

[5] The 1972 Amendments made two changes that are relevant here. First, they modified the definitions in 33 U. S. C. §§ 902(3) and 902(4). Before the Amendments, the definitions read:

"(3) The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

"(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." §§ 902(3), (4) (1970 ed.).

As amended in 1972, the definitions read:

"(3) The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

"(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

Second, the Amendments modified the section defining covered injuries, 33 U. S. C. § 903(a). Before the Amendments, it read:

"Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

"(1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

"(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof." § 903(a) (1970 ed.).

[Footnote 5 is continued on p. 330]

decisions that are unmentioned in that history—we must reach the same conclusion. I cannot find a single word[6] in the Committee hearings, the Committee Reports, or the legislative debates that even suggests that any Congressman or Senator believed that the statute provided coverage for anyone other than longshoremen, harbor workers, and persons in the entirely separate categories that had been included by special statutory enactment.[7]

As amended in 1972, the section reads:

"Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of—

"(1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

"(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof." 86 Stat. 1251, Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972.

[6] The Court assumes that the words "traditionally covered" in the Committee Reports are intended to refer to employees who are not longshoremen or harbor workers. *Ante*, at 319, quoting S. Rep. No. 92–1125, at 16. See n. 1, *supra*. In particular, the Court assumes that the Committee was referring to the claimants in *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244 (1941), *Davis* v. *Department of Labor*, 317 U. S. 249 (1942), and *Calbeck* v. *Travelers Insurance Co.*, 370 U. S. 114 (1962). As I point out in Part III, *infra*, the *Calbeck* claimants were shipbuilders, a subcategory of the statutorily defined class of harbor workers, who are of course still covered under the 1972 Act; *Davis* held only that the claimant was entitled to state benefits; and *Parker* was plainly not a "traditional" LHWCA case. None of these cases was cited at any time in the hearings or the Reports. In my opinion the reference to the "traditional" coverage of the Act was intended to identify the coverage of longshoremen and harbor workers as opposed to the special categories of coverage defined by specific statutory enactment.

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

At the opening of the House Subcommittee hearings, Congressman Daniels explained his understanding of the existing scope of the LHWCA[8] and the need for amendments:

> "This Act provides workmen's compensation protection to longshoremen, ship repairmen, harbor workers at U. S. defense bases outside the United States and workers employed in private industry in the District of Columbia.
>
> "Amendments to the Longshoremen's and Harbor Workers' Compensation Act are long overdue. Benefits under this act have not been increased for 12 years, and the cost to the injured workers of inadequate benefits has become a serious matter.
>
> "For example, the law now allows a totally disabled worker to receive two-thirds of his average weekly wages at the time of his injury. However, since 1961 there has been a limitation of $70 per week as the maximum payment for a permanent disability. This statutory maximum results in a substantially lower payment than two-thirds of the weekly wage for most longshoremen and District of Columbia workers covered by this statute.
>
> "More than 270,000 longshoremen and ship repairmen are covered by this statute. In addition, another 300,000 employees of private employers within the District of Columbia are protected by this law as well as an additional 200,000 workers in defense bases and work on Outer Continental Shelf projects.

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[8] None of the original bills proposing amendments to the LHWCA in 1972 embodied any change in the scope of coverage. See H. R. 247; H. R. 3505; H. R. 12006; H. R. 15023; S. 2318; S. 525; S. 1547 (all in 92d Cong., 2d Sess.). The changes were incorporated between the hearings and the final Committee action. See H. R. 12006; S. 2318 (as reported). The hearings are nonetheless relevant because they give more direct evidence of what groups the legislators intended to protect than does the history of pre-1972 Supreme Court decisions.

> "Last year, there were more than 109,000 injuries under this statute; 240 of them fatal, 68,000 of them related to longshore work, and another 27,000 involved District of Columbia workers." Hearings on H. R. 247 et al. before the Select Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 2d Sess., 46 (1972) (hereinafter House Hearings).

Throughout the hearings, the legislators were told over and over again how important it was to increase the Act's benefits for workers in the categories identified by Congressman Daniels.[9] It seems plain that these were the categories of employment that were understood by Congress to define the traditional coverage of the Act.

When the House and Senate Committees reported out their respective bills, they had granted the sought-after increase in benefits. They had also amended the provisions defining the scope of coverage, including the language of "status" and "situs" discussed in the previous section. They had done so in response to a problem in the scope of prior coverage. Before 1972, longshoremen's and harbor workers' federal coverage had stopped at the water's edge. Because their duties regularly took them off the vessel and onto the

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[9] *E. g.*, Statement of James Hodgson, Secretary of Labor, House Hearings, at 47–64 (referring throughout to "longshoremen" and the "longshore industry"); Statement of Ralph Hartman, Bethlehem Steel Corp., *id.*, at 67 ("reference to the Longshoremen's and Harbor Workers' Compensation Act seems to suggest that the only industry involved is 'longshoring,' which fails to recognize that the act is also applicable to shipbuilding and ship repair yards—and to the District of Columbia"); Exhibits D1, D2, E, and F to Statement of James Flynn, New York Shipping Association, *id.*, at 98–100 (pointing out how hazardous longshoring is); Statement of Howard McGuigan, AFL–CIO, *id.*, at 255–258 (pointing out how LHWCA benefits were far below 66⅔% of current wage levels in the longshore industry, in the shipbuilding and ship repair industry, and in the District of Columbia). Cf. Statement of John J. O'Donnell, Air Line Pilots Association, *id.*, at 327–329 (suggesting that coverage be extended to flight crews).

pier, they were constantly "walking in and out of coverage." On the House side, Joseph Leonard, the international safety director of the International Longshoremen's Association, spoke about the hardship this system imposed:

> "Federal compensation law stops at the gangplank to the pier. When you come off of the gangplank you come under a different law; you come under the State. Thirty-six States cover these docks and maybe more now with the inland waterways.
>
> "The longshoremen are the only workers in the United States who must worry about their injury to determine the compensation. . . . It is time for a Federal law for compensation for all longshoremen." *Id.*, at 297.

And on the Senate side, the Minority Counsel brought this problem to the Senators' attention.[10]

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[10] The Minority Counsel, Eugene Mittelman, had the following exchange with a representative of the AFL–CIO:

"Mr. MITTELMAN. My last question concerns the fact that the longshoreman *[sic]* applies only when the man is over the navigable waters of the United States, and under whole series of court decisions there has been established a line where the provisions of the Longshore Act apply when the man is over the water, and yet the provisions of the State workmen's compensation law applies if the man is injured on land.

. . . . . .

"Do you have any position on this, concerning whether the Federal law should be extended, really, so that a uniform system of benefits is applicable to longshoremen, regardless of which side of the waterline the injury occurred on?

"Mr. MCGUIGAN. The first position we would have is that obviously there would be no incentive to cover him under the act until we know the act gives him benefits superior to the State workmen's compensation laws.

"Mr. MITTELMAN. I appreciate that. But assuming we would amend the act to provide a reasonable schedule of benefits as proposed in this bill, would you favor the principle of extending of the Longshore Act to cover all longshore workers whether performed on land or over water?

. . . . . .

"Mr. O'BRIEN . . . . [I]f the act were amended to take up its former place of prominence in the field of workmen's compensation, we would certainly

The Committee amendments responded to this problem by defining the protected situs to encompass the entire area in which members of the protected class customarily perform their regular duties. This definition of situs clearly precludes coverage for a construction worker standing on a sewage treatment plant or a bridge. Yet if one accepts the view of the claimant in this case, the statute grants him coverage while aboard a floating vessel and therefore expects him to walk in and out of coverage during a typical workday. Such a view is flatly inconsistent with the explicit intent of Congress to "permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for [only] part of their activity." H. R. Rep. No. 92–1441, pp. 10–11 (1972); S. Rep. No. 92–1125, p. 13 (1972).[11] Only if

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like to see the coverage of the act extended." Hearings on S. 2318 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., 73–74 (1972).

[11] The language of the Committee Reports shows how clearly Congress understood who was to be covered:

"The present Act, insofar as longshoremen and ship builders and ship repairmen are concerned, covers only injuries which occur 'upon the navigable waters of the United States.' Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

. . . . . .

"The Committee believes that the compensation payable to a longshoreman or a ship repairman or a builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel." H. R. Rep. No. 92–1441, at 10; S. Rep. No. 92–1125, at 12–13.

we adhere to the language used by Congress to define the relevant status harmoniously with the relevant situs can the congressional purpose be achieved.

III

The pre-1972 judicial history of the LHWCA confirms my construction of the 1972 Amendments and also explains why the work of longshoremen and harbor workers is described as "maritime employment" in the statute. Only once during the 45-year interval between the enactment of the LHWCA in 1927 and its amendment in 1972, in *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244 (1941), did this Court uphold an award of benefits under the LHWCA for a worker who was neither a longshoreman nor a harbor worker.[12] That lonely decision rested on a concern that is no longer significant, and surely provides an insufficient predicate for the Court's all-inclusive interpretation of "maritime employment." Before commenting specifically on the *Parker* case, however, I shall briefly identify the two principal chapters in the pre-1972 history of the LHWCA.

The first chapter (which covers the period from 1917 to 1927) explains why there was a need for federal legislation to provide compensation for injured longshoremen and harbor workers. Prior to 1917, it was assumed that these workers were adequately protected by whatever state legislation existed. In that year, however, this Court held that the na-

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[12] Arguably one other case, mentioned in a footnote of the Court's opinion, *ante*, at 312, n. 21, echoed *Parker*'s broad construction of the scope of LHWCA coverage. *Pennsylvania R. Co.* v. *O'Rourke*, 344 U. S. 334 (1953). There, this Court struck down an award of benefits under the Federal Employers' Liability Act, reasoning that the employee in that case—a brakeman who worked moving freight cars onto "car floats"—could have recovered under the LHWCA. The opinion in *O'Rourke* is somewhat cloudy, however, since it does not explicitly state that the particular employee was engaged in maritime employment, but only that his employer had such employees. *Id.*, at 339–340. Like the cases on which the Court relies, *O'Rourke* was not mentioned in the 1972 legislative history.

tional interest in the uniform regulation of maritime commerce precluded state jurisdiction over injuries occurring on navigable waters. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (1917).[13]

Over the classic dissents of two of our greatest Justices, the Court adhered to that view even though Congress twice attempted to authorize the exercise of state jurisdiction over these "maritime" injuries.[14] The so-called "*Jensen* line" thus developed as a constitutional limit on the exercise of state power over maritime employment.

The reasoning of the *Jensen* case originally appeared to foreclose the application of state workmen's compensation schemes to any injury occurring on navigable waters. The Court soon made it clear, however, that there was a somewhat vaguely defined area—an area that became known as the "maritime but local" area—in which state jurisdiction survived. Thus, in 1922, five years before the enactment of the LHWCA, the Court held that a carpenter injured at work aboard an uncompleted ship that had been launched in the Willamette River could recover under the Oregon Workmen's Compensation Law. *Grant Smith-Porter Ship Co.* v.

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[13] The Court reasoned:

"The work of a stevedore in which the deceased was engaging is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction.

"If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded." 244 U. S., at 217 (citation omitted).

[14] See *id.*, at 218–223 (Holmes, J., dissenting); *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 166–170 (1920) (Holmes, J., dissenting); *Washington* v. *W. C. Dawson & Co.*, 264 U. S. 219, 228–239 (1924) (Brandeis, J., dissenting).

Rohde, 257 U. S. 469 (1922). The national interest in uniformity that had been considered paramount in *Jensen* was not thought to be materially prejudiced by Oregon's regulation of "certain local matters."[15]

Unlike the work of the carpenter in *Rohde*, the work of the longshoreman was considered by the Court to have a character that required regulation by a uniform federal scheme. That much was made clear by the Court's opinion in *Northern Coal and Dock Co.* v. *Strand*, 278 U. S. 142 (1928),[16] a case involving a fatal shipboard injury to a longshoreman.

> "The unloading of a ship is not a matter of purely local concern. It has direct relation to commerce and navigation, and uniform rules in respect thereto are essential. The fact that Strand worked for the major portion of the time upon land is unimportant. He was upon the water in pursuit of his maritime duties when the accident occurred." *Id.*, at 144.

The LHWCA was enacted in 1927 to remedy this inability of the States to provide adequate protection for longshoremen injured on navigable waters. The fact that these workers had been characterized as "maritime" in the cases that had denied them adequate state protection explains why Congress later used the same term in the LHWCA.

The second chapter (which covers the period from 1927 to 1972) explains why it was necessary for Congress to limit the

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[15] In explaining why the holding in *Rohde* was consistent with *Jensen* and subsequent cases, the Court stated:

"In each of them the employment or contract was maritime in nature and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity. Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential." 257 U. S., at 477.

[16] The *Strand* case was decided in 1928 but arose out of an injury that had occurred in 1924, prior to the enactment of the LHWCA.

coverage of the LHWCA to a defined category of employees. As originally enacted in 1927, the LHWCA was merely intended to fill the gap in state coverage that had been created by *Jensen* and its progeny.[17] The provision that defined the scope of coverage, § 903(a) (which remained unchanged until 1972), purported to exclude federal coverage if recovery may "validly be provided by State law." At first, the statutory language was taken literally, and state and federal coverage were thought to be purely complementary and mutually exclusive. See *Crowell* v. *Benson*, 285 U. S. 22, 39, and n. 3 (1932). But given the imprecision of the *Jensen-Rohde* line, that system risked serious unfairness: If an injured employee asked for state benefits and was seaward of the line, a literalist interpretation of the LHWCA would bar recovery. An employee close to the line might easily misguess, miss the statute of limitations, and end up with no benefits at all.

This Court responded to this potential for injustice in two ways. Notwithstanding the plain language of the statute which purported to describe mutually exclusive spheres of state and federal jurisdiction,[18] the Court first upheld a state award in a case in which it was assumed that the federal statute would also apply, *Davis* v. *Department of Labor*, 317 U. S. 249 (1942), and then upheld a federal award in a case in which the Court assumed that recovery could "validly be pro-

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[17] "The main impetus for the Longshoremen's and Harbor Workers' Compensation Act was the need to correct a gap made plain by decisions of this Court. We believe that there is only one interpretation of the proviso in § 3(a) which would accord with the aim of Congress; the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the *Jensen* line of decision excluded from state compensation laws. Without affirming or rejecting the *constitutional* implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence." *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S., at 250.

[18] See *Davis* v. *Department of Labor*, 317 U. S., at 261 (Stone, C. J., dissenting); *Calbeck* v. *Travelers Insurance Co.*, 370 U. S., at 132 (Stewart, J., dissenting).

vided by State law." *Calbeck* v. *Travelers Insurance Co.*, 370 U. S. 114 (1962).[19] But the Court's mechanism for ensuring that no employee would go entirely unprotected created a twilight zone of overlapping jurisdiction in which many employers were required to obtain duplicate insurance coverage.[20] Moreover, the practice of defining coverage entirely by reference to the place where an accident occurred gave rise to the anomalous circumstance that longshoremen regularly walked in and out of coverage during the performance of their routine duties.

Whatever force the *Jensen* rule may once have had, it is now perfectly clear that a shore-based worker who is normally covered by a state compensation program may still recover state benefits even though he is injured over navigable waters. Surely no Member of this Court would question the

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[19] The Court relies heavily on the proposition that Congress did not wish "to repeal *Calbeck*" (*ante*, at 321). It is, of course, true that the claimants in that case are still covered by the Act. What Congress repealed was the statutory language that appeared to preclude coverage for harbor workers like the *Calbeck* claimants who were injured in the maritime but local area. The problem confronted by the Court in *Calbeck* simply no longer exists.

[20] In 1942, this Court observed:

"The horns of the jurisdictional dilemma press as sharply on employers as on employees. In the face of the cases referred to above, the most competent counsel may be unable to predict on which side of the line particular employment will fall. The employer's contribution to a state insurance fund may therefore wholly fail to protect him against the liabilities for which it was specifically planned. If this very case is affirmed, for example, the employer will not only lose the benefit of the state insurance to which he has been compelled to contribute and by which he has thought himself secured against loss for accidents to his employees; he must also, by virtue of the conclusion that the employee was subject to the federal act at the time of the accident, become liable for substantial additional payments. He will also be subject to fine and imprisonment for the misdemeanor of having failed, as is apparently the case, to secure payment for the employee under the federal act. 33 U. S. C. §§ 938, 932." *Davis*, 317 U. S., at 255.

On that point, the dissenter was in complete agreement. See *id.*, at 262 (Stone, C. J., dissenting).

fact that the construction worker injured in this case could have received a state award even though he was on a barge in the Hudson River when he was injured. The concern about the inability of the States to protect land-based workers who may temporarily cross the *Jensen* line is no longer significant—surely that concern provided no motivation whatsoever for the action Congress took in 1972 when it amended the LHWCA.

On the other hand, the 1972 Congress clearly did have reason to be concerned about the cost of duplicate insurance coverage and the unpredictability of coverage that depends entirely on the happenstance of where an accident occurs. As I have mentioned above,[21] the unpredictability of coverage was mentioned explicitly in the legislative history. And the burdens of duplicate insurance for employees who might occasionally walk into federal coverage became substantially more onerous as a result of the 1972 changes that made federal LHWCA benefits significantly higher than state workers' compensation benefits.[22] Both of these concerns are alleviated by defining the scope of the statutory coverage in terms of the *status* of the covered employee. And both of these concerns can only be aggravated by indiscriminately

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[21] See *supra*, at 332–334.

[22] Before 1972, the financial burden of duplicate coverage had not been particularly heavy. LHWCA benefits were low, and insurance carriers offered to cover operations subject to the LHWCA for only a nominal addition to the state workers' compensation premiums. See Note, 50 Calif. L. Rev. 342, 347 (1962); Comment, 30 NACCA L. J. 200, 203, 206 (1964); Gardner, Remedies for Personal Injuries to Seamen, Railroadmen, and Longshoremen, 71 Harv. L. Rev. 438, 449–450, and n. 34 (1958).

Today, of course, things are quite different. In 1981, LHWCA premiums averaged 252 percent higher than California construction worker premiums, and 160 percent higher than Florida premiums. See Testimony of the Associated General Contractors of America, Hearings on S. 1182 before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, 97th Cong., 1st Sess., 924–936 (1981).

extending coverage to an undefined group of workers who plainly do not "load, unload, build, or repair ships."

All that remains to support the Court's rewriting of the statute is the absence of an expressed intent to withdraw pre-1972 coverage. As I have already noted, that intent is adequately demonstrated by the changes in the text of the statute itself.[23] Even if that were not sufficient, however, the Court is really objecting to nothing more than a failure to mention a single case decided in 1942—*Parker* v. *Motor Boat Sales, Inc.*—during the hearings or the debates. But when one considers the highly unusual facts of that case, it is unlikely that any Member of Congress had it in mind and virtually inconceivable that Congress would have wanted to provide federal coverage for similar future cases. The employee in the *Parker* case—a janitor for a small boat concern located on the James River—was not protected by a state workmen's compensation program for a reason that had nothing to do with the character of his employment or the place of his injury. The employer did not have the minimum number of employees to bring it under the Virginia statute. See *Motor Boat Sales, Inc.* v. *Parker*, 116 F. 2d 789, 793 (CA4 1941). The happenstance that the janitor was riding in a motorboat at the time of his injury enabled the Court to find a basis for sustaining an award under the LHWCA as it was then written.[24] Even if the presumption that Congress understands the legal context in which it legislates justifies

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[23] The "status" provision replaced the "unless recovery may validly be provided by state law" language that was being construed in *Parker* and *Calbeck*.

[24] In 1942, as it does today, the LHWCA expressly excluded coverage of injuries to members of the crew of any vessel and to persons who load or unload small boats. See n. 5, *supra*. Thus, a janitor could not recover on the theory that he was a member of the crew of the motorboat, or that he helped to load or unload the motorboat. It is difficult to explain the narrow category of workmen associated with motorboat operations for whom *Parker* expressed concern or for whom the Court preserves coverage today.

the inference that it remembered this isolated case decided three decades earlier, it by no means follows that Congress had a duty to disavow the case explicitly in order to give effect to its otherwise plainly expressed purpose.[25]

This case presents us with a straightforward problem of statutory construction. The Court should begin its analysis with the language of the statute itself. "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). In this case the statutory language plainly encompasses longshoremen and harbor workers; there is no affirmative evidence of a legislative intent to provide coverage for any other type of occupation. Surely there is no evidence of an intent to classify the work of a janitor or a builder of sewage treatment plants as "maritime employment."[26]

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[25] The Court cites three cases from the Federal District Courts, three from the Courts of Appeals, and one from a state appellate court in which workers who were not longshoremen or harbor workers were stated to have been covered by the LHWCA before 1972. *Ante*, at 312, n. 21. It uses these cases to support its argument that it would have been a radical and unsettling change for the 1972 Congress to limit post-1972 coverage to people who perform the work of longshoremen and harbor workers. I would draw a somewhat different inference. It is hard to believe that Congress had in mind such a light sprinkling of cases during the 45-year interval between 1927 and 1972 when it spoke of the traditional coverage of the Act, especially given Congressman Daniels' reminder that in 1970 there were 68,000 injuries to longshoremen. See *supra*, at 332.

[26] I note some tension among different components of the Court's opinion with regard to whether the janitor in *Parker* would be covered after 1972. On the one hand, the Court states:

"[B]efore 1972 . . . *any* worker injured upon navigable waters in the course of employment was 'covered . . . without any inquiry into what he was doing (or supposed to be doing) at the time of his injury. . . .'" *Ante*, at 311. "We are unable to find any congressional intent to withdraw coverage of the LHWCA from those workers injured on navigable waters in the course of their employment, and who would have been covered by the Act before 1972." *Ante*, at 315. "Congress . . . assumed that injuries occurring on

Because the claimant in this case was neither a longshoreman nor a harbor worker, I would affirm the judgment of the United States Court of Appeals for the Second Circuit.

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the actual navigable waters were covered, and would remain covered." *Ante*, at 319.

On the other hand, it concludes:

"Our holding, of course, extends only to those persons 'traditionally covered' before the 1972 Amendments. We express no opinion whether such coverage extends to a worker injured while transiently or fortuitously upon actual navigable waters . . . . Our decision today should not be read as exempting water-based workers from the new status test. Rather, our holding is simply a recognition that a worker's performance of his duties upon actual navigable waters is necessarily a very important factor . . . ." *Ante*, at 324, n. 34.

Similarly, at one point the Court says "[Congress'] use of 'employees traditionally covered' was intended to refer to those employees included in the scope of coverage under *Parker*, *Davis*, and *Calbeck*," *ante* at 319–320, but at another point it concedes that those very cases were read "not to limit LHWCA coverage only to 'traditional' maritime activities," *ante*, at 312, n. 21.

I agree with the Court that the post-1972 Act provides coverage for "traditional" maritime activities. However, as I have indicated *supra*, at 328–335, Congress understood such activities to be those of longshoremen and harbor workers, not janitors and construction workers.

SHEPARD *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

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

No. 81–1627. Argued December 6, 1982—Decided January 18, 1983

Respondent union entered into a collective-bargaining agreement with respondent contractors' associations and their members prohibiting dealings by the contractors with nonunion dump truck operators. Petitioner, the owner and operator of a dump truck, who previously had not been a member of a union, joined the union under protest and paid an initiation fee, dues, and a contribution to a fringe benefit plan. Petitioner and one of respondent contractors' associations then filed charges with the National Labor Relations Board, claiming that the agreement violated, *inter alia*, § 8(e) of the National Labor Relations Act (Act), which prohibits so-called "hot cargo" contracts. An Administrative Law Judge held that the union and the contractors had violated § 8(e) by agreeing not to do business with nonunion owner-operators of dump trucks, and recommended that the Board issue a cease-and-desist order and order the union and the contractors to reimburse the owner-operators who were compelled to join the union for amounts paid as dues, initiation fees, and fringe benefit contributions. The Board affirmed and adopted the recommended order except for the reimbursement provision, holding that a reimbursement order would not effectuate the remedial policies of the Act. The Court of Appeals enforced the Board's order in all respects.

Held: The Board acted within its authority in deciding that a reimbursement order would not effectuate the policies of the Act. Congress has delegated to the Board the power to determine when those policies would be effectuated by a particular remedy, and the Board could properly conclude that a remedy such as reimbursement should be reserved for especially egregious situations. There is nothing in the language or structure of the Act that requires the Board to reflexively order "complete relief" for every unfair labor practice. Pp. 349–352.

215 U. S. App. D. C. 373, 669 F. 2d 759, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, *post*, p. 352.

Robert F. Gore argued the cause for petitioner. With him on the brief was *Rex H. Reed.*

Edwin S. Kneedler argued the cause for respondent National Labor Relations Board. With him on the brief were *Solicitor General Lee, Deputy Solicitor General Wallace, Norton J. Come,* and *Linda Sher. Richard D. Prochazka* filed a brief for respondent Building Material and Dump Truck Drivers, Teamsters Local 36. *Robert W. Bell, Jr.,* filed a brief for respondents Associated General Contractors of America et al. *William C. Bottger, Jr.,* and *Robert Varde Kuenzel* filed briefs for respondent California Dump Truck Owners Association.*

JUSTICE REHNQUIST delivered the opinion of the Court.

This case grows out of a labor dispute in the construction industry in San Diego County, Cal. The issue is whether the National Labor Relations Board was required to provide a make-whole remedy for a violation of § 8(e) of the National Labor Relations Act (Act), 73 Stat. 543, 29 U. S. C. § 158(e), which prohibits so-called "hot cargo" contracts.[1]

Petitioner Larry Shepard owns a dump truck, and operates it in the San Diego area to haul materials to and from construction sites. Contractors in this area generally hire dump truck operators through so called "brokers" on a day-to-day basis. Brokers agree with contractors to supply trucks and operators, then refer hauling jobs to individual owner-oper-

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**J. Albert Woll, Laurence Gold, Michael H. Gottesman,* and *Jeremiah A. Collins* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

[1] Section 8(e) provides in pertinent part:

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement . . . whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any employer, or to cease doing business with any other person, and any contract or agreement entered into . . . containing such an agreement shall be to such extent unenforcible *[sic]* and void . . . ." 73 Stat. 543.

ators such as Shepard. Brokers handle the owner-operators' billing and perform other coordinating services. They receive commissions based on the amount billed.

Before August 1978, Shepard was not a member of any union. In 1977 respondent Building Material and Dump Truck Drivers, Teamsters Local 36 (Union), entered into a new master collective-bargaining agreement (Agreement) with respondent contractors' associations and their member contractors (Contractors). This Agreement accomplished a long-sought objective of the Union by prohibiting dealings on the part of contractors with nonunion operators. The effect of the Agreement was described by the Court of Appeals in this language:

> "[T]he Union enlisted the aid of the Contractors to insure that only signatory brokers received subcontracts and only union truck operators performed hauling services for building contractors in the San Diego area." 215 U. S. App. D. C. 373, 376, 669 F. 2d 759, 762 (1981).

In February 1978, Shepard contracted with Terra Trucking Co., a broker that had subscribed to the Agreement, for brokerage services. Although Shepard was not a member of the Union, he authorized Terra to make deductions from his earnings for several purposes, including the fringe benefit plan created by the Agreement. Terra deducted the appropriate sums when Shepard worked on union jobs and paid them to the Union's fringe benefit funds.

In August 1978, the Union wrote to Terra stating that under the Agreement Terra must not deal with seven nonunion owner-operators, including Shepard. Terra informed these owner-operators that they would have to join the Union or find a new broker. Shepard joined under protest and paid an initiation fee and dues.

Shepard and respondent California Dump Truck Owners Association (Association) filed charges with the National Labor Relations Board, claiming that the Agreement vio-

lated both § 8(e) and § 8(b)(4) of the Act,[2] 29 U. S. C. § 158(b)(4), the latter of which prohibits secondary boycotts. At the request of the Regional Director of the Board, Shepard filed a new charge alleging only a violation of § 8(e). In 1979 the Regional Director consolidated the two charges and issued a complaint against the Union and the Contractors alleging only a violation of § 8(e). After a hearing, an Administrative Law Judge found that these owner-operators are independent contractors rather than employees, and that the Union and the Contractors had therefore violated § 8(e) by agreeing not to do business with nonunion owner-operators. The ALJ recommended that the Board issue a cease-and-desist order and order the Union and the Contractors to reimburse owner-operators who were compelled to join the Union for amounts paid as dues, initiation fees, and fringe benefit contributions.

The Board affirmed the ALJ's findings and adopted his recommended order except for the reimbursement provision. The Board stated:

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[2] Section 8(b)(4), as set forth in 29 U. S. C. § 158(b)(4), provides in pertinent part:

"It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"(A) forcing or requiring any employer or selfemployed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . ."

> "The Board has on one occasion adopted without comment an [ALJ's] recommended order containing such a remedy. *Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Santini Brothers, Inc.)*, 208 NLRB 184, 201 (1974). In the present case, however, there is insufficient evidence in the record with respect to alleged losses directly attributable to actual coercion by Respondents. Furthermore, we find a reimbursement order, typically used to 'make whole' *employees* for violations of the Act, to be generally overbroad and inappropriate in the context of 8(e) violations. We note that aggrieved owner-operators engaged in business as independent contractors may pursue a damage claim under Sec. 303 of the Act. For the foregoing reasons, we find that the reimbursement of owner-operators ordered by the [ALJ] would not effectuate the remedial policies of the Act. See *[Carpenters]* v. *N. L. R. B.*, 365 U. S. 651 (1961)." 249 N. L. R. B. 386, n. 2 (1980) (emphasis in original).

On petitions for review, the Court of Appeals enforced the Board's order in all respects. It held that "the Board's explanation is adequate, and that given our limited authority to disturb the Board's exercise of discretion in such matters we may not interfere." 215 U. S. App. D. C., at 380, 669 F. 2d, at 766. In a similar case involving dump truck owner-operators and a similar collective-bargaining agreement, the Court of Appeals for the Ninth Circuit remanded the case to the Board to order reimbursement, or to explain why reimbursement would not effectuate the purposes of the Act. *Joint Council of Teamsters No. 42* v. *NLRB*, 671 F. 2d 305, 310–313 (1981). We granted certiorari in this case, 456 U. S. 970 (1982), and now affirm the judgment of the Court of Appeals for the District of Columbia Circuit.

The Board's authority to issue an order in this case is granted by § 10(c) of the Act, 49 Stat. 454, as amended, 29 U. S. C. § 160(c):

> "If . . . the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board . . . shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

Shepard and the Association argue that the Board is *required* to order a make-whole remedy in this case. They rely on the reasoning of the Ninth Circuit in *Joint Council of Teamsters No. 42*, *supra*, that "where money has been collected illegally, the Board should order a refund, absent some rational ground for not doing so." 671 F. 2d, at 310. We think the Court of Appeals for the Ninth Circuit took too restricted a view of the Board's discretion in designing a remedy. We conclude that the Board need not order reimbursement because its conclusion that the policies of the Act would not be effectuated by such an order is reasonable.

Congress has delegated to the Board the power to determine when the policies of the Act would be effectuated by a particular remedy. "In fashioning its remedies . . . the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 612, n. 32 (1969). See *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203, 216 (1964). In this case, the Board issued a cease-and-desist order and an order requiring the Union and the Contractors to post notices stating that the illegal portions of the Agreement will not be enforced. Shepard insists that the Board should have gone the last mile and ordered reimbursement as well.

The Board justified its action in declining to grant this additional remedy by the portion of its order quoted above. This explanatory paragraph strikes us as something less than a model of precise expository prose. Shortly after the enactment of the National Labor Relations Act, this Court had occasion to remind the Board:

> "The administrative process will best be vindicated by clarity in its exercise. Since Congress has defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of reviewing the Board's orders (§ 10(e) and (f)), it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order. We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it." *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 197 (1941).

In this case, we think that the sense of the Board's explanation is that it has decided to treat cases in which there is no finding of "actual" coercion differently from cases in which there is such a finding. By actual coercion, the Board apparently means threats, picketing, a strike, or some other form of coercion that would amount to a violation of § 8(b)(4). See *Teamsters* v. *Morton*, 377 U. S. 252, 259 (1964). It can scarcely be doubted that the Board could properly conclude that a remedy such as reimbursement should be reserved for especially egregious situations.

In choosing to accord the limited relief that it did, the Board relied on *Carpenters* v. *NLRB*, 365 U. S. 651 (1961), in which this Court held that a showing of coercion was required before the Board could order a union to reimburse dues paid to it by workers who were required by an unlawful "closed shop" contract to join the union. The Board presumably concluded that the reasoning of this case supported, at least

by analogy, its decision not to award reimbursement. We think this conclusion was justifiable.

Congress has provided a judicial damages remedy for illegal secondary activity in § 303 of the Labor Management Relations Act of 1947,[3] 29 U. S. C. § 187. Shepard and the Board agree that § 303 provides a remedy only for violations of § 8(b)(4) of the Act, which, in turn, requires proof of coercion. Brief for Petitioner 28–37; Brief for Respondent National Labor Relations Board 32, n. 19, 38–42. Of course, Congress is free to provide a damages remedy for some violations of federal law, and not for others. It is reasonable for the Board to follow the pattern of the Act and order reimbursement only where Congress chose to permit damages.

The crux of the argument against the Board's position made by Shepard and the Association is that actual coercion is not an element of a § 8(e) violation and therefore should not be required as a prerequisite to what they call "complete relief." Brief for Petitioner 17. But the very way in which this argument is framed suggests that its proponents misconceive the role of the Board. The Board is not a court; it is not even a labor court; it is an administrative agency charged by Congress with the enforcement and administration of the federal labor laws. While a prayer for "complete relief" might find a receptive ear in a court of general jurisdiction, it is well settled that there are wide differences between administrative agencies and courts. See, *e. g.*, *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141–144 (1940). This

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[3] Section 303 provides in pertinent part:

"(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) . . . .

"(b) Whoever shall be injured in his business or property by reason [of] any violation of subsection (a) of this section may sue therefor in any district court of the United States . . . without respect to the amount in controversy, or in any other court, and shall recover the damages by him sustained and the cost of the suit." 61 Stat. 158, as amended, 73 Stat. 545.

Court has said that the Board's "power to order affirmative relief under § 10(c) is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices. Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct." *Automobile Workers v. Russell*, 356 U. S. 634, 642–643 (1958).

We find nothing in the language or structure of the Act that requires the Board to reflexively order that which a complaining party may regard as "complete relief" for every unfair labor practice. We are satisfied for the reasons heretofore stated that the Board acted within its authority in deciding that a reimbursement order in this case would not effectuate the policies of the Act. The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE O'CONNOR, dissenting.

I agree with the Court that the National Labor Relations Board (NLRB) could reasonably determine in this case that reimbursing the petitioner is not necessary to effectuate the objectives of the National Labor Relations Act (Act). My disagreement is with the Court's conclusion that the Board provided an adequate explanation for its decision. The Board offered three reasons for its conclusion that reimbursing the petitioner would not effectuate the purposes of the Act. Each of its stated reasons was in error or inadequate to justify its conclusion. I would therefore remand the case to the Board in order to give it an opportunity to determine the appropriateness of reimbursement in light of the Court's opinion.

I

A brief review of the facts is useful in understanding the inadequacy of the Board's explanation for its decision.

For over a decade, there has been a dispute between respondent Building Material and Dump Truck Drivers, Teamsters Local 36 (Union), and respondent California Dump

Truck Owners Association (Association) over the availability of hauling jobs for nonunion truck operators. In June 1977, three contractors' associations, which are respondents in this case (Contractors), entered into a new master labor agreement (Agreement) with the Union which required signatory contractors to transport "all materials . . . to or from or on the site of the work by workmen furnished by the appropriate craft [union] . . . ." App. 10. The Agreement also required contractors to obtain the services of dump truck operators only through brokers who had signed an agreement with the Union and provided for penalties for contractors who failed to comply. Thus through the Agreement the Union required the Contractors to ensure that only signatory brokers received subcontracts for hauling and that only union operators performed hauling services.

Petitioner Larry Shepard is a self-employed dump truck operator. He accepted referrals from the Terra Trucking Co., a broker. In February 1978, Shepard entered into a subhaul agreement with Terra, under which the broker was authorized to make deductions from his earnings for a number of purposes, including "payroll benefits as required by the Union Agreement." *Id.*, at 22. When Shepard worked on union jobs, Terra deducted the appropriate amounts for payment to the Union's benefit funds.

Terra signed the Agreement and was therefore required to refer only union operators to contractors. In August 1978, Terra's president, Fred ReCupido, received a letter from the Union stating that seven of Terra's "employees," including Shepard, were not members in good standing of the Union. The letter requested that the seven be "removed from [Terra's] employ and not be rehired until properly cleared by [the Union]." *Id.*, at 27. ReCupido told the seven they would have to join the Union by September 5, 1978, if they wished to work through Terra. Shepard joined the Union in September 1978, and paid initiation fees and union dues

"under protest," on advice of counsel. Some of the other operators named in the Union's letter also joined at that time.

On August 25, 1978, Shepard's counsel filed unfair labor practice charges on behalf of Terra's nonunion operators alleging violations of both § 8(b)(4) of the Act, 29 U. S. C. § 158(b)(4)—the prohibition against secondary boycotts—and § 8(e), 29 U. S. C. § 158(e), the hot cargo provision. At the request of the Regional Director of the Board, those charges were withdrawn and replaced in October 1978 by charges alleging only a § 8(e) violation. The Regional Director joined Shepard's unfair labor practice charge with charges previously filed by the Association and issued a consolidated complaint against the Union and the Contractors alleging that the Agreement violated § 8(e).

After trial, an Administrative Law Judge found that the Union and the Contractors violated § 8(e) by agreeing not to do business with nonunion operators and their brokers. He found that since 1965, the Union had brought economic pressure against the Contractors in order "to achieve its goal of unionization of owner-operators," and that the Agreement was "part of the Union's continuing efforts to achieve its goal . . . ." 249 N. L. R. B. 386, 393 (1980).

The ALJ found that "Shepard joined the Union because of the letter Local 36 sent ReCupido." *Id.*, at 391. In addition to this specific finding, the ALJ made findings concerning another incident[1] and stated that "union membership of owner-operators, resulted from illegal provisions of the [Agreement]." *Id.*, at 394.

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[1] The ALJ found that in November 1977, the Kissinger Trucking Co., a broker, entered into an agreement with a contractor, the Penhall Co., to supply hauling services. Shortly thereafter, Kissinger's manager was informed by Penhall's superintendent that the Union had said that Kissinger should be replaced because it was referring nonunion operators. Kissinger lost the contract with Penhall and subsequently signed the 1977 Agreement. 249 N. L. R. B., at 390.

The ALJ recommended that the Board issue a cease-and-desist order and require that notices of its ruling be posted conspicuously. In addition, the ALJ recommended that the Union and the Contractors be required to reimburse operators for payments to the Union. *Id.*, at 395.[2]

The Board upheld the ALJ's findings and conclusions but deleted his "make-whole" reimbursement order. The Board stated its reasons for doing so in a footnote which reads in relevant part:

> "[T]here is insufficient evidence in the record with respect to alleged losses directly attributable to actual coercion by [the Union and the Contractors]. Furthermore, we find a reimbursement order, typically used to "make whole" *employees* for violations of the Act, to be generally overbroad and inappropriate in the context of 8(e) violations. We note that aggrieved owner-operators engaged in business as independent contractors may pursue a damage claim under Sec. 303 of the Act. For the foregoing reasons, we find that the reimbursement of owner-operators ordered by the Administrative Law Judge would not effectuate the remedial policies of the Act. See *[Carpenters]* v. *N. L. R. B.*, 365 U. S. 651 (1961)." *Id.*, at 386, n. 2 (emphasis in original).

The United States Court of Appeals for the District of Columbia Circuit upheld the Board's refusal to order reimbursement, rejecting the contentions that the Board had failed to explain its decision adequately and that the relief ordered

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[2] The recommended order, which was omitted from publication, would have required the Union and the Contractors "[j]ointly and severally [to] make whole all owner-operators . . . for all dues, initiation fees, assessments, and contributions to trust funds which . . . said owner-operators paid to [the] Union or its trust fund as a result of enforcement of the [illegal] provisions of the . . . Agreement." *Building Material and Dump Truck Drivers, Teamsters Local Union No. 36, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, No. 21–CE–197, slip op., at 18 (NLRB, Oct. 30, 1979).

was insufficient as a matter of law. 215 U. S. App. D. C. 373, 380, 669 F. 2d 759, 766 (1981).

II

The broad language of § 10(c) of the Act, 29 U. S. C. § 160(c), compels the conclusion that the Board has the authority to order restitution of money unlawfully collected by a union, regardless of whether the money was collected from employees or other persons.[3] See *Virginia Electric & Power Co.* v. *NLRB*, 319 U. S. 533 (1943). Indeed, in a proceeding very similar to the instant case, the Board ordered reimbursement of independent owner-operators who joined a union as a result of the union's successful efforts to coerce an employer to enter into and enforce a hot cargo agreement. *Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Santini Brothers, Inc.)*, 208 N. L. R. B. 184 (1974), enf'd, 178 U. S. App. D. C. 223, 546 F. 2d 989 (1976), cert. denied, 434 U. S. 818 (1977).

The Board's first reason for denying reimbursement was that it found that there was "insufficient evidence in the record with respect to alleged losses directly attributable to coercion by [the Union and the Contractors]." There is however, ample evidence, as found by the ALJ, that Shepard and other Terra owner-operators joined the Union and paid initiation fees and dues,[4] against their

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[3] I express no opinion as to whether the Board could, as the ALJ recommended here, require an employer to reimburse employees or independent contractors for funds unlawfully collected by a union with the acquiesence of the employer.

[4] Because Shepard signed the subhaul agreement, which authorized Terra to make deductions from his earnings for payments to the Union's benefit funds, prior to the Union's efforts to enforce the illegal provisions of the Agreement, it is not clear whether his payments to the benefit funds should be attributed to the Union's attempts to enforce the hot cargo provision.

will, as a result of the Union's effort to enforce an agreement which violated § 8(e).

The Board's second reason, that a reimbursement order is "generally overbroad and inappropriate in the context of 8(e) violations," cannot withstand scrutiny. Although it would be inappropriate to order reimbursement of persons who would have made payments to a union regardless of whether it had attempted to enforce an illegal provision, an order requiring that Shepard be reimbursed for the initiation fees and dues he paid to the Union would not be "overbroad and inappropriate" in light of the ALJ's finding that Shepard joined the Union as a result of the Union's effort to enforce the hot cargo provision. Cf. *Carpenters* v. *NLRB*, 365 U. S. 651 (1961).

As its third reason for refusing to order reimbursement, the Board stated that the owner-operators "may pursue a damage claim under Sec. 303 of the Act." But as the Board conceded, § 303 by its terms only creates a damages remedy for persons harmed by a § 8(b)(4) violation, not a § 8(e) violation. *Ante*, at 351. See *Connell Construction Co.* v. *Plumbers & Steamfitters*, 421 U. S. 616, 649, n. 9 (1975) (Stewart, J., dissenting). Thus in the absence of a finding of a § 8(b)(4) violation, petitioner could not successfully pursue a § 303 action.

It is true that the Court "will uphold a decision of less than ideal clarity if the agency's [reasons] may reasonably be discerned." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 286 (1974) (citation omitted). But as the Court ruled in *SEC* v. *Chenery Corp.*, 318 U. S. 80, 95 (1943), "[a]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." See *FPC* v. *Texaco Inc.*, 417 U. S. 380, 397 (1974). The Board's order in this case simply does not sup-

port its denial of reimbursement.[5] I would therefore reverse the judgment of the Court of Appeals and remand this case to allow the Board to consider whether reimbursement of any or all of the funds paid to the Union by the petitioner is necessary to effectuate the Act's prohibition against hot cargo agreements. See *NLRB* v. *Food Store Employees*, 417 U. S. 1 (1974).

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[5] Unlike the majority, I do not believe that it can reasonably be discerned from the terse footnote quoted above that the Board has barred reimbursement in cases in which there is no finding of a § 8(b)(4) violation because "reimbursement should be reserved for especially egregious situations." *Ante*, at 350.

Syllabus

MISSOURI *v.* HUNTER

CERTIORARI TO THE COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT

No. 81–1214. Argued November 10, 1982—Decided January 19, 1983

A Missouri statute provides that any person who commits any felony under the laws of the State through the use of a dangerous or deadly weapon is also guilty of the crime of armed criminal action punishable by imprisonment for not less than three years, which punishment shall be in addition to any punishment provided by law for the felony. Another Missouri statute provides that any person convicted of the felony of first-degree robbery by means of a dangerous and deadly weapon shall be punished by imprisonment for not less than five years. Respondent, as the result of a robbery of a supermarket in which he used a revolver, was convicted in a Missouri state court of both first-degree robbery and armed criminal action, and pursuant to the statutes was sentenced to concurrent prison terms of 10 years for robbery and 15 years for armed criminal action. The Missouri Court of Appeals reversed respondent's conviction and sentence for armed criminal action on the ground that his sentence for both robbery and armed criminal action violated the protection against multiple punishments for the same offense provided by the Double Jeopardy Clause of the Fifth Amendment as made applicable to the states by the Fourteenth Amendment. The court construed the robbery and armed criminal action statutes as defining the "same offense" under the test announced in *Blockburger* v. *United States*, 284 U. S. 299, *i. e.*, where the same act or transaction constitutes a violation of two distinct statutes, the test for determining whether there are two offenses or only one, is whether each statute requires proof of a fact which the other does not.

Held: Respondent's conviction and sentence for both armed criminal action and first-degree robbery in a single trial did not violate the Double Jeopardy Clause. Pp. 365–369.

(a) With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. Pp. 365–368.

(b) Simply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. *Whalen* v. *United States*, 445 U. S. 684; *Albernaz* v. *United States*, 450 U. S. 333. The

rule of statutory construction whereby cumulative punishments are not permitted "in the absence of a clear indication of contrary legislative intent," *Whalen, supra,* at 692, is not a constitutional rule requiring courts to negate clearly expressed legislative intent. Accordingly, where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those statutes proscribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecution may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial. Pp. 368–369.

622 S. W. 2d 374, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 369.

Philip M. Koppe, Assistant Attorney General of Missouri, argued the cause for petitioner. With him on the brief were *John Ashcroft*, Attorney General, and *Steven W. Garrett*, Assistant Attorney General.

Gary L. Gardner argued the cause for respondent. With him on the brief was *James W. Fletcher*.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether the prosecution and conviction of a criminal defendant in a single trial on both a charge of "armed criminal action" and a charge of first-degree robbery—the underlying felony—violates the Double Jeopardy Clause of the Fifth Amendment.

I

On the evening of November 24, 1978, respondent and two accomplices entered an A & P supermarket in Kansas City,

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*Briefs of *amici curiae* urging reversal were filed by *Solicitor General Lee, Assistant Attorney General Jensen, Deputy Solicitor General Frey, Elliott Schulder*, and *Mervyn Hamburg* for the United States; and by *William L. Cahalan, Edward Reilly Wilson*, and *Timothy A. Baughman* for the Wayne County Prosecutor's Office.

Missouri. Respondent entered the store manager's office and ordered the manager, at gunpoint, to open two safes. While the manager was complying with the demands of the robbers, respondent struck him twice with the butt of his revolver. While the robbery was in progress, an employee who drove in front of the store observed the robbery and went to a nearby bank to alert an off-duty police officer. That officer arrived at the front of the store and ordered the three men to stop. Respondent fired a shot at the officer and the officer returned the fire but the trio escaped.

Respondent and his accomplices were apprehended. In addition to being positively identified by the store manager and the police officer at trial and in a lineup, respondent made an oral and written confession which was admitted in evidence. At his trial, respondent offered no direct evidence and was convicted of robbery in the first degree, armed criminal action, and assault with malice.

Missouri's statute proscribing robbery in the first degree, Mo. Rev. Stat. § 560.120 (1969), provides:

> "Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree."

Missouri Rev. Stat. § 560.135 (Supp. 1975) prescribes the punishment for robbery in the first degree and provides in pertinent part:

> "Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon and every person convicted of robbery in the first degree by any other means shall be punished by imprisonment by the division of corrections for not less than five years . . . ."

Missouri Rev. Stat. § 559.225 (Supp. 1976) proscribes armed criminal action and provides in pertinent part:

> "[A]ny person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years."

Pursuant to these statutes respondent was sentenced to concurrent terms of (a) 10 years' imprisonment for the robbery; (b) 15 years for armed criminal action; and (c) to a consecutive term of 5 years' imprisonment for assault, for a total of 20 years.

On appeal to the Missouri Court of Appeals, respondent claimed that his sentence for both robbery in the first degree and armed criminal action violated the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution made applicable to the states by the Fourteenth Amendment. The Missouri Court of Appeals agreed and reversed respondent's conviction and 15-year sentence for

armed criminal action. 622 S. W. 2d 374 (1981). The Court of Appeals relied entirely upon the holding of the Missouri Supreme Court opinions in *State* v. *Haggard*, 619 S. W. 2d 44 (1981); *Sours* v. *State*, 593 S. W. 2d 208 *(Sours I)*, vacated and remanded, 446 U. S. 962 (1980); and *Sours* v. *State*, 603 S. W. 2d 592 (1980) *(Sours II)*, cert. denied, 449 U. S. 1131 (1981). The State's timely alternative motion for rehearing or transfer to the Missouri Supreme Court was denied by the Court of Appeals on September 15, 1981. The Missouri Supreme Court denied review on November 10, 1981.

We granted certiorari, 456 U. S. 914 (1982), and we vacate and remand.

II

The Missouri Supreme Court first adopted its challenged approach to the Double Jeopardy issue now before us in *Sours I*, *supra*.[1] In that case, as here, the defendant was convicted and sentenced separately for robbery in the first degree and armed criminal action based on the robbery. The Missouri Supreme Court concluded that under the test announced in *Blockburger* v. *United States*, 284 U. S. 299 (1932), armed criminal action and any underlying offense are the "same offense" under the Fifth Amendment's Double Jeopardy Clause. That court acknowledged that the Missouri Legislature had expressed its clear intent that a de-

[1] In *Sours I*, the Missouri Supreme Court noted that the double jeopardy provision in the Missouri Constitution, Art. I, § 19, "has been interpreted to apply 'only where there has been an acquittal of the defendant by the jury.'" 593 S. W. 2d, at 211, quoting *Murray* v. *State*, 475 S. W. 2d 67, 70 (Mo. 1972). Clearly, it is the Double Jeopardy Clause of the Fifth Amendment, and not Missouri's double jeopardy provision, that is relied upon by the Missouri Supreme Court in these cases.

When the issue first arose, the Missouri Supreme Court took the position that multiple convictions for both armed criminal action and the underlying felony did not violate the Double Jeopardy Clause. *State* v. *Treadway*, 558 S. W. 2d 646 (1977), cert. denied, 439 U. S. 838 (1978); *State* v. *Valentine*, 584 S. W. 2d 92 (1979).

fendant should be subject to conviction and sentence under the armed criminal action statute in addition to any conviction and sentence for the underlying felony. 593 S. W. 2d, at 216. The court nevertheless held that the Double Jeopardy Clause "prohibits imposing punishment for both armed criminal action and for the underlying felony." *Id.*, at 223 (footnote omitted). It then set aside the defendant's conviction for armed criminal action.[2]

When the State sought review here in *Sours I*, we remanded the case for reconsideration in light of our holding in *Whalen* v. *United States*, 445 U. S. 684 (1980). *Missouri* v. *Sours*, 446 U. S. 962 (1980). On remand, in *Sours II*, *supra*, the Missouri Supreme Court adhered to its previous ruling that armed criminal action and the underlying felony are the "same offense" and that the Double Jeopardy Clause bars separate punishment of a defendant for each offense, notwithstanding the acknowledged intent of the legislature to impose two separate punishments for the two defined offenses.[3]

Most recently, in *State* v. *Haggard*, *supra*, the Missouri Supreme Court reexamined its decisions in *Sours I*, *supra*, and *Sours II*, *supra*, in light of our 1981 holding in *Albernaz* v. *United States*, 450 U. S. 333.[4] The Missouri court, however, remained unpersuaded, stating:

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[2] The Missouri Supreme Court has recently made clear that "in order to establish uniformity of sentencing in *Sours* type cases, the armed criminal action sentence should be reversed in all instances. [W]e are convinced that in the historical background of the armed criminal action statute, the net effect of such statute is to enhance (in pure sense of enlarging) the penalty assessed for the underlying felony . . . . The attempt to enhance or enlarge having failed because of being phrased in terms of separate crime or offense and in our opinion thereby violative of the constitutional prohibition against double jeopardy, we are left with only the penalty assessed on the underlying felony." *State* v. *Kane*, 629 S. W. 2d 372, 377 (1982).

[3] The State's petition for writ of certiorari in *Sours II* was denied. JUSTICE BLACKMUN and JUSTICE REHNQUIST would have dismissed the petition as moot. *Missouri* v. *Sours*, 449 U. S. 1131 (1981).

[4] Subsequent to the Missouri Supreme Court's decision on remand in *Sours II*, the Missouri Supreme Court, as well as the three districts of the

> "Until such time as the Supreme Court of the United States declares clearly and unequivocally that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution does not apply to the legislative branch of government, we cannot do other than what we perceive to be our duty to refuse to enforce multiple punishments for the same offense arising out of a single transaction." 619 S. W. 2d, at 51.

This view manifests a misreading of our cases on the meaning of the Double Jeopardy Clause of the Fifth Amendment; we need hardly go so far as suggested to decide that a legislature constitutionally can prescribe cumulative punishments for violation of its first-degree robbery statute and its armed criminal action statute.

III

The Double Jeopardy Clause is cast explicitly in terms of being "twice put in jeopardy." We have consistently interpreted it "'to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.'" *Burks* v. *United States*, 437 U. S. 1, 11 (1978), quoting *Green* v. *United States*, 355 U. S. 184, 187 (1957). Because respondent has been subjected to only one trial, it is not contended that his right to be free from multiple trials for the same offense has been violated. Rather, the Missouri court vacated respondent's conviction for armed

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Missouri Court of Appeals, began reversing convictions for armed criminal action in a number of cases. The State, in most instances, sought review by certiorari from this Court. In response to those petitions, this Court repeatedly granted certiorari and vacated decisions that had reversed convictions for armed criminal action on the basis of *Sours II*. See, *e. g.*, *Missouri* v. *Counselman*, 450 U. S. 990 (1981). The orders from this Court in every case read substantially the same: "Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Albernaz* v. *United States*, *ante*, p. 333." *Ibid.* The Missouri Supreme Court chose *Haggard* "as the vehicle for accomplishing the reexamination 'in light of *Albernaz*.'" 619 S. W. 2d, at 49.

criminal action because of the statements of this Court that the Double Jeopardy Clause also "protects against multiple punishments for the same offense." *North Carolina* v. *Pearce*, 395 U. S. 711, 717 (1969). Particularly in light of recent precedents of this Court, it is clear that the Missouri Supreme Court has misperceived the nature of the Double Jeopardy Clause's protection against multiple punishments. With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.

In *Whalen* v. *United States*, *supra*, we addressed the question whether cumulative punishments for the offenses of rape and of killing the same victim in the perpetration of the crime of rape was contrary to federal statutory and constitutional law. A divided Court relied on *Blockburger* v. *United States*, 284 U. S. 299 (1932), in holding that the two statutes in controversy proscribed the "same" offense. The opinion in *Blockburger* stated:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.*, at 304.

In *Whalen* we also noted that *Blockburger* established a rule of statutory construction in these terms:

> "The assumption underlying the rule is that Congress *ordinarily* does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments *in the absence of a clear indication of contrary legislative intent.*" 445 U. S., at 691–692 (emphasis added).

We went on to emphasize the qualification on that rule:

> "[W]here the offenses are the same . . . cumulative sentences are not permitted, *unless elsewhere specially authorized by Congress.*" *Id.*, at 693 (emphasis added).

It is clear, therefore, that the result in *Whalen* turned on the fact that the Court saw no "clear indication of contrary legislative intent." Accordingly, under the rule of statutory construction, we held that cumulative punishment could not be imposed under the two statutes.

In *Albernaz* v. *United States*, 450 U. S. 333 (1981), we addressed the issue whether a defendant could be cumulatively punished in a single trial for conspiracy to import marihuana and conspiracy to distribute marihuana. There, in contrast to *Whalen*, we concluded that the two statutes did not proscribe the "same" offense in the sense that "'each provision requires proof of a fact [that] the other does not.'" 450 U. S., at 339, quoting *Blockburger*, *supra*, at 304. We might well have stopped at that point and upheld the petitioners' cumulative punishments under the challenged statutes since cumulative punishment can presumptively be assessed after conviction for two offenses that are not the "same" under *Blockburger*. See, *e. g.*, *American Tobacco Co.* v. *United States*, 328 U. S. 781 (1946). However, we went on to state that because

> "[t]he *Blockburger* test is a 'rule of statutory construction,' and because it serves as a means of discerning congressional purpose *the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent.*" *Albernaz* v. *United States*, 450 U. S., at 340 (emphasis added).

We found "[n]othing . . . in the legislative history which . . . discloses an intent contrary to the presumption which should be accorded to these statutes after application of the *Blockburger* test." *Ibid.* We concluded our discussion of the impact of clear legislative intent on the *Whalen* rule of statutory construction with this language:

> "[T]he question of what punishments are constitutionally permissible is no different from the question of what punishments the Legislative Branch intended to be imposed. *Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution.*" 450 U. S., at 344 (emphasis added) (footnote omitted).

Here, the Missouri Supreme Court has construed the two statutes at issue as defining the same crime. In addition, the Missouri Supreme Court has recognized that the legislature intended that punishment for violations of the statutes be cumulative. We are bound to accept the Missouri court's construction of that State's statutes. See *O'Brien* v. *Skinner*, 414 U. S. 524, 531 (1974). However, we are not bound by the Missouri Supreme Court's legal conclusion that these two statutes violate the Double Jeopardy Clause, and we reject its legal conclusion.

Our analysis and reasoning in *Whalen* and *Albernaz* lead inescapably to the conclusion that simply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. The rule of statutory construction noted in *Whalen* is not a constitutional rule requiring courts to negate clearly expressed legislative intent. Thus far, we have utilized that rule only to limit a federal court's power to impose convictions and punishments when the will of Congress is not clear. Here, the Missouri Legislature has made its intent crystal clear. Legislatures, not courts, prescribe the scope of punishments.[5]

Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Block-*

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[5] This case presents only issues under the Double Jeopardy Clause.

burger, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

Accordingly, the judgment of the Court of Appeals of Missouri, Western District, is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE MARSHALL, with whom JUSTICE STEVENS joins, dissenting.

The Double Jeopardy Clause forbids either multiple prosecutions or multiple punishment for "the same offence." See, *e. g.*, *North Carolina* v. *Pearce*, 395 U. S. 711, 717–718 (1969); *United States* v. *Benz*, 282 U. S. 304, 307–308 (1931); *Ex parte Lange*, 18 Wall. 163, 169, 173–175 (1874). Respondent was convicted of both armed criminal action and the lesser included offense of first-degree robbery, and he was sentenced for both crimes. Had respondent been tried for these two crimes in separate trials, he would plainly have been subjected to multiple prosecutions for "the same offence" in violation of the Double Jeopardy Clause.[1] See *Harris* v. *Oklahoma*, 433 U. S. 682 (1977) *(per curiam)*; *Brown* v. *Ohio*, 432 U. S. 161 (1977). For the reasons stated below, I do not believe that the phrase "the same offence" should be interpreted to mean one thing for purposes of the prohibition against multiple prosecutions and something else for purposes of the prohibition against multiple punishment.

First-degree robbery and armed criminal action constitute the same offense under the test set forth in *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932). To punish respondent for first-degree robbery, the State was not required

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[1] The Double Jeopardy Clause would have forbidden multiple prosecutions regardless of which charge was brought first, and regardless of whether the first trial ended in a conviction or an acquittal.

to prove a single fact in addition to what it had to prove to punish him for armed criminal action.[2] The punishment imposed for first-degree robbery was not predicated upon proof of any act, state of mind, or result different from that required to establish armed criminal action. Respondent was thus punished twice for the elements of first-degree robbery: once when he was convicted and sentenced for that crime, and again when he was convicted and sentenced for armed criminal action.

A State has wide latitude to define crimes and to prescribe the punishment for a given crime. For example, a State is free to prescribe two different punishments (*e. g.*, a fine and a prison term) for a single offense. But the Constitution does not permit a State to punish as two crimes conduct that constitutes only one "offence" within the meaning of the Double Jeopardy Clause. For whenever a person is subjected to the risk that he will be convicted of a crime under state law, he is "put in jeopardy of life or limb." If the prohibition against being "twice put in jeopardy" for "the same offence" is to have any real meaning, a State cannot be allowed to con-

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[2] Under *Blockburger* "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U. S., at 304. Missouri law defines first-degree robbery as the felonious taking of property of another from his person, or in his presence, by violence or threat of violence. Mo. Rev. Stat. § 560.120 (1969). Armed criminal action is the commission of a felony with a dangerous or deadly weapon. Mo. Rev. Stat. § 559.225 (Supp. 1976). Although the underlying felony necessary to obtain a conviction for armed criminal action need not be first-degree robbery, the Missouri courts have properly recognized that the theoretical possibility that the underlying felony could be some felony other than first-degree robbery is irrelevant for purposes of the Double Jeopardy Clause where no other underlying felony is in fact charged. *Sours* v. *State*, 593 S. W. 2d 208, 217–220 (Mo.), vacated and remanded, 446 U. S. 962 (1980). Cf. *Harris* v. *Oklahoma*, 433 U. S. 682 (1977) (defendant cannot be subjected to multiple prosecutions for felony murder and robbery with firearms where the felony underlying the felony-murder charge was robbery with firearms). Petitioner makes no argument to the contrary.

vict a defendant two, three, or more times simply by enacting separate statutory provisions defining nominally distinct crimes. If the Double Jeopardy Clause imposed no restrictions on a legislature's power to authorize multiple punishment, there would be no limit to the number of convictions that a State could obtain on the basis of the same act, state of mind, and result. A State would be free to create substantively identical crimes differing only in name, or to create a series of greater and lesser included offenses, with the first crime a lesser included offense of the second, the second a lesser included offense of the third, and so on.[3]

Contrary to the assertion of the United States in its *amicus* brief, Brief for United States as *Amicus Curiae* 18–19, the entry of two convictions and the imposition of two sentences cannot be justified on the ground that the legislature could have simply created one crime but prescribed harsher punishment for that crime. This argument incorrectly assumes that the total sentence imposed is all that matters, and that the number of convictions that can be obtained is of no

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[3] Although the majority relies on a passage in *Albernaz* v. *United States*, 450 U. S. 333, 344 (1981), which states that cumulative punishment does not violate the Constitution so long as it is authorized by the legislature, *ante*, at 367–368, that passage is clearly dicta. The Court held in *Albernaz* that the two crimes at issue did not constitute the same offense under the *Blockburger* test, 450 U. S., at 339, because each required proof of a fact which the other did not. *Albernaz* simply did not involve the question whether the Double Jeopardy Clause forbids multiple punishment for two crimes that do constitute the same offense under the *Blockburger* test.

Whalen v. *United States*, 445 U. S. 684 (1980), on which the Court also relies, *ante*, at 366–367, likewise did not decide this question. *Whalen* held that, "in the absence of a clear indication of contrary legislative intent," 445 U. S., at 692, a defendant cannot be subjected to multiple punishment for two crimes that constitute the same offense under *Blockburger*. The Court had no occasion to decide, and it did not decide, whether multiple punishment for two such crimes *can* be imposed if clearly authorized by the legislature. See 445 U. S., at 689 ("The Double Jeopardy Clause *at the very least* precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so") (emphasis supplied).

relevance to the concerns underlying the Double Jeopardy Clause.

When multiple charges are brought, the defendant is "put in jeopardy" as to each charge. To retain his freedom, the defendant must obtain an acquittal on all charges; to put the defendant in prison, the prosecution need only obtain a single guilty verdict. The prosecution's ability to bring multiple charges increases the risk that the defendant will be convicted on one or more of those charges. The very fact that a defendant has been arrested, charged, and brought to trial on several charges may suggest to the jury that he must be guilty of at least one of those crimes. Moreover, where the prosecution's evidence is weak, its ability to bring multiple charges may substantially enhance the possibility that, even though innocent, the defendant may be found guilty on one or more charges as a result of a compromise verdict. The submission of two charges rather than one gives the prosecution "the advantage of offering the jury a choice—a situation which is apt to induce a doubtful jury to find the defendant guilty of the less serious offense rather than to continue the debate as to his innocence." *Cichos* v. *Indiana*, 385 U. S. 76, 81 (1966) (Fortas, J., dissenting from dismissal of certiorari).[4]

The Government's argument also overlooks the fact that, quite apart from any sentence that is imposed, each separate criminal conviction typically has collateral consequences, in both the jurisdiction in which the conviction is obtained and in other jurisdictions. See *Benton* v. *Maryland*, 395 U. S. 784, 790 (1969); *Sibron* v. *New York*, 392 U. S. 40, 53–58

[4] It is true that compromise is possible even under the familiar procedure whereby a lesser included offense is submitted along with a greater offense and the jury is told that it can convict on only one charge. Under the usual procedure, however, the risk of an irrational compromise is reduced by the rule that a lesser included offense will not be submitted to the jury if the element that distinguishes the two offenses is not in dispute. See, *e. g.*, *Sansone* v. *United States*, 380 U. S. 343 (1965); *United States* v. *Tsanas*, 572 F. 2d 340, 345–346 (CA2), cert. denied, 435 U. S. 995 (1978).

(1968). The number of convictions is often critical to the collateral consequences that an individual faces. For example, a defendant who has only one prior conviction will generally not be subject to sentencing under a habitual offender statute.

Furthermore, each criminal conviction itself represents a pronouncement by the State that the defendant has engaged in conduct warranting the moral condemnation of the community. See Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401, 404–405 (1958). Because a criminal conviction constitutes a formal judgment of condemnation by the community, each additional conviction imposes an additional stigma and causes additional damage to the defendant's reputation. See *O'Clair* v. *United States*, 470 F. 2d 1199, 1203 (CA1 1972), cert. denied, 412 U. S. 921 (1973).

A statutory scheme that permits the prosecution to obtain two convictions and two sentences therefore cannot be regarded as the equivalent of a statute that permits only a single conviction, whether or not that single conviction can result in a sentence of equal severity. The greater the number of possible convictions, the greater the risk that the defendant faces. The defendant is "put in jeopardy" with respect to each charge against him.

The very fact that the State could simply convict a defendant such as respondent of one crime and impose an appropriate punishment for that crime demonstrates that it has no legitimate interest in seeking multiple convictions and multiple punishment. The creation of multiple crimes serves only to strengthen the prosecution's hand. It advances no valid state interest that could not just as easily be achieved without bringing multiple charges against the defendant.

In light of these considerations, the Double Jeopardy Clause cannot reasonably be interpreted to leave legislatures completely free to subject a defendant to the risk of multiple punishment on the basis of a single criminal transaction. In the context of multiple prosecutions, it is well established

that the phrase "the same offence" in the Double Jeopardy Clause has independent content—that two crimes that do not satisfy the *Blockburger* test constitute "the same offence" under the Double Jeopardy Clause regardless of the legislature's intent to treat them as separate offenses.[5] Otherwise multiple prosecutions would be permissible whenever authorized by the legislature. The Court has long assumed that the *Blockburger* test is also a rule of constitutional stature in multiple-punishment cases,[6] and I would not hesitate to hold that it is. If the prohibition against being "twice put in jeopardy" for "the same offence" is to provide meaningful protection, the phrase "the same offence" must have content independent of state law in both contexts. Since the Double Jeopardy Clause limits the power of all branches of government, including the legislature, there is no more reason to treat the test as simply a rule of statutory construction in multiple-punishment cases than there would be in multiple-prosecution cases.

I respectfully dissent.

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[5] The test later set forth in *Blockburger* was adopted by this Court in the context of multiple prosecutions nearly a century ago. See *In re Nielsen*, 131 U. S. 176, 186–188 (1889). See also *In re Snow*, 120 U. S. 274 (1887).

[6] *Blockburger* itself was a multiple-punishment case. In rejecting the defendant's double jeopardy claim on the ground that each crime required proof of a fact which the other did not, 284 U. S., at 304, the Court relied on Justice Brandeis' opinion for the Court in *Albrecht* v. *United States*, 273 U. S. 1 (1927), in which he had expressly analyzed a claim of multiple punishment in constitutional rather than statutory terms and rejected the claim because it would have been possible to commit each crime without committing the other, *id.*, at 11.

HERMAN & MacLEAN *v.* HUDDLESTON ET AL.

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

No. 81–680. Argued November 9, 1982—Decided January 24, 1983*

Alleging that they were defrauded by misrepresentations in a registration statement and prospectus for certain securities, purchasers of such securities brought a class action in Federal District Court against most of the participants in the offering, seeking recovery under § 10(b) of the Securities Exchange Act of 1934 (1934 Act), which makes it unlawful for "any" person to use "any" manipulative or deceptive device or contrivance in the purchase or sale of "any" security. The trial judge instructed the jury to determine whether the plaintiffs had proved their cause of action by a preponderance of the evidence, and judgment was entered on the basis of a jury verdict in plaintiffs' favor. The Court of Appeals held that a cause of action may be maintained under § 10(b) for fraudulent misrepresentations and omissions even when, as in this case, that conduct might also be actionable under § 11 of the Securities Act of 1933 (1933 Act), which expressly allows purchasers of a registered security to sue certain enumerated parties who play a direct role in a registered offering when false or misleading information is included in a registration statement. However, the Court of Appeals concluded that a plaintiff seeking recovery under § 10(b) of the 1934 Act must prove his case by "clear and convincing" evidence, and reversed and remanded on other grounds.

Held:

1. The availability of an express remedy under § 11 of the 1933 Act does not preclude defrauded purchasers of registered securities from maintaining an action under § 10(b) of the 1934 Act. Pp. 380–387.

(a) The two provisions involve distinct causes of action and were intended to address different types of wrongdoing. Under § 11, a plaintiff need only show a material misstatement or omission in a registration statement to establish a prima facie case. Such an action must be brought by a purchaser of a registered security, and can only be brought against certain parties. In contrast, § 10(b) is a "catchall" antifraud provision and requires a purchaser or seller of a security, in order to estab-

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*Together with No. 81–1076, *Huddleston et al.* v. *Herman & MacLean et al.*, also on certiorari to the same court.

lish a cause of action, to prove that the defendant acted with scienter. Pp. 380–382.

(b) To exempt conduct actionable under § 11 from liability under § 10(b) would conflict with the basic purpose of the 1933 Act: to provide greater protection to purchasers of registered securities. It is hardly a novel proposition that the two Acts prohibit some of the same conduct. Cf. *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185. A cumulative construction of the remedies under the Acts is also supported by the fact that when Congress comprehensively revised the securities laws in 1975, federal courts had consistently recognized an implied private right of action under § 10(b) even where express remedies under § 11 or other provisions were available. A cumulative construction of the securities laws also furthers their broad remedial purposes. Pp. 382–387.

2. Persons seeking recovery under § 10(b) need prove their cause of action by a preponderance of the evidence only, not by clear and convincing evidence. The preponderance standard has been consistently employed in private actions under the securities laws. Cf. *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344. Reference to the traditional use of a higher burden of proof in civil fraud actions at common law is unavailing here. An important purpose of the federal securities statutes was to rectify perceived deficiencies in the available common-law protections by establishing higher standards of conduct in the securities industry. The balance of the parties' interests in this case warrants use of the preponderance standard, which allows both parties to share the risk of error in roughly equal fashion. While defendants face the risk of opprobrium that may result from a finding of fraudulent conduct, defrauded investors are among the very individuals Congress sought to protect in the securities laws, and if they prove that it is more likely than not that they were defrauded, they should recover. Pp. 387–391.

640 F. 2d 534, affirmed in part, reversed in part, and remanded.

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

James L. Truitt argued the cause for Herman & MacLean. With him on the briefs was *Jack Pew, Jr.*

Robert H. Jaffe argued the cause for respondents in No. 81–680 and petitioners in No. 81–1076. With him on the brief were *Myer Feldman*, *Jonathan M. Weisgall*, *Robert L. Deitz*, and *David S. Komiss*.

Paul Gonson argued the cause for the Securities and Exchange Commission as *amicus curiae*. With him on the brief urging affirmance in part and reversal in part were *Solicitor General Lee*, *Deputy Solicitor General Shapiro*, *Jacob H. Stillman*, and *Richard A. Kirby*.†

JUSTICE MARSHALL delivered the opinion of the Court.

These consolidated cases raise two unresolved questions concerning § 10(b) of the Securities Exchange Act of 1934 (1934 Act), 48 Stat. 891, 15 U. S. C. § 78j(b). The first is whether purchasers of registered securities who allege they were defrauded by misrepresentations in a registration statement may maintain an action under § 10(b) notwithstanding the express remedy for misstatements and omissions in registration statements provided by § 11 of the Securities Act of 1933 (1933 Act), 48 Stat. 82, as amended, 15 U. S. C. § 77k. The second question is whether persons seeking recovery under § 10(b) must prove their cause of action by clear and convincing evidence rather than by a preponderance of the evidence.

I

In 1969 Texas International Speedway, Inc. (TIS), filed a registration statement and prospectus with the Securities and Exchange Commission offering a total of $4,398,900 in securities to the public. The proceeds of the sale were to be used to finance the construction of an automobile speedway. The entire issue was sold on the offering date, October 30, 1969. TIS did not meet with success, however, and the corporation filed a petition for bankruptcy on November 30, 1970.

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†*William E. Hegarty*, *Victor M. Earle III*, and *Joseph W. Muccia* filed a brief for Peat, Marwick, Mitchell & Co. as *amicus curiae* urging reversal.

Briefs of *amici curiae* were filed by *Edward J. Ross* and *Charles W. Boand* for Arthur Anderson & Co.; and by *John L. Warden*, *Philip K. Howard*, and *William J. Fitzpatrick* for the Securities Industry Association.

In 1972 plaintiffs Huddleston and Bradley instituted a class action in the United States District Court for the Southern District of Texas[1] on behalf of themselves and other purchasers of TIS securities. The complaint alleged violations of § 10(b) of the 1934 Act and SEC Rule 10b–5 promulgated thereunder, 17 CFR § 240.10b–5 (1982).[2] Plaintiffs sued most of the participants in the offering, including the accounting firm, Herman & MacLean, which had issued an opinion concerning certain financial statements and a *pro forma* balance sheet[3] that were contained in the registration statement and prospectus. Plaintiffs claimed that the defendants had engaged in a fraudulent scheme to misrepresent or conceal material facts regarding the financial condition of TIS, including the costs incurred in building the speedway.

After a 3-week trial, the District Judge submitted the case to the jury on special interrogatories relating to liability. The judge instructed the jury that liability could be found only if the defendants acted with scienter.[4] The judge also instructed the jury to determine whether plaintiffs had proved their cause of action by a preponderance of the evi-

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[1] The case was transferred to the United States District Court for the Northern District of Texas in January 1973.

[2] Plaintiffs also alleged violations of, *inter alia*, § 17(a) of the 1933 Act, 15 U. S. C. § 77q(a). We have previously reserved decision on whether § 17(a) affords a private remedy, *Teamsters* v. *Daniel*, 439 U. S. 551, 557, n. 9 (1979), and we do so once again. Plaintiffs have abandoned their § 17(a) claim, Brief for Respondents in No. 81–680, p. 4, n. 6, and the Court of Appeals did not address the existence of a separate cause of action under § 17(a). Accordingly, there is no need for us to decide the issue.

[3] A *pro forma* balance sheet is one prepared on the basis of assumptions as to future events.

[4] The judge stated that reckless behavior could satisfy the scienter requirement. While this instruction reflects the prevailing view of the Courts of Appeals that have addressed the issue, see *McLean* v. *Alexander*, 599 F. 2d 1190, 1197, and n. 12 (CA3 1979) (collecting cases), we have explicitly left open the question whether recklessness satisfies the scienter requirement. *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 194, n. 12 (1976).

dence. After the jury rendered a verdict in favor of the plaintiffs on the submitted issues, the judge concluded that Herman & MacLean and others had violated § 10(b) and Rule 10b–5 by making fraudulent misrepresentations in the TIS registration statement.[5] The court then determined the amount of damages and entered judgment for the plaintiffs.

On appeal, the United States Court of Appeals for the Fifth Circuit held that a cause of action may be maintained under § 10(b) of the 1934 Act for fraudulent misrepresentations and omissions even when that conduct might also be actionable under § 11 of the 1933 Act. 640 F. 2d 534, 540–543 (1981). However, the Court of Appeals disagreed with the District Court as to the appropriate standard of proof for an action under § 10(b), concluding that a plaintiff must prove his case by "clear and convincing" evidence. *Id.*, at 545–546. The Court of Appeals reversed the District Court's judgment on other grounds and remanded the case for a new trial. *Id.*, at 547–550, 560.

We granted certiorari to consider whether an implied cause of action under § 10(b) of the 1934 Act will lie for conduct subject to an express civil remedy under the 1933 Act, an issue we have previously reserved,[6] and to decide the standard of proof applicable to actions under § 10(b).[7] 456 U. S. 914

[5] The trial court also found that Herman & MacLean had aided and abetted violations of § 10(b). While several Courts of Appeals have permitted aider-and-abettor liability, see *IIT, An International Investment Trust* v. *Cornfeld*, 619 F. 2d 909, 922 (CA2 1980) (collecting cases), we specifically reserved this issue in *Ernst & Ernst* v. *Hochfelder*, *supra*, at 191–192, n. 7. Cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 394 (1982) (discussing liability for participants in a conspiracy under analogous Commodity Exchange Act provision).

[6] See, *e. g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 752, n. 15 (1975).

[7] The Fifth Circuit's adoption of a clear-and-convincing-evidence standard in a private action under § 10(b) appears to be unprecedented. See 3 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 98.04, p. 930 (3d ed., 1981 Cum. Supp.). Other courts have employed a preponderance-of-the-evidence standard in private actions under the securities

(1982). We now affirm the Court of Appeals' holding that plaintiffs could maintain an action under § 10(b) of the 1934 Act, but we reverse as to the applicable standard of proof.

II

The Securities Act of 1933 and the 1934 Act "constitute interrelated components of the federal regulatory scheme governing transactions in securities." *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 206 (1976). The Acts created several express private rights of action,[8] one of which is contained in § 11 of the 1933 Act. In addition to the private actions created explicitly by the 1933 and 1934 Acts, federal courts have implied private remedies under other provisions of the two laws.[9] Most significantly for present purposes, a private right of action under § 10(b) of the 1934 Act and Rule 10b–5 has been consistently recognized for more than 35 years.[10] The existence of this implied remedy is simply beyond peradventure.

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laws. See, *e. g.*, *Mihara* v. *Dean Witter & Co.*, 619 F. 2d 814, 824–825 (CA9 1980); *Dzenits* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F. 2d 168, 171, n. 2 (CA10 1974); *Globus* v. *Law Research Service, Inc.*, 418 F. 2d 1276, 1291 (CA2 1969), cert. denied, 397 U. S. 913 (1970); *Franklin Life Insurance Co.* v. *Commonwealth Edison Co.*, 451 F. Supp. 602, 607 (SD Ill. 1978), aff'd *per curiam*, 598 F. 2d 1109 (CA7), cert. denied, 444 U. S. 900 (1979).

[8] 1933 Act, §§ 11, 12, 15, 15 U. S. C. §§ 77k, 77*l*, 77*o*; 1934 Act, §§ 9, 16, 18, 15 U. S. C. §§ 78i, 78p, 78r.

[9] See, *e. g.*, *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964) (§ 14(a) of 1934 Act); *Dan River, Inc.* v. *Unitex Ltd.*, 624 F. 2d 1216 (CA4 1980) (§ 13 of 1934 Act), cert. denied, 449 U. S. 1101 (1981); *Kirshner* v. *United States*, 603 F. 2d 234, 241 (CA2 1978) (§ 17(a) of 1934 Act), cert. denied, 442 U. S. 909 (1979). But see, *e. g.*, *Touche Ross & Co.* v. *Redington*, 442 U. S. 560 (1979) (no implied private right of action under § 17(a) of 1934 Act); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1 (1977) (defeated tender offeror has no implied private right of action under § 14(e) of 1934 Act).

[10] The right of action was first recognized in *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (ED Pa. 1946). By 1961, four Courts of Appeals

The issue in this case is whether a party should be barred from invoking this established remedy for fraud because the allegedly fraudulent conduct would apparently also provide the basis for a damages action under § 11 of the 1933 Act.[11] The resolution of this issue turns on the fact that the two provisions involve distinct causes of action and were intended to address different types of wrongdoing.

Section 11 of the 1933 Act allows purchasers of a registered security to sue certain enumerated parties in a registered offering when false or misleading information is included in a registration statement. The section was designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability[12] on the parties who

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and several District Courts in other Circuits had recognized the existence of a private remedy under § 10(b) and Rule 10b–5, and only one District Court decision had reached a contrary conclusion. See 3 L. Loss, Securities Regulation 1763–1764, and nn. 260–263 (2d ed. 1961) (collecting cases). By 1969, the existence of a private cause of action had been recognized by 10 of the 11 Courts of Appeals. See 6 *id.*, at 3871–3873 (Supp. 1969) (collecting cases). When the question whether an implied cause of action can be brought under § 10(b) and Rule 10b–5 was first considered in this Court, we confirmed the existence of such a cause of action without extended discussion. See *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 13, n. 9 (1971). We have since repeatedly reaffirmed that "the existence of a private cause of action for violations of the statute and the Rule is now well established." *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 196 (citing prior cases).

[11] The Court of Appeals noted that the plaintiffs "apparently did have a Section 11 remedy." 640 F. 2d 534, 541, n. 5 (1981). While accurate as to the two other defendants, this conclusion may be open to question with respect to Herman & MacLean. Accountants are liable under § 11 only for those matters which purport to have been prepared or certified by them. 15 U. S. C. § 77k(a)(4). Herman & MacLean contends that it did not "expertise" at least some of the materials that were the subject of the lawsuit, Tr. of Oral Arg. 6–8, which if true could preclude a § 11 remedy with respect to these materials.

[12] See H. R. Rep. No. 85, 73d Cong., 1st Sess., 9 (1933) (Section 11 creates "correspondingly heavier legal liability" in line with responsibility to the public).

play a direct role in a registered offering.[13] If a plaintiff purchased a security issued pursuant to a registration statement, he need only show a material misstatement or omission to establish his prima facie case. Liability against the issuer of a security is virtually absolute,[14] even for innocent misstatements. Other defendants bear the burden of demonstrating due diligence. See 15 U. S. C. § 77k(b).

Although limited in scope, § 11 places a relatively minimal burden on a plaintiff. In contrast, § 10(b) is a "catchall" antifraud provision,[15] but it requires a plaintiff to carry a heavier burden to establish a cause of action. While a § 11 action must be brought by a purchaser of a registered security, must be based on misstatements or omissions in a registration statement, and can only be brought against certain parties, a § 10(b) action can be brought by a purchaser or seller of "*any* security" against "*any* person" who has used "*any* manipulative or deceptive device or contrivance" in connection with the purchase or sale of a security. 15 U. S. C. § 78j (emphasis added). However, a § 10(b) plaintiff carries a heavier burden than a § 11 plaintiff. Most significantly, he must prove that the defendant acted with scienter, *i. e.*, with intent to deceive, manipulate, or defraud.[16]

Since § 11 and § 10(b) address different types of wrongdoing, we see no reason to carve out an exception to § 10(b) for fraud occurring in a registration statement just because the

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[13] A § 11 action can be brought only against certain parties such as the issuer, its directors or partners, underwriters, and accountants who are named as having prepared or certified the registration statement. See 15 U. S. C. § 77k(a). At the same time, §§ 3 and 4 of the 1933 Act exclude a wide variety of securities (such as those issued by the Government and certain banks) and transactions (such as private ones and certain small offerings) from the registration requirement. 15 U. S. C. §§ 77c and 77d.

[14] See *Feit* v. *Leasco Data Processing Equipment Corp.*, 332 F. Supp. 544, 575 (EDNY 1971); R. Jennings & H. Marsh, Securities Regulation 828–829 (4th ed. 1977).

[15] See *Chiarella* v. *United States*, 445 U. S. 222, 234–235 (1980).

[16] See *Ernst & Ernst* v. *Hochfelder*, *supra*, at 193.

same conduct may also be actionable under § 11.[17] Exempting such conduct from liability under § 10(b) would conflict with the basic purpose of the 1933 Act: to provide greater protection to purchasers of registered securities. It would be anomalous indeed if the special protection afforded to purchasers in a registered offering by the 1933 Act were deemed to deprive such purchasers of the protections against manipulation and deception that § 10(b) makes available to all persons who deal in securities.

While some conduct actionable under § 11 may also be actionable under § 10(b), it is hardly a novel proposition that the 1934 Act and the 1933 Act "prohibit some of the same conduct." *United States* v. *Naftalin*, 441 U. S. 768, 778 (1979) (applying § 17(a) of the 1933 Act to conduct also prohibited by § 10(b) of the 1934 Act in an action by the SEC). "'The fact that there may well be some overlap is neither unusual nor unfortunate.'" *Ibid.*, quoting *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 468 (1969). In saving clauses included in the 1933 and 1934 Acts, Congress rejected the notion that the express remedies of the securities laws would pre-empt all other rights of action. Section 16 of the 1933 Act states unequivocally that "[t]he rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity." 15 U. S. C. § 77p. Section 28(a) of the 1934 Act contains a parallel provision. 15 U. S. C. § 78bb(a). These provisions confirm that the remedies in each Act were to be supplemented by "any and all" additional remedies.

This conclusion is reinforced by our reasoning in *Ernst & Ernst* v. *Hochfelder*, which held that actions under § 10(b) require proof of scienter and do not encompass negligent conduct. In so holding, we noted that each of the express civil

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[17] Cf. *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 390–391 (1970) (existence of express provisions for recovery of attorney's fees in §§ 9(e) and 18(a) of 1934 Act does not preclude award of attorney's fees under § 14(a) of Act).

remedies in the 1933 Act allowing recovery for negligent conduct is subject to procedural restrictions not applicable to a § 10(b) action.[18] 425 U. S., at 208–210. We emphasized that extension of § 10(b) to negligent conduct would have allowed causes of action for negligence under the express remedies to be brought instead under § 10(b), "thereby nullify[ing] the effectiveness of the carefully drawn procedural restrictions on these express actions." *Id.*, at 210 (footnote omitted). In reasoning that scienter should be required in § 10(b) actions in order to avoid circumvention of the procedural restrictions surrounding the express remedies, we necessarily assumed that the express remedies were not exclusive. Otherwise there would have been no danger of nullification. Conversely, because the added burden of proving scienter attaches to suits under § 10(b), invocation of the § 10(b) remedy will not "nullify" the procedural restrictions that apply to the express remedies.[19]

This cumulative construction of the remedies under the 1933 and 1934 Acts is also supported by the fact that, when Congress comprehensively revised the securities laws in 1975, a consistent line of judicial decisions had permitted plaintiffs to sue under § 10(b) regardless of the availability of express remedies. In 1975 Congress enacted the "most substantial and significant revision of this country's Federal securities laws since the passage of the Securities Exchange

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[18] For example, a plaintiff in a § 11 action may be required to post a bond for costs, 15 U. S. C. § 77k(e), and the statute of limitations is only one year, § 77m. In contrast, § 10(b) contains no provision requiring plaintiffs to post security for costs. Also, courts look to the most analogous statute of limitations of the forum State, which is usually longer than the period provided for § 11 actions. See *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 210, n. 29.

[19] See *Fischman* v. *Raytheon Mfg. Co.*, 188 F. 2d 783, 786–787 (CA2 1951); 1 A. Bromberg & L. Lowenfels, Securities Fraud & Commodities Fraud § 2.4(403), pp. 2:179–2:180 (1982).

Act in 1934."[20] See Securities Acts Amendments of 1975, Pub. L. 94–29, 89 Stat. 97. When Congress acted, federal courts had consistently and routinely permitted a plaintiff to proceed under § 10(b) even where express remedies under § 11 or other provisions were available.[21] In light of this

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[20] Securities Acts Amendments of 1975: Hearings on S. 249 before the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess., 1 (1975). As the Conference Report on the legislation explained, the 1975 Amendments were the culmination of "the most searching reexamination of the competitive, statutory, and economic issues facing the securities markets, the securities industry, and, of course, public investors, since the 1930's." H. R. Conf. Rep. No. 94–229, p. 91 (1975).

[21] See, *e. g.*, *Schaefer* v. *First National Bank of Lincolnwood*, 509 F. 2d 1287, 1292–1293 (CA7 1975), cert. denied, 425 U. S. 943 (1976); *Wolf* v. *Frank*, 477 F. 2d 467, 475 (CA5), cert. denied, 414 U. S. 975 (1973); *Jordan Bldg. Corp.* v. *Doyle, O'Connor & Co.*, 401 F. 2d 47, 51 (CA7 1968); *Ellis* v. *Carter*, 291 F. 2d 270, 273–274 (CA9 1961); *Fischman* v. *Raytheon Mfg. Co.*, *supra*, at 786–787; *Orn* v. *Eastman Dillon, Union Securities & Co.*, 364 F. Supp. 352, 355 (CD Cal. 1973); *Stewart* v. *Bennett*, 359 F. Supp. 878, 886 (Mass. 1973); *Trussell* v. *United Underwriters, Ltd.*, 228 F. Supp. 757, 765–766 (Colo. 1964). Cf. *Gilbert* v. *Nixon*, 429 F. 2d 348, 355 (CA10 1970) (recognizing overlapping actions but resolving conflict in favor of express remedy where that remedy is "explicit"). Two early District Court decisions had refused to recognize an action under Rule 10b–5 in the face of overlap with § 11. *Rosenberg* v. *Globe Aircraft Corp.*, 80 F. Supp. 123 (ED Pa. 1948); *Montague* v. *Electronic Corp. of America*, 76 F. Supp. 933 (SDNY 1948). The latter case was not subsequently followed in the Southern District, *e. g.*, *Osborne* v. *Mallory*, 86 F. Supp. 869 (SDNY 1949), and it has no precedential value in light of the Second Circuit's decision in *Fischman* v. *Raytheon Mfg. Co.*, *supra*. The *Rosenberg* decision stood alone at the time of the 1975 Amendments, and even that decision had not been followed in the District in which it was decided, *Premier Industries, Inc.* v. *Delaware Valley Financial Corp.*, 185 F. Supp. 694 (ED Pa. 1960), or elsewhere within the same Circuit, *Dauphin Corp.* v. *Redwall Corp.*, 201 F. Supp. 466 (Del. 1962). Since the 1975 Amendments, the lower courts have continued to recognize that an implied cause of action under § 10(b) can be brought regardless of whether express remedies are available. See, *e. g.*, *Berger* v. *Bishop Investment Corp.*, 695 F. 2d 302 (CA8 1982); *Wachovia Bank & Trust Co.* v. *National Student Mar-*

well-established judicial interpretation, Congress' decision to leave § 10(b) intact suggests that Congress ratified the cumulative nature of the § 10(b) action. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 381–382 (1982); *Lorillard* v. *Pons*, 434 U. S. 575, 580–581 (1978).

A cumulative construction of the securities laws also furthers their broad remedial purposes. In enacting the 1934 Act, Congress stated that its purpose was "to impose requirements necessary to make [securities] regulation and control reasonably complete and effective." 15 U. S. C. § 78b. In furtherance of that objective, § 10(b) makes it unlawful to use "*any* manipulative or deceptive device or contrivance" in connection with the purchase or sale of any security. The effectiveness of the broad proscription against fraud in § 10(b) would be undermined if its scope were restricted by the existence of an express remedy under § 11.[22] Yet we have repeatedly recognized that securities laws combating fraud should be construed "not technically and

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keting Corp., 209 U. S. App. D. C. 9, 21–26, 650 F. 2d 342, 354–359 (1980), cert. denied, 452 U. S. 954 (1981); *Ross* v. *A. H. Robins Co.*, 607 F. 2d 545, 551–556 (CA2 1979), cert. denied, 446 U. S. 946 (1980); *Pearlstein* v. *Justice Mortgage Investors*, [1979] CCH Fed. Sec. L. Rep. ¶ 96,760, pp. 94,973–94,974 (ND Tex. 1978); *In re Clinton Oil Company Securities Litigation*, [1977–1978] CCH Fed. Sec. L. Rep. ¶ 96,015, p. 91,575 (Kan. 1977).

[22] Moreover, certain individuals who play a part in preparing the registration statement generally cannot be reached by a § 11 action. These include corporate officers other than those specified in 15 U. S. C. § 77k(a), lawyers not acting as "experts," and accountants with respect to parts of a registration statement which they are not named as having prepared or certified. If, as Herman & MacLean argues, purchasers in registered offerings were required to rely solely on § 11, they would have no recourse against such individuals even if the excluded parties engaged in fraudulent conduct while participating in the registration statement. The exempted individuals would be immune from federal liability for fraudulent conduct even though § 10(b) extends to "any person" who engages in fraud in connection with a purchase or sale of securities.

restrictively, but flexibly to effectuate [their] remedial purposes." *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 195 (1963). Accord, *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 12 (1971); *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 151 (1972). We therefore reject an interpretation of the securities laws that displaces an action under § 10(b).[23]

Accordingly, we hold that the availability of an express remedy under § 11 of the 1933 Act does not preclude defrauded purchasers of registered securities from maintaining an action under § 10(b) of the 1934 Act. To this extent the judgment of the Court of Appeals is affirmed.

III

In a typical civil suit for money damages, plaintiffs must prove their case by a preponderance of the evidence.[24] Similarly, in an action by the SEC to establish fraud under § 17(a) of the 1933 Act, 15 U. S. C. § 77q(a), we have held that proof by a preponderance of the evidence suffices to establish liability. *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 355 (1943). "Where . . . proof is offered in a civil action, as here, a preponderance of the evidence will establish the case . . . ."

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[23] We also reject application of the maxim of statutory construction, *expressio unius est exclusio alterius*. See H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1173–1174 (tent. ed. 1958); Note, Implying Civil Remedies from Federal Regulatory Statutes, 77 Harv. L. Rev. 285, 290–291 (1963). As we stated in *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 350–351 (1943), such canons "long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose." See generally *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 357 (1963) (favoring "an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted"). We believe the maxim cannot properly be applied to a situation where the remedies redress different misconduct and where the remedial purposes of the Acts would be undermined by a presumption of exclusivity.

[24] See *Addington* v. *Texas*, 441 U. S. 418, 423 (1979).

Ibid. The same standard applies in administrative proceedings before the SEC[25] and has been consistently employed by the lower courts in private actions under the securities laws.[26]

The Court of Appeals nonetheless held that plaintiffs in a § 10(b) suit must establish their case by clear and convincing evidence. The Court of Appeals relied primarily on the traditional use of a higher burden of proof in civil fraud actions at common law. 640 F. 2d, at 545–546. Reference to common-law practices can be misleading, however, since the historical considerations underlying the imposition of a higher standard of proof have questionable pertinence here.[27] See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 744–745 (1975) ("[T]he typical fact situation in which the classic tort of misrepresentation and deceit evolved was light years away from the world of commercial transactions to which Rule 10b–5 is applicable"). Moreover, the antifraud provisions of the securities laws are not coextensive with

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[25] See *Steadman* v. *SEC*, 450 U. S. 91 (1981).

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

[27] A higher standard of proof apparently arose in courts of equity when the chancellor faced claims that were unenforceable at law because of the Statute of Wills, the Statute of Frauds, or the parol evidence rule. See Note, Appellate Review in the Federal Courts of Findings Requiring More than a Preponderance of the Evidence, 60 Harv. L. Rev. 111, 112 (1946). Concerned that claims would be fabricated, the chancery courts imposed a more demanding standard of proof. The higher standard subsequently received wide acceptance in equity proceedings to set aside presumptively valid written instruments on account of fraud. See *United States* v. *American Bell Telephone Co.*, 167 U. S. 224, 240–241 (1897); *Southern Development Co.* v. *Silva*, 125 U. S. 247, 249–250 (1888); *Colorado Coal Co.* v. *United States*, 123 U. S. 307, 316–319 (1887); *Maxwell Land-Grant Case*, 121 U. S. 325, 381 (1887) ("We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt"). Such proceedings bear little relationship to modern lawsuits under the federal securities laws.

common-law doctrines of fraud.[28] Indeed, an important purpose of the federal securities statutes was to rectify perceived deficiencies in the available common-law protections by establishing higher standards of conduct in the securities industry. See *SEC* v. *Capital Gains Research Bureau, Inc.*, *supra*, at 186. We therefore find reference to the common law in this instance unavailing.

Where Congress has not prescribed the appropriate standard of proof and the Constitution does not dictate a particular standard, we must prescribe one. See *Steadman* v. *SEC*, 450 U. S. 91, 95 (1981). See generally *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, at 749 (private cause of action under § 10(b) and Rule 10b–5 must be judicially delimited until Congress acts). In doing so, we are mindful that a standard of proof "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington* v. *Texas*, 441 U. S. 418, 423 (1979). See also *In re Winship*, 397 U. S. 358, 370–371 (1970) (Harlan, J., concurring). Thus, we have required proof by clear and convincing evidence where particularly important individual interests or rights are at stake. See, *e. g.*, *Santosky* v. *Kramer*, 455 U. S. 745 (1982) (proceeding to terminate parental rights); *Addington* v. *Texas*, *supra* (involuntary commitment proceeding); *Woodby* v. *INS*, 385 U. S. 276, 285–286 (1966) (deportation).[29] By contrast, imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a

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[28] See *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 194 (1963) (common-law doctrines of fraud which developed around transactions involving tangible items of wealth are ill-suited to the sale of intangibles such as securities); 3 Loss, *supra* n. 10, at 1435.

[29] In *Vance* v. *Terrazas*, 444 U. S. 252, 266 (1980), we held that the Due Process Clause did not require proof beyond a preponderance of the evidence even in an expatriation proceeding. Cf. *Nishikawa* v. *Dulles*, 356 U. S. 129, 135–136 (1958) (in the absence of evidence of congressional intent to adopt a particular standard of proof, Court imposes clear-and-convincing-evidence standard in expatriation cases).

preponderance of the evidence. See, *e. g.*, *United States* v. *Regan*, 232 U. S. 37, 48–49 (1914) (proof by a preponderance of the evidence suffices in civil suits involving proof of acts that expose a party to a criminal prosecution). Thus, in interpreting a statutory provision in *Steadman* v. *SEC*, *supra*, we upheld use of the preponderance standard in SEC administrative proceedings concerning alleged violations of the antifraud provisions. The sanctions imposed in the proceedings included an order permanently barring an individual from practicing his profession. And in *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S., at 355, we held that a preponderance of the evidence suffices to establish fraud under § 17(a) of the 1933 Act.

A preponderance-of-the-evidence standard allows both parties to "share the risk of error in roughly equal fashion." *Addington* v. *Texas*, *supra*, at 423. Any other standard expresses a preference for one side's interests. The balance of interests in this case warrants use of the preponderance standard. On the one hand, the defendants face the risk of opprobrium that may result from a finding of fraudulent conduct, but this risk is identical to that in an action under § 17(a), which is governed by the preponderance-of-the-evidence standard. The interests of defendants in a securities case do not differ qualitatively from the interests of defendants sued for violations of other federal statutes such as the antitrust or civil rights laws, for which proof by a preponderance of the evidence suffices. On the other hand, the interests of plaintiffs in such suits are significant. Defrauded investors are among the very individuals Congress sought to protect in the securities laws. If they prove that it is more likely than not that they were defrauded, they should recover.

We therefore decline to depart from the preponderance-of-the-evidence standard generally applicable in civil actions.[30]

[30] The Court of Appeals also noted that the proof of scienter required in fraud cases is often a matter of inference from circumstantial evidence. If

Accordingly, the Court of Appeals' decision as to the appropriate standard of proof is reversed.

IV

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are otherwise remanded for proceedings consistent with this opinion.

It is so ordered.

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

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anything, the difficulty of proving the defendant's state of mind supports a lower standard of proof. In any event, we have noted elsewhere that circumstantial evidence can be more than sufficient. *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 330 (1960). See *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438, 463, and n. 24 (1976).

MEMPHIS BANK & TRUST CO. *v.* GARNER, SHELBY COUNTY TRUSTEE, ET AL.

APPEAL FROM THE SUPREME COURT OF TENNESSEE

No. 81–1613. Argued November 29, 1982—Decided January 24, 1983

A Tennessee statute imposes a tax on the net earnings of banks doing business in the State, and defines net earnings to include interest received on obligations of the United States and its instrumentalities and of other States but not interest earned on obligations of Tennessee and its political subdivisions. Appellant bank brought an action in a Tennessee state court to recover taxes paid on interest earned on various federal obligations, alleging that the bank tax, as applied to appellant, violated 31 U. S. C. § 742—which exempts obligations of the United States from state and local taxation except where the taxes are "nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations" or estate or inheritance taxes—and thus was unconstitutional under the Supremacy Clause. The trial court granted appellant's motion for a summary judgment. The Tennessee Supreme Court reversed, holding that the bank tax fell within the exception for "nondiscriminatory franchise taxes" set forth in § 742.

Held: The Tennessee bank tax violates the immunity of obligations of the United States from state and local taxation. The tax cannot be characterized as nondiscriminatory under § 742. It discriminates in favor of securities issued by Tennessee and its political subdivisions and against federal obligations by including in the tax base income from federal obligations while excluding income from otherwise comparable state and local obligations, and thus improperly discriminates against the Federal Government and those with whom it deals. Pp. 395–399.

624 S. W. 2d 551, reversed and remanded.

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

K. Martin Worthy argued the cause for appellant. With him on the briefs were *Stephen L. Humphrey* and *David C. Scruggs*.

Jimmy C. Creecy, Deputy Attorney General of Tennessee, argued the cause for appellee *William M. Leech, Jr.*, Attorney General. With Mr. Creecy on the brief were Mr. Leech, *pro se*, and *Joe C. Peel*, Assistant Attorney

General. *J. Minor Tait, Jr.*, argued the cause for appellees Garner et al. With him on the brief was *Clifford D. Pierce, Jr.**

JUSTICE MARSHALL delivered the opinion of the Court.

The Tennessee bank tax imposes a tax on the net earnings of banks doing business within the State, and defines net earnings to include income from obligations of the United States and its instrumentalities but to exclude interest earned on the obligations of Tennessee and its political subdivisions. Tenn. Code Ann. § 67–751 (Supp. 1982). This appeal presents the question whether the Tennessee bank tax violates the immunity of obligations of the United States from state and local taxation.

I

Appellant Memphis Bank & Trust Co. (Memphis Bank) brought this action in state court to recover $56,696.81 in taxes covering the years 1977 and 1978 which had been assessed pursuant to the Tennessee bank tax, Tenn. Code Ann. § 67–751 (Supp. 1982).[1] Each bank doing business in Ten-

*Briefs of *amici curiae* urging reversal were filed by *Solicitor General Lee, Acting Assistant Attorney General Hamblen, Stuart A. Smith,* and *Ernest J. Brown* for the United States; by *Henry W. Howard* and *Elizabeth S. Salveson* for the Capital Preservation Fund, Inc., et al.; and by *Mac Asbill, Jr.*, and *Warren N. Davis* for the Farm Credit Banks.

[1] "Excise tax on bank earnings—Rate.—There is hereby created a subclassification of intangible personal property which shall be designated as the 'shares of banks and banking associations.' All property in this subclassification shall be taxed in the following manner: Commencing in 1977 and each year thereafter, in lieu of the assessment according to the value and taxation of its intangible personal property, each bank doing business in this state shall pay to local governments of Tennessee an excise tax of three percent (3%) of the net earnings for the next preceding fiscal year less ten percent (10%) of the ad valorem taxes paid by the bank on its real property and tangible personal property for the next preceding year. The net earnings shall be calculated in the same manner as prescribed by chapter 27 of title 67. The tax herein imposed shall be in lieu of all taxes on the redeemable or cash value of all of their outstanding shares of capital

nessee is required under § 67–751 to pay to local governments of the State a tax of 3% of the bank's net earnings for the preceding fiscal year, less a portion of the ad valorem taxes paid by the bank for that year.[2] Under the statute, net earnings include interest received by the bank on the obligations of the United States and its instrumentalities, as well as interest on bonds and other obligations of States other than Tennessee, but exclude interest on obligations of Tennessee and its political subdivisions.[3]

Appellant alleged that the bank tax, as applied to it, violated 31 U. S. C. § 742, and thus was unconstitutional under the Supremacy Clause. The parties stipulated that the amount of tax paid by appellant for the years 1977 and 1978 was based entirely on interest earned on various federal

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stock, customer savings and checking accounts, certificates of deposit and certificates of investment, by whatever name called, including other intangible corporate property of such bank or banking association provided that such bank or banking association shall nonetheless continue to be subject to ad valorem taxes on its real and tangible personal property, the excise tax imposed under chapter 27 of title 67 and all other taxes to which it is currently subject."

[2] A "minimum tax" provides that under § 67–751 the bank shall be taxed no less than an ad valorem tax calculated on 60% of the bank's book value. Tenn. Code Ann. § 67–752 (Supp. 1982). The parties apparently did not consider the "minimum tax" described in § 67–752 to be an alternative basis of tax liability in the event that § 67–751 was held unconstitutional. Accordingly, the courts below had no occasion to consider the constitutionality of § 67–752 and we do not reach this question.

[3] For purposes of the bank tax, the term "net earnings" is defined as "[f]ederal taxable income" with specified adjustments. Tenn. Code Ann. § 67–2704 (Supp. 1982). "Federal taxable income" includes interest on obligations of the United States and its instrumentalities, but does not include interest on state or municipal obligations. See 26 U. S. C. § 103(a). Tennessee Code Ann. § 67–2704(b)(1)(B) adjusts "federal taxable income" by adding "[i]nterest income earned on bonds and other obligations of other states or their political subdivisions, less allowable amortization." However, no similar adjustment is made to include interest on obligations of the State of Tennessee or its political subdivisions in the definition of "net earnings" subject to the bank tax.

obligations, primarily notes and bills of the United States Treasury and obligations of Federal Credit Banks.[4] They also stipulated that if the interest earned on such federal obligations were excluded from the computation, Memphis Bank would owe no taxes for the years in question.

The Chancery Court of Shelby County granted Memphis Bank's motion for summary judgment, holding that 31 U. S. C. § 742 prohibits the inclusion of interest on obligations of the United States and its instrumentalities in the computation of taxable "net earnings" under the Tennessee bank tax. The Supreme Court of Tennessee reversed. 624 S. W. 2d 551 (1981). It held that the bank tax fell within the exception for "nondiscriminatory franchise . . . taxes" set forth in 31 U. S. C. § 742. We noted probable jurisdiction, 456 U. S. 943 (1982), and we reverse.

II

Title 31 U. S. C. § 742 establishes a broad exemption of federal obligations from state and local taxation:

> "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other non-

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[4] There are 37 Farm Credit Banks: 12 Federal Land Banks, 12 Federal Intermediate Credit Banks, and 13 Banks for Cooperatives. They are federal instrumentalities designed to provide a reliable source of credit for agriculture. Pub. L. 92–181, 85 Stat. 583, 12 U. S. C. § 2001 *et seq.* See generally *United States* v. *Mississippi Chemical Corp.*, 405 U. S. 298, 301–305 (1972).

The tax on Memphis Bank was also based in part on income from obligations of the Farmers Home Administration and the Federal National Mortgage Association.

property taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes."

The exemption established in § 742 applies not only to Treasury notes and bills, but also to the obligations of such instrumentalities of the United States as Federal Farm Credit Banks. Cf. *Smith* v. *Davis*, 323 U. S. 111, 117 (1944) ("other obligations" must be interpreted "in accord with the long established Congressional intent to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit"). Because no federal statutes have "otherwise provided," § 742 applies to income from the types of federal obligations held by Memphis Bank.[5] Therefore, the bank tax is impermissible unless the tax is a "nondiscriminatory franchise or other nonproperty ta[x] in lieu thereof" under § 742.[6]

We have not previously had occasion to determine whether a state or local tax is "nondiscriminatory" within the meaning of § 742. However, we have frequently considered this concept in our decisions concerning the constitutional immunity

[5] In establishing the Federal Farm Credit Banks, Congress made clear that the obligations of these banks would be immune from taxation by the States. 12 U. S. C. §§ 2055, 2079, and 2134. We have no occasion to determine whether the immunity described in these provisions is broader than that otherwise provided by 31 U. S. C. § 742. We note, however, that for purposes of federal tax immunity, our cases have made no distinction between the obligations of the United States Treasury and the obligations of the Federal Credit Banks. See, *e. g.*, *Tradesmens National Bank of Oklahoma* v. *Oklahoma Tax Comm'n*, 309 U. S. 560 (1940); *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U. S. 113 (1935); *Federal Land Bank* v. *Crosland*, 261 U. S. 374 (1923); *Macallen Co.* v. *Massachusetts*, 279 U. S. 620 (1929); *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180 (1921).

[6] The nondiscrimination requirement applies to both franchise taxes and other nonproperty taxes. Cf. S. Rep. No. 909, 86th Cong., 1st Sess., 8 (1959). Because we hold that the Tennessee bank tax discriminates against federal obligations, we need not reach the question whether the tax may be characterized as a "franchise or other nonproperty ta[x] in lieu thereof."

of Federal Government property, including bonds and other securities, from taxation by the States. Our decisions have treated § 742 as principally a restatement of the constitutional rule. See, *e. g.*, *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U. S. 665, 672 (1950); *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313, 321–322 (1930).

Under the constitutional rule of tax immunity established in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), "States may not impose taxes directly on the Federal Government, nor may they impose taxes the legal incidence of which falls on the Federal Government." *United States* v. *County of Fresno*, 429 U. S. 452, 459 (1977) (footnote omitted). Where, as here, the economic but not the legal incidence of the tax falls on the Federal Government, such a tax generally does not violate the constitutional immunity if it does not discriminate against holders of federal property or those with whom the Federal Government deals. See, *e. g.*, *United States* v. *County of Fresno*, *supra*, at 459–464; *United States* v. *City of Detroit*, 355 U. S. 466, 473 (1958); *Werner Machine Co.* v. *Director of Division of Taxation*, 350 U. S. 492 (1956); *Tradesmens National Bank of Oklahoma* v. *Oklahoma Tax Comm'n*, 309 U. S. 560, 564 (1940).[7]

A state tax that imposes a greater burden on holders of federal property than on holders of similar state property impermissibly discriminates against federal obligations. See, *e. g.*, *United States* v. *County of Fresno*, *supra*, at 462 ("a state tax imposed on those who deal with the Federal Government" is unconstitutional if the tax "is imposed [un]equally on . . . similarly situated constituents of the State"). Our cases establish, however, that if the "tax remains the

[7] Although the scope of the Federal Government's constitutional tax immunity has been interpreted more narrowly in recent years, there has been no departure from the principle that state taxes are constitutionally invalid if they discriminate against the Government. See, *e. g.*, *United States* v. *New Mexico*, 455 U. S. 720, 735, n. 11 (1982).

same whatever the character of the [property] may be, no claim can be sustained that this taxing statute discriminates against the federal obligations." *Werner Machine Co.* v. *Director of Division of Taxation, supra,* at 493–494. In *Schuylkill Trust Co.* v. *Pennsylvania,* 296 U. S. 113, 119–120 (1935), we held invalid a Pennsylvania tax levied upon the shares of a trust company that was measured by the company's net assets. In calculating net assets, the statute excluded shares owned by the trust company in Pennsylvania corporations but included shares owned in United States obligations. The Court found that the tax statute discriminated in favor of securities issued by Pennsylvania corporations and against United States bonds or other obligations.

Similarly, in *Phillips Chemical Co.* v. *Dumas Independent School District,* 361 U. S. 376 (1960), we held unconstitutional a local tax upon private lessees which was imposed on the estimated full value of the leased premises. The tax statute applied to lessees of United States Government property but not to lessees of exempt real property owned by the State and its political subdivisions. We held that the tax "discriminates unconstitutionally against the United States and its lessee." *Id.,* at 387.

It is clear that under the principles established in our previous cases, the Tennessee bank tax cannot be characterized as nondiscriminatory under § 742. Tennessee discriminates in favor of securities issued by Tennessee and its political subdivisions and against federal obligations. The State does so by including in the tax base income from federal obligations while excluding income from otherwise comparable state and local obligations.[8] We conclude, therefore, that

[8] We cannot regard the impact of the discrimination as *de minimis.* According to the United States, which filed a brief as *amicus curiae* in support of reversal, if all 50 States enacted provisions comparable to the Tennessee bank tax, the United States would incur additional annual borrowing costs estimated at $280 million at an interest rate of 12%. Brief for United States as *Amicus Curiae* 2.

the Tennessee bank tax impermissibly discriminates against the Federal Government and those with whom it deals.

The judgment of the Supreme Court of Tennessee is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

ENERGY RESERVES GROUP, INC. *v.* KANSAS POWER & LIGHT CO.

APPEAL FROM THE SUPREME COURT OF KANSAS

No. 81–1370. Argued November 9, 1982—Decided January 24, 1983

In 1975, appellee public utility entered into two intrastate contracts with appellant's predecessor-in-interest to purchase wellhead and residue gas from a certain gas field. Each contract contains a "governmental price escalator clause," which provides that if any governmental authority fixes a price for any natural gas that is higher than the contract price, the contract price shall be increased to that level, and a "price redetermination clause," which gives appellant the option to have the contract price redetermined no more than once every two years by averaging the prices being paid under three other gas contracts chosen by the parties. If the price is increased pursuant to either clause, each contract requires appellee, within specified time periods, to seek from the Kansas Corporation Commission (Commission) approval to pass the increase through to consumers. If pass-through approval is refused and appellee elects not to pay the increase, appellant has the option to terminate the agreement. Pursuant to the price redetermination clauses, the parties agreed on a higher price to be effective November 27, 1977, the Commission approved the pass-through of the increase to consumers, and appellee paid the new price through 1978. Effective December 1, 1978, the Natural Gas Policy Act of 1978 replaced earlier federal price controls for interstate natural gas with gradually increasing price ceilings, including a ceiling for newly discovered or newly produced gas (§ 102) and a lower ceiling for categories of gas not otherwise covered by the Act (§ 109). The Act also extended federal price regulation to the intrastate gas market, providing in § 105(b)(1) that the ceiling price for intrastate gas shall be the lower of the § 102 price and "the price under the terms of the existing contract, to which such natural gas was subject on [November 9, 1978]." As authorized by the federal Act, the Kansas Natural Gas Price Protection Act was enacted in May 1979, imposing price controls on the intrastate gas market with regard to contracts executed before April 20, 1977, and prohibiting consideration either of ceiling prices set by federal authorities or of prices paid in Kansas under other contracts in the application of governmental price escalator and price redetermination clauses. However, the Kansas Act permits indefinite price escalator clauses to operate after March 1, 1979, to raise the price of "old" intrastate gas up to the federal Act's § 109 ceiling price. In November 1978

appellant notified appellee that gas prices would be escalated to the § 102 price pursuant to the governmental price escalator clauses, but appellee, after failing to obtain pass-through approval because of its failure to file a timely application with the Commission, elected not to pay the higher price and appellant then sought to terminate the contracts. When appellee contended that the governmental price escalator clauses were not triggered by the federal Act and that the Kansas Act prohibited their activation, appellant filed suit in a Kansas state court, seeking a declaratory judgment that it had the contractual right to terminate the contracts. Appellee later rejected appellant's request under the price redetermination clauses for a price increase, to be effective in November 1979, contending that the Kansas Act had extinguished appellee's obligation to comply with those clauses. Appellant then filed an amended complaint, alleging that it was entitled to terminate the contracts because of appellee's refusal to redetermine the price. Appellee counterclaimed for a declaratory judgment that the contracts were still in effect. The trial court entered summary judgment for appellee, holding that the federal Act's imposition of price ceilings on intrastate gas did not trigger the governmental price escalator clauses, and that the Kansas Act did not violate the Contract Clause of the Federal Constitution. The Kansas Supreme Court affirmed.

Held:

1. The Kansas Act does not impair appellant's contracts with appellee in violation of the Contract Clause, and thus the contract price may be escalated under either escalator clause only to the ceiling under § 109 of the federal Act, not to the § 102 ceiling. Pp. 409–419.

(a) The Contract Clause's prohibition of any state law impairing the obligation of contracts must be accommodated to the State's inherent police power to safeguard the vital interests of its people. The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co.* v. *Spannaus*, 438 U. S. 234, 244. If a substantial impairment is found, the State, in justification, must have a significant and legitimate public purpose behind the regulation. Once such a purpose has been identified, the adjustment of the contracting parties' rights and responsibilities must be based upon reasonable conditions and must be of a character appropriate to the public purpose justifying the legislation's adoption. Pp. 410–413.

(b) Here, the Kansas Act has not impaired substantially appellant's contractual rights. The parties are operating in a heavily regulated industry, and the statement of intent in their contracts made clear that the escalator clauses were designed to guarantee price increases consistent with anticipated regulated increases in the value of appellant's gas, not

that appellant expected to receive deregulated prices. Moreover, the contract provision making any contractual term subject to relevant present and future state and federal law suggests that appellant knew its contractual rights were subject to alteration by state price regulation. Pp. 413–416.

(c) To the extent, if any, the Kansas Act impairs appellant's contractual interests, it rests on significant state interests in protecting consumers from the escalation of natural gas prices caused by deregulation and in correcting the imbalance between the interstate and intrastate markets by permitting the intrastate prices to rise only to the § 109 level. Nor are the means chosen to implement these purposes deficient, particularly in light of the deference to which the Kansas Legislature's judgment is entitled. Pp. 416–419.

2. The Kansas Supreme Court did not err in holding that the enactment of § 105 of the federal Act did not trigger the governmental price escalator clauses in these contracts so as to entitle appellant to a price increase on December 1, 1978. As a matter of federal statutory interpretation, the federal Act does not trigger such clauses automatically. By the language of § 105(b)(1), Congress set a ceiling for the operation of contractual provisions; it did not prescribe a price. And the Kansas Supreme Court's holding that the particular governmental price escalator clauses involved here were insufficient to escalate the gas price is an interpretation of state law to which this Court defers. Pp. 419–420.

230 Kan. 176, 630 P. 2d 1142, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, STEVENS, and O'CONNOR, JJ., joined, and in all but Part II–C of which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined. POWELL, J., filed an opinion concurring in part, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 421.

Gary W. Davis argued the cause for appellant. With him on the briefs were *Martin W. Bauer*, *Clark Mandigo*, *Edwin W. Parker II*, *I. Michael Greenberger*, and *Nancy J. Bregstein*.

Basil W. Kelsey argued the cause for appellee. With him on the brief were *Jerome T. Wolf*, *Terry W. Schackmann*, and *David S. Black*.*

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*Briefs of *amici curiae* urging affirmance were filed by *Brian J. Moline*, Special Assistant Attorney General of Kansas, for the State Corporation Commission of the State of Kansas; by *William E. Metcalf* and *Patrick H. Donahue* for Kansas Legal Services, Inc.; by *Jan Eric Cart-*

JUSTICE BLACKMUN delivered the opinion of the Court.

This case concerns the regulation by the State of Kansas of the price of natural gas sold at wellhead in the intrastate market. It presents a federal Contract Clause issue and a statutory issue.

I

On September 27, 1975, The Kansas Power & Light Company (KPL), a public utility and appellee here, entered into two intrastate natural gas supply contracts with Clinton Oil Company, the predecessor-in-interest of appellant Energy Reserves Group, Inc. (ERG). Under the first contract, KPL agrees to purchase gas directly at the wellhead on the Spivey-Grabs Field in Kingman and Harper Counties in southern Kansas. The second contract obligates KPL to purchase from the same field residue gas, that is, gas remaining after certain recovery and processing steps are completed. The original contract price was $1.50 per thousand cubic feet (Mcf) of gas. The contracts continue in effect for the life of the field or for the life of the processing plants associated with the field.

A

Each contract contains two clauses known generically as indefinite price escalators. The first is a governmental price escalator clause; this provides that if a governmental authority fixes a price for any natural gas that is higher than the price specified in the contract, the contract price shall be increased to that level.[1] The second is a price redetermination

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wright, Attorney General of Oklahoma, *Robert D. Stewart, Jr.*, and *Eddie M. Pope* for the Oklahoma Corporation Commission; and by *Dennis G. Lyons*, *Mark J. Spooner*, *John L. Arrington, Jr.*, *Curtis M. Long*, *Jay M. Galt*, and *Harry W. Birdwell* for Oklahoma Natural Gas Co. et al.

[1] The governmental price escalator provision states:

"If any federal or Kansas regulatory or governmental authority having jurisdiction in the premises shall at any time hereafter fix a price per MCF applicable to any natural gas of any vintage produced in Kansas, higher than the contract price then in effect under this gas contract, the price to

clause; this gives ERG the option to have the contract price redetermined no more than once every two years.[2] The new price is then set by averaging the prices being paid under three other gas contracts chosen by the parties.

When the price is increased pursuant to either of these clauses, each contract requires KPL to seek from the Kansas Corporation Commission (Commission) approval to pass the increase through to consumers. App. to Juris. Statement 69a. The application for approval is to be submitted within 5 days after a price increase resulting from governmental ac-

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be paid for gas thereafter shall be increased to equal such regulated price. In that event, the increased price shall be effective as of the date of action of the governmental or regulatory authority establishing the regulated price, or its effective date, whichever is later . . . ." App. to Juris. Statement 66a.

[2] The price redetermination provision states in relevant part:

"SELLER shall have the option to cause the price being paid for its gas by BUYER to be redetermined every two years, beginning in 1977. The request for a price redetermination shall be given in writing by SELLER to BUYER not later than 120 days prior to the beginning of the Contract Year for which the price redetermination is requested. . . .

". . . Within the same one hundred twenty (120) days following SELLER'S request for a price redetermination, the parties shall mutually redetermine the price by considering three (3) contracts under which the highest prices are actually being paid for flowing gas ninety (90) days prior to the date the redetermined price is to be effective. The contracts to be considered shall, (a) have a primary term of one (1) or more years, (b) be for gas produced in Kansas, (c) be for gas purchased by an interstate or intrastate company selling or using an average daily volume of 5,000 MCF or more of gas for the twelve (12) months period ending ninety (90) days prior to the date the redetermined price is to be effective, (d) not be for the purchase of Spivey-Grabs Field gas by BUYER under contracts dated in 1975, (e) not include more than one contract of any one purchaser in any one field, and (f) not be for a price then subject to regulatory suspense or refunds. . . .

"After the BUYER and SELLER have decided on the three contracts and appropriate prices to be used from each one for this redetermination, the weighted average price per MCF being paid under the three contracts shall be calculated. This price shall become the redetermined price to be paid by BUYER to SELLER." *Id.*, at 67a–68a.

tion, or no fewer than 60 days before a price redetermination increase is to become effective. *Ibid.* If the Commission refuses to permit the pass-through and KPL elects not to pay the increase, ERG has the option to terminate the agreement on 30 days' written notice.

Each contract states that the purpose of the price escalator clauses is "solely" to compensate ERG for "anticipated" increases in its operating costs and in the value of its gas. *Id.*, at 70a. Each contract also provides: "Neither party shall be held in default for failure to perform hereunder if such failure is due to compliance with," *ibid.*, any "relevant present and future state and federal laws." *Id.*, at 69a.

In 1977, ERG invoked the price redetermination clause, and the parties agreed on a price of $1.77 per Mcf, effective November 27 of that year. The Commission approved the pass-through of this increase to consumers. KPL paid the new price through 1978.[3]

B

On December 1, 1978, the Natural Gas Policy Act of 1978 (Act), Pub. L. 95–621, 92 Stat. 3350, 15 U. S. C. § 3301 *et seq.* (1976 ed., Supp. V), designed in principal part to encourage increased natural gas production, became effective. The Act replaced the federal price controls that had been established under the Natural Gas Act, ch. 556, 52 Stat. 821, with price ceilings that rise monthly based on "an inflation adjustment factor" and other considerations. Different ceilings are set for different types of gas. Section 102 of the Act, 15 U. S. C. § 3312 (1976 ed., Supp. V), sets a gradually increasing ceiling price for newly discovered or newly produced natural gas. The December 1978 ceiling price under § 102 was

[3] On June 9, 1978, the Commission gave KPL permission to implement a purchased-gas price adjustment. This authorized an automatic pass-through to consumers of wholesale gas cost increases upon written notice to the Commission. The Commission retained authority to review and revoke any pass-through under its normal standards for reviewing rate increases.

$2.078 per million British thermal units. Section 104 sets ceiling prices for "old" interstate gas, that is, gas from already discovered and producing wells. Section 109 sets another ceiling price for categories of natural gas not covered by the other sections of the Act. As of December 1978, the § 109 ceiling price was $1.63 per million Btu's.

In another departure from the 1938 Natural Gas Act, the new Act extended federal price regulation to the intrastate gas market. See S. Conf. Rep. No. 95–1126, pp. 67–68 (1978); H. R. Conf. Rep. No. 95–1752, pp. 67–68 (1978). Section 105 of the Act establishes the rule for applying price ceilings to intrastate gas, described as gas not committed to interstate commerce on November 8, 1978.[4] It provides, in its subsection (b)(1), that the maximum lawful price of such gas "shall be the lower of . . . the price under the terms of the existing contract, to which such natural gas was subject on [November 9, 1978], . . . or . . . the maximum lawful price . . . computed for such month under section 102 (relating to new natural gas)."[5] The parties agree that § 105(b)(1) governs these contracts.

The Act, by § 602(a), also permits a State "to establish or enforce any maximum lawful price for the first sale of natural

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[4] In pertinent part, § 105 provides:

"(a) Application.—The maximum lawful price computed under subsection (b) shall apply to any first sale of natural gas delivered during any month in the case of natural gas, sold under any existing contract or any successor to an existing contract, which was not committed or dedicated to interstate commerce on the day before the enactment of this Act.

"(b) Maximum lawful price.—

"(1) General rule.—Subject to paragraphs (2) and (3), the maximum lawful price under this section shall be the lower of—

"(A) the price under the terms of the existing contract, to which such natural gas was subject on the date of the enactment of this Act [November 9, 1978], as such contract was in effect on such date; or

"(B) the maximum lawful price, per million Btu's, computed for such month under section 102 (relating to new natural gas)."

[5] Section 105(b)(2) applies to contracts under which the price of gas on November 9, 1978, exceeded the § 102 price.

gas produced in such State which does not exceed the applicable maximum lawful price, if any, under title I of this Act."

C

In direct response to the Act, the Kansas Legislature promptly imposed price controls on the intrastate gas market. In May 1979, the Kansas Natural Gas Price Protection Act (Kansas Act), 1979 Kan. Sess. Laws, ch. 171, codified as Kan. Stat. Ann. §§ 55–1401 to 55–1415 (Supp. 1982), was enacted.[6] The Kansas Act applies only to natural gas contracts executed before April 20, 1977, § 55–1403, and controls natural gas prices until December 31, 1984, § 55–1411. Section 55–1404 prohibits consideration either of ceiling prices set by federal authorities or of prices paid in Kansas under other contracts in the application of governmental price escalator clauses and price redetermination clauses.[7] Section

[6] ERG asserts that the Kansas Act is special interest legislation designed to permit KPL to avoid gas price increases and to aid KPL in this and other litigation. ERG notes that KPL supported the bill, that the Special Joint Committee approved the bill by only a narrow margin, and that several members of the Committee's minority believed the bill to be special interest legislation. Brief for Appellant 9–12. The bill, however, was supported by the Governor, labor unions, farmers, and municipal representatives, and was passed by substantial margins in both Houses of the Kansas Legislature. Although KPL purchases a sizable portion of the gas affected by the Kansas Act, there are other purchasers as well. Moreover, as indicated in n. 3, *supra*, KPL already had obtained from the Commission a purchased-gas price adjustment that allowed it to pass through to its customers any gas cost increase.

[7] Section 55–1404 provides, with certain exceptions, that "on or after December 1, 1978, the price allowed to be paid pursuant to federal legislation or any regulation by an agency implementing such legislation, or the price paid or to be paid for any sale of natural gas in the state of Kansas shall not be taken into account in applying any indefinite price escalator clause contained in any gas purchase contract subject to this act, to the extent that such contract provides for the sale in the state of Kansas, of gas produced within this state which was not committed or dedicated to interstate commerce on November 8, 1978. This section shall not require a reduction of any price contained in any gas purchase contract subject to this act below the price actually paid prior to the date of enactment of this act."

55–1405 of the Kansas Act, however, permits indefinite price escalator clauses to operate after March 1, 1979, to raise the price of old intrastate gas up to the federal Act's § 109 ceiling price. Section § 55–1406 exempts new gas and gas from stripper wells.

D

On November 20, 1978, ERG and other gas suppliers having similar contracts with KPL notified KPL that gas prices would be escalated to the § 102 price on December 1, pursuant to the governmental price escalator clause. KPL sought pass-through approval from the Commission for this increase by an application filed December 7, one day too late to satisfy the 5-day contractual requirement. KPL never elected to pay the higher price.

On June 5, 1979, ERG notified KPL that it would terminate the contracts within 30 days because KPL had failed to apply to the Commission for pass-through authority within five days of December 1, 1978, had failed to obtain Commission approval, and had failed to pay the increased price ERG contends was required by the governmental price escalator clause. KPL's response was that the clause was not triggered by the Act and that the Kansas Act prohibited its activation. ERG then filed an action in the District Court of Harper County, Kan., praying for a declaratory judgment that it had the contractual right to terminate the contracts.

On July 24, in light of KPL's refusal to terminate, ERG requested an increase up to the Act's § 102 ceiling price under the price redetermination clause. The increase was to be effective in November 1979, the next redetermination date possible under the contracts. KPL conceded that the price redetermination clause permitted such an increase, but contended that § 55–1404 of the Kansas Act had extinguished the utility's obligation to comply with that clause. ERG then filed an amended complaint, alleging that it was entitled to terminate the contracts because of KPL's refusal to redeter-

mine the price. KPL counterclaimed for a declaratory judgment that the contracts were still in effect.

On the parties' cross-motions for summary judgment, the state trial court held that the Act's imposition of price ceilings on intrastate gas did not trigger the governmental escalator clause. It also found that the Kansas Act did not violate the Contract Clause, reasoning that Kansas has a legitimate interest in addressing and controlling the serious economic dislocations that the sudden increase in gas prices would cause, and that the Kansas Act reasonably furthered that interest. App. to Juris. Statement 25a, 42a, 45a. The Supreme Court of Kansas, by unanimous vote, affirmed. 230 Kan. 176, 630 P. 2d 1142 (1981).[8] We noted probable jurisdiction. 456 U. S. 904 (1982).

II

ERG raises both statutory and constitutional issues in challenging the ruling of the Kansas Supreme Court. The constitutional issue is whether the Kansas Act impairs ERG's contracts with KPL in violation of the Contract Clause, U. S. Const., Art. I, § 10, cl. 1.[9] The statutory issue is whether the federal enactment of § 105 triggered the governmental price escalator clause. As to the latter issue, if § 105's enactment did have that effect, ERG was entitled to a price increase on December 1, 1978. If not, ERG could rely only on the price redetermination clause for any increase. That clause could not be exercised until November 1979. The

[8] The court held that an emergency situation existed because the anticipated sudden escalation of intrastate gas prices threatened to boost dramatically both gas and electricity utility rates. The court suggested that because ERG had not attempted to exercise the price redetermination clause prior to the date of enactment, the Kansas Act was being applied only prospectively. The court concluded, however, that the State's interest and chosen means could justify a retroactive application. 230 Kan., at 189–190, 630 P. 2d, at 1153.

[9] "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."

statutory issue thus controls the timing of any increase. The constitutional issue, on the other hand, affects the price that ERG may claim under either clause. If ERG prevails, the price may be escalated to the § 102 ceiling; if ERG does not prevail, the price may be escalated only to the § 109 ceiling. We consider the Contract Clause issue first.[10]

A

Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State "to safeguard the vital interests of its people." *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 434 (1934). In *Blaisdell*, the Court approved a Minnesota mortgage moratorium statute, even though the statute retroactively impaired contract rights. The Court balanced the language of the Contract Clause against the State's interest in exercising its police power, and concluded that the statute was justified.[11]

The Court in two recent cases has addressed Contract Clause claims. In *United States Trust Co.* v. *New Jersey*, 431 U. S. 1 (1977), the Court held that New Jersey could not retroactively alter a statutory bond covenant relied upon by bond purchasers. One year later, in *Allied Structural Steel Co.* v. *Spannaus*, 438 U. S. 234 (1978), the Court invalidated a Minnesota statute that required an employer who closed its office in the State to pay a "pension funding charge" if its

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[10] If fairly possible, we of course construe a statute so as to avoid a constitutional question. *Machinists* v. *Street*, 367 U. S. 740, 749–750 (1961). Because, however, the statutory issue affects only the operation of the governmental price escalator clause, its resolution in no way obviates the need to scrutinize the Kansas Act under the Contract Clause.

[11] The Court listed five factors that were then deemed to be significant in its analysis: whether the Act (1) was an emergency measure; (2) was one to protect a basic societal interest, rather than particular individuals; (3) was tailored appropriately to its purpose; (4) imposed reasonable conditions; and (5) was limited to the duration of the emergency. 290 U. S., at 444–447.

pension fund at the time was insufficient to provide full benefits for all employees with at least 10 years' seniority.[12] Although the legal issues and facts in these two cases differ in certain ways, they clarify the appropriate Contract Clause standard.

The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co.*, 438 U. S., at 244. See *United States Trust Co.*, 431 U. S., at 17. The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected. *Allied Structural Steel Co.*, 438 U. S., at 245. Total destruction of contractual expectations is not necessary for a finding of substantial impairment. *United States Trust Co.*, 431 U. S., at 26–27. On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. *Id.*, at 31, citing *El Paso* v. *Simmons*, 379 U. S. 497, 515 (1965). In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. *Allied Structural Steel Co.*, 438 U. S., at 242, n. 13, citing *Veix* v. *Sixth Ward Bldg. & Loan Assn.*, 310 U. S. 32, 38 (1940) ("When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic"). The Court long ago observed: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 357 (1908).

If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, *United*

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[12] See also *Malone* v. *White Motor Corp.*, 444 U. S. 911 (1979), summarily aff'g 599 F. 2d 283 (CA8).

States Trust Co., 431 U. S., at 22, such as the remedying of a broad and general social or economic problem. *Allied Structural Steel Co.*, 438 U. S., at 247, 249. Furthermore, since *Blaisdell*, the Court has indicated that the public purpose need not be addressed to an emergency or temporary situation. *United States Trust Co.*, 431 U. S., at 22, n. 19; *Veix* v. *Sixth Ward Bldg. & Loan Assn.*, 310 U. S., at 39–40. One legitimate state interest is the elimination of unforeseen windfall profits. *United States Trust Co.*, 431 U. S., at 31, n. 30. The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests.[13]

Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." *United States Trust Co.*, 431 U. S., at 22. Unless the State itself is a contracting party, see *id.*, at 23,[14] "[a]s is customary in re-

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[13] In *Allied Structural Steel Co.* v. *Spannaus*, the Court held that the Minnesota pension law severely impaired established contractual relations between employers and employees. The State had not acted to meet an important general social problem. The pension statute had a very narrow focus: it was aimed at specific employers. Indeed, it even may have been directed at one particular employer planning to terminate its pension plan when its collective-bargaining agreement expired. See 438 U. S., at 247–248, and n. 20.

[14] See generally Note, A Process-Oriented Approach to the Contract Clause, 89 Yale L. J. 1623, 1647–1648 (1980) (distinguishing public from private contracts). In *United States Trust Co.*, but not in *Allied Structural Steel Co.*, the State was one of the contracting parties. When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets. See *United States Trust Co.*, 431 U. S., at 25–28; *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56 (1935); *Murray* v. *Charleston*, 96 U. S. 432 (1878). But see *Faitoute Iron & Steel Co.* v. *City of Asbury Park*, 316 U. S. 502 (1942). When the State is a party to the contract,

viewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.*, at 22–23.

B

The threshold determination is whether the Kansas Act has impaired substantially ERG's contractual rights. Significant here is the fact that the parties are operating in a heavily regulated industry.[15] See *Veix* v. *Sixth Ward Bldg. & Loan Assn.*, 310 U. S., at 38. State authority to regulate natural gas prices is well established. See *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179 (1950).[16] At the time of the execution of these contracts, Kansas did not regulate natural gas prices specifically,[17] but its supervi-

"complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *United States Trust Co.*, 431 U. S., at 26. In the present case, of course, the stricter standard of *United States Trust Co.* does not apply because Kansas has not altered its own contractual obligations.

[15] In addition to the Kansas and federal regulations, 38 States regulate various aspects of gas production and sale. See Interstate Oil Compact Commission, Summary of State Statutes and Regulations for Oil and Gas Production (1979).

[16] For some time, the Court has recognized the validity of state regulation of the production and sale of natural gas in furtherance of conservation goals. See *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, 210 (1900); see also 5 E. Kuntz, Law of Oil and Gas § 70.2, p. 307 (1978); cf. *Henderson Co.* v. *Thompson*, 300 U. S. 258, 266 (1937) (state statute retrospectively regulating the contractual sale of natural gas containing different amounts of hydrogen sulfide does not violate Contract Clause of Texas Constitution). On several occasions, the Court has approved state price regulation of natural gas that did not interfere with interstate commerce. See, *e. g.*, *Phillips Petroleum Co.* v. *Oklahoma*, 340 U. S. 190 (1950); *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179 (1950); *Pennsylvania Gas Co.* v. *Public Service Comm'n*, 252 U. S. 23 (1920); 5 E. Kuntz, *supra*, § 75.2, p. 371.

[17] Kansas in the past has regulated the wellhead price of natural gas. See *Cities Service Gas Co.* v. *State Corporation Comm'n*, 355 U. S. 391 (1958), rev'g 180 Kan. 454, 304 P. 2d 528 (1956). Although this Court struck down the Commission's earlier attempt to set a wellhead price, it

sion of the industry was extensive and intrusive.[18] Moreover, under the authority of § 5(a) of the 1938 Natural Gas Act, the Federal Power Commission (FPC) set "just and reasonable" rates for prices of gas both at the wellhead and in pipelines. Although prices in the intrastate market have diverged somewhat from those in the interstate market due to the recent shortage of natural gas,[19] the regulation of interstate prices effectively limits intrastate price increases.[20]

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apparently did so because the price regulation extended to gas in interstate commerce. See 355 U. S., at 392, citing *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672 (1954), and *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U. S. 44 (1955); see n. 16, *supra*. The instant case does not raise a Commerce Clause issue because the parties agree that the gas is not in interstate commerce and because Congress, by § 602, authorized the State to regulate its price. See S. Conf. Rep. No. 95–1126, p. 125 (1978) ("The Congress . . . is ceding its authority under the commerce clause of the Constitution to regulate prices for such production to affected States"); H. R. Conf. Rep. No. 95–1752, p. 125 (1978) (same).

[18] For more than 75 years now, Kansas has regulated the production, transportation, distribution, and sale of natural gas. See *Cities Service Gas Co.* v. *State Corporation Comm'n*, 222 Kan. 598, 609–610, 567 P. 2d 1343, 1352 (1977).

[19] Because of the shortage, some gas was diverted to the intrastate market where consumers were willing to pay higher prices. "As the FPC price ceiling dropped below market levels prevailing in the intrastate sector, new gas supply has increasingly gravitated toward the latter." Federal Trade Commission, Staff Report of the Bureau of Economics, J. Mulholland, The Economic Structure and Behavior in the Natural Gas Production Industry 10 (1979) (footnote omitted); see Executive Office of the President, The National Energy Plan 18 (1977), reprinted in 1 National Energy Plan, 95th Congress: Legislative History of the National Energy Acts of 1978 (item 5) (1979); Comment, For Gas, Congress Spells Relief N-G-P-A: An Analysis of the Natural Gas Policy Act of 1978, 40 U. Pitt. L. Rev. 429, 434 (1979). The Emergency Natural Gas Act of 1977, § 6(a), Pub. L. 95–2, 91 Stat. 7, addressed this problem by extending federal price regulation to the intrastate market during a Presidentially declared emergency. These emergency provisions were carried forward in § 302(a) of the 1978 Act.

[20] "Even if the gas can be sold intrastate, FPC price ceilings will indirectly affect price levels in the unregulated sector over the long

It is in this context that the indefinite escalator clauses at issue here are to be viewed. In drafting each of the contracts, the parties included a statement of intent, which made clear that the escalator clause was designed to guarantee price increases consistent with *anticipated* increases in the value of ERG's gas. App. to Juris. Statement 70a. While it is not entirely inconceivable that ERG in September 1975 anticipated the deregulation of gas prices introduced by the Act in 1978, we think this is highly unlikely, and we read the statement of intent to refer to nothing more than changes in value resulting from changes in the federal regulator's "just and reasonable" rates. In exchange for these anticipated increases, KPL agreed to accept gas from the Spivey-Grabs field for the lifetime of that field. Thus, at the time of the execution of the contracts, ERG did not expect to receive deregulated prices. The very existence of the governmental price escalator clause and the price redetermination clause indicates that the contracts were structured against the background of regulated gas prices. If deregulation had not occurred, the contracts undoubtedly would have called for a much smaller price increase than that provided by the Kansas Act's adoption of the § 109 ceiling.[21]

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term." P. Starratt, The Natural Gas Shortage and the Congress 29 (1974). Determining the actual effect on the intrastate market of federal regulation of the interstate market is difficult because state oil and gas agencies have not collected information on intrastate sales. See Schanz & Frank, Natural Gas in the Future National Energy Pattern, in Regulation of the Natural Gas Producing Industry 18, 28–30 (K. Brown ed. 1972).

[21] Absent deregulation, the existing interstate price would have continued to act as a brake on increases ERG could obtain under the price redetermination clause. As has been noted, the originally specified contract price was $1.50 per Mcf. App. to Juris. Statement 66a. Under the contract, ERG was entitled to an increase of two cents per Mcf each year absent a price redetermination in excess of that amount. *Ibid.* A price redetermination occurred in November 1977, and by November 1978, the contract price had risen to $1.77 per Mcf. The July 1982 § 109 price ceiling was $2.194 and the § 102 ceiling was $3.152. 47 Fed. Reg. 17981, 17982 (1982). There is no reason to believe that, by operation of either escalator

Moreover, the contracts expressly recognize the existence of extensive regulation by providing that any contractual terms are subject to relevant present and future state and federal law.[22] This latter provision could be interpreted to incorporate all future state price regulation, and thus dispose of the Contract Clause claim. Regardless of whether this interpretation is correct,[23] the provision does suggest that ERG knew its contractual rights were subject to alteration by state price regulation. Price regulation existed and was foreseeable as the type of law that would alter contract obligations. Reading the Contract Clause as ERG does would mean that indefinite price escalator clauses could exempt ERG from any regulatory limitation of prices whatsoever. Such a result cannot be permitted. *Hudson Water Co.* v. *McCarter*, 209 U. S., at 357. In short, ERG's reasonable expectations have not been impaired by the Kansas Act. See *El Paso* v. *Simmons*, 379 U. S., at 515.

C

To the extent, if any, the Kansas Act impairs ERG's contractual interests, the Kansas Act rests on, and is prompted by, significant and legitimate state interests. Kansas has

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clause under the old regulatory structure, ERG's prices ever would have reached the Act's levels.

[22] Many gas sale contracts contain similar provisions. See 4 H. Williams, Oil and Gas Law § 734, pp. 800–801 (1981). These stem from the assumption that the contracts are subject to governmental price and other regulation. *Id.*, at 802. Their purpose is to "provide that the contract shall continue in effect though modified to conform to the requirements of such law or regulation." *Ibid.*

[23] A similar clause has been held implicitly not to incorporate state price regulations that impair interstate commerce. See *Natural Gas Pipeline Co.* v. *Harrington*, 139 F. Supp. 452, 454–455 (ND Tex. 1956), vacated and remanded on other grounds, 246 F. 2d 915 (CA5 1957), cert. denied, 356 U. S. 957 (1958). Analogously, state price regulations pre-empted by FPC price regulation have been held not to be incorporated by governmental price escalator clauses. See *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, 297 F. 2d 561, 567–568 (CA8 1962).

exercised its police power to protect consumers from the escalation of natural gas prices caused by deregulation. The State reasonably could find that higher gas prices have caused and will cause hardship among those who use gas heat but must exist on limited fixed incomes.

The State also has a legitimate interest in correcting the imbalance between the interstate and intrastate markets by permitting intrastate prices to rise only to the § 109 level. By slowly deregulating interstate prices, the Act took the cap off intrastate prices as well.[24] The Kansas Act attempts to coordinate the intrastate and interstate prices by supplementing the federal Act's regulation of intrastate gas. Congress specifically contemplated such action:

> "The conference agreement provides that nothing in this Act shall affect the authority of any State to establish or enforce any maximum lawful price for sales of gas in intrastate commerce which does not exceed the applicable maximum lawful price, if any, under Title I of this Act. This authority extends to the operation of any indefinite price escalator clause." S. Conf. Rep. No. 95–1126, pp. 124–125 (1978); H. R. Conf. Rep. No. 95–1752, pp. 124–125 (1978).

There can be little doubt about the legitimate public purpose behind the Act.[25]

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[24] Although the Act does place a ceiling on intrastate gas, it is the highest ceiling under the law, that is, the § 102 limit for newly discovered gas. Old interstate gas is subject to the much lower ceilings of § 104, or § 106 in the case of rollover contracts. In fact, the § 109 price for July 1982 of $2.194 per Mcf is substantially higher than any of the § 104 or § 106 prices for old interstate gas from wells drilled before 1974. See 47 Fed. Reg. 17981, 17982–17983 (1982). The Spivey-Grabs Field gas wells covered by these contracts were drilled between 1954 and 1961. Brief for Appellee 41, and n. 139 (citing Kansas Geological Society Library, Drillers' Log (Kansas producers)).

[25] ERG claims that the legislation was designed to benefit KPL. See n. 6, *supra*. Unlike *Allied Structural Steel Co.* v. *Spannaus*, 438 U. S. 234 (1978), there is little or nothing in the record here to support the con-

Nor are the means chosen to implement these purposes deficient, particularly in light of the deference to which the Kansas Legislature's judgment is entitled. On the surface, the State's Act seems limited to altering indefinite price escalation clauses of intrastate contracts that affect less than 10% of the natural gas consumed in Kansas. Tr. of Oral Arg. 16. To analyze properly the Kansas Act's effect, however, we must consider the entire state and federal gas price regulatory structure. Only natural gas subject to indefinite price escalator clauses poses the danger of rapidly increasing prices in Kansas. Gas under contracts with fixed escalator clauses and interstate gas purchased by the utilities subject to § 109 would not escalate as would intrastate gas subject to indefinite price escalator clauses. The Kansas Act simply brings the latter category into line with old interstate gas prices by limiting the operation of the indefinite price escalator clauses.

The Kansas Act also rationally exempts the types of new gas the production of which Congress sought to encourage through the higher § 102 prices. Finally, the Act is a temporary measure that expires when federal price regulation of certain categories of gas terminates. The Kansas statute

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tention that the Kansas Act is special interest legislation. Given the nature of the industry—sales to public utilities—it is impossible for any regulation not to have a major effect on a small number of participants. This differs from the statute under challenge in *Allied Structural Steel Co.*, where a small number of employers were singled out from the larger group. The fact that there was a close vote at the committee stage, and that some of the committee dissenters expressed the view that the Kansas Act was special interest legislation, bears little if any resemblance to the circumstantial evidence present in *Allied Structural Steel Co.* Nor is there any indication that the Kansas political process had broken down. Cf. Note, 89 Yale L. J., at 1645 (provided "legislature is functioning properly, selection of a public purpose and determinations of necessity and appropriateness should be left to it"). In addition, the automatic price pass-through adjustment indicates that KPL will not benefit significantly from the statute. Although ERG is correct that the Commission could revoke the pass-through, it has given no indication that it will do so.

completes the regulation of the gas market by imposing gradual escalation mechanisms on the intrastate market, consistent with the new national policy toward gas regulation. We thus resolve the constitutional issue against ERG.

III

We turn to ERG's statutory contention that the Kansas courts misconstrued § 105 as fixing the contract price at the November 9, 1978, level. While, on this point, the opinion of the Kansas Supreme Court is not entirely clear to us, it does not appear so to construe § 105. And KPL, in fact, does not contend that it did. Instead, the court recognized that § 105 permits the indefinite price escalator clauses to continue to operate to raise the contract price up to the lawful ceiling. See *Pennzoil Co.* v. *FERC*, 645 F. 2d 360, 379 (CA5 1981) ("[T]he NGPA does not preclude escalation of area rate clauses [a type of indefinite price escalators] to NGPA prices"), cert. denied, 454 U. S. 1142 (1982).

The actual point of dispute is whether the governmental price escalator clauses in these contracts were triggered by the enactment of § 105. The Kansas Supreme Court acknowledged that the Act could trigger a governmental price escalator clause. 230 Kan., at 184, 630 P. 2d, at 1149. In this case, however, it held that "[t]he NGPA did not trigger a price increase because the contracts herein did not contain a sufficient escalation mechanism." *Id.*, at 185, 630 P. 2d, at 1150. We agree that, as a matter of federal statutory interpretation, the Act does not trigger such clauses automatically. See 44 Fed. Reg. 16895, 16904 (1979).[26] Section 105(b)(1) provides that the ceiling price shall be the lower of

[26] On December 1, 1978, the Federal Energy Regulatory Commission issued interim regulations stating: "The establishment of maximum lawful prices under the NGPA shall not trigger indefinite price escalator clauses in existing intrastate or interstate contracts." 43 Fed. Reg. 56448, 56550 (1978). After a comment period, the FERC altered the regulation to reserve to state law the question whether such clauses operate in intrastate contracts. 44 Fed. Reg. 16895, 16904 (1979).

the § 102 price and "the price under the terms of the existing contract, to which such natural gas was subject on [November 9, 1978], as such contract was in effect on such date." By this language, Congress set a ceiling for the operation of contractual provisions; it did not prescribe a price:

> "[T]he price under the contract may escalate through the operation of both fixed price escalator clauses and indefinite price escalator clauses in existence as of the date of enactment, but the price may not exceed the new gas price [provided by § 102].
>
> . . . . . .
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> ". . . The conferees do not intend that the mere establishment of the ceiling prices under this Act shall trigger indefinite price escalator clauses in existing intrastate contracts." S. Conf. Rep. No. 95–1126, pp. 82–83 (1978); H. R. Conf. Rep. No. 95–1752, pp. 82–83 (1978).

See *Pennzoil Co.* v. *FERC*, 645 F. 2d, at 379.

The Kansas Supreme Court relied on its prior decision in *Mesa Petroleum Co.* v. *Kansas Power & Light Co.*, 229 Kan. 631, 629 P. 2d 190, clarified, 230 Kan. 166, 630 P. 2d 1129 (1981), cert. denied, 455 U. S. 928 (1982), which interpreted the effect of § 105 on a similar contract provision. In that decision, it read § 105 to set the lawful ceiling at the lower price provided by the contract. In light of our discussion above, we view this reading of the federal statute as unassailable. The Kansas Supreme Court's further holding in this case that these particular governmental price escalator clauses were insufficient to escalate the gas price is an interpretation of state law to which, of course, we defer.

IV

The regulation of energy production and use is a matter of national concern. Congress set out on a new path with the Natural Gas Policy Act of 1978. In pursuing this path, Congress explicitly envisioned that the States would regulate in-

trastate markets in accordance with the overall national policy. The Kansas Natural Gas Price Protection Act is one State's effort to balance the need to provide incentives for the production of gas against the need to protect consumers from hardships brought on by deregulation of a traditionally regulated commodity. We see no constitutional or statutory infirmity in Kansas' attempt. The judgment of the Supreme Court of Kansas is therefore

Affirmed.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in part.

I concur in the judgment and all of the Court's opinion except Part II–C. The Court concludes in Part II–B that there has been no substantial impairment of ERG's contractual rights. The closing sentence states that "ERG's reasonable expectations have not been impaired by the Kansas Act." *Ante*, at 416. This conclusion is dispositive, and it is unnecessary for the Court to address the question of whether, if there were an impairment of contractual rights, it would constitute a violation of the Contract Clause. See *Allied Structural Steel Co.* v. *Spannaus*, 438 U. S. 234, 245 (1978).

The Court concludes in Part II–C that even if ERG's "contractual interests" were impaired, the Act furthers "significant and legitimate state interests" and is a valid exercise of the State's police power. *Ante*, at 416–419. I do not necessarily disagree with this conclusion, particularly in the context of the pervasive regulation of public utilities. I decline to join Part II–C, however, because it addresses a substantial question and our discussion of the separate issue in Part II–B disposes of this case.

MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY *v.* LONBERGER

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

No. 81–420. Argued October 5, 1982—Decided February 22, 1983

In an application in a federal court by a state prisoner for a writ of habeas corpus, 28 U. S. C. § 2254(d) establishes a presumption of correctness for "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State . . . were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia." An exception to this presumption occurs where the federal habeas court, on reviewing the state-court record, concludes that the state court's factual finding "is not fairly supported by the record." Respondent was convicted of murder at a jury trial in an Ohio court. At the trial, the prosecution sought to prove a "specification," for purposes of obtaining the death penalty against respondent. There were admitted into evidence, to be considered only in connection with the specification, a copy of an Illinois indictment, a copy of a so-called "conviction statement," and the transcript of a hearing in an Illinois trial court in which respondent pleaded guilty to charges in the indictment. Before admitting such evidence, the Ohio trial court conducted a hearing to determine whether respondent's guilty plea to the Illinois charge was knowing and voluntary. On review of the Illinois records and upon testimony by respondent as to his recollection of the Illinois proceedings, the court held that respondent had intelligently and voluntarily entered his plea of guilty in the Illinois court. Upholding respondent's murder conviction, the Ohio Court of Appeals held that the specification based on the prior Illinois conviction was adequately proved and that the trial court did not err in ruling that respondent's guilty plea in the Illinois court was knowing and voluntary and should be submitted to the jury. Subsequently, respondent brought a habeas corpus proceeding in Federal District Court, which denied relief. The United States Court of Appeals reversed, holding that respondent's plea of guilty to the previous Illinois charge was invalid and that its admission into evidence at the Ohio trial rendered respondent's ensuing murder conviction unconstitutional. The court, noting that no express finding was made concerning respondent's credibility as a witness, credited his testimony at the Ohio trial court hearing, absent contrary evidence by the State.

Held: The admission in the Ohio murder trial of respondent's Illinois conviction based upon a guilty plea did not deprive respondent of any federal right. Pp. 430–439.

(a) Whether the Court of Appeals' reassessment of the effect of respondent's testimony at the Ohio trial court hearing was undertaken because of the trial court's failure to make express findings as to respondent's credibility or whether the Court of Appeals felt it should assess for itself the weight that such evidence should have been accorded by the Ohio trial court, the Court of Appeals erroneously applied the "fairly supported by the record" standard enunciated in § 2254(d). The Court of Appeals' reliance on respondent's testimony and the fact that the State produced no contrary evidence are wide of the mark for purposes of deciding whether factual findings are fairly supported by the record. Section 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court but not by them. Pp. 432–436.

(b) Respondent must be presumed to have been informed, either by his lawyers or at one of the Illinois presentencing proceedings, of the charges on which he was indicted in Illinois. *Henderson* v. *Morgan*, 426 U. S. 637. Applying this standard to the factual determinations arising from the Ohio trial court proceedings which were "fairly supported by the record" within the meaning of § 2254(d), this Court cannot accept the Court of Appeals' conclusion that respondent's guilty plea to the Illinois charge was not voluntary and knowing in the constitutional meaning of those terms. Pp. 436–438.

(c) Because respondent's prior conviction was valid, this case is controlled by *Spencer* v. *Texas*, 385 U. S. 554, which is reaffirmed. The Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules. The jury in respondent's trial was instructed to consider the prior conviction only in determining whether the specification was proved, and it is a "crucial assumption" of the jury trial system that juries will obey their instructions. Moreover, as recognized by the common law, any unfairness resulting from admitting prior convictions generally is balanced by their probative value. Pp. 438–439, n. 6.

651 F. 2d 447, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 439. BLACKMUN, J., filed a dissenting opinion, *post*, p. 447. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 447.

Richard David Drake, Assistant Attorney General of Ohio, argued the cause for petitioner. With him on the briefs were *William J. Brown*, Attorney General, and *Simon B. Karas*, *Dain N. De Veny*, and *Dennis L. Sipe*, Assistant Attorneys General.

John Czarnecki, by appointment of the Court, 455 U. S. 917, argued the cause and filed a brief for respondent.

JUSTICE REHNQUIST delivered the opinion of the Court.

The issue here is whether the Due Process Clause of the Fourteenth Amendment requires the vacation of respondent's Ohio murder conviction. The United States Court of Appeals for the Sixth Circuit, which granted respondent's petition for a writ of habeas corpus, *Lonberger* v. *Jago*, 635 F. 2d 1189 (1980), and *Lonberger* v. *Jago*, 651 F. 2d 447 (1981), held that it did. The Court of Appeals held that respondent's plea of guilty to a previous Illinois felony charge, offered and admitted into evidence at his Ohio murder trial, was invalid under *Boykin* v. *Alabama*, 395 U. S. 238 (1969). It went on to hold that the admission into evidence of the Illinois conviction at the Ohio trial rendered respondent's ensuing conviction in that proceeding unconstitutional under this Court's decision in *Burgett* v. *Texas*, 389 U. S. 109 (1967). The State claims that the Court of Appeals exceeded its authority, under our holding in *Sumner* v. *Mata*, 449 U. S. 539 (1981), in concluding that the prior Illinois conviction was invalid. It also contends that even if the Court of Appeals were warranted in so concluding, the admission of that conviction at the Ohio murder trial did not render the Ohio conviction constitutionally infirm. We granted certiorari to consider, *inter alia*, the interrelationship between *Boykin* v. *Alabama*, *supra*, and *Henderson* v. *Morgan*, 426 U. S. 637 (1976).

I

There is apparently no dispute with respect to the operative facts which led to respondent's indictment and convic-

tion for the murder of Charita Lanier in Toledo, Ohio, on the evening of January 29, 1975. Lanier was brutally murdered in the living room of her home during that evening; blood stains led from the living room to the kitchen, where the victim's partially clothed body was found in a freezer. An autopsy revealed that the victim bled to death after her throat had been slashed, and a bent, blood-stained knife found near the scene of the crime was identified as the murder weapon. The victim's clothing was torn and sperm was detected in her vaginal canal.

The morning after the murder, the victim's children told police that respondent, Robert Lonberger, had been at their home the previous evening. After the children had been sent to their upstairs bedroom, they heard their mother scream. When there was no response to his questions, the older child left his bedroom and went downstairs. The lights were out and when the child attempted to turn them on respondent grabbed his hand; he ordered the child back to bed. A pack of cigarettes of respondent's brand was found in the house and blood-stained articles of clothing were discovered in his possession.

Respondent was indicted by a state grand jury on two counts of "aggravated murder." The first count charged that respondent had murdered Lanier with "prior calculation and design," in violation of Ohio Rev. Code Ann. § 2903.01(A) (1975). The second count charged respondent with murder while committing rape, in violation of Ohio Rev. Code Ann. § 2903.01(B) (1975).[1] Both counts of aggravated murder included a "specification," described below, in which the prosecution alleged that respondent previously had been convicted of an "offense of which the gist was the purposeful

[1] Both the first and the second counts of aggravated murder, and the accompanying specifications, were submitted to the jury. No verdict was returned as to the first count or the specification accompanying that charge, and neither is relevant to our decision.

killing of or attempt to kill another." Ohio Rev. Code Ann. § 2929.04(A)(5) (1975).[2]

Respondent pleaded not guilty to the charges, and the State sought at trial to prove the specification of prior conviction for attempt to kill by introducing the record of a conviction of respondent in the Circuit Court of Cook County, Ill. It is the introduction of this conviction into evidence in the Ohio murder trial which has been the focus of constitutional objection on the part of respondent since that time, and upon which the Court of Appeals for the Sixth Circuit based its conclusion that respondent's conviction was constitutionally infirm. Because of its central role in this litigation, we find it desirable to describe in some detail the evidence before the Ohio court relating to this prior conviction.

It is fair to say that from the time the State first offered the record of the Illinois conviction until the present time, the opposing parties have never agreed as to the historical facts surrounding the acceptance of respondent's plea of guilty to an indictment returned by a grand jury in the Circuit Court of Cook County, Ill., some three years before he was tried on the Ohio murder charge. The State offered in evidence at the Ohio trial a copy of the grand jury indictment forming the basis for the Illinois charge, a certified copy of an Illinois record called a "conviction statement," and the transcript of a hearing in the Circuit Court of Cook County occurring at the time respondent pleaded guilty.

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[2] Under the Ohio statute, the death sentence could be imposed only for the crime of aggravated murder, Ohio Rev. Code Ann. § 2929.03 (1975). Even as to aggravated murder, the prosecution was required separately to allege a specification and prove beyond a reasonable doubt the aggravating circumstance contained in the specification, § 2929.03(C). If the jury found the defendant guilty of both aggravated murder and the specification, then the trial judge was required to hold a sentencing hearing where the defendant could show mitigating circumstances, §§ 2929.03(D) and 2929.04. If no mitigating circumstances were found, the judge was required to impose the death sentence; a mandatory life sentence applied if mitigating circumstances were shown.

These documents show that respondent was indicted by the Cook County grand jury in May 1971 on four counts: aggravated battery against Dorothy Maxwell, aggravated battery with a deadly weapon against Dorothy Maxwell, intentionally and knowingly attempting to kill Dorothy Maxwell by cutting her with a knife, and aggravated battery against Wendtian Maxwell with a deadly weapon. The "conviction statement," prepared and authenticated by the Circuit Court of Cook County, recited in pertinent part that respondent was indicted for "AGGRAVATED BATTERY, ETC.," that on March 10, 1972, respondent withdrew an earlier plea of not guilty and entered a plea of guilty, and that after the court "fully explained to the Defendant . . . before the entry of said PLEA OF GUILTY, the consequences of entering such PLEA OF GUILTY, the said Defendant still persisted in his PLEA OF GUILTY in manner and form as charged in the indictment in this cause." App. 5. The third record offered in evidence in the Ohio proceedings is the transcript of the colloquy at the time of sentencing in the Circuit Court of Cook County, Ill., *id.*, at 6–15. It contains the following relevant exchanges at a time when the sentencing judge, respondent, respondent's attorney, and the prosecuting attorney were shown to be present in open court:

"THE COURT: In other words, you are pleading guilty, that you did on August 25, 1968, commit the offense of aggravated battery on one Dorothy Maxwell, and that you did on the same date attempt on Dorothy Maxwell, with a knife, is that correct?

"THE DEFENDANT: Yes, sir.

"THE COURT: And you did on the same date commit the offense of aggravated battery on one Wendtian Maxwell, is that correct?

"That is what you are pleading to, sir?

"THE DEFENDANT: Yes, sir.

"THE COURT: And understand by pleading guilty to this indictment you are waiving your right to a trial by this Court or trial by this Court and a jury?

"THE DEFENDANT: Yes.

. . . . . .

"THE COURT: Understand by pleading guilty I could sentence you from one to ten on the aggravated battery, and attempt one to twenty. So, I could sentence you to the penitentiary for a maximum of from one to forty years.

"Understand that?

"THE DEFENDANT: Yes, sir.

. . . . . .

"THE COURT: What do you wish to tell me insofar as stipulation and as far as facts concerned?

"MR. RANDALL [prosecuting attorney]: Let it be stipulated by and between the parties, Indictment 71–1554, it is both sufficient in law and in fact to sustain the charges contained therein, to sustain a finding of guilty on the charges involving Robert Lonberger. . . .

"MR. XINOS [respondent's attorney]: So stipulated."

Before respondent's trial on the aggravated murder charges, the Ohio trial court conducted a hearing *in limine* to determine whether respondent's guilty plea to the Illinois attempted murder charge was voluntary. The Illinois records were offered, and respondent took the stand and submitted himself to direct and cross-examination primarily as to his recollection of the Illinois proceedings which had taken place three years earlier. At the conclusion of this hearing, the trial court made the following findings:

"The Court finds on the evidence presented that the defendant is an intelligent individual, well experienced in the criminal processes and well represented at all stages of the proceedings by competent and capable counsel in Illinois. On review of the certified copy of the Illinois

> proceedings and a transcript of the plea of guilty, the Court finds that every effort was taken to safeguard and to protect the constitutional rights of the defendant. Therefore, the Court finds that the defendant intelligently and voluntarily entered his plea of guilty in the Illinois court." *Id.*, at 99–100.

Evidence of respondent's Illinois conviction was admitted at his Ohio trial, subject to an instruction that it be considered only in connection with the specification, and not as probative of guilt on the underlying murder count. The jury returned a verdict of guilty on the second count of aggravated murder, one including the specification of the prior charge of attempted murder; after a sentencing hearing in accordance with Ohio law, the trial court imposed a sentence of death.

Respondent's appeal to the Ohio Court of Appeals was partially successful; that court found as a matter of state law that the jury's finding that respondent had not only murdered Charita Lanier, but raped her as well, did not satisfy the Ohio rule relating to proof of crime by circumstantial evidence. App. to Pet. for Cert. A–38. It did uphold the jury finding that respondent was guilty of the murder of Lanier, and that the specification based on the prior Illinois conviction was adequately proved. It reversed the judgment imposing a death penalty, and directed imposition of a sentence based solely on the conviction of murder. With respect to the admissibility and evidence of the prior Illinois conviction, the Ohio Court of Appeals said:

> "The transcript from the Cook County Circuit Court proceedings at which appellant changed his plea to guilty indicated that he was represented by competent counsel. When questioned by the court, appellant answered affirmatively that he was pleading guilty to 'the offense of aggravated battery on one Dorothy Maxwell, . . . attempt on Dorothy Maxwell, with a knife . . . [and] the offense of aggravated battery on Wendtian Maxwell . . . .' Appellant further affirmed that he understood that he

was waiving his right to trial and to confront witnesses, that he understood the penalties that could be imposed, that he was motivated to plead guilty by an offer of a reduced sentence, and that he had not otherwise been threatened or promised anything. Through his counsel, appellant stipulated that there were sufficient facts to sustain the charges contained in the indictment. We find from the record of this proceeding and from the record of the pre-trial hearing in the instant case, that the trial court did not err in ruling that appellant's guilty plea was voluntarily and knowingly made and that the evidence of the prior conviction should be submitted to the jury." *Id.*, at A–42.

II

It was the record of these proceedings in the Ohio state courts that formed the basis of respondent's application for federal habeas in the United States District Court for the Northern District of Ohio. The District Court denied relief, finding that "from a review of the record, this Court is satisfied that an ordinary person would have understood the nature of the charges to which petitioner was pleading guilty." *Id.*, at A–31. The Court of Appeals for the Sixth Circuit reversed the judgment of the District Court, and ordered that a writ of habeas corpus issue. *Lonberger* v. *Jago*, 635 F. 2d 1189 (1980). We granted certiorari, vacated the judgment of the Court of Appeals, and remanded for reconsideration in the light of *Sumner* v. *Mata*, 449 U. S. 539 (1981). *Marshall* v. *Lonberger*, 451 U. S. 902 (1981). On remand the Court of Appeals adhered to its previous decision. *Lonberger* v. *Jago*, 651 F. 2d 447 (1981). We again granted certiorari, 454 U. S. 1141 (1982), and we now reverse the judgment of the Court of Appeals.

The Court of Appeals, referring to its earlier opinion, stated:

"The basis for our judgment was that Lonberger's 1972 guilty plea to attempted murder was not demonstrably

an intelligent one, and was therefore invalid under federal constitutional standards. This conclusion is directly contrary to the conclusions of both of the Ohio courts that considered the question of the validity of Lonberger's 1972 plea. We now expressly hold that these factual determinations by the Ohio courts are not fairly supported by the records that were before them. This we are empowered to do by 28 U. S. C. § 2254(d)(8). *Sumner* v. *Mata*, *supra*, requires that federal courts state their rationales for exercise of this power.

"The basis for our disagreement with the factual determinations of the state courts can be briefly stated. The question of an effective waiver of a federal constitutional right is governed by federal standards. *Boykin v. Alabama*, *supra*, 395 U. S. at 243 . . . . A guilty plea, which works as a waiver of numerous constitutional rights, cannot be truly voluntary if the defendant 'has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt.' *Henderson v. Morgan*, 426 U. S. 637, 645 n. 13 . . . (1976). *Accord*, *Smith v. O'Grady*, 312 U. S. 329, 334 . . . (1941).

"The transcript of Lonberger's 1972 plea is inadequate to show that Lonberger was aware that he was pleading guilty to a charge of attempted murder." 651 F. 2d, at 449 (footnote omitted).

We entirely agree with the Court of Appeals for the Sixth Circuit that the governing standard as to whether a plea of guilty is voluntary for purposes of the Federal Constitution is a question of federal law, *Henderson* v. *Morgan*, 426 U. S. 637 (1976); *Boykin* v. *Alabama*, 395 U. S. 238 (1969), and not a question of fact subject to the requirements of 28 U. S. C. § 2254(d). But the questions of historical fact which have dogged this case from its inception—what the Illinois records show with respect to respondent's 1972 guilty plea, what other inferences regarding those historical facts the Court of

Appeals for the Sixth Circuit could properly draw, and related questions—are obviously questions of "fact" governed by the provisions of § 2254(d).

Section 2254(d) establishes a presumption of correctness for "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia. . . ." One of the eight exceptions to this presumption of correctness, and the one relied upon by the Court of Appeals in this case, is where the federal habeas court, reviewing the state-court record offered to support the factual finding, "on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record." 28 U. S. C. § 2254(d)(8).

In its treatment of the state courts' factual findings, the Court of Appeals failed in at least one major respect to accord those determinations the "high measure of deference," *Sumner* v. *Mata*, *supra*, to which they are entitled. This deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even "fair support" in the record. The Court of Appeals' treatment of the issue of respondent's credibility failed to satisfy this standard. Following a recital of the findings of the Ohio trial court, the Court of Appeals for the Sixth Circuit states that "[n]o explicit findings were made concerning Lonberger's credibility as a witness." 651 F. 2d, at 448. Likewise, the Court of Appeals wrote:

> "At the pretrial hearing, Lonberger testified that he 'copped out to aggravated battery' in 1972, but had no knowledge of other charges. The Ohio prosecutors attempted to discredit this testimony by introducing copies of the 1972 indictment charging Lonberger with 'the offense of attempt.' Lonberger denied that he had ever

> seen or read this indictment. The prosecutors sought to imply by their questioning of Lonberger that he must have heard of the 'attempt' charge either at his arraignment or in conversation with his attorneys. Lonberger testified that he had not, and the state produced no contrary evidence." *Id.*, at 449–450 (footnote omitted).

Finally, the Court of Appeals explicitly credited Lonberger's testimony in a footnote rejecting the State's reliance on *Henderson* v. *Morgan*, *supra*. 651 F. 2d, at 450, n. 3.

We are unsure whether the Court of Appeals' reassessment of the effect of respondent's testimony at the Ohio state trial court hearing was undertaken because of the failure of the trial court to make express findings as to respondent's credibility, or whether the Court of Appeals for the Sixth Circuit felt that it should assess for itself the weight that such evidence should have been accorded by the state trial court. In either event, we hold that it erroneously applied the "fairly supported by the record" standard enunciated in 28 U. S. C. § 2254(d).

In *LaVallee* v. *Delle Rose*, 410 U. S. 690 (1973), we dealt with a state-court hearing in which the trial judge likewise failed to make express findings as to the defendant's credibility. We held that because it was clear under the applicable federal law that the trial court would have granted the relief sought by the defendant had it believed the defendant's testimony, its failure to grant relief was tantamount to an express finding against the credibility of the defendant. We think the same is true in the present case. The assumption referred to in *Townsend* v. *Sain*, 372 U. S. 293, 314–315 (1963), quoted in *LaVallee* v. *Delle Rose*, *supra*, at 694, "that the state trier of fact applied correct standards of federal law to the facts . . ." leads inevitably to a similar conclusion here. Had the Ohio trial court credited respondent's insistence that he had only been advised of or been aware of the battery charge at the time he pleaded guilty in Illinois, the Ohio trial court would have surely refused to allow the record of the Illinois conviction in evidence to prove the specification of

attempted murder. The trial court's ruling allowing the record of conviction to be admitted in evidence in support of the specification is tantamount to a refusal to believe the testimony of respondent.[3]

The Court of Appeals' reliance on respondent's testimony, discussed above, and the fact that "the state produced no contrary evidence," are quite wide of the mark for purposes of deciding whether factual findings are fairly supported by the record. Title 28 U. S. C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them. In *United States* v. *Oregon Medical Society*, 343 U. S. 326 (1952), commenting on the deference which this Court gave to the findings of a District Court on direct appeal from a judgment in a bench trial, we stated:

> "As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' *Boyd* v. *Boyd*, 252 N. Y. 422, 429, 169 N. E. 632, 634." *Id.*, at 339.

We greatly doubt that Congress, when it used the language "fairly supported by the record" considered "as a

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[3] The likelihood that the state trial court would have reached such a conclusion is not diminished by the facts before us. The state courts found that respondent was represented by two lawyers who were competent and capable, and the record suggests that one of the two was a nationally respected public defender; either of them might well have informed respondent of the charges contained in the indictment against him. Moreover, respondent appeared in several court proceedings in connection with his attack on Dorothy Maxwell, at any one of which the indictment could have been read to him.

whole" intended to authorize broader federal review of state-court credibility determinations than are authorized in appeals within the federal system itself. While disbelief of respondent's testimony may not form the basis for any affirmative findings by the state trial court on issues with respect to which the State bore the burden of proof, it certainly negates any inferences favorable to respondent such as those drawn by the Court of Appeals, based on his testimony before the Ohio trial court.

Thus, the factual conclusions which the federal habeas courts were bound to respect in assessing respondent's constitutional claims were the contents of the Illinois court records, the finding of the Ohio trial court that respondent was "an intelligent individual, well experienced in the criminal processes and well represented at all stages of the proceedings by competent and capable counsel in Illinois," *supra*, at 428, and the similar conclusion of the Ohio Court of Appeals, and the inferences fairly deducible from these facts.[4] These records and findings show, with respect to the attempted murder charge, that it was one of the four counts contained in the Cook County indictment returned against respondent. The "conviction certificate" recites that at the time respondent pleaded guilty, he was duly advised by the court of the consequences of pleading guilty, and nonetheless adhered to his plea. The transcript, as appears from its face and as found by the Ohio Court of Appeals, shows that respondent answered affirmatively that he was pleading guilty, *inter alia*, to the offense of "attempt on Dorothy Maxwell, with a knife . . . ." Respondent's attorney, in his presence,

[4] The method by which court records from one State are to be authenticated and proved in the courts of a second State, the weight to be given those records, and the extent to which they may be impeached by later oral testimony, are all matters generally left to the laws of the States. A State "is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934).

stipulated that the indictment was "both sufficient in law and in fact to sustain the charges contained therein, to sustain a finding of guilty on the charges involving [respondent]." *Ibid.* There is perhaps an arguable conflict between the recitation of the "conviction certificate" and the transcript by reason of the latter's omission of the word "murder" after the word "attempt" in the colloquy between respondent and the court. For our purposes we assume that the transcript version, which is more favorable to respondent, was accurate.

It is well established that a plea of guilty cannot be voluntary in the sense that it constitutes an intelligent admission that the accused committed the offense unless the accused has received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Smith* v. *O'Grady*, 312 U. S. 329, 334 (1941), quoted in *Henderson* v. *Morgan*, 426 U. S., at 645. In *Henderson* v. *Morgan*, we went on to make the following observations:

> "Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." *Id.*, at 647.

Applying this standard[5] to the factual determinations arising from the state-court proceedings which were "fairly sup-

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[5] The Sixth Circuit sought to distinguish *Henderson* on several grounds, none of which withstands analysis. First, it relied on "Lonberger's testimony that his lawyers did not discuss the charge of 'attempt' with him." This, however, requires rejection of the state courts' necessary conclusions as to Lonberger's testimony, which the federal habeas court was unjustified in doing. *Supra*, at 433–434. In addition, the Court of Appeals

ported by the record" within the meaning of 28 U. S. C. § 2254(d), we disagree with the Court of Appeals for the Sixth Circuit in its conclusion that respondent's plea to the Illinois charge was not "voluntary" in the constitutional meaning of that term. We think that the application of the principles enunciated in *Henderson* v. *Morgan*, *supra*, lead inexorably to the conclusion that the plea *was* voluntary. We think a person of respondent's intelligence and experience in the criminal justice system would have understood, from the statements made at the sentencing hearing recorded in the transcript before us, that the presiding judge was inquiring whether the defendant pleaded guilty to offenses charged in the indictment against him. This is evident from the references in the proceeding by the judge to the fact the respondent was "pleading guilty to this indictment" and by respondent's counsel's stipulation that the indictment sustained the plea of guilty. *Supra*, at 427–428. Under *Henderson*, respondent must be presumed to have been informed, either by his lawyers or at one of the presentencing proceedings, of the charges on which he was indicted. Given this knowledge of the indictment and the fact that the indict-

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thought that the fact that respondent had changed lawyers following the return of the grand jury indictment somehow made it less likely that the presumption would operate. The mere fact of a change in representation, if it has any probative value, would suggest to us that it was even more likely than usual that one of the two lawyers informed respondent of the contents of the indictment. The Court of Appeals also relied on what it thought was a vague description of the attempt-to-kill offense in the indictment and the sentencing proceedings. We cannot agree with the Court of Appeals' apparent implication that the indictment failed to provide respondent's counsel with sufficient information to enable them to describe to him the charges he faced: indeed, counsel stipulated that the indictment was "sufficient in law and fact" to sustain the charges against respondent. Finally, the Court of Appeals thought it "questionable whether [the *Henderson* presumption] is proper in a case . . . in which a prior conviction forms an essential element of a later crime." Whatever may be the case otherwise, there is surely no obstacle to use of the presumption in a case such as this, when the defendant is challenging a conviction which does not have a prior conviction as an element.

ment contained no other attempt charges, respondent could only have understood the judge's reference to "attempt on Dorothy Maxwell, with a knife" as a reference to the indictment's charge of attempt to kill. It follows, therefore, both that respondent's argument that his plea of guilty was not made knowingly must fail, and that the admission in the Ohio murder trial of the conviction based on that plea deprived respondent of no federal right. *Spencer* v. *Texas*, 385 U. S. 554 (1967).[6] The judgment of the Court of Appeals is accordingly

Reversed.

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[6] In *Spencer*, which we reaffirm, the Court upheld a conviction despite the introduction at the guilt-determination stage of trial of a defendant's prior conviction for purposes of sentence enhancement. Central to our decision was the fact that the Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules: "It has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." 385 U. S., at 564. Applying these principles, we observed that the Texas procedural rules permitting introduction of the defendant's prior conviction did not pose a sufficient danger of unfairness to the defendant to offend the Due Process Clause, in part because such evidence was accompanied by instructions limiting the jury's use of the conviction to sentence enhancement. This analysis remains persuasive; as recognized in *Parker* v. *Randolph*, 442 U. S. 62, 73 (1979) (REHNQUIST, J.), the "crucial assumption" underlying the system of trial by jury "is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed." Cf. *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). *Spencer* also observed that in cases where documentary evidence is used to prove the prior crime, the evidence seldom, if ever, will be so inflammatory or "devastating," *Parker* v. *Randolph*, *supra*, at 74–75, that the jury will be unable to follow its instructions. See, *e. g.*, *Bruton* v. *United States*, 391 U. S. 123 (1968). And, of course, if the jury considers a defendant's prior conviction only for purposes of sentence enhancement no questions of fairness arise.

JUSTICE STEVENS' dissent appears to rest on a view that the common law regarded the admission of prior convictions as grossly unfair and subject to some sort of blanket prohibition. In fact, the common law was far more ambivalent. See, *e. g.*, Stone, Exclusion of Similar Fact Evidence:

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I join JUSTICE STEVENS' dissent. I write separately only to emphasize that more is subject to question in the Court's

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America, 51 Harv. L. Rev. 988 (1938). Alongside the general principle that prior convictions are inadmissible, despite their relevance to guilt, 1 J. Wigmore, Evidence § 194 (3d ed. 1940), the common law developed broad, vaguely defined exceptions—such as proof of intent, identity, malice, motive, and plan—whose application is left largely to the discretion of the trial judge, see *Spencer* v. *Texas*, 385 U. S., at 560–561. In short, the common law, like our decision in *Spencer*, implicitly recognized that any unfairness resulting from admitting prior convictions was more often than not balanced by its probative value and permitted the prosecution to introduce such evidence without demanding any particularly strong justification.

Here, as in *Spencer*, the trial judge gave a careful and sound instruction requiring the jury to consider respondent's prior conviction only for purposes of the specification. The extent to which the jury can and does consider limiting instructions, or for that matter any instructions, has been fully considered in cases such as *Spencer*, *supra*, *Bruton*, *supra*, *Parker*, *supra*, and *Burgett* v. *Texas*, 389 U. S. 109 (1967). The matter was put to rest for cases such as this by our decision in *Spencer*, *supra*, in which the Court quoted the remark of Justice Cardozo in *Snyder* v. *Massachusetts*, 291 U. S., at 105, that a state rule of law "does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar."

Remarking on the state of the law of evidence with respect to reputation in criminal cases, the Court in *Michelson* v. *United States*, 335 U. S. 469, 486 (1948), said:

"We concur in the general opinion of the courts, textwriters and the profession that much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other. But somehow it has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court. To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice."

If this Court was thus willing to defer to "accumulated judicial experience" at the expense of "abstract logic," *id.*, at 487, in a case such as *Michelson* which arose in the federal court system, the Due Process Clause as construed in *Spencer* surely cannot require a State to do more.

opinion than its penultimate sentence. See *ante*, at 438, and n. 6.

I

The bulk of the Court's opinion is devoted not to defending *Spencer* v. *Texas*, 385 U. S. 554 (1967), but rather to establishing that this case is not governed on all fours by *Burgett* v. *Texas*, 389 U. S. 109 (1967). *Burgett* held, notwithstanding *Spencer*, that it was inherently prejudicial to admit an unconstitutional, uncounseled prior conviction against a defendant at a trial on a new offense, regardless of the purpose for which it had been introduced or of any limiting instructions given to the jury. 389 U. S., at 115.[1]

The proceedings below concerned themselves exclusively with the question whether respondent's 1972 conviction for attempted murder in Illinois was the type of conviction which, under *Burgett*, could not have been admitted against him in the later Ohio trial for any purpose, regardless of the curative instructions or procedural protections Ohio might

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[1] Whether or not *Spencer* may still be read as broadly as it was written, the two cases are reconcilable. *Spencer* took a balancing approach to interpreting the requirements of the Fourteenth Amendment's Due Process Clause, and held only that the risk of prejudice alone from admitting a valid prior conviction—provided the jury was given proper limiting instructions—did not necessarily outweigh the legitimate benefits the State might derive from the procedures that required admitting the conviction. See 385 U. S., at 562–563. *Spencer* expressly distinguished situations in which admission of the prior conviction, in addition to exposing the defendant to a risk of prejudice, might compromise a specific federal right. *Id.*, at 564–565. *Burgett* recognized that admitting *unconstitutional* prior convictions did compromise vital federal rights. Furthermore, the conviction admitted into evidence in *Burgett* was not merely unconstitutional, it was also unreliable evidence that the defendant had in fact committed the prior offense, because the defendant had not had the benefit of the advice of counsel. These additional elements of unconstitutionality and unreliability tip the delicate balance struck by *Spencer*. Thus, *Burgett* unquestionably states good law: where a defendant's prior conviction is unconstitutional or unreliable, it may not be introduced in evidence against that defendant for any purpose.

have adopted. The Court of Appeals for the Sixth Circuit granted respondent's habeas petition solely on the ground that the Illinois conviction admitted in evidence at his Ohio trial had been obtained unconstitutionally, because respondent had entered a guilty plea without notice that he was pleading guilty to an attempted murder charge as well as an aggravated battery charge. A defendant's failure to receive notice of the charge to which he pleads guilty renders his plea invalid and a conviction based upon it unconstitutional. See *Henderson* v. *Morgan*, 426 U. S. 637 (1976); *Boykin* v. *Alabama*, 395 U. S. 238 (1969). The conviction is also completely unreliable, since it rests entirely on a guilty plea that cannot be taken as an admission that the defendant indeed committed the elements of the offense. So if the Court of Appeals for the Sixth Circuit was right about respondent's failure to receive notice in Illinois, the conviction should not have been admitted into evidence in Ohio, his Ohio conviction was invalid under *Burgett*, and the court properly granted his habeas corpus petition.

II

Both JUSTICE REHNQUIST's opinion for the Court, *ante*, at 426–430, and JUSTICE STEVENS' dissent, *post*, at 457, show why the factual correctness of the Court of Appeals for the Sixth Circuit's conclusion as to notice is a close question. The records of respondent's guilty plea and conviction in Illinois leave the matter in considerable doubt. The formal statement of conviction preserved in Illinois records states only that respondent was found guilty of "AGGRAVATED BATTERY, ETC." App. 5. The transcript of respondent's guilty plea proceedings shows that the trial judge asked him to admit, "that you did on August 25, 1968, commit the offense of aggravated battery on one Dorothy Maxwell, and that you did on the same date attempt on Dorothy Maxwell, with a knife," and he answered, "Yes, sir." *Id.*, at 8. The judge also mentioned the possible sentence for "attempt." *Id.*, at 9. In the absence of more, neither of these records

clearly establishes that respondent had notice that he was pleading guilty to attempted murder as well as aggravated battery. On the other hand, respondent was represented by competent counsel in Illinois, and he was arraigned on an indictment that clearly charged him with attempted murder.

The Court resolves this tension on the basis of rules of law derived from *Sumner* v. *Mata*, 449 U. S. 539 (1981), and on dictum in *Henderson* v. *Morgan*, *supra*. *Henderson* states that in cases such as this, where the record does not clearly show that the defendant received notice, "it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." *Id.*, at 647. The Court thus holds:

> "Under *Henderson*, respondent must be presumed to have been informed, either by his lawyers or at one of the presentencing proceedings, of the charges on which he was indicted. Given this knowledge of the indictment and the fact that the indictment contained no other attempt charges, respondent could only have understood the judge's reference to 'attempt on Dorothy Maxwell, with a knife' as a reference to the indictment's charge of attempt to kill." *Ante*, at 437–438.

Under *Sumner* v. *Mata*, *supra*, and 28 U. S. C. § 2254(d)(8), the Court of Appeals for the Sixth Circuit may have been required to accept the inference that respondent was informed of the charges against him, if it was drawn by the Ohio Court of Appeals, as fairly supported by the record.[2]

[2] In the absence of proof to the contrary, *Henderson* does support a presumption that respondent's Illinois counsel informed him at some point of the charges against him. In this case, however, respondent submitted proof to the contrary—he testified at length that he had never been told, by his lawyer or by the court, that he was being charged with attempted murder. See App. 24–25, 85–94 (transcript of hearing before Ohio trial court). Under the normal rule applying in federal courts, a judge-made "presumption" does no more than require the opposing party to go forward

But, assuming the Ohio court drew such an inference (it did not say so), the inference fails to resolve this case. Both respondent's testimony and the applicable law establish that, although he may have known he had been *charged* with attempted murder, it does not necessarily follow that he knew he was *pleading guilty* to attempted murder.

Testifying at a pretrial hearing in Ohio, respondent claimed that he was told of a plea bargain whereby he would plead guilty only to aggravated battery and be sentenced accordingly. He testified that his Illinois lawyer told him "[t]hat he had talked it over with the State's attorney and that again we would go out and the judge would say a lot of things but it was just for the record's sake and that we was copping out to aggravated battery from two to four, that was the agreement." App. 24; cf. *id.*, at 84–85. It is hard to judge respondent's credibility on a cold record, but this statement is hardly incredible on its face. The State made no effort to impeach it, unlike respondent's claim that he was never told he had been charged with attempted murder, see *id.*, at 27–75, and the Ohio Court of Appeals did not address it, see App. to Pet. for Cert. A–40—A–42; *ante*, at 429–430. Apart from the Illinois trial judge's ambiguous reference to "attempt . . . with a knife," nothing at respondent's guilty plea proceeding would have informed him that he was doing more than going forward with the deal that had been proposed to him. He was sentenced to two to four years in prison—two years is the minimum sentence for aggravated battery[3]—and his con-

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with evidence to rebut or meet it. See Fed. Rule Evid. 301; H. R. Conf. Rep. No. 93–1597, pp. 5–6 (1974). Even if the State had rebutted respondent's testimony—and it did not—respondent's showing clearly sufficed to meet any presumption created by *Henderson*. At most, then, *Henderson*'s effect on this case was to create a permissible inference that respondent had been informed of the charges against him.

[3] See Ill. Rev. Stat., ch. 38, ¶¶ 12–4(e), 1005–8–1(6) (1979). At the time respondent was sentenced in Illinois, it was not clear whether there was any minimum sentence for attempted murder. See *People* v. *Moore*, 69 Ill. 2d 520, 372 N. E. 2d 666 (1978); *People* v. *Jones*, 55 Ill. App. 3d 446,

viction statement specified no crime but "AGGRAVATED BATTERY."

More importantly, respondent's understanding that he was pleading guilty only to aggravated battery was perfectly reasonable, despite the judge's mention of "attempt." Since at least 1958, Illinois has had a state statutory and constitutional rule forbidding convictions—not merely punishments—for two offenses based on a single act. See *People* v. *King*, 66 Ill. 2d 551, 560–566, 363 N. E. 2d 838, 842–843 (1977) (discussing development of Illinois law); Illinois Criminal Code of 1961, § 1–7(m) (current version at Ill. Rev. Stat., ch. 38, ¶ 1005–8–4(a) (1979)). This rule has been applied several times to vacate one conviction when a defendant, in a single trial, has been convicted of both aggravated battery and attempted murder resulting from the same act.[4] *E. g.*, *People ex rel. Walker* v. *Pate*, 53 Ill. 2d 485, 292 N. E. 2d 387 (1973); *People* v. *Carter*, 21 Ill. App. 3d 207, 315 N. E. 2d 47 (1974); *People* v. *Peery*, 81 Ill. App. 2d 372, 377, 225 N. E. 2d 730, 732 (1967).

Under Illinois law, therefore, respondent could not have been convicted of both "aggravated battery" and "etc." if the "etc." referred to the attempted murder of Dorothy Maxwell. Upon hearing the reference to "attempt . . . with a knife," respondent would have been warranted in thinking that the

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455, 370 N. E. 2d 1142, 1149 (1977). Since then the Illinois Legislature has imposed a 6-year minimum. See Ill. Rev. Stat., ch. 38, ¶¶ 8–4(c)(1), 1005–8–1–(3) (1979).

[4] The Illinois indictment establishes that respondent's aggravated battery charge rested on precisely the same facts as his attempted murder charge:

"[O]n August 25th, 1968, . . . Robert Lonberger committed the offense of aggravated battery, in that he, in committing a battery on Dorothy Maxwell used a deadly weapon . . . .

"[O]n August 25th, 1968, . . . Robert Lonberger committed the offense of attempt, in that he, with intent to commit the offense of murder, intentionally and knowingly attempted to kill Dorothy Maxwell by cutting Dorothy Maxwell with a knife without lawful justification. . . ." App. 2–3.

judge was indulging in a lawyer's well-known penchant for redundancy.

The Court of Appeals for the Sixth Circuit held that the transcript of respondent's Illinois guilty plea was inadequate to show that he was aware that he was pleading guilty to attempted murder as well as aggravated battery. The Ohio Court of Appeals reached a different conclusion about the same transcript. But in finding that respondent had made a knowing and intelligent plea, the Ohio court relied completely on the facts that respondent answered "Yes" to the question described above, that he stated that he understood he was waiving his right to trial, and that his lawyers stipulated that there were sufficient facts to prove the charges in the indictment. App. to Pet. for Cert. A–42; see *ante*, at 429–430. The Court of Appeals for the Sixth Circuit's result is perfectly consistent with *Sumner*'s "presumption of correctness," see 449 U. S., at 550–551, because the Ohio Court of Appeals' findings, read in light of Illinois law or of respondent's unimpeached testimony in the Ohio trial court, fall short of establishing that respondent knew that he was pleading guilty to attempted murder.

This Court now slips a new rationale beneath the flawed determination of the Ohio court. It holds that respondent's guilty plea must have been valid if at some point, under *Henderson*, it is likely that he learned of all the charges against him.[5] Like the Ohio court, however, this Court fails to explain its leap from notice of the charges to notice of which charges were included in the guilty plea. It makes no sense whatsoever to maintain that *Henderson* required the Court

[5] This holding is obviously limited by *Henderson* itself, which makes clear that a habeas petitioner is free to introduce evidence rebutting the inference the Court draws in this case, and courts are free to believe that evidence. See 426 U. S., at 647. Furthermore, if there is enough evidence in the record indicating that the *Henderson* inference cannot be drawn, or that even if it can be drawn other factors indicate that the plea may not have been made with knowledge, then any state court's reliance on *Henderson* would not be fairly supported by the record.

of Appeals for the Sixth Circuit to accept an inference that respondent's counsel had explained all the charges against him, but at the same time to ignore the likelihood that his lawyer also told him that he could not be convicted of both aggravated battery and attempted murder. As a factual matter, respondent's lawyer may or may not have explained the state conviction rule to him. But the Court is left with a rule of law that makes sense only if respondent was ignorant of settled state law, for only then would the trial judge's brief reference to "attempt" seem anything but absurd.

III

A simple, but unanswerable question of fact and a simple question of law are central to this case. Did respondent have actual knowledge that he was pleading guilty to attempted murder as well as aggravated battery in 1972? At this point, more than 10 years later and in the face of an ambiguous record, no factfinder could be completely certain that a particular answer is correct. So the crucial question becomes what makes an ambiguous record sufficient to support a state court's finding that a plea was knowing, voluntary, and intelligent. Under *Henderson*, mere absence of a recitation of all the charges at a guilty plea hearing may not be enough to render a plea unconstitutional, but in this case respondent had good reason to believe he was pleading guilty only to aggravated battery.

By dismissing part of the record, failing to confront the difference between notice of charges and notice of the charges to which one is pleading guilty, and disregarding the law of Illinois, the Court manages to fit this case within a rule of law that permits it to reverse the judgment below. And to what end this Procrustean effort? To uphold the great principle that the unique record before us was not so ambiguous as to forbid an inference that at some point respondent may have known what the charges against him were? To reaffirm that a conviction obtained under such circumstances is not so fun-

damentally unsound as to bar a zealous prosecutor from introducing it into evidence in some later prosecution, for (as JUSTICE STEVENS and JUSTICE BLACKMUN show) no good reason at all? To relieve Ohio of the burden of a single retrial? I question that this case was "certworthy." The game hardly seems worth the candle.

JUSTICE BLACKMUN, dissenting.

I join JUSTICE STEVENS' dissenting opinion, for I, too, would affirm the judgment of the United States Court of Appeals for the Sixth Circuit. It is enough for me in this case to note the utter absence of a legitimate state interest once the prosecution refused to accept respondent's proffered stipulation. That refusal revealed that the prosecution believed the indictment had prejudicial value, and it rendered nonexistent any otherwise legitimate interest the State might have had in introducing the indictment.

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

Criminal prosecution involves two determinations: whether the defendant is guilty or innocent, and what the appropriate punishment should be if he is guilty. In most cases, these determinations are made in two stages. At the first stage, strict rules of procedure govern the order in which evidence is offered, the quality of the evidence that may be admitted, and the burden of proof that is required to establish the defendant's guilt. At the second stage, however, the rules are relaxed; a wide range of evidence concerning the defendant's character may be received by the sentencing authority even though it is entirely extraneous to the particular offense that has just been proved.

This case involves the unfairness that may result from an attempt to merge the two stages. At issue is a highly prejudicial item of evidence: an Illinois indictment charging that in 1968 the respondent had "intentionally and knowingly at-

tempted to kill Dorothy Maxwell by cutting Dorothy Maxwell with a knife without lawful justification." Everyone agrees that this evidence could not be used to prove the respondent's guilt in this case, which concerned a 1975 murder in Ohio.[1] On the other hand, if the respondent were found guilty of the Ohio murder, the evidence was certainly relevant to whether

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[1] The common law has long deemed it unfair to argue that, because a person has committed a crime in the past, he is more likely to have committed a similar, more recent crime. See, *e. g.*, *People* v. *White*, 14 Wend. 111, 113–114 (N. Y. Sup. Ct. 1835) (in prosecution for possession of counterfeit money, improper to introduce evidence of former conviction); *United States* v. *Burr*, 25 Fed. Cas. 187, 198 (No. 14,694) (CC Va. 1807) (Marshall, C. J.) (in prosecution for providing support to a treasonous military expedition in Virginia, improper to introduce evidence that the accused had provided the means for a treasonous military expedition in Kentucky); *King* v. *Doaks*, Quincy's Mass. Reports 90 (Mass. Sup. Ct. 1763) (in prosecution for keeping a bawdy house, improper to introduce evidence of acts of lasciviousness performed before the defendant became mistress of the house); *Hampden's Trial*, 9 How. St. Tr. 1053, 1103 (Eng. 1684) ("a person was indicted of forgery, we would not let them give evidence of any other forgeries but that for which he was indicted").

The objection to such evidence is not that the proposed inference is illogical. The objection is rather that the inference is so attractive that it will overwhelm the factfinder and create an unwarranted presumption of guilt. As Professor Wigmore explained:

"The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge." 1 J. Wigmore, Evidence § 194 (3d ed. 1940).

In *Michelson* v. *United States*, 335 U. S. 469 (1948), this Court observed:

"Not that the law invests the defendant with a presumption of good character . . . but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a logical perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Id.*, at 475–476 (footnotes omitted).

he should be given the death penalty.[2] The reason this case is before us today is that the Ohio trial court allowed the prosecutor to present the evidence to the jury *before* it decided whether the respondent was guilty of the 1975 crime.

The Court finds no constitutional objection to this procedure because it is satisfied that the evidence could legitimately be used in determining the appropriate penalty, and because the jury was instructed not to consider the evidence as probative of the respondent's guilt. In my opinion the constitutional question is more difficult than the Court acknowledges. It requires, I believe, a re-examination of this Court's decision in *Spencer* v. *Texas*, 385 U. S. 554 (1967), as well as more attention to the prosecutorial tactics disclosed by this record.

I

The structure for constitutional analysis in this area was established in 1967, when this Court twice considered the constitutionality of convictions under the Texas recidivist statute. Under the Texas procedure, the prosecutor was allowed to offer evidence of the defendant's guilt and evidence of his prior criminal record in a single proceeding, so long as the jury was instructed that the defendant's past convictions were not to be taken into account in assessing his guilt or innocence under the current indictment.

In *Spencer* v. *Texas*, a bare majority of the Court concluded that such a procedure did not "fall below the minimum level the Fourteenth Amendment will tolerate." *Id.*, at 569 (Stewart, J., concurring). The Court acknowledged

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[2] Under Ohio law, the death penalty could not be imposed unless the respondent had been convicted of "an offense of which the gist was the purposeful killing or attempt to kill another." Ohio Rev. Code Ann. § 2929.04(A)(5) (1975). An Illinois "conviction statement" shows that the respondent pleaded guilty in 1972 to "aggravated battery, etc." The prosecutor asserted that in fact the respondent had pleaded guilty to attempted murder. Although the conviction statement and indictment were clearly not sufficient, standing alone, to prove that assertion beyond a reasonable doubt, they were at least relevant to the inquiry.

that prior-crimes evidence "is generally recognized to have potentiality for prejudice." *Id.*, at 560. Nevertheless, it held that this potentiality did not distinguish recidivist trials from other criminal trials in which prior-crime evidence was admissible.

The majority noted that, under the rule of *Delli Paoli* v. *United States*, 352 U. S. 232 (1957), a hearsay statement that was inadmissible against a defendant could nevertheless be introduced into evidence when the defendant was being tried jointly with the declarant, provided that the jury was instructed not to consider the statement in evaluating the defendant's guilt. The Court observed that under *Delli Paoli* "all joint trials, whether of several codefendants or of one defendant charged with multiple offenses, furnish inherent opportunities for unfairness when evidence submitted as to one crime (on which there may be an acquittal) may influence the jury as to a totally different charge." 385 U. S., at 562. This unfairness was deemed acceptable for two reasons:

> "(1) the jury is expected to follow instructions in limiting this evidence to its proper function, and (2) the convenience of trying different crimes against the same person, and connected crimes against different defendants, in the same trial is a valid governmental interest." *Ibid.*

The Court conceded that the use of prior-crime evidence in a one-stage recidivist trial may be thought to represent "a less cogent state interest" than the state interest promoted by *Delli Paoli*. 385 U. S., at 563. Nevertheless, it held that this distinction should not lead to a different constitutional result. *Ibid.*

Two cases decided within 18 months of *Spencer* called its analytic structure into question. *Burgett* v. *Texas*, 389 U. S. 109 (1967), also involved a conviction under the Texas

recidivist statute in which the jury had been instructed "not to consider the prior offenses for any purpose whatsoever in arriving at the verdict." *Id.*, at 113 (footnote omitted). In *Burgett*, the record did not affirmatively show that the petitioner had been represented by counsel at his earlier trial. Over the dissent of three Members of the *Spencer* majority,[3] the Court reversed the conviction. The Court reasoned that the earlier conviction was "presumptively void," that the admission of such a conviction was "inherently prejudicial and we are unable to say that the instructions to disregard it made the constitutional error 'harmless beyond a reasonable doubt' within the meaning of *Chapman* v. *California*, 386 U. S. 18." 389 U. S., at 115. In a footnote the Court unequivocally rejected the notion that a jury could be expected to follow instructions to disregard prejudicial evidence of this character. The Court stated:

> "What Mr. Justice Jackson said in *Krulewitch* v. *United States*, 336 U. S. 440, 445, 453 (concurring opinion), in the sensitive area of conspiracy is equally applicable in the sensitive area of repetitive crimes, 'The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.'" *Id.*, at 115, n. 7.[4]

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[3] Justice Harlan, who had authored the Court's opinion in *Spencer*, dissented and was joined by Justice Black and JUSTICE WHITE. See 389 U. S., at 120.

[4] Compare Chief Justice Warren's observations, dissenting in part in *Spencer:*

"Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him. As Mr. Justice Jackson put it in a famous phrase, '[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.' *Krulewitch* v. *United States*, 336 U. S. 440, 453 (concurring opinion) (1949). *United States* v. *Banmiller*, 310 F. 2d 720, 725 (CA3 1962). Mr. Justice Jackson's assessment has received

Later in the same Term the Court decided *Bruton* v. *United States*, 391 U. S. 123 (1968). Over the dissent of two Members of the *Spencer* majority,[5] the Court expressly overruled *Delli Paoli*. 391 U. S., at 126. As in *Burgett*, the Court stressed that a jury instruction is simply inadequate to ensure that a jury will disregard highly prejudicial evidence. Once again, the Court relied on Justice Jackson's *Krulewitch* opinion. 391 U. S., at 129.[6] Justice Stewart concurred,

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support from the most ambitious empirical study of jury behavior that has been attemped, see H. Kalven & H. Zeisel, The American Jury 127–130, 177–180 (1966).

"Recognition of the prejudicial effect of prior-convictions evidence has traditionally been related to the requirement of our criminal law that the State prove beyond a reasonable doubt the commission of a specific criminal act. It is surely engrained in our jurisprudence that an accused's reputation or criminal disposition is no basis for penal sanctions. Because of the possibility that the generality of the jury's verdict might mask a finding of guilt based on an accused's past crimes or unsavory reputation, state and federal courts have consistently refused to admit evidence of past crimes except in circumstances where it tends to prove something other than general criminal disposition." 385 U. S., at 575.

[5] JUSTICE WHITE's dissenting opinion was joined by Justice Harlan.

[6] The Court could also have relied on another opinion written by Justice Jackson only three weeks before the *Krulewitch* case was argued. In *Michelson* v. *United States*, 335 U. S. 469 (1948), a prosecutor had introduced the defendant's prior conviction to rebut testimony that he had a reputation for being a law-abiding citizen. After first discussing the general rule that such evidence is not admissible, see n. 1, *supra*, the Court declared: "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." 335 U. S., at 479. Presaging both the Court's later holding in *Bruton* and also identifying the common element in *Bruton* and *Burgett*, Justice Jackson wrote:

"We do not overlook or minimize the consideration that 'the jury almost surely cannot comprehend the judge's limiting instruction,' which disturbed the Court of Appeals. The refinements of the evidentiary rules on this subject are such that even lawyers and judges, after study and reflection, often are confused, and surely jurors in the hurried and unfamiliar movement of a trial must find them almost unintelligible. However, limiting instructions on this subject are no more difficult to comprehend or apply than those upon various other subjects; for example, instructions

noting that certain kinds of evidence "are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give." *Id.*, at 138 (emphasis in original).

The opinions in *Burgett* and *Bruton* demolished one of the two pillars that had supported the holding in *Spencer*. After *Burgett* and *Bruton*, it was plainly no longer appropriate to presume that a jury will ignore prejudicial evidence presented to it, even if the court tells it to do so. Moreover, given *Spencer*'s suggestion that the State's interest in holding a one-stage sentence enhancement proceeding may be "less cogent" than the state interest promoted in *Delli Paoli*, the other pillar was shaky at best. The case before the Court today requires us to consider what is left of that other pillar. More concretely, the question before us is whether the unfair prejudice that Ohio imposed on the respondent is justified by any valid state interest in prosecuting him in the manner it chose to employ.

II

Under Ohio law, a person convicted of murder may not be sentenced to death unless (a) the murder was "aggravated," Ohio Rev. Code Ann. § 2929.03 (1975), (b) a "specification" is included in the indictment, § 2929.04(A), and (c) the "specification" is proved beyond a reasonable doubt, *ibid.* In this

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that admissions of a co-defendant are to be limited to the question of his guilt and are not to be considered as evidence against other defendants, and instructions as to other problems in the trial of conspiracy charges. A defendant in such a case is powerless to prevent his cause from being irretrievably obscured and confused; but, in cases such as the one before us, the law foreclosed this whole confounding line of inquiry, unless defendant thought the net advantage from opening it up would be with him." 335 U. S., at 484–485.

It is ironic that the Court should pluck one sentence out of the *Michelson* opinion in ostensible support of its "crucial assumption" that juries always mechanically follow the instructions given them by trial judges. See *ante*, at 438–439, n. 6.

case the murder was alleged to have been "aggravated" because it was committed during a rape. And the indictment included, by way of "specification," an allegation that the respondent had previously been convicted of attempted murder in Illinois.

Before trial, the respondent moved to dismiss the specification, citing *Burgett* and arguing that the prior conviction was void because it had been based on an involuntary guilty plea. At a hearing on that motion, the State produced the Illinois indictment, the transcript of the Illinois proceedings, and the Illinois "conviction statement." It argued that the respondent must have known he was pleading guilty to attempted murder, even though the indictment was never read to him, the words "attempted murder" were never mentioned at the hearing, he was never told that he was pleading guilty to everything alleged in the indictment, he was sentenced to only two to four years of imprisonment, and the conviction statement showed only a conviction for "AGGRAVATED BATTERY, ETC." The Ohio trial judge found that the respondent had knowingly and voluntarily pleaded guilty to attempted murder.

At trial, the prosecutor sought to introduce the conviction statement and the indictment to prove the specification. The respondent moved for a bifurcated trial in order to prevent the jury from receiving this evidence until after guilt had been established. He argued that since the prior indictment alleged an attack on a woman with a knife, it would be especially prejudicial in this case, because he was again charged with assaulting a female with a knife. The trial judge agreed that it would be wrong to consider the evidence regarding the earlier conviction for the purpose of establishing the current offense, and he so instructed the jury.[7] Nevertheless, he refused to bifurcate the proceeding.

[7] The judge's instructions stated, in part:

"Now, the evidence presented to you concerning a prior conviction of this Defendant, Robert Lonberger, for the offense of attempted murder in Illi-

Respondent then offered to stipulate that the Illinois conviction was for attempted murder, arguing that this would at least eliminate any need to introduce the Illinois indictment. Both the prosecutor and the trial judge rejected that offer. Instead, the jury was given a copy of the Illinois indictment reciting the details of the Illinois charge as well as the Illinois conviction statement. The jury found respondent guilty of aggravated murder and found the specification to have been proved beyond a reasonable doubt; the trial judge sentenced him to death.

The Ohio Court of Appeals reversed the aggravated murder conviction on the ground that the State had failed to prove rape, or even intercourse with the respondent, beyond a reasonable doubt. However, the court rejected the argument that the jury's finding that the respondent was guilty of murder had been unfairly contaminated by its receipt of the Illinois indictment. On remand, the trial court imposed a sentence of 15 years to life.

In retrospect, it is quite obvious that the highly prejudicial Illinois indictment should *never* have been admitted into evidence for any purpose at all. The indictment was relevant only to the specification, the specification was relevant only if the murder was aggravated, and the State failed to produce enough evidence of aggravation even to justify sending the charge to the jury.

Even if there had been enough evidence of aggravation to reach the jury, there was no legitimate reason for the State to give the Illinois indictment to the jury until *after* it had found an aggravated murder beyond a reasonable doubt. Sixteen years ago, the *Spencer* Court upheld such a procedure by stressing that state procedures varied widely and

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nois in 1968 is not introduced for the purpose of proving that the Defendant committed the offenses, or either of them, for which he is being tried this week . . . you may not consider it for the purpose of proving, in any way, that the Defendant committed the offenses for which he is being tried today." Tr. 1178–1180.

that experimentation was still in progress. 385 U. S., at 566. Those facts are not true today. Bifurcated proceedings are now the rule in capital cases throughout the Nation.[8] It is

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[8] Ohio's laws are unique in this country.

The District of Columbia and 13 States (Alaska, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Oregon, Rhode Island, West Virginia, and Wisconsin) have no capital punishment statutes at all.

Three States have capital punishment statutes limited to certain precise categories of "aggravated" murder, where the existence of prior convictions is not an aggravating circumstance. N. Y. Penal Law § 125.27(1)(a)(iii) (McKinney 1975) (see *People* v. *Davis*, 43 N. Y. 2d 17, and n. 3, 371 N. E. 2d 456, and n. 3 (1977), cert. denied, 435 U. S. 998 and 438 U. S. 914 (1978)); Vt. Stat. Ann., Tit. 13, § 2303(c) (Supp. 1982); Wash. Rev. Code § 10.95.020 (1981). It is significant that under the "habitual criminal" statutes in all three States, where prior convictions *are* in effect "aggravating circumstances," bifurcated proceedings are used. See N. Y. Crim. Proc. Law §§ 400.20, 400.21 (McKinney Supp. 1982); *State* v. *Angelucci*, 137 Vt. 272, 405 A. 2d 33 (1979); *State* v. *Gear*, 30 Wash. App. 307, 633 P. 2d 930 (1981).

Thirty-three States have capital punishment statutes with bifurcated proceedings so that evidence of aggravating circumstances is not introduced until after the jury has determined guilt or innocence. Ala. Code § 13A–5–45 (Supp. 1982); Ariz. Rev. Stat. Ann. § 13–703B (Supp. 1982); Ark. Stat. Ann. § 41–1301 (1977); Cal. Penal Code Ann. § 190.1 (West Supp. 1982); Colo. Rev. Stat. §§ 16–11–103, 18–1–105(4) (1978 and Supp. 1982); Conn. Gen. Stat. § 53a–46a (Supp. 1982); Del. Code Ann., Tit. 11, § 4209(b) (1979); Fla. Stat. § 921.141 (Supp. 1982); Ga. Code Ann. § 17–10–31 (1982); Idaho Code § 19–2515 (1979); Ill. Rev. Stat., ch. 38, ¶ 9–1(d) (1979); Ind. Code § 35–50–2–9(d) (1979); Ky. Rev. Stat. § 532.025 (Supp. 1982); La. Code Crim. Proc. Ann., Art. 905 (West Supp. 1982); Md. Ann. Code, Art. 27, § 413(a) (1982); Miss. Code Ann. § 99–19–101 (Supp. 1982); Mo. Rev. Stat. § 565.006 (Supp. 1982); Mont. Code Ann. § 46–18–301 (1981); Neb. Rev. Stat. § 29–2520 (1979); Nev. Rev. Stat. § 175.552 (1981); N. H. Rev. Stat. Ann. § 630:5 (Supp. 1981); N. J. Stat. Ann. § 2C:11–3.c (West 1982); 1982 N. J. Laws, ch. 111; N. M. Stat. Ann. § 31–18–14(A) (1981); N. C. Gen. Stat. § 15A–2000 (Supp. 1981); Okla. Stat., Tit. 21, § 701.10 (Supp. 1982); 42 Pa. Cons. Stat. § 9711 (Supp. 1982); S. C. Code § 16–3–20 (1982); S. D. Comp. Laws Ann. § 23A–27A–2 (1979); Tenn. Code Ann. § 39–2404 (Supp. 1981); Tex. Code Crim. Proc. Ann., Art. 37.071 (Vernon 1981); Utah Code Ann. § 76–3–207 (1978); Va. Code § 19.2–264.4 (Supp. 1982); Wyo. Stat. §§ 6–4–101, 6–4–102 (1977).

simply no longer tenable to say that the difficulties of administering a bifurcated trial are sufficient to justify a State's use of a prejudicial one-stage system. Indeed, the tactics employed in this case dramatically unmask the true prosecutorial interest in preserving a one-stage procedure—to enhance the likelihood that the jury will convict.[9] Because the only premises that even arguably support the holding in *Spencer* are no longer valid and plainly are not implicated in this case, I would not permit that decision to dictate the result in this case.

Even under the holding in *Spencer*, the Court should take note of the fact that the prejudice associated with a one-stage procedure increases whenever the written record of the earlier proceeding is not sufficient on its face to foreclose a challenge to the validity of the prior conviction. Such a challenge often requires a discussion of the details of a prior offense or of an unproved charge, thereby increasing the danger that the jury may draw the inference that has been universally recognized as impermissible throughout our history. See n. 1, *supra*. I would adopt a simple rule that a one-stage enhancement procedure is constitutionally intolerable whenever the documentary evidence of the prior conviction fails to establish its validity and its relevance beyond debate. Cf. *Spencer*, 385 U. S., at 562 ("The evidence itself is usually, and in recidivist cases almost always, of a documentary kind, and in the cases before us there is no claim that its presentation was in any way inflammatory"). The documentary evidence in this case plainly failed to satisfy that test.

Only Ohio considers prior convictions as aggravating circumstances without a fully bifurcated proceeding. Today, Ohio's system is half bifurcated: guilt and aggravating circumstances are considered together in one phase, mitigating circumstances in a second. Ohio Rev. Code Ann. § 2929.03 (1982).

[9] The stark contrast between the gratuitous use of prejudicial evidence over the defendant's objection in this case and the justification for the prosecutor's rebuttal when the defendant opened up the subject in *Michelson*, see n. 6, *supra*, highlights this conclusion.

Even if one believed that Ohio had a legitimate interest in refusing to bifurcate these proceedings, it insults our intelligence when it claims that it had a legitimate interest in sending the Illinois *indictment* to the jury. The State was allegedly trying to show, for sentence enhancement purposes, that respondent had been convicted of attempted murder in Illinois. The conviction statement showed that he had been convicted of "AGGRAVATED BATTERY, ETC." After failing in his efforts to get the proceeding bifurcated, the respondent offered to stipulate that the "ETC." referred to attempted murder. Yet the State refused to accept this stipulation. The prosecutor instead insisted on sending the indictment to the jury. The indictment was less probative of the specification than a stipulation would have been, since the conviction statement did not reflect a conviction for each of the four charges listed in the indictment, and the State has never suggested that it did. And the indictment was more prejudicial than a stipulation would have been, since it recited the details of the Illinois charge. The prosecutor's naked desire to inject prejudice into the record had the effect of complicating and prolonging the proceedings in this case [10]

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[10] After the Ohio Court of Appeals remanded to the state trial court for resentencing in 1977, both the State and the respondent sought review in the Ohio Supreme Court, which was denied. After resentencing, the respondent sought federal habeas corpus relief in the United States District Court for the Northern District of Ohio. That court denied relief in an unpublished opinion and order. He appealed to the United States Court of Appeals for the Sixth Circuit, which reversed and ordered that the writ issue. *Lonberger* v. *Jago*, 635 F. 2d 1189 (1980). The State sought rehearing in the Court of Appeals, which was denied. This Court granted certiorari, 451 U. S. 902 (1981), vacating the judgment of the Sixth Circuit and remanding for further consideration in light of *Sumner* v. *Mata*, 449 U. S. 539 (1981). The Sixth Circuit reinstated its prior judgment. *Lonberger* v. *Jago*, 651 F. 2d 447 (1981). The State again sought certiorari, which we again granted. 454 U. S. 1141 (1982). Today, almost six years after the Ohio Court of Appeals held that the issue of aggravated murder should never even have gone to the jury, litigation of this issue draws to a close.

and deprived the respondent of his constitutional right to a fair trial.

I would affirm the judgment of the Court of Appeals for the Sixth Circuit.

HEWITT ET AL. *v.* HELMS

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

No. 81–638. Argued November 8, 1982—Decided February 22, 1983

Following a riot in the Pennsylvania State Prison where he was an inmate, respondent was removed from his cell and the general prison population and confined to administrative segregation within the prison pending an investigation into his role in the riot. The next day respondent received notice of a misconduct charge against him. Five days after his transfer to administrative segregation a Hearing Committee reviewed the evidence against respondent, and he acknowledged in writing that he had an opportunity to have his version of the events reported, but no finding of guilt was made. Subsequently, criminal charges based on the riot were filed against respondent but were later dropped. In the meantime, a Review Committee concluded that respondent should remain in administrative segregation as posing a threat to the safety of other inmates and prison officials and to the security of the prison. Ultimately, the Hearing Committee, based on a second misconduct report and after hearing testimony from a prison guard and respondent, found respondent guilty of the second misconduct charge and ordered him confined to disciplinary segregation for six months, while dropping the earlier misconduct charge. Respondent sued in Federal District Court, claiming that petitioner prison officials' actions in confining him to administrative segregation violated his rights under the Due Process Clause of the Fourteenth Amendment. The District Court granted petitioners' motion for summary judgment. The Court of Appeals reversed, holding that, on the facts, respondent had a protected liberty interest in continuing to reside in the general prison population, which interest was created by the Pennsylvania regulations governing the administration of state prisons; that respondent could not be deprived of this interest without a hearing in compliance with the requirements of *Wolff* v. *McDonnell*, 418 U. S. 539; and that since the court was uncertain whether the Hearing Committee's initial proceeding satisfied such requirements, the case would be remanded to the District Court for a hearing regarding the character of that proceeding.

Held:

1. Prison officials have broad administrative and discretionary authority over the institutions they manage, and lawfully incarcerated persons

retain only a narrow range of protected liberty interests. Administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration, and does not involve an interest independently protected by the Due Process Clause. But in light of the Pennsylvania statutes and regulations setting forth the procedures for confining an inmate to administrative segregation, respondent did acquire a protected liberty interest in remaining in the general prison population. Pp. 466–472.

2. The process afforded respondent satisfied the minimum requirements of the Due Process Clause. Pp. 472–477.

(a) In view of the wide-ranging deference accorded prison administrators in adopting and executing policies and practices needed to preserve order and discipline and to maintain security, petitioners were obligated to engage only in an informal, nonadversary review of the information supporting respondent's administrative confinement. P. 472.

(b) Under *Mathews* v. *Eldridge*, 424 U. S. 319, the private interests at stake in a governmental decision, the governmental interests involved, and the value of procedural requirements are considered in determining what process is due under the Fourteenth Amendment. Here, respondent's private interest was not of great consequence, but the governmental interests in the safety of the prison guards and other inmates and in isolating respondent pending investigation of the charges against him were of great importance. Neither of the grounds for confining respondent to administrative segregation involved decisions or judgments that would have been materially assisted by a detailed adversary proceeding. Pp. 473–474.

(c) An informal, nonadversary evidentiary review is sufficient both for the decision that an inmate represents a security threat and the decision to confine him to administrative segregation pending completion of an investigation into misconduct charges against him. In either situation, an inmate must merely receive notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation. Measured against these standards, respondent received all the process that was due after being confined to administrative segregation. Pp. 476–477.

655 F. 2d 487, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, *post*, p. 478. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MAR-

SHALL, JJ., joined, and in Parts II and III of which BLACKMUN, J., joined, *post*, p. 479.

LeRoy S. Zimmerman, Attorney General of Pennsylvania, argued the cause for petitioners. With him on the brief were *Francis R. Filipi* and *Gregory R. Neuhauser*, Deputy Attorneys General.

Richard G. Fishman argued the cause and filed a brief for respondent.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Aaron Helms was serving a term in the State Correctional Institution at Huntingdon, Pa. (SCIH), which was administered by petitioners. He sued in the United States District Court for the Middle District of Pennsylvania, claiming that petitioners' actions confining him to administrative segregation within the prison violated his rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The District Court granted petitioners' motion for summary judgment, but the Court of Appeals for the Third Circuit reversed. 655 F. 2d 487 (1981). We granted certiorari, 455 U. S. 999 (1982), to consider what limits the Due Process Clause of the Fourteenth Amendment places on the authority of prison administrators to remove inmates from the general prison population and confine them to a less desirable regimen for administrative reasons.

In the early evening of December 3, 1978, a prisoner in the state penitentiary at Huntingdon, assaulted two guards. The prisoner was subdued with the assistance of other

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**Solicitor General Lee, Assistant Attorney General Jensen, Deputy Solicitor General Frey, Barbara E. Etkind*, and *Kathleen A. Felton* filed a brief for the United States as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Leonard Esquina, Jr.*, and *Larry Bennett* for the State Bar of Michigan, Prisons and Corrections Committee; and by *Frederick M. Stanczak* for Susquehanna Legal Services.

guards, but one guard received a broken nose, and another a broken thumb. Later in the evening, the violence erupted into a riot during which a group of prisoners attempted to seize the institution's "control center." One group of inmates attacked a prison guard and a trainee, using table legs, the guard's flashlight, barbells, and whatever else came to hand. On another floor, three inmates were subdued while trying to attack a sergeant of the prison guard with a flashlight, and it was necessary to forcibly subdue them and handcuff them to pipes. Inmates in one of the prison blocks tried to break a grille to enter the prison's control center, but they were held back. One of the assaulted guards suffered cuts and bruises on the face and leg areas, and another reported a possible skull fracture, broken jaw, broken teeth, and an injured collarbone.

This uprising was eventually quelled, but only with the assistance of state police units, local law enforcement officers, and off-duty prison guards whose aid was summoned. Several hours after the riot ended, respondent Helms was removed from his cell and the general prison population for questioning by the state police. Following the interview, he was placed in restrictive confinement,[1] and the state police

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[1] Pennsylvania has adopted regulations promulgated by the State Bureau of Corrections establishing two basic types of restricted housing in its correctional facilities—disciplinary and administrative segregation. 37 Pa. Code § 95.107 (1978). Other jurisdictions follow a similar pattern. See 28 CFR pt. 541 (1982). Confinement in disciplinary segregation is imposed when an inmate has been found to have committed a misconduct violation. 37 Pa. Code § 95.106(2) (1978). Administrative segregation may be imposed when an inmate poses a threat to security, when disciplinary charges are pending against an inmate, or when an inmate requires protection. § 95.104. According to the state regulations, administrative segregation is somewhat less restrictive than disciplinary segregation, compare § 95.107(a)(2) with § 95.107(b)(2), although, as noted elsewhere, see n. 4, *infra*, we assume for purposes of this case that the conditions in the two types of confinement are substantially identical.

and prison authorities began an investigation into his role in the riot.

On December 4, 1978, Helms was given a "Misconduct Report" charging him with "Assaulting Officers and Conspiracy to Disrupt Normal Institution Routine by Forcefully Taking Over the Control Center." The report briefly described the factual basis for the charge and contained a lengthy recitation of the procedures governing the institution's disciplinary hearing.[2] On December 8, 1978, a "Hearing Committee," consisting of three prison officials charged with adjudicating alleged instances of misconduct by inmates, was convened to dispose of the charges against Helms. Following a review of the misconduct report, the panel summarized its decision as "[n]o finding as to guilt reached at this time, due to insufficient information," and ordered that Helms' confinement in restricted housing be continued.

While as a matter of probabilities it seems likely that Helms appeared personally before the December 8 Hearing Committee, we agree with the Court of Appeals that the record does not allow definitive resolution of the issue on summary judgment. Helms signed a copy of the misconduct report stating that "[t]he circumstance of the charge has been read and fully explained to me," and that "I have had the opportunity to have my version reported as part of the record." App. 41a. Likewise, he admitted in an affidavit filed during this litigation that he was "informed by an institutional hearing committee" of the disposition of the misconduct charge against him. *Id.*, at 33a. The same affidavit, however, asserted that no "hearing" was conducted on December 8, suggesting that respondent did not appear before

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[2] The misconduct report informed respondent that a hearing would be held as soon as possible, that he could remain silent at the hearing, that he could be represented by an inmate or staff member, and that he could request witnesses who would be permitted to appear if they were found willing, capable of giving relevant testimony, and not a security hazard. App. 38a–39a.

the Committee. The State did not file any affidavit controverting Helms' contention.

On December 11, 1978, the Commonwealth of Pennsylvania filed state criminal charges against Helms, charging him with assaulting Correction Officer Rhodes and with riot. On January 2, 1979, SCIH's Program Review Committee, which consisted of three prison officials, was convened. The Committee met to review the status of respondent's confinement in administrative segregation and to make recommendations as to his future confinement. The Committee unanimously concluded that Helms should remain in administrative segregation; affidavits of the Committee members said that the decision was based on several related concerns. Helms was seen as "a danger to staff and to other inmates if released back into general population," *id.*, at 11a; he was to be arraigned the following day on state criminal charges, *id.*, at 24a; and the Committee was awaiting information regarding his role in the riot, *id.*, at 16a. The Superintendent of SCIH personally reviewed the Program Review Committee's determination and concurred in its recommendation. *Id.*, at 15a, 18a.

The preliminary hearing on the state criminal charges against Helms was postponed on January 10, 1979, apparently due to a lack of evidence. On January 19, 1979, a second misconduct report was given to respondent; the report charged Helms with assaulting a second officer during the December 3 riot. On January 22 a Hearing Committee composed of three prison officials heard testimony from one guard and Helms. Based on this, the Committee found Helms guilty of the second misconduct charge and ordered that he be confined to disciplinary segregation for six months, effective December 3, 1978. The Committee also decided to drop the earlier misconduct charge against respondent, without determining guilt. On February 6, 1979, the State dropped criminal charges relating to the prison riot against Helms.

The Court of Appeals, reviewing these facts, concluded that Helms had a protected liberty interest in continuing to reside in the general prison population. While the court seemed to doubt that this interest could be found in the Constitution, it held that Pennsylvania regulations governing the administration of state prisons created such an interest. It then said that Helms could not be deprived of this interest without a hearing, governed by the procedures mandated in *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), to determine whether such confinement was proper.[3] Being uncertain whether the hearing conducted on December 8 satisfied the *Wolff* requirements, see *supra*, at 464–465, the Court of Appeals remanded the case to the District Court for an evidentiary hearing regarding the character of that proceeding. On these same facts, we agree with the Court of Appeals that the Pennsylvania statutory framework governing the administration of state prisons gave rise to a liberty interest in respondent, but we conclude that the procedures afforded respondent were "due process" under the Fourteenth Amendment.

While no State may "deprive any person of life, liberty, or property, without due process of law," it is well settled that only a limited range of interests fall within this provision. Liberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the States. *Meachum* v. *Fano*, 427 U. S. 215, 223–227 (1976). Respondent argues, rather weakly, that the Due Process Clause implicitly creates an interest in being confined to a general population cell, rather than the

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[3] *Wolff* required that inmates facing disciplinary charges for misconduct be accorded 24 hours' advance written notice of the charges against them; a right to call witnesses and present documentary evidence in defense, unless doing so would jeopardize institutional safety or correctional goals; the aid of a staff member or inmate in presenting a defense, provided the inmate is illiterate or the issues complex; an impartial tribunal; and a written statement of reasons relied on by the tribunal. 418 U. S., at 563–572.

more austere and restrictive administrative segregation quarters. While there is little question on the record before us that respondent's confinement added to the restraints on his freedom,[4] we think his argument seeks to draw from the Due Process Clause more than it can provide.

We have repeatedly said both that prison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests. As to the first point, we have recognized that broad discretionary authority is necessary because the administration of a prison is "at best an extraordinarily difficult undertaking," *Wolff* v. *McDonnell*, *supra*, at 566, and have concluded that "to hold . . . that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts." *Meachum* v. *Fano*, *supra*, at 225. As to the second point, our decisions have consistently refused to recognize more than the most basic liberty interests in prisoners. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston*, 334 U. S. 266, 285 (1948). Thus, there is no "constitutional or inherent right" to parole, *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 7 (1979), and "the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison," *Wolff* v. *McDonnell*, *supra*, at 557, despite the undoubted

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[4] As noted previously, the case is here on motions for summary judgment. Respondent submitted an affidavit that the State did not rebut, claiming that confinement to administrative segregation imposed severe hardships on him. Among other things, he alleged a denial of access to vocational, educational, recreational, and rehabilitative programs, restrictions on exercise, and confinement to his cell for lengthy periods of time.

impact of such credits on the freedom of inmates. Finally, in *Meachum* v. *Fano*, *supra*, at 225, the transfer of a prisoner from one institution to another was found unprotected by "the Due Process Clause in and of itself," even though the change of facilities involved a significant modification in conditions of confinement, later characterized by the Court as a "grievous loss." *Moody* v. *Daggett*, 429 U. S. 78, 88, n. 9 (1976). As we have held previously, these decisions require that "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Montanye* v. *Haymes*, 427 U. S. 236, 242 (1976). See also *Vitek* v. *Jones*, 445 U. S. 480, 493 (1980).

It is plain that the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence. The phrase "administrative segregation," as used by the state authorities here, appears to be something of a catchall: it may be used to protect the prisoner's safety, to protect other inmates from a particular prisoner, to break up potentially disruptive groups of inmates, or simply to await later classification or transfer. See 37 Pa. Code §§ 95.104 and 95.106 (1978), and n. 1, *supra*. Accordingly, administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration. This conclusion finds ample support in our decisions regarding parole and good-time credits. Both these subjects involve release from institutional life altogether, which is a far more significant change in a prisoner's freedoms than that at issue here, yet in *Greenholtz* and *Wolff* we held that neither situation involved an interest independently protected by the Due Process Clause. These decisions compel an identical result here.

Despite this, respondent points out that the Court has held that a State may create a liberty interest protected by the Due Process Clause through its enactment of certain statutory or regulatory measures. Thus, in *Wolff*, where we rejected any notion of an interest in good-time credits inherent in the Constitution, we also found that Nebraska had created a right to such credits. 418 U. S., at 556–557. See also *Greenholtz* v. *Nebraska Penal Inmates*, *supra* (parole); *Vitek* v. *Jones*, *supra* (transfer to mental institution). Likewise, and more relevant here, was our summary affirmance in *Wright* v. *Enomoto*, 462 F. Supp. 397 (ND Cal. 1976), summarily aff'd, 434 U. S. 1052 (1978), where the District Court had concluded that state law created a liberty interest in confinement to any sort of segregated housing within a prison. *Hughes* v. *Rowe*, 449 U. S. 5 (1980) *(per curiam)*, while involving facts similar to these in some respects, was essentially a pleading case rather than an exposition of the substantive constitutional issues involved.[5]

Respondent argues that Pennsylvania, in its enactment of regulations governing the administration of state prisons, has created a liberty interest in remaining free from the restraints accompanying confinement in administrative segregation. Except to the extent that our summary affirmance in *Wright* v. *Enomoto*, *supra*, may be to the contrary, we have never held that statutes and regulations governing daily operation of a prison system conferred any liberty interest in and of themselves. *Meachum* v. *Fano*, 427 U. S. 215

[5] We held there that it was error to dismiss for failure to state a claim a *pro se* prisoner's complaint alleging confinement to restricted quarters without a hearing. Observing that "[w]e [could not] say with assurance that petitioner can prove no set of facts in support of his claim entitling him to relief," 449 U. S., at 12–13, we expressly stated that "[o]ur discussion of this claim is not intended to express any view on its merits." *Id.*, at 12. *Rowe* is likewise factually dissimilar from this case, since in *Rowe* we also noted that "[t]here [was] no suggestion in the record that . . . emergency conditions" existed and the prisoner's "offense did not involve violence." *Id.*, at 11.

(1976), and *Montanye* v. *Haymes*, *supra*, held to the contrary; in *Wolff*, *supra*, we were dealing with good-time credits which would have actually reduced the period of time which the inmate would have been in the custody of the government; in *Greenholtz*, *supra*, we dealt with parole, which would likewise have radically transformed the nature of the custody to which the inmate was subject; and in *Vitek*, *supra*, we considered the transfer from a prison to a mental institution.

There are persuasive reasons why we should be loath to transpose all of the reasoning in the cases just cited to the situation where the statute and regulations govern the day-to-day administration of a prison system. The deprivations imposed in the course of the daily operations of an institution are likely to be minor when compared to the release from custody at issue in parole decisions and good-time credits. Moreover, the safe and efficient operation of a prison on a day-to-day basis has traditionally been entrusted to the expertise of prison officials, see *Meachum* v. *Fano*, *supra*, at 225. These facts suggest that regulations structuring the authority of prison administrators may warrant treatment, for purposes of creation of entitlements to "liberty," different from statutes and regulations in other areas. Nonetheless, we conclude in the light of the Pennsylvania statutes and regulations here in question, the relevant provisions of which are set forth in full in the margin,[6] that respondent did ac-

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[6] Title 37 Pa. Code § 95.104(b)(1) (1978) provides:

"An inmate who has allegedly committed a Class I Misconduct may be placed in Close or Maximum Administrative Custody upon approval of the officer in charge of the institution, not routinely but based upon his assessment of the situation and the need for control pending application of procedures under § 95.103 of this title."

Section 95.104(b)(3) of the same Title provides:

"An inmate may be temporarily confined to Close or Maximum Administrative Custody in an investigative status upon approval of the officer in charge of the institution where it has been determined that there is a threat of a serious disturbance, or a serious threat to the individual or oth-

quire a protected liberty interest in remaining in the general prison population.

Respondent seems to suggest that the mere fact that Pennsylvania has created a careful procedural structure to regulate the use of administrative segregation indicates the existence of a protected liberty interest. We cannot agree. The creation of procedural guidelines to channel the decisionmaking of prison officials is, in the view of many experts in the field, a salutary development. It would be ironic to hold that when a State embarks on such desirable experimentation it thereby opens the door to scrutiny by the federal courts, while States that choose not to adopt such procedural provisions entirely avoid the strictures of the Due Process Clause. The adoption of such procedural guidelines, without more, suggests that it is these restrictions alone, and not those federal courts might also impose under the Fourteenth Amendment, that the State chose to require.

Nonetheless, in this case the Commonwealth has gone beyond simple procedural guidelines. It has used language of an unmistakably mandatory character, requiring that certain procedures "shall," "will," or "must" be employed, see n. 6,

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ers. The inmate shall be notified in writing as soon as possible that he is under investigation and that he will receive a hearing if any disciplinary action is being considered after the investigation is completed. An investigation shall begin immediately to determine whether or not a behavior violation has occurred. If no behavior violation has occurred, the inmate must be released as soon as the reason for the security concern has abated but in all cases within ten days."

Finally, a State Bureau of Correction Administrative Directive states that when the State Police have been summoned to an institution:

"Pending arrival of the State Police, the institutional representative shall:

"1. Place all suspects and resident witnesses or complainants in such custody, protective or otherwise, as may be necessary to maintain security. A hearing complying with [37 Pa. Code § 95.103 (1972)] will be carried out after the investigation period. Such hearing shall be held within four (4) days unless the investigation warrants delay and in that case as soon as possible." Pa. Admin. Dir. BC–ADM 004, § IV(B) (1975).

supra, and that administrative segregation will not occur absent specified substantive predicates—viz., "the need for control," or "the threat of a serious disturbance." Petitioners argue, with considerable force, that these terms must be read in light of the fact that the decision whether to confine an inmate to administrative segregation is largely predictive, and therefore that it is not likely that the State meant to create binding requirements. But on balance we are persuaded that the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest.

That being the case, we must then decide whether the process afforded respondent satisfied the minimum requirements of the Due Process Clause. We think that it did. The requirements imposed by the Clause are, of course, flexible and variable dependent upon the particular situation being examined. *E. g.*, *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S., at 12; *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). In determining what is "due process" in the prison context, we are reminded that "one cannot automatically apply procedural rules designed for free citizens in an open society . . . to the very different situation presented by a disciplinary proceeding in a state prison." *Wolff* v. *McDonnell*, 418 U. S., at 560. "Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell* v. *Wolfish*, 441 U. S. 520, 547 (1979). These considerations convince us that petitioners were obligated to engage only in an informal, nonadversary review of the information supporting respondent's administrative confinement, including whatever statement respondent wished to submit, within a reasonable time after confining him to administrative segregation.

Under *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976), we consider the private interests at stake in a governmental decision, the governmental interests involved, and the value of procedural requirements in determining what process is due under the Fourteenth Amendment. Respondent's private interest is not one of great consequence. He was merely transferred from one extremely restricted environment to an even more confined situation. Unlike disciplinary confinement the stigma of wrongdoing or misconduct does not attach to administrative segregation under Pennsylvania's prison regulations. Finally, there is no indication that administrative segregation will have any significant effect on parole opportunities.

Petitioners had two closely related reasons for confining Helms to administrative segregation prior to conducting a hearing on the disciplinary charges against him. First, they concluded that if housed in the general population, Helms would pose a threat to the safety of other inmates and prison officials and to the security of the institution. Second, the prison officials believed that it was wiser to separate respondent from the general population until completion of state and institutional investigations of his role in the December 3 riot and the hearing on the charges against him. Plainly, these governmental interests are of great importance. The safety of the institution's guards and inmates is perhaps the most fundamental responsibility of the prison administration. See *Bell* v. *Wolfish*, *supra*, at 547; *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U. S. 119, 132 (1977); *Pell* v. *Procunier*, 417 U. S. 817, 823 (1974); *Procunier* v. *Martinez*, 416 U. S. 396, 404 (1974). Likewise, the isolation of a prisoner pending investigation of misconduct charges against him serves important institutional interests relating to the insulating of possible witnesses from coercion or harm, see *infra*, at 476.

Neither of these grounds for confining Helms to administrative segregation involved decisions or judgments that

would have been materially assisted by a detailed adversary proceeding. As we said in *Rhodes* v. *Chapman*, 452 U. S. 337, 349, n. 14 (1981), "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators." In assessing the seriousness of a threat to institutional security, prison administrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners *inter se*, and the like. In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incidents. The judgment of prison officials in this context, like that of those making parole decisions, turns largely on "purely subjective evaluations and on predictions of future behavior," *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458, 464 (1981); indeed, the administrators must predict not just one inmate's future actions, as in parole, but those of an entire institution. Owing to the central role of these types of intuitive judgments, a decision that an inmate or group of inmates represents a threat to the institution's security would not be appreciably fostered by the trial-type procedural safeguards suggested by respondent.[7] This, and the balance of public and private interests, lead us to conclude that the Due Process Clause requires only an informal nonadversary review of evidence, discussed more fully below, in order to confine an inmate feared to be a threat to institutional security to administrative segregation.

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[7] Indeed, we think an administrator's judgment probably would be hindered. Prison officials, wary of potential legal liability, might well spend their time mechanically complying with cumbersome, marginally helpful procedural requirements, rather than managing their institution wisely.

Likewise, confining respondent to administrative segregation pending completion of the investigation of the disciplinary charges against him is not based on an inquiry requiring any elaborate procedural safeguards. We think the closest case in point dealing with an analogous situation in the world outside of prisons is *Gerstein* v. *Pugh*, 420 U. S. 103 (1975). There, in the context of a challenge to the pretrial detainment of persons suspected of criminal acts, we held that States must "provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty," and we required that "this determination must be made by a judicial officer either before or promptly after arrest." *Id.*, at 125. We explicitly rejected the suggestion, however, that an adversary proceeding, accompanied by traditional trial-type rights, was required, and instead permitted an informal proceeding designed to determine whether probable cause existed to believe that the detained person had committed a crime. *Id.*, at 119–123.

While *Gerstein* was grounded in the Fourth Amendment, we think it provides a useful point of departure with respect to the due process question raised here. *Mathews* v. *Eldridge*, *supra*, at 335, again suggests the points at which *Gerstein* is inapposite in the prison context. As our discussion above suggests, the private interest at stake here is far less weighty than that at issue in *Gerstein*, which involved removing a suspect from unrestricted liberty in open society and placing him in an institution. In contrast, as noted above, Helms was merely transferred from an extremely restricted environment to an even more confined situation. Under the *Mathews* formula, respondent has a far less compelling claim to procedural safeguards than did the pretrial detainees in *Gerstein*. Likewise, weighty governmental interests are at stake. To be sure, *Gerstein* involved a situation in which a real possibility existed that the suspected criminal would flee from justice; it is unlikely, to say the least, that confinement to administrative segregation is nec-

essary for this purpose where an inmate has been charged with misconduct. Yet the State has other important interests. For example, it must protect possible witnesses—whose confinement leaves them particularly vulnerable—from retribution by the suspected wrongdoer, and, in addition, has an interest in preventing attempts to persuade such witnesses not to testify at disciplinary hearings. These considerations lead us to conclude that while general patterns of the *Gerstein* procedures should be our guide, some of the elements required in that case are unnecessary in the much more informal context of prison officials who propose to confine an inmate to administrative segregation pending completion of an investigation against him.

We think an informal, nonadversary evidentiary review is sufficient both for the decision that an inmate represents a security threat and the decision to confine an inmate to administrative segregation pending completion of an investigation into misconduct charges against him. An inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation. Ordinarily a written statement by the inmate will accomplish this purpose, although prison administrators may find it more useful to permit oral presentations in cases where they believe a written statement would be ineffective. So long as this occurs, and the decisionmaker reviews the charges and then-available evidence against the prisoner, the Due Process Clause is satisfied.[8] This informal procedure permits a reasonably accurate assessment of probable cause to believe that misconduct occurred, and the "value [of additional 'formalities and safeguards'] would be too slight to justify holding, as a matter of constitutional principle" that they must be adopted, *Gerstein* v. *Pugh*, *supra*, at 122.

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[8] The proceeding must occur within a reasonable time following an inmate's transfer, taking into account the relatively insubstantial private interest at stake and the traditionally broad discretion of prison officials.

Measured against these standards we are satisfied that respondent received all the process that was due after being confined to administrative segregation. He received notice of the charges against him the day after his misconduct took place. Only five days after his transfer to administrative segregation a Hearing Committee reviewed the existing evidence against him, including a staff member's statement that "[t]his inmate was a member of an organized plot and did actively involve himself with at least 10 other inmates in the assault upon 5 corrections officers in 'C' Block and attempted to break thru the 'C' grill to the Control Center to disrupt the normal institution routine by usurping the authority of institution officials." App. 38a. While the Court of Appeals may have been correct that the record does not clearly demonstrate that a *Wolff* hearing was held, it does show that he had an opportunity to present a statement to the Committee. As noted previously, Helms acknowledged on the misconduct form that he "had the opportunity to have [his] version reported as part of the record"; we see no reason to question the accuracy of his statement. This proceeding plainly satisfied the due process requirements for continued confinement of Helms pending the outcome of the investigation.[9]

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[9] Of course, administrative segregation may not be used as a pretext for indefinite confinement of an inmate. Prison officials must engage in some sort of periodic review of the confinement of such inmates. This review will not necessarily require that prison officials permit the submission of any additional evidence or statements. The decision whether a prisoner remains a security risk will be based on facts relating to a particular prisoner—which will have been ascertained when determining to confine the inmate to administrative segregation—and on the officials' general knowledge of prison conditions and tensions, which are singularly unsuited for "proof" in any highly structured manner. Likewise, the decision to continue confinement of an inmate pending investigation of misconduct charges depends upon circumstances that prison officials will be well aware of—most typically, the progress of the investigation. In both situations, the ongoing task of operating the institution will require the prison officials to consider a wide range of administrative considerations; here, for example, petitioners had to consider prison tensions in the aftermath of the De-

Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE BLACKMUN, concurring in part and dissenting in part.

The Court's prior cases of course recognize that a valid criminal conviction and sentence extinguish a defendant's otherwise protected right to be free from confinement. *E. g., Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458, 464 (1981); *Vitek* v. *Jones*, 445 U. S. 480, 493 (1980); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 7 (1979); *Meachum* v. *Fano*, 427 U. S. 215, 224 (1976). Although prison inmates retain a residuum of liberty, see *Wolff* v. *McDonnell*, 418 U. S. 539, 555–556 (1974), this liberty is not infringed by conditions of confinement that are "within the normal limits or range of custody which the conviction has authorized the State to impose." *Meachum* v. *Fano*, 427 U. S., at 225; see *Montanye* v. *Haymes*, 427 U. S. 236, 242 (1976); *Vitek* v. *Jones*, 445 U. S., at 493. In *Meachum* and *Montanye*, we held that certain prison transfers were "within the normal limits or range of custody" even though conditions of confinement were more severe in the prisons to which the inmates were transferred. Because I believe that a transfer to administrative segregation within a prison likewise is within the normal range of custody, I agree with the Court that respondent has not been deprived of "an interest independently protected by the Due Process Clause," *ante*, at 468.

I also agree that the Pennsylvania statutes and prison regulations at issue in this case created an entitlement not to

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cember 3 riot, the ongoing state criminal investigation, and so forth. The record plainly shows that on January 2 a Program Review Committee considered whether Helms' confinement should be continued, App. 13a–15a. This review, occurring less than a month after the initial decision to confine Helms to administrative segregation, is sufficient to dispel any notions that the confinement was a pretext.

be placed in administrative segregation without due process. These statutes and regulations are similar to the ones at issue in *Hughes* v. *Rowe*, 449 U. S. 5 (1980), and *Wright* v. *Enomoto*, 462 F. Supp. 397 (ND Cal. 1976), summarily aff'd, 434 U. S. 1052 (1978), and our dispositions of those cases made clear that a liberty interest was created. We also found a state-created liberty interest in *Greenholtz*, *supra*, even though the statutes at issue there permitted parole decisions to be based on partially subjective and predictive criteria. In cases in which we have declined to find a state-created liberty interest, we have noted that state law permitted prison transfers to be made "for whatever reason or for no reason at all," *Meachum* v. *Fano*, 427 U. S., at 228; that state law "impose[d] no conditions on the discretionary power to transfer," *Montanye* v. *Haymes*, 427 U. S., at 243; or that state law gave a Board of Pardons "unfettered discretion," *Dumschat*, 452 U. S., at 466. This is not such a case.

Having found a state-created liberty interest, I cannot agree with the Court that the procedures used here comported with due process. Accordingly, I join Parts II and III of JUSTICE STEVENS' dissenting opinion.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, and with whom JUSTICE BLACKMUN joins as to Parts II and III, dissenting.

When respondent Helms was transferred to "administrative segregation," he was placed in solitary confinement in B-Block at the State Correctional Institution at Huntingdon, Pennsylvania. The conditions in B-Block are significantly more restrictive than those experienced by inmates in the general prison population.[1] Indeed, in all material respects

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[1] In an uncontroverted affidavit, respondent Helms described those conditions as follows:

"While confined in segregation I had no access to vocational, educational, recreational, and rehabilitative programs as I would have had while out in the general population. Exercise was limited to between five and ten minutes a day and was often only three or four days a week. Showers

conditions in administrative custody are the same as those in disciplinary segregation.[2] The reasons for placing one inmate in administrative and another in punitive segregation may be different, and the periods of confinement may vary, but the Court properly assumes for purposes of this case that "the conditions in the two types of confinement are substantially identical." *Ante*, at 463, n. 1.

None of the three substantive charges against respondent Helms has ever been substantiated in a valid manner.[3]

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were virtually nonexistent in segregation in December and January. The changing of clothes was also only once or twice a week while I could have changed more often in population. Had I been in general population I would have had access to various exercise facilities such as the gym and the yard and would have been able to do this for most of the time out of my cell which would have been approximately 14 hours a day. While in segregation I only got out of my cell a few minutes for exercise, showers and an occasional visit. I was virtually confined there 24 hours a day otherwise." App. 35a.

The State has not challenged the factual accuracy of this description.

[2] Compare 37 Pa. Code § 95.106(1) and § 95.106(2) (1978) (virtually identical language in regulations describing administrative custody and disciplinary custody); see also Tr. of Oral Arg. 9–10 (Attorney General's response to question).

Indeed, the record shows that, because of the large number of prisoners placed in administrative custody after the December 3, 1978, riot, some individuals including Helms "were placed in an area otherwise designated as disciplinary custody close. The physical attributes of these cells are similar to those of administrative custody . . . ." Affidavit submitted by Dennis R. Erhard, Deputy Superintendent for Treatment at the State Correctional Institution at Huntingdon, in support of defendants' motion to dismiss or for summary judgment. App. 12a. Mr. Erhard served as a member of the Program Review Committee. See also *id.*, at 14a (record of the January 2, 1979, review proceeding, describing Helms' location as Disciplinary Custody Close); *id.*, at 16a (affidavit by another member of the Program Review Committee stating that Helms was "in an area designated as disciplinary custody" even though it was not a disciplinary placement).

[3] The state criminal charges filed on December 11, 1978, were voluntarily abandoned at the preliminary hearing on February 6, 1979. The first misconduct charge of assaulting a correctional officer, filed on Decem-

Nevertheless, he was held in "administrative segregation" for over seven weeks—from the evening of December 3, 1978, until January 22, 1979—before he received an evidentiary hearing, and he was then sentenced to six months in "disciplinary custody." Despite the severity of conditions in solitary confinement, and the admitted differences between segregated custody and the general prison population, petitioners urge us to hold that the transfer of an inmate into administrative segregation does not deprive him of any interest in liberty protected by the Due Process Clause. The Court correctly rejects this contention today. It does so, however, for reasons that do not withstand analysis. It then concludes that the procedures afforded by prison authorities in this case "plainly satisfied the due process requirements for continued confinement of Helms pending the outcome of the investigation." *Ante*, at 477. I cannot agree.

I

The principal contention advanced by petitioners in this Court is that the Federal Constitution imposes no procedural limitations on the absolute discretion of prison officials to place any inmate in administrative segregation and to keep him there, if they choose, for the entire period of his confinement.[4] Petitioners argue that a transfer into solitary confinement is merely one example of various routine decisions

ber 4, 1978, was never sustained. *Id.*, at 31a. In addition, the second misconduct charge of assaulting a different correctional officer, filed on January 19, 1979, must be regarded as still unproved. The Court of Appeals held that due process was violated at the January 22, 1979, hearing that found respondent guilty of the second misconduct, because the finding was supported only by uncorroborated hearsay testimony—"literally, next to no evidence." 655 F. 2d 487, 502 (CA3 1981). Petitioners have not challenged that holding. Brief for Petitioners 7, n. 6.

[4] Tr. of Oral Arg. 17. There is no contention in this case that conditions in administrative segregation at Huntingdon violated the Eighth Amendment's prohibition against cruel and unusual punishments. If such a violation existed, the Constitution would impose substantive rather than procedural limits on transfers into segregated status.

made on a day-to-day basis by prison authorities, regarding "place of confinement, both as to which facility is appropriate and within the appropriate facility which cell block or housing unit is appropriate; his job assignment; the potential for freedom of movement; and the possibility and variety of educational and vocational opportunities available to him." Brief for Petitioners 11–12. According to petitioners, operational decisions such as these do not raise any constitutional question because prison officials need wide latitude to operate their institutions in a safe and efficient manner.

The Court properly rejects the contention that the Due Process Clause is simply inapplicable to transfers of inmates into administrative segregation. It holds that respondent's transfer from the general population into administrative confinement was a deprivation of liberty that must be accompanied by due process of law. The majority's reasoning in support of this conclusion suffers, however, from a fundamental flaw. In its view, a "liberty interest" exists only because Pennsylvania's written prison regulations[5] display a magical combination of "substantive predicates" and "explicitly mandatory language." *Ante*, at 472. This analysis attaches no significance either to the character of the conditions of confinement or to actual administrative practices in the institution. Moreover, the Court seems to assume that after his conviction a prisoner has, in essence, no liberty save that created, in writing, by the State which imprisons him. Under this view a prisoner crosses into limbo when he enters into penal confinement. He might have some minimal freedoms if the State chooses to bestow them; but such freedom as he has today may be taken away tomorrow.

This approach, although consistent with some of the Court's recent cases,[6] is dramatically different from the anal-

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[5] These regulations were issued in compliance with a consent decree in federal-court litigation. *Imprisoned Citizens Union* v. *Shapp*, C. A. 70–3054 (ED Pa., May 22, 1978). See 8 Pa. Bull. 2682 (1978).

[6] See *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458, 463–467 (1981); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 11–12

ysis in *Wolff* v. *McDonnell*, 418 U. S. 539 (1974). In *Wolff*, the Court squarely held that every prisoner retains a significant residuum of constitutionally protected liberty following his incarceration. Though the prisoner's "rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country. . . . [Prisoners] may not be deprived of life, liberty, or property without due process of law." *Id.*, at 555–556.

The source of the liberty recognized in *Wolff* is not state law, nor even the Constitution itself. Rather, it is plain that

> "neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen . . . . Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.
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> "I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations." *Meachum* v. *Fano*, 427 U. S. 215, 230 (1976) (STEVENS, J., dissenting).[7]

(1979); *Meachum* v. *Fano*, 427 U. S. 215, 225–228 (1976); *Montanye* v. *Haymes*, 427 U. S. 236, 243 (1976). Although I believe these cases were erroneously decided, I am also persuaded that they do not control the present case. None of them dealt with transfers into solitary confinement. See *Meachum*, *supra*, at 222; *Montanye*, *supra*, at 238.

[7] See *United States ex rel. Miller* v. *Twomey*, 479 F. 2d 701, 712–713 (CA7 1973) (Stevens, J.) (footnote omitted) ("The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual. 'Liberty' and 'custody' are not mutually exclusive

Identifying the "liberty" that survives in a closely controlled prison environment is understandably more difficult than in the world at large. For it is obvious that "[l]awful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a 'retraction justified by the considerations underlying our penal system.'" *Wolff*, *supra*, at 555, quoting *Price* v. *Johnston*, 334 U. S. 266, 285 (1948). But I remain convinced that an inmate "has a protected right to pursue his limited rehabilitative goals, or at the minimum, to maintain whatever attributes of dignity are associated with his status in a tightly controlled society. It is unquestionably within the power of the State to change that status, abruptly and adversely; but if the change is sufficiently grievous, it may not be imposed arbitrarily. In such case due process must be afforded." *Meachum*, *supra*, at 234 (STEVENS, J., dissenting). Thus, the relevant question in this case is whether transfer into administrative segregation constitutes a "sufficiently grievous" change in a prisoner's status to require the protection of "due process." See *Vitek* v. *Jones*, 445 U. S. 480, 492 (1980), quoting *Miller* v. *Vitek*, 437 F. Supp. 569, 573 (Neb. 1977); *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972), quoting *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring).

In answering this question it is useful to consider the residuum of liberty that the ordinary citizen enjoys in any organized society. All general laws—whether designed to protect the health of the community, to control urban traffic, to improve the environment, or to raise tax revenues—curtail the individual's freedom to do as he pleases. Thus the residuum of liberty is far removed from a license to gratify every whim without restraint. It is more akin to the characteristic of "independence," which played a special role in our early history. Consider Professor Dworkin's discussion of this term:

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concepts"), cert. denied *sub nom. Gutierrez* v. *Department of Public Safety of Illinois*, 414 U. S. 1146 (1974).

> "Mill saw independence as a further dimension of equality; he argued that an individual's independence is threatened, not simply by a political process that denies him equal voice, but by political decisions that deny him equal respect. Laws that recognize and protect common interests, like laws against violence and monopoly, offer no insult to any class or individual; but laws that constrain one man, on the sole ground that he is incompetent to decide what is right for himself, are profoundly insulting to him. They make him intellectually and morally subservient to the conformists who form the majority, and deny him the independence to which he is entitled. Mill insisted on the political importance of these moral concepts of dignity, personality, and insult. It was these complex ideas, not the simpler idea of license, that he tried to make available for political theory . . . ." R. Dworkin, Taking Rights Seriously 263 (1977).

Ordinarily the mere fact that the existence of a general regulation may significantly impair individual liberty raises no question under the Due Process Clause.[8] But the Clause is implicated when the State singles out one person for adverse treatment significantly different from that imposed on the community at large. For an essential attribute of the liberty protected by the Constitution is the right to the same kind of treatment as the State provides to other similarly situated persons.[9] A convicted felon, though he is

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[8] There are, of course, particular liberties that have constitutional status in their own right, such as freedom of speech and the free exercise of religion, whose deprivation by a State on a classwide as well as an individual basis may violate the Due Process Clause of the Fourteenth Amendment.

[9] "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." *Bolling* v. *Sharpe*, 347 U. S. 497, 499–500 (1954).

"While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of

properly placed in a disfavored class, retains this essential right.[10]

Thus, for a prisoner as for other persons, the grievousness of any claimed deprivation of liberty is, in part, a relative matter: one must compare the treatment of the particular prisoner with the customary, habitual treatment of the population of the prison as a whole. In general, if a prisoner complains of an adverse change in conditions which he shares with an entire class of his fellow prisoners as part of the day-to-day operations of the prison, there would be no reason to find that he has been deprived of his constitutionally protected liberty.[11] But if a prisoner is singled out for disparate treatment and if the disparity is sufficiently severe, his liberty is at stake.[12]

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the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923), quoted in *Board of Regents* v. *Roth*, 408 U. S. 564, 572 (1972).

[10] See *Wolff* v. *McDonnell*, 418 U. S. 539, 556 (1974); cf. *Lee* v. *Washington*, 390 U. S. 333 (1968) (statutes requiring racial segregation in prisons and jails violate Fourteenth Amendment).

[11] This category would include some if not all of the day-to-day decisions listed by the petitioners, see Brief for Petitioners 11–12. When an entire class is affected by a change, individual prisoners are neither more acutely affected by it than other members of their class nor uniquely able to bring personal knowledge to bear on the appropriateness of its implementation. Therefore the reasons for the due process requirement of some kind of hearing are absent. There may, of course, be other constitutional issues, such as the Eighth Amendment's proscription of cruel and unusual punishments, or the First Amendment's guarantee of religious freedom.

[12] Although I disagree with the Court's assumption that the State "creates" a prisoner's interest in liberty, I recognize, of course, that the State does have the power to limit the scope of the liberty that remains after incarceration. Just as it may impose either a long or a short term of confinement, so may it establish more or less severe conditions of confinement. Whether by formal written guidelines or by consistent unwritten practice, the State establishes the base line of how it customarily treats the

In this case, by definition, the institutional norm is confinement in the "general prison population."[13] The deprivation of which respondent complains is transfer to "administrative segregation"—that is, solitary confinement—which by its nature singles out individual prisoners. That confinement was not specified by the terms of his initial criminal sentence. Not only is there a disparity, the disparity is drastic.[14] It is concededly as serious as the difference between confinement in the general prison population and "disciplinary segregation." See *supra*, at 479–480, and n. 2. As the District Court wrote in *Wright* v. *Enomoto*, 462 F. Supp. 397, 402 (ND Cal. 1976), summarily aff'd, 434 U. S. 1052 (1978):

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prison population. In my opinion, it does not matter whether the State uses a particular form of words in its laws or regulations, or indeed whether it has adopted written rules at all.

Hence, as we noted in *Wolff*, the State is not required to allow prisoners good-time credits. But if it establishes such a system, it may not arbitrarily deprive a prisoner of these credits on the ground that the prisoner has engaged in serious misbehavior, unless its procedures for so doing are constitutionally adequate. *Wolff*, *supra*, at 556–557. Similarly, an offender has a liberty interest in parole release or probation "derived solely from the existence of a system that permits criminal offenders to serve their sentences on probation or parole." *Greenholtz*, 442 U. S., at 24–25 (MARSHALL, J., dissenting in part); see *id.*, at 30–31. Due process must be satisfied when a prisoner is singled out and denied parole. See also *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S., at 471, and n. 5 (STEVENS, J., dissenting) (when 75% of all life inmates receive commutation of life sentence, each life inmate has a liberty interest in commutation).

[13] See Brief for Respondent 32–34 (briefly setting forth history of penitentiaries; initially solitary confinement was the norm, but gradually authorities realized the advantages of the congregated system).

[14] The Commonwealth's own prison regulations make clear how substantial the disparity is. Title 37 Pa. Code § 95.107(a)(2) (1978) provides: "The inmates therein shall have all the rights and privileges accorded to the general population except for freedom to move about the institution, freedom to engage in programs with the general population, the use of civilian clothing, the use of items specifically found by the Program Review Committee to be a security hazard . . . ."

"When a prisoner is transferred from the general prison population to the grossly more onerous conditions of maximum security, be it for disciplinary or for administrative reasons, there is severe impairment of the residuum of liberty which he retains as a prisoner—an impairment which triggers the requirement for due process safeguards."[15]

In this case, the Court's exclusive focus on written regulations happens to lead it to the conclusion that there is a "liberty interest." I agree that the regulations are relevant: by limiting the substantive reasons for a transfer to administrative segregation and by establishing prescribed procedures, these regulations indicate that the State recognizes the substantiality of the deprivation. They therefore provide evidentiary support for the conclusion that the transfer affects a constitutionally protected interest in liberty. But the regulations do not *create* that interest. Even in their absence due process safeguards would be required when an inmate's liberty is further curtailed by a transfer into administrative custody that is the functional equivalent of punitive isolation.

II

The "touchstone of due process," as we pointed out in *Wolff* v. *McDonnell*, is "protection of the individual against arbitrary action of government." 418 U. S., at 558. Pennsylvania may not arbitrarily place a prisoner in administrative segregation. *Hughes* v. *Rowe*, 449 U. S. 5, 9 (1980). The majority agrees with this general proposition, but I believe its standards guarding against arbitrariness fall short of what the Constitution requires.

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[15] See *Wolff*, *supra*, at 571–572, n. 19 (due process applies to transfer to solitary confinement for major misconduct because it "represents a major change in the conditions of confinement"); cf. *Montanye* v. *Haymes*, 427 U. S., at 242 (question is whether the conditions or degree of confinement to which the prisoner is subjected is "within the sentence imposed upon him").

First, the majority declares that the Constitution is satisfied by an initial proceeding[16] with minimal participation by the inmate who is being transferred into administrative custody. According to the Court: "An inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation. Ordinarily a written statement by the inmate will accomplish this purpose, although prison administrators may find it more useful to permit oral presentations in cases where they believe a written statement would be ineffective." *Ante*, at 476. Applying this standard, it declares that the proceeding on December 8, 1979, "plainly satisfied the due process requirements for continued confinement of Helms pending the outcome of the investigation," *ante*, at 477, even though the record does not clearly show whether respondent was present at the Hearing Committee review.

I agree with the Court that the Constitution does not require a hearing with all of the procedural safeguards set forth in *Wolff* v. *McDonnell* when prison officials initially decide to segregate an inmate to safeguard institutional security or to

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[16] The Court of Appeals recognized that, in the emergency conditions on December 3, 1978, prison officials were justified in placing respondent in administrative segregation without a hearing. Respondent does not contend otherwise. The Due Process Clause allows prison officials flexibility to cope with emergencies. But petitioners acknowledge that the disturbance was "quelled" the same day, Brief for Petitioners 3, and that, within a day or two after the December 3, 1978, prison riot, conditions had returned completely to normal. See App. 55a–56a, 68a. At that point the emergency rationale for administrative segregation without a hearing had expired. The Due Process Clause then required a prompt proceeding to determine whether continued administrative segregation was justified. Cf. *Hughes* v. *Rowe*, 449 U. S. 5, 11 (1980) ("Segregation of a prisoner without a prior hearing may violate due process if the postponement of procedural protections is not justified by apprehended emergency conditions"). Yet Helms was not accorded any procedural safeguards whatsoever until five days after the riot—another violation of his due process rights.

conduct an investigation of an unresolved misconduct charge. But unlike the majority, I believe that due process does require that the inmate be given the opportunity to present his views in person to the reviewing officials. As many prisoners have little education, limiting an inmate to a written statement is unlikely to provide a "meaningful opportunity to be heard" in accordance with due process principles. See *Goldberg* v. *Kelly*, 397 U. S. 254, 267–269 (1970).[17]

Of greater importance, the majority's due process analysis fails to provide adequate protection against arbitrary continuation of an inmate's solitary confinement.[18] The opinion recognizes that "[p]rison officials must engage in some sort of periodic review of the confinement of such inmates." *Ante*, at 477, n. 9. It thus recognizes that the deprivation of liberty in the prison setting is a continuous process rather than an isolated event.[19] But the Court requires only minimal re-

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[17] Indeed, petitioners do not contend that a face-to-face presentation by the inmate would be unduly burdensome. Their brief cites *Goss* v. *Lopez*, 419 U. S. 565 (1975), as a model of appropriate procedure, noting that there the Court did not require an "elaborate hearing" before a neutral party, "but simply 'an informal give-and-take between student and disciplinarian' which gives the student 'an opportunity to explain his version of the facts.'" Brief for Petitioners 27–28, quoting *Ingraham* v. *Wright*, 430 U. S. 651, 693 (1977) (WHITE, J., dissenting).

[18] Unlike disciplinary custody, which is imposed for a fixed term, in practice administrative custody sometimes continues for lengthy or indefinite periods. See *Ruiz* v. *Estelle*, 503 F. Supp. 1265, 1365, 1367 (SD Tex. 1980) ("months or even years"); *Mims* v. *Shapp*, 457 F. Supp. 247, 249 (WD Pa. 1978) (five years); *United States ex rel. Hoss* v. *Cuyler*, 452 F. Supp. 256 (ED Pa. 1978) (more than five years); *Wright* v. *Enomoto*, 462 F. Supp. 397, 403–404 (ND Cal. 1976) (various instances up to a year).

[19] As the Eighth Circuit wrote in 1975:

"Conditions in prisons change as they do everywhere else, and a reason for administrative segregation of an inmate that is valid today may not necessarily be valid six months or a year in the future.

"Since there must be a valid and subsisting reason for holding an inmate in segregation, we agree with the district court that where an inmate is held in segregation for a prolonged or indefinite period of time due process requires that his situation should be reviewed periodically in a meaningful

view procedures; prison officials need not permit the submission of any additional evidence or statements and need not give the inmate a chance to present his position. It is constitutionally sufficient, according to the majority, that administrative segregation not be a pretext for indefinite confinement. In my view, the Due Process Clause requires a more searching review of the justifiability of continued confinement.

The Court relies on two major justifications for respondent's transfer into solitary confinement: institutional security and the pendency of investigations into respondent's behavior on December 3, 1978. Each of these justifications may serve important governmental interests. See *Hughes* v. *Rowe*, 449 U. S., at 13, n. 12. But it cannot fairly be assumed that either rationale, though it might initially be adequate, remains valid or sufficient indefinitely.[20] Nor can it

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way and by relevant standards to determine whether he should be retained in segregation or returned to population." *Kelly* v. *Brewer*, 525 F. 2d 394, 400 (CA8 1975).

Accord, *Drayton* v. *Robinson*, 519 F. Supp. 545, 551–552 (MD Pa. 1981); *Ruiz* v. *Estelle*, *supra*, at 1366; *United States ex rel. Hoss* v. *Cuyler*, *supra*, at 290–291.

See Brief for United States as *Amicus Curiae* 30: "Since the imposition of administrative segregation generally is a response to a particular confluence of circumstances occurring in a prison at a given time, fairness and effectiveness would seem to be best served by reassessments of the situation at regular intervals to assure that an inmate is released from the restrictive confinement as soon as the 'reasons for placement cease to exist.'"

[20] Some of the provisions of Pennsylvania's own regulations appear to recognize that the investigative rationale does not support indefinite solitary confinement. When a prisoner is confined as a result of a general institutional disturbance or incident, because officials determine that there is a threat of a serious disturbance or a serious threat to the individual or others, the regulations provide: "An investigation shall begin immediately to determine whether or not a behavior violation has occurred. If no behavior violation has occurred, the inmate must be released as soon as the reason for the security concern has abated but in all cases within ten days." 37 Pa. Code § 95.104(b)(3) (1978). When a prisoner is placed in administrative custody pending investigation by the state police, Administrative

fairly be assumed that prison officials can properly judge the continued existence of either rationale without gathering fresh information and allowing the inmate to state his own case in person.

The majority assumes that the facts needed to decide whether a particular prisoner remains a security risk "will have been ascertained when determining to confine the inmate to administrative segregation." *Ante*, at 477, n. 9. This assertion simply ignores the passage of time. Even if Helms was a threat to safety on December 8, 1978, it cannot be taken for granted that he was still a threat to safety on January 8, 1979—or that, if there had been no hearing on January 22, he would still have been a threat to safety a year later. Conditions—including Helms' own attitudes, the attitudes of other prisoners toward him and toward each other, and the disruptions caused by the riot—simply do not remain static.

The majority acknowledges that periodic reviews should consider "the progress of the investigation." But it gives no guidance on the significance of this factor. In my view, the mere notation on a record, "there is an ongoing investigation," should not automatically validate the continuation of solitary confinement. As the Court held in *Hughes* v. *Rowe*, *supra*, the Due Process Clause does not countenance "automatic investigative segregation of all inmate suspects." *Id.*, at 13, n. 12.[21] Investigations take varying forms. An active

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Directive BC–ADM 004, § IV(B)(1) (1975) requires that a hearing "will be carried out after the investigation period. Such hearing shall be held within four (4) days unless the investigation warrants delay and in that case as soon as possible." When a prisoner is confined pending a hearing on a misconduct charge, the inmate shall be informed in writing of the charge and "given a specific date for a hearing which shall be held no less than 24 hours after receipt of this notice but within six days." 37 Pa. Code § 95.103(d)(1) (1978).

[21] The record in *Hughes* v. *Rowe* did not show that petitioner's segregation was based on specific "investigative concerns [that] might, in particular cases, justify prehearing segregation." 449 U. S., at 13, n. 12. We

investigation involving pursuit of leads among prisoners may justify continued segregation of the suspected inmate, in order to protect potential witnesses from intimidation or influence. But segregation might not be proper if the investigative file is merely being kept open in the hope that something else might turn up.[22] In such event there is a possibility that a prisoner might be kept in segregation simply because prison officials believe that he should be punished, even though there is insufficient evidence to support a misconduct charge at a disciplinary hearing.[23] The lengthier the period of administrative detention, the more likely it may be that "investigation" is merely a pretext. Therefore, due process demands periodic reviews that have genuine substance—not mere paper-shuffling.[24]

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therefore reversed the lower court's dismissal for failure to state a claim and remanded for further factfinding proceedings.

[22] In an affidavit, Lt. Buddy B. Kyler, who prepared the January 18, 1979, misconduct charge, stated that, by January 4, 1979, he had received the notarized statement from an inmate informant which was the sole evidence against respondent at the hearing 18 days later. He did not write a misconduct report at the time, because he was awaiting the preliminary hearing on the pending state criminal charges. "In addition, more information could have come to light at the preliminary hearing revealing additional acts of assault or institutional misconduct by plaintiff which should be handled at a single administrative hearing." On January 18, he wrote a misconduct report because an Assistant Attorney General recommended that administrative proceedings be completed even though the preliminary hearing had not taken place. App. 82a–84a (affidavit submitted in support of defendants' motion for summary judgment). It is not at all self-evident that this delay was justified.

[23] Cf. *Wright* v. *Enomoto*, 462 F. Supp., at 400–401. The plaintiffs had been placed in administrative solitary confinement for a variety of reasons, including "becoming too militant" and spending too much time in the yard with other Black Muslims, being an influential member of the Mexican prison community and having "leadership qualities," and being "suspected of being a leader in Nuestra Familia."

[24] Moreover, once investigation has been completed, the pending misconduct charge should be promptly adjudicated. Cf. *Moody* v. *Daggett*, 429 U. S. 78, 91–92 (1976) (STEVENS, J., dissenting) (constitutional right to a

At each periodic review, I believe due process requires that the prisoner be allowed to make an oral statement about the need for and the consequences of continued confinement. Concededly some of the information relevant to a decision whether to continue confinement will be beyond the reach of a prisoner who has been held in segregated custody, including conditions in the general prison population and the progress of an ongoing investigation. But the prisoner should have the right to be present in order to explain his current attitude toward his past activities and his present circumstances, and the impact of solitary confinement on his rehabilitation program and training.[25] These factors may change as the period of confinement continues.

Further, if the decisionmaker decides to retain the prisoner in segregation, I believe he should be required to explain his reasons in a brief written statement which is retained in the file and given to the prisoner. As JUSTICE MARSHALL has written in a related prison context, this requirement would direct the decisionmaker's focus "to the relevant . . . criteria and promote more careful consideration of the evidence. It would also enable inmates to detect and correct inaccuracies that could have a decisive impact. And the obligation to justify a decision publicly would provide the

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fair hearing on parole revocation includes the right to a prompt hearing; due process is violated by putting a person under the cloud of an unresolved charge for an indeterminate period).

[25] In addition to worsening his conditions of confinement, respondent alleged that detention in solitary confinement might indirectly affect his parole opportunities by depriving him of the opportunity to participate in rehabilitation programs. Brief for Respondent 48, n. 35; App. 35a; see Brief for State Bar of Michigan, Prisons and Corrections Committee, as *Amicus Curiae* 11 (prisoner in extended administrative segregation loses his assigned general population cell and work or program assignments). Petitioners do not directly answer this assertion, but generally state that administrative custody has no effect on parole or prerelease status. Tr. of Oral Arg. 10.

assurance, critical to the appearance of fairness, that the Board's decision is not capricious." *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 38–41 (1979) (dissenting in part) (footnote omitted). A written statement of reasons would facilitate administrative and judicial review[26] and might give the prisoner an opportunity to improve his conduct.

Neither a right to personal appearance by the prisoner nor a requirement of written reasons would impose an undue burden on prison officials. It is noteworthy that these procedural safeguards are provided in regulations governing both the Pennsylvania and federal prison systems.[27] Given the

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[26] The Pennsylvania regulations provide for administrative review, upon the inmate's request, of transfers into segregated confinement, 37 Pa. Code §§ 95.103(g)(2), 95.103(h) (1978); see also App. 31a, 41a (notification to Helms of Hearing Committee actions, informing him of opportunity to seek review). In addition, petitioners' brief states that "arbitrary action by prison officials is violative of substantive due process and, therefore, subject to full judicial review." Brief for Petitioners 17.

[27] Title 37 Pa. Code § 95.103(g)(4) (1978) requires that a Program Review Committee, composed of the Deputy Superintendent for Operations, the Deputy Superintendent for Treatment Services, and the Classification and Treatment Supervisor, must

"interview in person at least once every 30 days, those inmates detained in Administrative Custody or Disciplinary Custody. The determination of whether continued confinement is warranted will be based upon a review of the counselor's notes and recommendations, psychological and psychiatric reports when available, recommendations by other staff and their written observations regarding his attitudes and actions, and his attitude and actions during the interview. . . . When the Program Review Committee determines that continued confinement is warranted, the inmate shall be given a written statement of the decision and its rationale."

In addition, the regulations mandate a weekly status review of each inmate in restrictive custody, to determine whether continuation of such custody is appropriate and necessary. The prisoner is not present at these weekly reviews, which are based on the notes and recommendations of the counselor and other entries in the inmate's record. § 95.103(g)(3). Finally, every 30 days the Superintendent is required personally to review

importance of the prisoner's interest in returning to the general prison population, the benefits of additional procedural safeguards, and the minimal burden on prison officials, I am convinced that the Due Process Clause requires more substantial periodic reviews than the majority acknowledges.

III

Unfortunately, today's majority opinion locates the due process floor at a level below existing procedures in Pennsylvania. The Court reverses the judgment of the Court of Appeals, and thus endorses the District Court's summary judgment in favor of petitioners. In my view, summary judgment is inappropriate because at least three issues of material fact remain unresolved. First, there has been no finding whether Helms had a constitutionally adequate opportunity to present his views at the initial proceeding on December 8, 1978. As the Court today acknowledges, it is not entirely clear from the record whether respondent appeared in person before the Hearing Committee on December 8. *Ante*, at 464–465. Second, the record does not ade-

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the case of each inmate separated from the general population for 30 days or more, and he must retain a written report of his findings in each such case. § 95.107(f).

The federal prison system appears to follow similar periodic review procedures. See Brief for United States as *Amicus Curiae* 29–30:

"After an inmate's first in-person review, he is afforded a record review (at which he does not appear) every seven days and further in-person reviews at least every 30 days. In connection with each of the 30-day in-person reviews, the staff conducts a psychiatric or psychological assessment of the inmate, which is submitted to the reviewing authority in a written report 'address[ing] the inmate's adjustment to his surroundings and the threat the inmate poses to self, staff and other inmates.'" 28 CFR § 541.20(c) (1982).

According to the Federal Government's brief, the inmate has a right to make a statement at his in-person review disputing the grounds for continued confinement in administrative detention, and he receives a written copy of the staff's decision and its reasons. Brief for United States as *Amicus Curiae* 29–30.

quately disclose the reasons for respondent's prolonged confinement.[28] Finally, it is by no means clear that the subsequent review proceedings, including Helms' appearance before the Program Review Committee on January 2, 1979, satisfied the mandates of the Due Process Clause. I therefore respectfully dissent.

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[28] The written record of the Program Review Committee's decision, App. 13a–14a, does not specifically discuss the progress of the investigation or the need for continuing administrative segregation; it merely states that restrictive custody should continue "until more information is received regarding his involvement in the December 3rd incident."

COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA *v.* GOTTFRIED ET AL.

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

No. 81–298. Argued October 12, 1982—Decided February 22, 1983*

Section 504 of the Rehabilitation Act of 1973 provides that no otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. Respondent Gottfried (respondent) filed a petition with the Federal Communications Commission (FCC) requesting it to deny renewal of a public television station's license because the station allegedly (1) had failed to discharge its obligation under the Communications Act of 1934 to ascertain the problems, needs, and interests of the deaf and hearing-impaired population within its service area, and (2) had violated § 504. Respondent filed similar objections to the renewal of seven commercial television station licenses. Consolidating all eight proceedings, the FCC held that the licensees' efforts to ascertain the special needs of the community were adequate; that the facts alleged by respondent did not give rise to a substantial and material question whether any of the licensees had abused its discretion in its programming; that § 504 did not apply to the commercial licensees; and that while the public television station might be governed by § 504, the allegations against that station under § 504 were premature unless and until the agency with authority to enforce compliance determined that the station had violated the Rehabilitation Act. The Court of Appeals affirmed the portion of the FCC's order relating to the commercial stations but vacated the renewal of the public station's license and remanded for further proceedings. Because the public station as a recipient of federal financial assistance was under a duty to comply with § 504, the court, while not holding that the station had violated § 504 or that its programming efforts were less satisfactory than the commercial licensees' efforts, held that nevertheless a stricter "public interest" standard should be applied to a licensee covered by § 504 than to a commercial licensee, and that the FCC could not find the service of public stations to be adequate to justify license renewal without at least inquiring into their efforts to meet the programming needs of the hearing impaired.

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*Together with No. 81–799, *Federal Communications Commission* v. *Gottfried et al.*, also on certiorari to the same court.

Held: Section 504 does not require the FCC to review a public television station's license renewal application under a different standard than applies to a commercial licensee's renewal application. Pp. 508–512.

(a) Congress did not intend the Rehabilitation Act to impose any special enforcement obligation on the FCC. The FCC is not a funding agency and has no responsibility for enforcing § 504. Moreover, there is not a word in the Act's legislative history suggesting that the Act was intended to alter the FCC's standard for reviewing the programming decisions of public television licensees. Pp. 508–510.

(b) The fact that a public television station has a duty to comply with the Rehabilitation Act does not support the conclusion that the FCC must evaluate the station's service to the handicapped community by a more stringent standard than that applicable to commercial stations. P. 511.

(c) Unless and until a differential standard has been promulgated with respect to public television stations as against commercial stations, the FCC acts within its authority when it declines to impose a greater obligation to provide special programming for the hearing impaired on a public licensee than on a commercial licensee. Pp. 511–512.

210 U. S. App. D. C. 184, 655 F. 2d 297, reversed in part.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 513.

Edgar F. Czarra, Jr., argued the cause for petitioner in No. 81–298. With him on the briefs were *Mark D. Nozette* and *Richard A. Meserve*. *Samuel A. Alito, Jr.*, argued the cause for petitioner in No. 81–799. With him on the briefs were *Solicitor General Lee*, *Deputy Solicitor General Shapiro*, *Stephen A. Sharp*, and *C. Grey Pash, Jr.*

Charles M. Firestone argued the cause for respondents Gottfried et al. in both cases. With him on the brief were *Abraham Gottfried* and *Stanley Fleishman*. *J. Roger Wollenberg*, *Timothy B. Dyk*, *Ralph E. Goldberg*, and *Eleanor S. Applewhaite* filed a brief for CBS Inc., respondent under this Court's Rule 19.6.†

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†*Harry R. Sheppard* filed a brief for Deaf Counseling, Advocacy and Referral Agency, Inc., et al. as *amici curiae* urging affirmance.

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether § 504 of the Rehabilitation Act of 1973[1] requires the Federal Communications Commission to review a public television station's license renewal application under a different standard than it applies to a commercial licensee's renewal application. Contrary to the holding of the Court of Appeals for the District of Columbia Circuit, 210 U. S. App. D. C. 184, 655 F. 2d 297 (1981), we conclude that it does not.

I

On October 28, 1977, respondent Sue Gottfried filed a formal petition with the Federal Communications Commission requesting it to deny renewal of the television license of station KCET–TV in Los Angeles. She advanced two principal grounds for denial: First, that the licensee had failed to discharge its obligation to ascertain the problems, needs, and interests of the deaf and hearing-impaired population within its service area; and second, that the licensee had

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[1] Section 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, and as set forth in 29 U. S. C. § 794 (1976 ed., Supp. V), provides:

"§ 794. Nondiscrimination under Federal grants and programs; promulgation of rules and regulations

"No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees."

violated, and remained in violation of, § 504 of the Rehabilitation Act.[2]

Correspondence attached to Gottfried's petition included complaints about KCET–TV's failure to carry enough programming with special captioning[3] or other aids to benefit the hearing-impaired members of the audience. The exhibits emphasized the station's failure to broadcast the ABC evening news in captioned form prior to May 23, 1977, and its subsequent failure to broadcast the captioned program during prime time.

In a verified opposition to the petition, the licensee recounted in some detail its efforts to ascertain the problems of the community it served, including the deaf and the hearing impaired, by a community leader survey and by a general public survey. App. in No. 79–1722 (CADC), pp. 102–105. The licensee also described its programming efforts to respond to the special needs of the hearing impaired,[4] and

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[2] In her petition, Gottfried alleged, in part:

"That the Licensee has violated, and remains in violation of Section 504 of the Rehabilitation Act of 1973, and the regulations promulgated thereunder, in that the Licensee has received and is receiving Federal financial assistance and has discriminated and is discriminating against the Petitioners 'solely by reason of [their] handicap', and said Petitioners have been and are 'excluded from participation in [and have been and are denied] the benefits of, [and have been and are being] subjected to discrimination' under the television services in connection with which Licensee has been and is receiving Federal financial assistance." App. in No. 79–1722 (CADC), p. 26 (brackets in original).

[3] "Captioning" refers to any of several technologies, see *Captioning for the Deaf*, 63 F. C. C. 2d 378 (1976), that project written text onto a television image so that deaf viewers receive information that is communicated to others by the soundtrack. See also n. 8, *infra*.

[4] "Contrary to Petitioners' unsupported charges (Petition, p. 3), KCET has responded to the needs of deaf and hearing-impaired persons in its service area. It has done so with three different types of programming: (a) *Captioned ABC Evening News;* (b) a variety of other programs, including children's programs, which were captioned or signed so as to be understandable to the deaf and hearing-impaired; and (c) special programs which

explained why its two daily broadcasts of the ABC captioned news had usually been scheduled for 11:30 p. m. and 6:30 a. m. The licensee specifically denied that it had violated § 504 and averred that the Commission is not an appropriate forum for the adjudication of Rehabilitation Act claims. *Id.*, at 113.

On December 22, 1977, Gottfried filed a verified response, criticizing the station's public survey, and commenting further on the station's failure to rebroadcast ABC captioned news programs before May 23, 1977. The response renewed the charge that the station had violated § 504,[5] and asserted that the Federal Communications Commission was indeed the proper forum to evaluate that charge.[6]

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have directly addressed needs and concerns of the deaf and hearing-impaired.

. . . . .

"Over the past three years, KCET has presented more than 960 programs which were either captioned, signed or, in rare instances, which had no spoken words in them at all. All of these programs were understandable to the deaf and hearing-impaired. In many instances, KCET has promoted these programs by listing them as designed for the hearing-impaired audience. During the past three years, in addition to *ABC Captioned News*, these broadcasts have included such programs as 'Zoom', 'Once Upon a Classic', 'Nova', films of Ingmar Bergman, 'The Tribal Eye', 'Masterpiece Theatre', 'Adams Chronicles', 'President Carter's Clinton, Massachusetts Town Meeting', and many others.

"In addition to programs designed to be understood by the deaf and hearing-impaired, KCET has devoted several special programs to substantive issues affecting those groups." App. in No. 79–1722 (CADC), pp. 106, 109.

[5] The response stated:

"[T]he station has not been responsive to the needs of the deaf and hearing impaired. In the station's viewing area, the deaf 20% of the population are not getting 20% of broadcast time; they were not even getting what other deaf in other viewing areas were receiving." *Id.*, at 148.

[6] The response continued:

"The Commission is a proper forum for the adjudication of claims of discrimination in broadcasting, as it is the Commission's obligation—even apart from the Act—to determine how the station has discharged its public

Gottfried also filed separate formal objections to the renewal of seven commercial television station licenses in the Los Angeles area. *E. g., id.*, at 199. The Commission consolidated all eight proceedings and ruled on Gottfried's objections in a single memorandum opinion adopted on August 8, 1978. 69 F. C. C. 2d 451.

The Commission first reviewed its own efforts to encourage the industry to serve the needs of the hearing impaired. In 1970, the Commission had issued a Public Notice to all licensees, advising them of the special needs of the deaf in responding to emergency situations as well as in appreciating general television programming.[7] In 1972, the Commission had granted authority to the Public Broadcasting System to begin experimentation with a "closed" captioning system, which would enable hearing-impaired persons with specially equipped television sets to receive captioned information that could not be seen by the remainder of the viewing audience.[8]

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trust obligations. The Act and the regulations thereunder, merely give further statutory and regulatory emphasis to that which the Commission is already charged to do under the law." *Id.*, at 150.

[7] *The Use of Telecasts to Inform and Alert Viewers with Impaired Hearing*, 26 F. C. C. 2d 917 (1970). The Commission described the effect of its 1970 action as follows:

"[I]t was suggested that television stations could make use of visual as well as oral announcements of emergencies, utilize the fac[e] of newscasters wherever possible so as to permit lip reading, and feature visualization of materials in news, weather, and sports programs. The Commission hoped that the notice would alert licensees to our concern for the needs of the hearing impaired citizen and make television a truly valuable medium for that segment of the population—estimated by the Department of Health, Education, and Welfare to include 13.4 million persons. We observed, however, that 'it may be necessary to begin rule making looking toward the adoption of minimum requirements.'" 69 F. C. C. 2d, at 454.

[8] "Through the use of an encoder at the transmitting end and a decoder at the receiving end, this closed captioning system could supply visual information—captioning—of the aural portion of the television program to those hearing impaired persons whose television sets were equipped to receive the captioned information while the rest of the viewing public would receive the normal visual and aural transmission. This differs from 'open'

In 1976, the Commission had adopted a rule requiring television licensees to broadcast emergency information visually. In that year, however, the Commission had also concluded that there were so many unanswered questions—both technical and financial—concerning the most effective means of improving television service for the hearing impaired, that it remained "the responsibility of each licensee to determine how it [could] most effectively meet those needs."[9] The Commission summarized its views concerning mandated forms of technology by noting that "there is no requirement that any television licensee—commercial or noncommercial—provide open or closed captioning or any other form of special visual program material other than for broadcasting emergency information." *Id.*, at 455.

The Commission then turned to Gottfried's objections to the eight license renewals. It approached the question whether the renewals would serve the public interest, convenience, and necessity from three different perspectives: ascertainment, programming, and § 504 of the Rehabilitation Act. It first found that the licensees' efforts to ascertain the special needs of the community were adequate. Next, it held that the facts alleged by Gottfried did not give rise to a substantial and material question whether any of the eight stations had abused its discretion in its selection of programming matter. The Commission explained that it is more difficult to provide special programming for the hearing impaired than for other segments of the community;[10] in the

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captioning utilized, for example, by PBS in its rebroadcast of the *ABC Evening News*. Open captioning is transmitted to all viewers who see a printed display of the text of the aural transmission at the bottom of the visual transmission." *Ibid.*

[9] *Captioning for the Deaf*, 63 F. C. C 2d, at 389.

[10] "Generally speaking, [special programming for other segments of the community] can be achieved without any additional production techniques other than those utilized for regular programming. Obviously, that is not the situation confronting a licensee who might wish to program for the aurally handicapped. For such programming to be effective, it must offer some specific form of visual communication: sign language interpretations,

absence of any Commission requirement for specialized programming techniques, it found "no basis to fault a licensee for failure to provide these options for the deaf and hearing impaired in the station service area." *Id.*, at 458.

The Commission held that § 504 of the Rehabilitation Act had no application to the seven commercial licensees because they were not alleged to have received any federal financial assistance. The Commission agreed that KCET–TV might be governed by § 504, and that a violation of the Act would need to be considered in a license renewal proceeding, but it saw no reason to consider § 504 in the absence of an adverse finding by the Department of Health, Education, and Welfare—"the proper governmental agency to consider such matters." *Id.*, at 459.

On May 29, 1979, the Commission adopted a second memorandum opinion and order denying Gottfried's petition for reconsideration. 72 F. C. C. 2d 273. The Commission again reviewed Gottfried's § 504 charge and again concluded that the Rehabilitation Act does not apply to commercial stations and that the allegations against KCET–TV under that Act were premature unless and until the agency with authority to enforce compliance determined that the station had violated its provisions. The Commission also rejected Gottfried's additional argument that it had a duty to adopt regulations to implement § 504. Finally, the Commission refused to hold that either its omission of a rule requiring "captioning or other techniques to enable the deaf and hearing impaired to have full access to television broadcasts," or the failure of the licensees to provide such services, was a violation of the "public interest" standard embodied in § 309 of the Communications Act of 1934, as amended. The Commission held:

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captioning, or extensive utilization of charts, signs, and facial closeups to permit lip reading. Even sign language and lip reading efforts, according to Gottfried, serve to limit the number of deaf and hearing impaired since many do not effectively understand these methods." 69 F. C. C. 2d, at 458.

> "We find no error and nothing inconsistent in concluding that licensees are serving the public interest although they are not currently providing captioning, in view of the fact that we have not required licensees to undertake such an activity. Furthermore, to judge a licensee's qualifications on the basis of the retroactive application of such a requirement would, in our opinion, raise serious questions of fundamental fairness. Thus, there is no inconsistency or error in our finding that the subject licensees had met their public interest burden even though they did not caption their programming." *Id.*, at 279.

Gottfried appealed the decision of the Commission to the Court of Appeals for the District of Columbia Circuit, pursuant to 47 U. S. C. § 402. The Court of Appeals affirmed the portion of the Commission's order that related to the commercial stations but vacated the renewal of the KCET–TV license and remanded for further proceedings. 210 U. S. App. D. C. 184, 655 F. 2d 297 (1981).

The court held that Congress did not intend the Commission's renewal of a broadcast license to be considered a form of "financial assistance" within the meaning of § 504 and therefore that the Rehabilitation Act did not directly apply to the seven commercial stations. The court was persuaded, however, that the Act reflected a national policy of extending increased opportunities to the hearing impaired and that commercial stations must therefore make some accommodation for the hard of hearing, given the Communications Act's general requirement that licensees serve the "public interest, convenience, and necessity." 47 U. S. C. §§ 307(d), 309(a), 309(d). In the absence of a more specific statutory directive than that contained in the public interest standard, however, the court accepted the Commission's judgment that the commercial licenses should be renewed. "Recognizing that the Commission possesses special competence in weighing the factors of technological feasibility and economic viability that the concept of the public interest must embrace, we defer to-

day to its judgment." 210 U. S. App. D. C., at 202–203, 655 F. 2d, at 315–316 (footnote omitted).

The majority of the Court of Appeals reached a different conclusion with respect to KCET–TV. As a recipient of federal financial assistance, the public station was admittedly under a duty to comply with § 504. The Court of Appeals did not hold that KCET–TV had violated § 504, or that its efforts to provide programming for the hearing impaired were less satisfactory than the efforts of the commercial licensees; nevertheless, it held that a stricter "public interest" standard should be applied to a licensee covered by § 504 than to a commercial licensee. Its narrow holding was that the Commission could not find the service of public stations "to be adequate to justify renewal without at least inquiring specifically into their efforts to meet the programming needs of the hearing impaired." *Id.*, at 188, 655 F. 2d, at 301.

Judge McGowan dissented in part. He agreed with the majority's view concerning commercial stations that rulemaking would be "a better, fairer, and more effective vehicle for considering how the broadcast industry is required to provide the enjoyment and educational benefits of television to persons with impaired hearing," *id.*, at 188, 203, 655 F. 2d, at 301, 316, than case-by-case adjudication in license renewal proceedings. He felt, however, that the same standard should be applied to public stations until regulations had been issued by the Department of Education dealing specifically with the rights of access of the hearing impaired to television programs.[11] Judge McGowan stated: "[F]orm is favored over substance when commercial stations are, for this reason, spared the expense and uncertainty of renewal hearings, and a noncommercial station is not. Neither, on the record before us, had advance notice during their expired license terms of what was, and therefore could reasonably be, ex-

[11] Judge McGowan pointed out that on January 19, 1981, the Department of Education had issued a notice of intent to develop such regulations, and invited comments by March 5, 1981. 210 U. S. App. D. C., at 204, 655 F. 2d, at 317. See 46 Fed. Reg. 4954.

pected of them with respect to the wholly laudable, but technically complex, objective of providing access for the hearing impaired." *Id.*, at 204, 655 F. 2d, at 317.

Both the Commission and the licensee petitioned for certiorari. Because of the serious implications of the Court of Appeals' holding on the status of licenses of public broadcasting stations, we granted both petitions. 454 U. S. 1141 (1982).

II

All parties agree that the public interest would be served by making television broadcasting more available and more understandable to the substantial portion of our population that is handicapped by impaired hearing.[12] The Commission recognized this component of the public interest even before the enactment of the Rehabilitation Act of 1973, see *The Use of Telecasts to Inform and Alert Viewers with Impaired Hearing*, 26 F. C. C. 2d 917 (1970), and that statute confirms the federal interest in developing the opportunities for all individuals with handicaps to live full and independent lives. No party suggests that a licensee, whether commercial or public, may simply ignore the needs of the hearing impaired in discharging its responsibilities to the community which it serves.[13]

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[12] "Estimates of the number of citizens who have impaired hearing and therefore have need for the receipt of news and entertainment material through appropriate television programming range from 8.5 million to 20 million. Many of these persons, it appears, live alone and oftentimes do not receive important new information unless advised by neighbors or friends." *The Use of Telecasts to Inform and Alert Viewers with Impaired Hearing*, 26 F. C. C. 2d 917 (1970).

[13] As the Commission has observed:

"In the fulfillment of his obligation the broadcaster should consider the tastes, needs and desires of the public he is licensed to serve . . . . He should reasonably attempt to meet all such needs and interests on an equitable basis." Report and Statement on Policy Re: Commission's En Banc Programming Inquiry, 25 Fed. Reg. 7291, 7295 (1960).

Accord, *In re Applications of Alabama Educational Television Comm'n*, 50 F. C. C. 2d 461, 472 (1975); *In re Applications of Capitol Broadcasting Co.*, 38 F. C. C. 1135, 1139 (1965).

We are not persuaded, however, that Congress intended the Rehabilitation Act of 1973 to impose any new enforcement obligation on the Federal Communications Commission.[14] As originally enacted, the Act did not expressly allocate enforcement responsibility. See Pub. L. 93–112, Tit. V, § 504, 87 Stat. 394. Nevertheless, since § 504 was patterned after Title VI of the Civil Rights Act of 1964, it was understood that responsibility for enforcing it, insofar as it regulated private recipients of federal funds, would lie with those agencies administering the federal financial assistance programs. See S. Rep. No. 93–1297, pp. 39–40 (1974). When the Act was amended in 1978, that understanding was made explicit. See Pub. L. 95–602, Tit. I, § 119, 92 Stat. 2982; n. 1, *supra*. It is clear that the Commission is not a funding agency and has never been thought to have responsibility for enforcing § 504.[15] Furthermore, there is not a

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[14] If such an enforcement obligation existed, it would have to derive from the Rehabilitation Act itself, since the general words "public interest" in the Communications Act are not sufficient to create it. In *McLean Trucking Co.* v. *United States*, 321 U. S. 67 (1944), we observed that an agency charged with promoting the "public interest" in a particular substantive area may not simply "ignore" the policies underlying other federal statutes. *Id.*, at 80. But we also emphasized that such an agency is not automatically given "either the duty or the authority to execute numerous other laws." *Id.*, at 79. Thus, in *McLean Trucking* the Interstate Commerce Commission had an administrative duty to consider the effect of a motor carrier merger on competing motor carriers in determining whether the merger would effectuate overall transportation policy, *id.*, at 87, yet was "not to measure proposals for all-rail or all-motor consolidations by the standards of the anti-trust laws," *id.*, at 85. Here, the FCC has an administrative duty to consider the needs of handicapped citizens in determining whether a license renewal would effectuate the policies behind the Communications Act but is by no means required to measure proposals for public television license renewals by the standards of § 504 of the Rehabilitation Act.

[15] In 1976, the President designated the Department of Health, Education, and Welfare as the agency responsible for coordinating the implementation of § 504. See Exec. Order No. 11914, 3 CFR 117 (1977). In 1980 that Executive Order was revoked and replaced by Exec. Order No. 12250,

word in the legislative history of the Act suggesting that it was intended to alter the Commission's standard for reviewing the programming decisions of public television licensees.

If a licensee should be found guilty of violating the Rehabilitation Act, or indeed of violating any other federal statute, the Commission would certainly be obligated to consider the possible relevance of such a violation in determining whether or not to renew the lawbreaker's license.[16] But in the absence of a direction in the Rehabilitation Act itself, and without any expression of such intent in the legislative history, we are unwilling to assume that Congress has instructed the Federal Communications Commission to take original jurisdiction over the processing of charges that its regulatees have violated that Act.[17]

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3 CFR 298 (1981), which transferred the coordination and enforcement of authority for § 504 from HEW to the Department of Justice. Regulations previously adopted by HEW remain in effect pending the adoption of new regulations by the Department of Justice. See 28 CFR pt. 41 (1982).

[16] The Commission has explained its policy as follows:

"Normally, we have declined to explore matters currently being litigated before the courts or to duplicate the ongoing investigative efforts of other government agencies charged with the responsibility of interpreting and enforcing the laws in question. Our restraint in this respect has not been predicated upon the unlikelihood of proving the violation of law. Indeed, conduct which does not contravene law may still run afoul of the public interest standard. . . . By our forbearance we have sought to maintain a proper working relationship with the judiciary and other governmental agencies and to avoid burdening applicants with unnecessary, costly multiple proceedings." *FCC Form 303*, 59 F. C. C. 2d 750, 763 (1976).

[17] This is not to say that the Commission may permit a licensee to ignore the needs of particular groups within the viewing public. The point is that the Commission's duties derive from the Communications Act, not from other federal statutes. In *NAACP* v. *FPC*, 425 U. S. 662, 670, n. 7 (1976), for example, this Court noted that the Commission's equal opportunity regulations could be regarded as "necessary . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." We then reiterated, however, that an agency's general duty to

The fact that a public television station has a duty to comply with the Rehabilitation Act does not support the quite different conclusion that the Commission must evaluate a public station's service to the handicapped community by a more stringent standard than that applicable to commercial stations. The interest in having all television stations—public and commercial—consider and serve their handicapped viewers is equally strong. By the same token, it is equally unfair to criticize a licensee—whether public or commercial—for failing to comply with a requirement of which it had no notice.[18] As both the majority and the dissenting judge in the Court of Appeals observed, rulemaking is generally a "better, fairer, and more effective" method of implementing a new industrywide policy than is the uneven application of conditions in isolated license renewal proceedings. That observation should be as determinative in relicensing a public station as it is in relicensing a commercial station.

A federal agency providing financial assistance to a public television station may, of course, attach conditions to its sub-

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enforce the public interest does not require it to assume responsibility for enforcing legislation that is not directed at the agency:

"It is useful again to draw on the analogy of federal labor law. No less than in the federal legislation defining the national interest in ending employment discrimination, Congress in its earlier labor legislation unmistakably defined the national interest in free collective bargaining. Yet it could hardly be supposed that in directing the Federal Power Commission to be guided by the 'public interest,' Congress thereby instructed it to take original jurisdiction over the processing of charges of unfair labor practices on the part of its regulatees." *Id.*, at 671.

[18] We have previously emphasized the desirability of making changes in licensing policies prospective. In *FCC* v. *National Citizens Committee for Broadcasting*, 436 U. S. 775, 811 (1978), we wrote:

"One of the most significant advantages of the administrative process is its ability to adapt to new circumstances in a flexible manner, see *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S., at 137–138, and we are unwilling to presume that the Commission acts unreasonably when it decides to try out a change in licensing policy primarily on a prospective basis."

sidy that will have the effect of subjecting such a licensee to more stringent requirements than must be met by a commercial licensee. Or regulations may be promulgated under the Rehabilitation Act that impose special obligations on the subsidized licensee. Conceivably, the Federal Communications Commission might determine that the policies underlying the Communications Act require extraordinary efforts to make certain types of programming universally accessible, thereby placing heightened responsibility on certain stations. But unless and until such a differential standard has been promulgated, the Federal Communications Commission does not abuse its discretion in interpreting the public interest standard, see *FCC* v. *WNCN Listeners Guild*, 450 U. S. 582 (1981), when it declines to impose a greater obligation to provide special programming for the hearing impaired on a public licensee than on a commercial licensee.[19]

The Court of Appeals was unanimous in its holding that the renewal of the seven commercial licensees was consistent with the public interest requirement in § 309 of the Federal Communications Act. Neither that court nor the Commission suggested that there was anything in the record that would justify treating the public licensee differently from the commercial licensees if both classes were to be judged under the same standard. The Court of Appeals' affirmance of the Commission's rejection of Gottfried's objection to the renewal of the commercial licenses therefore requires a like disposition of the objections to the renewal of the KCET–TV license. Accordingly, the judgment of the Court of Appeals is reversed insofar as it vacated the order of the Commission.

It is so ordered.

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[19] We note the Commission's argument that, if a differential standard were appropriate, commercial stations would be better able to afford the costs associated with special programming than public television stations, which cannot sell advertising and which serve the public in large part by airing programs of specialized interest that lack the mass appeal required for broadcast on network affiliates.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

In determining that the "public interest" would be served by renewal of the broadcast license of public station KCET–TV, the FCC refused to consider whether the station had violated the Rehabilitation Act of 1973 during its previous license term. The Court today holds that this refusal to consider the Rehabilitation Act did not constitute an abuse of discretion. In concluding that the FCC was free to disregard the Rehabilitation Act, the Court emphasizes that "the Commission's duties derive from the Communications Act, not from other federal statutes," *ante*, at 510, n. 17, and that there is no evidence that Congress intended to vest the Commission with power to enforce the Rehabilitation Act, *ante*, at 509. Because the Court's decision is not supported by either precedent or any sound view of the administrative process, I respectfully dissent.

I

This Court's decisions establish that where an agency has a statutory duty, as does the FCC,[1] to assess the "public interest" in implementing a particular regulatory scheme, the agency must give at least some consideration to other federal statutes that are pertinent to its administrative decision. Although the open-ended phrase "public interest" "take[s] meaning from the purposes of the regulatory legislation" that defines the particular agency's responsibilities, *NAACP* v. *FPC*, 425 U. S. 662, 669 (1976), the agency may not focus on those purposes to the complete exclusion of the policies reflected in other relevant statutes.

The principle that an agency may not ignore a relevant Act of Congress was clearly set forth by Justice Rutledge in his

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[1] The FCC is directed by statute to grant an application for renewal of a broadcast license only if it finds that the "public interest, convenience, and necessity would be served thereby." 47 U. S. C. § 307(c) (1982 ed.).

opinion for the Court in *McLean Trucking Co.* v. *United States*, 321 U. S. 67 (1944). In *McLean Trucking* the ICC had approved a proposed consolidation as "'consistent with the public interest.'" *Id.*, at 75–76, quoting 49 U. S. C. § 5(2)(b). While recognizing that the ICC's duties derived primarily from the Interstate Commerce Act and related legislation specifically regulating commerce, Justice Rutledge rejected any suggestion that the ICC could therefore ignore other relevant statutes in deciding whether a proposed transaction would serve the "public interest":

> "To secure the continuous, close and informed supervision which enforcement of legislative mandates frequently requires, Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to execute numerous other laws. Thus, here, the Commission has no power to enforce the Sherman Act as such. It cannot decide definitively whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act. The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action.
>
> "But in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. *When this is true, it cannot, without more, ignore the latter.*" 321 U. S., at 79–80 (emphasis added).

The Court held that the ICC was obligated to take the Sherman Act into account in deciding whether to approve the proposed consolidation, even though Congress had not given the Commission either the power or the duty to enforce the Act.[2]

Similarly, in *Denver & R. G. W. R. Co.* v. *United States*, 387 U. S. 485 (1967), this Court concluded that "the broad terms 'public interest' and 'lawful object' [in § 20a(2) of the Interstate Commerce Act] negate the existence of a mandate to the ICC to close its eyes to facts indicating that the transaction may exceed limitations imposed by other relevant laws." *Id.*, at 492. JUSTICE BRENNAN explained in his opinion for the Court that "[c]ommon sense and sound administrative policy point to the conclusion that such broad statutory standards require at least some degree of consideration of control and anticompetitive consequences when suggested by the circumstances surrounding a particular transaction." *Ibid.* Accordingly, the Court held that the ICC was required to consider the anticompetitive effect under § 7 of the Clayton Act of a proposed stock issuance by a carrier even though that Act confers no enforcement power on the ICC.

In *Southern S.S. Co.* v. *NLRB*, 316 U. S. 31 (1942), this Court recognized that the National Labor Relations Board must consider federal statutes independent of federal labor law where they are relevant to an issue to be

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[2] The majority errs in attempting to distinguish *McLean Trucking* by quoting Justice Rutledge's statement that the ICC was "not to measure proposals for all-rail or all-motor consolidations by the standards of the anti-trust laws." 321 U. S., at 85, quoted *ante*, at 509, n. 14. The issue here is not whether the FCC should have measured KCET–TV's application by the same standards that would apply in a proceeding to enforce the Rehabilitation Act, but whether the FCC should have given at least some consideration to the policies underlying the Act. In *McLean Trucking* the Court made it clear that the ICC was not free to ignore the policies underlying the antitrust laws. In addition to the passage quoted in the text, see 321 U. S., at 86 ("Congress . . . neither has made the anti-trust laws wholly inapplicable to the transportation industry nor has authorized the Commission in passing on a proposed merger to ignore their policy").

decided by the Board. Although the Court acknowledged the breadth of the Board's discretion, *id.*, at 46, it concluded that the Board had no discretion to disregard pertinent federal laws: "the Board has not been commissioned to effectuate the policies of the National Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Id.*, at 47. The Court ruled that the Board had abused its discretion in ordering the reinstatement of striking seamen without considering whether the strike had violated either a federal law requiring crew members to promise obedience to their superiors or provisions of the Federal Criminal Code proscribing mutiny and revolt aboard ship.

These decisions establish that, however broad an administrative agency's discretion in implementing a regulatory scheme may be, the agency may not ignore a relevant Act of Congress. The agency need not conclusively determine what the statute in question requires or forbids. See *McLean Trucking Co.* v. *United States*, *supra*, at 79 (ICC "cannot decide definitively whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize"). If the agency, after considering the relevant statute, concludes that it should not prevent achievement of the objectives embodied in the regulatory scheme that the agency is specifically empowered to implement, and states reasons for this conclusion, the agency's determination will not lightly be overturned. But the agency cannot simply "close its eyes" to the existence of the statute. *Denver & R. G. W. R. Co.* v. *United States*, *supra*, at 492.

There are good reasons for this Court's insistence that administrative agencies consider relevant statutes. The objectives of Congress would be ill served if each administrative agency were permitted to disregard any statute that it is not specifically authorized to enforce. "No agency entrusted with determinations of public convenience and necessity is an island. It fits within a national system of regulatory control

of industry." *Palisades Citizens Assn., Inc.* v. *CAB*, 136 U. S. App. D. C. 346, 349, 420 F. 2d 188, 191 (1969). As the Court observed in *Southern S.S. Co.*, "[f]requently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another." 316 U. S., at 47. There can be no accommodation, careful or otherwise, if an agency refuses even to consider a relevant statute.

II

In light of the principle established by our prior decisions, the Court of Appeals correctly held that it was an abuse of discretion for the FCC to refuse to consider respondent's allegation that KCET–TV had violated § 504 of the Rehabilitation Act.[3]

The relevance of the alleged violation to the Commission's licensing decision is beyond dispute. The chief purpose of the Communications Act was "to make available . . . to *all the people of the United States* a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." 47 U. S. C. § 151 (emphasis added). See *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 217 (1943). The deaf constitute a substantial segment of the population. *Ante*, at 508, n. 12. If, as this Court has stated, the Commission has an "obligation . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups,"

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[3] Section 504 provides in pertinent part that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U. S. C. § 794 (1976 ed., Supp. V). Respondents alleged that KCET–TV had violated the Rehabilitation Act by, among other things, failing, for most of its license term, to broadcast a captioned version of the ABC Evening News that was made available to it free of charge by the Public Broadcasting Service, and by thereafter failing to broadcast the program during any prime time hours. It is undisputed that KCET–TV conducts a "program or activity receiving Federal financial assistance" within the meaning of § 504.

NAACP v. *FPC*, 425 U. S., at 670, n. 7, then surely it also has an obligation to consider whether a licensee has denied meaningful programming of any kind to a sizable minority group.

Since respondent's allegation that KCET–TV had violated the Rehabilitation Act was relevant to the FCC's determination of whether renewal of the station's license would serve the "public interest," the Commission should have given "at least some degree of consideration" to the Act. *Denver & R. G. W. R. Co.* v. *United States*, 387 U. S., at 492. There is no reason to depart from our traditional insistence that administrative agencies take into account any federal statute that is pertinent to an administrative decision.[4] As the Court noted in *Southern S.S. Co.*, consideration of any pertinent statutes "is not too much to demand of an administrative body." 316 U. S., at 47. The decision of the Court of Appeals demanded no more than this, and the handicapped individuals protected by the Rehabilitation Act are entitled to no less.

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[4] Contrary to the Court's suggestion, *ante*, at 512, a requirement that the Commission take the Rehabilitation Act into account in its licensing decisions involving public stations would not necessarily subject such stations to a more stringent standard than that applicable to commercial stations, which are not covered by the Act. In the exercise of its discretion, there is nothing to stop the Commission from imposing an equally or more demanding standard on commercial stations if it properly explains why such a standard is justified by the purposes of the Communications Act. For example, commercial stations may be better able to afford the costs of special programming. See *ante*, at 512, n. 19. What the Commission cannot do under our prior decisions is simply ignore the Rehabilitation Act in a licensing proceeding in which that Act is relevant.

Syllabus

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC. *v.* CALIFORNIA STATE COUNCIL OF CARPENTERS ET AL.

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

No. 81–334. Argued October 5, 1982—Decided February 22, 1983

Petitioner multiemployer association and respondents (collectively the Union) are parties to collective-bargaining agreements governing the terms and conditions of employment in construction-related industries in California. The Union filed suit in Federal District Court, alleging that petitioner and its members, in violation of the antitrust laws, coerced certain third parties and some of petitioner's members to enter into business relationships with nonunion contractors and subcontractors, and thus adversely affected the trade of certain unionized firms, thereby restraining the Union's business activities. Treble damages were sought under § 4 of the Clayton Act, which authorizes recovery of such damages by "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." The District Court dismissed the complaint as insufficient to allege a cause of action for treble damages under § 4. The Court of Appeals reversed.

Held: Based on the allegations of the complaint, the Union was not a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act. Pp. 526–546.

(a) Even though coercion allegedly directed by petitioner at third parties in order to restrain the trade of "certain" contractors and subcontractors may have been unlawful, it does not necessarily follow that the Union is a person injured by reason of a violation of the antitrust laws within the meaning of § 4. Pp. 526–529.

(b) The question whether the Union may recover for the alleged injury cannot be answered by literal reference to § 4's broad language. Instead, as was required in common-law damages litigation in 1890 when § 4's predecessor was enacted as § 7 of the Sherman Act, the question requires an evaluation of the Union's harm, the petitioner's alleged wrongdoing, and the relationship between them. Pp. 529–535.

(c) The Union's allegations of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the Union, are insufficient as a matter of law. Other relevant factors—the nature of the alleged injury to the Union, which is

neither a consumer nor a competitor in the market in which trade was allegedly restrained, the tenuous and speculative character of the causal relationship between the Union's alleged injury and the alleged restraint, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy—weigh heavily against judicial enforcement of the Union's antitrust claim. Pp. 535–546.

648 F. 2d 527, reversed.

STEVENS, J., delivered the opinion of the Court in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, *post*, p. 546.

James P. Watson argued the cause for petitioner. With him on the briefs was *George M. Cox*.

Victor J. Van Bourg argued the cause and filed a brief for respondents.*

JUSTICE STEVENS delivered the opinion of the Court.

This case arises out of a dispute between parties to a multiemployer collective-bargaining agreement. The plaintiff unions allege that, in violation of the antitrust laws, the multiemployer association and its members coerced certain third parties, as well as some of the association's members, to enter into business relationships with nonunion firms. This coercion, according to the complaint, adversely affected the trade of certain unionized firms and thereby restrained the

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*Briefs of *amici curiae* urging reversal were filed by *Solicitor General Lee*, *Assistant Attorney General Baxter*, *Deputy Solicitor General Wallace*, *Elinor Hadley Stillman*, *Robert B. Nicholson*, and *Robert J. Wiggers* for the United States; by *Peter G. Nash* for the Associated General Contractors of America, Inc.; and by *Edward B. Miller* and *Stephen A. Bokat* for the Chamber of Commerce of the United States.

J. Albert Woll, *Laurence Gold*, and *George Kaufmann* filed briefs for the American Federation of Labor and Congress of Industrial Organization as *amicus curiae* urging affirmance.

Kenneth E. Ristau, Jr., and *David A. Cathcart* filed a brief for the Pacific Maritime Association as *amicus curiae*.

business activities of the unions. The question presented is whether the complaint sufficiently alleges that the unions have been "injured in [their] business or property by reason of anything forbidden in the antitrust laws" and may therefore recover treble damages under § 4 of the Clayton Act. 38 Stat. 731, 15 U. S. C. § 15. Unlike the majority of the Court of Appeals for the Ninth Circuit, we agree with the District Court's conclusion that the complaint is insufficient.

I

The two named plaintiffs (the Union)—the California State Council of Carpenters and the Carpenters 46 Northern Counties Conference Board—are affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL–CIO. The Union represents more than 50,000 individuals employed by the defendants in the carpentry, drywall, piledriving, and related industries throughout the State of California. The Union's complaint is filed as a class action on behalf of numerous affiliated local unions and district councils. The defendants are Associated General Contractors of California, Inc. (Associated), a membership corporation composed of various building and construction contractors, approximately 250 members of Associated who are identified by name in an exhibit attached to the complaint, and 1,000 unidentified co-conspirators.

The Union and Associated, and their respective predecessors, have been parties to collective-bargaining agreements governing the terms and conditions of employment in construction-related industries in California for over 25 years. The wages and other benefits paid pursuant to these agreements amount to more than $750 million per year. In addition, approximately 3,000 contractors who are not members of Associated have entered into separate "memorandum agreements" with the Union, which bind them to the terms of the master collective-bargaining agreements between the Union and Associated. The amended complaint does not

state the number of nonsignatory employers or the number of nonunion employees who are active in the relevant market.

In paragraphs 23 and 24 of the amended complaint, the Union alleges the factual basis for five different damages claims.[1] Paragraph 23 alleges generally that the defendants conspired to abrogate and weaken the collective-bargaining relationship between the Union and the signatory employers. In seven subsections, paragraph 24 sets forth activities allegedly committed pursuant to the conspiracy. The most specific allegations relate to the labor relations between the parties.[2] The complaint's description of actions affecting nonparties is both brief and vague. It is alleged that defendants

> "(3) Advocated, encouraged, induced, and aided nonmembers of defendant Associated General Contractors of California, Inc. to refuse to enter into collective bargaining relationships with plaintiffs and each of them;
>
> "(4) Advocated, encouraged, induced, *coerced*, aided and encouraged owners of land and other letters of construction contracts to hire contractors and subcontractors who are not signatories to collective bargaining agreements with plaintiffs and each of them;

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[1] The facts set forth in paragraphs 23 and 24, initially alleged in support of the Union's federal antitrust claim, are realleged in each of the other claims for relief: breach of collective-bargaining agreements (¶¶ 29–31); intentional interference with contractual relations (¶¶ 32–35); intentional interference with business relationships (¶¶ 36–39); and violation of the California antitrust statute (¶¶ 40–43).

[2] For example, it is alleged that defendants breached their collective-bargaining agreements "by failing to pay agreed-upon wages, by failing to use the hiring hall, by failing to pay Trust Fund contributions, by failing to observe other terms and conditions of employment, and by generally weakening the good faith requirement of the collective bargaining agreements"; that defendants improperly changed their names and corporate status and made use of so-called "double breasted operations"; and that they encouraged nonmembers of Associated to refuse to enter into collective-bargaining agreements with the Union.

> "(5) Advocated, induced, *coerced*, encouraged, and aided members of Associated General Contractors of California, Inc., non-members of Associated General Contractors of California, Inc., and 'memorandum contractors' to enter into subcontracting agreements with subcontractors who are not signatories to any collective bargaining agreements with plaintiffs and each of them"; App. E to Pet. for Cert. 17–19 (emphasis added).[3]

Paragraph 25 describes the alleged "purpose and effect" of these activities: first, "to weaken, destroy, and restrain the trade of certain contractors," who were either members of Associated or memorandum contractors who had signed agreements with the Union; and second, to restrain "the free exercise of the business activities of plaintiffs and each of them."[4] Plaintiffs claim that these alleged antitrust viola-

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[3] The word "coerced" did not appear in the complaint as originally filed. Even as amended after the filing of motions to dismiss, the complaint does not allege that the defendants used any coercion to persuade nonmembers of Associated to refuse to enter into collective-bargaining agreements with the Union (¶ 24(3)). The complaint alleges neither the identity nor the number of landowners, general contractors, or others who were coerced into making contracts with nonunion firms.

[4] Paragraph 25, which describes the effect of the conspiracy, reads in full as follows:

"The purpose and effect of the above described activities, plan and conspiracy are oppressive, unreasonable, and illegal, and are in restraint of trade and an unlawful interference and restraint of the free exercise of the business activities of plaintiffs and each of them, all in violation of 15 U. S. C. Section 1. The purpose and effect of the above described activities, plan and conspiracy, in addition, are to weaken, destroy, and restrain the trade of certain contractors, both members of the Associated General Contractors of California, Inc. and non-members, who are 'memorandum contractors,' who have faithfully performed the terms and conditions set out in the master collective bargaining agreements described above. The effect of this restraint on trade is to further weaken and destroy plaintiffs in this matter. These activities are in restraint of the free exercise of plaintiffs' trade and an interference therein, all in violation of 15 U. S. C. Section 1." App. E to Pet. for Cert. 20–21.

tions caused them $25 million in damages.[5] The complaint does not identify any specific component of this damages claim.

After hearing "lengthy oral argument" and after receiving two sets of written briefs, one filed before and the second filed after this Court's decision in *Connell Construction Co.* v. *Plumbers & Steamfitters*, 421 U. S. 616 (1975), the District Court dismissed the complaint, including the federal antitrust claim. 404 F. Supp. 1067 (ND Cal. 1975).[6] The court observed that the complaint alleged "a rather vague, general conspiracy," and that the allegations "appear typical of disputes a union might have with an employer," which in the normal course are resolved by grievance and arbitration or by the NLRB. *Id.*, at 1069.[7] Without seeking to clarify or further amend the first amended complaint, the Union filed its notice of appeal on October 9, 1975.

Over five years later, on November 20, 1980, the Court of Appeals reversed the District Court's dismissal of the Union's federal antitrust claim. 648 F. 2d 527.[8] The ma-

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[5] Plaintiffs do not seek injunctive relief under § 16 of the Clayton Act, 15 U. S. C. § 26, and they do not ask us to consider whether they have standing to request such relief.

[6] An order dismissing the federal antitrust claim and the state-law claims was filed on August 4, 1975, and an amended order dismissing the entire complaint was entered on September 10, 1975. The District Court had initially stayed the breach-of-contract claim for 120 days pending grievance and arbitration procedures. On reconsideration it also dismissed the breach-of-contract claim, deciding that the suit had been prematurely filed.

[7] Addressing the federal antitrust claim, the District Court concluded: "The essence of plaintiffs' claim seems to be that defendants violated the antitrust laws insofar as they declined to enter into agreements with plaintiffs to deal only with subcontractors which were signatories to contracts with plaintiffs, precisely the type of agreement which subjected the union in *Connell* to antitrust liability." 404 F. Supp., at 1070.

The District Court reasoned that the employers' refusal to enter into such an agreement could not provide the basis for an antitrust claim.

[8] The Court of Appeals affirmed the dismissal of all other claims.

jority of the Court of Appeals disagreed with the District Court's characterization of the antitrust claim; it adopted a construction of the amended complaint which is somewhat broader than the allegations in the pleading itself.[9] The Court of Appeals held (1) that a Sherman Act violation—a group boycott—had been alleged, *id.*, at 531–532; (2) that the defendants' conduct was not within the antitrust exemption for labor activities, *id.*, at 532–536; and (3) that the plaintiffs had standing to recover damages for the injury to their own business activities occasioned by the defendants' "industry-wide boycott against all subcontractors with whom the Unions had signed agreements . . . ." *Id.*, at 537. In support of the Union's standing, the majority reasoned that the Union was within the area of the economy endangered by a breakdown of competitive conditions, not only because injury to the Union was a foreseeable consequence of the antitrust violation, but also because that injury was specifically intended by the defendants. The court noted that its conclusion was consistent with other cases holding that union orga-

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[9] The Court of Appeals majority read subparagraph (4) of paragraph 24, quoted *supra*, at 522, as though it alleged that the defendants had coerced landowners and other persons who let construction contracts "to hire *only* construction firms, primarily subcontractors, who had not signed with the Unions." 648 F. 2d, at 532 (emphasis added); see also *id.*, at 544 (denying petition for rehearing). The word "only" does not appear in the amended complaint, and it implies that the defendants' activities gave rise to a broader restraint than was actually alleged.

The majority read subparagraph (5) of paragraph 24 to charge that defendants had "coerced and aided each other to subcontract *only* with subcontractors who had not signed with the Unions." *Id.*, at 531 (emphasis added). Again using the word "only," which does not appear in the complaint itself, the majority characterized the defendants' alleged activities as "very similar to a concerted refusal to deal, or a group boycott." *Ibid.* It concluded that the allegations "present virtually the obverse of the situation described in *Connell*": the conspiracy, if successful, "would effectively lock union-signatory subcontractors out of a portion of the market for carpentry work." *Id.*, at 532.

nizational and representational activities constitute a form of business protected by the antitrust laws.[10]

II

As the case comes to us, we must assume that the Union can prove the facts alleged in its amended complaint. It is not, however, proper to assume that the Union can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged.[11]

We first note that the Union's most specific claims of injury involve matters that are not subject to review under the antitrust laws. The amended complaint alleges that the defendants have breached their collective-bargaining agreements in various ways, and that they have manipulated their corporate names and corporate status in order to divert business to nonunion divisions or firms that they actually control. Such deceptive diversion of business to the nonunion portion of a so-called "double-breasted" operation might constitute a breach of contract, an unfair labor practice, or perhaps even a

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[10] See *Tugboat, Inc.* v. *Mobile Towing Co.*, 534 F. 2d 1172, 1176–1177 (CA5 1976); *International Assn. of Heat & Frost Insulators* v. *United Contractors Assn.*, 483 F. 2d 384, 397–398 (CA3 1973).

Circuit Judge Sneed dissented. He first rejected the majority's characterization of the complaint, agreeing instead with the District Court. Second, assuming that the complaint alleged a boycott of certain employers, he concluded that neither the employees of a victim of the boycott nor their collective-bargaining representative had standing to assert the antitrust claim. Finally, he concluded that an injury that affected only the Union's organizational and representational activity was remediable under the labor laws rather than the antitrust laws.

The Court of Appeals denied the petition for rehearing and rehearing en banc on May 22, 1981. Accompanying the order was a statement by the majority rebutting the petitioners' assertion that the opinion rendered multiemployer bargaining units unlawful, and a dissent by Circuit Judge Sneed. 648 F. 2d, at 543, 545.

[11] The Union had an adequate opportunity to amend its pleading to add factual allegations demonstrating that the District Court's decision to dismiss the complaint was based on a misunderstanding of its antitrust claim.

common-law fraud or deceit, but in the context of the bargaining relationship between the parties to this litigation, such activities are plainly not subject to review under the federal antitrust laws.[12] Similarly, the charge that the defendants "advocated, encouraged, induced, and aided nonmembers . . . to refuse to enter into collective bargaining relationships" with the Union (¶ 24(3)) does not describe an antitrust violation.[13]

The Union's antitrust claims arise from alleged restraints caused by defendants in the market for construction contracting and subcontracting.[14] The complaint alleges that defendants "coerced"[15] two classes of persons: (1) landowners and

[12] In analyzing the antitrust allegations in the amended complaint, we therefore construe the references to "contractors and subcontractors who are not signatories to collective bargaining agreements" as referring to completely independent nonunion firms rather than to operations covertly controlled by one or more defendants.

[13] The Court of Appeals did not reverse the District Court's dismissal of the complaint with regard to these allegations. 648 F. 2d, at 531–532, 537, 540.

[14] See Brief for Respondents 37. There is no allegation of wrongful conduct directed at nonunion subcontracting firms. We therefore assume that, if any nonunion firms refused to bargain with the Union because of the conspiracy, they did so because they were rewarded with business they would not otherwise have obtained. Thus, nonunion firms could not be considered victims of the conspiracy; rather, they appear to have been its indirect beneficiaries. None are named either as defendants or as co-conspirators.

The amended complaint also does not allege any restraint on competition in the market for labor union services. Unlike the two cases involving union plaintiffs cited by the Court of Appeals, see n. 10, *supra*, in this case there is no claim that competition between rival unions has been injured or even that any rival unions exist.

[15] The complaint does not specify the nature of the "coercion." It does not, for example, allege that the defendants refused to deal with all members of either of the two classes of persons against whom coercion was applied. Indeed, it is highly improbable that the defendants—all of whom are signatories to union contracts—would refuse to deal with all of their customers and potential customers in an attempt to divert all of their business to nonunion firms.

others who let construction contracts, *i. e.*, the defendants' customers and potential customers; and (2) general contractors, *i. e.*, defendants' competitors and defendants themselves. Coercion against the members of both classes was designed to induce them to give some of their business—but not necessarily all of it—to nonunion firms.[16] Although the pleading does not allege that the coercive conduct increased the aggregate share of nonunion firms in the market, it does allege that defendants' activities weakened and restrained the trade "of certain contractors." See n. 4, *supra*. Thus, particular victims of coercion may have diverted particular contracts to nonunion firms and thereby caused certain unionized subcontractors to lose some business.

We think the Court of Appeals properly assumed that such coercion might violate the antitrust laws.[17] An agreement to restrain trade may be unlawful even though it does not entirely exclude its victims from the market. See *Associated Press* v. *United States*, 326 U. S. 1, 17 (1945). Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect. Cf. *Klors, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207, 210–214 (1959).[18]

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[16] There is no allegation that any person subjected to coercion was required to deal exclusively with nonunion firms.

[17] Had the District Court required the Union to describe the nature of the alleged coercion with particularity before ruling on the motion to dismiss, it might well have been evident that no violation of law had been alleged. In making the contrary assumption for purposes of our decision, we are perhaps stretching the rule of *Conley* v. *Gibson*, 355 U. S. 41, 47–48 (1957), too far. Certainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.

[18] Although we do not know what kind of coercion defendants allegedly employed, we assume for purposes of decision that it had a predatory "nature or character," *Klors, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S.,

Even though coercion directed by defendants at third parties in order to restrain the trade of "certain" contractors and subcontractors may have been unlawful, it does not, of course, necessarily follow that still another party—the Union—is a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act.

III

We first consider the language in the controlling statute. See *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). The class of persons who may maintain a private damages action under the antitrust laws is broadly defined in § 4 of the Clayton Act. 15 U. S. C. § 15. That section provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

A literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation. Some of our prior cases have paraphrased the statute in an equally expansive way.[19] But before we hold that the statute is as broad as its

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at 211, and that it would "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211, 213 (1951).

[19] In *Mandeville Island Farms, Inc.* v. *Sugar Co.*, 334 U. S. 219 (1948), the Court held that growers of sugar beets could maintain a treble-damages action against refiners who had allegedly conspired to fix the price that they would pay for the beets. Although previous price-fixing cases had involved agreements among sellers to fix sales prices, the Court readily concluded that the Act applied equally to an agreement among competing buyers to fix purchase prices. The Court stated:

words suggest, we must consider whether Congress intended such an open-ended meaning.

The critical statutory language was originally enacted in 1890 as § 7 of the Sherman Act. 26 Stat. 210. The legislative history of the section shows that Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices by the giant trusts and combinations that dominated certain interstate markets.[20] That history supports a broad construction of this remedial provision. A proper interpretation of the section cannot, however, ignore the larger context in which the entire statute was debated.

"The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *American Tobacco Co.* v. *United States*, 328 U. S. 781. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Id.*, at 236.

Similarly broad language was used in later cases holding that actions could be maintained by consumers, *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 337–338 (1979), by a foreign government, *Pfizer Inc.* v. *India*, 434 U. S. 308, 313–314 (1978), and by the direct victim of a boycott. *Blue Shield of Virginia* v. *McCready*, 457 U. S. 465, 472–473 (1982). In each of those cases, however, the actual plaintiff was directly harmed by the defendants' unlawful conduct. The paraphrasing of the language of § 4 in those opinions added nothing to the even broader language that the statute itself contains.

[20] See 21 Cong. Rec. 1767–1768, 2455–2456, 2459, 2615, 3147–3148 (1890). The original proposal, which merely allowed recovery of the amount of actual enhancement in price, was successively amended to authorize double-damages and then treble-damages recoveries, in order to provide otherwise remediless small consumers with an adequate incentive to bring suit. *Id.*, at 1765, 2455, 3145. The same purpose was served by the special venue provisions, the provision for the recovery of attorney's fees, and the elimination of any requirement that the amount in controversy exceed the jurisdictional threshold applicable in other federal litigation. See, *e. g.*, *id.*, at 2612, 3149. Moreover, changes in the description of the remedy extended the section's coverage beyond price fixing.

The repeated references to the common law in the debates that preceded the enactment of the Sherman Act make it clear that Congress intended the Act to be construed in the light of its common-law background.[21] Senator Sherman stated that the bill "does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government."[22] Thus our comments on the need for judicial interpretation of § 1 are equally applicable to § 7:

> "One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that 'every' contract that restrains trade is unlawful. But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law. . . .
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> "Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." *National Society of*

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[21] See, *e. g.*, *id.*, at 2456, 2459, 3151–3152.

[22] *Id.*, at 2456. Senator Sherman added: "The purpose of this bill is to enable the courts of the United States to apply the same remedies against combinations which injuriously affect the interests of the United States that have been applied in the several States to protect local interests." *Ibid.*; see also *id.*, at 2459, 3149, 3151–3152. Although Members of Congress referred particularly to common-law definitions of "monopoly" and "restraint of trade," they appear to have been generally aware that the statute would be construed by common-law courts in accordance with traditional canons. For example, at the beginning of the debate on the Sherman Act, one Senator cautioned his colleagues:

"A careful analysis of the terms of the bill is essential. We must know what it means, what its legal effect is, if we give force to it as it is written. . . . We must adopt, therefore, the known methods of the courts in determining what the bill means." *Id.*, at 1765.

Professional Engineers v. *United States*, 435 U. S. 679, 687–688 (1978) (footnotes omitted).

Just as the substantive content of the Sherman Act draws meaning from its common-law antecedents, so must we consider the contemporary legal context in which Congress acted when we try to ascertain the intended scope of the private remedy created by § 7.

In 1890, notwithstanding general language in many state constitutions providing in substance that "every wrong shall have a remedy,"[23] a number of judge-made rules circumscribed the availability of damages recoveries in both tort and contract litigation—doctrines such as foreseeability and proximate cause,[24] directness of injury,[25] certainty of dam-

[23] For example, the State Constitution of Illinois, adopted in 1870, provided: "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation . . . ." Art. II, § 19. Comparable provisions were found in the State Constitutions of Arkansas, Connecticut, Delaware, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Hampshire, Ohio, and Vermont. See generally F. Hough, American Constitutions (1871).

[24] One treatise stated: "Natural, proximate, and legal results are all that damages can be recovered for, even under a statute entitling one 'to recover *any* damage.'" 3 J. Lawson, Rights, Remedies, and Practice 1740 (1890). Another leading treatise explained:

"The chief and sufficient reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries with safety." T. Cooley, Law of Torts 73 (2d ed. 1888).

[25] In torts, a leading treatise on damages set forth the general principle that, "*[w]here the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote*, if the plaintiff sustains no other than a contract relation to such a third person, or is under contract obligation on his account, and the injury consists only in impairing the ability or inclination of such person to perform his part, or in increasing the plaintiff's expense or labor of fulfilling such contract, unless the wrongful act is willful for that purpose." Thus, A, who had agreed with a town to support all the town paupers for a specific period, in return for a fixed sum, had no cause of ac-

ages,[26] and privity of contract.[27] Although particular common-law limitations were not debated in Congress, the frequent references to common-law principles imply that Congress simply assumed that antitrust damages litigation would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation.[28]

The federal judges who first confronted the task of giving meaning to § 7 so understood the congressional intent. Thus in 1910 the Court of Appeals for the Third Circuit held as a matter of law that neither a creditor nor a stockholder of a corporation that was injured by a violation of the antitrust laws could recover treble damages under § 7. *Loeb* v. *East-*

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tion against S for assaulting and beating one of the paupers, thereby putting A to increased expense. Similarly, a purchaser under an output contract with a manufacturer had no right of recovery against a trespasser who stopped the company's machinery, and a creditor could not recover against a person who had forged a note, causing diminution in the dividends from an estate. 1 J. Sutherland, Law of Damages 55–56 (1882) (emphasis in original, footnote omitted).

Similarly, in contract, the common-law courts drew a distinction between direct and consequential damages; the latter had to be specifically included in the contract to be recoverable. See *id.*, at 74–93; 1 T. Sedgwick, Measure of Damages 203–244 (8th ed. 1891) (discussing the rule of *Hadley* v. *Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854)).

[26] The common law required the plaintiff to prove, with certainty, both the existence of damages and the causal connection between the wrong and the injury. No damages could be recovered for uncertain, conjectural, or speculative losses. See generally cases cited in F. Bohlen, Cases on the Law of Torts 292–312 (2d ed. 1925) (cases alleging emotional harm to plaintiff). Even if the injury was easily provable, there would be no recovery if the plaintiff could not sufficiently establish the causal connection. See 1 Sutherland, *supra* n. 25, at 94–126; 1 Sedgwick, *supra* n. 25, at 245–294.

[27] See, *e. g.*, *Winterbottom* v. *Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

[28] See n. 22, *supra*. The common law, of course, is an evolving body of law. We do not mean to intimate that the limitations on damages recoveries found in common-law actions in 1890 were intended to serve permanently as limits on Sherman Act recoveries. But legislators familiar with these limits could hardly have intended the language of § 7 to be taken literally.

man Kodak Co., 183 F. 704. The court explained that the plaintiff's injury as a stockholder was "indirect, remote, and consequential." *Id.*, at 709.[29] This holding was consistent with Justice Holmes' explanation of a similar construction of the remedial provision of the Interstate Commerce Act a few years later: "The general tendency of the law, in regard to damages at least, is not to go beyond the first step." *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 533 (1918).[30] When Congress enacted § 4 of the Clayton Act in 1914, and when it reenacted that section in 1955, 69 Stat. 282, it adopted the language of § 7 and presumably also the judicial gloss that avoided a simple literal interpretation.

As this Court has observed, the lower federal courts have been "virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 263, n. 14 (1972). Just last Term we stated:

> "An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but 'despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable.' [*Illi-*

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[29] See also *Ames* v. *American Telephone & Telegraph Co.*, 166 F. 820 (CC Mass. 1909). Applying "ordinary principles of law" to the general language of the statute, the court held that a stockholder had no legally cognizable antitrust claim against defendants for illegally acquiring the corporation, thereby rendering plaintiff's stock worthless. Plaintiff's claim was not distinguishable from any injury sustained by the company itself. Therefore, the court stated, a contrary result would "subject the defendant not merely to treble damages, but to sextuple damages, for the same unlawful act." *Id.*, at 823.

[30] The Court held in that case that the plaintiff shippers could recover damages from the defendant railroad for charging an excessive freight rate, even though they had been able to pass on the damage to their purchasers. Justice Holmes wrote that the law holds the defendant "liable if proximately the plaintiff has suffered a loss," but "does not attribute remote consequences to a defendant." 245 U. S., at 533–534.

> *nois Brick Co.* v. *Illinois*, 431 U. S.], at 760 (BRENNAN, J., dissenting). It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." *Blue Shield of Virginia* v. *McCready*, 457 U. S. 465, 476–477 (1982).

It is plain, therefore, that the question whether the Union may recover for the injury it allegedly suffered by reason of the defendants' coercion against certain third parties cannot be answered simply by reference to the broad language of § 4. Instead, as was required in common-law damages litigation in 1890, the question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.[31]

IV

There is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of "proximate cause,"[32] and the struggle of federal judges to

[31] The label "antitrust standing" has traditionally been applied to some of the elements of this inquiry. As commentators have observed, the focus of the doctrine of "antitrust standing" is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action. See Berger & Bernstein, An Analytical Framework for Antitrust Standing, 86 Yale L. J. 809, 813, n. 11 (1977); Pollock, Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine, 32 A. B. A. Antitrust L. J. 5, 6–7 (1966).

[32] In his comment, *Mahoney v. Beatman:* A Study in Proximate Cause, 39 Yale L. J. 532, 533 (1930), Leon Green noted: "Legal theory is too rich in content not to afford alternative ways, and frequently several of them, for stating an acceptable judgment." Earlier, in his Rationale of Proximate Cause 135–136 (1927) (footnote omitted), Green had written:

"'Cause,' although irreducible in its concept, could not escape the ruffles and decorations so generously bestowed: remote, proximate, direct, immediate, adequate, efficient, operative, inducing, moving, active, real, effec-

articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages.[33] It is common ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing. In both situations the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case.[34] In-

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tive, decisive, supervening, primary, original, contributory, ultimate, concurrent, causa causans, legal, responsible, dominating, natural, probable, and others. The difficulty now is in getting any one to believe that so simple a creature could have been so extravagantly garbed."

[33] Some courts have focused on the directness of the injury, *e. g.*, *Loeb* v. *Eastman Kodak Co.*, 183 F. 704, 709 (CA3 1910); *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F. 2d 678, 679 (CA2 1955), cert. denied, 350 U. S. 936 (1956); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F. 2d 383, 394–395 (CA6 1962), cert. denied, 372 U. S. 907 (1963). Others have applied the requirement that the plaintiff must be in the "target area" of the antitrust conspiracy, that is, the area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. *E. g.*, *Pan-Islamic Trade Corp.* v. *Exxon Corp.*, 632 F. 2d 539, 546–547 (CA5 1980); *Engine Specialties, Inc.* v. *Bombardier Ltd.*, 605 F. 2d 1, 17–18 (CA1 1979); *Calderone Enterprises Corp.* v. *United Artists Theater Circuit, Inc.*, 454 F. 2d 1292, 1292–1295 (CA2 1971). Another Court of Appeals has asked whether the injury is "arguably within the zone of interests protected by the antitrust laws." *Malamud* v. *Sinclair Oil Corp.*, 521 F. 2d 1142, 1151–1152 (CA6 1975). See generally Berger & Bernstein, *supra* n. 31.

As a number of commentators have observed, these labels may lead to contradictory and inconsistent results. See Berger & Bernstein, *supra* n. 31, at 835, 843; Handler, The Shift From Substantive to Procedural Innovations in Antitrust Suits, 71 Colum. L. Rev. 1, 27–31 (1971); Sherman, Antitrust Standing: From *Loeb* to *Malamud*, 51 N. Y. U. L. Rev. 374, 407 (1976) ("it is simply not possible to fashion an across-the-board and easily applied standing rule which can serve as a tool of decision for every case"). In our view, courts should analyze each situation in light of the factors set forth in the text *infra*.

[34] Cf. *Blue Shield of Virginia* v. *McCready*, 457 U. S., at 477–478, n. 13 (discussing elusiveness of test of proximate cause); *Palsgraf* v. *Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928); *id.*, at 351–352, 162 N. E., at 103 (Andrews, J., dissenting) ("What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many consider-

stead, previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.

The factors that favor judicial recognition of the Union's antitrust claim are easily stated. The complaint does allege a causal connection between an antitrust violation and harm to the Union and further alleges that the defendants intended to cause that harm. As we have indicated, however, the mere fact that the claim is literally encompassed by the Clayton Act does not end the inquiry. We are also satisfied that an allegation of improper motive, although it may support a plaintiff's damages claim under § 4,[35] is not a panacea that will enable any complaint to withstand a motion to dismiss.[36] Indeed, in *McCready*, we specifically held: "The availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators." 457 U. S., at 479.[37]

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ations . . . . What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point").

[35] It is well settled that a defendant's specific intent may sometimes be relevant to the question whether a violation of law has been alleged. See *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 522 (1948). Moreover, there no doubt are cases in which such an allegation would adequately support a plaintiff's claim under § 4. Cf. Handler, *supra* n. 33, at 30 (specific intent of defendant to cause injury to a particular class of persons should "ordinarily be dispositive" in creating standing to sue); Lytle & Purdue, Antitrust Target Area Under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation, 25 Am. U. L. Rev. 795, 814–816 (1976) (suggesting that standing in a group boycott situation should be based on the purpose of the boycott).

[36] See Sherman, *supra* n. 33, at 389–391, citing *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F. 2d 183, 189 (CA2 1970), cert. denied, 401 U. S. 923 (1971).

[37] In *McCready* we rejected the contention that, because there was no specific intent to harm the plaintiff, her injury was thereby rendered remote. This case presents a different question, but in neither case is the motive allegation of controlling importance.

A number of other factors may be controlling. In this case it is appropriate to focus on the nature of the plaintiff's alleged injury. As the legislative history shows, the Sherman Act was enacted to assure customers the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market.[38] Last Term in *Blue Shield of Virginia* v. *McCready*, *supra*, we identified the relevance of this central policy to a determination of the plaintiff's right to maintain an action under § 4. McCready alleged that she was a consumer of psychotherapeutic services and that she had been injured by the defendants' conspiracy to restrain competition in the market for such services.[39] The Court stressed the fact that "McCready's injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws." 457 U. S., at 483, citing *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 487–489 (1977). After noting that her injury "was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market," 457 U. S., at 484, the Court concluded that such an injury "falls squarely within the area of congressional concern." *Ibid.*

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[38] See *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster").

[39] McCready, a Blue Shield subscriber, alleged that Blue Shield and the Neuropsychiatric Society of Virginia, Inc., had unlawfully conspired to restrain competition in the market for psychotherapeutic services by providing insurance coverage only for consumers who patronized psychiatrists, not psychologists. McCready obtained services from a psychologist and was denied reimbursement.

In this case, however, the Union was neither a consumer nor a competitor in the market in which trade was restrained.[40] It is not clear whether the Union's interests would be served or disserved by enhanced competition in the market. As a general matter, a union's primary goal is to enhance the earnings and improve the working conditions of its membership; that goal is not necessarily served, and indeed may actually be harmed, by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals.[41] At common law—as well as in the early days of administration of the federal antitrust laws—the collective activities of labor unions were regarded as a form of conspiracy in restraint of trade.[42] Federal policy has since developed not only a broad labor exemption from the antitrust laws,[43] but also a separate body of

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[40] Moreover, it has not even alleged any marketwide restraint of trade. The allegedly unlawful conduct involves predatory behavior directed at "certain" parties, rather than a claim that output has been curtailed or prices enhanced throughout an entire competitive market.

[41] In *Mine Workers* v. *Pennington*, 381 U. S. 657, 664 (1965), the Court recognized that wages lie at the heart of the subjects of mandatory collective bargaining, and that "the elimination of competition based on wages among the employers in the bargaining unit," which directly benefits the union, also has an effect on competition in the product market. See generally Leslie, Principles of Labor Antitrust, 66 Va. L. Rev. 1183, 1185–1188 (1980); Winter, Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities, 73 Yale L. J. 14, 17–20, 28–30 (1963).

[42] See, *e. g.*, *Coronado Coal Co.* v. *Mine Workers*, 268 U. S. 295, 310 (1925) (applying Sherman Act to alleged conspiracy by unions involved in labor dispute to restrain interstate trade in coal); *Loewe* v. *Lawlor*, 208 U. S. 274 (1908) (applying Sherman Act to boycott by labor organization seeking to unionize plaintiff's hat factory); Cox, Labor and the Antitrust Laws—A Preliminary Analysis, 104 U. Pa. L. Rev. 252, 256–262 (1955); Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. Chi. L. Rev. 659, 661–666 (1965); Winter, *supra* n. 41, at 30–38.

[43] See 29 U. S. C. § 52 (statutory labor exemption); *Mine Workers* v. *Pennington*, *supra*; *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676 (1965) (nonstatutory exemption). In this case we need not reach petitioner's con-

labor law specifically designed to protect and encourage the organizational and representational activities of labor unions. Set against this background, a union, in its capacity as bargaining representative, will frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains. In each case its alleged injury must be analyzed to determine whether it is of the type that the antitrust statute was intended to forestall. See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, *supra*, at 487–488. In this case, particularly in light of the longstanding collective-bargaining relationship between the parties, the Union's labor-market interests seem to predominate, and the *Brunswick* test is not satisfied.

An additional factor is the directness or indirectness of the asserted injury. In this case, the chain of causation between the Union's injury and the alleged restraint in the market for construction subcontracts contains several somewhat vaguely defined links. According to the complaint, defendants applied coercion against certain landowners and other contracting parties in order to cause them to divert business from certain union contractors to nonunion contractors.[44] As a re-

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tentions that the alleged activities are within the statutory and nonstatutory labor exemptions.

[44] There is a parallel between these allegations and the claim in *Connell Construction Co.* v. *Plumbers & Steamfitters*, 421 U. S. 616 (1975). The plaintiff in that case, a general building contractor, was coerced by the defendant union into signing an agreement not to deal with nonunion subcontractors. Similarly, in the *McCready* case, the plaintiff was the direct victim of unlawful coercion. As the Court noted, "McCready did not yield to Blue Shield's coercive pressure, and bore Blue Shield's sanction in the form of an increase in the net cost of her psychologist's services." 457 U. S., at 483. Her status was thus comparable to that of a contracting or subcontracting firm that refused to yield to the defendants' coercive practices and therefore suffered whatever sanction that coercion imposed. Like McCready, and like Connell Construction Co., such a firm could maintain an action against the defendants. In contrast, the Union is neither a participant in the market for construction contracts or subcontracts nor a direct victim of the defendants' coercive practices. We therefore need not

sult, the Union's complaint alleges, the Union suffered unspecified injuries in its "business activities."[45] It is obvious that any such injuries were only an indirect result of whatever harm may have been suffered by "certain" construction contractors and subcontractors.[46]

If either these firms, or the immediate victims of coercion by defendants, have been injured by an antitrust violation, their injuries would be direct and, as we held in *McCready*, they would have a right to maintain their own treble-damages actions against the defendants. An action on their behalf would encounter none of the conceptual difficulties that

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decide whether the direct victim of a boycott, who suffers a type of injury unrelated to antitrust policy, may recover damages when the ultimate purpose of the boycott is to restrain competition in the relevant economic market.

[45] Its brief merely echoes the Court of Appeals' description of its allegations: "the Unions have been injured in their business, i. e., organizing carpentry industry employees, negotiating and policing collective bargaining agreements, and securing jobs for their members." Brief for Respondents 25–26.

[46] Because of the absence of specific allegations, we can only speculate about the specific components of the Union's claim. If the Union asserts that its attempts to organize previously nonunion firms have been frustrated because nonunion firms wish to continue to obtain business from those subjected to coercion by the defendants, its harm stems most directly from the conduct of persons who are not victims of the conspiracy. See n. 14, *supra*. If the Union claims that dues payments were adversely affected because employees had less incentive to join the Union in light of expanding nonunion job opportunities, its damage is more remote than the harm allegedly suffered by unionized subcontractors. The same is true if the Union contends that revenues from dues payments declined because its members lost jobs or wages because their unionized employers lost business. That harm, moreover, is even more indirect than the already indirect injury to its members, yet a number of decisions have denied standing to employees with merely derivative injuries. See, *e. g.*, *Pitchford* v. *PEPI, Inc.*, 531 F. 2d 92, 97 (CA3), cert. denied, 426 U. S. 935 (1976); *Contreras* v. *Grower Shipper Vegetable Assn.*, 484 F. 2d 1346 (CA9 1973), cert. denied, 415 U. S. 932 (1974); *Reibert* v. *Atlantic Richfield Co.*, 471 F. 2d 727 (CA10), cert. denied, 411 U. S. 938 (1973). But see *Nichols* v. *Spencer Int'l Press, Inc.*, 371 F. 2d 332, 334 (CA7 1967).

encumber the Union's claim.[47] The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the Union to perform the office of a private attorney general.[48] Denying the Union a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied.

Partly because it is indirect, and partly because the alleged effects on the Union may have been produced by independent factors, the Union's damages claim is also highly speculative. There is, for example, no allegation that any collective-bargaining agreement was terminated as a result of the coercion, no allegation that the aggregate share of the contracting market controlled by union firms has diminished, no allegation that the number of employed union members has declined, and no allegation that the Union's revenues in the form of dues or initiation fees have decreased. Moreover, although coercion against certain firms is alleged, there is no assertion that any such firm was prevented from doing business with any union firms or that any firm or group of firms was subjected to a complete boycott. See nn. 9, 15, and 16, *supra*.

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[47] Indeed, if there is substance to the Union's claim, it is difficult to understand why these direct victims of the conspiracy have not asserted any claim in their own right. The Union's suggested explanations of this fact tend to shed doubt on the proposition that these "victims" were actually harmed at all.

"Many unionized firms will respond to the alleged boycott . . . by setting up double-breasted operations or shifting more of their resources to the non-unionized part of their operations when double-breasted operations already exist. In this manner, unionized subcontractors can avoid losing any business and, as a result, these subcontractors will *not* 'possess the classic economic incentive to file suit.' Alternatively, unionized subcontractors may simply not renew the collective bargaining agreement when it expires." Brief for Respondents 49 (citation omitted).

[48] Cf. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 739–748 (1975) (purchaser-seller limitation on actions under § 10(b) of Securities Exchange Act of 1934).

Other than the alleged injuries flowing from breaches of the collective-bargaining agreements—injuries that would be remediable under other laws—nothing but speculation informs the Union's claim of injury by reason of the alleged unlawful coercion. Yet, as we have recently reiterated, it is appropriate for § 4 purposes "to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm." *Blue Shield of Virginia* v. *McCready*, 457 U. S., at 475, n. 11, citing *Hawaii* v. *Standard Oil Co.*, 405 U. S., at 262–263, n. 14.[49]

The indirectness of the alleged injury also implicates the strong interest, identified in our prior cases, in keeping the scope of complex antitrust trials within judicially manageable limits.[50] These cases have stressed the importance of avoid-

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[49] We expressly noted in *McCready:*

"[O]ur cautious approach to speculative, abstract, or impractical damages theories has no application to McCready's suit. The nature of her injury is easily stated: As the result of an unlawful boycott, Blue Shield failed to pay the cost she incurred for the services of a psychologist. Her damages were fixed by the plan contract and, as the Court of Appeals observed, they could be 'ascertained to the penny.'" 457 U. S., at 475–476, n. 11.

[50] This interest was also identified in the legislative debates preceding the enactment of the Sherman Act. Speaking in opposition to a proposed amendment that might have complicated the procedures in private actions, Senator Edmunds said:

"Therefore I say as to the suggested amendment of my friend from Mississippi—and I repeat it in all earnestness—that if I were a lobbyist and wanted to entangle this business, I should provide that everybody might sue everybody else in one common suit and have a regular *pot-pourri* of the affair, as his amendment proposes, and leave it to the lawyers of the trust to have an interminable litigation in respect of the proper parties, whether their interests were common or diverse or how they were affected, and take twenty years in order to get a result as to a single one of them. The Judiciary Committee did not think it wise to do that sort of thing, because we were in earnest about the business, as I know my friend is." 21 Cong. Rec. 3148 (1890).

See also *id.*, at 3149 (remarks of Senator Morgan opposing same amendment: "There is as much harm in trying to do too much as there is in not

ing either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other. Thus, in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968), we refused to allow the defendants to discount the plaintiffs' damages claim to the extent that overcharges had been passed on to the plaintiffs' customers. We noted that any attempt to ascertain damages with such precision "would often require additional long and complicated proceedings involving massive evidence and complicated theories." *Id.*, at 493. In *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977), we held that treble damages could not be recovered by indirect purchasers of concrete blocks who had paid an enhanced price because their suppliers had been victimized by a price-fixing conspiracy. We observed that potential plaintiffs at each level in the distribution chain would be in a position to assert conflicting claims to a common fund, the amount of the alleged overcharge, thereby creating the danger of multiple liability for the fund and prejudice to absent plaintiffs.

> "Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness." *Id.*, at 737–738.

The same concerns should guide us in determining whether the Union is a proper plaintiff under § 4 of the Clayton Act.[51]

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trying to do anything, and I think we have stopped at about the proper line in this bill, and I shall support it just as it is").

[51] We pointed out in *McCready*, 457 U. S., at 475, n. 11:

"If there is a subordinate theme to our opinions in *Hawaii* and *Illinois Brick*, it is that the feasibility and consequences of implementing particular

As the Court wrote in *Illinois Brick*, massive and complex damages litigation not only burdens the courts, but also undermines the effectiveness of treble-damages suits. *Id.*, at 745. In this case, if the Union's complaint asserts a claim for damages under § 4, the District Court would face problems of identifying damages and apportioning them among directly victimized contractors and subcontractors and indirectly affected employees and union entities. It would be necessary to determine to what extent the coerced firms diverted business away from union subcontractors, and then to what extent those subcontractors absorbed the damage to their businesses or passed it on to employees by reducing the work force or cutting hours or wages. In turn it would be necessary to ascertain the extent to which the affected employees absorbed their losses and continued to pay union dues.[52]

We conclude, therefore, that the Union's allegations of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the Union, are insufficient as a matter of law. Other relevant factors—the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy—weigh heavily against judicial enforcement of the Union's antitrust claim. Accordingly, we hold that, based on the allegations of this complaint, the District

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damages theories may, in certain limited circumstances, be considered in determining who is entitled to prosecute an action brought under § 4. . . . Thus we recognized that the task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system."

[52] Although the policy against duplicative recoveries may not apply to the other type of harm asserted in the Union's brief—reduction in its ability to persuade nonunion contractors to enter into union agreements—the remote and obviously speculative character of that harm is plainly sufficient to place it beyond the reach of § 4. See n. 46, *supra*.

Court was correct in concluding that the Union is not a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act. The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE MARSHALL, dissenting.

Section 4 of the Clayton Act provides that a damages action may be brought under the antitrust laws by "*[a]ny person* who [has been] injured in his business or property by reason of *anything* forbidden in the antitrust laws." 15 U. S. C. § 15 (emphasis added). Despite the absence of an "articulable consideration of statutory policy" supporting the denial of standing, *Blue Shield of Virginia* v. *McCready*, 457 U. S. 465, 473 (1982), the Court today holds that the intended victim of a restraint of trade does not constitute a "person who [has been] injured in his business or property by reason of anything forbidden in the antitrust laws." Because I believe that this decision imposes an unwarranted judge-made limitation on the antitrust laws, I respectfully dissent.

Congress' adoption of the broad language of § 4 was not accidental. As this Court observed in *Pfizer Inc.* v. *India*, 434 U. S. 308, 312 (1978): "Congress used the phrase 'any person' intending it to have its naturally broad and inclusive meaning. There was no mention in the floor debates of any more restrictive definition." Only last Term we emphasized that the all-encompassing language of § 4 "reflects Congress' 'expansive remedial purpose' in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations." *Blue Shield of Virginia* v. *McCready*, *supra*, at 472, quoting *Pfizer Inc.* v. *India*, *supra*, at 313–314.

In keeping with the inclusive language and remedial purposes of § 4, this Court has "refused to engraft artificial limi-

tations on the § 4 remedy." *Blue Shield of Virginia* v. *McCready*, *supra*, at 472 (footnote omitted).[1] Thus, for example, in *Pfizer Inc.* v. *India*, the Court held that the statutory phrase "any person" is broad enough to encompass a foreign sovereign. In *Reiter* v. *Sonotone Corp.*, 442 U. S. 330 (1979), the Court likewise adopted an expansive reading of the statutory term "property," ruling that a consumer who pays a higher price as a result of a price-fixing conspiracy has sustained an injury to his "property" and therefore has standing to sue under § 4.

The plaintiff unions fit comfortably within the language of § 4. The complaint alleges that plaintiffs suffered injury as a result of a restraint of trade that was "designed to weaken and destroy plaintiffs and each of them." Complaint ¶ 26. The Court does not suggest that a union is not a "person" within the meaning of § 4, or that plaintiffs cannot prove injury to their "business or property." Moreover, it would require a strained reading of § 4 to conclude that a party that an antitrust violation was aimed at cannot prove that it suffered injury "by reason of" an antitrust violation.

Far from supporting the Court's conclusion, *ante*, at 531–533, the common-law background of the antitrust laws highlights the anomaly of denying a remedy to the intended victim of unlawful conduct. Since antitrust violations are essentially "tortious acts," *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251, 264 (1946),[2] the most apt analogy is to the common law of torts. Although many legal battles have been fought over the extent of tort liability for remote conse-

[1] Cf. *Radovich* v. *National Football League*, 352 U. S. 445, 453–454 (1957) (given Congress' determination that the activities prohibited by the antitrust laws are "injurious to the public" and its creation of "sanctions allowing private enforcement of the antitrust laws by an aggrieved party," "this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws").

[2] See *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F. 2d 358, 363 (CA9 1955) (antitrust action is basically a suit to recover "for a tort").

quences of *negligent* conduct, it has always been assumed that the victim of an *intentional* tort can recover from the tortfeasor if he proves that the tortious conduct was a cause-in-fact of his injuries. An inquiry into proximate cause has traditionally been deemed unnecessary in suits against intentional tortfeasors.[3] For example, if one party makes false representations to another, intending them to be communicated to a third party and acted upon to his detriment, the third party can bring an action for misrepresentation against the originator of the false information if he suffers injury as a result.[4] Indeed, in many situations the common law holds

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[3] See Restatement of Torts § 279 (1934) ("If the actor's conduct is intended by him to bring about bodily harm to another which the actor is not privileged to inflict, it is the legal cause of any bodily harm of the type intended by him which it is a substantial factor in bringing about"); *id.*, Comment *c* ("There are no rules which relieve the actor from liability because of the manner in which his conduct has resulted in the injury such as there are where the liability of a negligent actor is in question. Therefore, the fact that the actor's conduct becomes effective in harm only through the intervention of new and independent forces for which the actor is not responsible is of no importance") (citations omitted); *id.*, § 280 (same rule applies to conduct intended to cause harm other than bodily harm); *Seidel* v. *Greenberg*, 108 N. J. Super. 248, 261–269, 260 A. 2d 863, 871–876 (1969); *Derosier* v. *New England Tel. & Tel. Co.*, 81 N. H. 451, 464, 130 A. 145, 152 (1925) ("For an intended injury the law is astute to discover even very remote causation").

The Court's reliance on Sutherland's treatise on damages is misplaced. *Ante*, at 532–533, n. 25. Although Sutherland stated as a general proposition that a defendant is not liable to a plaintiff for injuries suffered as a result of the defendant's conduct with respect to a third party, he distinguished cases in which "the wrongful act is willful for that purpose," by which he presumably meant cases in which the defendant intended to injure the plaintiff. 1 J. Sutherland, Law of Damages 55 (1882) (footnote omitted). In the examples given by Sutherland and cited by the Court, there is no suggestion that the defendants intended to inflict injury upon the plaintiffs.

[4] See, *e. g.*, *Watson* v. *Crandall*, 7 Mo. App. 233 (1879), aff'd, 78 Mo. 583 (1883); *Campbell* v. *Gooch*, 131 Kan. 456, 292 P. 752 (1930). See generally Prosser, Misrepresentation and Third Persons, 19 Vand. L. Rev. 231, 240–242 (1966).

an intentional tortfeasor liable even for the unforeseeable consequences of his conduct.[5] I am not aware of any cases exonerating an intentional tortfeasor from responsibility for the intended consequences of his actions merely because he inflicted harm upon his victim indirectly rather than directly.

This case does not implicate the sort of "articulable consideration of statutory policy" which we have deemed necessary to deny standing to a party encompassed by the language of § 4. *Blue Shield of Virginia* v. *McCready*, 457 U. S., at 473. In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1977), we denied standing to parties that suffered injury because an illegal acquisition prevented them from reaping profits that they would have reaped had the acquired firms been permitted to fail. We reasoned that permitting recovery for "the profits [plaintiffs] would have realized had competition been reduced" would be "inimical" to the purposes of the antitrust laws, *id.*, at 488, since plaintiffs' injuries did not "reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation," *id.*, at 489. This consideration of statutory policy is not applicable here, for plaintiffs allege that they suffered injury as a result of the defendants' efforts to coerce and induce letters of construction contracts and others to deal with nonunion carpentry firms solely because of their nonunion status. If plaintiffs prove their allegations, they will prove that they suffered harm attributable to the anticompetitive consequences of the defendants' restraint of trade.

Nor does the present case implicate the consideration of statutory policy underlying this Court's decisions in *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977), and *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251 (1972). Critical to the denial of standing in those cases was the risk of duplicative recovery that would have been created by affording the plain-

[5] See, *e. g.*, W. Prosser, Law of Torts 32–33 (4th ed. 1971) (doctrine of transferred intent); *id.*, at 67–68 (trespasser is responsible for unforeseeable consequences of his trespass).

tiffs standing.[6] In *Illinois Brick* the Court held that an indirect purchaser has no standing to sue a seller on the theory that overcharges paid to the seller by a direct purchaser were passed on to the indirect purchaser. 431 U. S., at 730–731. If the Court had held in *Illinois Brick* that the indirect purchaser has standing, sellers would have faced the prospect of two treble-damages actions based on the same overcharges. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968), had established that a direct purchaser can sue a seller for the entire amount of the seller's overcharges, and that the seller cannot assert as a defense that the direct purchaser passed the overcharges through to its customers (the indirect purchasers). Similarly, in *Hawaii* v. *Standard Oil Co.*, where the State of Hawaii sought to recover for financial harm allegedly suffered by the general economy of the State, the Court denied standing because "[a] large and ultimately indeterminable part of the injury to the 'general economy,' as it is measured by economists, is no more than a reflection of injuries to the 'business or property' of consumers, for which they may recover themselves under § 4." 405 U. S., at 264.[7]

There is no risk of double recovery here. The plaintiff unions seek recovery for injuries distinct from those that other parties may have suffered. One such distinct injury

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[6] See *Blue Shield of Virginia* v. *McCready*, 457 U. S. 465, 474–475 (1982) (noting that *Illinois Brick* and *Hawaii* v. *Standard Oil Co.* "focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws").

[7] Significantly, the risk of duplicative recovery that the Court relied on in both *Illinois Brick* and *Hawaii* v. *Standard Oil Co.* is not simply a judicially invented reason for restricting the broad scope of § 4. Permitting two recoveries based on the very same injuries would be contrary to the basic statutory scheme governing damages actions, for the result would be to subject antitrust defendants to sextuple-damages awards rather than the treble-damages awards that Congress contemplated. See 2 P. Areeda & D. Turner, Antitrust Law § 337d (1978).

plaintiffs may have suffered is a decrease in union dues resulting from a reduction in work available to union members. In addition to regular dues, it is not uncommon for employees to pay periodic dues representing a percentage of their wages. See R. Gorman, Basic Text on Labor Law 650 (1976).[8] If union members lost work as a result of the alleged restraint of trade, their wages and thus the dues collected by the plaintiff unions may have been reduced.

Any recovery of lost dues by the plaintiff unions would not duplicate recoveries that might be obtained by either unionized carpentry firms or employees of those firms. A recovery of lost dues by a union would not duplicate a recovery for lost profits that might be obtained by a firm for which union members worked, for union dues are not an element of a firm's profits. Nor would a recovery of lost dues by a union duplicate recoveries of lost wages that employees might obtain. Although periodic union dues are based on a percentage of wages, there would be no double recovery because union dues would be subtracted from lost wages in calculating the employees' damages. The *Hanover Shoe* rule barring the assertion of a "pass-through" defense would not prevent subtraction of union dues from wages in determining the employees' damages. The *Hanover Shoe* rule was designed to avoid the "additional long and complicated proceedings involving massive evidence and complicated theories" that would be required to determine the extent to which price overcharges were passed through to an indirect purchaser. 392 U. S., at 493. In sharp contrast, where union dues are a percentage of wages, there is no difficulty in determining the amount of dues that a union lost as a result of a reduction in the wages earned by union members.

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[8] Since we have only the pleadings before us, we do not know how the plaintiff unions collect their dues. However, plaintiffs are entitled to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) if there is any set of facts that, if proved at trial, would entitle them to recover.

I recognize that it may not be easy to ascertain to what extent any reduction in union dues was attributable to the defendants' conduct. But our cases make it clear that "[i]f there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what the evidence proves is for the jury." *Perkins* v. *Standard Oil Co.*, 395 U. S. 642, 648 (1969) (reinstating jury verdict based on injury indirectly caused by price discrimination in violation of the Robinson-Patman Act). Insofar as the amount of damages is concerned, an antitrust plaintiff need only provide a reasonable estimate of the damages stemming from an antitrust violation. See *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S., at 266. "'Difficulty of ascertainment is no longer confused with right of recovery,'" *id.*, at 265, quoting *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 566 (1931), and "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created," 327 U. S., at 265.

Any concern the Court may have that the plaintiffs cannot prove their case does not justify throwing them out of court solely on the basis of the pleadings. If, during discovery, it becomes apparent that plaintiffs cannot establish a reasonable inference of causation or cannot provide evidence supporting a rational estimate of damages, they will be vulnerable to a motion for summary judgment. Dismissal for failure to state a claim is too crude a procedural device to be used to vindicate the "interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits." *Ante*, at 543.

Syllabus

SOUTH DAKOTA *v.* NEVILLE

CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

No. 81–1453. Argued December 8, 1982—Decided February 22, 1983

A South Dakota statute permits a person suspected of driving while intoxicated to refuse to submit to a blood-alcohol test, but authorizes revocation of the driver's license of a person so refusing the test and permits such refusal to be used against him at trial. When respondent was arrested by police officers in South Dakota for driving while intoxicated, the officers asked him to submit to a blood-alcohol test and warned him that he could lose his license if he refused but did not warn him that the refusal could be used against him at trial. Respondent refused to take the test. The South Dakota trial court granted respondent's motion to suppress all evidence of his refusal to take the blood-alcohol test. The South Dakota Supreme Court affirmed on the ground that the statute allowing introduction of evidence of the refusal violated the privilege against self-incrimination.

Held:

1. The admission into evidence of a defendant's refusal to submit to a blood-alcohol test does not offend his Fifth Amendment right against self-incrimination. A refusal to take such a test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination. The offer of taking the test is clearly legitimate and becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice. Pp. 558–564.

2. It would not be fundamentally unfair in violation of due process to use respondent's refusal to take the blood-alcohol test as evidence of guilt, even though the police failed to warn him that the refusal could be used against him at trial. *Doyle* v. *Ohio*, 426 U. S. 610, distinguished. Such failure to warn was not the sort of implicit promise to forgo use of evidence that would unfairly "trick" respondent if the evidence were later offered against him at trial. Pp. 564–566.

312 N. W. 2d 723, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 566.

Mark V. Meierhenry, Attorney General of South Dakota, argued the cause for petitioner. With him on the briefs was *Mark Smith*, Assistant Attorney General.

David R. Gienapp argued the cause and filed a brief for respondent.*

JUSTICE O'CONNOR delivered the opinion of the Court.

Schmerber v. *California*, 384 U. S. 757 (1966), held that a State could force a defendant to submit to a blood-alcohol test without violating the defendant's Fifth Amendment right against self-incrimination. We now address a question left open in *Schmerber*, *supra*, at 765, n. 9, and hold that the admission into evidence of a defendant's refusal to submit to such a test likewise does not offend the right against self-incrimination.

I

Two Madison, South Dakota, police officers stopped respondent's car after they saw him fail to stop at a stop sign. The officers asked respondent for his driver's license and asked him to get out of the car. As he left the car, respondent staggered and fell against the car to support himself.

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*Briefs of *amici curiae* urging reversal were filed for the State of Indiana et al. by *Linley E. Pearson*, Attorney General of Indiana, and *Palmer K. Ward*, Deputy Attorney General, by *Donald M. Bouton*, Acting Attorney General of the Virgin Islands, and by the Attorneys General for their respective States as follows: *Charles A. Graddick* of Alabama, *Wilson L. Condon*, of Alaska, *Jim Smith* of Florida, *Tany S. Hong* of Hawaii, *Tyrone C. Fahner* of Illinois, *Robert T. Stephan* of Kansas, *William J. Guste, Jr.*, of Louisiana, *James E. Tierney* of Maine, *Warren R. Spannaus* of Minnesota, *John D. Ashcroft* of Missouri, *Michael T. Greeley* of Montana, *Robert Abrams* of New York, *Rufus L. Edmisten* of North Carolina, *William J. Brown* of Ohio, *David Frohnmayer* of Oregon, *LeRoy S. Zimmerman* of Pennsylvania, *Daniel R. McLeod* of South Carolina, *William M. Leech, Jr.*, of Tennessee, *John J. Easton* of Vermont, *Chauncey H. Browning* of West Virginia, *Bronson C. La Follette* of Wisconsin, and *Steven F. Freudenthal* of Wyoming; for Mothers Against Drunk Drivers, Inc., by *Hartley T. Hansen;* and for the Texas District and County Attorneys Association et al. by *David Crump*.

The officers smelled alcohol on his breath. Respondent did not have a driver's license, and informed the officers that it was revoked after a previous driving-while-intoxicated conviction. The officers asked respondent to touch his finger to his nose and to walk a straight line. When respondent failed these field sobriety tests, he was placed under arrest and read his *Miranda* rights.[1] Respondent acknowledged that he understood his rights and agreed to talk without a lawyer present. App. 11. Reading from a printed card, the officers then asked respondent to submit to a blood-alcohol test and warned him that he could lose his license if he refused.[2] Respondent refused to take the test, stating "I'm too drunk, I won't pass the test." The officers again read the request to

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[1] The officer read the *Miranda* warning from a printed card. He read: "You have the right to remain silent. You don't have to talk to me unless you want to do so. If you want to talk to me I must advise you whatever you say can and will be used as evidence against you in court. You have the right to confer with a lawyer, and to have a lawyer present with you while you're being questioned. If you want a lawyer but are unable to pay for one, a lawyer will be appointed to represent you free of any cost to you. Knowing these rights, do you want to talk to me without having a lawyer present? You may stop talking to me at any time. You may also demand a lawyer at any time." App. 8. See *Miranda* v. *Arizona*, 384 U. S. 436, 467–473 (1966).

[2] The card read: "I have arrested you for driving or being in actual physical control of a vehicle while under the influence of alcohol or drugs, a violation of S. D. C. L. 32–23–1. I request that you submit to a chemical test of your blood to determine your blood alcohol concentration. You have the right to refuse to submit to such a test and if you do refuse no test will be given. You have the right to a chemical test by a person of your own choosing at your own expense in addition to the test I have requested. You have the right to know the results of any chemical test. If you refuse the test I have requested, your driver's license and any non-residence driving privilege may be revoked for one year after an opportunity to appear before a hearing officer to determine if your driver's license or non-residence driving privilege shall be revoked. If your driver's license or non-residence driving privileges are revoked by the hearing officer, you have the right to appeal to Circuit Court. Do you understand what I told you? Do you wish to submit to the chemical test I have requested?" App. 8–10.

submit to a test, and then took respondent to the police station, where they read the request to submit a third time. Respondent continued to refuse to take the test, again saying he was too drunk to pass it.[3]

South Dakota law specifically declares that refusal to submit to a blood-alcohol test "may be admissible into evidence at the trial." S. D. Comp. Laws Ann. § 32–23–10.1 (Supp. 1982).[4] Nevertheless, respondent sought to suppress all evidence of his refusal to take the blood-alcohol test. The Circuit Court granted the suppression motion for three reasons: the South Dakota statute allowing evidence of refusal violated respondent's federal constitutional rights; the officers failed to advise respondent that the refusal could be used against him at trial; and the refusal was irrelevant to the issues before the court. The State appealed from the entire order. The South Dakota Supreme Court affirmed the suppression of the act of refusal on the grounds that § 32–23–10.1, which allows the introduction of this evidence, violated the federal and state privilege against self-incrimination.[5] 312 N. W. 2d 723 (1981). The court reasoned that

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[3] Responding to other questions, respondent informed the officers that he had been drinking "close to one case" by himself at home, and that his last drink was "about ten minutes ago." Tr. of Preliminary Hearing 8.

[4] South Dakota Comp. Laws Ann. § 19–13–28.1 (Supp. 1982) likewise declares that, notwithstanding the general rule in South Dakota that the claim of a privilege is not a proper subject of comment by judge or counsel, evidence of refusal to submit to a chemical analysis of blood, urine, breath, or other bodily substance "is admissible into evidence" at a trial for driving under the influence of alcohol. A person "may not claim privilege against self-incrimination with regard to admission of refusal to submit to chemical analysis." *Ibid.*

[5] As JUSTICE STEVENS emphasizes, *post*, at 567, the South Dakota Supreme Court clearly held that the statute violated the State as well as Federal Constitution. Although this would be an *adequate* state ground for decision, we do not read the opinion as resting on an *independent* state ground. Rather, we think the court determined that admission of this evidence violated the Fifth Amendment privilege against self-incrimination, and then concluded without further analysis that the state privilege was

the refusal was a communicative act involving respondent's testimonial capacities and that the State compelled this communication by forcing respondent "'to choose between submitting to a perhaps unpleasant examination and producing

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violated as well. In reaching its holding, the court first analyzed our decisions in *Schmerber* v. *California*, 384 U. S. 757 (1966), and *Miranda* v. *Arizona*, *supra*. The court then described the issue for its review as being "[t]o determine whether the *Fifth Amendment* privilege against self-incrimination applies to refusal evidence," 312 N. W. 2d 723, 725 (1981) (emphasis added), and later asked "whether this testimonial evidence was compelled for purposes of applying the *Fifth Amendment* standard," *id.*, at 726 (emphasis added). The cases relied on by the court to resolve these issues analyze the *federal* privilege against self-incrimination.

The analysis of the court below was remarkably similar to that of the state-court opinion reviewed in *Delaware* v. *Prouse*, 440 U. S. 648, 651–653 (1979). That state-court opinion analyzed various decisions interpreting the Federal Constitution, concluded that the Fourth Amendment violated the police procedure at issue there, and then summarily held that the State Constitution was therefore also infringed. As we characterized their analysis, every police practice found to violate the Fourth Amendment would, without further analysis, be held to be contrary to the State Constitution as well. In such a situation, we concluded, this Court has jurisdiction to review the federal constitutional issue decided below.

JUSTICE STEVENS, while expressing general dissatisfaction with *Prouse*, attempts to distinguish it by noting that the state court there had said the State and Federal Constitutions are "'substantially similar' and that 'a violation of the latter is necessarily a violation of the former.'" *Post*, at 571, n. 7. But the South Dakota Supreme Court made virtually identical statements. In a footnote, the court recognized the textual difference between the federal and state constitutional privileges against self-incrimination, but noted that this Court in *Schmerber* had interpreted the Fifth Amendment prohibition "in light of the more liberal definition of 'evidence' as used in our state constitution." 312 N. W. 2d, at 726, n. Therefore, the court concluded, "[s]ince the Fifth Amendment of the U. S. Constitution is broad enough to exclude this evidence, there is no need to draw a distinction at this time between S. D. Const. Art. VI, § 9 and the Fifth Amendment of the U. S. Constitution." *Ibid.* The court could not have stated more clearly that it simply assumed that any violation of the Fifth Amendment privilege also violated, without further analysis, the state privilege. This was precisely the reasoning we found sufficient in *Prouse* to give us jurisdiction to hear the case and decide the federal constitutional issue.

testimonial evidence against himself,'" *id.*, at 726 (quoting *State* v. *Andrews*, 297 Minn. 260, 262, 212 N. W. 2d 863, 864 (1973), cert. denied, 419 U. S. 881 (1974)).[6]

Since other jurisdictions have found no Fifth Amendment violation from the admission of evidence of refusal to submit to blood-alcohol tests,[7] we granted certiorari to resolve the conflict. 456 U. S. 971 (1982).

II

The situation underlying this case—that of the drunk driver—occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the problem that the state courts have, has repeatedly lamented the tragedy. See *Breithaupt* v. *Abram*, 352 U. S. 432, 439 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield"); *Tate* v. *Short*, 401 U. S. 395, 401 (1971) (BLACKMUN, J., concurring) (deploring "traffic irresponsibility and the frightful carnage it spews upon our highways"); *Perez* v. *Campbell*, 402 U. S. 637, 657, 672 (1971) (BLACKMUN, J., concurring) (footnote omitted) ("The slaughter on the highways of this Nation exceeds the death toll of all our

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[6] The South Dakota Supreme Court also remanded for a determination whether respondent's statement that he was too drunk to pass the test was made after a voluntary waiver of his right to remain silent. As yet, of course, there has been no final judgment in this case. This Court nevertheless has jurisdiction under 28 U. S. C. § 1257(3) to review the federal constitutional issue which has been finally determined, because if the State ultimately prevails at trial, the federal issue will be mooted; and if the State loses at trial, governing state law, S. D. Comp. Laws Ann. §§ 23A–32–4 and 23A–32–5 (1979), prevents it from again presenting the federal claim for review. See *California* v. *Stewart* (decided with *Miranda* v. *Arizona*, 384 U. S. 436, 498, n. 71 (1966)); *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 481 (1975).

[7] See, *e. g.*, cases cited in nn. 11 and 13, *infra*.

wars"); *Mackey* v. *Montrym*, 443 U. S. 1, 17–19 (1979) (recognizing the "compelling interest in highway safety").

As part of its program to deter drinkers from driving, South Dakota has enacted an "implied consent" law. S. D. Comp. Laws Ann. § 32–23–10 (Supp. 1982). This statute declares that any person operating a vehicle in South Dakota is deemed to have consented to a chemical test of the alcoholic content of his blood if arrested for driving while intoxicated. In *Schmerber* v. *California*, 384 U. S. 757 (1966), this Court upheld a state-compelled blood test against a claim that it infringed the Fifth Amendment right against self-incrimination, made applicable to the States through the Fourteenth Amendment.[8] We recognized that a coerced blood test infringed to some degree the "inviolability of the human personality" and the "requirement that the State procure the evidence against an accused 'by its own independent labors,'" but noted the privilege has never been given the full scope suggested by the values it helps to protect. *Id.*, at 762. We therefore held that the privilege bars the State only from compelling "communications" or "testimony." Since a blood test was "physical or real" evidence rather than testimonial evidence, we found it unprotected by the Fifth Amendment privilege.

Schmerber, then, clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood-alcohol test.[9] South Dakota, however, has declined to authorize its police officers to administer a blood-alcohol test against the suspect's will. Rather, to avoid violent confrontations, the South Dakota statute permits a suspect to

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[8] *Schmerber* also rejected arguments that the coerced blood test violated the right to due process, the right to counsel, and the prohibition against unreasonable searches and seizures.

[9] *Schmerber* did caution that due process concerns could be involved if the police initiated physical violence while administering the test, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force. 384 U. S., at 760, n. 4.

refuse the test, and indeed requires police officers to inform the suspect of his right to refuse. S. D. Comp. Laws Ann. § 32–23–10 (Supp. 1982). This permission is not without a price, however. South Dakota law authorizes the Department of Public Safety, after providing the person who has refused the test an opportunity for a hearing, to revoke for one year both the person's license to drive and any nonresident operating privileges he may possess. § 32–23–11. Such a penalty for refusing to take a blood-alcohol test is unquestionably legitimate, assuming appropriate procedural protections. See *Mackey* v. *Montrym*, *supra*.

South Dakota further discourages the choice of refusal by allowing the refusal to be used against the defendant at trial. S. D. Comp. Laws. Ann. §§ 32–23–10.1 and 19–13–28.1 (Supp. 1982). *Schmerber* expressly reserved the question of whether evidence of refusal violated the privilege against self-incrimination. 384 U. S., at 765, n. 9. The Court did indicate that general Fifth Amendment principles, rather than the particular holding of *Griffin* v. *California*, 380 U. S. 609 (1965), should control the inquiry. 384 U. S., at 766, n. 9.[10]

Most courts applying general Fifth Amendment principles to the refusal to take a blood test have found no violation of the privilege against self-incrimination. Many courts, following the lead of Justice Traynor's opinion for the California Supreme Court in *People* v. *Sudduth*, 65 Cal. 2d 543, 421 P. 2d 401 (1966), cert. denied, 389 U. S. 850 (1967), have reasoned that refusal to submit is a physical act rather than a communication and for this reason is not protected by the

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[10] *Griffin* held that a prosecutor's or trial court's comments on a defendant's refusal to take the witness stand impermissibly burdened the defendant's Fifth Amendment right to refuse. Unlike the defendant's situation in *Griffin*, a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test. The specific rule of *Griffin* is thus inapplicable.

privilege.[11] As Justice Traynor explained more fully in the companion case of *People* v. *Ellis*, 65 Cal. 2d 529, 421 P. 2d 393 (1966) (refusal to display voice not testimonial), evidence of refusal to take a potentially incriminating test is similar to other circumstantial evidence of consciousness of guilt, such as escape from custody and suppression of evidence. The court below, relying on *Dudley* v. *State*, 548 S. W. 2d 706 (Tex. Crim. App. 1977), and *State* v. *Andrews*, 297 Minn. 260, 212 N. W. 2d 863 (1973), cert. denied, 419 U. S. 881 (1974), rejected this view. This minority view emphasizes that the refusal is "a tacit or overt expression and communication of defendant's thoughts," 312 N. W. 2d, at 726, and that the Constitution "simply forbids any compulsory revealing or communication of an accused person's thoughts or mental processes, whether it is by acts, failure to act, words spoken or failure to speak." *Dudley*, *supra*, at 708.

While we find considerable force in the analogies to flight and suppression of evidence suggested by Justice Traynor, we decline to rest our decision on this ground. As we recognized in *Schmerber*, the distinction between real or physical evidence, on the one hand, and communications or testimony, on the other, is not readily drawn in many cases. 384 U. S., at 764.[12] The situations arising from a refusal present a diffi-

[11] See, *e. g.*, *Newhouse* v. *Misterly*, 415 F. 2d 514 (CA9 1969); *Hill* v. *State*, 366 So. 2d 318, 324–325 (Ala. 1979); *Campbell* v. *Superior Court*, 106 Ariz. 542, 479 P. 2d 685 (1971); *State* v. *Haze*, 218 Kan. 60, 542 P. 2d 720 (1975) (refusal to give handwriting exemplar); *City of Westerville* v. *Cunningham*, 15 Ohio St. 2d 121, 239 N. E. 2d 40 (1968).

[12] The Court in *Schmerber* pointed to the lie detector test as an example of evidence that is difficult to characterize as testimonial or real. Even though the test may seek to obtain physical evidence, we reasoned that to compel a person to submit to such testing "is to evoke the spirit and history of the Fifth Amendment." 384 U. S., at 764. See also *People* v. *Ellis*, 65 Cal. 2d 529, 537, and n. 9, 421 P. 2d 393, 397, and n. 9 (1966) (analyzing lie detector tests as within the Fifth Amendment privilege). A second example of seemingly physical evidence that nevertheless invokes Fifth Amendment protection was presented in *Estelle* v. *Smith*, 451 U. S. 454 (1981). There, we held that the Fifth Amendment privilege protected compelled

cult gradation from a person who indicates refusal by complete inaction, to one who nods his head negatively, to one who states "I refuse to take the test," to the respondent here, who stated "I'm too drunk, I won't pass the test." Since no impermissible coercion is involved when the suspect refuses to submit to take the test, regardless of the form of refusal, we prefer to rest our decision on this ground, and draw possible distinctions when necessary for decision in other circumstances.[13]

As we stated in *Fisher* v. *United States*, 425 U. S. 391, 397 (1976), "[t]he Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege." This coercion requirement comes directly from the constitutional language directing that no person "shall be *compelled* in any criminal case to be a witness against himself." U. S. Const., Amdt. 5 (emphasis added). And as Professor Levy concluded in his history of the privilege, "[t]he element of compulsion or involuntariness was always an ingredient of the right and, before the right existed, of protests against incriminating interrogatories." L. Levy, Origins of the Fifth Amendment 328 (1968).

Here, the State did not directly compel respondent to refuse the test, for it gave him the choice of submitting to the test or refusing. Of course, the fact the government gives a defendant or suspect a "choice" does not always resolve the

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disclosures during a court-ordered psychiatric examination. We specifically rejected the claim that the psychiatrist was observing the patient's communications simply to infer facts of his mind, rather than to examine the truth of the patient's statements.

[13] Many courts have found no self-incrimination problem on the ground of no coercion, or on the analytically related ground that the State, if it can compel submission to the test, can qualify the right to refuse the test. See, *e. g.*, *Welch* v. *District Court*, 594 F. 2d 903 (CA2 1979); *State* v. *Meints*, 189 Neb. 264, 202 N. W. 2d 202 (1972); *State* v. *Gardner*, 52 Ore. App. 663, 629 P. 2d 412 (1981); *State* v. *Brean*, 136 Vt. 147, 385 A. 2d 1085 (1978).

compulsion inquiry. The classic Fifth Amendment violation—telling a defendant at trial to testify—does not, under an extreme view, compel the defendant to incriminate himself. He could submit to self-accusation, or testify falsely (risking perjury) or decline to testify (risking contempt). But the Court has long recognized that the Fifth Amendment prevents the State from forcing the choice of this "cruel trilemma" on the defendant. See *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55 (1964). See also *New Jersey* v. *Portash*, 440 U. S. 450, 459 (1979) (telling a witness under a grant of legislative immunity to testify or face contempt sanctions is "the essence of coerced testimony"). Similarly, *Schmerber* cautioned that the Fifth Amendment may bar the use of testimony obtained when the proffered alternative was to submit to a test so painful, dangerous, or severe, or so violative of religious beliefs, that almost inevitably a person would prefer "confession." 384 U. S., at 765, n. 9.[14] Cf. *Miranda* v. *Arizona*, 384 U. S. 436, 458 (1966) (unless compulsion inherent in custodial surroundings is dispelled, no statement is truly a product of free choice).

In contrast to these prohibited choices, the values behind the Fifth Amendment are not hindered when the State offers a suspect the choice of submitting to the blood-alcohol test or having his refusal used against him. The simple blood-alcohol test is so safe, painless, and commonplace, see *Schmerber*, 384 U. S., at 771, that respondent concedes, as he must, that the State could legitimately compel the suspect, against his will, to accede to the test. Given, then, that the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice. Nor is this a case where the State has subtly coerced respondent into choosing the option it had no right to compel, rather than offering a true

[14] Nothing in the record suggests that respondent made or could sustain such a claim in this case.

choice. To the contrary, the State wants respondent to choose to take the test, for the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test.

We recognize, of course, that the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices. See, *e. g.*, *Crampton* v. *Ohio*, decided with *McGautha* v. *California*, 402 U. S. 183, 213–217 (1971). We hold, therefore, that a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination.[15]

III

Relying on *Doyle* v. *Ohio*, 426 U. S. 610 (1976), respondent also suggests that admission at trial of his refusal violates the Due Process Clause because respondent was not fully warned of the consequences of refusal. *Doyle* held that the Due Process Clause prohibits a prosecutor from using a defendant's silence after *Miranda* warnings to impeach his testimony at trial. Just a Term before, in *United States* v. *Hale*, 422 U. S. 171 (1975), we had determined under our supervisory power that the federal courts could not use such silence for impeachment because of its dubious probative value. Al-

[15] In the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of *Miranda*. As we stated in *Rhode Island* v. *Innis*, 446 U. S. 291, 301 (1980), police words or actions "normally attendant to arrest and custody" do not constitute interrogation. The police inquiry here is highly regulated by state law, and is presented in virtually the same words to all suspects. It is similar to a police request to submit to fingerprinting or photography. Respondent's choice of refusal thus enjoys no prophylactic *Miranda* protection outside the basic Fifth Amendment protection. See generally Arenella, *Schmerber* and the Privilege Against Self-Incrimination: A Reappraisal, 20 Am. Crim. L. Rev. 31, 56–58 (1982).

though *Doyle* mentioned this rationale in applying the rule to the States, 426 U. S., at 617, the Court relied on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial. *Id.*, at 618.

Unlike the situation in *Doyle*, we do not think it fundamentally unfair for South Dakota to use the refusal to take the test as evidence of guilt, even though respondent was not specifically warned that his refusal could be used against him at trial. First, the right to silence underlying the *Miranda* warnings is one of constitutional dimension, and thus cannot be unduly burdened. See *Miranda*, *supra*, at 468, n. 37. Cf. *Fletcher* v. *Weir*, 455 U. S. 603 (1982) (postarrest silence without *Miranda* warnings may be used to impeach trial testimony). Respondent's right to refuse the blood-alcohol test, by contrast, is simply a matter of grace bestowed by the South Dakota Legislature.

Moreover, the *Miranda* warnings emphasize the dangers of choosing to speak ("whatever you say can and will be used as evidence against you in court"), but give no warning of adverse consequences from choosing to remain silent. This imbalance in the delivery of *Miranda* warnings, we recognized in *Doyle*, implicitly assures the suspect that his silence will not be used against him. The warnings challenged here, by contrast, contained no such misleading implicit assurances as to the relative consequences of his choice. The officers explained that, if respondent chose to submit to the test, he had the right to know the results and could choose to take an additional test by a person chosen by him. The officers did not specifically warn respondent that the test results could be used against him at trial.[16] Explaining the consequences of

[16] Even though the officers did not specifically advise respondent that the test results could be used against him in court, no one would seriously contend that this failure to warn would make the test results inadmissible, had respondent chosen to submit to the test. Cf. *Schneckloth* v. *Busta-*

the other option, the officers specifically warned respondent that failure to take the test could lead to loss of driving privileges for one year. It is true the officers did not inform respondent of the further consequence that evidence of refusal could be used against him in court,[17] but we think it unrealistic to say that the warnings given here implicitly assure a suspect that no consequences other than those mentioned will occur. Importantly, the warning that he could lose his driver's license made it clear that refusing the test was not a "safe harbor," free of adverse consequences.

While the State did not actually warn respondent that the test results could be used against him, we hold that such a failure to warn was not the sort of implicit promise to forgo use of evidence that would unfairly "trick" respondent if the evidence were later offered against him at trial. We therefore conclude that the use of evidence of refusal after these warnings comported with the fundamental fairness required by due process.

IV

The judgment of the South Dakota Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

The Court is understandably anxious to do its part in curtailing the "carnage caused by drunk drivers." *Ante*, at 558. I sympathize with that concern, but it does not justify the rendition of an advisory opinion on a constitutional issue. In

monte, 412 U. S. 218 (1973) (knowledge of right to refuse not an essential part of proving effective consent to a search).

[17] Since the State wants the suspect to submit to the test, it is in its interest fully to warn suspects of the consequences of refusal. We are informed that police officers in South Dakota now warn suspects that evidence of their refusal can be used against them in court. Tr. of Oral Arg. 16.

this case, the Court has no power to reverse the judgment of the South Dakota Supreme Court, because its decision rests on an adequate and independent state ground. I therefore cannot join the Court's opinion.

The South Dakota Supreme Court framed the question before it on appeal as "whether SDCL 32–23–10.1 is a violation of Neville's federal and state constitutional privilege against self-incrimination. U. S. Const. Amend. V; S. D. Const. art. VI, § 9." 312 N. W. 2d 723, 725 (1981). After analyzing both federal and state cases, the South Dakota Supreme Court concluded:

> "We hold that evidence of the accused's refusal to take a blood test violates the federal and state privilege against self-incrimination and therefore SDCL 32–23–10.1 is unconstitutional." *Id.*, at 726.

Thus, the South Dakota Supreme Court unambiguously held that the statute violated the State Constitution. That holding is certainly adequate to support its judgment and is beyond our power to review.

Given the existence of an adequate state ground, it is established beyond dispute that this Court may not take jurisdiction if the state ground is independent.[1] In this case, we lack jurisdiction because the South Dakota Supreme Court has not indicated, explicitly or implicitly, that its construction of Art. VI, § 9, of the South Dakota Constitution was contin-

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[1] "[W]e will not review a judgment of a state court that rests on an adequate and independent ground in state law. Nor will we review one until the fact that it does not do so appears of record." *Herb* v. *Pitcairn*, 324 U. S. 117, 128 (1945). Accord, *Jankovich* v. *Indiana Toll Road Comm'n*, 379 U. S. 487 (1965); *Honeyman* v. *Hanan*, 300 U. S. 14, 18–19 (1937); *Fox Film Corp.* v. *Muller*, 296 U. S. 207 (1935); *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52 (1934); *McCoy* v. *Shaw*, 277 U. S. 302 (1928); *Petrie* v. *Nampa and Meridian Irrigation District*, 248 U. S. 154, 157 (1918); *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 163–166 (1917); *Eustis* v. *Bolles*, 150 U. S. 361 (1893); *Murdock* v. *Memphis*, 20 Wall. 590 (1875).

gent on our agreement with its interpretation of the Fifth Amendment to the United States Constitution.[2] There is no general presumption of federal law, no general presumption of state law, and no specific language in the opinion below to suggest that the South Dakota Court harbored such an opinion.

Unless we have explicit notice that a provision of a State Constitution is intended to be a mere shadow of the comparable provision in the Federal Constitution, it is presumptuous—if not paternalistic—for this Court to make that assumption on its own. No matter how eloquent and persuasive our analysis of the Federal Constitution may be, we cannot simply *presume* that the highest court of a sovereign State will modify its interpretation of its own law whenever we interpret comparable federal law differently. Even when a state tribunal misconceives federal law, this Court cannot vacate its judgment merely to give it an unsolicited opportunity to reanalyze its own law.[3] If a state-court judg-

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[2] As Justice Harlan wrote for the Court in *Mental Hygiene Dept.* v. *Kirchner*, 380 U. S. 194, 198 (1965):

"[W]e would have jurisdiction to review only if the federal ground had been the *sole* basis for the decision, or the State Constitution was interpreted under what the state court deemed the compulsion of the Federal Constitution" (emphasis in original) (footnote omitted).

[3] "[O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn*, *supra*, at 126. Accord, *Minnick* v. *California Dept. of Corrections*, 452 U. S. 105, 120–123 (1981); *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568–569 (1947); *United States* v. *Hastings*, 296 U. S. 188, 193 (1935).

The policy of avoiding advisory opinions on federal constitutional issues is a consistent theme throughout our jurisprudence. *Paschall* v. *Christie-Stewart, Inc.*, 414 U. S. 100 (1973) *(per curiam)*, is especially instructive. In that case, our independent review of the record turned up a state ground supporting the Supreme Court of Oklahoma's judgment that had not even been *mentioned* in the state court's opinion. Observing that if

ment is premised on an adequate state ground, that ground must be presumed independent unless the state court suggests otherwise.[4]

Nothing in South Dakota law establishes a presumption that the State Constitution adds no additional protections for South Dakota residents beyond those already provided by the Fourteenth Amendment to the Federal Constitution. Indeed, the South Dakota Supreme Court has explicitly established a contrary presumption:

> "This court is the final authority on interpretation and enforcement of the South Dakota Constitution. We have always assumed the independent nature of our state constitution regardless of any similarity between the language of that document and the federal constitution." *State* v. *Opperman*, 247 N. W. 2d 673, 674 (1976).[5]

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the argument proved solid, "any decision by this Court would be advisory and beyond our jurisdiction," we remanded for analysis of the state-law claim. *Id.*, at 102.

Even in cases arising through the *federal* courts, we have always been alert to opportunities to avoid federal constitutional issues by means of a state-law disposition. *E. g.*, *Mills* v. *Rogers*, 457 U. S. 291, 302–306 (1982); *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U. S. 283, 294–295 (1982); *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175 (1909). See generally *Hagans* v. *Lavine*, 415 U. S. 528, 546–547, and nn. 12–13 (1974).

[4] The burden is on the petitioner or appellant to establish our jurisdiction. We have therefore regularly dismissed cases when the state judgment *might* have rested on an independent and adequate state ground. *E. g.*, *Durley* v. *Mayo*, 351 U. S. 277, 285 (1956); *Stembridge* v. *Georgia*, 343 U. S. 541, 547 (1952); *Lynch* v. *New York ex rel. Pierson*, *supra*; *Johnson* v. *Risk*, 137 U. S. 300 (1890).

[5] The South Dakota Supreme Court was speaking on remand from this Court. The state court had previously held certain police conduct unconstitutional, relying *solely* on the Fourth Amendment to the Federal Constitution. *State* v. *Opperman*, 89 S. D. 25, 228 N. W. 2d 152 (1975). This Court had reversed. *South Dakota* v. *Opperman*, 428 U. S. 364 (1976). The passage in text is excerpted from the South Dakota Supreme Court's reaffirmation of the rationale of its prior opinion, relying on the State Constitution. In reaching its conclusion, the court noted that the language of

Thus, both federal and South Dakota law establish the presumption that an adequate state ground is independent. That presumption is reinforced in this case. For the opinion of the South Dakota Supreme Court explicitly noted that the language of the South Dakota Constitution is "more liberal" than the comparable federal language. 312 N. W. 2d, at 726, n.[6] It was willing to rest the judgment on federal as well as state grounds, however, because this Court's opinion in *Schmerber* v. *California*, 384 U. S. 757, 761–762, n. 6 (1966), had assumed that the Fifth Amendment should be construed as broadly as the more liberal state language. 312 N. W. 2d, at 726, n. It concluded that federal law is "broad enough" to exclude the evidence in this case, and it therefore saw "no need to draw a distinction *at this time*" between state and federal law. *Ibid.* (emphasis added). Those words plainly suggest that the State Supreme Court did not understand its holding to be "dependent" on this Court's view of federal law.[7]

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the relevant state provision "is almost identical to that found in the Fourth Amendment," 247 N. W. 2d, at 674, and was unmoved by the prosecutor's observation that the defendant had not argued in his first appeal that state and federal law were different, *id.*, at 675.

[6] After quoting a footnote from our opinion in *Schmerber* v. *California*, 384 U. S. 757, 761–762, n. 6 (1966), the South Dakota Supreme Court stated:

"This footnote indicates that *Schmerber* was decided in light of the more liberal definition of 'evidence' as used in our state constitution. Since the Fifth Amendment of the U. S. Constitution is broad enough to exclude this evidence, there is no need to draw a distinction at this time between S. D. Const. art. VI, § 9 and the Fifth Amendment of the U. S. Constitution." 312 N. W. 2d, at 726, n.

[7] In *Delaware* v. *Prouse*, 440 U. S. 648, 651–653 (1979), we did not so interpret the opinion of the Delaware Supreme Court. Although I must confess that I now have some misgivings about our reaching that conclusion without further clarification, see n. 8, *infra*, there was far more indication in that case than in this one that the state court's analysis was contingent on the correctness of its understanding of federal law. The opinion there began with a statement that the police stops "violate Federal and State

Because there exists an independent and adequate state ground for the judgment below, I would dismiss the writ of certiorari.[8]

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constitutional guarantees," *State* v. *Prouse*, 382 A. 2d 1359, 1361 (1978), but then went on to say that the State and Federal Constitutions are "substantially similar" and that "a violation of the latter is necessarily a violation of the former," *id.*, at 1362. The opinion drew to a close with the statement: "We hold, therefore, that a random stop of a motorist [absent reasonable suspicion] is constitutionally impermissible and violative of the Fourth and Fourteenth Amendments to the United States Constitution." *Id.*, at 1364.

[8] In cases where an apparent adequate state ground was arguably not independent, this Court has occasionally vacated the state-court judgment and remanded for clarification of the basis for the decision. *E. g.*, *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U. S. 861, 866 (1974); *California* v. *Krivda*, 409 U. S. 33 (1972); *Mental Hygiene Dept.* v. *Kirchner*, 380 U. S. 194 (1965); *Minnesota* v. *National Tea Co.*, 309 U. S. 551 (1940); *State Tax Comm'n* v. *Van Cott*, 306 U. S. 511 (1939). Cf. *Herb* v. *Pitcairn*, 324 U. S. 117 (1945) (case held while parties sought a certificate from the state court clarifying the basis for judgment). The Court should, at the very least, follow that course today. "[I]n cases where the answer is not clear to us, it seems consistent with the respect due the highest courts of states of the Union that they be asked rather than told what they have intended." *Id.*, at 127–128.

Some of us have pointed out that even this practice may be overused, because it "tak[es] from appellants the normal burden of demonstrating that we have jurisdiction and plac[es] it on the Supreme Court of [the State]." *Philadelphia Newspapers, Inc.* v. *Jerome*, 434 U. S. 241, 244 (1978) (REHNQUIST, J., joined by STEVENS, J., dissenting). See also *Department of Motor Vehicles of California* v. *Rios*, 410 U. S. 425, 427–430 (1973) (Douglas, J., joined by BRENNAN, Stewart, and MARSHALL, JJ., dissenting).

Reporter's Note

The next page is purposely numbered 801. The numbers between 571 and 801 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM OCTOBER 4, 1982, THROUGH FEBRUARY 22, 1983

OCTOBER 4, 1982

Affirmed on Appeal

No. 81–2302. GIACOBBE *v.* ANDREWS ET AL. Affirmed on appeal from C. A. 2d Cir. Reported below: 688 F. 2d 815.

No. 81–2385. KING, GOVERNOR OF NEW MEXICO, ET AL. *v.* SANCHEZ ET AL. Affirmed on appeal from D. C. N. M. Reported below: 550 F. Supp. 13.

No. 82–39. HISPANIC COALITION ON REAPPORTIONMENT ET AL. *v.* LEGISLATIVE REAPPORTIONMENT COMMISSION ET AL. Affirmed on appeal from D. C. E. D. Pa. Reported below: 536 F. Supp. 578.

No. 82–55. CITY OF WEST HELENA, ARKANSAS, ET AL. *v.* PERKINS ET AL. Affirmed on appeal from C. A. 8th Cir. JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 675 F. 2d 201.

Appeals Dismissed

No. 81–2019. COUNTY OF ARLINGTON, VIRGINIA *v.* UNITED STATES ET AL. Appeal from C. A. 4th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS would affirm the judgment. Reported below: 669 F. 2d 925.

No. 81–2077. THOMPSON *v.* INDIANA. Appeal from Ct. App. Ind. dismissed for want of substantial federal question. Reported below: 425 N. E. 2d 167.

No. 81–2176. FISHER *v.* ANDERSON. Appeal from Ct. App. Mich. dismissed for want of substantial federal question.

No. 81–2197. KRANDA *v.* HOUSER-NORBORG MEDICAL CORP. ET AL. Appeal from Ct. App. Ind. dismissed for want of substantial federal question. Reported below: 419 N. E. 2d 1024.

No. 81–2310. ELLERBE *v.* OTIS ELEVATOR CO. Appeal from Ct. App. Tex., 1st Sup. Jud. Dist., dismissed for want of substantial federal question. Reported below: 618 S. W. 2d 870.

No. 81–2377. GIANECHINI, TUTRIX OF THE ESTATE OF GIANECHINI *v.* CITY OF NEW ORLEANS ET AL. Appeal from Ct. App. La., 4th Cir., dismissed for want of substantial federal question. Reported below: 410 So. 2d 292.

No. 81–2383. BOSWELL, INC., DBA BROADACRES *v.* HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT; and BOSWELL, INC., DBA RENO COUNTY ADULT CARE HOME *v.* HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT. Appeals from Sup. Ct. Kan. dismissed for want of substantial federal question. Reported below: 230 Kan. 738, 640 P. 2d 1208 (first case); 230 Kan. 610, 640 P. 2d 1202 (second case).

No. 81–2403. THRELKELD ET AL. *v.* ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872, AFL–CIO, ET AL. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 316 N. W. 2d 551.

No. 81–6818. CHRISTENSEN *v.* UTAH. Appeal from Sup. Ct. Utah dismissed for want of substantial federal question. Reported below: 639 P. 2d 205.

No. 82–5. SUPERIOR OIL CO. *v.* CITY OF PORT ARTHUR, TEXAS, ET AL. Appeal from Ct. App. Tex., 9th Sup. Jud. Dist., dismissed for want of substantial federal question. Reported below: 628 S. W. 2d 94.

No. 82–77. GRIFFIN ET AL. *v.* SIMS ET AL. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 249 Ga. 293, 290 S. E. 2d 433.

No. 82–135. SEARS, ROEBUCK & CO. *v.* WASHINGTON DEPARTMENT OF REVENUE. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. Reported below: 97 Wash. 2d 260, 643 P. 2d 884.

No. 82–159. SYRACUSE SAVINGS BANK ET AL. *v.* TOWN OF DEWITT. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 56 N. Y. 2d 671, 436 N. E. 2d 1315.

No. 82–5022. FLOWERS *v.* COLORADO. Appeal from Sup. Ct. Colo. dismissed for want of substantial federal question. Reported below: 644 P. 2d 916.

No. 82–5046. CRUMPACKER *v.* INDIANA SUPREME COURT DISCIPLINARY COMMISSION. Appeal from Sup. Ct. Ind. dismissed for want of substantial federal question. Reported below: 431 N. E. 2d 91.

No. 81–2084. IZZARD ET AL. *v.* FLORIDA. Appeal from Dist. Ct. App. Fla., 4th Dist., dismissed for want of jurisdiction. Reported below: 412 So. 2d 501.

No. 81–2113. COOPER *v.* CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 81–2213. WAKE COUNTY HOSPITAL SYSTEM, INC., ET AL. *v.* NEWS & OBSERVER PUBLISHING CO. ET AL. Appeal from Ct. App. N. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 55 N. C. App. 1, 284 S. E. 2d 542.

No. 81–2217. RACER ET VIR *v.* JOHNSON & JOHNSON. Appeal from Ct. App. Mo., Eastern Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 629 S. W. 2d 387.

No. 81–2236. LOCKWOOD *v.* JEFFERSON AREA TEACHERS ASSN. Appeal from Sup. Ct. Ohio dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 69 Ohio St. 2d 671, 433 N. E. 2d 604.

No. 81–2281. RIVOLI TRUCKING CORP. ET AL. *v.* NEW YORK SHIPPING ASSN., INC., ET AL. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 697 F. 2d 296.

No. 81–2389. STEPAK *v.* RUTGERS MEDICAL SCHOOL ET AL. Appeal from Super. Ct. N. J., App. Div., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 81–2395. KALIN *v.* AEROSPACE CORP. ET AL. Appeal from C. A. 9th 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: 672 F. 2d 922.

No. 81–6710. MICHAELIS *v.* NEBRASKA STATE BAR ASSN. Appeal from Sup. Ct. Neb. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 210 Neb. 545, 316 N. W. 2d 46.

No. 81–6839. WAYLAND *v.* O'BRIEN. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 81–6871. GIFFORD *v.* TIERNAN, CHAIRMAN, FEDERAL ELECTION COMMISSION. Appeal from C. A. 9th 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: 670 F. 2d 882.

No. 81–6912. SCHOLL *v.* ANSELMI ET AL. Appeal from Sup. Ct. Wyo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 640 P. 2d 746.

No. 81–6917. HANSON *v.* UNITED STATES. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 81–6947. VELASQUEZ *v.* COLORADO. Appeal from Sup. Ct. Colo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 641 P. 2d 943.

No. 81–6970. BUGG *v.* INTERNATIONAL UNION OF ALLIED INDUSTRIAL WORKERS OF AMERICA, LOCAL 507, AFL–CIO, ET AL. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 674 F. 2d 595.

No. 81–6998. OGROD ET AL. *v.* SCHOOL DISTRICT OF PHILADELPHIA. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 676 F. 2d 687.

No. 82–8. CALIFORNIA STATE BOARD OF EQUALIZATION *v.* WESTERN MARINA CORP., DBA SHELTER ISLAND INN. Appeal from C. A. 9th 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: 672 F. 2d 921.

No. 82–107. MILES *v.* SHUR-GOOD BISCUIT CO., INC., ET AL. Appeal from Ct. App. Ohio, Hamilton County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 82–193. LAMPKIN-ASAM *v.* MIAMI DAILY NEWS, INC., DBA THE MIAMI NEWS, ET AL. Appeal from Dist. Ct. App. Fla., 3d Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 408 So. 2d 666.

No. 82–5064. ROBINSON *v.* BERG ET AL. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 82–5089. JONES *v.* FREDERICKSBURG DEPARTMENT OF PUBLIC WELFARE AND SOCIAL SERVICES. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 82–5102. JOHNSON *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO; and JOHNSON *v.* MARSHALL. Appeal from C. A. 6th 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: 703 F. 2d 563 (second case).

No. 82–5105. PHILLIPS, AKA HASLEM *v.* MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. Appeal from Sup. Ct. Ohio dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 82–5112. ALFONSO *v.* BOARD OF REVIEW, DEPARTMENT OF LABOR AND INDUSTRY OF NEW JERSEY. Appeal

from Sup. Ct. N. J. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 89 N. J. 41, 444 A. 2d 1075.

No. 82–5179. KINNEY, DBA MEDIA GRAPHICS *v.* KOTLER EXTERMINATING CO., INC. Appeal from Sup. Ct. Tenn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 81–2127. VINCENT B. *v.* JOAN R. ET AL. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question. JUSTICE BRENNAN and JUSTICE WHITE would note probable jurisdiction and set case for oral argument. Reported below: 126 Cal. App. 3d 619, 179 Cal. Rptr. 9.

No. 81–2144. GODWIN *v.* EAST BATON ROUGE PARISH SCHOOL BOARD ET AL. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: 408 So. 2d 1214.

No. 81–2174. QUEENSGATE INVESTMENT CO., DBA HOLIDAY INN *v.* LIQUOR CONTROL COMMISSION OF OHIO. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. JUSTICE BRENNAN and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 69 Ohio St. 2d 361, 433 N. E. 2d 138.

No. 81–2225. COLUMBIA GAS TRANSMISSION CORP. *v.* ROSE, TAX COMMISSIONER OF WEST VIRGINIA. Appeal from Cir. Ct. W. Va., Kanawha County, dismissed for want of substantial federal question. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument.

No. 81–2244. GOOCHER *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of substantial federal

question. JUSTICE BRENNAN would reverse the conviction. Reported below: 633 S. W. 2d 860.

No. 81–2352. JOFFIN *v.* SPAIN. Appeal from Ct. App. Ohio, Trumbull County, dismissed for want of substantial federal question. JUSTICE WHITE would note probable jurisdiction and set case for oral argument.

No. 82–5100. GHOLSTON *v.* MARTIN ET AL. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. JUSTICE WHITE would note probable jurisdiction and set case for oral argument.

No. 81–2375. EVANS *v.* ARIZONA CORPORATION COMMISSION ET AL. Appeal from Ct. App. Ariz. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 131 Ariz. 569, 643 P. 2d 14.

No. 81–6779. WILLIAMS *v.* INDIANA. Appeal from Sup. Ct. Ind. dismissed for want of substantial federal question. Reported below: 430 N. E. 2d 759.

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 vacate the death sentence in this case.

Vacated and Remanded on Appeal

No. 81–2080. RUSSELL STOVER CANDIES, INC. *v.* DEPARTMENT OF REVENUE OF MONTANA. Appeal from Sup. Ct. Mont. Judgment vacated and case remanded for further consideration in light of *F. W. Woolworth Co.* v. *Taxation and Revenue Dept. of N. M.*, 458 U. S. 354 (1982), and *ASARCO Inc.* v. *Idaho State Tax Comm'n*, 458 U. S. 307 (1982). Reported below: 196 Mont. 87, 638 P. 2d 1053.

Vacated and Remanded After Probable Jurisdiction Postponed or Certiorari Granted

No. 81–1282. NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL. *v.* IDAHO ET AL. Appeal from D. C. Idaho. [Probable jurisdiction postponed, 455 U. S. 918];

No. 81–1283. NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL. *v.* IDAHO ET AL. C. A. 9th Cir. [Certiorari before judgment granted, 455 U. S. 918];

No. 81–1312. CARMEN, ADMINISTRATOR OF GENERAL SERVICES *v.* IDAHO ET AL. Appeal from D. C. Idaho. [Probable jurisdiction postponed, 455 U. S. 918]; and

No. 81–1313. CARMEN, ADMINISTRATOR OF GENERAL SERVICES *v.* IDAHO ET AL. C. A. 9th Cir. [Certiorari before judgment granted, 455 U. S. 918.] Upon consideration of the memorandum for the Administrator of General Services suggesting mootness, filed July 9, 1982, and the responses thereto, the judgment of the United States District Court for the District of Idaho is vacated and the cases are remanded to that court with instructions to dismiss the complaints as moot. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950).

Certiorari Granted—Vacated and Remanded

No. 81–1653. UNIVERSITY OF HOUSTON ET AL. *v.* WILKINS ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pullman-Standard* v. *Swint*, 456 U. S. 273 (1982), and *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147 (1982). Reported below: 654 F. 2d 388 and 662 F. 2d 1156.

No. 81–1778. CALIFORNIA *v.* RUGGLES. Ct. App. Cal., 2d 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 *United States* v. *Ross*, 456 U. S. 798 (1982). Reported below: 125 Cal. App. 3d 473, 178 Cal. Rptr. 231.

No. 81–2049. UNITED STATES *v.* ARMIJO-MARTINEZ ET AL. C. A. 6th Cir. Motions of respondents Carlos Armijo-DeLeon and Carlos Armijo-Martinez for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Valenzuela-Bernal*, 458 U. S. 858 (1982). Reported below: 669 F. 2d 1131.

No. 81–2189. COUNTY OF LOS ANGELES *v.* JORDAN. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147 (1982). JUSTICE WHITE dissents. Reported below: 669 F. 2d 1311.

No. 81–2283. WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND *v.* MUSIC. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *UMWA Health & Retirement Funds* v. *Robinson*, 455 U. S. 562 (1982). JUSTICE WHITE and JUSTICE BLACKMUN dissent and would deny certiorari. Reported below: 660 F. 2d 400.

No. 81–6713. BRITT *v.* SIMI VALLEY UNIFIED SCHOOL DISTRICT ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Patsy* v. *Florida Board of Regents*, 457 U. S. 496 (1982). Reported below: 676 F. 2d 708.

Miscellaneous Orders

No. — – ——. FOWLER *v.* TUCKER. Motion to direct the Clerk to file the petition for writ of certiorari denied.

No. — – ——. SUMNER ET AL. *v.* UNITED STATES. Motion to direct the Clerk to file the petition for writ of certiorari denied.

No. — – ——. ZERMAN *v.* JACOBS ET AL. Motion to direct the Clerk to file the petition for writ of certiorari denied.

No. — – ——. SOUZA ET AL. *v.* TRUSTEES OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST. Motion to direct the Clerk to file the petition for writ of certiorari denied.

No. A–172. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* BASS. Application to vacate the stay of execution of sentence of death, presented to JUSTICE REHNQUIST, and by him referred to the Court, denied.

No. A–279. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Application for stay, addressed to JUSTICE POWELL and referred to the Court, denied.

No. D–274. IN RE DISBARMENT OF KLEINDIENST. Disbarment entered. JUSTICE REHNQUIST and JUSTICE O'CONNOR took no part in the consideration or decision of this order. [For earlier order herein, see 456 U. S. 1004.]

No. 8, Orig. ARIZONA *v.* CALIFORNIA ET AL. Motion of Pyramid Lake Indian Tribe for leave to file a brief as *amicus curiae* granted. Exceptions to the Report of the Special Master are set for oral argument in due course. Motion of Arizona et al. for leave to file a brief in response to the reply briefs of the United States et al. granted. JUSTICE MARSHALL took no part in the consideration or decision of these motions and this order. [For earlier order herein, see, *e. g.*, 456 U. S. 912.]

No. 67, Orig. IDAHO EX REL. EVANS, GOVERNOR OF IDAHO, ET AL. *v.* OREGON ET AL. Final Report of the Special Master received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Replies to such Exceptions, with supporting briefs, may be filed within 30 days. [For earlier decision herein, see, *e. g.*, 444 U. S. 380.]

No. 73, Orig. CALIFORNIA *v.* NEVADA. It is ordered that the Honorable Robert Van Pelt be discharged as Special Master in this case. [For earlier decision herein, see, *e. g.*, 456 U. S. 867.]

No. 93, Orig. OKLAHOMA *v.* ARKANSAS ET AL. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 80–1074. VELDE ET AL. *v.* NATIONAL BLACK POLICE ASSN., INC., ET AL., 458 U. S. 591. Motion of respondents to defer taxation of costs denied. JUSTICE POWELL and JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 80–1735. FEDERAL BUREAU OF INVESTIGATION ET AL. *v.* ABRAMSON, 456 U. S. 615. Motion of respondent for reconsideration of taxation of costs denied.

No. 80–1991. OREGON *v.* KENNEDY, 456 U. S. 667. Motion of respondent to retax costs denied.

No. 81–1. GOLDSBORO CHRISTIAN SCHOOLS, INC. *v.* UNITED STATES; and

No. 81–3. BOB JONES UNIVERSITY *v.* UNITED STATES. C. A. 4th Cir. [Certiorari granted, 454 U. S. 892.] Motions of National Association of Independent Schools, Lawrence E. Lewy, Independent Sector, International Human Rights Law Group, and Anti-Defamation League of B'nai B'rith for leave to file briefs as *amici curiae* granted. Motions for divided argument and for additional time for oral argument granted, and a total of one hour and 15 minutes allotted for oral argument to be divided as follows: 15 minutes for Goldsboro Christian Schools, Inc.; 15 minutes for Bob Jones University; 15 minutes for the United States; and 30 minutes for William T. Coleman, Jr., Esquire, as *amicus curiae*.

No. 81–150. NORTHERN PIPELINE CONSTRUCTION CO. *v.* MARATHON PIPE LINE CO. ET AL.; and

No. 81–546. UNITED STATES *v.* MARATHON PIPE LINE CO. ET AL., 458 U. S. 50. Upon consideration of the motion of the Solicitor General to extend stay of judgment and the responses thereto, it is ordered that the Clerk shall further stay the sending of the certified copy of the judgment to the United States District Court for the District of Minnesota to and including December 24, 1982.

No. 81–185. SIMOPOULOS *v.* VIRGINIA. Sup. Ct. Va. [Probable jurisdiction noted, 456 U. S. 988.] Motions of American Public Health Association and Women Lawyers of Sacramento et al. for leave to file briefs as *amici curiae* granted. Motion of Legal Defense Fund for Unborn Children for leave to participate in oral argument as *amicus curiae* denied.

No. 81–523. CONTAINER CORPORATION OF AMERICA *v.* FRANCHISE TAX BOARD. Ct. App. Cal., 1st App. Dist. [Probable jurisdiction noted, 456 U. S. 960.] Motion of International Bankers Association in California et al. for leave to file a brief as *amici curiae* granted. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 81–596. SPRINGDALE SCHOOL DISTRICT NO. 50 OF WASHINGTON COUNTY *v.* GRACE ET AL., 458 U. S. 1118. Motion of state respondents to retax costs denied.

No. 81–680. HERMAN & MACLEAN *v.* HUDDLESTON ET AL.; and

No. 81–1076. HUDDLESTON ET AL. *v.* HERMAN & MACLEAN ET AL. C. A. 5th Cir. [Certiorari granted, 456 U. S. 914.] Motion of Arthur Andersen & Co. for leave to participate in oral argument as *amicus curiae* denied.

No. 81–857. MARTINEZ, AS NEXT FRIEND OF MORALES *v.* BYNUM, TEXAS COMMISSIONER OF EDUCATION, ET AL. C. A. 5th Cir. [Certiorari granted *sub nom. Martinez* v.

Brockette, 457 U. S. 1131.] Motion of respondents for divided argument denied.

No. 81–746. CITY OF AKRON *v.* AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.; and

No. 81–1172. AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL. *v.* CITY OF AKRON ET AL. C. A. 6th Cir. [Certiorari granted, 456 U. S. 988.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of Francois Seguin, M. D., et al. for divided argument and for additional time for oral argument denied. Motion of Legal Defense Fund for Unborn Children for leave to participate in oral argument as *amicus curiae* denied.

No. 81–1020. EXXON CORP. ET AL. *v.* EAGERTON, COMMISSIONER OF REVENUE OF ALABAMA, ET AL.; and

No. 81–1268. EXCHANGE OIL & GAS CORP. ET AL. *v.* EAGERTON, COMMISSIONER OF REVENUE OF ALABAMA. Sup. Ct. Ala. [Probable jurisdiction noted, 456 U. S. 970.] Motion of appellants for divided argument granted. Request for additional time for oral argument denied.

No. 81–1180. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS *v.* NEW BANNER INSTITUTE, INC. C. A. 4th Cir. [Certiorari granted, 455 U. S. 1015.] Motion of National Rifle Association of America for leave to participate in oral argument as *amicus curiae* denied.

No. 81–1255. PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., ET AL. *v.* ASHCROFT, ATTORNEY GENERAL OF MISSOURI, ET AL.; and

No. 81–1623. ASHCROFT, ATTORNEY GENERAL OF MISSOURI, ET AL. *v.* PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., ET AL. C. A. 8th Cir. [Certiorari granted, 456 U. S. 988.] Motion of Legal Defense Fund for Unborn Children for leave to participate in oral argument as *amicus curiae* denied.

No. 81–1304. NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS *v.* UNITED STATES POSTAL SERVICE ET AL.; and

No. 81–1381. UNITED PARCEL SERVICE OF AMERICA, INC. *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 2d Cir. [Certiorari granted, 456 U. S. 925.] Motion of petitioners for divided argument granted. Request for additional time for oral argument denied. Motion of American Newspaper Publishers Association et al. for leave to file a brief as *amici curiae* granted. Motion of Direct Mail/Marketing Association, Inc., for divided argument denied.

No. 81–1314. W. R. GRACE & CO. *v.* LOCAL UNION 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM & PLASTIC WORKERS OF AMERICA. C. A. 5th Cir. [Certiorari granted, 458 U. S. 1105.] Motion of Equal Employment Advisory Council for leave to file a brief as *amicus curiae* granted.

No. 81–1335. DISTRICT OF COLUMBIA COURT OF APPEALS ET AL. *v.* FELDMAN ET AL. C. A. D. C. Cir. [Certiorari granted, 458 U. S. 1105.] Motion of Conference of Chief Justices for leave to file a brief as *amicus curiae* granted.

No. 81–1370. ENERGY RESERVES GROUP, INC. *v.* KANSAS POWER & LIGHT CO. Sup. Ct. Kan. [Probable jurisdiction noted, 456 U. S. 904.] Motion of Energy Consumers & Producers Association et al. for leave to file a brief as *amici curiae* denied.

No. 81–1574. LOCAL 926, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO, ET AL. *v.* JONES. Ct. App. Ga. [Probable jurisdiction postponed, 456 U. S. 987.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 81–1613. MEMPHIS BANK & TRUST CO. *v.* GARNER, SHELBY COUNTY TRUSTEE, ET AL. Sup. Ct. Tenn. [Probable jurisdiction noted, 456 U. S. 943.] Motion of appellees for divided argument granted.

No. 81–1618. WEYERHAEUSER CO. ET AL. *v.* LYMAN LAMB CO. ET AL.; and

No. 81–1619. GEORGIA-PACIFIC CORP. *v.* LYMAN LAMB CO. ET AL. C. A. 5th Cir. [Certiorari granted, 456 U. S. 971.] Motions of Business Roundtable et al. and City Investing Co. et al. for leave to file briefs as *amici curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument granted, and 10 additional minutes allotted for that purpose. JUSTICE WHITE took no part in the consideration or decision of these motions.

No. 81–1627. SHEPARD *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. [Certiorari granted, 456 U. S. 970.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 81–1661. GENERAL MOTORS CORP. *v.* DEVEX CORP. ET AL. C. A. 3d Cir. [Certiorari granted, 456 U. S. 988.] Motion of the Bar Association of the District of Columbia for leave to file a brief as *amicus curiae* granted. Motion of the Bar Association of the District of Columbia for leave to participate in oral argument as *amicus curiae* denied.

No. 81–1664. METROPOLITAN EDISON CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. [Certiorari granted, 457 U. S. 1116.] Motion of the Solicitor General for divided argument granted.

No. 81–1748. UNITED STATES *v.* MITCHELL ET AL. Ct. Cl. [Certiorari granted, 457 U. S. 1104.] Motion of the parties to dispense with printing the joint appendix granted.

No. 81–1863. UNITED STATES ET AL. *v.* GRACE ET AL. C. A. D. C. Cir. [Probable jurisdiction noted, 457 U. S. 1131.] Motion of the parties to dispense with printing the joint appendix granted.

No. 81–1756. LEHR *v.* ROBERTSON ET AL. Ct. App. N. Y. [Probable jurisdiction postponed, 456 U. S. 970.] Motions of Community Action for Legal Services, Inc., et al. and National Committee For Adoption, Inc., for leave to file briefs as *amici curiae* granted.

No. 81–1774. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* BULLARD. C. A. 5th Cir. [Certiorari granted, 457 U. S. 1116.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* denied.

No. 81–1802. UNITED STATES *v.* KNOTTS. C. A. 8th Cir. [Certiorari granted, 457 U. S. 1131.] Motion for appointment of counsel granted, and it is ordered that Mark W. Peterson, Esquire, of Minneapolis, Minn., be appointed to serve as counsel for respondent in this case. Motion of the parties to dispense with printing the joint appendix denied.

No. 81–1938. UNITED STATES *v.* BAGGOT. C. A. 7th Cir. [Certiorari granted, 457 U. S. 1131.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 81–1945. PACIFIC GAS & ELECTRIC CO. ET AL. *v.* STATE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION ET AL. C. A. 9th Cir. [Certiorari granted, 457 U. S. 1132.] Motions of New England Legal Foundation and Fusion Energy Foundation for leave to file briefs as *amici curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 81–1966. BELKNAP, INC. *v.* HALE ET AL. Ct. App. Ky. [Certiorari granted, 457 U. S. 1131.] Motions of

American Federation of Labor and Congress of Industrial Organizations and Chamber of Commerce of the United States for leave to file briefs as *amici curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 81–2159. SILKWOOD, ADMINISTRATOR *v.* KERR-MCGEE CORP. ET AL. Appeal from C. A. 10th Cir.;

No. 81–2278. UNION ELECTRIC CO. *v.* CITY OF KIRKWOOD, MISSOURI. C. A. 8th Cir.;

No. 81–2359. AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. *v.* PHONETELE, INC. C. A. 9th Cir.;

No. 82–116. GREATER WASHINGTON CENTRAL LABOR COUNCIL *v.* DISTRICT OF COLUMBIA ET AL. Ct. App. D. C.; and

No. 82–146. FOOD & ALLIED SERVICES TRADE COUNCIL OF METROPOLITAN WASHINGTON *v.* DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 81–2249. SUMNER, WARDEN, SAN QUENTIN PRISON *v.* MAXWELL. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 81–6737. IN RE JAFFER; and

No. 81–6916. IN RE WEIGANG. Petitions for writs of common-law certiorari denied.

No. 81–6878. IN RE JONES;

No. 81–6898. IN RE DONNELSON;

No. 82–5016. IN RE SULLIVAN;

No. 82–5166. IN RE HOOVER;

No. 82–5172. IN RE VON LUDWITZ;

No. 82–5193. IN RE MCGOURTY;

No. 82–5221. IN RE KULIK; and

No. 82–5326. IN RE BARNEY. Petitions for writs of habeas corpus denied.

No. 81–6633. BEARDEN *v.* GEORGIA. Ct. App. Ga. [Certiorari granted, 458 U. S. 1105.] Motion for appointment of counsel granted, and it is ordered that James H. Lohr, Esquire, of Chattanooga, Tenn., be appointed to serve as counsel for petitioner in this case.

No. 81–2153. IN RE FEINSTEIN ET AL.;
No. 81–2319. IN RE PICKERING;
No. 81–6693. IN RE PARKER;
No. 81–6729. IN RE BARNEY;
No. 81–6776. IN RE CAVALLARO;
No. 81–6831. IN RE CARTER;
No. 81–6889. IN RE KALEC;
No. 81–6909. IN RE LE GRAND;
No. 81–6997. IN RE WESTOVER;
No. 82–5137. IN RE POOLE;
No. 82–5168. IN RE ALOI; and
No. 82–5184. IN RE VELILLA. Petitions for writs of mandamus denied.

No. 82–440. IN RE FARMERS UNION CENTRAL EXCHANGE, INC., ET AL. Motion of petitioners to expedite consideration of the petition for writ of mandamus denied. Petition for writ of mandamus denied. JUSTICE STEVENS took no part in the consideration or decision of this motion and this petition.

No. 81–2205. IN RE LIEBER. Petition for writ of prohibition and/or mandamus denied.

Probable Jurisdiction Noted

No. 81–2338. REGAN, SECRETARY OF THE TREASURY, ET AL. *v.* TAXATION WITH REPRESENTATION OF WASHINGTON. Appeal from C. A. D. C. Cir. Probable jurisdiction noted. Reported below: 219 U. S. App. D. C. 117, 676 F. 2d 715.

No. 82–65. BROWN ET AL. *v.* THOMSON, SECRETARY OF STATE OF WYOMING, ET AL. Appeal from D. C. Wyo. Probable jurisdiction noted. Reported below: 536 F. Supp. 780.

Certiorari Granted

No. 81–2125. BELL, SECRETARY OF EDUCATION *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 662 F. 2d 208.

No. 81–2337. BLOCK, SECRETARY OF AGRICULTURE, ET AL. *v.* NORTH DAKOTA EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS. C. A. 8th Cir. Certiorari granted. Reported below: 671 F. 2d 271.

No. 82–63. CITY OF REVERE *v.* MASSACHUSETTS GENERAL HOSPITAL. Sup. Jud. Ct. Mass. Certiorari granted. Reported below: 385 Mass. 772, 434 N. E. 2d 185.

No. 82–195. MUELLER ET AL. *v.* ALLEN ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 676 F. 2d 1195.

No. 81–1889. PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK *v.* MID-LOUISIANA GAS CO. ET AL.;
No. 81–1958. ARIZONA ELECTRIC POWER COOPERATIVE, INC. *v.* MID-LOUISIANA GAS CO. ET AL.;
No. 81–2042. MICHIGAN *v.* MID-LOUISIANA GAS CO. ET AL.; and
No. 82–19. FEDERAL ENERGY REGULATORY COMMISSION *v.* MID-LOUISIANA GAS CO. ET AL. C. A. 5th Cir. Motion of Public Utilities Commission of California et al. for leave to file a brief as *amici curiae* in Nos. 81–1889, 81–1958, and 81–2042 granted. Motion of Associated Gas Distributors for leave to file a brief as *amicus curiae* in No. 81–1889 granted. Motions of National Rural Electric Cooperative Association and Edmund G. Brown, Jr., Governor of California, for leave to file briefs as *amici curiae* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 664 F. 2d 530.

No. 81–1891. MORRISON-KNUDSEN CONSTRUCTION CO. ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION

PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. D. C. Cir. Motions of American Insurance Association, Alliance of American Insurers et al., and National Association of Stevedores for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 216 U. S. App. D. C. 50, 670 F. 2d 208.

No. 81–1893. CALIFORNIA *v.* RAMOS. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 30 Cal. 3d 553, 639 P. 2d 908.

No. 81–2147. ARIZONA ET AL. *v.* SAN CARLOS APACHE TRIBE OF ARIZONA ET AL.; ARIZONA ET AL. *v.* NAVAJO TRIBE OF INDIANS ET AL.; and

No. 81–2188. MONTANA ET AL. *v.* NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one and one-half hours allotted for oral argument. Reported below: No. 81–2147, 668 F. 2d 1093 (first case), 668 F. 2d 1100 (second case); No. 81–2188, 668 F. 2d 1080.

No. 81–2318. FLORIDA *v.* CASAL ET AL. Sup. Ct. Fla. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 410 So. 2d 152.

No. 82–131. JONES & LAUGHLIN STEEL CORP. *v.* PFEIFER. C. A. 3d Cir. Motion of Keystone Shipping Co. et al. for leave to file a brief as *amici curiae* granted. Certiorari granted limited to Questions I and II presented by the petition. Reported below: 678 F. 2d 453.

Certiorari Denied. (See also Nos. 81–2019, 81–2113, 81–2213, 81–2217, 81–2236, 81–2281, 81–2389, 81–2395, 81–6710, 81–6839, 81–6871, 81–6912, 81–6917, 81–6947, 81–6970, 81–6998, 82–8, 82–107, 82–193, 82–5064, 82–5089, 82–5102, 82–5105, 82–5112, 82–5179, 81–2375, 81–6737, and 81–6916, *supra.*)

No. 81–1688. GERBER *v.* DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 81–1755. DOLLAR *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 160 Ga. App. 759, 288 S. E. 2d 42.

No. 81–1760. MULLIGAN *v.* VETERANS ADMINISTRATION. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 492.

No. 81–1808. MOORE *v.* EL PASO COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 660 F. 2d 586.

No. 81–1819. NAVASKY *v.* CENTRAL INTELLIGENCE AGENCY. C. A. 2d Cir. Certiorari denied. Reported below: 679 F. 2d 873.

No. 81–1828. VAVRA ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 2d 1349.

No. 81–1861. WILKINS ET AL. *v.* UNIVERSITY OF HOUSTON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 654 F. 2d 388 and 662 F. 2d 1156.

No. 81–1876. DAVIS *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. D. C. Cir. Certiorari denied. Reported below: 217 U. S. App. D. C. 359, 672 F. 2d 893.

No. 81–1880. HALL *v.* BOARD OF TRUSTEES OF ARKANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 671 F. 2d 269.

No. 81–1894. CAPPUCCILLI ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 668 F. 2d 138.

No. 81–1906. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* SADLOWSKI ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 666 F. 2d 845.

No. 81–1910. SOUTH DAKOTA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 665 F. 2d 837.

No. 81–1936. APODACA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 666 F. 2d 89.

No. 81–1961. IDAHO EX REL. TROMBLEY, DIRECTOR, IDAHO DEPARTMENT OF LANDS, ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 666 F. 2d 444.

No. 81–1962. REGENTS OF THE UNIVERSITY OF CALIFORNIA *v.* LYNN; and

No. 81–2005. LYNN *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 656 F. 2d 1337.

No. 81–1965. BRAMSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 218 U. S. App. D. C. 162, 673 F. 2d 553.

No. 81–1970. SAMUEL T. ISAAC & ASSOCIATES, INC. *v.* GOVERNMENT NATIONAL MORTGAGE ASSOCIATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 673 F. 2d 1330.

No. 81–1976. WALTERS *v.* TENNESSEE VALLEY AUTHORITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1225.

No. 81–1978. FREEMAN ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 660 F. 2d 1030.

No. 81–1986. ATTORNEY GENERAL OF OHIO *v.* KRAUSE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 671 F. 2d 212.

No. 81–2004. PALM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 672 F. 2d 924.

No. 81–2014. BREWER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 670 F. 2d 1369.

No. 81–2030. EDGEWOOD SCHOOL DISTRICT ET AL. *v.* HOOTS ET AL.;

No. 81–2032. HALLENBERG, PRESIDENT OF THE ALLEGHENY COUNTY BOARD OF SCHOOL DIRECTORS *v.* HOOTS ET AL.;

No. 81–2034. ALLEGHENY COUNTY SCHOOL BOARD ET AL. *v.* HOOTS ET AL.;

No. 81–2037. SWISSVALE AREA SCHOOL DISTRICT *v.* HOOTS ET AL.; and

No. 81–2038. PENNSYLVANIA ET AL. *v.* HOOTS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 1107.

No. 81–2051. PETITO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 68.

No. 81–2054. SECHAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 671 F. 2d 1383.

No. 81–2061. NEW JERSEY *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. 3d Cir. Certiorari denied. Reported below: 670 F. 2d 1284.

No. 81–2064. NICHOL *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 55 Ore. App. 162, 637 P. 2d 625.

No. 81–2067. HAWAII *v.* BLOSS; and HAWAII *v.* HAWKINS. Sup. Ct. Haw. Certiorari denied. Reported below: 64 Haw. 148, 637 P. 2d 1117 (first case); 64 Haw. 499, 643 P. 2d 1058 (second case).

No. 81–2068. RUTUELO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 86 App. Div. 2d 784, 449 N. Y. S. 2d 372.

No. 81–2069. ASSOCIATED GROCERS *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 217 U. S. App. D. C. 358, 672 F. 2d 892.

No. 81–2072. RUBUSH ET AL. *v.* BEMIS CO., INC., ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: 427 N. E. 2d 1058.

No. 81–2073. THEVIS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 665 F. 2d 616.

No. 81–2075. WOLD *v.* WOLD ET AL. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 100 Ill. App. 3d 1200, 429 N. E. 2d 929.

No. 81–2078. AMON ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 669 F. 2d 1351.

No. 81–2083. ITT CONTINENTAL BAKING CO. *v.* WILLIAM INGLIS & SONS BAKING CO. ET AL.; and

No. 81–2289. WILLIAM INGLIS & SONS BAKING CO. ET AL. *v.* ITT CONTINENTAL BAKING CO., INC. C. A. 9th Cir. Certiorari denied. Reported below: 668 F. 2d 1014.

No. 81–2089. PHILLIPS PETROLEUM CO. *v.* ASHLAND OIL, INC., ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–2090. CITY OF SAULT STE. MARIE, MICHIGAN *v.* WATT, SECRETARY OF THE INTERIOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 217 U. S. App. D. C. 359, 672 F. 2d 893.

No. 81–2093. COUNTY OF IMPERIAL ET AL. *v.* MUNOZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 811.

No. 81–2100. STEPHENS *v.* LOWERY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 657 F. 2d 1250.

No. 81–2094. CLANCY ET AL. *v.* JARTECH, INC., ET AL.; and

No. 81–2096. CLANCY ET AL. *v.* JARTECH, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 666 F. 2d 403.

No. 81–2098. SUNTEX DAIRY ET AL. *v.* BLOCK, SECRETARY OF AGRICULTURE. C. A. 5th Cir. Certiorari denied. Reported below: 666 F. 2d 158.

No. 81–2102. HUSTLER MAGAZINE, INC., ET AL. *v.* GUCCIONE. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 81–2106. JOHNSON *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 673 F. 2d 1338.

No. 81–2107. MILLER ET AL. *v.* CURRY, DISTRICT ATTORNEY, TARRANT COUNTY, ET AL. Ct. App. Tex., 2d Sup. Jud. Dist. Certiorari denied. Reported below: 625 S. W. 2d 84.

No. 81–2108. CORCHADO *v.* PUERTO RICO MARINE MANAGEMENT, INC. C. A. 1st Cir. Certiorari denied. Reported below: 665 F. 2d 410.

No. 81–2109. DOHAISH *v.* TOOLEY. C. A. 10th Cir. Certiorari denied. Reported below: 670 F. 2d 934.

No. 81–2111. COLUMBIA BROADCASTING SYSTEM, INC. *v.* ROY EXPORT COMPANY ESTABLISHMENT OF VADUZ, LIECHTENSTEIN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 1095.

No. 81–2112. PETERS ET AL. *v.* HEALTH AND HOSPITALS GOVERNING COMMISSION OF COOK COUNTY. Sup. Ct. Ill. Certiorari denied. Reported below: 88 Ill. 2d 316, 430 N. E. 2d 1128.

No. 81–2114. GUNTER ET UX. *v.* HUTCHESON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 674 F. 2d 862.

No. 81–2116. PETTIBONE CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 679 F. 2d 894.

No. 81–2119. AXELROD, NEW YORK STATE COMMISSIONER OF HEALTH *v.* COE ET AL.; and

No. 81–6511. COE ET AL. *v.* AXELROD, NEW YORK STATE COMMISSIONER OF HEALTH, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 669 F. 2d 67.

No. 81–2120. DURHAM INDUSTRIES, INC. *v.* NORTH RIVER INSURANCE CO. C. A. 2d Cir. Certiorari denied. Reported below: 673 F. 2d 37.

No. 81–2121. BOLL *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 81–2122. WISCONSIN AVENUE ASSOCIATES, INC., ET AL. *v.* 2720 WISCONSIN AVENUE COOPERATIVE ASSN., INC., ET AL.; and

No. 81–2179. GOLD DEPOSITORY & LOAN CO., INC. *v.* 2720 WISCONSIN AVENUE COOPERATIVE ASSN., INC., ET AL. Ct. App. D. C. Certiorari denied. Reported below: 441 A. 2d 956.

No. 81–2124. BOSTON ASSOCIATION OF SCHOOL ADMINISTRATORS & SUPERVISORS, AFL–CIO *v.* MORGAN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 671 F. 2d 23.

No. 81–2126. FIELDS, ACTING WARDEN, JOSEPH HARP CORRECTIONAL CENTER, ET AL. *v.* PAUL M. C. A. 10th Cir. Certiorari denied. Reported below: 668 F. 2d 1127.

No. 81–2129. EISENBERG *v.* CROWLEY. Ct. App. Wis. Certiorari denied. Reported below: 103 Wis. 2d 691, 310 N. W. 2d 652.

No. 81–2130. JOSEPH ET AL. *v.* BOND ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 685 F. 2d 436.

No. 81–2131. HILL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 669 F. 2d 23.

No. 81–2132. CORY, STATE CONTROLLER *v.* CAMPBELL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 125 Cal. App. 3d 1044, 178 Cal. Rptr. 823.

No. 81–2136. TEXACO, INC. *v.* HASBROUCK, DBA RICK'S TEXACO, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 663 F. 2d 930.

No. 81–2137. ARCO POLYMERS, INC. *v.* LOCAL 8–74, AFFILIATED WITH THE OIL, CHEMICAL & ATOMIC WORKERS' INTERNATIONAL UNION. C. A. 3d Cir. Certiorari denied. Reported below: 671 F. 2d 752.

No. 81–2138. PARKER ET AL. *v.* ANDERSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 667 F. 2d 1204.

No. 81–2139. TYLER *v.* HARTFORD INSURANCE GROUP ET AL. Ct. App. Colo. Certiorari denied.

No. 81–2140. STEWART *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 278 S. C. 296, 295 S. E. 2d 627.

No. 81–2142. LINDQUIST ET AL. *v.* FOWLER. C. A. 9th Cir. Certiorari denied. Reported below: 672 F. 2d 922.

No. 81–2143. THOMPSON *v.* COVINGTON HOUSING DEVELOPMENT CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1223.

No. 81–2145. ARRANDALE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 688.

No. 81–2146. SINGLETON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 672 F. 2d 924.

No. 81–2154. CURRIER *v.* FOGEL ET AL.; and

No. 81–2163. CHESTNUTT ET AL. *v.* FOGEL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 668 F. 2d 100.

No. 81–2155. VARNEY ET AL. *v.* SMIDDY; and
No. 81–2382. SMIDDY *v.* VARNEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 261.

No. 81–2157. CAROLINA CASUALTY INSURANCE CO. *v.* TRANSPORT INDEMNITY CO. C. A. 4th Cir. Certiorari denied. Reported below: 676 F. 2d 690.

No. 81–2158. SKAINES, DBA WYATT TIRE DISTRIBUTORS *v.* UNIROYAL, INC. C. A. 6th Cir. Certiorari denied. Reported below: 673 F. 2d 1330.

No. 81–2160. AGRILLO-LADLAD ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 675 F. 2d 905.

No. 81–2161. GRIFFITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 181.

No. 81–2165. KENNETH M. M. *v.* CLAIRE A. M. Sup. Ct. Del. Certiorari denied. Reported below: 450 A. 2d 893.

No. 81–2166. BARBER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 668 F. 2d 778.

No. 81–2167. SEEKONK WATER DISTRICT *v.* HERITAGE HOMES OF ATTLEBORO, INC. C. A. 1st Cir. Certiorari denied. Reported below: 670 F. 2d 1.

No. 81–2170. HASER *v.* WISKOWSKI, DIRECTOR, DIVISION OF MOTOR VEHICLES OF NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 89 N. J. 400, 446 A. 2d 135.

No. 81–2173. GRABINSKI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 674 F. 2d 677.

No. 81–2178. THOMPSON ET AL. *v.* WOOD. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1223.

No. 81–2180. STEED *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 674 F. 2d 284.

No. 81–2182. GANA *v.* HAWAII. Sup. Ct. Haw. Certiorari denied. Reported below: 64 Haw. 407, 642 P. 2d 933.

No. 81–2183. RUFFIN *v.* CASEY, DIRECTOR, CENTRAL INTELLIGENCE AGENCY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 218 U. S. App. D. C. 161, 673 F. 2d 552.

No. 81–2185. GIBSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 89 Ill. 2d 322, 433 N. E. 2d 629.

No. 81–2186. M. R. YUDOFSKY & ASSOCIATES ET AL. *v.* KENTUCKY DEPARTMENT OF FINANCE. Ct. App. Ky. Certiorari denied.

No. 81–2187. GUTHERY *v.* GUTHERY. Ct. Civ. App. Ala. Certiorari denied. Reported below: 409 So. 2d 844.

No. 81–2190. HALL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 673 F. 2d 1340.

No. 81–2191. MAYBERRY *v.* DEES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 663 F. 2d 502.

No. 81–2192. MORRAN *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 412 So. 2d 487.

No. 81–2193. HERN IRON WORKS, INC. *v.* DONOVAN, SECRETARY OF LABOR; and YOUNGSTROM, DBA YOUNGSTROM'S LOG HOMES *v.* U. S. DEPARTMENT OF LABOR. Certiorari (first case) and certiorari before judgment (second case) to C. A. 9th Cir. Certiorari denied. Reported below: 670 F. 2d 838 (first case).

No. 81–2196. COUNCIL OF NORTH ATLANTIC SHIPPING ASSNS. ET AL. *v.* FEDERAL MARITIME COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 217 U. S. App. D. C. 318, 672 F. 2d 171.

No. 81–2200. MINERS & MERCHANTS BANK OF ROUNDUP, MONTANA *v.* STENSVAD ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 196 Mont. 193, 640 P. 2d 1303.

No. 81–2201. KEEFE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 228 Ct. Cl. 493, 657 F. 2d 1194.

No. 81–2203. GIOVANAZI *v.* GIOVANAZI ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 673 F. 2d 1337.

No. 81–2207. C. B. FOODS, INC. *v.* UNITED STATES DEPARTMENT OF AGRICULTURE. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 804.

No. 81–2208. INTERCOLLEGIATE (BIG TEN) CONFERENCE OF FACULTY REPRESENTATIVES ET AL. *v.* WILSON. C. A. 7th Cir. Certiorari denied. Reported below: 668 F. 2d 962.

No. 81–2210. GREYHOUND LINES, INC. *v.* PRICE. C. A. 4th Cir. Certiorari denied.

No. 81–2212. KAYE *v.* LUCE, FORWARD, HAMILTON & SCRIPPS ET AL. C. A. 9th Cir. Certiorari denied.

No. 81–2214. ANDRUS ENERGY CORP. ET AL. *v.* UNITED STATES ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 678 F. 2d 1081.

No. 81–2216. BYRD *v.* SAN FRANCISCO UNIFIED SCHOOL DISTRICT. C. A. 9th Cir. Certiorari denied. Reported below: 673 F. 2d 1336.

No. 81–2220. UNITED STATES EX REL. PATRICK *v.* HILTON, WARDEN, TRENTON STATE PRISON. C. A. 3d Cir. Certiorari denied.

No. 81–2222. SWEATT ET AL. *v.* PLUMBAGO MINING CORP. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 444 A. 2d 361.

No. 81–2223. KELTNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 675 F. 2d 602.

No. 81–2227. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 327.

No. 81–2228. SOOJIAN *v.* COUNTY OF FRESNO ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 81–2229. CHIAFARI *v.* U. S. DEPARTMENT OF INTERIOR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1307.

No. 81–2230. MCGOUGH *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 407 So. 2d 622.

No. 81–2232. BRUCE *v.* KOSNOSKI. C. A. 4th Cir. Certiorari denied. Reported below: 669 F. 2d 944.

No. 81–2233. VALDES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 661 F. 2d 436.

No. 81–2234. ACME QUILTING CO., INC. *v.* PERFECT FIT INDUSTRIES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 673 F. 2d 53.

No. 81–2235. GARCIA *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 666 F. 2d 960.

No. 81–2238. PARSONS, DBA EXECUTIVE MOTORS UNLIMITED ET AL. *v.* FORD MOTOR CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 669 F. 2d 308.

No. 81–2241. KEMBER ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 222 U. S. App. D. C. 1, 685 F. 2d 451.

No. 81–2246. CONSTANT *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 645 P. 2d 843.

No. 81–2247. McCARTHY ET AL. *v.* MENSCH ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 412 So. 2d 343.

No. 81–2248. BERNS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1224.

No. 81–2250. HARVEY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 767.

No. 81–2251. WILLIAMS *v.* COOK COUNTY CIVIL SERVICE COMMISSION ET AL. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 81–2253. VINSTON *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 274 Ark. 452, 625 S. W. 2d 533.

No. 81–2255. CHECKRITE PETROLEUM INC. *v.* AMOCO OIL CO. C. A. 2d Cir. Certiorari denied. Reported below: 678 F. 2d 5.

No. 81–2256. JEFFERSON COUNTY, KENTUCKY, ET AL. *v.* HAYS ET AL.; and

No. 82–28. HAYS ET AL. *v.* JEFFERSON COUNTY, KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 668 F. 2d 869 and 673 F. 2d 152.

No. 81–2259. MISSOURI PACIFIC RAILROAD CO. *v.* BOUBEL. C. A. 5th Cir. Certiorari denied. Reported below: 670 F. 2d 183.

No. 81–2260. S. A. R. L. DE GESTION PIERRE CARDIN *v.* MORSE. C. A. 2d Cir. Certiorari denied. Reported below: 688 F. 2d 816.

No. 81–2261. KIM ET AL. *v.* TAYLOR ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 81–2262. SUTTON ET AL. *v.* SOUTHERN NATURAL GAS CO.; and SUN FRESH FARMS OF LOUISIANA ET AL. *v.* SOUTHERN NATURAL GAS CO. Ct. App. La., 2d Cir. Cer-

tiorari denied. Reported below: 406 So. 2d 657 (first case); 406 So. 2d 669 (second case).

No. 81–2263. UZZOLINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 810.

No. 81–2264. LONEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 688.

No. 81–2265. KELLY *v.* WARMINSTER TOWNSHIP BOARD OF SUPERVISORS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 806.

No. 81–2267. FIRST NATIONAL BANK OF SCOTIA ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 688 F. 2d 815.

No. 81–2269. BERGER *v.* BERGER. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 3 Ohio App. 3d 125, 443 N. E. 2d 1375.

No. 81–2270. GUSTAFSON ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 675 F. 2d 965.

No. 81–2271. SCHOOL BOARD OF DADE COUNTY, FLORIDA *v.* TRAVELERS INDEMNITY CO. C. A. 11th Cir. Certiorari denied. Reported below: 666 F. 2d 505.

No. 81–2274. JONNET DEVELOPMENT CORP. *v.* CALIGUIRI ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 686.

No. 81–2277. NORTH STATE CHEMICALS, INC. *v.* STRICKLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 885.

No. 81–2282. COUGHLIN ET AL. *v.* JACOBSON. C. A. 2d Cir. Certiorari denied. Reported below: 688 F. 2d 815.

No. 81–2286. SARMIENTO-PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 667 F. 2d 1239.

No. 81–2287. WOOLERY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 670 F. 2d 513.

No. 81–2288. SPECKTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 671 F. 2d 1377.

No. 81–2290. CINCINNATI ASSOCIATION FOR THE BLIND *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 672 F. 2d 567.

No. 81–2291. ALEXANDRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 675 F. 2d 34.

No. 81–2292. AIR EXPRESS INTERNATIONAL CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 11th Cir. Certiorari denied. Reported below: 659 F. 2d 610 and 670 F. 2d 512.

No. 81–2293. CONNECTICUT LIGHT & POWER CO. ET AL. *v.* NUCLEAR REGULATORY COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 218 U. S. App. D. C. 134, 673 F. 2d 525.

No. 81–2295. BONELLO *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied. Reported below: 3 Ohio App. 3d 365, 445 N. E. 2d 667.

No. 81–2297. WARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 676 F. 2d 94.

No. 81–2298. WILLIAMS *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1320.

No. 81–2300. CONSIDINE ET VIR *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 227 Ct. Cl. 77, 645 F. 2d 925.

No. 81–2301. BRENNER, DBA TEDDY BRENNER ENTERPRISES *v.* WORLD BOXING COUNCIL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 675 F. 2d 445.

No. 81–2304. UNITED STATES STEEL CORP. *v.* GAUDIANO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 811.

No. 81–2308. CAPPS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 81–2311. KERSEY ET AL. *v.* SHIPLEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 730.

No. 81–2312. MISSOURI PACIFIC RAILROAD CO. *v.* UNITED STATES STEEL CORP. C. A. 8th Cir. Certiorari denied. Reported below: 668 F. 2d 435.

No. 81–2314. TAYLOR *v.* KENTUCKY EX REL. MAY. Sup. Ct. Ky. Certiorari denied.

No. 81–2315. DEL RE *v.* PRUDENTIAL LINES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 669 F. 2d 93.

No. 81–2317. RANGER FUEL CORP. *v.* YOUGHIOGHENY & OHIO COAL CO. C. A. 4th Cir. Certiorari denied. Reported below: 677 F. 2d 378.

No. 81–2320. DAZZO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 284.

No. 81–2321. WAIDE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 229 Ct. Cl. 833.

No. 81–2323. W. H. MOSELEY CO., INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 230 Ct. Cl. 405, 677 F. 2d 850.

No. 81–2325. ATLANTA GAS LIGHT CO. *v.* UNITED STATES DEPARTMENT OF ENERGY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 666 F. 2d 1359.

No. 81–2327. DEBATTISTA *v.* ARGONAUT-SOUTHWEST INSURANCE CO. ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 410 So. 2d 279.

No. 81–2329. UNION TEXAS PETROLEUM, A DIVISION OF ALLIED CHEMICAL CORP., ET AL. *v.* CORPORATION COMMISSION OF OKLAHOMA ET AL.; and

No. 81–2330. HARPER OIL CO. *v.* CORPORATION COMMISSION OF OKLAHOMA ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 651 P. 2d 652.

No. 81–2335. BROWNING, ADMINISTRATRIX *v.* B. F. DIAMOND CONSTRUCTION CO., INC., ET AL. Ct. App. Ga. Certiorari denied. Reported below: 161 Ga. App. 73, 289 S. E. 2d 268.

No. 81–2339. BUCHANON *v.* MACON COUNTY COMMUNITY ACTION COMMITTEE, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 670 F. 2d 185.

No. 81–2341. KUDLER ET AL. *v.* SMITH. Ct. App. Colo. Certiorari denied. Reported below: 643 P. 2d 783.

No. 81–2342. GONSALVES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 675 F. 2d 1050.

No. 81–2345. LYLE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 673 F. 2d 1326.

No. 81–2346. REXROAT *v.* THORELL. Sup. Ct. Ill. Certiorari denied. Reported below: 89 Ill. 2d 221, 433 N. E. 2d 235.

No. 81–2347. BODDICKER ET AL. *v.* ARIZONA STATE DENTAL ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 680 F. 2d 66.

No. 81–2348. AETNA LIFE & CASUALTY CO. ET AL. *v.* GURNEE ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 55 N. Y. 2d 184, 433 N. E. 2d 128.

No. 81–2350. MOFFET ET AL. *v.* STONE MOUNTAIN MEMORIAL ASSN. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 671 F. 2d 1383.

No. 81–2351. SCHREFFLER *v.* PENNSYLVANIA LABOR RELATIONS BOARD ET AL. Pa. Commw. Ct. Certiorari denied. Reported below: 58 Pa. Commw. 78, 427 A. 2d 305.

No. 81–2353. GRACE *v.* SANTA FE PACIFIC RAILROAD CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 668 F. 2d 1140.

No. 81–2354. UNIFORMED FIREFIGHTERS ASSN., LOCAL 94, IAFF, AFL–CIO, ET AL. *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 676 F. 2d 20.

No. 81–2356. GRANT *v.* ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION. Sup. Ct. Ill. Certiorari denied. Reported below: 89 Ill. 2d 247, 433 N. E. 2d 259.

No. 81–2357. JOHN G. RINALDO LIMITED PARTNERSHIP NUMBER 14 ET AL. *v.* ROADRUNNER LAKE PARKS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 673 F. 2d 1338.

No. 81–2360. MOELLER ET AL. *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 186 Conn. 547, 442 A. 2d 939.

No. 81–2361. GROSSMAN *v.* FIDELITY MUNICIPAL BOND FUND, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 674 F. 2d 115.

No. 81–2364. GEE *v.* GEE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 672 F. 2d 922.

No. 81–2365. FITZPATRICK *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 290.

No. 81–2367. SOLITRON DEVICES, INC., ET AL. *v.* SIROTA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 673 F. 2d 566.

No. 81–2368. ARMIJO, COMMISSIONER OF PUBLIC LANDS FOR NEW MEXICO *v.* JENSEN ET AL. Sup. Ct. N. M. Cer-

tiorari denied. Reported below: 97 N. M. 630, 642 P. 2d 1089.

No. 81–2372. DELESDERNIER *v.* PORTERIE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 666 F. 2d 116.

No. 81–2374. FERGUSON *v.* UNION MUTUAL STOCK LIFE INSURANCE COMPANY OF AMERICA. C. A. 8th Cir. Certiorari denied. Reported below: 673 F. 2d 253.

No. 81–2378. YACHTS AMERICA, INC., ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 230 Ct. Cl. 26, 673 F. 2d 356.

No. 81–2379. PROCTOR ET AL. *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 218 U. S. App. D. C. 289, 675 F. 2d 308.

No. 81–2380. PENNAVARIA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 810.

No. 81–2387. RESTAURANT EMPLOYEES, BARTENDERS & HOTEL SERVICE EMPLOYEES WELFARE AND PENSION TRUST ET AL. *v.* GATEWAY CAFE, INC., ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 95 Wash. 2d 791, 630 P. 2d 1348.

No. 81–2392. PHILLIPS PETROLEUM CO. *v.* SAUCEDO. C. A. 5th Cir. Certiorari denied. Reported below: 670 F. 2d 634.

No. 81–2393. MUNOZ *v.* DEPARTMENT OF REGISTRATION AND EDUCATION OF ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 101 Ill. App. 3d 827, 428 N. E. 2d 1137.

No. 81–2396. BENJAMIN *v.* UNITED STATES;
No. 82–5228. FEENEY *v.* UNITED STATES; and
No. 82–5252. ROSTEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 675 F. 2d 46.

No. 81–2397. PRIDDY *v.* PRIDDY. Sup. Ct. Tex. Certiorari denied.

No. 81–2398. PERKINS *v.* CATERPILLAR TRACTOR CO. C. A. 7th Cir. Certiorari denied. Reported below: 676 F. 2d 699.

No. 81–2400. CAPITOL AGGREGATES, INC. *v.* DONOVAN, SECRETARY OF LABOR, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 671 F. 2d 1377.

No. 81–2401. YOUNG ET AL. *v.* FIDELITY UNION LIFE INSURANCE CO. ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–2405. PASS WORD, INC., ET AL., DBA COEUR D'ALENE ANSWERING SERVICE *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 218 U. S. App. D. C. 181, 673 F. 2d 1363.

No. 81–2410. GEE *v.* GEE. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 81–2411. GEE *v.* DAWSON ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 81–2412. GULF OIL CORP. ET AL. *v.* FISHER. C. A. 5th Cir. Certiorari denied. Reported below: 671 F. 2d 904.

No. 81–2413. VALENTINE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 903.

No. 81–6183. JONES *v.* CITY OF ST. LOUIS, MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied.

No. 81–6309. PICKENS *v.* BRAND, SHERIFF OF JOHNSON COUNTY, ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–6356. HERNANDEZ *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 408 So. 2d 911.

No. 81–6361. WIGGINS *v.* NEW MEXICO SUPREME COURT CLERK ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 664 F. 2d 812.

No. 81–6453. MULDER *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 313 N. W. 2d 885.

No. 81–6473. CHAKA *v.* DEROBERTIS ET AL. C. A. 7th Cir. Certiorari denied.

No. 81–6480. FIELDS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 627 S. W. 2d 714.

No. 81–6497. LEWIS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 410 So. 2d 1308.

No. 81–6518. STEERMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 2d 505.

No. 81–6533. ALDRIDGE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 81–6534. CLEVELAND *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–6572. WILLIAMSON *v.* FLORIDA DEPARTMENT OF CORRECTIONS. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 411 So. 2d 268.

No. 81–6581. SIMMS *v.* PATALINGHUG ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 672 F. 2d 913.

No. 81–6582. GUICHARD *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 681 F. 2d 801.

No. 81–6583. LIPPERT *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 89 Ill. 2d 171, 432 N. E. 2d 605.

No. 81–6597. DROKE *v.* GOLDSBY, CLERK OF GENERAL SESSIONS COURT OF SHELBY COUNTY, TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1218.

No. 81–6612. ARNOLD *v.* OHIO. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 81–6621. ANDERSON *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 96 Wash. 2d 739, 638 P. 2d 1205.

No. 81–6628. FLENORY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 688.

No. 81–6636. WILLIAMS *v.* BRADLEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1225.

No. 81–6639. MARSHALL *v.* COOMBE, SUPERINTENDENT, EASTERN NEW YORK CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 688 F. 2d 816.

No. 81–6659. TAYLOR *v.* UNITED STATES; and
No. 81–6899. SIMMONS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 426.

No. 81–6669. FRIAS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 670 F. 2d 849.

No. 81–6674. MORGAN *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 673 F. 2d 218.

No. 81–6681. ADDICKS *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. Ct. App. Ore. Certiorari denied. Reported below: 54 Ore. App. 830, 636 P. 2d 454.

No. 81–6683. TAVASSOLI ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 676 F. 2d 714.

No. 81–6687. RENFRO *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 96 Wash. 2d 902, 639 P. 2d 737.

No. 81–6689. STURM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 671 F. 2d 749.

No. 81–6703. WEAVER *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 100 Ill. App. 3d 512, 426 N. E. 2d 1227.

No. 81–6706. GATEWOOD *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 81–6707. DICKINSON *v.* VAUGHN. C. A. 11th Cir. Certiorari denied.

No. 81–6714. BARNETT *v.* ALFORD, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–6716. LURZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 666 F. 2d 69.

No. 81–6717. CODA *v.* MARKS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 805.

No. 81–6720. PARK *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 81–6722. EBERSOLE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 810.

No. 81–6723. WILLIAMS *v.* YEAGER. C. A. 5th Cir. Certiorari denied.

No. 81–6726. MADRID *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 673 F. 2d 1114.

No. 81–6727. CHATFIELD *v.* RICKETTS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 673 F. 2d 330.

No. 81–6733. WILLIAMS *v.* TOUCHTON. C. A. 5th Cir. Certiorari denied.

No. 81–6734. HOLDEN *v.* COMMISSION AGAINST DISCRIMINATION OF MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 671 F. 2d 30.

No. 81–6735. BATTLE *v.* SUTTON. C. A. 4th Cir. Certiorari denied. Reported below: 676 F. 2d 690.

No. 81–6736. DONNELL *v.* GENERAL MOTORS CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 705.

No. 81–6739. MADON *v.* LONG ISLAND UNIVERSITY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 681 F. 2d 802.

No. 81–6740. HOLLAND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1318.

No. 81–6742. DEMPS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 666 F. 2d 224.

No. 81–6744. WILSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 671 F. 2d 1291.

No. 81–6745. WALTON *v.* JAGO. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 182.

No. 81–6747. THOMAS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 275 Ark. xxi.

No. 81–6751. LYNN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 677 F. 2d 116.

No. 81–6753. MUNGO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 676 F. 2d 695.

No. 81–6758. CRUZ *v.* HAMMOCK, CHAIRMAN OF THE NEW YORK STATE DEPARTMENT OF PAROLE. C. A. 2d Cir. Certiorari denied. Reported below: 669 F. 2d 872.

No. 81–6759. SMITH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 101 Ill. App. 3d 1197, 432 N. E. 2d 396.

No. 81–6761. HUTCHISON *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 81–6762. GLEICHER *v.* TURNER. Ct. App. D. C. Certiorari denied.

No. 81–6763. GLEICHER *v.* HAWKINS. Ct. App. D. C. Certiorari denied.

No. 81–6764. GLEICHER *v.* HINCKLEY. Ct. App. D. C. Certiorari denied.

No. 81–6766. SUDRANSKI *v.* VETERANS ADMINISTRATION. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1317.

No. 81–6770. FIELDS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 81–6772. HOWLAND *v.* FAIRMAN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 676 F. 2d 701.

No. 81–6774. FREEMAN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 409 So. 2d 581.

No. 81–6775. JACKSON *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 230 Kan. ix, 643 P. 2d 197.

No. 81–6778. JERRY *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 497 Pa. 422, 441 A. 2d 1210.

No. 81–6781. KAUFMAN *v.* CHILDREN'S HOME SOCIETY OF NEW JERSEY ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 89 N. J. 403, 446 A. 2d 137.

No. 81–6784. WILLIAMS *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 97 N. M. 634, 642 P. 2d 1093.

No. 81–6785. DOSS *v.* BREWER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 685 F. 2d 1003.

No. 81–6788. BROWN *v.* LEAVITT, SHERIFF, NORFOLK CITY JAIL. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1307.

No. 81–6789. FORD *v.* U-HAUL COMPANY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–6790. PARKER ET AL. *v.* PARRATT, WARDEN, NEBRASKA PENAL AND CORRECTIONAL COMPLEX. C. A. 8th Cir. Certiorari denied. Reported below: 662 F. 2d 479.

No. 81–6791. MERRILL *v.* GROUNDS, JUDGE OF THE SUPERIOR COURT, MARICOPA COUNTY, ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 81–6792. SMITH *v.* ESTELLE. C. A. 5th Cir. Certiorari denied.

No. 81–6794. CHAGRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 669 F. 2d 241.

No. 81–6795. JONES *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 50 Md. App. 743.

No. 81–6796. WILSON *v.* BROWN, WARDEN, ET AL. C. A. 1st Cir. Certiorari denied.

No. 81–6798. BOSTIC *v.* GARRISON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 876.

No. 81–6799. JACKSON *v.* SEEDCO'S LBDO. C. A. 11th Cir. Certiorari denied.

No. 81–6800. CHAKA *v.* WELCH ET AL. C. A. 7th Cir. Certiorari denied.

No. 81–6801. HAWKINS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 55 N. Y. 2d 474, 435 N. E. 2d 376.

No. 81–6802. PIGEE *v.* ISRAEL, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION, WAUPUN, WISCONSIN. C. A. 7th Cir. Certiorari denied. Reported below: 670 F. 2d 690.

No. 81–6805. THOMAS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 81–6808. CARROLL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 102 Ill. App. 3d 1198, 434 N. E. 2d 1200.

No. 81–6809. MALLOY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 55 N. Y. 2d 296, 434 N. E. 2d 237.

No. 81–6811. WILLEY *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 103 Mich. App. 405, 303 N. W. 2d 217.

No. 81–6814. FLORIAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 677 F. 2d 116.

No. 81–6815. CARTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 810.

No. 81–6816. HARRISON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 671 F. 2d 1159.

No. 81–6817. DICKERSON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 415 So. 2d 1371.

No. 81–6819. ALBERT *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 81–6822. LORENTZEN *v.* TRUSTEES OF BOSTON COLLEGE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 676 F. 2d 682.

No. 81–6824. OMERNICK *v.* LAROCQUE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 676 F. 2d 700.

No. 81–6826. TYLER ET AL. *v.* BOND, GOVERNOR OF MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 685 F. 2d 436.

No. 81–6829. BLOUNT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 101 Ill. App. 3d 443, 428 N. E. 2d 621.

No. 81–6830. GADOMSKI *v.* COMMON PLEAS COURT OF PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 685.

No. 81–6832. JOHNSON *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 318 N. W. 2d 417.

No. 81–6833. HAZEEM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 770.

No. 81–6834. SANFORD *v.* LIPPMAN, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 81–6835. VETETO *v.* PAYNE. C. A. 11th Cir. Certiorari denied.

No. 81–6836. WADE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 667 F. 2d 95.

No. 81–6837. JOHN *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 821.

No. 81–6840. SWINNEY *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 673 F. 2d 1325.

No. 81–6841. YOUNG *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 55 N. Y. 2d 419, 434 N. E. 2d 1068.

No. 81–6842. PAREZ *v.* HOGAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 900.

No. 81–6843. SMITH ET AL. *v.* SOWDERS, SUPERINTENDENT, KENTUCKY STATE PENITENTIARY. C. A. 6th Cir. Certiorari denied. Reported below: 671 F. 2d 986.

No. 81–6846. BUIE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 87 App. Div. 2d 740, 449 N. Y. S. 2d 819.

No. 81–6847. HARRIS *v.* LEZAK. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 898.

No. 81–6848. BALOGH *v.* HILTON ET AL. C. A. 3d Cir. Certiorari denied.

No. 81–6850. BUTHY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 55 N. Y. 2d 1040, 434 N. E. 2d 1083.

No. 81–6852. POSEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 903.

No. 81–6855. MARTINEZ *v.* HARRIS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 675 F. 2d 51.

No. 81–6856. CONTRERAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 667 F. 2d 976.

No. 81–6859. ARELLANES *v.* HADDEN ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–6860. BOAG *v.* CHIEF OF POLICE OF PORTLAND, OREGON, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 669 F. 2d 587.

No. 81–6863. WHITE *v.* OHIO. Ct. App. Ohio, Portage County. Certiorari denied.

No. 81–6864. EDWARDS *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 126 Cal. App. 3d 447, 178 Cal. Rptr. 876.

No. 81–6865. REITER *v.* CROSIER, JUDGE, 18TH DISTRICT COURT, JOHNSON COUNTY, TEXAS. Sup. Ct. Tex. Certiorari denied.

No. 81–6866. SETTLE ET AL. *v.* ESPIEFS, TRUSTEE. C. A. 1st Cir. Certiorari denied.

No. 81–6867. STRADER *v.* BUNCH, ASSISTANT SOLICITOR, HORRY COUNTY, SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1317.

No. 81–6869. THRAILKILL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 685 F. 2d 436.

No. 81–6874. TUNSIL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 672 F. 2d 879.

No. 81–6876. BLUE THUNDER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 81–6877. ECHOLS *v.* ANDERSON. C. A. 6th Cir. Certiorari denied.

No. 81–6879. NEWTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 677 F. 2d 16.

No. 81–6880. MANYPENNY *v.* ARIZONA. C. A. 9th Cir. Certiorari denied. Reported below: 672 F. 2d 761.

No. 81–6884. MARTIN *v.* SAMPLE ET AL. C. A. 3d Cir. Certiorari denied.

No. 81–6885. MARTIATO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 300.

No. 81–6886. WASKIEWICZ *v.* SHIELDS, CHAIRMAN, VIRGINIA STATE PAROLE BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 891.

No. 81–6887. LAMBDIN *v.* SUPERINTENDENT, CALIFORNIA CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 940.

No. 81–6888. FULTZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 675 F. 2d 815.

No. 81–6890. HEDRICK *v.* ALLSBROOK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 882.

No. 81–6892. COOPER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 682 F. 2d 114.

No. 81–6893. LONG *v.* BALKCOM, WARDEN, GEORGIA STATE PRISON. C. A. 11th Cir. Certiorari denied.

No. 81–6895. PAGE *v.* CARLSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 565.

No. 81–6896. LONG *v.* SOWDERS. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 178.

No. 81–6897. BEALS *v.* KELLER. App. Ct. Ill., 4th Dist. Certiorari denied.

No. 81–6900. JOHNSON *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 679 F. 2d 251.

No. 81–6901. DELIC *v.* HAYWARD, SHERIFF, ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–6902. CLAYBORN *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 81–6906. MORGAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 81–6907. MCLAIN *v.* HARRIS. C. A. 2d Cir. Certiorari denied. Reported below: 688 F. 2d 816.

No. 81–6910. HALIBURTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 181.

No. 81–6911. DAMMONS *v.* STEPHENSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 879.

No. 81–6913. BERNHARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 676 F. 2d 713.

No. 81–6914. DRUCKER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 81–6915. WEIGANG *v.* SMITH, ATTORNEY GENERAL. C. A. D. C. Cir. Certiorari denied.

No. 81–6918. KNOTT *v.* MABRY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 671 F. 2d 1208.

No. 81–6919. GUNN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 673 F. 2d 1325.

No. 81–6920. FIELDS *v.* FLORIDA. Sup. Ct. Ohio. Certiorari denied.

No. 81–6921. BARROW *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 410 So. 2d 1070.

No. 81–6923. WRENN *v.* AMERICAN CAST IRON PIPE CO. C. A. 11th Cir. Certiorari denied. Reported below: 670 F. 2d 185.

No. 81–6924. SYROVATKA ET AL. *v.* NEBRASKA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 706.

No. 81–6925. MCCULLEY ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 673 F. 2d 346.

No. 81–6926. MARTIN *v.* KISER. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1313.

No. 81–6927. SEVERA *v.* RESPOND, INC., ET AL. C. A. 3d Cir. Certiorari denied.

No. 81–6928. FOSTER *v.* GREER, WARDEN, MENARD CORRECTIONAL CENTER. C. A. 7th Cir. Certiorari denied. Reported below: 676 F. 2d 699.

No. 81–6930. DIN *v.* LONG ISLAND LIGHTING CO. C. A. 2d Cir. Certiorari denied.

No. 81–6931. BOLES *v.* GUILFORD TECHNICAL INSTITUTE. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 876.

No. 81–6932. EVANS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 31 Wash. App. 330, 641 P. 2d 722.

No. 81–6933. HUMPHRIES *v.* CITY OF CHESAPEAKE. C. A. 4th Cir. Certiorari denied. Reported below: 676 F. 2d 692.

No. 81–6934. REYES-PEREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 903.

No. 81–6935. MALHOTRA *v.* DOW CHEMICAL CO. C. A. 10th Cir. Certiorari denied.

No. 81–6939. CORNISH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 81–6940. FEISTMAN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

No. 81–6941. JOHANSON ET AL. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 81–6943. ERICKSON ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 676 F. 2d 408.

No. 81–6944. GIBSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 86 App. Div. 2d 783, 449 N. Y. S. 2d 553.

No. 81–6945. MCMILLAN *v.* OSBORNE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1313.

No. 81–6946. WRIGHT *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1320.

No. 81–6949. WALKER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 219 U. S. App. D. C. 67, 675 F. 2d 1292.

No. 81–6950. ADKINS *v.* BORDENKIRCHER, SUPERINTENDENT, WEST VIRGINIA STATE PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 674 F. 2d 279.

No. 81–6951. MINTZ *v.* BLOCK, SHERIFF, ET AL. C. A. 9th Cir. Certiorari denied.

No. 81–6954. MARSH *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 108 Mich. App. 659, 311 N. W. 2d 130.

No. 81–6956. WELSH *v.* ST. JOSEPH HOSPITAL, INC. Sup. Ct. N. M. Certiorari denied.

No. 81–6957. PENIX *v.* TAYLOR. Sup. Ct. Ohio. Certiorari denied.

No. 81–6958. MATTHEWS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 681 F. 2d 820.

No. 81–6959. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 677 F. 2d 394.

No. 81–6960. JOHANNING *v.* NEW JERSEY. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 424.

No. 81–6961. JOHNSON *v.* BAUCUM ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 178.

No. 81–6962. GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 674 F. 2d 396.

No. 81–6963. BROADWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 676 F. 2d 713.

No. 81–6964. SCOTT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 659 F. 2d 585.

No. 81–6965. MILLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 664 F. 2d 94.

No. 81–6967. BROWN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 220 U. S. App. D. C. 83, 679 F. 2d 260.

No. 81–6969. LACE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 669 F. 2d 46.

No. 81–6971. ROBERTS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 1185.

No. 81–6972. PINERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 677 F. 2d 116.

No. 81–6973. MOUSSALLIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 903.

No. 81–6975. RUDMAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–6977. VANN *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 681 F. 2d 820.

No. 81–6979. SHAPIRO *v.* UNITED STATES VETERANS ADMINISTRATION. C. A. 2d Cir. Certiorari denied. Reported below: 688 F. 2d 816.

No. 81–6980. RUBIN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 81–6981. MCKEOWN *v.* PIGG ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1334.

No. 81–6982. MEDDOWS *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 100 Ill. App. 3d 576, 427 N. E. 2d 219.

No. 81–6984. VINSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 81–6985. LEDBETTER *v.* REGAN, SECRETARY OF THE TREASURY. C. A. D. C. Cir. Certiorari denied.

No. 81–6986. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 677 F. 2d 26.

No. 81–6987. CHURCH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 685 F. 2d 436.

No. 81–6988. BUCKMORE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 81–6989. MONTOYA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 676 F. 2d 428.

No. 81–6990. WILLIFORD *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 672 F. 2d 552.

No. 81–6991. GOSS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 902.

No. 81–6992. KIRBY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 826.

No. 81–6993. ARREDONDO *v.* ESTELLE. C. A. 5th Cir. Certiorari denied. Reported below: 673 F. 2d 1326.

No. 81–6995. BHOJWANI *v.* ILLINOIS STATE BOARD OF LAW EXAMINERS. Sup. Ct. Ill. Certiorari denied.

No. 81–6996. VELEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 301.

No. 81–6999. COMER *v.* PARRATT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 674 F. 2d 734.

No. 81–7000. ROE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 670 F. 2d 956.

No. 81–7001. WEXLER *v.* LOWER MORELAND TOWNSHIP POLICE DEPARTMENT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 811.

No. 81–7002. THOMPSON-EL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 672 F. 2d 924.

No. 81–7003. MILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 676 F. 2d 359.

No. 81–7004. CONRAD ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 82–2. E. J. T. CONSTRUCTION CO., INC., ET AL. *v.* UNITED STATES EX REL. BILLOWS ELECTRIC CO., INC.

C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 827.

No. 82–6. KYPTA *v.* MCDONALD'S CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 671 F. 2d 1282.

No. 82–7. HEIMBACH, ORANGE COUNTY EXECUTIVE, ET AL. *v.* HUDSON VALLEY FREEDOM THEATRE, INC. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 702.

No. 82–9. SAADON *v.* UNITED STATES; and

No. 82–202. BEN-NATAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 300.

No. 82–10. CINCINNATI MILACRON CHEMICALS, INC., ET AL. *v.* BLANKENSHIP ET AL.; MINSTER MACHINE CO. *v.* KNITZ; and ST. VINCENT HOSPITAL & MEDICAL CENTER ET AL. *v.* ZAK ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 69 Ohio St. 2d 608, 433 N. E. 2d 572 (first case); 69 Ohio St. 2d 460, 432 N. E. 2d 814 (second case); 69 Ohio St. 2d 471, 433 N. E. 2d 162 (third case).

No. 82–12. CHOCALLO, ADMINISTRATIVE LAW JUDGE *v.* PROKOP, CHAIRWOMAN, MERIT SYSTEMS PROTECTION BOARD, ET AL. C. A. D. C. Cir. Petition for certiorari and certiorari before judgment denied. Reported below: 218 U. S. App. D. C. 160, 673 F. 2d 551.

No. 82–13. RANDOLPH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 98 Ill. App. 3d 696, 424 N. E. 2d 893.

No. 82–14. SHIRLEY ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 300.

No. 82–16. BALL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 568.

No. 82–17. COUCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 599.

No. 82–20. SANZO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 673 F. 2d 64.

No. 82–21. CARSWELL *v.* MILGRIM ET AL. Sup. Ct. Va. Certiorari denied.

No. 82–26. FIRST STATE BANK OF MIAMI *v.* GOTHAM PROVISION CO., INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 669 F. 2d 1000.

No. 82–27. MARINA POINT, LTD. *v.* WOLFSON ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 30 Cal. 3d 721, 640 P. 2d 115.

No. 82–30. PAYNE ET AL. *v.* BOBBIE BROOKS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 180.

No. 82–31. SABET *v.* AMERICAN EXPRESS INTERNATIONAL BANKING CORP. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 287.

No. 82–32. LEVIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 82–35. REISNER, DBA INTERMECCANICA AUTOMOBILI, ET AL. *v.* GENERAL MOTORS CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 91.

No. 82–36. SHIELDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 675 F. 2d 1152.

No. 82–37. JANOWSKI ET AL. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 710 PENSION FUND ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 931.

No. 82–40. SUNCREST ENVIRONMENTAL RESOURCES CORP. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 825.

No. 82–42. BACA ET AL. *v.* WALGREEN CO. Sup. Ct. Kan. Certiorari denied. Reported below: 230 Kan. 443, 638 P. 2d 898.

No. 82–43. ASAM *v.* STANLEY, DBA POODLE PALACE, ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 413 So. 2d 1056.

No. 82–44. BOTHKE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 1030.

No. 82–45. MILLER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 296 Pa. Super. 596, 438 A. 2d 653.

No. 82–46. CATHOLIC BISHOP OF CHICAGO *v.* F.E.L. PUBLICATIONS, LTD. C. A. 7th Cir. Certiorari denied.

No. 82–49. FEDERATED DEPARTMENT STORES, INC., DBA I. MAGNIN *v.* CANCELLIER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 672 F. 2d 1312.

No. 82–50. SMITH ET AL. *v.* AHR. Sup. Ct. Mo. Certiorari denied.

No. 82–51. LEITCH ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

No. 82–58. GRAND FALOON TAVERN, INC. *v.* WICKER, CHIEF OF COCOA BEACH, FLORIDA, POLICE DEPARTMENT, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 670 F. 2d 943.

No. 82–64. PARMLEY *v.* STATE BAR OF CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 82–66. MAZALESKI *v.* MAY. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1313.

No. 82–68. SWIFT AGRICULTURAL CHEMICALS CORP. *v.* FARMLAND INDUSTRIES, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 674 F. 2d 1351.

No. 82–69. MID-AMERICA REGIONAL BARGAINING ASSN. ET AL. *v.* WILL COUNTY CARPENTERS DISTRICT COUNCIL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 675 F. 2d 881.

No. 82–70. CHIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 688 F. 2d 817.

No. 82–71. COCHRANE *v.* MARX ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 684.

No. 82–73. CRAIG ET AL. *v.* BARNEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 678 F. 2d 1200.

No. 82–76. SHAPIRO *v.* COOKE, CHIEF JUDGE, COURT OF APPEALS OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied.

No. 82–78. CALIFORNIA *v.* SHIRLEY. Sup. Ct. Cal. Certiorari denied. Reported below: 31 Cal. 3d 18, 641 P. 2d 775.

No. 82–82. MCKEE ET AL. *v.* COUNTY OF RAMSEY ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 316 N. W. 2d 555.

No. 82–83. STEPENY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 297.

No. 82–85. CAVALIER *v.* T. SMITH & SON, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 668 F. 2d 861.

No. 82–89. HENRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 182.

No. 82–90. SARGENT *v.* MAYER. C. A. 9th Cir. Certiorari denied. Reported below: 673 F. 2d 1339.

No. 82–92. PICCOLO *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 82–93. STICH *v.* NATIONAL TRANSPORTATION SAFETY BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 446.

No. 82–95. NORDASILLA CORP. *v.* NORFOLK SHIPBUILDING & DRYDOCK CORP. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 885.

No. 82–96. SINAI TEMPLE ET AL. *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES (SMOTRICH, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 82–100. PEAT MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 673 F. 2d 1339.

No. 82–102. DAWKINS ET AL. *v.* FENSLAGE. C. A. 5th Cir. Certiorari denied. Reported below: 673 F. 2d 1325.

No. 82–104. PENSION PLAN OF THE CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA *v.* BRUG. C. A. 9th Cir. Certiorari denied. Reported below: 669 F. 2d 570.

No. 82–108. TYLER *v.* HARTFORD FIRE INSURANCE CO. ET AL. C. A. 10th Cir. Certiorari before judgment denied.

No. 82–110. ORSINI *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 187 Conn. 264, 445 A. 2d 887.

No. 82–111. PROVENZANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 810.

No. 82–112. IN RE NEAMON. C. A. D. C. Cir. Certiorari denied.

No. 82–113. TUTINO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 56 N. Y. 2d 815, 437 N. E. 2d 1171.

No. 82–115. CERVANTES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 632 S. W. 2d 368.

No. 82–119. AMERICAN LAUNDRY PRESS CO. ET AL. *v.* REXRODE. C. A. 10th Cir. Certiorari denied. Reported below: 674 F. 2d 826.

No. 82–120. GREYHOUND LINES, INC. *v.* TRAILWAYS, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 218 U. S. App. D. C. 123, 673 F. 2d 514.

No. 82–123. TIMMONS *v.* ANDREWS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1317.

No. 82–127. JENNINGS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 276 Ark. 217, 633 S. W. 2d 373.

No. 82–128. RUNCK ET AL. *v.* PHOENIX ASSURANCE COMPANY OF CANADA ET AL. Sup. Ct. N. D. Certiorari denied. Reported below: 317 N. W. 2d 402.

No. 82–129. DALTON *v.* EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 671 F. 2d 835.

No. 82–133. PATEL ET AL. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 671 F. 2d 1377.

No. 82–136. AMBASSADOR COLLEGE *v.* GEOTZKE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 675 F. 2d 662.

No. 82–138. HOWELL *v.* MANAGEMENT ASSISTANCE, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 424.

No. 82–140. SUAREZ ET AL. *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 82–142. NEWMAN ET AL. *v.* TIDWELL, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA. C. A. 11th Cir. Certiorari denied.

No. 82–143. COLE ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 91 Ill. 2d 172, 435 N. E. 2d 490.

No. 82–144. HARRIS ET AL. *v.* RESEARCH FEDERAL CREDIT UNION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1219.

No. 82–147. MUZII *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 676 F. 2d 919.

No. 82–150. RETAIL CLERKS UNION LOCAL 648 ET AL. *v.* JUDICIAL PANEL ON MULTIDISTRICT LITIGATION (EXXON CORP. ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 82–153. JOHNSTON ET AL. *v.* NYBERG ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 900.

No. 82–160. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 673 F. 2d 115.

No. 82–163. INTERSTATE COMMERCE COMMISSION *v.* CITY OF CHEROKEE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 671 F. 2d 1080.

No. 82–165. SPEED *v.* GOODNER, A MINOR, BY HER GUARDIAN AD LITEM, HADLEY, ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 96 Wash. 2d 838, 640 P. 2d 13.

No. 82–170. FESSLER ET UX. *v.* REDEVELOPMENT AUTHORITY OF THE CITY OF WILKES-BARRE, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 805.

No. 82–171. MARINE TERMINALS CORP. ET AL. *v.* KELLY. C. A. 9th Cir. Certiorari denied. Reported below: 678 F. 2d 830.

No. 82–172. TOMARGO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 672 F. 2d 887.

No. 82–173. WASHINGTON STATE CHARTERBOAT ASSN. *v.* HOH INDIAN TRIBE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 676 F. 2d 710.

No. 82–176. AMADA ENTERPRISES, DBA VIEW HEIGHTS CONVALESCENT HOSPITAL, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 444.

No. 82–180. RASKY *v.* COLUMBIA BROADCASTING SYSTEM, INC., AKA CBS–WBBM, ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 103 Ill. App. 3d 577, 431 N. E. 2d 1055.

No. 82–182. MALDONADO ET AL. *v.* RODRIGUEZ ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 292.

No. 82–189. WARNER ET AL. *v.* SOVEREIGN NEWS CO. C. A. 6th Cir. Certiorari denied. Reported below: 674 F. 2d 484.

No. 82–190. MCDERMOTT *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 679 F. 2d 873.

No. 82–199. VALERINO *v.* VALERINO. Ct. Sp. App. Md. Certiorari denied.

No. 82–203. SAVOY ET AL. *v.* MASSACHUSETTS; and

No. 82–5159. ALDOUPOLIS *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 386 Mass. 260, 435 N. E. 2d 330.

No. 82–208. KOLOJAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 82–210. CITY OF FORT WORTH, TEXAS *v.* GARRIS. C. A. 5th Cir. Certiorari denied. Reported below: 678 F. 2d 1264.

No. 82–216. MIRKIN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 685 F. 2d 421.

No. 82–223. CORTINAS *v.* PEOPLES SECURITY BANK OF MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 676 F. 2d 691.

No. 82–225. MANNING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 890.

No. 82–232. DEL RIO FLYING SERVICES, INC. *v.* MANJE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 443.

No. 82–244. GARDNER *v.* BRADENTON HERALD, INC. Sup. Ct. Fla. Certiorari denied. Reported below: 413 So. 2d 10.

No. 82–249. CENTURY FOREST INDUSTRIES, INC. *v.* DURAWOOD TREATING CO., A DIVISION OF ROY O. MARTIN LUMBER CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 675 F. 2d 745.

No. 82–255. PARK PLACE, INC. *v.* CITY OF CLEVELAND ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1222.

No. 82–257. RESENDE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 679 F. 2d 251.

No. 82–264. GRAVISS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 568.

No. 82–279. MARTIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 899.

No. 82–285. WYLER ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 301.

No. 82–295. PLATER *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 230 Ct. Cl. 930.

No. 82–297. MELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 677 F. 2d 264.

No. 82–307. MASTRANGELO *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 682 F. 2d 402.

No. 82–318. STROOM *v.* CARTER. C. A. D. C. Cir. Certiorari denied.

No. 82–320. HARRINGTON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 676 F. 2d 359.

No. 82–321. PAULK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 677 F. 2d 116.

No. 82–324. COLLINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 825.

No. 82–339. MARTELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 826.

No. 82–5002. WALTERS *v.* JAGO. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 569.

No. 82–5003. DAVID L. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 56 N. Y. 2d 698, 436 N. E. 2d 1324.

No. 82–5004. BLAINE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 902.

No. 82–5005. BRYANT *v.* UNITED STATES (two cases). C. A. 4th Cir. Certiorari denied. Reported below: 665 F. 2d 1042 (first case); 679 F. 2d 877 (second case).

No. 82–5006. BORRELLI *v.* CUYLER ET AL. C. A. 3d Cir. Certiorari denied.

No. 82–5007. BROWN *v.* LEAVITT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 877.

No. 82–5008. GAUVAIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 902.

No. 82–5009. LAWSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 685 F. 2d 433.

No. 82–5011. JOLIVETTE *v.* CITY OF LAFAYETTE ET AL. Sup. Ct. La. Certiorari denied. Reported below: 413 So. 2d 495.

No. 82–5013. MAZUR *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 82–5015. WARD *v.* OHIO. Ct. App. Ohio, Hancock County. Certiorari denied.

No. 82–5017. SELLERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 890.

No. 82–5018. WILLIAMS *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE. C. A. 6th Cir. Certiorari denied.

No. 82–5019. BEACHBOARD *v.* BELL, SECRETARY OF EDUCATION. C. A. D. C. Cir. Certiorari denied. Reported below: 221 U. S. App. D. C. 509, 684 F. 2d 1031.

No. 82–5021. BUMGARDNER *v.* THOMAS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 877.

No. 82–5023. PERRY *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 82–5025. ROSARIO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 677 F. 2d 614.

No. 82–5026. BARBEE *v.* RUTH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 678 F. 2d 634.

No. 82–5027. HUDAK *v.* CURATORS OF THE UNIVERSITY OF MISSOURI ET AL. C. A. 8th Cir. Certiorari denied.

No. 82–5031. WILSON *v.* SOWDERS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 569.

No. 82–5032. PEISTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 82–5034. DEGRAFFENREID *v.* ORR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 879.

No. 82–5035. HOLT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 182.

No. 82–5036. BRYAN *v.* U. S. OFFICE OF PERSONNEL MANAGEMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 877.

No. 82–5037. ELLERY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 678 F. 2d 674.

No. 82–5039. STODDARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 890.

No. 82–5040. GISH *v.* GAGNON. Ct. App. Ohio, Summit County. Certiorari denied.

No. 82–5042. PARKER ET AL. *v.* MYERS ET AL. Sup. Ct. S. C. Certiorari denied.

No. 82–5043. NEWELL *v.* MIZELL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 667 F. 2d 1247.

No. 82–5044. MCMURRY *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 228 Ct. Cl. 897.

No. 82–5047. HARRIS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 82–5048. HARRIS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 82–5049. BRAWER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 810.

No. 82–5050. BREESE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 679 F. 2d 251.

No. 82–5051. JUDD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 82–5052. BAMOND ET AL. *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 287.

No. 82–5054. ORTIZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 300.

No. 82–5055. MORALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 675 F. 2d 772.

No. 82–5056. ANTONELLI *v.* LIPPMAN ET AL. C. A. 7th Cir. Certiorari denied.

No. 82–5057. FIELDS *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 8th Cir. Certiorari denied. Reported below: 675 F. 2d 219.

No. 82–5058. BLAIR *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 82–5060. S. D. S. *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 103 Ill. App. 3d 1008, 431 N. E. 2d 759.

No. 82–5061. WOJIE *v.* HUTSON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 811.

No. 82–5062. HUSSEIN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 675 F. 2d 114.

No. 82–5063. DECKER, ADMINISTRATOR *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 176.

No. 82–5065. MAYES *v.* ROSE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 179.

No. 82–5066. DANCE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 568.

No. 82–5067. CAMERON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 825.

No. 82–5068. DAWSON ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 82–5069. STOKES *v.* ARTHUR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 676 F. 2d 695.

No. 82–5070. WALL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 413 So. 2d 1014.

No. 82–5072. HANKERSON ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 70 Ohio St. 2d 87, 434 N. E. 2d 1362.

No. 82–5075. JONES *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 633 S. W. 2d 756.

No. 82–5076. BORRELLI *v.* CICCITTO ET AL. C. A. 3d Cir. Certiorari denied.

No. 82–5077. BORRELLI *v.* CAVANAUGH ET AL. C. A. 3d Cir. Certiorari denied.

No. 82–5078. CAMILLO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 82–5079. LYNCH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 568.

No. 82–5081. HOLSEY *v.* MARYLAND PAROLE COMMISSION. Ct. App. Md. Certiorari denied.

No. 82–5091. BEARD *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 82–5095. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 1010.

No. 82–5097. PEACOCK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 826.

No. 82–5099. ECCLESTON *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 289.

No. 82–5101. BARBOUR *v.* STEPHENSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 917.

No. 82–5103. WHITED *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 230 Ct. Cl. 963.

No. 82–5106. PIROLLI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 673 F. 2d 1200.

No. 82–5107. SANDERS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 103 Ill. App. 3d 700, 431 N. E. 2d 1145.

No. 82–5110. GLENN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 82–5111. BRAYTON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 685 F. 2d 421.

No. 82–5113. GLENN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 82–5114. ALVAREZ-RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 903.

No. 82–5117. BANKS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 102 Ill. App. 3d 877, 430 N. E. 2d 602.

No. 82–5118. BRINGLOE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 447.

No. 82–5120. KING *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 82–5121. BALL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 103 Ill. App. 3d 1200, 435 N. E. 2d 1383.

No. 82–5122. HADDIX *v.* OHIO LIQUOR CONTROL COMMISSION. Sup. Ct. Ohio. Certiorari denied.

No. 82–5123. KRALOWEC *v.* PRINCE GEORGE'S COUNTY, MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 883.

No. 82–5124. FERGUSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 102 Ill. App. 3d 702, 429 N. E. 2d 1321.

No. 82–5125. FREZZELL *v.* ZIMMERMAN ET AL. C. A. 3d Cir. Certiorari denied.

No. 82–5127. ROBINSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 104 Ill. App. 3d 278, 432 N. E. 2d 937.

No. 82–5130. UNITED STATES EX REL. WOODS *v.* DEROBERTIS ET AL. C. A. 7th Cir. Certiorari denied.

No. 82–5132. DICKEY *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., Los Angeles County. Certiorari denied.

No. 82–5134. TOMLIN *v.* MCDANIEL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 446.

No. 82–5135. RUCKER *v.* REGAN, SECRETARY OF THE TREASURY, ET AL. C. A. 8th Cir. Certiorari denied.

No. 82–5138. RODZIEWICZ *v.* DEGNAN, ATTORNEY GENERAL OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 824.

No. 82–5140. NADEMI *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 10th Cir. Certiorari denied. Reported below: 679 F. 2d 811.

No. 82–5141. BRAWNER ET AL. *v.* MLEKUSH ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 219 U. S. App. D. C. 114, 675 F. 2d 1339.

No. 82–5142. DRUMMOND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 681 F. 2d 817.

No. 82–5143. CLARK *v.* CHRYSLER CORP. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 921.

No. 82–5144. GORNICK *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 104 Ill. App. 3d 1203, 437 N. E. 2d 944.

No. 82–5145. GAINES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 448.

No. 82–5149. LYSIAK *v.* FIRST SECURITIES INSURANCE ET AL. C. A. 7th Cir. Certiorari denied.

No. 82–5150. ROYSTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 825.

No. 82–5151. RABB *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 680 F. 2d 294.

No. 82–5152. NESBY *v.* ROSE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 565.

No. 82–5153. MCLAIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 568.

No. 82–5154. ROOT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 568.

No. 82–5155. SMITH *v.* FRANZEN, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 681 F. 2d 820.

No. 82–5156. PERRY *v.* CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 679 F. 2d 894.

No. 82–5158. COBB *v.* SUN PAPERS, INC. C. A. 11th Cir. Certiorari denied. Reported below: 673 F. 2d 337.

No. 82–5161. LYNN *v.* AUSTIN, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 677 F. 2d 112.

No. 82–5162. FARBER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 679 F. 2d 733.

No. 82–5163. BRAGGS *v.* ROSE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 559.

No. 82–5164. JONES *v.* ROSE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 563.

No. 82–5165. BARBER *v.* TEXAS. Ct. App. Tex., 4th Sup. Jud. Dist. Certiorari denied. Reported below: 628 S. W. 2d 104.

No. 82–5167. CARTER *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 559.

No. 82–5171. WHITE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 82–5173. HOWARD-ARIAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 363.

No. 82–5174. CRAWFORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 568.

No. 82–5176. HAEFNER *v.* COUNTY OF LANCASTER, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 806.

No. 82–5178. GLEN-ARCHILA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 677 F. 2d 809.

No. 82–5180. PALMERE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 679 F. 2d 252.

No. 82–5187. QUINONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 676 F. 2d 714.

No. 82–5189. CARMACK *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 103 Ill. App. 3d 1027, 432 N. E. 2d 282.

No. 82–5195. IN RE MARSHALL. Ct. App. D. C. Certiorari denied. Reported below: 445 A. 2d 5.

No. 82–5198. DILLENSCHNEIDER *v.* SAMUELSON, POSTMASTER, BROCKTON, MASSACHUSETTS. C. A. 1st Cir. Certiorari denied. Reported below: 685 F. 2d 420.

No. 82–5199. OLDEN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 88 App. Div. 2d 793, 451 N. Y. S. 2d 330.

No. 82–5205. UNDERWOOD *v.* LAGAN. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 567.

No. 82–5206. GIDDEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 19.

No. 82–5208. SCHAFER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 685 F. 2d 433.

No. 82–5212. CASTRANOVA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 685 F. 2d 421.

No. 82–5219. HUFF *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 568.

No. 82–5220. HUNTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 826.

No. 82–5226. KIRK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 890.

No. 82–5227. DICKERSON *v.* JOHNSON, ADMINISTRATOR, VETERANS ADMINISTRATION, ET AL. C. A. 3d Cir. Certiorari denied.

No. 82–5233. GIFFORD *v.* UNITED STATES; and
No. 82–5254. GIFFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 902.

No. 82–5243. ALEXANDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 673 F. 2d 287.

No. 82–5245. FARMER ET AL. *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 82–5246. LIVINGSTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 668 F. 2d 535.

No. 82–5248. LONG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 826.

No. 82–5256. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 889.

No. 82–5257. BLACK *v.* TRIPLE U. ENTERPRISES. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 82–5258. THIBODEAUX *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied.

No. 82–5261. ALLEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 683 F. 2d 114.

No. 82–5267. MATTHEWS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 825.

No. 82–5270. SALES *v.* HARRIS, SUPERINTENDENT, GREENHAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 675 F. 2d 532.

No. 82–5282. ROYSTER *v.* BALLANTINE BOOKS, A DIVISION OF RANDOM HOUSE, INC. C. A. D. C. Cir. Certiorari denied.

No. 82–5289. DAWSON ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 82–5291. GENOVESE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 448.

No. 82–5297. THOMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 681 F. 2d 817.

No. 82–5299. WILEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 301.

No. 82–5303. EDWARDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 679 F. 2d 249.

No. 82–5309. LIPSCOMB *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 691 F. 2d 503.

No. 82–5310. JAMES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 568.

No. 82–5316. CONLON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 825.

No. 82–5322. ATTIA *v.* INTERNAL REVENUE SERVICE. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 451.

No. 82–5327. ADAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 683 F. 2d 1371.

No. 81–1963. CITRONELLE-MOBILE GATHERING, INC., ET AL. *v.* UNITED STATES. Temp. Emerg. Ct. App. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 669 F. 2d 717.

No. 81–2231. MCLEOD *v.* CHILTON ET AL. Ct. App. Ariz. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 132 Ariz. 9, 643 P. 2d 712.

No. 81–2015. CHURCHILL AREA SCHOOL DISTRICT *v.* HOOTS ET AL. C. A. 3d Cir. Motion of Pennsylvania School Boards Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 672 F. 2d 1107.

No. 81–2022. MISSOURI ET AL. *v.* LIDDELL ET AL. C. A. 8th Cir. Motion of respondents Craton Liddell et al. for

leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 677 F. 2d 626.

No. 81–2040. MOORE *v.* MOORE. Super. Ct. Ga., Fulton County. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 81–2164. BORDENKIRCHER, SUPERINTENDENT, WEST VIRGINIA PENITENTIARY *v.* ADKINS. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 674 F. 2d 279.

No. 81–2184. PARRATT, WARDEN *v.* FORD. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 673 F. 2d 232.

No. 81–2206. ALABAMA *v.* DICKERSON. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 667 F. 2d 1364.

No. 81–2285. CONNECTICUT *v.* OSTROSKI. Sup. Ct. Conn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 186 Conn. 287, 440 A. 2d 984.

No. 81–2307. ILLINOIS *v.* TOWNES. Sup. Ct. Ill. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 91 Ill. 2d 32, 435 N. E. 2d 103.

No. 81–2309. WAINWRIGHT *v.* ROBERTS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 666 F. 2d 517.

No. 81–2046. SCHENBERG ET AL. *v.* BOND, GOVERNOR OF MISSOURI, ET AL. C. A. 8th Cir. Motion of New Jersey Motor Vehicle Agents Association for leave to file a brief as

amicus curiae granted. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 669 F. 2d 542.

No. 81–2088. PINTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 681 F. 2d 810.

No. 81–6881. MCCLAIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 676 F. 2d 915.

No. 81–2095. CLANCY ET AL. *v.* JARTECH, INC., ET AL. C. A. 9th Cir. Motion of petitioners for leave to enlarge questions presented for review denied. Certiorari denied. Reported below: 666 F. 2d 403.

No. 81–2198. CHEMICAL MANUFACTURERS ASSN. ET AL. *v.* U. S. ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 218 U. S. App. D. C. 9, 673 F. 2d 400.

No. 81–2226. PROCTER & GAMBLE MANUFACTURING CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 658 F. 2d 968.

No. 81–2279. BEST ET AL. *v.* UNITED VIRGINIA BANK/NATIONAL ET AL. Sup. Ct. Va. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 223 Va. 112, 286 S. E. 2d 221.

No. 81–2211. MCDONALD *v.* HAMILTON ELECTRIC, INC. OF FLORIDA. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 666 F. 2d 509.

No. 81–6494. STAWICKI *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 105 Wis. 2d 762, 318 N. W. 2d 22.

No. 81–2215. H. L. MOORE DRUG EXCHANGE, A DIVISION OF LEVITT INDUSTRIES, INC. *v.* ELI LILLY & CO. C. A. 2d Cir. Motion of petitioners to defer consideration of the petition for writ of certiorari denied. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion and this petition. Reported below: 662 F. 2d 935.

No. 81–2218. UNITED STATES EX REL. LAPIN *v.* INTERNATIONAL BUSINESS MACHINES CORP. C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN and JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 673 F. 2d 1340.

No. 81–2224. CURTIS ET AL. *v.* LEWIS. C. A. 3d Cir. Certiorari denied. JUSTICE POWELL would grant certiorari. Reported below: 671 F. 2d 779.

No. 81–2237. NORTH AMERICAN PHILIPS CONSUMER ELECTRONICS CORP. ET AL. *v.* ATARI, INC., ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 672 F. 2d 607.

No. 82–169. CENCO INC. *v.* SEIDMAN & SEIDMAN. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 686 F. 2d 449.

No. 81–2252. HONDA MOTOR CO., LTD., ET AL. *v.* DORSEY ET AL. C. A. 11th Cir. Motion of Product Liability Advisory Council of the Motor Vehicle Manufacturers Association of the United States, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 655 F. 2d 650 and 670 F. 2d 21.

No. 81–2266. TUROSO ET AL. *v.* CLEVELAND MUNICIPAL COURT ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE

BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and vacate the convictions. Reported below: 674 F. 2d 486.

No. 81–2272. HAPPY DAY, INC., ET AL. *v.* KENTUCKY. Cir. Ct. Ky., Campbell County. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and vacate the convictions.

No. 81–2299. HARRY'S HARDWARE, INC. *v.* PARSONS, SUPERINTENDENT OF POLICE, ET AL. Sup. Ct. La. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 410 So. 2d 735.

No. 81–2322. FISHER *v.* CITY OF TUCSON. C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 663 F. 2d 861.

No. 81–2366. FIGUEREDO ET AL. *v.* SOUTH FLORIDA BEVERAGE CORP. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 409 So. 2d 490.

No. 81–2306. LOCAL 66, BOSTON TEACHERS UNION, AFT, AFL–CIO *v.* BOSTON SCHOOL COMMITTEE ET AL. C. A. 1st Cir. Motions of American Federation of Teachers, AFL–CIO, A. Philip Randolph Institute, and University Centers for Rational Alternatives, Inc., for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 671 F. 2d 23.

No. 81–2316. BOARD OF EDUCATION OF THE NORTH LITTLE ROCK, ARKANSAS, SCHOOL DISTRICT, ET AL. *v.* DAVIS ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE REHNQUIST would grant certiorari for the reasons set forth in his dissent from denial of certiorari in *Board of Education of North Little Rock* v. *Davis*, 454 U. S. 904 (1981). JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 674 F. 2d 684.

No. 81–5634. TISON *v.* ARIZONA (two cases). Sup. Ct. Ariz.;

No. 81–6536. AUTRY *v.* TEXAS. Ct. Crim. App. Tex.;

No. 81–6711. HILL *v.* ARKANSAS. Sup. Ct. Ark.;

No. 81–6777. CAPE *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC CLASSIFICATION CENTER. Super. Ct. Ga., Butts County;

No. 81–6861. WHITLEY *v.* VIRGINIA. Sup. Ct. Va.;

No. 81–6976. RUIZ ET AL. *v.* ARKANSAS. Sup. Ct. Ark.;

No. 81–6978. SMITH *v.* BALKCOM, WARDEN, GEORGIA STATE PRISON. C. A. 11th Cir.;

No. 82–5001. SMITH *v.* GEORGIA. Sup. Ct. Ga.;

No. 82–5020. ADAMS *v.* FLORIDA. Sup. Ct. Fla.;

No. 82–5086. MESSER *v.* ZANT, WARDEN. Super. Ct. Ga., Butts County;

No. 82–5088. JOHNSON *v.* TENNESSEE. Sup. Ct. Tenn.;

No. 82–5090. BROOKS *v.* ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Super. Ct. Ga., Butts County;

No. 82–5093. MASON *v.* MORRIS. Sup. Ct. Va.;

No. 82–5147. SINGLETON *v.* ARKANSAS. Sup. Ct. Ark.;

No. 82–5170. BLAZAK *v.* ARIZONA. Sup. Ct. Ariz.;

No. 82–5183. EVANS *v.* MACDOUGALL, DIRECTOR OF ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir.; and

No. 82–5188. BREEDLOVE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 81–5634, 129 Ariz. 526, 633 P. 2d 335 (first case), 129 Ariz. 546, 633 P. 2d 355 (second case); No. 81–6536, 626 S. W. 2d 758; No. 81–6711, 275 Ark. 71, 628 S. W. 2d 284; No. 81–6861, 223 Va. 66, 286 S. E. 2d 162; No. 81–6976, 275 Ark. 410, 630 S. W. 2d 44; No. 81–6978, 660 F. 2d 573, 671 F. 2d 858, and 677 F. 2d 20; No. 82–5001, 249 Ga. 228, 290 S. E. 2d 43; No. 82–5020, 412 So.

2d 850; No. 82–5088, 632 S. W. 2d 542; No. 82–5170, 131 Ariz. 598, 643 P. 2d 694; No. 82–5188, 413 So. 2d 1.

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. 81–2326. SOVEREIGN NEWS CO. *v.* CORRIGAN ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and vacate the judgment. Reported below: 674 F. 2d 484.

No. 81–2336. LINNAS *v.* UNITED STATES. C. A. 2d Cir. Motion of American East European Ethnic Conference for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 685 F. 2d 427.

No. 81–2376. MERTZ ET AL. *v.* DENNY. Sup. Ct. Wis. It appearing the judgment below is not final, the petition for writ of certiorari is denied. Reported below: 106 Wis. 2d 636, 318 N. W. 2d 141.

No. 81–2388. CANINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 681 F. 2d 809.

No. 82–194. INTERNATIONAL RECTIFIER CORP. *v.* COHEN ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 685 F. 2d 436.

No. 81–6828. THOMPSON *v.* SCURR, WARDEN, IOWA STATE PENITENTIARY; and LONG *v.* BREWER, WARDEN, IOWA STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would

grant certiorari. Reported below: 668 F. 2d 999 (first case); 667 F. 2d 742 (second case).

No. 81–6660. NEWLON *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 627 S. W. 2d 606.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Supreme Court of Missouri insofar as it left undisturbed the death sentence imposed in this case. However, even if I believed that the death penalty could constitutionally be imposed under certain circumstances, I would grant certiorari and vacate the death sentence imposed here.

On August 4, 1978, petitioner Rayfield Newlon was indicted in St. Louis County, Mo., for capital murder. The evidence at trial was that Newlon, along with two others, Franz Williams and Walter West, agreed to rob a "convenience" store. Petitioner and Williams entered the store while West parked the car in front of the building. During the attempted robbery, the proprietor of the store, Mansfield Dave, was shot twice with a sawed-off shotgun. Newlon and Williams then ran from the store. Dave died from the gunshot wounds.

There was disputed testimony at trial as to whether Newlon or Williams fired the shots. West testified that petitioner had done the shooting, though there was considerable question whether West could possibly have seen what was happening inside the store from his position across the street. In a videotaped statement made prior to trial, Newlon said that he had gone to the back of the store to get a soda and to divert Dave's attention, and that while he was there, Williams had fired the shots. Newlon testified at trial and again denied responsibility for the shooting.

In his argument on summation, the prosecutor stressed that even if Newlon did not fire the shots, he was still guilty of capital murder as an accomplice of Williams. The trial judge instructed the jury as follows with respect to the elements of capital murder:

> "If you find and believe from the evidence beyond a reasonable doubt:
>
> "First, that on or about April 24, 1978, in the County of St. Louis, State of Missouri, the defendant *or another* caused the death of Mansfield Dave by shooting him, and
>
> "Second, that the defendant *or another* intended to take the life of Mansfield Dave, and
>
> "Third, that the defendant *or another* knew they were practically certain to cause the death of Mansfield Dave, and
>
> "Fourth, that the defendant *or another* considered taking the life of Mansfield Dave and reflected upon this matter coolly and fully before doing so, and
>
> "Fifth, that the defendant acted either alone or knowingly and with common purpose together with another in the conduct referred to in the above paragraphs, then you will find the defendant guilty of capital murder." (Emphasis added.)

The jury returned a guilty verdict.

A separate sentencing hearing was then held before the same jury. Under Missouri law the death penalty may be imposed for capital murder if the trier of fact finds aggravating circumstances that warrant the imposition of death and the absence of sufficient countervailing mitigating circumstances. Mo. Rev. Stat. § 565.012 (1978). In this case the jury was instructed to consider two aggravating circumstances alleged by the prosecution. First, it was instructed to decide whether petitioner murdered Mansfield Dave for the purpose of receiving money. Second, it was instructed to decide whether the murder involved "depravity of mind and . . . as a result thereof . . . was outrageously or wantonly

horrible or inhuman." See § 565.012(2)(7). The jury found the second alleged aggravating circumstance to be applicable and imposed the death sentence. On appeal the Missouri Supreme Court affirmed, with two judges dissenting. 627 S. W. 2d 606 (1982).

Even accepting, *arguendo*, the prevailing view that there are circumstances in which the death sentence may constitutionally be imposed, I would grant certiorari and set aside the sentence imposed in this case. First, the Missouri Supreme Court's decision is inconsistent with this Court's decision last Term in *Enmund* v. *Florida*, 458 U. S. 782 (1982). *Enmund* established that a State may not punish by death one "who neither took life, attempted to take life, nor intended to take life." *Id.*, at 787. The Court observed:

> "For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts." *Id.*, at 801.

We concluded that death is a disproportionate penalty for one who neither killed nor intended to kill.

The instructions in the guilt phase of petitioner's trial were impermissible under *Enmund*. A reasonable juror might have understood from the instructions that petitioner could be found guilty of capital murder even if he neither killed Dave nor intended to kill him. The instructions told the jury that it could find petitioner guilty *as an accomplice* if it found that Williams killed Dave with the requisite intent and that petitioner knowingly assisted Williams in the attempted robbery. Given the conflict in the evidence as to who fired the shots, it is not unlikely that the jury's verdict was in fact premised on a finding that petitioner acted as Williams' ac-

complice. In any event, since the jury's guilty verdict may have been based solely on the theory of accomplice liability, and since such liability does not provide a constitutionally sufficient basis for the death penalty, petitioner's death sentence must be set aside. See, *e. g.*, *Stromberg* v. *California*, 283 U. S. 359, 367–368 (1931). At the very least, the judgment upholding the sentence should be vacated and remanded for reconsideration in light of our decision in *Enmund*, which was announced five months after the Missouri Supreme Court's decision in the instant case.

Even if the trial judge had properly charged in the guilt phase of the trial that petitioner could be convicted as an accomplice only if he intended to take life, imposition of the death sentence would still have been improper because the instructions in the punishment phase of the trial permitted the jury to impose the death sentence solely on the basis of the conduct and mental state of the principal. The sole aggravating circumstance found by the jury—that the murder involved "depravity of mind and . . . as a result thereof . . . was outrageously or wantonly horrible or inhuman"—did not include a finding that *petitioner's* conduct involved "depravity of mind." The jury was required to find only that the murder itself involved "depravity of mind." It is irrational to sentence an accomplice to death on the ground that the principal's conduct evidenced "depravity of mind." The State must prove that the accomplice himself deserves the death penalty, and it cannot do so simply by attributing to him the conduct and mental state of the principal. "[P]unishment must be tailored to [the defendant's] personal responsibility and moral guilt." *Enmund* v. *Florida*, *supra*, at 801. Because the jury did not find that petitioner's actions demonstrated that he was more culpable than any other murderer, "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey* v. *Georgia*, 446 U. S. 420, 433 (1980) (plurality opinion).

Petitioner's death sentence should also be set aside because the sentencing standards applied in this case completely failed to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Godfrey* v. *Georgia*, 446 U. S., at 428 (footnotes omitted). The jury in *Godfrey* was instructed, in the terms of the Georgia statute, that it could impose the death sentence if it found that the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Id.*, at 422. A plurality of this Court held that the discretion of the sentencer has to be narrowed when it is instructed to consider this alleged aggravating circumstance, since "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" *Id.*, at 428–429. The plurality recognized that "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Id.*, at 428. Since the jury in *Godfrey* had not been given any narrowing construction of the open-ended statutory language, the plurality concluded that the death sentence had to be vacated.

The death sentence imposed here must be vacated for the same reason. The aggravating circumstance found applicable by the jury here—that the murder "involved depravity of mind and . . . as a result thereof . . . was outrageously or wantonly horrible or inhuman"—is almost identical to that found applicable by the jury in *Godfrey*. Here, as in *Godfrey*, the sentencer was not provided with any narrowing construction of the statute to channel its discretion; the judge "gave the jury no guidance concerning the meaning of any of [the statute's] terms," *id.*, at 429, and indeed refused a request by the jury for an explanation of the statutory language. As a result, the decision whether the

defendant would live or die was similarly left to "the uncontrolled discretion of a basically uninstructed jury." *Ibid.*

The Missouri Supreme Court made an unconvincing attempt to distinguish *Godfrey* on the ground that that decision "rests on its unique facts." 627 S. W. 2d, at 621. The court explained at some length why, in its view, Newlon's conduct was more culpable than Godfrey's. *Id.*, at 621–622. This distinction of *Godfrey* clearly cannot withstand scrutiny. As the plurality stated in *Godfrey*, a State must "define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.'" 446 U. S., at 428, quoting *Gregg* v. *Georgia*, 428 U. S. 153, 196, n. 47 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.) (brackets supplied in *Godfrey*). It is the discretion of the *sentencer* that must be channeled. In capital murder cases in the State of Missouri, only the trier of fact may impose a sentence of death; if the trier of fact imposes a life sentence or cannot agree on the appropriate sentence, the death penalty may not be imposed. Mo. Rev. Stat. § 565.006(2) (1978). Since under Missouri law the trier of fact is the sentencer, it is the discretion of the trier of fact—in this case, the jury—that must be channeled. The impermissibly vague and broad instructions given to the jury here cannot be cured by distinctions drawn by the Missouri Supreme Court on appeal. Nothing that the Missouri Supreme Court can say about its own view of the record can change the fact that the critical sentencing decision was left to "the uncontrolled discretion of a basically uninstructed jury." *Godfrey* v. *Georgia*, *supra*, at 429. See *Zant* v. *Stephens*, 456 U. S. 410, 424–428 (1982) (MARSHALL, J., dissenting); *Brooks* v. *Georgia*, 451 U. S. 921 (1981) (MARSHALL, J., dissenting from denial of certiorari); *Godfrey* v. *Georgia*, *supra*, at 436–437 (MARSHALL, J., concurring in judgment).

Finally, I would grant certiorari and vacate the death sentence on the additional ground that the prosecutor's improper arguments to the jury denied petitioner a fair sentencing pro-

ceeding. The prosecutor's arguments at the sentencing proceeding dealt only briefly with the facts of the case as they related to the aggravating and mitigating circumstances submitted to the jury. As Judge Seiler set forth in greater detail in his dissenting opinion below, 627 S. W. 2d, at 633–634, the thrust of the prosecutor's remarks concerned wholly extraneous matters. For example, the prosecutor argued that the death penalty should be imposed on petitioner because there was no one on death row in Missouri;[1] because the jury would be cowardly if it imposed the lesser sentence of life without parole for 50 years;[2] and because anything but a death sentence was forever subject to change.[3] The prosecutor also suggested to the jury that the death penalty was appropriate solely because the defendant had been convicted of capital murder;[4] and that the availability of post-trial procedures relieved the jury of the full responsibility for its decision.[5]

This Court's decisions speak of the "'vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.'" *Beck* v. *Alabama*, 447 U. S. 625, 637–638 (1980), quoting *Gardner* v. *Florida*, 430 U. S. 349, 357–358 (1977) (opinion of STEVENS, J.). The Court has also emphasized that juries may not be given

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[1] "Do you know how many people are on death row in this State? None. We've got the death penalty, but how many are there? None. Mr. Newlon will be the first one, if you put him on death row."

[2] "As sure as he sits there, he doesn't think you have the guts to do it. . . . Once again, I hope you have the courage to do that because it's tough."

[3] "[W]hat assurances do you have that he'll be there fifty years? The legislature could change the law. All it says is no parole. It doesn't say it can't be commuted. There's no assurance of that at all."

[4] "[I]f somebody is guilty of capital murder, the ultimate crime, why should they get anything other than death?"

[5] "Now, if you say he deserves the death penalty, under the law, Judge Ruddy must review it and if he agrees, then his decision is reviewed by the Supreme Court."

standardless discretion to impose capital sentences. See, *e. g.*, *Woodson* v. *North Carolina*, 428 U. S. 280, 302 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). In this case the trial judge allowed the prosecutor to exhort the jury to depart from the statutory sentencing standards and to impose the death sentence based on entirely improper considerations. I believe the prosecutor's remarks, which invited an unreasoned imposition of the death sentence, so far exceeded the bounds of proper argument as to deprive petitioner of the fair sentencing proceeding guaranteed by the Eighth and Fourteenth Amendments. Cf. *Donnelly* v. *DeChristoforo*, 416 U. S. 637, 645 (1974) (suggesting that prosecutorial remarks in closing argument may be sufficiently prejudicial to deprive the defendant of his constitutional right to a fair trial).

For these reasons, I dissent from the denial of certiorari.

No. 81–6854. DAVIS *v.* GEORGIA. Sup. Ct. Ga.; and
No. 81–6891. JONES *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 81–6891, 411 So. 2d 165.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I continue to adhere to my view that the death penalty is unconstitutional in all circumstances. I would therefore grant certiorari and vacate the death sentences on this basis alone. However, even if I believed that the death penalty could constitutionally be imposed under certain circumstances, I would grant certiorari in these cases to resolve a substantial question left open by this Court's decision in *Bullington* v. *Missouri*, 451 U. S. 430 (1981): whether, on resentencing, the prosecution may be given a second chance to prove a statutory aggravating circumstance that it failed to prove in the prior capital sentencing proceeding.

We held in *Bullington* that the Double Jeopardy Clause is fully applicable to capital sentencing proceedings that are patterned after trials on the question of guilt or innocence.

The state law considered in *Bullington*, like the state law in each of these cases, provides that the death penalty may be imposed only after a trier of fact finds at least one statutory aggravating circumstance. The determination by the trier of fact is made at a separate sentencing hearing at which evidence is presented in aggravation and mitigation of punishment. To obtain a death sentence the prosecution must prove the existence of one or more aggravating circumstances beyond a reasonable doubt. The trier of fact is instructed to identify the aggravating circumstance or circumstances it finds applicable. We concluded in *Bullington* that "[b]ecause the sentencing proceeding at [Bullington's] first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury is also available to him, with respect to the death penalty, at his retrial." *Id.*, at 446 (footnote omitted). Like an acquittal, a decision not to impose the death penalty is absolutely final. "Having received 'one fair opportunity to offer whatever proof it could assemble,' the State is not entitled to another." *Ibid.*, quoting *Burks* v. *United States*, 437 U. S. 1, 16 (1978).

In the instant cases, petitioners were convicted of capital murder and were then sentenced to death following separate sentencing hearings authorized by state statutes similar to the one involved in *Bullington*. In each case, the prosecution failed to prove one or more statutory aggravating circumstances,[1] but the trier of fact found at least one other ag-

[1] In No. 81–6891, the sentencing judge found that two of the aggravating circumstances alleged by the prosecution were not supported by the evidence. In No. 81–6854, the sentencing judge's failure to submit to the jury an aggravating circumstance rested on finding that it was not supported by the evidence. Under Ga. Code Ann. §§ 17–10–30(b) and (c) (1982), the sentencing judge "shall" submit to the jury any statutory aggravating circumstance "supported" and "warranted by the evidence." Because such a submission is required where the evidence is sufficient, see *Williams* v. *State*, 237 Ga. 399, 228 S. E. 2d 806 (1976), the trial judge's decision not to submit a particular aggravating circumstance to the jury

gravating circumstance and recommended a sentence of death. In each case the sentence was later vacated.[2] On remand, new sentencing proceedings were held and death sentences were again imposed, but this time they were based at least in part upon aggravating circumstances that the prosecution had been unable to prove at the first sentencing proceedings. In each case, the State Supreme Court upheld the sentence, rejecting the argument that the Double Jeopardy Clause bars the imposition of the death sentence on the basis of a statutory aggravating circumstance that the prosecution previously had failed to prove.

The conclusion of the state courts in these cases is at odds with that of another state court of last resort. In *State* v. *Silhan*, 302 N. C. 223, 267–271, 275 S. E. 2d 450, 480–483 (1981), the North Carolina Supreme Court noted that the prosecution's effort to prove the existence of statutory aggravating circumstances at the sentencing proceeding is, for double jeopardy purposes, analogous to the prosecution's effort to prove the crimes charged at the guilt-innocence phase of a criminal trial. Moreover, the court observed, a determination that an aggravating circumstance does not apply is analogous to a determination that the accused is not guilty of an offense. Since the Double Jeopardy Clause protects a de-

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was necessarily based on a conclusion that there was insufficient evidence to support a jury verdict finding that circumstance to be applicable. Under the Double Jeopardy Clause, a dismissal for insufficient evidence constitutes a judgment of acquittal that bars reprosecution. *Burks* v. *United States*, 437 U. S. 1, 10–11 1978); *Fong Foo* v. *United States*, 369 U. S. 141 (1962).

[2] In No. 81–6854, petitioner Davis' conviction was affirmed by the Supreme Court of Georgia, but his death sentence was vacated because of the trial court's failure to make clear to the jury that it might in its discretion recommend a life sentence even if it found the existence of a statutory aggravating circumstance. 240 Ga. 763, 243 S. E. 2d 12 (1978). In No. 81–6891, the Supreme Court of Florida reversed petitioner Jones' conviction because of the trial court's error in denying the defense's motion for a psychiatric examination to determine Jones' sanity at the time of the alleged offense. 362 So. 2d 1334 (1978).

fendant from being retried for an offense of which he has been acquitted, it should also protect him from being resentenced to death on the basis of an aggravating circumstance that a jury previously found inapplicable. The court concluded that the Double Jeopardy Clause, therefore, precludes the State from relying, at a new sentencing hearing, on an aggravating circumstance that the jury found inapplicable at the first sentencing hearing.

In *Bullington* this Court made clear that double jeopardy principles which apply to determinations of guilt or innocence also apply to capital sentencing proceedings at which the prosecution must prove the existence of statutory aggravating circumstances. *Bullington* did not address whether and to what extent the Double Jeopardy Clause precludes a second effort to prove an aggravating circumstance that the State failed to prove in a prior proceeding. There is disagreement on this question in the state courts, and the question is sufficiently important to warrant this Court's review.

No. 82–67. CHAPMAN *v.* CARDARELLI ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and vacate the conviction. Reported below: 701 F. 2d 175.

No. 82–106. GLEN CORP. ET AL. *v.* O.C. ASSOCIATES ET AL. C. A. 1st Cir. Motion of Continental Mortgage Investors, Debtor, for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 679 F. 2d 264.

No. 82–125. CHANCELLOR ET AL. *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF ORANGE (BAKER, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Motion of respondent Mark Jay Baker for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 82–200. WIDGERY *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner to defer consideration of the peti-

tion for writ of certiorari denied. Certiorari denied. Reported below: 674 F. 2d 710.

No. 82–5096. QUINCE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 414 So. 2d 185.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that capital punishment is unconstitutional under all circumstances, I would grant certiorari and vacate the death sentence on this basis alone. However, even if I believed that the death penalty could constitutionally be imposed under certain circumstances, I would grant certiorari because the decision below undermines a critical premise of this Court's conclusion that Florida's capital sentencing procedures adequately guard against the "arbitrary or capricious" imposition of death sentences. *Proffitt* v. *Florida*, 428 U. S. 242, 253 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.).

Petitioner pleaded guilty to burglary and felony murder in the first degree. As part of the plea bargain, petitioner waived his right to a sentencing recommendation by a jury and agreed that the sentence would be determined solely by the trial judge. After conducting a sentencing hearing, the judge found three aggravating circumstances and one mitigating circumstance. The judge found as aggravating circumstances that the murder was heinous, that it was committed for pecuniary gain, and that it was committed during the commission of a rape. He found as a mitigating circumstance that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Fla. Stat. § 921.141(6)(f) (1981). The judge concluded, however, that this mitigating circumstance was "not entitled to a great deal of weight," and was outweighed by the aggravating circumstances. Accordingly, he imposed the death sentence. Petitioner appealed to the Florida Supreme Court, contending

that the trial court erred in giving too little weight to the mitigating circumstance.

In its decision affirming the death sentence, the Florida Supreme Court declined to make an independent evaluation of the evidence concerning aggravating and mitigating circumstances. The court explained that its statutory duty to review death sentences does not require it to make such an evaluation:

> "'Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge . . . could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, . . . and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.'" 414 So. 2d 185, 187 (1982), quoting *Brown* v. *Wainwright*, 392 So. 2d 1327, 1331 (Fla.) (footnote omitted), cert. denied, 454 U. S. 1000 (1981).

Applying its deferential standard of review, the court affirmed the death sentence on the ground that "[t]he trial judge was not unreasonable in failing to give great weight" to petitioner's diminished capacity. 414 So. 2d, at 187. In the court's view it was significant that "[t]he trial judge clearly did not ignore every aspect of the medical testimony as the judge did in *Huckaby* v. *State*, 343 So. 2d 291 (Fla.), *cert. denied*, 434 U. S. 920 . . . (1977)." *Ibid.*

The decision below undermines a fundamental premise of this Court's decision in *Proffitt* v. *Florida* upholding Florida's death penalty statute. The Florida statute, which was enacted in response to *Furman* v. *Georgia*, 408 U. S. 238 (1972), provides for automatic review by the Florida Supreme Court of all death sentences. Fla. Stat. § 921.141(4)

(1981). In rejecting a constitutional challenge to the statute, this Court assumed in *Proffitt* that the Florida Supreme Court's obligation to review death sentences encompasses two functions.[1] First, death sentences must be reviewed "to ensure that similar results are reached in similar cases." 428 U. S., at 258 (opinion of Stewart, POWELL, and STEVENS, JJ.); see also *id.*, at 251, 253 (same). In addition,

> "the evidence of the aggravating and mitigating circumstances is *reviewed and reweighed* by the Supreme Court of Florida 'to determine *independently* whether the imposition of the ultimate penalty is warranted.' *Songer* v. *State*, 322 So. 2d 481, 484 (1975). See also *Sullivan* v. *State*, 303 So. 2d 632, 637 (1974)." *Id.*, at 253 (same) (emphasis added).

On the basis of this understanding of the Florida Supreme Court's duty to review death sentences, this Court concluded that the risk of "arbitrary or capricious" imposition of death sentences was "minimized by Florida's appellate review system." *Ibid.*[2] The Florida Supreme Court subsequently confirmed this Court's understanding of the standard of review when it stated that its "responsibility [is] to *evaluate anew* the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate."

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[1] Since the statute does not specify the standard of review, the Court relied in *Proffitt* on Florida Supreme Court decisions interpreting and applying the mandatory review provision.

[2] There can be little doubt that the joint opinion of Justices Stewart, POWELL, and STEVENS placed particular emphasis on the independent evidentiary review performed by the Florida Supreme Court. The opinion stresses that the Florida Supreme Court "has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed." 428 U. S., at 253. In one of the cases cited in support of this assertion, *Halliwell* v. *State*, 323 So. 2d 557, 561 (1975), the Florida Supreme Court stated: "As required by statute, we have *weighed* both the aggravating and the mitigating circumstances as shown in the record, and we conclude that the death penalty is not warranted." (Emphasis added.)

Harvard v. *State*, 375 So. 2d 833, 834 (1977) (emphasis added), cert. denied, 441 U. S. 956 (1979).

This is no longer a correct statement of Florida law. The decision below indicates that the Florida Supreme Court now employs a far more restricted standard of review in capital cases. So long as "sufficient competent evidence," 414 So. 2d, at 187, supports the death sentence, the Florida Supreme Court will uphold the sentence even if its "independent evaluation" would "have reached a different result." *Ibid.*

In light of the Florida Supreme Court's abandonment of its previously recognized duty to make an independent determination of whether a death sentence is warranted, the constitutionality of the Florida death penalty statute should be reappraised by this Court. It is simply no longer the case that "evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.'" 428 U. S., at 253 (opinion of Stewart, POWELL, and STEVENS, JJ.) (citation omitted). Therefore, even if I believed that the death penalty could constitutionally be imposed under certain conditions, I would grant certiorari to decide whether Florida's death penalty statute, as reinterpreted by the Florida Supreme Court, "serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed." *Id.*, at 260, quoting *Furman* v. *Georgia*, *supra*, at 310 (Stewart, J., concurring).

Rehearing Denied

No. 81–202. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* CLAIBORNE HARDWARE CO. ET AL., 458 U. S. 886. Motion for leave to file petition for rehearing denied. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 81–5036. ROGERS *v.* NEW YORK, 454 U. S. 898. Motion for leave to file petition for rehearing denied.

No. 81–1882. TOWN OF CHINO VALLEY ET AL. *v.* CITY OF PRESCOTT, 457 U. S. 1101. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 80–1798. WOELKE & ROMERO FRAMING, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL., 456 U. S. 645;

No. 80–1808. PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL., 456 U. S. 645;

No. 81–91. OREGON-COLUMBIA CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL., 456 U. S. 645;

No. 80–2100. ROGERS ET AL. *v.* LODGE ET AL., 458 U. S. 613;

No. 80–2134. FOREMOST INSURANCE CO. ET AL. *v.* RICHARDSON ET AL., 457 U. S. 668; and

No. 81–395. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* SADLOWSKI ET AL., 457 U. S. 102. Petitions for rehearing denied.

OCTOBER 12, 1982

Appeals Dismissed

No. 82–240. THEOHAROUS *v.* DEER RUN SHORES PROPERTY OWNERS ASSN., INC. Appeal from Super. Ct. Conn., Small Claims Sess., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 82–5204. WAYLAND *v.* REGISTRY OF DEEDS, SALEM, ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 82–245. JALIFI *v.* INDUSTRIAL COMMISSION OF ARIZONA ET AL. Appeal from Ct. App. Ariz. dismissed for want of substantial federal question. JUSTICE WHITE would note

probable jurisdiction and set case for oral argument. Reported below: 132 Ariz. 233, 644 P. 2d 1319.

No. 82–288. KLEINER ET AL. *v.* SANDERSON ET AL. Appeal from Sup. Ct. Mich. dismissed for want of substantial federal question. JUSTICE BLACKMUN and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 413 Mich. 96, 321 N. W. 2d 565.

Certiorari Granted—Vacated and Remanded

No. 81–6782. MACK *v.* OKLAHOMA. Ct. Crim. App. Okla. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Johnson*, 457 U. S. 537 (1982). Reported below: 641 P. 2d 1122.

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST joins, dissenting.

By its action today, the Court vacates the judgment of the state court and remands this case in light of *United States* v. *Johnson*, 457 U. S. 537 (1982). Because I believe that *Johnson* is not applicable to the present case, I respectfully dissent.

The petitioner in this case was convicted in Oklahoma state court of robbery with a firearm, Okla. Stat., Tit. 21, § 801 (1981). The petitioner did not testify at trial, and his trial counsel orally requested a jury instruction cautioning the jury to draw no inference from petitioner's failure to testify at trial. The instruction was not given. While petitioner's direct appeal to the Oklahoma Court of Criminal Appeals was pending, this Court announced its decision in *Carter* v. *Kentucky*, 450 U. S. 288 (1981). In *Carter*, we held that a failure to give a requested instruction on a defendant's failure to testify is a violation of the defendant's Fifth Amendment privilege against self-incrimination, made applicable to the States by the Fourteenth Amendment. See *Malloy* v. *Hogan*, 378 U. S. 1, 6 (1964). The Oklahoma Court of Criminal

Appeals determined that *Carter* was not to be given retroactive effect. The petitioner now argues that our recent decision in *United States* v. *Johnson*, *supra*, requires that the Oklahoma judgment be vacated.

In *Johnson*, we were faced with deciding whether *Payton* v. *New York*, 445 U. S. 573 (1980), was to be applied retroactively to a defendant whose appeal was pending when *Payton* was announced. The majority in *Johnson* decided, as a general proposition, that "a decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered." 457 U. S., at 562. The Court's opinion in *Johnson* stated that it was intended to "leave undisturbed our precedents in other areas" and "express[ed] no view on the retroactive application of decisions construing any constitutional provision other than the Fourth Amendment." *Ibid.* (footnote omitted). The constitutional violation in this case involves the Fifth Amendment privilege against self-incrimination, which was not covered by the Court's holding in *Johnson*.

I would not extend our holding in *United States* v. *Johnson* to cases arising under the Fifth Amendment without plenary review and full consideration of the appropriate principles. The court below will be understandably confused by the Court's action in vacating the judgment, and remanding to determine the applicability of a decision that by its explicit terms is restricted to the Fourth Amendment.

I respectfully dissent.

Miscellaneous Orders

No. — - ——. HULL *v.* CITY OF DUNCANVILLE. Motion to direct the Clerk to file the petition for writ of certiorari denied.

No. — - ——. OKLAHOMA *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. Motion to direct the Clerk to file the petition for writ of certiorari denied.

No. A–281. FILIPAS ET AL. *v.* LEMONS. C. A. 6th Cir. Application for further extension of time within which to file a petition for writ of certiorari, presented to JUSTICE O'CONNOR, and by her referred to the Court, is granted and the time for filing a petition for writ of certiorari is extended to and including November 26, 1982.

No. A–283. MASHPEE TRIBE ET AL. *v.* WATT, SECRETARY OF THE INTERIOR, ET AL. D. C. Mass. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–294. MCDONALD *v.* BRANIFF AIRWAYS, INC., ET AL. Bkrtcy. Ct. N. D. Tex. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. 81–802. CITY OF LOCKHART *v.* UNITED STATES ET AL. D. C. D. C. [Probable jurisdiction noted, 455 U. S. 987.] Motion of the Solicitor General for divided argument denied.

No. 81–1314. W. R. GRACE & CO. *v.* LOCAL UNION 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM & PLASTIC WORKERS OF AMERICA. C. A. 5th Cir. [Certiorari granted, 458 U. S. 1105.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 81–1636. FLORIDA *v.* BRADY ET AL. Sup. Ct. Fla. [Certiorari granted, 456 U. S. 988.] Motion of Western Growers Association for leave to file a brief as *amicus curiae* granted.

No. 81–2101. PENNHURST STATE SCHOOL AND HOSPITAL ET AL. *v.* HALDERMAN ET AL. C. A. 3d Cir. [Certiorari granted, 457 U. S. 1131.] Motion of respondents Halderman et al. to dismiss the writ of certiorari as improvidently granted is denied.

No. 82–227. PROVIDENCE JOURNAL CO. *v.* HOME PLACEMENT SERVICE, INC., ET AL. C. A. 1st Cir.; and

No. 82–282. MCCAIN ET AL. *v.* LYBRAND ET AL. D. C. S. C. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 82–287. ARIZONA ET AL. *v.* ASH GROVE CEMENT CO. ET AL. C. A. 9th Cir. Motion of petitioners to defer consideration of the petition for writ of certiorari granted. Motion of respondents for leave to file typewritten supplemental brief in opposition to petition for writ of certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of these motions.

No. 82–392. MONEX INTERNATIONAL, LTD., ET AL. *v.* COMMODITY FUTURES TRADING COMMISSION ET AL. C. A. 6th Cir. Motion of petitioners for simultaneous consideration of this case with No. 82–24, *Federal Trade Commission* v. *Francis Ford, Inc.*, denied.

No. 82–5419. IN RE CONRAD ET AL.; and

No. 82–5420. IN RE CONRAD ET AL. Petitions for writs of habeas corpus denied.

No. 82–88. IN RE RICE. Petition for writ of mandamus denied.

No. 82–5104. IN RE ROBINSON. Petition for writ of mandamus and/or certiorari denied.

No. 82–5240. IN RE DEMOS; and

No. 82–5264. IN RE SIMS. Petitions for writs of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 82–11. MENNONITE BOARD OF MISSIONS *v.* ADAMS. Appeal from Ct. App. Ind. Probable jurisdiction noted. Reported below: 427 N. E. 2d 686.

Certiorari Granted

No. 81–1843. ILLINOIS *v.* ANDREAS. App. Ct. Ill., 1st Dist. Certiorari granted. Reported below: 100 Ill. App. 3d 396, 426 N. E. 2d 1078.

No. 81–2169. HARING, LIEUTENANT, ARLINGTON COUNTY POLICE DEPARTMENT, ET AL. *v.* PROSISE. C. A. 4th Cir. Certiorari granted. Reported below: 667 F. 2d 1133.

No. 82–52. ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS ET AL. *v.* NORRIS. C. A. 9th Cir. Certiorari granted. Reported below: 671 F. 2d 330.

No. 82–256. MICHIGAN *v.* LONG. Sup. Ct. Mich. Certiorari granted. Reported below: 413 Mich. 461, 320 N. W. 2d 866.

No. 81–2245. NEVADA *v.* UNITED STATES ET AL.;

No. 81–2276. TRUCKEE-CARSON IRRIGATION DISTRICT *v.* UNITED STATES ET AL.; and

No. 82–38. PYRAMID LAKE PAIUTE TRIBE OF INDIANS *v.* TRUCKEE-CARSON IRRIGATION DISTRICT ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 649 F. 2d 1286 and 666 F. 2d 351.

No. 81–1985. EDWARD J. DEBARTOLO CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Motion of American Retail Federation for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 662 F. 2d 264.

No. 82–34. AMERICAN PAPER INSTITUTE, INC. *v.* AMERICAN ELECTRIC POWER SERVICE CORP. ET AL.; and

No. 82–226. FEDERAL ENERGY REGULATORY COMMISSION *v.* AMERICAN ELECTRIC POWER SERVICE CORP. ET AL. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. JUSTICE

O'CONNOR took no part in the consideration or decision of these petitions. Reported below: 219 U. S. App. D. C. 1, 675 F. 2d 1226.

No. 81–6756. TUTEN *v.* UNITED STATES. Ct. App. D. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 440 A. 2d 1008.

Certiorari Denied. (See also Nos. 82–240, 82–5204, and 82–5104, *supra.*)

No. 81–1784. AMERICAN CYANAMID CO. *v.* OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 217 U. S. App. D. C. 137, 671 F. 2d 643.

No. 81–2331. PENNSYLVANIA ET AL. *v.* DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 674 F. 2d 976.

No. 81–2371. AMIS *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 673 F. 2d 1343.

No. 81–2384. GENERAL LONGSHORE WORKERS, ILA, LOCALS 1418 ET AL. *v.* BENTZ, ACTING REGIONAL DIRECTOR OF THE FIFTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 673 F. 2d 1325.

No. 81–2391. KNAPP *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 299.

No. 81–6462. LOPEZ *v.* FLORIDA PAROLE AND PROBATION COMMISSION. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 410 So. 2d 1354.

No. 81–6812. HYDABURG COOPERATIVE ASSN. ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 229 Ct. Cl. 250, 667 F. 2d 64.

No. 81–6851. GARRETT *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 627 S. W. 2d 635.

No. 81–6868. PLATSHORN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 664 F. 2d 971.

No. 81–6936. PINSON *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 82–54. MCCABE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 688 F. 2d 102.

No. 82–57. HOBSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 672 F. 2d 825.

No. 82–59. BROCK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 669 F. 2d 655.

No. 82–72. WILKINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 677 F. 2d 998.

No. 82–74. ANTELMAN *v.* DECATALDO, REVENUE AGENT, ET AL. C. A. 1st Cir. Certiorari denied.

No. 82–79. D'AMBROSIO *v.* BOARD OF EDUCATION OF THE WARREN HILLS REGIONAL SCHOOL DISTRICT. Super. Ct. N. J., App. Div. Certiorari denied.

No. 82–81. CABLEVISION SYSTEMS DEVELOPMENT CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 737.

No. 82–84. GENS ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 230 Ct. Cl. 42, 673 F. 2d 366.

No. 82–87. PUERTO RICO MARITIME SHIPPING AUTHORITY *v.* FEDERAL MARITIME COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 220 U. S. App. D. C. 13, 678 F. 2d 327.

No. 82–97. AMUSEMENT & MUSIC OPERATORS ASSN. *v.* COPYRIGHT ROYALTY TRIBUNAL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 676 F. 2d 1144.

No. 82–103. RANK ET AL. *v.* NIMMO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 677 F. 2d 692.

No. 82–109. ZUCKERMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 676 F. 2d 699.

No. 82–114. OLIVA-CANTU *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 677 F. 2d 116.

No. 82–117. NUNZIATA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 300.

No. 82–126. SOOJIAN ET AL. *v.* DONALDSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 676 F. 2d 712.

No. 82–161. SHORTBULL *v.* LOOKING ELK ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 677 F. 2d 645.

No. 82–162. HILTON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 2d 316.

No. 82–191. WHITE TOOL & MACHINE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 677 F. 2d 528.

No. 82–196. CIRAMI ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 298.

No. 82–197. MARESSA *v.* NEW JERSEY MONTHLY ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 89 N. J. 176, 445 A. 2d 376.

No. 82–205. RESORTS INTERNATIONAL, INC., ET AL. *v.* NJM ASSOCIATES, DBA NEW JERSEY MONTHLY, ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 89 N. J. 212, 445 A. 2d 395.

No. 82–212. J. TRUETT PAYNE CO., INC. *v.* CHRYSLER MOTORS CORP. C. A. 11th Cir. Certiorari denied. Reported below: 670 F. 2d 575.

No. 82–214. CAFFALL BROS. FOREST PRODUCTS, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 230 Ct. Cl. 517, 678 F. 2d 1071.

No. 82–219. SECRETARY OF COMMERCE OF PUERTO RICO ET AL. *v.* VILLANUEVA. Sup. Ct. P. R. Certiorari denied. Reported below: —— P. R. R. ——.

No. 82–221. INNKEEPERS OF NEW CASTLE, INC. *v.* MALEY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 671 F. 2d 221.

No. 82–230. POMANOWSKI *v.* MONMOUTH COUNTY BOARD OF REALTORS ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 89 N. J. 306, 446 A. 2d 83.

No. 82–231. MOTHON *v.* UNITED STATES ET AL.; and

No. 82–416. TWOMBLY, INC. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 685 F. 2d 793.

No. 82–234. LEE *v.* SHIELD PETROLEUM CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 178.

No. 82–236. LOUIS STERNBACH & CO. *v.* SIROTA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 673 F. 2d 566.

No. 82–238. FLEWALLEN *v.* FAULKNER. C. A. 7th Cir. Certiorari denied. Reported below: 677 F. 2d 610.

No. 82–239. ARTUSO ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 87 App. Div. 2d 873, 449 N. Y. S. 2d 513.

No. 82–248. NORBERG, TAX ADMINISTRATOR OF RHODE ISLAND *v.* GEORGE, INC. Sup. Ct. R. I. Certiorari denied. Reported below: —— R. I. ——, 444 A. 2d 868.

No. 82–250. TRULY *v.* MADISON GENERAL HOSPITAL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 673 F. 2d 763.

No. 82–251. ESTATE OF WRIGHT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 677 F. 2d 53.

No. 82–253. PHELPS CEMENT PRODUCTS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 295.

No. 82–258. ARIZONA ET AL. *v.* MCGRAW-HILL, INC. C. A. 2d Cir. Certiorari denied. Reported below: 680 F. 2d 5.

No. 82–266. MICHELIN TIRE CORP. ET AL. *v.* FALLAW ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 880.

No. 82–269. POLLARD ET AL. *v.* CITY OF DETROIT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1222.

No. 82–273. OLD MOUNTAIN PROPERTIES, LTD. *v.* APRIL INVESTMENTS, INC. Sup. Ct. Ala. Certiorari denied. Reported below: 415 So. 2d 1048.

No. 82–275. MIENER, BY AND THROUGH HER NEXT FRIEND AND PARENT, MIENER *v.* MISSOURI ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 673 F. 2d 969.

No. 82–278. JACKSON *v.* WASHINGTON MONTHLY CO. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 219 U. S. App. D. C. 115, 675 F. 2d 1340.

No. 82–283. ANDREWS ET UX. *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 443 A. 2d 566.

No. 82–286. OREGON DEPARTMENT OF REVENUE *v.* PACIFIC FIRST FEDERAL SAVINGS & LOAN ASSN. Sup. Ct.

Ore. Certiorari denied. Reported below: 293 Ore. 138, 645 P. 2d 27.

No. 82–291. DOLLAR ELECTRIC CO. *v.* SYNDEVCO, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 688 F. 2d 429.

No. 82–292. CONSULTANTS & ADMINISTRATORS, INC. *v.* ILLINOIS DEPARTMENT OF INSURANCE ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 103 Ill. App. 3d 920, 431 N. E. 2d 1306.

No. 82–296. WHALEN, T/A TOWSON ASSOCIATES LIMITED PARTNERSHIP ET AL. *v.* FORD MOTOR CREDIT CO. C. A. 4th Cir. Certiorari denied. Reported below: 684 F. 2d 272.

No. 82–301. SOLARGEN ELECTRIC MOTOR CAR CORP. ET AL. *v.* GENERAL MOTORS CORP. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 297.

No. 82–302. HODGE *v.* SOUTH CAROLINA; and

No. 82–351. MCLEOD *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: No. 82–302, 278 S. C. 110, 292 S. E. 2d 600; No. 82–351, 278 S. C. 112, 293 S. E. 2d 699.

No. 82–304. SONA FOOD PRODUCTS CO. *v.* HAIN PURE FOOD CO., INC. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 898.

No. 82–306. NORRIS *v.* JACKSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 565.

No. 82–311. BURLINGTON NORTHERN INC. *v.* BUSKIRK. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 103 Ill. App. 3d 414, 431 N. E. 2d 410.

No. 82–361. COLACURCIO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 902.

No. 82–377. FAIRCLOTH ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 678 F. 2d 1202.

No. 82–380. STRAUSS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 678 F. 2d 886.

No. 82–388. IPPOLITO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 299.

No. 82–391. WAXMAN *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 681 F. 2d 819.

No. 82–405. HAMILTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 568.

No. 82–406. AUERBACH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 682 F. 2d 735.

No. 82–410. CAWTHON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 679 F. 2d 252.

No. 82–420. PATTERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 678 F. 2d 774.

No. 82–430. LATTIMORE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 292.

No. 82–5029. OCHOA-SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 676 F. 2d 1283.

No. 82–5033. PHILSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 903.

No. 82–5045. JONES *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 82–5059. J. P. *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 102 Ill. App. 3d 1205, 434 N. E. 2d 1206.

No. 82–5073. COWLING *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 632 S. W. 2d 367.

No. 82–5085. REGNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 677 F. 2d 754.

No. 82–5108. PUGH *v.* JONES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 296.

No. 82–5175. JOHNSON *v.* CLAWSON. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 882.

No. 82–5185. BRYANT *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 82–5186. SARACHO *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 82–5190. WENDT *v.* MACDOUGALL. C. A. 9th Cir. Certiorari denied.

No. 82–5194. CLINGER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 681 F. 2d 221.

No. 82–5197. SERE ET AL. *v.* GROUP HOSPITALIZATION, INC., ET AL. Ct. App. D. C. Certiorari denied. Reported below: 443 A. 2d 33.

No. 82–5202. BORRELLI *v.* CUYLER. C. A. 3d Cir. Certiorari denied.

No. 82–5207. PELCZARSKI *v.* FRIEDLAND ET AL. C. A. 1st Cir. Certiorari denied.

No. 82–5209. BUCHANAN *v.* JEFFERSON COUNTY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 559.

No. 82–5213. MITCHELL *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 679 F. 2d 77.

No. 82–5214. MCFALL *v.* PARKE ET AL. C. A. 6th Cir. Certiorari denied.

No. 82–5217. DOWLEARN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 415 So. 2d 959.

No. 82–5218. COLLINS *v.* CHICAGO BOARD OF EDUCATION. C. A. 7th Cir. Certiorari denied. Reported below: 681 F. 2d 820.

No. 82–5225. PENICK *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 82–5230. TOSON *v.* ANDALE CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 825.

No. 82–5231. WEST *v.* FINANCIAL CORP. Sup. Ct. La. Certiorari denied. Reported below: 414 So. 2d 390.

No. 82–5232. TROP ET AL. *v.* ORANGE COUNTY MUNICIPAL COURT. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 901.

No. 82–5234. JOHL *v.* TOWN OF GROTON ET AL. C. A. 2d Cir. Certiorari denied.

No. 82–5235. STONEMAN *v.* AURELIUS. C. A. 9th Cir. Certiorari denied.

No. 82–5241. DRUMHELLER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 223 Va. 695, 292 S. E. 2d 602.

No. 82–5244. HOLSEY *v.* D'ALESANDRO, COMMISSIONER, MARYLAND PAROLE BOARD, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 882.

No. 82–5250. RAJAN *v.* NEW YORK STATE BOARD OF LAW EXAMINERS. Ct. App. N. Y. Certiorari denied.

No. 82–5255. BULLOCK *v.* NATIONAL RAILROAD ADJUSTMENT BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 681 F. 2d 821.

No. 82–5259. JONES *v.* GARRISON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 681 F. 2d 814.

No. 82–5262. CHOW *v.* SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 441.

No. 82–5263. MARSHALL *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 82–5265. SALAHUDDIN *v.* WRIGHT ET AL.; and SALAHUDDIN *v.* GOLD ET AL. C. A. 2d Cir. Certiorari denied.

No. 82–5268. WOJIE *v.* FRANCIS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 828.

No. 82–5269. BLOW ET AL. *v.* LASCARIS, COMMISSIONER, ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 668 F. 2d 670.

No. 82–5273. ROSS *v.* MCLEOD, ATTORNEY GENERAL OF SOUTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 685 F. 2d 431.

No. 82–5274. ROBINSON *v.* MATNEY. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 886.

No. 82–5278. STUMHOFER *v.* ROSS, INDUSTRIAL COMMISSIONER OF NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 82–5294. DICKINSON *v.* TEXAS. Ct. App. Tex., 11th Sup. Jud. Dist. Certiorari denied.

No. 82–5300. MCCORD *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 230 Ct. Cl. 849.

No. 82–5311. LEWINGDON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 82–5321. BRASSELL *v.* CITY OF MONTGOMERY, ALABAMA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 679 F. 2d 251.

No. 82–5337. MITCHELL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 51 Md. App. 347, 443 A. 2d 651.

No. 82–5338. DEGIDEO *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 3d Cir. Certiorari denied.

No. 82–5340. BUTTERY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 86 App. Div. 2d 987, 449 N. Y. S. 2d 552.

No. 82–5354. VESPUCCI *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists. Certiorari denied.

No. 82–5355. DOANE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 448.

No. 82–5361. JANOVICH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 1227.

No. 82–5362. DIXON *v.* MACDOUGALL. C. A. 9th Cir. Certiorari denied.

No. 82–5363. LEWIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 683 F. 2d 418.

No. 82–5366. BURKHART *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 682 F. 2d 589.

No. 82–5368. HOLLY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 826.

No. 82–5369. REYES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 685 F. 2d 421.

No. 82–5381. REAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 449.

No. 82–5390. MANOS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 568.

No. 82–5393. MEISNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 459.

No. 82–5394. BRIONES-GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 680 F. 2d 417.

No. 82–5396. HARPER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 680 F. 2d 731.

No. 81–1798. LARRY V. MUKO, INC. *v.* SOUTHWESTERN PENNSYLVANIA BUILDING & CONSTRUCTION TRADES COUNCIL ET AL. C. A. 3d Cir. Motions of Center on National Labor Policy and Associated Builders & Contractors, Inc., for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 670 F. 2d 421.

No. 81–1852. MONTANA ET AL. *v.* CROW TRIBE OF INDIANS. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 650 F. 2d 1104 and 665 F. 2d 1390.

No. 81–6966. STOICA *v.* STEWART ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 672 F. 2d 309.

No. 82–61. SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI, ET AL. *v.* MIENER, BY AND THROUGH HER NEXT FRIEND AND PARENT, MIENER, ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 673 F. 2d 969.

No. 82–5148. WILLIAMS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 441 A. 2d 255.

No. 81–2012. ELBY'S BIG BOY OF STEUBENVILLE, INC., ET AL. *v.* FRISCH'S RESTAURANTS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 670 F. 2d 642.

JUSTICE WHITE, dissenting.

One of the questions presented by this case is whether a district court's finding of a likelihood of confusion for pur-

poses of § 43(a) of the Lanham Act, 15 U. S. C. § 1125(a), is reviewable under the "clearly erroneous" standard, as a question of fact, or *de novo*, as a legal conclusion. Because there is a split in the lower courts on this question, compare *Sun Banks of Florida, Inc.* v. *Sun Federal Savings & Loan Assn.*, 651 F. 2d 311, 314–315 (CA5 1981) (applying "clearly erroneous" standard); *Squirtco* v. *Seven-Up Co.*, 628 F. 2d 1086, 1091 (CA8 1980) (same); *Keebler Co.* v. *Rovira Biscuit Corp.*, 624 F. 2d 366, 377 (CA1 1980) (same), with *Alpha Industries, Inc.* v. *Alpha Steel Tube & Shapes, Inc.*, 616 F. 2d 440, 443–444 (CA9 1980) (reviewing *de novo* court's conclusion that there was a likelihood of confusion); *Blue Bell, Inc.* v. *Jaymar-Ruby, Inc.*, 497 F. 2d 433, 435, n. 2 (CA2 1974) (same), I would grant certiorari to resolve the conflict.

No. 81–2027. CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP & TRAINING COMMITTEE & TRAINING BOARD *v.* ELDREDGE ET AL. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 662 F. 2d 534.

JUSTICE REHNQUIST, dissenting.

This case raises a question of the proper application of Rule 19 of the Federal Rules of Civil Procedure.[1] Because I believe the Court of Appeals seriously misapprehended the import of the Rule, I respectfully dissent.

Petitioner Joint Apprenticeship & Training Committee (JATC) is the board of trustees for the Carpenters Ap-

[1] Rule 19(a) provides in pertinent part:

"A person . . . shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring . . . inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party."

prenticeship and Training Trust Fund for Northern California. The labor-management agreement that created JATC requires it to establish and maintain programs for training apprentices. Respondents, two women who sought unsuccessfully to become carpentry apprentices, sued JATC in the District Court, claiming its selection process discriminates against women in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–2 *et seq.* The District Court set out the facts in detail in its first opinion, 440 F. Supp. 506, 510–514 (ND Cal. 1977).

JATC's program provides four years of classroom instruction for apprentices, who receive on-the-job training from an employer. In theory, applicants can become indentured apprentices in one of two ways. First, they can wait in line at a local JATC office to obtain a place on a referral list. Employers can call the local office, which will refer to them the applicant at the top of the list. Employers are entitled under their collective-bargaining agreements to reject referred applicants "for any reason." If the employer hires the referred applicant, he or she is indentured and thus admitted to the training program.

Second, local JATC offices will give anyone a "hunting license," which enables the holder to hunt for jobs directly from employers. If the applicant obtains a job, he or she is indentured without regard to the referral list. In practice, very few employers use the referral list and virtually all apprentices obtain their jobs through a hunting license.

As the Court of Appeals found, the essence of respondents' amended complaint is that JATC adopted the hunting license system knowing it has a discriminatory effect on women. Respondents claim that employers discriminate against women when hiring applicants with hunting licenses, and that JATC's use of the system therefore violates Title VII. 662 F. 2d 534, 536 (CA9 1981). Respondents sought injunctive relief requiring JATC to adopt some other system. As the District Court noted:

"[Respondents] have not specified the precise system they seek to have instituted, but it is plain that they envision a system requiring an employer who wishes to hire a beginning apprentice to contact the union local and enter a request without naming any individual, whereupon the union would be required to dispatch an applicant selected by the JATC by means of one of a number of non-discriminatory techniques." 440 F. Supp., at 514 (footnote omitted).

The District Court held that the employers are necessary parties under Rule 19(a)(1). It reasoned that any relief it might grant against JATC alone would be ineffective. Although more women might obtain referrals, they would not be any more successful in becoming apprentices. "There is no evidence that the change in referral system sought here will have any effect on the apparent source of the discrimination alleged—the absent employers."[2] 440 F. Supp., at 521.

Furthermore, the District Court reasoned, employers have a substantial interest in selecting their own apprentices. Even if the court could affect employers' hiring decisions by a decree entered only against petitioner, it would be unfair to do so without affording them an opportunity to contest the allegations. Thus the employers are also necessary parties under Rule 19(a)(2)(i).[3] 440 F. Supp., at 522–523.

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[2] The District Court acknowledged that it could order JATC to include women in its classroom programs, but noted that such an order would not help any woman obtain the on-the-job training that is a prerequisite for employment as a journeyman carpenter. "Thus the relief obtained in this lawsuit would serve only to swell the ranks of unemployed apprentices. This surely cannot be the 'complete relief' contemplated by Rule 19(a)." 440 F. Supp., at 520.

See generally *Gilmore* v. *Kansas City Terminal R. Co.*, 509 F. 2d 48, 52–53 (CA8 1975); *Evans* v. *Sheraton Park Hotel*, 164 U. S. App. D. C. 86, 90, 503 F. 2d 177, 181 (1974).

[3] The District Court found the employers' interests were not sufficiently similar to JATC's interests for a decree against JATC to bind the employ-

The District Court applied the balancing process established by Rule 19(b)[4] and concluded that the employers are indispensable parties. Respondents were unable to join the 4,500 employers, so the District Court dismissed the action without prejudice under Rule 41(b). 83 F. R. D. 136 (ND Cal. 1979).

The Court of Appeals reversed. 662 F. 2d, at 537–538. Although the Court of Appeals claimed "the district court misapprehended the legal inquiry required by rule 19(a)(1)," it did not state what form of inquiry would be appropriate. It believed the court has "both the power and the duty to enjoin" activities that violate Title VII. "[R]elief on plaintiffs' claims against JATC as an entity could be afforded by an injunction against JATC alone." *Id.*, at 537. This seems to mean that since plaintiffs have sought only an injunction against JATC, the District Court can afford the complete relief contemplated by Rule 19(a)(1) by granting only what the plaintiffs seek, regardless of whether the order would have any impact on the discrimination that was apparently the reason for the lawsuit. This approach is hardly the "pragmatic" reasoning this Court commended in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U. S. 102, 106–107, 116–117, n. 12 (1968).

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ers as nonparty participants under Rule 65(d). This ruling was apparently not challenged on appeal.

[4] Rule 19(b) provides:

"If a person as described in subdivision (a)(1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

Although the Court of Appeals thought there was "no evidence" that "employers would refuse to hire women admitted to the apprentice program pursuant to any judgment that may be entered against JATC," 662 F. 2d, at 537, the substance of respondents' complaint is that *employers* discriminate against women. See 83 F. R. D., at 138. The District Court correctly perceived the dilemma it and respondents faced. If it ordered relief against JATC alone, it could not affect the alleged discriminatory practices. Rule 19(a)(1). If it ordered relief against the employers, it would almost certainly affect their right to select apprentices without affording them an opportunity to rebut the charge that they discriminate. Rule 19(a)(2)(i).[5]

The Court of Appeals sought to avoid the force of this argument by claiming that because the agreement that created JATC grants it "full authority to structure the apprenticeship program and to select the apprentices . . . the employers have by contract ceded to JATC whatever legally protectible interest they may have had in selecting apprentices to be trained." 662 F. 2d, at 538. This is simply not correct. The agreement gives JATC authority only to select persons to refer to employers; an applicant does not become an apprentice and begin the training program until and unless an employer hires him. 440 F. Supp., at 510–512; 83 F. R. D., at 137. And, as noted above, employers have bargained to retain their right to reject any applicant for any reason. Yet the Court of Appeals rather cavalierly found, in a proceeding to which the employers were not parties, that the employers have ceded these rights.

The impropriety of the Court of Appeals' ruling is demonstrated by *General Building Contractors Assn., Inc.* v. *Pennsylvania*, 458 U. S. 375 (1982), in which we considered a similar apprenticeship system. We held that a district

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[5] See *NLRB* v. *Doug Neal Management Co.*, 620 F. 2d 1133, 1139–1140 (CA6 1980) (adopting the approach of and quoting extensively from the opinion of the District Court in this case).

court cannot issue an injunction against employers in an employment discrimination case under 42 U. S. C. § 1981 when the employers are not guilty of intentional discrimination. In that case there apparently was no hunting license system, and the discrimination was caused by the JATC and the union, but the bar to an injunction was the same as the bar that will face the District Court on remand in this case: it is improper for a court to act against a person who has not been found to have violated the law.

The Court of Appeals, as if recognizing the unsatisfactory posture of the litigation for providing meaningful adjudication and relief, commented that "on remand it is possible that some employers . . . may move to intervene." 662 F. 2d, at 538. But to secure full participation only by torturing the meaning of Rule 19 to avoid dismissal, in the hopes that the absent parties will then take it upon themselves to protect their interests, is not an appealing basis for the result reached by the Court of Appeals. It is respondents who have sought to affect the hiring practices of some 4,500 employers; it is respondents, and not the absent employers, who should shoulder the responsibility of joining the necessarily affected employers or suffering dismissal of their lawsuit.

If I only disagreed with the Court of Appeals' conclusion, this case would not merit this Court's attention. However, in choosing this approach over the District Court's reasoned, pragmatic path, the Court of Appeals has, I believe, embraced a significant departure from the meaning of Rule 19. Since courts will not, I am confident, begin issuing injunctions against nonparties, the approach of the Court of Appeals will tend to reduce the district courts to issuers of "'paper' decrees which neither adjudicate nor, in the end, protect rights." *Schutten* v. *Shell Oil Co.*, 421 F. 2d 869, 874 (CA5 1970). This is hardly a sound way to expend the energies of overburdened district judges. Furthermore, plaintiffs will be frustrated by their failure to obtain effective relief, but will gain this frustration only after lengthy litigation and the

attendant inconvenience and expense, instead of reaching the same practical result after relatively brief proceedings. Indeed, the only genuine beneficiaries of the Court of Appeals' approach are attorneys who may be able to collect statutory attorney's fees from defendants on the basis of a legal "success," without having gained anything of practical value for their clients.

Since the Court of Appeals held the employers were not necessary parties, it did not reach the question whether they were also indispensable parties under Rule 19(b). It will thus suffice for me to indicate my agreement with the reasoning of the District Court on this question as well. I would grant the petition for certiorari.

No. 81–2105. MIZELL, WARDEN, VIENNA CORRECTIONAL CENTER *v.* WELSH. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Motion of respondent to strike material in petition denied. Certiorari denied. Reported below: 668 F. 2d 328.

No. 81–2358. AMERICAN NATIONAL BANK *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 652 F. 2d 1176.

No. 81–2407. MISKOVSKY *v.* OKLAHOMA PUBLISHING CO. Sup. Ct. Okla. Certiorari denied. Reported below: 654 P. 2d 587.

JUSTICE REHNQUIST, with whom JUSTICE WHITE joins, dissenting.

In the midst of the 1978 campaign for the Democratic nomination for United States Senator from Oklahoma, petitioner, a candidate for that office, repeated charges made by a second candidate for the office against still a third candidate. As a result of these charges, respondent, publisher of two daily newspapers in Oklahoma City, published three news

stories, an editorial, and an editorial cartoon castigating petitioner for his role in the imbroglio. In the editorial, respondent stated that petitioner "has sunk to a new low in Oklahoma political rhetoric—and for him that takes some doing."

Petitioner brought suit in the Oklahoma state trial court asserting that respondent by these publications had libeled him. Following a trial on the merits, at the close of which the jury was instructed that it must find actual malice under the rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), the jury deliberated for six hours and awarded petitioner $35,000 actual damages and $965,000 punitive damages. On appeal to the Supreme Court of Oklahoma, the judgment was reversed by that court.

Whether or not these particular statements in respondent's newspapers were actionable under state and federal constitutional law is not clear to me. What is clear is that the Supreme Court of Oklahoma, apparently feeling itself bound by the decisions of this Court in cases such as *New York Times Co.* v. *Sullivan*, *supra*, and *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), said categorically that several of respondent's statements were simply statements of opinion, and that "[a]s opinions they are not statements of fact, and therefore *cannot* be false." 654 P. 2d 587, 593 (1982) (emphasis supplied).

The Supreme Court of Oklahoma also said:

> "Like the U. S. Supreme Court, we also, in proper cases, must review the evidence to make certain that constitutional principles have been correctly applied. The case before us is such an instance." *Id.*, at 591.

From this and similar statements in its decision, it is quite possible to conclude that the Supreme Court of Oklahoma thought that the entire law of defamation, hitherto the province of the States, had been pre-empted by federal constitutional standards. This, of course, is not the case, as we have made clear in *Gertz* v. *Robert Welch, Inc.*, *supra*, and succeeding cases. If statements in the decision of the Supreme

Court of Oklahoma such as that quoted above with respect to "opinion" not forming the basis of a libel action were applications of Oklahoma law, they would of course present no federal question. But it seems probable to me that the Supreme Court of Oklahoma in discussing the subject was relying on the following dicta in *Gertz* v. *Robert Welch, Inc.*, *supra:*

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.*, at 339–340 (footnote omitted).

A respected commentator on the subject has stated with respect to this quotation that "[t]he problem of defamatory opinion was not remotely in issue in *Gertz*, and there is no evidence that the Court was speaking with an awareness of the rich and complex history of the struggle of the common law to deal with this problem." Hill, Defamation and Privacy Under the First Amendment, 76 Colum. L. Rev. 1205, 1239 (1976).

Examples of the "rich and complex history" of the common law's effort to deal with the question of opinion are found in an entire chapter headed "Opinion" in R. Sack, Libel, Slander, and Related Problems 153–185 (1980). I am confident this Court did not intend to wipe out this "rich and complex history" with the two sentences of dicta in *Gertz* quoted above. The Supreme Court of Oklahoma's statement that opinion was not actionable may fairly be read to suggest that the court felt this result to be compelled by the United States Constitution, rather than merely being a statement of Oklahoma law. Under these circumstances, we have jurisdiction to review the judgment of the Supreme Court of Oklahoma, *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562 (1977), and I would exercise that jurisdiction by granting the petition for certiorari in this case.

No. 81–6463. ROMERO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 688 F. 2d 817.

JUSTICE WHITE, dissenting.

This petition seeks review of the Second Circuit's minimum standard of competence for an attorney to satisfy the Sixth Amendment's requirement that a defendant receive effective assistance of counsel. More than 30 years ago, the Second Circuit formulated what has become known as the "farce and mockery" test: "A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." *United States* v. *Wight*, 176 F. 2d 376, 379 (1949), cert. denied, 338 U. S. 950 (1950). Since that time, every other Federal Court of Appeals has adopted a "reasonable competence" standard or some variation thereof. *United States* v. *DeCoster*, 159 U. S. App. D. C. 326, 331, 487 F. 2d 1197, 1202 (1973); *United States* v. *Bosch*, 584 F. 2d 1113, 1121 (CA1 1978); *Moore* v. *United States*, 432 F. 2d 730, 736 (CA3 1970); *Marzullo* v. *Maryland*, 561 F. 2d 540, 543 (CA4 1977), cert. denied, 435 U. S. 1011 (1978); *Akridge* v. *Hopper*, 545 F. 2d 457, 459 (CA5), cert. denied, 431 U. S. 941 (1977); *United States* v. *Toney*, 527 F. 2d 716, 720 (CA6 1975), cert. denied *sub nom. Pruitt* v. *United States*, 429 U. S. 838 (1976); *United States ex rel. Williams* v. *Twomey*, 510 F. 2d 634, 641 (CA7), cert. denied, 423 U. S. 876 (1975); *Reynolds* v. *Mabry*, 574 F. 2d 978 (CA8 1978); *Cooper* v. *Fitzharris*, 586 F. 2d 1325, 1328 (CA9 1978), cert. denied, 440 U. S. 974 (1979); *Dyer* v. *Crisp*, 613 F. 2d 275, 278 (CA10) (en banc), cert. denied, 445 U. S. 945 (1980). Despite the rejection of the "farce and mockery" standard by the rest of the Nation's federal courts, the Second Circuit has remained steadfast in its adherence to the test. Indeed, it has "reaffirmed this standard numerous times." *Rickenbacker* v. *Warden*, 550 F. 2d 62, 65 (1976) (citing cases).

In this case, a panel of the Second Circuit has applied the "farce and mockery" test in rejecting petitioner's claim that

he was denied effective assistance of counsel. Petitioner's contention of ineffective assistance is not frivolous. His trial attorney failed to offer exculpatory testimony given at a suppression hearing and failed to call witnesses to testify at trial who exonerated petitioner at the hearing. Perhaps the performance of petitioner's counsel satisfied the more exacting standard that the Court of Appeals has rejected, but there was no holding to that effect, and that question should be answered by the Court of Appeals after the level of minimum competence required by the Sixth Amendment has been determined by this Court. Unfortunately, despite conflicts among the Courts of Appeals, we have long refused to consider whether the "farce and mockery" test satisfies the constitutional imperative of effective assistance of counsel, or to otherwise clearly articulate what level of effectiveness is required by the Constitution. A more fundamental question to the administration of criminal justice in the state and federal courts can scarcely be envisioned. I have previously argued that the Court should review this issue, *Maryland* v. *Marzullo*, 435 U. S. 1011 (1978) (WHITE, J., joined by REHNQUIST, J., dissenting from the denial of certiorari), and I remain of that view.

I respectfully dissent.

No. 81–6894. SHAW *v.* SHAW ET AL. Ct. App. Tex., 9th Sup. Jud. Dist. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE O'CONNOR would grant certiorari. Reported below: 623 S. W. 2d 148.

No. 81–6942. BARRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 673 F. 2d 912.

No. 82–33. HELEN MINING CO. ET AL. *v.* DONOVAN, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. Motions of American Mining Congress and Cedar Coal Co. et al. for leave to file briefs as *amici curiae* granted. Certiorari de-

nied. Reported below: 217 U. S. App. D. C. 109, 671 F. 2d 615.

No. 81–6952. TUCKER *v.* ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Super. Ct. Ga., Butts County;

No. 82–5012. KING *v.* TEXAS. Ct. Crim. App. Tex.;

No. 82–5084. SPRAGGINS *v.* ZANT, WARDEN. Super. Ct. Ga., Butts County;

No. 82–5275. EDWARDS *v.* MISSISSIPPI. Sup. Ct. Miss.; and

No. 82–5306. SHAW *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: No. 82–5012, 631 S. W. 2d 486; No. 82–5275, 413 So. 2d 1007; No. 82–5306, 636 S. W. 2d 667.

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. 82–48. CASTORR ET AL. *v.* BRUNDAGE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 674 F. 2d 531.

Opinion of JUSTICE STEVENS respecting the denial of the petition for writ of certiorari.

It is, of course, not possible to explain the reasons supporting every order denying a petition for a writ of certiorari. An occasional explanation, however, may allay the possible concern that this Court is not faithfully performing its responsibilities. Cf. *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912, 917–918 (1950) (opinion of Frankfurter, J., respecting the denial of the petition for writ of certiorari). In this case petitioners request the Court to resolve the conflict among the Circuits on the question whether constitutional claims not actually litigated in earlier state proceedings are barred in a subsequent action under 42 U. S. C. § 1983.

The general phrasing of the issue in the petition reflects the wholly unrealistic assumption that neither the character of the federal constitutional claim[1] nor the character of the earlier state proceeding[2] can affect its answer.

The case that gives rise to this petition does not squarely conflict with any previous decision. The Sixth Circuit wrote:

> "We do not hold that the application of the principles of res judicata and collateral estoppel is mandatory in every case. They are an expression of the policy of federal courts preferring finality, *i. e.*, that litigation at some time must become final. In the face of more important federal policies, however, the preference for fi-

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[1] The § 1983 cases petitioners cite to demonstrate a conflict among Circuits range from alleged employment discrimination, *Jennings* v. *Caddo Parish School Board*, 531 F. 2d 1331 (CA5 1976), to alleged First Amendment violations by a mobile home park owner, *Lovely* v. *Laliberte*, 498 F. 2d 1261 (CA1), cert. denied, 419 U. S. 1038 (1974), to procedural due process claims arising in different contexts: termination of parental rights, *Robbins* v. *District Court*, 592 F. 2d 1015 (CA8 1979), conveyance of real property to the city for failure to pay a property assessment, *Scoggin* v. *Schrunk*, 522 F. 2d 436 (CA9 1975), cert. denied, 423 U. S. 1066 (1976), and discharge from public employment, *Spence* v. *Latting*, 512 F. 2d 93 (CA10), cert. denied, 423 U. S. 896 (1975). This Court has previously recognized the importance of differing contexts in determining whether negligence would support a § 1983 action. See *Parratt* v. *Taylor*, 451 U. S. 527, 534 (1981), citing *Baker* v. *McCollan*, 443 U. S. 137, 139–140 (1979).

[2] Prior state proceedings involved in cases cited by petitioner include a landlord's action for possession, *Lovely* v. *Laliberte*, *supra;* a state hearing on termination of parental rights, *Robbins* v. *District Court*, *supra;* a state action to regain title to property, *Scoggin* v. *Schrunk*, *supra;* a suit to challenge termination of employment, *Lombard* v. *Board of Education of New York City*, 502 F. 2d 631 (CA2 1974), cert. denied, 420 U. S. 976 (1975); and a state challenge to the validity of regulations, *New Jersey Education Assn.* v. *Burke*, 579 F. 2d 764 (CA3), cert. denied, 439 U. S. 894 (1978). Differences in procedures and in standard of review in prior state proceedings in different cases may affect the degree to which federal courts should apply res judicata. Compare *Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461, 480–485 (1982) (majority opinion), with JUSTICE BLACKMUN's dissenting opinion, *id.*, at 490–493.

nality might be outweighed by more compelling considerations. We do not foreclose the possibility that certain § 1983 claims might not be barred by res judicata under proper circumstances. We hold only that the facts of this case do not present a proper situation in which to find an exception to the principles of res judicata." 674 F. 2d 531, 536 (1982).

This case, as the Court of Appeals recognized, arises out of a dispute over termination of parental rights, a domestic relations matter in which "the importance of finality is compelling." The record strongly suggests that prolongation of this litigation might have a serious adverse effect on the emotional and physical health of the child. See generally Brief for Guardian Ad Litem in Opposition. Nothing in the petition indicates that the child's interests would be served by this Court's intervention in this family law matter. There does not appear to be any conflict among the Circuits regarding the application of res judicata in challenges to state decisions terminating parental rights. See *Robbins* v. *District Court*, 592 F. 2d 1015 (CA8 1979) (res judicata bars § 1983 action challenging parental rights termination on constitutional grounds not raised in state-court proceedings). In my judgment it would be an abuse of our discretion to use this case as a vehicle for addressing the somewhat abstract question that is advanced by counsel for the petitioners.

JUSTICE WHITE, dissenting.

In this case brought under 42 U. S. C. § 1983 the Sixth Circuit held that res judicata principles barred the petitioner from presenting a constitutional claim because she had failed to present the claim in previous state litigation. The issue of whether constitutional claims not actually litigated in earlier state proceedings are barred in a subsequent federal suit is of considerable importance to § 1983 litigants and has divided the Federal Courts of Appeals. The First, Fifth, Eighth, Ninth, and Tenth Circuits, and now the Sixth Circuit, have

held that a § 1983 claimant is precluded by res judicata from relitigating not only the issues which were actually decided in the state proceeding, but also the issues which he might have presented. See *Lovely* v. *Laliberte*, 498 F. 2d 1261 (CA1), cert. denied, 419 U. S. 1038 (1974); *Jennings* v. *Caddo Parish School Bd.*, 531 F. 2d 1331 (CA5 1976); *Robbins* v. *District Court*, 592 F. 2d 1015 (CA8 1979); *Scoggin* v. *Schrunk*, 522 F. 2d 436 (CA9 1975), cert. denied, 423 U. S. 1066 (1976); *Spence* v. *Latting*, 512 F. 2d 93 (CA10), cert. denied, 423 U. S. 896 (1975). The Second and Third Circuits hold that a litigant is not precluded from asserting later such claims in federal court. See *Lombard* v. *Board of Ed. of New York City*, 502 F. 2d 631 (CA2 1974), cert. denied, 420 U. S. 976 (1975); *New Jersey Ed. Assn.* v. *Burke*, 579 F. 2d 764 (CA3), cert. denied, 439 U. S. 894 (1978). This conflict—which has been recognized by petitioners, by respondents, by the court below, and even by this Court, *Allen* v. *McCurry*, 449 U. S. 90, 97, n. 10 (1980)—should now be resolved. I would grant certiorari.

No. 82–56. SIMMONS ET AL. *v.* SEA-LAND SERVICES, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 676 F. 2d 106.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting.

Under § 33(b) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1440, as amended, 33 U. S. C. § 933(b), the 6-month period within which an injured longshoreman must commence a third-party negligence action against a shipowner begins upon his "[a]cceptance of . . . compensation under an award in a compensation order." In this case, the Fourth Circuit held that, in effect, this period begins whenever an injured longshoreman accepts a compensation payment from his employer, even if he does not know at that time what his ultimate recovery will be. This approach conflicts with that of the Second Circuit, which has

held that the 6-month period begins only when the total amount of compensation benefits to be received by the injured worker is fixed, either by order, stipulation of the parties, or informal award. See *Verderame* v. *Torm Lines, a/s*, 670 F. 2d 5, 7 (CA2 1982). See also *D'Amico* v. *Cia de Nav. Mar. Netumar*, 677 F. 2d 249 (CA2 1982). I would grant certiorari in order to resolve the conflict.

No. 82–5028. BUTLER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 277 S. C. 452, 290 S. E. 2d 1.

JUSTICE BRENNAN, dissenting.

Adhering to my view 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 (1976), I would vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that capital punishment is unconstitutional under all circumstances, I would grant certiorari and vacate petitioner's death sentence. However, even if I believed that the death penalty could constitutionally be imposed under certain circumstances, I would vacate the death sentence in this case because both the trial court's instructions concerning the standard of proof and the State Supreme Court's standard for reviewing the sufficiency of the evidence failed to assure a reliable sentencing determination.

Following petitioner Horace Butler's conviction for murder, the trial court conducted a separate sentencing proceeding in accordance with South Carolina law, S. C. Code § 16–3–20(B) (Supp. 1981). In order to impose the death penalty, the State was required to prove beyond a reasonable doubt the existence of at least one statutory aggravating circumstance. § 16–3–20(C). The State alleged two aggravating circumstances: that the murder occurred during the commission of a rape and that the murder occurred during the

commission of a kidnaping. See §§ 16–3–20(C)(a)(1)(a) and (c). The trial judge initially stated that he was "extremely dubious" whether the State had presented sufficient evidence of either rape or kidnaping.[1] He subsequently changed his mind concerning the sufficiency of the evidence of rape and submitted that aggravating circumstance to the jury, but he ruled that the evidence of kidnaping did not suffice as a matter of law. The jury then found that the State had established the aggravating circumstance of rape, and sentenced petitioner to death. The South Carolina Supreme Court affirmed the conviction and sentence. 277 S. C. 452, 290 S. E. 2d 1 (1982).

Recognizing the extraordinary consequences of the capital sentencing process, this Court has stressed "the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.) (footnote omitted). See *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (opinion of BURGER, C. J.). Accordingly, "we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination." *Beck* v. *Alabama*, 447 U. S. 625, 638 (1980). In this case, errors committed by the trial judge at the sentencing stage and by the State Supreme Court on appeal seriously undermined the reliability of the sentencing determination.

The sentencing court's instructions to the jury concerning reasonable doubt impermissibly lowered the standard of proof required to establish the aggravating circumstance of rape. South Carolina's death penalty statute requires that proof of aggravating circumstances be established beyond a

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[1] Petitioner, a Negro, had stated to the police that he had met the white victim on her way home, that she had agreed to accompany him to a secluded area, that she had voluntarily engaged in sexual relations with him, that she had then told him she would claim that he had raped her, and that he had panicked and shot her. There was evidence that the victim had received a blow to the head before being shot.

reasonable doubt. In my view the reasonable-doubt standard is constitutionally mandated. We have previously recognized that a capital sentencing proceeding is in many respects analogous to a trial on the issue of guilt or innocence. *Bullington* v. *Missouri*, 451 U. S. 430, 438 (1981). Since the death penalty may be imposed only if the State proves at least one aggravating circumstance, an aggravating circumstance is functionally an element of the crime of capital murder and, like any other element of a crime, its existence must be proved beyond a reasonable doubt. *In re Winship*, 397 U. S. 358, 364 (1970). The magnitude of the individual interest at stake in a capital sentencing proceeding requires a standard of proof "designed to exclude as nearly as possible the likelihood of erroneous judgment." *Addington* v. *Texas*, 441 U. S. 418, 423 (1979).

Here the sentencing judge's instructions significantly undercut the full constitutional protection afforded by the reasonable-doubt standard. The jury was told that reasonable doubt means "a substantial doubt for which an honest person seeking the truth can give a real reason," and is "not a weak or slight doubt, but . . . a serious or strong or substantial well-founded doubt as to the truth of the matters asserted by the state." See 277 S. C., at 458, 290 S. E. 2d, at 4. At a minimum, instructions equating reasonable doubt with "substantial doubt" can confuse the jury about the proper standard of proof. See *Taylor* v. *Kentucky*, 436 U. S. 478, 488 (1978). When the instructions also define reasonable doubt as a "serious or strong or substantial well-founded doubt," they create a serious danger that the jury may have found the existence of the aggravating circumstance on a lesser showing than "beyond a reasonable doubt."[2] The danger is

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[2] The term "reasonable doubt" conveys its own "unmistakable meaning," while "the cumulative effect resulting from the reiteration of the same idea by the use of the words and phrases 'well founded doubt,' 'substantial doubt,' and others of like meaning, is well calculated to fritter away

exacerbated when the jurors are told that they must be able to articulate a "real reason" for the substantial doubt. "The ability to give sound reasons for their doubts or their beliefs is not given to many men, and . . . doubts for which [a person] can formulate no convincing reason often induce him to act or to refuse to act." *Pettine* v. *Territory of New Mexico*, 201 F. 489, 496 (CA8 1912).[3]

Viewed in their entirety, the instructions substantially reduced the reliability of the jury's finding of the aggravating circumstance of rape. "Such a risk cannot be tolerated in a case in which the defendant's life is at stake." *Beck* v. *Alabama*, *supra*, at 637 (discussing failure to give a jury the option of convicting of a lesser included offense).

The errors in the jury instructions were compounded by the South Carolina Supreme Court's failure to ensure the existence of a sufficient evidentiary basis for the jury's determination. South Carolina law requires the State Supreme Court to review all death sentences and to determine whether the evidence supports the jury's finding of the existence of one or more statutory aggravating circumstances. §§ 16–3–25(A) and (C)(2). In this case, the court rejected petitioner's argument that the evidence of rape was insufficient to submit the aggravating circumstance to the jury. The court stated: "*Any* evidence direct or circumstantial reasonably tending to prove the guilt of the accused creates a jury issue." 277 S. C., at 457, 290 S. E. 2d, at 4 (emphasis in

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and destroy all benefit to be derived from this important rule of law." *Frazier* v. *State*, 117 Tenn. 430, 467, 100 S. W. 94, 103 (1906).

The "substantial doubt" instruction has been widely criticized. *E. g.*, *United States* v. *Zimeri-Safie*, 585 F. 2d 1318 (CA5 1978); *United States* v. *Wright*, 542 F. 2d 975 (CA7 1976), cert. denied, 429 U. S. 1073 (1977); *Laird* v. *State*, 251 Ark. 1074, 476 S. W. 2d 811 (1972); *State* v. *Thorpe*, —— R. I. ——, 429 A. 2d 785 (1981).

[3] Many courts have disapproved the requirement that a juror be able to articulate a reason for his doubt. *E. g.*, *Dunn* v. *Perrin*, 570 F. 2d 21 (CA1), cert. denied, 437 U. S. 910 (1978); *Commonwealth* v. *Robinson*, 382 Mass. 189, 415 N. E. 2d 805 (1981).

original), citing *State* v. *Hill*, 268 S. C. 390, 234 S. E. 2d 219, cert. denied, 434 U. S. 870 (1977). Applying this standard, the court found sufficient evidence to submit the aggravating circumstance to the jury.

The South Carolina Supreme Court's use of the "any evidence" rule to review death sentences is inconsistent with this Court's decision in *Jackson* v. *Virginia*, 443 U. S. 307 (1979). *Jackson* established a constitutional standard of review for criminal convictions, holding that due process requires a reviewing court to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. *Id.*, at 318–319.[4] We rejected the "no evidence" rule of *Thompson* v. *Louisville*, 362 U. S. 199 (1960), as "simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt . . . ." *Jackson* v. *Virginia*, 443 U. S., at 320. We noted that while the "no evidence" rule could be satisfied by "[a]ny evidence that is relevant," such a bare showing could not "rationally support a conviction beyond a reasonable doubt." *Ibid.*

The State as respondent does not dispute the applicability of *Jackson*. Instead, it argues that the standard of review utilized by the state court was "equivalent to that required in *Jackson*." Brief in Opposition 6. Indeed, according to the State, "the South Carolina Supreme Court has fully embraced, and in fact anticipated the standard of review required by this Court in *Jackson*." *Ibid.* These assertions are simply inaccurate. The South Carolina Supreme Court's "any evidence" standard is substantively identical to the "no evidence" rule of *Thompson*, and the state court itself has long equated the two formulations. In *State* v. *Bailey*, 253

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[4] While *Jackson* involved habeas corpus review by a federal court of a state-court conviction, "[t]he implications of *Jackson* are not limited to the habeas corpus context." The Supreme Court, 1978 Term, 93 Harv. L. Rev. 60, 215 (1979). Because the standard outlined in *Jackson* is constitutionally required, state courts are obligated to apply it on direct review.

S. C. 304, 170 S. E. 2d 376 (1969), the court held that "if there is any evidence which tends to establish the guilt of the defendant on the charges alleged a refusal to direct a verdict of acquittal is not an error of law. . . . There is no such error unless there is a *total failure* of competent evidence as to the charges alleged." *Id.*, at 308–309, 170 S. E. 2d, at 378 (emphasis added). Moreover, the state court continues to apply the equivalent of a "no evidence" rule even after *Jackson*. *E. g.*, *State* v. *Halyard*, 274 S. C. 397, 400, 264 S. E. 2d 841, 842–843 (1980) ("The rule is that unless there is a failure of competent evidence tending to prove the charge in the indictment, a trial judge should refuse a defendant's motion for a directed verdict of acquittal"); *State* v. *Tyner*, 273 S. C. 646, 657, 258 S. E. 2d 559, 565 (1979).

In short, the procedures employed at both the trial and appellate levels did not adequately ensure the reliable imposition of the death sentence. Under these circumstances, the death sentence must be vacated.

No. 82–5272. GENSON *v.* RIPLEY ET AL. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 681 F. 2d 1240.

Assignment Order. (For Court's order assigning THE CHIEF JUSTICE to the Federal Circuit as Circuit Justice, see *ante*, p. II.)

OCTOBER 18, 1982

Appeals Dismissed

No. 82–105. CALIFORNIA ET AL. *v.* KEENAN. Appeal from Sup. Ct. Cal. Motion of appellee for leave to proceed *in forma pauperis* granted. Appeal dismissed for want of substantial federal question. Reported below: 31 Cal. 3d 424, 640 P. 2d 108.

No. 82–381. BETHLEHEM STEEL CORP. ET AL. *v.* RHODE ISLAND TURNPIKE AND BRIDGE AUTHORITY. Appeal from Sup. Ct. R. I. dismissed for want of substantial federal question. Reported below: —— R. I. ——, 446 A. 2d 752.

Miscellaneous Orders

No. A–299. HAYES *v.* JUSTICES OF THE SUPREME COURT OF NEVADA ET AL. C. A. 9th Cir. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–307 (82–477). HERZOG *v.* DAYTON BAR ASSN. ET AL. Sup. Ct. Ohio. Application for stay, addressed to JUSICE MARSHALL and referred to the Court, denied.

No. A–344 (82–55). CITY OF WEST HELENA, ARKANSAS, ET AL. *v.* PERKINS ET AL., *ante*, p. 801. Application for the issuance of the judgment forthwith, presented to JUSTICE BLACKMUN, and by him referred to the Court, is granted and the judgment is to issue forthwith.

No. D–260. IN RE DISBARMENT OF BUSSEY. Disbarment entered. [For earlier order herein, see 455 U. S. 1012.]

No. D–265. IN RE DISBARMENT OF GRANT. Disbarment entered. [For earlier order herein, see 456 U. S. 956.]

No. D–269. IN RE DISBARMENT OF BROWN. Disbarment entered. [For earlier order herein, see 456 U. S. 957.]

No. D–273. IN RE DISBARMENT OF MICUN. Disbarment entered. [For earlier order herein, see 456 U. S. 987.]

No. D–276. IN RE DISBARMENT OF HUBBARD. Disbarment entered. [For earlier order herein, see 457 U. S. 1103.]

No. D–282. IN RE DISBARMENT OF LEVINE. Due to mistaken identity, the Appellate Division of the Supreme Court of New York, First Judicial Department, having two attor-

neys on its roster with identical names, the rule to show cause is discharged and the order entered September 9, 1982 [458 U. S. 1126], is vacated.

No. D–293. IN RE DISBARMENT OF DOYLE. It is ordered that Eugene William Doyle, of San Francisco, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–294. IN RE DISBARMENT OF WOLFF. It is ordered that Peter Wolff, of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–295. IN RE DISBARMENT OF MOYER. It is ordered that J. Hudson Moyer, of Amarillo, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–296. IN RE DISBARMENT OF COLEMAN. It is ordered that Frederick L. Coleman, Jr., of Big Spring, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–297. IN RE DISBARMENT OF JEFFCOAT. It is ordered that Lynn R. Jeffcoat, of Richardson, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–298. IN RE DISBARMENT OF BURGER. It is ordered that George Ralph Burger, of Sandy Springs, Ga., 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. 8, Orig. ARIZONA *v.* CALIFORNIA ET AL. Joint motion for additional time for oral argument and for divided argument granted, and a total of one and one-half hours allotted for oral argument and no more than two counsel per side shall present oral argument. JUSTICE MARSHALL took no part in the consideration or decision of this motion. [For earlier order herein, see, *e. g.*, *ante*, p. 811.]

No. 65, Orig. TEXAS *v.* NEW MEXICO. Report of the Special Master received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Replies to such Exceptions, with supporting briefs, may be filed within 30 days. [For earlier order herein, see, *e. g.*, 454 U. S. 1076.]

No. 92, Orig. ARKANSAS *v.* MISSISSIPPI. Answer to the Counterclaim referred to the Special Master. [For earlier order herein, see, *e. g.*, 458 U. S. 1122.]

No. 81–395. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* SADLOWSKI ET AL., 457 U. S. 102. Motion of respondents to dispense with taxation of costs denied.

No. 81–460. MIDDLESEX COUNTY ETHICS COMMITTEE *v.* GARDEN STATE BAR ASSN. ET AL., 457 U. S. 423. Motion of respondents to retax costs denied.

No. 81–746. CITY OF AKRON *v.* AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.; and

No. 81–1172. AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL. *v.* CITY OF AKRON ET AL. C. A. 6th Cir. [Certiorari granted, 456 U. S. 988.] Motion of The Board of Church and Society of the United Methodist Church

et al. for leave to join the brief, *amicus curiae*, of Certain Religious Organizations denied.

No. 81–878. LARKIN ET AL. *v.* GRENDEL'S DEN, INC. C. A. 1st Cir. [Probable jurisdiction noted, 454 U. S. 1140.] Motion of appellee for leave to file supplemental statement after argument granted.

No. 81–1055. POYTHRESS, SECRETARY OF STATE OF GEORGIA, ET AL. *v.* DUNCAN ET AL. C. A. 11th Cir. [Certiorari granted, 455 U. S. 937.] Oral argument in this case, presently scheduled for November 1, 1982, is hereby postponed and the case of *Federal Election Commission et al.* v. *National Right to Work Committee et al.*, No. 81–1506 [certiorari granted, 456 U. S. 914], is set for oral argument in its stead.

No. 81–1120. UNITED STATES ET AL. *v.* RYLANDER ET AL. C. A. 9th Cir. [Certiorari granted, 456 U. S. 943.] Motion of respondents for leave to argue points not raised by petitioners denied.

No. 81–1536. COMMISSIONER OF INTERNAL REVENUE *v.* TUFTS ET AL. C. A. 5th Cir. [Certiorari granted, 456 U. S. 960.] Motion of Wayne G. Barnett for leave to file a brief as *amicus curiae* granted.

No. 81–1717. AMERICAN BANK & TRUST CO. ET AL. *v.* DALLAS COUNTY ET AL.; BANK OF TEXAS ET AL. *v.* CHILDS ET AL.; and WYNNEWOOD BANK & TRUST ET AL. *v.* CHILDS ET AL. Ct. App. Tex., 5th Sup. Jud. Dist. Motion of Texas Association of Appraisal Districts et al. for leave to file a brief as *amici curiae* denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 82–488. IN RE HOPFMANN. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 81–984. FIRST NATIONAL CITY BANK *v.* BANCO PARA EL COMERCIO EXTERIOR DE CUBA. C. A. 2d Cir. Certiorari granted. Reported below: 658 F. 2d 913.

No. 81–2257. BILL JOHNSON'S RESTAURANTS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari granted. Reported below: 660 F. 2d 1335.

No. 82–242. GORSUCH, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* SIERRA CLUB ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 217 U. S. App. D. C. 180, 672 F. 2d 33, and 221 U. S. App. D. C. 450, 684 F. 2d 972.

Certiorari Denied

No. 81–2242. SEIBEL *v.* WHITLEY. C. A. 7th Cir. Certiorari denied. Reported below: 676 F. 2d 245.

No. 81–2294. MADONNA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 293.

No. 81–2369. JOHNSON *v.* SPALDING ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 669 F. 2d 589.

No. 81–2370. LASCANO *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 275 Ark. 346, 631 S. W. 2d 258.

No. 81–6704. ARTIS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 81–6708. GRIFFIN *v.* WARDEN, C. C. I., COLUMBIA, SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 277 S. C. 288, 286 S. E. 2d 145.

No. 81–6725. NELSON *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 101 Ill. App. 3d 1198, 432 N. E. 2d 398.

No. 81–6768. CART *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 102 Ill. App. 3d 173, 429 N. E. 2d 553.

No. 81–6872. McGAHEE *v.* MASSEY, SUPERINTENDENT, UNION CORRECTIONAL INSTITUTION. C. A. 11th Cir. Certiorari denied. Reported below: 667 F. 2d 1357.

No. 81–6929. AICE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 81–6968. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 82–60. DOZIER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 672 F. 2d 531.

No. 82–121. HAWKINS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 671 F. 2d 1383.

No. 82–122. CENTURY AIR FREIGHT, INC. *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 220 U. S. App. D. C. 84, 679 F. 2d 261.

No. 82–124. ROSSANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 826.

No. 82–166. ZENITH RADIO CORP. *v.* UNITED STATES ET AL. C. C. P. A. Certiorari denied. Reported below: 69 C. C. P. A. (Cust.) 96, 673 F. 2d 1254.

No. 82–213. CHAUFFEURS, TEAMSTERS & HELPERS, LOCAL UNION NO. 633 OF NEW HAMPSHIRE, ET AL. *v.* JONES MOTOR CO., INC. C. A. 1st Cir. Certiorari denied. Reported below: 671 F. 2d 38.

No. 82–305. FARMERS BANK & TRUST COMPANY OF WINCHESTER, TENNESSEE *v.* TRANSAMERICA INSURANCE CO. C. A. 6th Cir. Certiorari denied. Reported below: 674 F. 2d 548.

No. 82–312. OHIO-SEALY MATTRESS MANUFACTURING CO. ET AL. *v.* SEALY, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 669 F. 2d 490.

No. 82–323. FISHER ET UX. *v.* WEST VIRGINIA DEPARTMENT OF HIGHWAYS ET AL. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va. ——, 289 S. E. 2d 213.

No. 82–325. LAWSON *v.* BURLINGTON INDUSTRIES, INC. C. A. 4th Cir. Certiorari denied. Reported below: 683 F. 2d 862.

No. 82–330. JADAIR, INC. *v.* WALT KEELER CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 679 F. 2d 131.

No. 82–334. GINTHER-DAVIS CONSTRUCTION CO., INC., ET AL. *v.* TEXAS COMMERCE BANK NATIONAL ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 679 F. 2d 249.

No. 82–336. STRICKLER ET AL. *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 293 Pa. Super. 605, 435 A. 2d 646.

No. 82–338. SUN PUBLISHING CO., INC. *v.* JONES. Sup. Ct. S. C. Certiorari denied. Reported below: 278 S. C. 12, 292 S. E. 2d 23.

No. 82–340. GLADSTONE ET AL., DBA ARTHUR YOUNG & CO., ET AL. *v.* M. BRYCE & ASSOCIATES, INC. Ct. App. Wis. Certiorari denied. Reported below: 107 Wis. 2d 241, 319 N. W. 2d 907.

No. 82–343. ROBINSON BUS SERVICE, INC., ET AL. *v.* WILLETT MOTOR COACH CO. ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 103 Ill. App. 3d 760, 431 N. E. 2d 1190.

No. 82–345. COOPER, CITY ATTORNEY OF SANTA ANA, CALIFORNIA *v.* MITCHELL BROTHERS' SANTA ANA THEATER ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 128 Cal. App. 3d 937, 180 Cal. Rptr. 728.

No. 82–348. CPC INTERNATIONAL, INC., ET AL. *v.* GOLDBERG ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 678 F. 2d 1365.

No. 82–369. GULF OFFSHORE CO., A DIVISION OF POOL CO. *v.* MOBIL OIL CORP. Ct. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. Reported below: 628 S. W. 2d 171.

No. 82–375. LOUIS N. RITTEN & CO. *v.* COMMISSIONER OF REVENUE OF MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 319 N. W. 2d 421.

No. 82–417. HOLCOMBE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 416 So. 2d 1121.

No. 82–421. LABAR ENTERPRISES, INC., ET AL. *v.* UNITED STATES; and

No. 82–431. LABAR ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 826.

No. 82–429. HONICKER *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 220 U. S. App. D. C. 84, 679 F. 2d 261.

No. 82–449. DALY ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 691 F. 2d 504.

No. 82–454. PATE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 776.

No. 82–465. TAYLOR ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 683 F. 2d 18.

No. 82–514. MORTON *v.* PROVIDENCE HOSPITAL. C. A. D. C. Cir. Certiorari denied.

No. 82–5030. CHAVIS-EL *v.* GREER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 681 F. 2d 820.

No. 82–5115. LABOW *v.* MALL. Sup. Ct. Conn. Certiorari denied.

No. 82–5126. VAUGHAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 682 F. 2d 290.

No. 82–5287. HOWARD *v.* OHIO. Ct. App. Ohio, Greene County. Certiorari denied.

No. 82–5288. SELLARS *v.* CITY OF LOS ANGELES, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 901.

No. 82–5292. FLOWERS *v.* FAIR. C. A. 1st Cir. Certiorari denied. Reported below: 680 F. 2d 261.

No. 82–5293. JONES *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 87 App. Div. 2d 941, 451 N. Y. S. 2d 843.

No. 82–5295. PHEGLEY *v.* GREER, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 685 F. 2d 435.

No. 82–5296. GARY *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 685 F. 2d 435.

No. 82–5301. WEINRAUCH *v.* UNIVERSITY OF THE STATE OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 301.

No. 82–5307. IN RE GANEY. C. A. 4th Cir. Certiorari denied. Reported below: 681 F. 2d 813.

No. 82–5312. WRIGHT *v.* EDWARDS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 685 F. 2d 432.

No. 82–5318. ANDREWS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 306 N. C. 144, 291 S. E. 2d 581.

No. 82–5320. KAUFMAN, AKA OJO *v.* TEXAS. Ct. App. Tex., 14th Sup. Jud. Dist. Certiorari denied.

No. 82–5323. TREADWAY *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 298 Pa. Super. 640, 445 A. 2d 202.

No. 82–5324. FARRAKHAN *v.* MCKESSON CHEMICAL CO. C. A. 8th Cir. Certiorari denied. Reported below: 691 F. 2d 503.

No. 82–5325. CROOKS *v.* CITY OF AKRON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 176.

No. 82–5330. STANDARD *v.* REES, WARDEN, KENTUCKY STATE REFORMATORY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 566.

No. 82–5380. MCCLELLAN *v.* SMITH, ATTORNEY GENERAL, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 683 F. 2d 416.

No. 82–5399. STAGO *v.* FAUST, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 824.

No. 82–5402. WILSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 301.

No. 82–5404. DI PIETRO ET AL. *v.* DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 681 F. 2d 813.

No. 82–5406. LAFFERTY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 691 F. 2d 503.

No. 82–5412. TANNENBAUM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 685 F. 2d 1387.

No. 82–5414. MORGAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 300.

No. 82–5415. ROMIEH *v.* REAGAN, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 82–5429. NOVAK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 685 F. 2d 1384.

No. 82–5445. HASSAIN, AKA FLETCHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 459.

No. 81–2343. SHOEMAKER, CHIEF, OHIO ADULT PAROLE AUTHORITY *v.* RILEY. C. A. 6th Cir. Certiorari denied. Reported below: 674 F. 2d 522.

JUSTICE WHITE, dissenting.

In *Stone* v. *Powell*, 428 U. S. 465 (1976), the Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.*, at 494. Since then, the Courts of Appeals have divided as to the meaning of the phrase "an opportunity for full and fair litigation." The Fifth Circuit has held that "an opportunity for full and fair litigation" of Fourth Amendment claims is provided if "the processes provided by a state to fully and fairly litigate fourth amendment claims are [not] routinely or systematically applied in such a way as to prevent the actual litigation of fourth amendment claims on their merits." *Williams* v. *Brown*, 609 F. 2d 216, 220 (1980). The Tenth Circuit has taken the position that the *Stone* v. *Powell* standard requires a determination that the state court made "at least [a] colorable application of the correct Fourth Amendment constitutional standards." *Gamble* v. *Oklahoma*, 583 F. 2d 1161, 1165 (1978) (allowing adjudication of Fourth Amendment claim because a controlling United States Supreme Court case was neither recognized nor applied by the state courts). The Third Circuit, as well as the Sixth Circuit in the case below, has held that *Stone* v. *Powell* does not deprive the federal courts of jurisdiction when " 'the state provides the process but in fact the defendant is precluded from utilizing it by

reason of an unconscionable breakdown in that process.'" *Boyd* v. *Mintz*, 631 F. 2d 247, 250 (1980) (quoting *Gates* v. *Henderson*, 568 F. 2d 830, 840 (CA2 1977) (en banc) (dictum)). The issue is obviously important and recurring. I would grant certiorari to settle it.

No. 81–6773. KIME ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1318.

JUSTICE BRENNAN, dissenting.

On March 27, 1980, petitioners, Teresa Kime and Donald Bonwell, participated in a peaceful political protest on a public sidewalk in front of the Federal Building in Greensboro, N. C. The stated purposes of the demonstration were to call attention to a planned May Day demonstration and to protest the prosecution of a leader of the political party to which petitioners belonged. During the demonstration, petitioners set fire to a privately owned United States flag.

The United States Attorney filed an information in the United States District Court for the Middle District of North Carolina, charging petitioners with casting contempt on a United States flag by publicly burning it, in violation of 18 U. S. C. § 700. That statute prohibits "*knowingly cast[ing] contempt upon any flag of the United States* by publicly mutilating, defacing, defiling, burning, or trampling upon it" (emphasis added).

Petitioners filed motions to dismiss the information on the ground that § 700 is unconstitutional on its face and as applied to them. The motions were denied after an evidentiary hearing. Petitioners were tried by jury before a United States Magistrate. They were convicted and sentenced to eight months' imprisonment each. The District Court affirmed the convictions in an unpublished opinion, and the Court of Appeals for the Fourth Circuit affirmed for the reasons stated in the District Court's opinion (affirmance order reported at 673 F. 2d 1318 (1982)).

I would grant certiorari and set this case for oral argument because I feel sure the Court would be persuaded after full briefing and oral argument that petitioners' convictions violate their First Amendment rights under the principles established in *Spence* v. *Washington*, 418 U. S. 405 (1974); *Schacht* v. *United States*, 398 U. S. 58 (1970); *Street* v. *New York*, 394 U. S. 576 (1969); *United States* v. *O'Brien*, 391 U. S. 367 (1968); and *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943).

It is not seriously contested that petitioners' action in burning a flag was, at a minimum, expressive conduct "sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendmen[t]," *Spence* v. *Washington*, 418 U. S., at 409. This Court has repeatedly recognized the communicative connotations of the use of flags, including the United States flag. *Id.*, at 410; *Stromberg* v. *California*, 283 U. S. 359 (1931). It is likewise clear from the context of petitioners' act that in burning a flag they were making a statement of political protest; here, as in *Spence*, "it would have been difficult for the great majority of citizens to miss the drift of [petitioners'] point." 418 U. S., at 410.[1] Indeed, the Government could hardly contend otherwise. The statute under which petitioners were convicted requires, as an element of the offense, that they "knowingly cast contempt" on the flag by burning it. See *infra*, at 954–956. Thus, if the Government were to contend that petitioners were not engaged in expressive conduct, it would be con-

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[1] Petitioners, over their own objection, were forbidden to introduce any evidence or argument at trial as to the purposes of the March 27 demonstration or as to their intent in burning a flag. Indeed, the trial Magistrate refused even to allow petitioners to make an offer of proof for appellate purposes. The Government, however, does not contradict petitioners' statement of their own intent, nor is there any room on the present record to doubt their statements. Certainly the courts below credited petitioners with communicative intent, see n. 2, *infra*.

fessing that petitioners did not commit the crime charged.[2] Cf., *e. g.*, *Smith* v. *Goguen*, 415 U. S. 566, 588 (1974) (WHITE, J., concurring in judgment); *id.*, at 593 (REHNQUIST, J., dissenting).

Nor can there be any doubt that the subject matter of petitioners' communication is well within the core of the First Amendment's protection. Nearly four decades ago, this Court held that the First Amendment does not permit a legislature to require a person to show his respect for the flag by saluting it. *West Virginia State Board of Education* v. *Barnette*, *supra*. The same constitutional principle applies when the legislature, instead of compelling respect for the flag, forbids disrespect. As we said in *Street* v. *New York*, *supra:*

> "We have no doubt that the constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the

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[2] Besides raising the First Amendment point, petitioners contend that their convictions are infirm because there was no evidence on the record that would show that, by burning the flag, they intended thereby to cast contempt on it. This alleged absence of evidence is compounded, they argue, by the trial Magistrate's refusal to allow them to testify or argue as to their purpose. The District Court, affirming the convictions, rejected this argument, stating that "the Court has difficulty imagining a situation in which someone could burn a flag as a means of doing anything other than casting contempt unless it was done inadvertently or to dispose of a soiled or worn flag." App. to Pet. for Cert. 28. Although I express no opinion on this point in the case's present posture, I suggest that petitioners' contention is not frivolous. The District Court's reasoning amounts to a virtual presumption that petitioners intended to express a contemptuous message about the flag (a crucial element of the offense) based on nothing more than the bare act of burning. Yet one can conceive of other messages that petitioners might have intended to convey. For example, petitioners point out that a person might burn a flag to vilify particular policies with which the flag is identified, rather than to cast contempt on the flag itself. Pet. for Cert. 11. Whether the jury would have accepted this explanation is unknown; petitioners' point is that they were not even allowed to make it.

> heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous." 394 U. S., at 593, quoting *West Virginia State Board of Education* v. *Barnette*, *supra*, at 641–642.

The only difference between this case and *Street* is that petitioners here communicated their contempt for the flag through expressive conduct rather than through spoken or written words (or through both words and conduct, as in *Street*). The First Amendment standard for government regulations of expressive conduct is the now-familiar four-part test first announced in *United States* v. *O'Brien*, *supra*, at 377:

> "[A] government regulation [of expressive conduct] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; *if the governmental interest is unrelated to the suppression of free expression;* and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (Emphasis supplied.)

It is the third branch of the *O'Brien* test (here italicized) that is dispositive of this case. The Government suggests only one possible "substantial governmental interest" underlying § 700—"preservation of the flag, not as a mere chattel, but as the 'visible embodiment of the Nation.'" Brief in Opposition 4. Not surprisingly, however, the cases that the Government cites for this proposition all predate our decision in *Spence* v. *Washington*, *supra*.[3] In *Spence*, we expressly *rejected* this alleged governmental interest as a basis for meeting the "unrelated to expression" branch of the *O'Brien*

[3] *United States* v. *Crosson*, 462 F. 2d 96 (CA9), cert. denied, 409 U. S. 1064 (1972); *Joyce* v. *United States*, 147 U. S. App. D. C. 128, 454 F. 2d 971 (1971), cert. denied, 405 U. S. 969 (1972); *Hoffman* v. *United States*, 144 U. S. App. D. C. 156, 445 F. 2d 226 (1971).

test. We assumed, *arguendo*, that the State has a valid interest in protecting the integrity of the flag as a national patriotic symbol. Even if that interest exists, we held, such an interest is directly related to expression, at least where it is invoked against one who would use the flag to make a political statement. 418 U. S., at 413–414, and n. 8. There is nothing surprising about that conclusion; it follows from the nature of the alleged governmental interest at stake. The Government has no esthetic or property interest in protecting a mere aggregation of stripes and stars for its own sake; the only basis for a governmental interest (if any) in protecting the flag is precisely the fact that the flag has substantive meaning as a political symbol. Thus, assuming that there is a legitimate interest at stake, it can hardly be said to be one divorced from political expression. Hence, the one governmental interest suggested as support for this statute, and these convictions, is one clearly foreclosed by both precedent and basic First Amendment principles.

The Government attempts to distinguish *Spence* on the ground that the defendant in that case merely displayed a flag in his own window with a peace symbol superimposed, whereas petitioners "contumaciously burned [the flag] in a public place." Brief in Opposition 6, n. 5.[4] It is true that we noted the absence of physical destruction of the flag in *Spence*, 418 U. S., at 415. Yet that fact does not dispose of the key principle at stake—that any governmental interest in protecting the flag's symbolism is one that cannot pass muster under the third branch of the *O'Brien* test. So long as petitioners were engaged in expressive conduct, and so long as their conduct impaired no *non-speech-related* governmental interest, it is entirely irrelevant what specific physical medium petitioners chose for their expression. See also *Spence*, *supra*, at 420–421 (REHNQUIST, J., dissenting);

[4] The courts below were not similarly troubled at the need to distinguish *Spence*. On the contrary, they dealt with the case by ignoring it entirely. It is not cited in the opinions of the District Court or Court of Appeals.

Cline v. *Rockingham County Superior Court*, 502 F. 2d 789 (CA1 1974). Section 700 is neither an arson statute nor a breach-of-the-peace statute; the Government does not and cannot suggest that the statute's prohibition is directed at any interest other than enforcing respect for the flag.[5]

So far I have analyzed this case simply as one governed by *Spence*. But even if that case were somehow distinguishable (on the basis of burning or otherwise), there is an entirely independent reason why the Court, after argument, would be persuaded that § 700 is flagrantly unconstitutional on its face—indeed, a ground much stronger than anything in *Spence*. For § 700 contains an odious feature not shared by the statute in *Spence*.[6] Section 700 makes it a crime "*knowingly [to] cas[t] contempt* upon any flag of the United States by publicly . . . burning . . . it." *Thus, it is an indispensable element of the offense under § 700 that one intend to engage in political expression—and not just any political expression, but only that espousing a particular, unpopular point of view.* This is indeed a narrowly drawn statute; it is drawn so that everything it might possibly prohibit is constitutionally protected expression. This statute is thus different from one that simply outlawed *any* public burning or mutilation of the flag, regardless of the expressive intent or

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[5] In *Spence*, we mentioned four factors important to our decision. First, the flag was privately owned; second, the defendant displayed the flag on private property, so that he committed no trespass or disorderly conduct; third, there was no evidence of breach of the peace; and fourth, the defendant was engaged in communication. 418 U. S., at 408–410. All of those factors are present here as well. Petitioners, unlike Spence, made their demonstration on public property, but in both cases there was no suggestion of trespass or disorderly conduct. Petitioners were where they had a right to be, and they were not charged with violating any regulation purporting to regulate use of public areas.

[6] The statute at issue in *Spence*, in fact, was not a flag desecration statute at all, but a so-called "improper use" statute, forbidding the superimposition of any advertising or other extraneous matter onto a flag. Wash. Rev. Code § 9.86.020; see 418 U. S., at 406–407, and n. 1.

nonintent of the actor.[7] To put it bluntly, one literally cannot violate § 700 *without* espousing unpopular political views.[8] That is the very definition of a censorship statute.

In *Schacht* v. *United States*, 398 U. S., at 62–63, this Court unanimously struck down an actor's conviction for the unauthorized wearing of a military uniform. The statute in question contained an exception to the prohibition for theatrical productions—but only those productions that did not tend to discredit the Armed Forces. We held that such a content-based exception constituted impermissible censorship.

The same principle applies in the context of selective flag desecration statutes. In his opinion concurring in the judgment in *Smith* v. *Goguen*, JUSTICE WHITE succinctly and soundly stated the reasons why such a statute is impermissible:

> "To violate the statute in this respect, it is not enough that one 'treat' the flag; he must also treat it 'contemptuously,' which, in ordinary understanding, is the expression of contempt for the flag. In the case before us, . . . the jury must have found that Goguen not only wore the flag on the seat of his pants but also that the act—and hence Goguen himself—was contemptuous of the flag.

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[7] I do not mean to be read as suggesting that such a statute would be constitutional. On the contrary, it would be invalid for the reasons stated in my discussion of *Spence*, *supra*. My present point is that even if we had reached the opposite conclusion in *Spence* from the one we stated, there would be an independent fatal flaw in § 700.

[8] The Government's brief gives the game away when it argues that "'the legislation was enacted to prohibit the physical act of contemptuously burning a flag, rather than to in any way suppress free speech.'" Brief in Opposition 5, quoting *United States* v. *Crosson*, 462 F. 2d, at 102. There is no such thing as a "*physical* act of *contemptuously* burning a flag." As JUSTICE REHNQUIST said in *Smith* v. *Goguen*, 415 U. S. 566, 593 (1974) (dissenting opinion), "I have difficulty seeing how Goguen could be found by a jury to have treated the flag contemptuously by his act and still not to have expressed any idea at all."

> *To convict on this basis is to convict not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas about the flag unacceptable to the controlling majority in the legislature.*
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> . . . . . .
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> ". . . It would be difficult . . . to believe that the conviction in *O'Brien* would have been sustained had the statute proscribed only contemptuous burning of draft cards." 415 U. S., at 588–590 (emphasis supplied; footnote omitted).

See also, *e. g.*, *id.*, at 591 (BLACKMUN, J., dissenting); *id.*, at 597–598 (REHNQUIST, J., dissenting); *Spence* v. *Washington*, 418 U. S., at 422–423 (REHNQUIST, J., dissenting).

In short, § 700 constitutes overt content-based censorship, pure and simple. Under this statute, one may freely burn, mutilate, or otherwise abuse a flag for any reason in the world, *except* for the purpose of stating a contemptuous political message about the flag and what it stands for. This censorship goes to the heart of what the First Amendment prohibits. Of course, § 700 does not bar petitioners from seeking to express their message by other means; but that is immaterial. It has long been settled that a government may not justify a content-based prohibition by showing that speakers have alternative means of expression.[9] This statute is unconstitutional on its face. I would grant certiorari because I am confident the Court after argument would reverse these convictions and uphold the vital constitutional principle forbidding government censorship of unpopular political views.

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[9] *E. g.*, *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S. 530, 541, n. 10 (1980), and cases cited.

No. 82–211. BORTON *v.* UNITED PARCEL SERVICE, INC. C. A. 7th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 679 F. 2d 893.

No. 82–349. NEW YORK *v.* WILLETTE. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 87 App. Div. 2d 642, 448 N. Y. S. 2d 210.

No. 82–5109. RIVERA *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Petitioner was arrested on August 13, 1980, after one Francis J. Kelley reported that petitioner had taken his motorcycle from him at knife point earlier that day, along with title to the motorcycle and some cash. On August 26, two weeks later, a Cuyahoga County grand jury handed down a one-count indictment charging petitioner with receiving stolen property. Petitioner appeared on the following September 26, pleaded guilty to the charge, and received a sentence. Then, on October 7, the grand jury returned a second indictment that charged petitioner with receiving stolen property, aggravated robbery, and intimidating a witness. The receiving and aggravated robbery counts were based upon the same theft of Mr. Kelley's belongings for which petitioner had already been convicted. Petitioner moved to dismiss the second indictment on the ground that it violated the Double Jeopardy Clause of the Fifth Amendment as applied to the States under the Fourteenth Amendment. The trial court dismissed the receiving count in the second indictment at the State's request, but overruled petitioner's motion to dismiss the remaining counts.

Petitioner took an interlocutory appeal. With one judge dissenting, the Ohio Court of Appeals, Eighth District, affirmed the trial court's ruling. It held:

> "The intimidation and aggravated robbery charges raise no double jeopardy issue. . . . [T]he aggravated robbery count implicates not a duplicate, but an allied offense. . . .
>
> "The allied offense issue will arise only if the defendant is found guilty of aggravated robbery. He may be tried, but cannot be convicted, for both the aggravated robbery and for receiving the stolen property acquired in the theft offense, *Maumee* v. *Geiger* (1976), 45 Ohio St. 2d 238, 244. Accordingly, the error assigned is without merit." App. to Pet. for Cert. 17–18.

The Ohio Supreme Court overruled petitioner's motion for leave to appeal, and this petition followed.

We have jurisdiction to review final judgments by state courts denying a defendant's pretrial motion to dismiss an indictment on former jeopardy grounds. *Harris* v. *Washington*, 404 U. S. 55, 56 (1971); see *Abney* v. *United States*, 431 U. S. 651, 656–661 (1977). I would grant the petition for certiorari and set the case for oral argument. The Double Jeopardy Clause prohibits "a second prosecution for the same offense after conviction," *North Carolina* v. *Pearce*, 395 U. S. 711, 717 (1969), and I adhere to the view that this prohibition requires States to prosecute in one proceeding "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson*, 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring); see *Brooks* v. *Oklahoma*, 456 U. S. 999 (1982) (BRENNAN, J., dissenting from denial of certiorari); *Thompson* v. *Oklahoma*, 429 U. S. 1053 (1977) (BRENNAN, J., dissenting from denial of certiorari), and cases cited therein. Petitioner's indictment for aggravated robbery manifestly arose from the selfsame criminal act supporting his earlier conviction for receiving stolen property. None of the exceptions discussed in my opinion in *Ashe* v. *Swenson*, *supra*, at 453, n. 7, and 455, n. 11, excuse the State's failure to prose-

cute petitioner in a single proceeding.[1] I therefore conclude that trying petitioner on an aggravated robbery charge after he has been convicted and sentenced on the receiving charge violates the Double Jeopardy Clause as applied to the States.[2]

In addition, any offense that requires proof of all the facts necessary to obtain a conviction for receiving is the "same offense" as receiving for purposes of the Double Jeopardy Clause. See *Illinois* v. *Vitale*, 447 U. S. 410, 416 (1980); *Brown* v. *Ohio*, 432 U. S. 161 (1977); cf. *Harris* v. *Oklahoma*, 433 U. S. 682 (1977). In Ohio, the crime of receiving stolen property is complete if a person retains or disposes of the property of another knowing or having reason to believe that it was acquired through theft. See Ohio Rev. Code Ann. § 2913.51 (1982). Aggravated robbery is defined as the use of a weapon or the infliction of harm in the course of committing, attempting, or fleeing after one of a series of "theft offenses" defined by statute, including receiving stolen goods. See §§ 2911.01, 2913.01(K). Thus, to convict petitioner of aggravated robbery in the current prosecution, the State must prove that he committed a "theft offense." As the court below implicitly recognized, petitioner cannot be retried for receiving stolen goods. See *Illinois* v. *Vitale*, *supra*. Yet, on the allegations in the indictment now outstanding, the State will be unable to prove that petitioner committed aggravated robbery without proving at the same

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[1] Nor does the authority cited by the Ohio Court of Appeals support its holding. It stands merely for the correct proposition that the State could have prosecuted petitioner on both charges at the same time, as long as he was convicted only of one.

[2] I express no opinion as to the propriety of indicting petitioner for intimidating a witness. The intimidation charge stems from a telephone call petitioner allegedly made shortly after his arrest threatening Mr. Kelley with retribution should he cooperate with the police in prosecuting petitioner. It thus arguably relates to a criminal transaction between petitioner and Mr. Kelley separate from the theft at issue in the receiving and aggravated robbery charges.

time that he retained or disposed of Mr. Kelley's property with knowledge that it was obtained by theft.[3] Since prosecuting petitioner for aggravated robbery will therefore require the State to prove every fact necessary to convict petitioner of receiving stolen goods, a charge on which he has already been convicted, the current prosecution violates the Double Jeopardy Clause. See *Illinois* v. *Vitale*, *supra*, at 426–428 (STEVENS, J., dissenting).

No. 82–5280. STRICKLAND *v.* ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Super. Ct. Ga., Butts County; and

No. 82–5305. HITCHCOCK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 82–5305, 413 So. 2d 741.

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

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[3] All but three of the "theft offenses" listed in § 2913.01(K), besides receiving stolen goods itself, are not even arguably relevant to petitioner's crime. For instance, he has not been charged with burglary, tampering with coin machines, impersonating an officer, or corrupting sports events, all of which constitute "theft offenses." The three relevant possibilities are robbery, theft, and unauthorized use. As a matter of law, the only way petitioner could have committed aggravated robbery on the basis of these crimes without also committing the crime of receiving stolen goods would be if he had merely attempted robbery, theft, or unauthorized use, without actually obtaining another's property. But there is no such attempt allegation in this case, and petitioner was in possession of some of the stolen property when he was arrested.

The situation in this case is different from that before the Court in *Illinois* v. *Vitale*, 447 U. S. 410 (1980). The Court in *Vitale* found that the State might conceivably prove the crime of reckless vehicular manslaughter without resorting to the same facts that had supported Vitale's earlier conviction for failing to reduce speed to avoid a collision, and it allowed the prosecution to proceed subject to a later double jeopardy challenge if the State in fact relied on failure to reduce speed. In this case, the State cannot conceivably convict petitioner of aggravated robbery without proving facts sufficient to obtain a conviction for receiving stolen goods.

Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 80–1745. F. W. WOOLWORTH CO. *v.* TAXATION AND REVENUE DEPARTMENT OF NEW MEXICO, 458 U. S. 354; and

No. 80–2015. ASARCO INC. *v.* IDAHO STATE TAX COMMISSION, 458 U. S. 307. Motion of Multistate Tax Commission et al. for leave to file a brief as *amici curiae* denied. Petition for rehearing denied.

OCTOBER 28, 1982

Dismissal Under Rule 53

No. 82–483. ARIZONA ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA (KAISER CEMENT & GYPSUM CORP. ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari before judgment dismissed under this Court's Rule 53.

OCTOBER 29, 1982

Miscellaneous Order

No. A–396. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* O'BRYAN. Application to vacate the stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE REHNQUIST would grant the application.

NOVEMBER 1, 1982

Affirmed on Appeal

No. 82–360. BURTON ET AL. *v.* HOBBIE ET AL. Affirmed on appeal from D. C. M. D. Ala. Reported below: 543 F. Supp. 235.

Appeals Dismissed

No. 82–139. JACOBY & MEYERS *v.* SUPREME COURT OF NEW JERSEY ET AL. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. JUSTICE WHITE and JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. JUSTICE POWELL took no part in the consideration or decision of this appeal. Reported below: 89 N. J. 74, 444 A. 2d 1092.

No. 82–309. SMITH ET AL. v. BRANDT, PRESIDENT, NEW JERSEY STATE BOARD OF EDUCATION, ET AL. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. Reported below: 89 N. J. 514, 446 A. 2d 501.

No. 82–347. WISER *v.* HUGHES, GOVERNOR OF MARYLAND; and

No. 82–5360. ANDREWS *v.* HUGHES, GOVERNOR OF MARYLAND. Appeals from Ct. App. Md. dismissed for want of substantial federal question. Reported below: 299 Md. 658, 475 A. 2d 428.

No. 82–402. DURNING, TRUSTEE *v.* CITY OF LOUISVILLE ET AL. Appeal from Ct. App. Ky. dismissed for want of substantial federal question.

No. 82–5372. MA *v.* COMMUNITY BANK. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 686 F. 2d 459.

No. 82–5376. LATENDRESSE *v.* LATENDRESSE. Appeal from Sup. Ct. N. D. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Reversed and Remanded. (See No. 81–2066, *ante*, p. 4.)

Miscellaneous Orders

No. A–325. GIFFORD *v.* UNITED STATES. Application for bail, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–390. CEPULONIS ET AL. *v.* CONNOLLY ET AL. Application for injunction, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. D–285. IN RE DISBARMENT OF GLOECKNER. Disbarment entered. [For earlier order herein, see 458 U. S. 1127.]

No. D–297. IN RE DISBARMENT OF JEFFCOAT. Lynn R. Jeffcoat, of Richardson, Tex., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on October 18, 1982 [*ante*, p. 939], is hereby discharged.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Petition of the Special Master, Walter P. Armstrong, Jr., for allowance of interim compensation and expenses, as set forth in the petition filed October 18, 1982, is granted, and it is ordered that the United States bear one-half the costs and the States of Mississippi and Alabama each bear one-quarter of the costs. JUSTICE MARSHALL took no part in the consideration or decision of this petition. [For earlier order herein, see, *e. g.*, 457 U. S. 1115.]

No. 88, Orig. CALIFORNIA *v.* TEXAS ET AL. It is ordered that the Honorable Wade H. McCree, Jr., of Ann Arbor, Mich., be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Special Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his technical, stenographic, clerical, and legal assistants, the cost of printing his report, and all other proper expenses shall be charged against and be

borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

The notice of dismissal of certain defendants is referred to the Special Master. [For earlier order herein, see, *e. g.*, 458 U. S. 1131.]

No. 81–3. BOB JONES UNIVERSITY *v.* UNITED STATES. C. A. 4th Cir. [Certiorari granted, 454 U. S. 892.] Motion of petitioner for leave to file a supplemental brief after argument granted.

No. 81–920. VERLINDEN B. V. *v.* CENTRAL BANK OF NIGERIA. C. A. 2d Cir. [Certiorari granted, 454 U. S. 1140.] Stephen N. Shulman, Esquire, of Washington, D. C., a member of the Bar of this Court, is invited to argue this case as *amicus curiae* in support of the judgment below.

No. 81–1320. KOLENDER, CHIEF OF POLICE OF SAN DIEGO, ET AL. *v.* LAWSON. C. A. 9th Cir. [Probable jurisdiction noted, 455 U. S. 999.] Treating appellee's letter of October 19, 1982, as a motion for leave to present oral argument *pro se*, the motion is denied. Mark D. Rosenbaum, Esquire, of Los Angeles, Cal., a member of the Bar of this Court, is invited to argue this case as *amicus curiae* in support of the judgment below.

No. 81–1493. GILLETTE CO. *v.* MINER. Sup. Ct. Ill. [Certiorari granted, 456 U. S. 914.] Motion of Consumer Coalition for leave to participate in oral argument as *amicus curiae* denied.

No. 81–1893. CALIFORNIA *v.* RAMOS. Sup. Ct. Cal. [Certiorari granted, *ante*, p. 821.] Motion for appointment of counsel granted, and it is ordered that Ezra Hendon, Es-

quire, of San Francisco, Cal., be appointed to serve as counsel for respondent in this case.

No. 81–1618. WEYERHAEUSER CO. ET AL. *v.* LYMAN LAMB CO. ET AL.; and

No. 81–1619. GEORGIA-PACIFIC CORP. *v.* LYMAN LAMB CO. ET AL. C. A. 5th Cir. [Certiorari granted, 456 U. S. 971.] Motion of Alaska et al. for leave to participate in oral argument as *amici curiae* and for additional time for oral argument denied. Motion of National Lumber & Building Material Dealers Association for leave to file a brief as *amicus curiae* granted. JUSTICE WHITE took no part in the consideration or decision of these motions.

No. 82–233. BROOKS ET AL. *v.* WINTER, GOVERNOR OF MISSISSIPPI, ET AL.; and

No. 82–413. WINTER, GOVERNOR OF MISSISSIPPI, ET AL. *v.* BROOKS ET AL. D. C. N. D. Miss. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 82–610 (A–388). IN RE HOPFMANN ET AL. Motion of petitioner to expedite consideration of the petition for writ of prohibition and/or mandamus and/or injunction denied. Application for stay, addressed to JUSTICE POWELL and referred to the Court, denied.

No. 82–5358. IN RE PENA-PEREZ. Petition for writ of mandamus denied.

Certiorari Granted

No. 82–25. JONES, A MINOR CHILD, BY HIS MOTHER AND NEXT FRIEND, JONES, ET AL. *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari granted. Reported below: 668 F. 2d 755.

No. 82–91. IMMIGRATION AND NATURALIZATION SERVICE *v.* PHINPATHYA. C. A. 9th Cir. Certiorari granted. Reported below: 673 F. 2d 1013.

No. 82–401. RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA *v.* REHNER. C. A. 9th Cir. Certiorari granted. Reported below: 678 F. 2d 1340.

No. 81–1717. AMERICAN BANK & TRUST CO. ET AL. *v.* DALLAS COUNTY ET AL.; BANK OF TEXAS ET AL. *v.* CHILDS ET AL.; and WYNNEWOOD BANK & TRUST ET AL. *v.* CHILDS ET AL. Ct. App. Tex., 5th Sup. Jud. Dist. Motions of American Bankers Association and Dale National Bank for leave to file briefs as *amici curiae* granted. Certiorari granted limited to Question 1 presented by the petition. JUSTICE O'CONNOR took no part in the consideration or decision of these motions and this petition. Reported below: 615 S. W. 2d 810 (second case).

No. 81–1857. OREGON *v.* BRADSHAW. Ct. App. Ore. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 54 Ore. App. 949, 636 P. 2d 1011.

No. 81–2399. METROPOLITAN EDISON CO. ET AL. *v.* PEOPLE AGAINST NUCLEAR ENERGY ET AL.; and

No. 82–358. UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. *v.* PEOPLE AGAINST NUCLEAR ENERGY ET AL. C. A. D. C. Cir. Motions of Atomic Industrial Forum, American Mining Congress, and Chamber of Commerce of the United States for leave to file briefs as *amici curiae* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 219 U. S. App. D. C. 358, 678 F. 2d 222.

No. 82–23. MARSH, NEBRASKA STATE TREASURER, ET AL. *v.* CHAMBERS. C. A. 8th Cir. Certiorari granted limited to Question 4 presented by the petition. Reported below: 675 F. 2d 228.

No. 82–167. CHAPPELL ET AL. *v.* WALLACE ET AL. C. A. 9th Cir. Motion of respondents Vernon Wallace et al.

for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 661 F. 2d 729.

No. 82–185. BOSTON FIREFIGHTERS UNION, LOCAL 718 *v.* BOSTON CHAPTER, NAACP, ET AL.;

No. 82–246. BOSTON POLICE PATROLMEN'S ASSN., INC. *v.* CASTRO ET AL.; and

No. 82–259. BEECHER ET AL. *v.* BOSTON CHAPTER, NAACP, ET AL. C. A. 1st Cir. Motion of International Association of Fire Fighters, AFL–CIO, for leave to file a brief as *amicus curiae* in No. 82–185 granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 679 F. 2d 965.

Certiorari Denied. (See also Nos. 82–5372 and 82–5376, *supra.*)

No. 81–2026. UNCLE BEN'S, INC. *v.* JOHNSON. C. A. 5th Cir. Certiorari denied. Reported below: 657 F. 2d 750.

No. 81–2195. KINSEL *v.* WOLFE. Dist. Ct. Hot Springs County, Wyo. Certiorari denied.

No. 81–2258. HELLENIC LINES LTD. *v.* INCORVAIA. C. A. 2d Cir. Certiorari denied. Reported below: 668 F. 2d 650.

No. 81–2275. CARDIN *v.* DE LA CRUZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 2d 363.

No. 81–2280. CALLAWAY *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 106 Wis. 2d 503, 317 N. W. 2d 428.

No. 81–2303. FABERGE, INC. *v.* CHESEBROUGH-POND'S, INC. C. A. 9th Cir. Certiorari denied. Reported below: 666 F. 2d 393.

No. 81–2349. JAPAN LINE, LTD. *v.* TURNER ET AL.; and

No. 82–99. PHILIPPINE PRESIDENT LINES, INC., MANILA *v.* TURNER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 651 F. 2d 1300.

No. 81–2404. GOLD BONDHOLDERS PROTECTIVE COUNCIL, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 230 Ct. Cl. 307, 676 F. 2d 643.

No. 81–6823. MINOR *v.* TEXAS. Ct. App. Tex., 8th Sup. Jud. Dist. Certiorari denied. Reported below: 624 S. W. 2d 702.

No. 81–6838. HICKS *v.* NIX, WARDEN, IOWA STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied. Reported below: 671 F. 2d 255.

No. 81–6849. ALVAREZ *v.* WAINWRIGHT. C. A. 11th Cir. Certiorari denied. Reported below: 677 F. 2d 116.

No. 81–6853. STAPLES *v.* ISRAEL. C. A. 7th Cir. Certiorari denied.

No. 81–6858. DANIELS *v.* MAGGIO, WARDEN, ANGOLA STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 669 F. 2d 1075.

No. 81–6903. HARRELL *v.* JAGO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1219.

No. 81–6904. ANONYMOUS *v.* O'BRIEN ET AL. C. A. 1st Cir. Certiorari denied.

No. 81–6948. VELASQUEZ *v.* CUYLER ET AL. C. A. 3d Cir. Certiorari denied.

No. 81–6974. WEDDLE *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 51 Md. App. 756.

No. 82–62. DAVIS CO. *v.* UNITED FURNITURE WORKERS OF AMERICA, AFL–CIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 674 F. 2d 557.

No. 82–80. KING *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 82–141. JACOBO MARTI & SONS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 975.

No. 82–152. HALL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 51 Md. App. 745.

No. 82–187. LUJAN *v.* UNITED STATES DEPARTMENT OF THE INTERIOR ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 673 F. 2d 1165.

No. 82–204. ORDERS ET AL. *v.* STOTTS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 679 F. 2d 579.

No. 82–222. 1616 REMINC LIMITED PARTNERSHIP *v.* UNITED STATES ELEVATOR CORP. C. A. 4th Cir. Certiorari denied. Reported below: 681 F. 2d 816.

No. 82–237. MONTANA EX REL. INTAKE WATER CO. *v.* BOARD OF NATURAL RESOURCES AND CONSERVATION OF MONTANA ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 197 Mont. 482, 645 P. 2d 383.

No. 82–254. HOSPITALITY MOTOR INN, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 562.

No. 82–274. PENNSYLVANIA ET AL. *v.* DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 678 F. 2d 470.

No. 82–310. SKIPPY, INC. *v.* CPC INTERNATIONAL, INC. C. A. 4th Cir. Certiorari denied. Reported below: 674 F. 2d 209.

No. 82–316. COSTANTINI, DBA UNITED TRAVEL SERVICE ET AL. *v.* CIVIL AERONAUTICS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 896.

No. 82–350. DARVILLE ET AL. *v.* TEXACO, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 674 F. 2d 443.

No. 82–359. INUPIAT COMMUNITY OF THE ARCTIC SLOPE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 230 Ct. Cl. 647, 680 F. 2d 122.

No. 82–363. BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS, LOCAL 70 *v.* CALIFORNIA TRUCKING ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 1275.

No. 82–364. NEUMAIER *v.* ANIMAL MATTERS HEARING BOARD. Cir. Ct. Montgomery County, Md. Certiorari denied.

No. 82–366. LOUISIANA *v.* WALGAMOTTE. Sup. Ct. La. Certiorari denied. Reported below: 415 So. 2d 205.

No. 82–367. MILLER, TRUSTEE IN BANKRUPTCY *v.* HAYNES. C. A. 7th Cir. Certiorari denied. Reported below: 679 F. 2d 718.

No. 82–371. BEHAR *v.* SOUTHEAST BANK TRUST CO., N.A., PERSONAL REPRESENTATIVE OF THE ESTATE OF BEHAR. C. A. 11th Cir. Certiorari denied.

No. 82–373. LAZZARA *v.* PLAINTIFF'S LEGAL COMMITTEE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 679 F. 2d 249.

No. 82–379. COASTAL PETROLEUM CO. *v.* MOBIL OIL CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 671 F. 2d 419.

No. 82–382. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 675 F. 2d 774.

No. 82–385. O'BANNON, SECRETARY OF PUBLIC WELFARE OF PENNSYLVANIA, ET AL. *v.* SHADIS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 685 F. 2d 824.

No. 82–387. CONROD *v.* JEEP CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 175.

No. 82–389. LEASURE *v.* CONNOR. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 819.

No. 82–390. BAILEY ET AL. *v.* BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL. Sup. Jud. Ct. Mass.

Certiorari denied. Reported below: 386 Mass. 367, 436 N. E. 2d 139.

No. 82–394. BELLASSAI ET AL. *v.* MCAVOY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 558.

No. 82–395. DILL ET AL. *v.* DAVIES NITRATE CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 676 F. 2d 709.

No. 82–400. KARAPINKA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 82–403. COUGAR BUSINESS OWNERS ASSN. ET AL. *v.* WASHINGTON ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 97 Wash. 2d 466, 647 P. 2d 481.

No. 82–407. KATZMAN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 297 Pa. Super. 612, 442 A. 2d 336.

No. 82–408. GEORGIA RESIDENTIAL FINANCE AUTHORITY ET AL. *v.* JEFFRIES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 678 F. 2d 919.

No. 82–415. ROBINSON *v.* MAGOVERN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 824.

No. 82–419. OWENS-ILLINOIS, INC. *v.* WILLIAMS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 918.

No. 82–433. LINMARK ASSOCIATES, INC. *v.* ROBERT E. LIPSCHUTZ ASSOCIATES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 824.

No. 82–436. IRWIN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 415 So. 2d 1181.

No. 82–443. JOHNSON & SON ERECTORS CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 231 Ct. Cl. 753.

No. 82–457. VIESTENZ *v.* FLEMING COS., INC. C. A. 10th Cir. Certiorari denied. Reported below: 681 F. 2d 699.

No. 82–464. COLEMAN *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 230 Ct. Cl. 923.

No. 82–484. ALBAUGH *v.* WOOD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 883.

No. 82–487. STULBACH *v.* UNITED STATES PATENT AND TRADEMARK OFFICE. C. C. P. A. Certiorari denied. Reported below: 681 F. 2d 823.

No. 82–506. SAFIR *v.* LEWIS, SECRETARY OF TRANSPORTATION, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 82–522. KOVIC *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 684 F. 2d 512.

No. 82–535. FRENCH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 683 F. 2d 1189.

No. 82–544. TRAYNOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 449.

No. 82–547. JANSSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 448.

No. 82–553. SCOTT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 678 F. 2d 60C.

No. 82–559. DEVITO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 56 N. Y. 2d 846, 438 N. E. 2d 874.

No. 82–560. KANELOPOULOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 683 F. 2d 871.

No. 82–562. GIBSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 675 F. 2d 825.

No. 82–569. PEDERSEN ET UX. *v.* SOUTH WILLIAMSPORT AREA SCHOOL DISTRICT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 677 F. 2d 312.

No. 82–570. HIRSH *v.* MARTINDALE-HUBBELL, INC. C. A. 9th Cir. Certiorari denied. Reported below: 674 F. 2d 1343.

No. 82–5010. BIZZARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 674 F. 2d 1382.

No. 82–5080. GAVIN *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 561.

No. 82–5092. HADDIX *v.* OHIO LIQUOR CONTROL COMMISSION. Sup. Ct. Ohio. Certiorari denied.

No. 82–5129. VANN *v.* HARDING. C. A. 2d Cir. Certiorari denied. Reported below: 698 F. 2d 301.

No. 82–5133. PILCHER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 672 F. 2d 875.

No. 82–5139. MUCCI *v.* UNITED STATES; and
No. 82–5181. BENDIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 681 F. 2d 561.

No. 82–5177. CELESTINE *v.* CROWN CENTER HOTEL. C. A. 8th Cir. Certiorari denied. Reported below: 685 F. 2d 438.

No. 82–5237. MURR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 681 F. 2d 246.

No. 82–5284. SMOKES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 827.

No. 82–5329. MILLER *v.* MILLER. Ct. App. Ohio, Sandusky County. Certiorari denied.

No. 82–5333. GUMSEY *v.* CRAWFORD. C. A. 6th Cir. Certiorari denied. Reported below: 679 F. 2d 666.

No. 82–5334. AIKEN *v.* CITIZENS & SOUTHERN BANK OF COBB COUNTY. Sup. Ct. Ga. Certiorari denied. Reported below: 249 Ga. 481, 291 S. E. 2d 717.

No. 82–5336. PATRICK ET UX. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 673 F. 2d 1343.

No. 82–5342. HAYES *v.* CREDIT BUREAU OF GEORGIA, INC. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 881.

No. 82–5343. GRAHAM *v.* MARSHALL. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 177.

No. 82–5344. MALLOY *v.* SULLIVAN. Sup. Ct. Ala. Certiorari denied. Reported below: 415 So. 2d 1059.

No. 82–5345. NOONE *v.* PETTINATO. Cir. Ct. Montgomery County, Md. Certiorari denied.

No. 82–5349. CRAFT *v.* CHOATE ET AL. C. A. 10th Cir. Certiorari denied.

No. 82–5351. BENARD *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 82–5357. GRANT *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 55 Ore. App. 741, 643 P. 2d 421.

No. 82–5359. RUSSELL *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 416 So. 2d 1283.

No. 82–5364. ROYSTER *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 82–5365. CROMARTIE *v.* MACK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 879.

No. 82–5367. MAGGARD *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 411 So. 2d 200.

No. 82–5370. WILLIAMS *v.* BANK OF NOVA SCOTIA. C. A. 3d Cir. Certiorari denied.

No. 82–5377. DAVIS *v.* GREER, WARDEN, MENARD CORRECTIONAL CENTER, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 675 F. 2d 141.

No. 82–5379. LOPES *v.* HOWARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 822.

No. 82–5383. WALKER *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 276 Ark. 434, 637 S. W. 2d 528.

No. 82–5384. NOWELS *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 56 Ore. App. 396, 643 P. 2d 424.

No. 82–5385. PHILLIPS *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 841.

No. 82–5386. RESPRES *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 249 Ga. 731, 293 S. E. 2d 319.

No. 82–5387. MEDLIN *v.* MANN. Super. Ct. Alaska, 1st Jud. Dist. Certiorari denied.

No. 82–5389. WATSON *v.* DEFRANCES. C. A. 11th Cir. Certiorari denied.

No. 82–5391. WASSON *v.* ENGLE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 569.

No. 82–5397. ABBITT *v.* JORDAN; and ABBITT *v.* SAIED. C. A. 10th Cir. Certiorari denied.

No. 82–5400. SANCHEZ ET AL. *v.* EGGER, COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

No. 82–5424. GROOMS ET AL. *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 685 F. 2d 435.

No. 82–5439. McCARTY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 82–5451. HALL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 849.

No. 82–5455. YATES *v.* MEDICAL COLLEGE OF PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 811.

No. 82–5477. HAMILTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 684 F. 2d 380.

No. 82–5481. LEWIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 676 F. 2d 508.

No. 82–5485. POLANSKY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 691 F. 2d 491.

No. 81–1591. CHASE MANHATTAN BANK, N.A. *v.* VISHIPCO LINE ET AL. C. A. 2d Cir. Motions of New York Clearing House Association and Federal Reserve Bank of New York for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE WHITE and JUSTICE POWELL would grant certiorari. Reported below: 660 F. 2d 854.

No. 81–2249. SUMNER, WARDEN, SAN QUENTIN PRISON *v.* MAXWELL. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR would grant certiorari. Reported below: 673 F. 2d 1031.

No. 81–2273. CAMINITA *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 411 So. 2d 13.

No. 82–181. PELTZMAN *v.* FEDERAL MARITIME COMMISSION ET AL. C. A. D. C. Cir. Motion of petitioner for leave to proceed as a seaman granted. Certiorari denied.

No. 82–207. EASTSIDE MENTAL HEALTH CENTER, INC. *v.* WILLIAMS. C. A. 11th Cir. Motion of respondent for

leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 669 F. 2d 671.

No. 81–2406. CITY OF POLSON, MONTANA *v.* CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, ET AL.; and

No. 82–22. NAMEN ET AL. *v.* CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 951.

JUSTICE REHNQUIST, with whom JUSTICE WHITE joins, dissenting.

In deciding these cases, the Court of Appeals for the Ninth Circuit held that (1) the historic Flathead Reservation was not terminated by an Act of Congress in 1904; (2) by virtue of the Treaty of Hell Gate the title to the bed and banks of the south half of Flathead Lake, a large inland lake in northwestern Montana, was retained by the United States as trustee for respondent Tribes, rather than passing to the State of Montana at the time the latter was admitted to the Union; and (3) respondent Tribes have the authority to regulate the riparian rights of non-Indian owners of land abutting Flathead Lake. In my opinion, the decision of the Court of Appeals with respect to the "termination" issue was based on principles derived from cases such as *Rosebud Sioux Tribe* v. *Kneip*, 430 U. S. 584 (1977), *DeCoteau* v. *District County Court*, 420 U. S. 425 (1975), and *Mattz* v. *Arnett*, 412 U. S. 481 (1973), and does not warrant review here. With respect to the "ownership" issue and the "regulatory" issue, as they were described by the Court of Appeals, however, I believe there is reason to think that the Court of Appeals incorrectly applied our decisions in *Montana* v. *United States*, 450 U. S. 544 (1981), *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191 (1978), and *United States* v. *Wheeler*, 435 U. S. 313 (1978), and I would grant certiorari to review these determinations.

The "ownership" issue. This requires deciding who owns the southern half of the bed and banks of Flathead Lake. The Court of Appeals relied on its own decision 40 years ago in *Montana Power Co.* v. *Rochester*, 127 F. 2d 189 (1942). Petitioners contended in the Court of Appeals that *Rochester* had been significantly undercut by our decision in *Montana* v. *United States*, *supra*, where we held that the treaty establishing the Crow Indian Reservation had not conveyed to the Indians beneficial ownership of the bed of the Big Horn River flowing through the Reservation. The Court of Appeals advanced several factual distinctions between the execution of the treaty in *Montana* and the execution of the Treaty of Hell Gate involved in these cases. But the Court of Appeals apparently also disagreed with a portion of this Court's reasoning in *Montana*. In its opinion, the Court of Appeals stated:

> "The *Montana* Court emphasized that 'Congress was, of course, aware of this presumption once it was established by this Court.' [Citation omitted.] There is no evidence, however, that the presumption against pre-statehood federal grants of land under navigable waters had been established at the time the Hell Gate Treaty was negotiated and ratified. The earliest statement of the presumption appeared seven decades later. . . ." 665 F. 2d 951, 961, n. 27 (1982).

While this may be a proper statement of the chronology, it would surely be as applicable to the Crow Treaty involved in *Montana* as to the Treaty of Hell Gate involved in this case.

It would appear that the Court of Appeals decision in *Rochester*, *supra*, was a dispute between a licensee under the Federal Power Commission which had built a dam at the outlet of Flathead Lake and a non-Indian owner of patented land. But the *Rochester* court did not even purport to discuss the principle laid down in *United States* v. *Holt State Bank*, 270 U. S. 49 (1926), and reaffirmed in *Montana*, *supra*, that there is no conveyance of ownership where there

is nothing in a treaty "which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy . . . of treating such lands as held for the benefit of the future State." *United States* v. *Holt State Bank*, *supra*, at 58–59, quoted in *Montana* v. *United States*, *supra*, at 552–553.

While it may be understandable why the Court of Appeals treated its decision in *Rochester* as *stare decisis* in these cases, the same is obviously not true so far as this Court is concerned. Because after *Montana* there is substantial doubt as to whether the Court of Appeals reached the right conclusion on the "ownership" issue, I would grant certiorari to review its judgment on that point.

The "regulatory" issue. The Court of Appeals also decided that a tribal ordinance regulating the riparian rights of owners of fee lands abutting Flathead Lake could be applied to non-Indian owners. The Court of Appeals saw, perhaps quite rightly, conflicting indications from our decisions in *Montana* v. *United States*, *supra*, *Oliphant* v. *Suquamish Indian Tribe*, *supra*, and *United States* v. *Wheeler*, *supra*, on the one hand, and *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134 (1980), on the other hand.

In *Oliphant*, *supra*, we acknowledged that Indian tribes retain elements of "quasi-sovereign" authority after ceding their lands to the United States, but went on to observe:

> "The tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers '*inconsistent with their status.*'" 435 U. S., at 208.

In *Wheeler*, *supra*, we further observed that "[t]he areas in which such implicit divestiture of sovereignty has been held to have occured are those involving the relations between an

Indian tribe and nonmembers of the tribe." 435 U. S., at 326.

The Court of Appeals saw an inconsistency between these statements and the statement contained in *Washington* v. *Confederated Tribes*, *supra*, that "[t]ribal powers are not implicitly divested by virtue of the tribe's dependent status." 447 U. S., at 153. But the Court of Appeals also recognized that the most recently decided of these cases, *Montana* v. *United States*, *supra*, cited *Wheeler* with complete approval. In *Montana*, we went on to say:

> "Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. [Citation omitted.] But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. [Citations omitted.] Since regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty did not authorize the Crow Tribe to adopt Resolution No. 74–05." 450 U. S., at 564–565 (footnote omitted).

Nevertheless, the Court of Appeals felt that even under the more recently expressed doctrines reaffirmed in *Montana*, the ordinance regulating non-Indian lands abutting Flathead Lake was authorized because the southern half of the lake, in its view, was owned by the United States in trust for the Tribes. The correctness of that conclusion obviously depends upon the Court of Appeals' resolution of the "ownership" issue; if upon review of this latter determination we were to decide that the southern half of Flathead Lake

passed to the State of Montana under our decision in *Montana* v. *United States*, the Court of Appeals' justification for its decision of the "regulatory" issue would likewise fail.

The "ownership" and "regulatory" issues present important questions having ramifications throughout the many Western States within the jurisdiction of the Court of Appeals for the Ninth Circuit. I would grant certiorari to review that court's decision of both issues.

No. 81–6813. ELLEDGE *v.* FLORIDA. Sup. Ct. Fla.;
No. 82–5317. BERRYHILL *v.* GEORGIA. Sup. Ct. Ga.;
No. 82–5348. RILEY *v.* FLORIDA. Sup. Ct. Fla.; and
No. 82–5373. BROWN *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Super. Ct. Ga., Butts County. Certiorari denied. Reported below: No. 81–6813, 408 So. 2d 1021; No. 82–5317, 249 Ga. 442, 291 S. E. 2d 685; No. 82–5348, 413 So. 2d 1173.

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. 82–393. WESTERN ELECTRIC CO., INC. *v.* HILL ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL would grant the petition for certiorari, vacate the judgment, and remand the case for further consideration in light of *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147 (1982). Reported below: 672 F. 2d 381.

No. 82–399. SPAN-DECK, INC. *v.* FABCON, INC., ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 667 F. 2d 1237.

No. 82–5083. MCDOWELL *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 312 N. W. 2d 301.

No. 82–5328. THOMAS *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Super. Ct. Ga., Butts County. Certiorari denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that capital punishment is unconstitutional in all circumstances, I would grant certiorari and vacate the death sentence on this basis alone. However, even if I believed that the death sentence could constitutionally be imposed under certain circumstances, I would grant certiorari and vacate the death sentence imposed here. The decision below is inconsistent with this Court's decision in *Godfrey* v. *Georgia*, 446 U. S. 420 (1980).

At the sentencing proceeding which followed petitioner's conviction of murder, the trial court instructed the jury, in the terms of the Georgia death penalty statute, that it could impose the death sentence if it found "that the offense of murder for which the accused has been convicted was outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind." Ga. Code § 27–2534.1(b)(7) (1978). The jury instruction did not in any way clarify or narrow the words of the statute.

The Court recognized in *Godfrey* that an instruction reciting this statutory language does not provide a constitutionally adequate "restraint on the arbitrary and capricious infliction of the death sentence," because it fails to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" 446 U. S., at 428 (plurality opinion) (footnotes omitted). Although the instruction in this case, like the instruction in *Godfrey*, did no more than restate the broad statutory language, the Georgia Supreme Court affirmed petitioner's death sentence without requiring a new sentencing proceeding. In failing to require resentencing, the Georgia

Supreme Court disregarded the clear mandate of *Godfrey*. Although the state appellate court concluded, upon reviewing the trial record, that petitioner deserved the death sentence, the fact remains that the critical sentencing decision was left to "the uncontrolled discretion of a basically uninstructed jury," *id.*, at 429 (plurality opinion). See *Newlon* v. *Missouri*, *ante*, at 888–889 (MARSHALL, J., dissenting from denial of certiorari); *Brooks* v. *Georgia*, 451 U. S. 921 (1981) (MARSHALL, J., dissenting from denial of certiorari); *Godfrey* v. *Georgia*, *supra*, at 436–437 (MARSHALL, J., concurring).

Rehearing Denied

No. 81–6606. FRANCOIS *v.* FLORIDA, 458 U. S. 1122; and

No. 82–120. GREYHOUND LINES, INC. *v.* TRAILWAYS, INC., ET AL., *ante*, p. 862. Petitions for rehearing denied.

No. 81–5243. COTNER *v.* OKLAHOMA, 454 U. S. 1100. Motion for leave to file petition for rehearing denied.

NOVEMBER 2, 1982

Dismissal Under Rule 53

No. 82–243. IMMIGRATION AND NATURALIZATION SERVICE *v.* PEREZ ET UX. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 643 F. 2d 640 and 665 F. 2d 269.

NOVEMBER 8, 1982

Affirmed on Appeal

No. 82–284. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL. Affirmed on appeal from C. A. D. C. Cir. Reported below: 220 U. S. App. D. C. 45, 678 F. 2d 1092.

Appeals Dismissed

No. 82–290. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES *v.* FINANCE ADMINISTRATION OF THE

CITY OF NEW YORK ET AL. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Reported below: 54 N. Y. 2d 533, 430 N. E. 2d 1290.

No. 82–293. NORTH SHORE UNIVERSITY HOSPITAL ET AL. *v.* NEW YORK STATE HUMAN RIGHTS APPEAL BOARD ET AL. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept., dismissed for want of jurisdiction. JUSTICE BLACKMUN would dismiss the appeal for want of substantial federal question. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 82 App. Div. 2d 799, 439 N. Y. S. 2d 408.

No. 82–5488. WAYLAND *v.* INTERNAL REVENUE SERVICE ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Reversed. (See No. 82–29, *ante*, p. 14.)

Miscellaneous Orders

No. ——. ROSS *v.* WOODARD, CHAIRMAN, NORTH CAROLINA PAROLE COMMISSION. Motion to direct the Clerk to file the petition for writ of certiorari denied.

No. D–262. IN RE DISBARMENT OF AUWAERTER. Disbarment entered. [For earlier order herein, see 456 U. S. 902.]

No. D–267. IN RE DISBARMENT OF DEFAZIO. Disbarment entered. [For earlier order herein, see 456 U. S. 956.]

No. D–286. IN RE DISBARMENT OF NADLER. Disbarment entered. [For earlier order herein, see 458 U. S. 1127.]

No. D–290. IN RE DISBARMENT OF SPIRO. Demetri M. Spiro, of Chicago, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be

stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on September 9, 1982 [458 U. S. 1128], is hereby discharged.

No. D–299. IN RE DISBARMENT OF OLKON. It is ordered that Ellis Olkon, of St. Louis Park, Minn., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–300. IN RE DISBARMENT OF GRUBOR. It is ordered that John M. Grubor, of Pittsburgh, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–301. IN RE DISBARMENT OF BONNIN. It is ordered that Robbin James Bonnin, of Amherst, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–302. IN RE DISBARMENT OF JOHNSON. It is ordered that Richard Vernon Johnson, of Baltimore, Md., 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. 81–1618. WEYERHAEUSER CO. ET AL. *v.* LYMAN LAMB CO. ET AL.; and

No. 81–1619. GEORGIA-PACIFIC CORP. *v.* LYMAN LAMB CO. ET AL. C. A. 5th Cir. [Certiorari granted, 456 U. S. 971.] Motion of respondents for relief from compliance with Rule 28.1 granted. JUSTICE WHITE, JUSTICE POWELL, and JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 81–1636. FLORIDA *v.* BRADY ET AL. Sup. Ct. Fla. [Certiorari granted, 456 U. S. 988.] The parties are directed to file supplemental memoranda addressing the present posture of the cases in the state courts, the status of the charges against each respondent and how any change, if there be any change, affects the case pending in this Court. Oral argument in this case, presently scheduled for December 8, 1982, is postponed and the case of *District of Columbia Court of Appeals et al.* v. *Feldman et al.*, No. 81–1335 [certiorari granted, 458 U. S. 1105], is set for oral argument in its stead.

No. 82–171. MARINE TERMINALS CORP. ET AL. *v.* KELLY, *ante*, p. 863. Motion of respondent for reimbursement of costs denied.

No. 82–446. DALLAS COUNTY HOSPITAL DISTRICT *v.* DALLAS ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW ET AL. C. A. 5th Cir. Motion of respondent Leon Gowans for leave to proceed *in forma pauperis* denied.

No. 82–667. FLORIDA *v.* ZAFRA. Dist. Ct. App. Fla., 3d Dist. Motion of petitioner to expedite consideration of the petition for writ of certiorari denied.

Certiorari Granted

No. 82–118. CROWN, CORK & SEAL CO., INC. *v.* PARKER. C. A. 4th Cir. Certiorari granted. Reported below: 677 F. 2d 391.

No. 82–372. FEDERAL TRADE COMMISSION ET AL. *v.* GROLIER INC. C. A. D. C. Cir. Certiorari granted. Reported below: 217 U. S. App. D. C. 47, 671 F. 2d 553.

No. 81–1859. ILLINOIS *v.* LAFAYETTE. App. Ct. Ill., 3d Dist. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 99 Ill. App. 3d 830, 425 N. E. 2d 1383.

No. 82–492. SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY *v.* HELM. C. A. 8th Cir. Motion of re-

spondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 684 F. 2d 582.

No. 82–271. CHARDON ET AL. *v.* FUMERO SOTO ET AL. C. A. 1st Cir. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 681 F. 2d 42.

No. 82–354. MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., ET AL. *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL.;

No. 82–355. CONSUMER ALERT ET AL. *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL.; and

No. 82–398. UNITED STATES DEPARTMENT OF TRANSPORTATION ET AL. *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL. C. A. D. C. Cir. Motion of Automotive Occupant Protective Association for leave to file a brief as *amicus curiae* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 220 U. S. App. D. C. 170, 680 F. 2d 206.

No. 81–6908. BARCLAY *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 411 So. 2d 1310.

Certiorari Denied. (See also No. 82–5488, *supra.*)

No. 81–2199. JAMES *v.* TEXAS. Ct. App. Tex., 5th Sup. Jud. Dist. Certiorari denied. Reported below: 629 S. W. 2d 92.

No. 81–2221. RUTLEDGE *v.* SMALL BUSINESS ADMINISTRATION. C. A. 5th Cir. Certiorari denied. Reported below: 669 F. 2d 732.

No. 81–2243. FINCHER *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 161 Ga. App. 556, 288 S. E. 2d 643.

No. 81–2254. GELVIN *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 318 N. W. 2d 302.

No. 81–2373. GAZIANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 825.

No. 81–5912. WOOD *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 648 P. 2d 71.

No. 81–6882. EPHRAIM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 902.

No. 82–94. LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 82–424. FRANK MASCALI CONSTRUCTION G.C.P. CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 294.

No. 82–154. BRANDSTETTER *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 103 Ill. App. 3d 259, 430 N. E. 2d 731.

No. 82–217. STOVER ET AL. *v.* RAU ET AL.;

No. 82–608. CROWN CENTER REDEVELOPMENT CORP. ET AL. *v.* STOVER ET AL.;

No. 82–616. JOHNSON ET AL. *v.* STOVER ET AL.; and

No. 82–626. RAU *v.* STOVER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 680 F. 2d 1175.

No. 82–224. AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL–CIO, LOCAL 3486 *v.* NEW JERSEY AIR NATIONAL GUARD, 177TH FIGHTER INTERCEPTOR GROUP, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 677 F. 2d 276.

No. 82–241. MOBAY CHEMICAL CORP. ET AL. *v.* GORSUCH, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY. C. A. 3d Cir. Certiorari denied. Reported below: 682 F. 2d 419.

No. 82–270. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* ERKINS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 663 F. 2d 1048.

No. 82–308. DELPRO CO. *v.* BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL–CIO, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 960.

No. 82–383. FUMERO SOTO ET AL. *v.* CHARDON ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 681 F. 2d 42.

No. 82–384. STACK *v.* CAPITAL-GAZETTE NEWSPAPERS, INC. Ct. App. Md. Certiorari denied. Reported below: 293 Md. 528, 445 A. 2d 1038.

No. 82–412. AMFAC FOODS, INC. *v.* ORE-IDA FOODS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 896.

No. 82–426. SNELL ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 680 F. 2d 545.

No. 82–434. NORTHERN UTILITIES, INC. *v.* KERR-MCGEE CORP. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 673 F. 2d 323.

No. 82–439. HARDY ET UX. *v.* HOUSING MANAGEMENT CO. ET AL. Ct. App. Md. Certiorari denied. Reported below: 293 Md. 394, 444 A. 2d 457.

No. 82–441. FAULKNER *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 82–442. CALVO *v.* LOS ANGELES UNIFIED SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 440.

No. 82–448. CREATIVE ENVIRONMENTS, INC., ET AL. *v.* ESTABROOK ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 680 F. 2d 822.

No. 82–456. GREENFIELD *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 82–460. DUNNING *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF CONTRA COSTA (DUNNING, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 82–463. MCNEA ET AL. *v.* VOINOVICH ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 70 Ohio St. 2d 117, 435 N. E. 2d 420.

No. 82–466. CURRY *v.* STATE BAR OF WISCONSIN ET AL. C. A. 7th Cir. Certiorari denied.

No. 82–470. CITY OF LOS ANGELES *v.* SOCIETA PER AZIONI DE NAVIGAZIONE ITALIA. Sup. Ct. Cal. Certiorari denied. Reported below: 31 Cal. 3d 446, 645 P. 2d 102.

No. 82–471. JORDAN ET AL. *v.* MANEIKIS. C. A. 7th Cir. Certiorari denied. Reported below: 678 F. 2d 720.

No. 82–474. SAFEWAY STORES, INC. *v.* DOGHERRA. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 1293.

No. 82–478. RECORA CO., INC. *v.* TAPESWITCH CORPORATION OF AMERICA. C. A. 7th Cir. Certiorari denied. Reported below: 681 F. 2d 821.

No. 82–510. FINCH ET AL. *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 644 P. 2d 1378.

No. 82–515. MURPHY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 826.

No. 82–539. FIBERGLASS SPECIALTY CO., INC. *v.* BOR-SON CONSTRUCTION, INC. C. A. 8th Cir. Certiorari denied. Reported below: 678 F. 2d 78.

No. 82–558. LUCERNE PRODUCTS, INC. *v.* SKIL CORP. C. A. 6th Cir. Certiorari denied. Reported below: 684 F. 2d 346.

No. 82–590. KURTZ *v.* UNITED STATES ON BEHALF OF SMALL BUSINESS ADMINISTRATION. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 827.

No. 82–591. ZERO ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 689 F. 2d 238.

No. 82–602. LAWSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 682 F. 2d 480.

No. 82–606. SAAD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 300.

No. 82–613. PERL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 82–615. JERSEY SANITATION CO., INC., ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 826.

No. 82–627. THOMSEN ET AL. *v.* WESTERN ELECTRIC CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 680 F. 2d 1263.

No. 82–5041. WASILOWSKI *v.* DIETZ, CHAIRMAN, NEW JERSEY STATE PAROLE BOARD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 811.

No. 82–5169. JOHNSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 82–5216. SWAIN ET AL. *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 676 F. 2d 543.

No. 82–5223. BROWN *v.* WARDEN, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 682 F. 2d 348.

No. 82–5224. BUSH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 680 F. 2d 468.

No. 82–5229. SULLIVAN ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 680 F. 2d 1131.

No. 82–5382. HUNSBERGER *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 211 Neb. 667, 319 N. W. 2d 757.

No. 82–5388. WIREMAN *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 432 N. E. 2d 1343.

No. 82–5398. TIPPETT *v.* WYRICK, WARDEN, MISSOURI STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied. Reported below: 680 F. 2d 52.

No. 82–5401. HARRELL *v.* INGRAM, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 881.

No. 82–5403. SIMPSON *v.* WYRICK, WARDEN, MISSOURI STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied. Reported below: 685 F. 2d 438.

No. 82–5405. MCPEEK ET AL. *v.* YOUNG, UNITED STATES DISTRICT JUDGE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 681 F. 2d 815.

No. 82–5407. JOSHUA *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 674 F. 2d 376.

No. 82–5410. MCCLANAHAN *v.* COMMUNITY ACTION COMMITTEE OF THE LEHIGH VALLEY, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 822.

No. 82–5413. HEIRENS *v.* HOUSEWRIGHT, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 841.

No. 82–5416. SMITH *v.* AVANCE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 683 F. 2d 415.

No. 82–5421. DOUGLAS *v.* SMITH. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 452.

No. 82–5422. HOUSTON *v.* HOUSEWRIGHT, COMMISSIONER, ARKANSAS DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 678 F. 2d 757.

No. 82–5425. KOMOROWSKI *v.* COLUMBIA GAS OF OHIO, INC. Sup. Ct. Ohio. Certiorari denied.

No. 82–5430. NAYLOR *v.* DIXON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 688 F. 2d 833.

No. 82–5435. MONTGOMERY *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 82–5436. VIPPERMAN *v.* NEVADA DEPARTMENT OF PAROLE. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 450.

No. 82–5437. PELCZARSKI *v.* GRANT ET AL. C. A. 1st Cir. Certiorari denied.

No. 82–5447. STOVALL *v.* PATTERSON ET AL. C. A. 7th Cir. Certiorari denied.

No. 82–5449. MILLER *v.* CUYLER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 823.

No. 82–5486. BUIE *v.* MARBLE. C. A. 4th Cir. Certiorari denied. Reported below: 688 F. 2d 830.

No. 82–5499. BERTMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 670 F. 2d 889.

No. 82–5502. MATTHEWS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 825.

No. 82–5508. BROADWAY *v.* BOGAN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 82–5510. HAWKINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 681 F. 2d 1343.

No. 82–5532. MCNEIL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 849.

No. 82–5535. VICCARONE *v.* UNITED STATES BOARD OF PAROLE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 460.

No. 82–5536. CONYERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 688 F. 2d 835.

No. 82–5537. AUSTIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 287.

No. 82–5545. LONG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 848.

No. 81–2103. PENNCO, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 684 F. 2d 340.

JUSTICE WHITE, with whom JUSTICE BLACKMUN and JUSTICE REHNQUIST join, dissenting.

Section 8(a)(5) of the National Labor Relations Act, 61 Stat. 140, 29 U. S. C. § 158(a)(5), makes an employer's refusal to collectively bargain with the representative of its employees an unfair labor practice. A union certified as the exclusive representative of an employer's workers enjoys an irrebuttable presumption that it has the loyalty of the majority of an employer's workers, and is thus the legal representative of the employer's workers, for one year after certification. *Brooks* v. *NLRB*, 348 U. S. 96, 98–104 (1954). Upon the expiration of that period, the presumption becomes a rebuttable one, and an employer may then withdraw recogni-

tion of the union and refuse to bargain with the union if it has a doubt, "reasonably grounded" and "based on objective considerations," that the union no longer has the support of a majority of the employer's workers. See, *e. g.*, *Soule Glass & Glazing Co.* v. *NLRB*, 652 F. 2d 1055, 1110 (CA1 1981); *NLRB* v. *Windham Community Memorial Hospital*, 577 F. 2d 805, 811 (CA2 1978).

In this case, as in several others, the employer attempted to withdraw recognition from a union because the composition of the employer's work force had significantly changed as a result of the employer's hiring of permanent replacements for striking workers. In such cases, the National Labor Relations Board has consistently relied on a presumption that striker replacements support the union in the same ratio as those whom they have replaced. *E. g.*, *Windham Community Memorial Hospital*, 230 N. L. R. B. 1070 (1977).

Several Circuits appear to presume that striker replacements do not support the certified union, and refuse to enforce NLRB decisions grounded on the Board's contrary presumption. While these Circuits have to some extent pointed to specific facts of the cases before them in relying on a presumption antithetical to that of the Board, all three, the First, *Soule Glass & Glazing Co.* v. *NLRB*, *supra*, at 1110, the Fifth, *NLRB* v. *Randle-Eastern Ambulance Service, Inc.*, 584 F. 2d 720, 728 (1978), and the Eighth, *National Car Rental System, Inc.* v. *NLRB*, 594 F. 2d 1203, 1206 (1979), seem to rely heavily on the statement, made by one commentator, R. Gorman, Labor Law (1976), that "if a new hire agrees to serve as a replacement for a striker . . . , it is generally assumed that he does not support the union and that he ought not to be counted toward a union majority." *Id.*, at 112 (citing only *Titan Metal Manufacturing Co.*, 135 N. L. R. B. 196 (1962), a case that has neither been cited by the NLRB for the proposition Gorman states nor been expressly overruled).

The Second Circuit has also had occasion to review a decision in which the NLRB has relied on its presumption. *NLRB* v. *Windham Community Memorial Hospital*, *supra* (NLRB suit to enforce its order in *Windham Community Memorial Hospital*, *supra*). It avoided the question of the validity of the NLRB's presumption that replacement workers supported the certified union in the same ratio as did the strikers. It did, however, clearly reject the presumption that "no replacement employee supports the Union," describing it as "equally, if not more, assailable than the NLRB's [presumption]." 577 F. 2d, at 813. The Second Circuit ultimately decided that the employer's withdrawal of recognition was unjustified, not because the NLRB's presumption was valid, but because the employer did not present any evidence supporting a basis for its belief that the certified union no longer enjoyed the support of a majority of its workers.

The Sixth Circuit, in the decision below, rejected both the presumption that striker replacements do not support the union and the presumption that the striker replacements support the union in the same ratio that the strikers support the union. The Sixth Circuit held the employer's withdrawal of recognition unlawful because the employer simply did not establish any basis, aside from an invalid presumption, for believing that the certified union was not the choice of the majority.

The questions of whether presumptions can properly be used to determine whether a union has the support of striker replacements, and whether replacements should be presumed to oppose the certified union or favor the certified union, have produced conflict among the Courts of Appeals and between the Courts of Appeals and the agency charged with enforcing the National Labor Relations Act. The questions are of obvious significance to national labor policy. The need for a uniform approach to these questions is equally obvious. I would grant certiorari to resolve this controversy.

No. 81–2313. AVENUE BOOK STORE *v.* CITY OF TALLMADGE, OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

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

In a common-law public nuisance action instituted by the city of Tallmadge, Ohio, petitioner Avenue Book Store was found to have been selling obscene material. The trial court concluded that the operation of the bookstore constituted a public nuisance as "a danger to the public morals and to the community welfare." The rear portion of petitioner's bookstore, where the obscene material had been displayed and sold, was ordered permanently closed.

On appeal, the Ohio Court of Appeals upheld the injunction with some modifications. The injunction currently in effect provides:

> "In abatement of the nuisance, defendant is enjoined from utilizing the rear section of the store for the exhibition, display or sale of materials which display or depict sexual conduct (activity) that is obscene as defined by R. C. 1907.01 and interpreted by the Ohio Supreme Court in State v. Burgun (1978), 56 Ohio St. 2d 354." *City of Tallmadge, Ohio* v. *Avenue Book Store*, No. 10038 (Ohio App., Summit County, Oct. 28, 1981) (unreported); App. to Pet. for Cert. 47.

The Court of Appeals held that the injunction, as modified, did not constitute a prior restraint of protected communicative material in violation of the First and Fourteenth Amendments because "no punishment will be imposed until it is proven that obscene material was indeed involved." *Id.*, at 48. Assuming the injunction was a prior restraint, the court held it was not an unconstitutional one because it did not "carry with it any of the dangers of a censorship system" against which the First Amendment protects. *Id.*, at 49. Petitioner challenges both aspects of this holding.

In *Vance* v. *Universal Amusement Co.*, 445 U. S. 308 (1980), this Court upheld a finding that a Texas public nuisance statute authorized an unconstitutional "prior restraint of indefinite duration on the exhibition of motion pictures without a final judicial determination of obscenity and without any guarantee of prompt review of a preliminary finding of probable obscenity." *Id.*, at 309. Fatal to that statute were particular procedural infirmities of the Texas nuisance scheme whereby the subject of an abatement order or injunction "would be subject to contempt proceedings even if the film [was] ultimately found to be nonobscene." *Id.*, at 316.

The Court has never determined, however, whether abatement orders, such as the one involved in the present case, will pass constitutional muster when they permanently enjoin the use of a business premises for the sale or display of obscene material, but do not subject the owner to contempt sanctions unless there has been a judicial determination of obscenity. Various state courts have held that the exhibition, display, or sale of obscene material may not be enjoined unless there has been a prior judicial determination on the obscenity of the particular materials sought to be enjoined regardless of the procedural safeguards employed. See, *e. g.*, *People ex rel. Busch* v. *Projection Room Theatre*, 17 Cal. 3d 42, 59, 550 P. 2d 600, 610 (exhibition or sale of magazines or films not specifically determined to be obscene may not be enjoined), cert. denied, 429 U. S. 922 (1976); *State ex rel. Cahalan* v. *Diversified Theatrical Corp.*, 59 Mich. App. 223, 242, 229 N. W. 2d 389, 398 (1975) (upholding one-year closure but rejecting permanent injunction on use of building for exhibition of lewd films—only films already adjudged obscene may be enjoined).

Other state courts have upheld such injunctions against a constitutional challenge. The present case is such a decision. See also *State ex rel. Andrews* v. *Chateau X, Inc.*, 296 N. C. 251, 250 S. E. 2d 603 (1979), vacated and remanded, 445 U. S. 947 (1980), reaffirmed, 302 N. C. 321, 330, 275 S. E. 2d

443, 449 (1981) (upholding injunction against sale or exhibition of obscene material because there is no possibility of punishment for sale or exhibition of nonobscene material); *State ex rel. Kidwell* v. *U. S. Marketing, Inc.*, 102 Idaho 451, 458, 631 P. 2d 622, 629 (1981) (one-year closure of business premises is not an unconstitutional prior restraint), appeal dism'd by stipulation of parties, 455 U. S. 1009 (1982).

The extent to which States may use nuisance statutes and common-law nuisance actions to control obscenity and the nature of the procedural safeguards necessary to avoid constitutional problems are important unsettled questions which this Court should address. Accordingly, I dissent from the denial of certiorari.

No. 82–24. FEDERAL TRADE COMMISSION *v.* FRANCIS FORD, INC. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 673 F. 2d 1008.

No. 82–130. LAWRENCE ET AL. *v.* BAUER PUBLISHING & PRINTING LTD. ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 89 N. J. 451, 446 A. 2d 469.

JUSTICE REHNQUIST, dissenting.

Because of the New Jersey Supreme Court's decision in this case, "[t]wo highly motivated senior citizens are left without redress for libelous publications holding them up to contempt and ridicule in the community in which they have lived for many years. This is the result of their sincere attempt to participate in local government." 89 N. J. 451, 446 A. 2d 469 (1982) (Schreiber, J., dissenting). Because I think that the decision of the Supreme Court of New Jersey was based on an erroneous belief that the First and Fourteenth Amendments to the United States Constitution required it, notwithstanding society's "pervasive and strong interest in preventing and redressing attacks upon reputation," *Rosenblatt* v. *Baer*, 383 U. S. 75, 86 (1966), I dissent from the denial of certiorari.

Petitioners, Lawrence and Simpson, were officers of a citizens group called Rahway Taxpayers Association. In 1974, the Association began a petition drive seeking a public referendum on plans to construct a new municipal firehouse. In late December 1974, petitions containing over 5,000 signatures were submitted to the Rahway City Clerk. On January 9, 1975, the Rahway News-Record, a newspaper owned and operated by respondents, printed the following headline across the top of its front page: "City Attorney rules association petitions improper; forgery charges may loom for Lawrence, Simpson." The accompanying article stated in pertinent part:

> "In separate actions city attorney Alan Karcher ruled the petitions filed by the officials of the Rahway Taxpayers Association are improper and attorney Theodore J. Romankow was asked to take action by city officials against association leaders because of 'irregularities' in the petitions.
>
> "The Rahway News-Record learned Mr. Romankow was empowered to handle a case against Alonzo W. Lawrence, president of the Association, and James Simpson, the group's secretary-treasurer.
>
> "The case would be based on charges that forgery was involved in the gathering of approximately 5,000 signatures which the two men filed with the city clerk Robert W. Schrof on December 27, the News-Record was told.
>
> "In connection with this the men would also be charged with false swearing of oaths and affidavits, it was asserted." 89 N. J., at 456, 446 A. 2d, at 471.

In response to petitioners' request that the News-Record retract these allegations, the newspaper ran a second front-page story on April 17, 1975. The headline read: "News-Record asked to retract article on firehouse battle." Rather than give a retraction, the newspaper proceeded to reiterate and defend its earlier story claiming that the story was based

on information provided by "a source in the [city] administration." *Id.*, at 456, 446 A. 2d, at 471.

Petitioners brought this libel action, alleging they had been defamed by both of the stories. The trial court ruled that Simpson was not a public figure and allowed his case to go to the jury without instructions on *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), "actual malice." The jury returned a verdict for Simpson in the amount of $22,500. The trial court ruled that Lawrence was a public figure, and in the first instance ruled that there was insufficient evidence for Lawrence to get to the jury on the *New York Times* "actual malice" issue. Subsequently, the trial court reversed itself on the latter finding and granted Lawrence's motion for a new trial. The New Jersey Supreme Court reversed, holding that both Simpson and Lawrence were "public figures" as defined by *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), and its progeny, and that "the evidence in the record is 'constitutionally insufficient' to present a jury question of actual malice." 89 N. J., at 468, 446 A. 2d, at 478.

In reaching its conclusion that no jury question was presented, the New Jersey court set out the "actual malice" standard as defined by this Court in *New York Times Co.* v. *Sullivan*, *supra*, and succeeding cases. The court prefaced its discussion of the facts by saying: "In light of this stringent standard we have carefully examined the record below to determine whether the evidence at trial was sufficient to present a jury question as to actual malice. That examination reveals that there was insufficient evidence of actual malice toward either plaintiff." 89 N. J., at 467, 469 A. 2d, at 477.

The court then proceeded to review the facts of the case *de novo*. The testimony indicated that the newspaper's sole source for the first story was Joseph Hartnett, a recent appointee as City Business Administrator. Hartnett had no official duties in connection with the filing of the petitions. Hartnett testified that he had informed an editor and re-

porter for the News-Record that there was an investigation concerning some signatures on the petitions, but he maintained repeatedly that he had never linked petitioners with the investigation. Hartnett further stated that the forgery claims concerned such instances as a husband signing a petition for his wife or vice versa and that the false swearing claims concerned the formalities of the affidavits submitted by the persons circulating the petitions. The News-Record editor and reporter testified that the information given by Hartnett was identical to that printed in its news stories, *i. e.*, that petitioners were under investigation for forgery and false swearing.

On the basis of its *de novo* review of these facts, the New Jersey court said:

> "Here, defendants honestly believed that the concededly misleading statements published in the two articles were true. Their misconceptions arose primarily from their conversation with Hartnett in which he told them that the petitions were under investigation for possible evidence of false swearing and forgery. . . . Neither 'errors of interpretation of judgment' nor 'misconceptions' are sufficient to create a jury issue of actual malice under the *New York Times* standard. See *Time, Inc.* v. *Pape*, 401 U. S. 279, 290 [1971] . . . . There is not 'clear and convincing' evidence that defendants *knew* that the defamatory publications were false, or that they *actually* doubted their accuracy. [Citation omitted.] Rather, . . . defendants published a careless and perhaps irresponsible account of the information received concerning the scope of the City Attorney's investigation. But the evidence in the record is 'constitutionally insufficient' to present a jury question of actual malice. See *New York Times* [*Co.* v. *Sullivan*, 376 U. S., at 288]." *Id.*, at 467–468, 446 A. 2d, at 477–478.

My cursory examination of New Jersey precedents suggests to me that New Jersey follows the rule adhered to in almost

all of the States with respect to the ruling of a trial court on a motion for directed verdict. "[T]he trial court cannot weigh the evidence but *must accept as true* all evidence which supports the view of the party against whom the motion is made and must give him the benefit of all legitimate inferences which are to be drawn therefrom in his favor." *Wilson* v. *Savino*, 10 N. J. 11, 18, 89 A. 2d 399, 402–403 (1952). In reviewing a jury verdict on appeal, the New Jersey courts have held that "it is equally well settled that the court may not set aside a verdict merely because in its opinion the jury upon the evidence might well have found otherwise. The appellate tribunal cannot invade the constitutional office of the jury; it may not merely weigh the evidence where it is fairly susceptible of divergent inferences and substitute its own judgment for that of the jury." *Brendel* v. *Public Service Electric and Gas Co.*, 28 N. J. Super. 500, 511, 101 A. 2d 56, 61–62 (1953). It seems to me inescapable that the New Jersey Supreme Court in this case felt bound by some invisible radiations from *New York Times Co.* v. *Sullivan* to reweigh for itself the credibility of interested witnesses who might have been wholly disbelieved by a jury. The above quotation from the New Jersey court's opinion indicates that it felt required to credit the testimony of the defendant's witnesses, all of whom were interested in the outcome of the lawsuit.

That there are no such "invisible radiations" from *New York Times Co.* v. *Sullivan* is established by our decision in *Hutchinson* v. *Proxmire*, 443 U. S. 111 (1979). There we said that "[t]he proof of 'actual malice' calls a defendant's state of mind into question . . . and does not readily lend itself to summary disposition." *Id.*, at 120, n. 9. This view was stated another way in *St. Amant* v. *Thompson*, 390 U. S. 727 (1968):

> "The defendant in a defamation action . . . cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine

whether the publication was indeed made in good faith." *Id.*, at 732.

Although post-*New York Times Co.* v. *Sullivan* decisions from this Court therefore confirm the principle that the jury is to be the judge of the credibility of the witnesses in libel cases as in other lawsuits, it seems clear that the Supreme Court of New Jersey did not follow this principle. There were sharp conflicts in the testimony respecting crucial events in the lawsuit. Hartnett, the City Business Administrator, testified he did not tell the News-Record that petitioners were under investigation. If he is to be believed, then the News-Record, which asserted that Hartnett was their only source, had no basis for stating that petitioners were targets of such an investigation and implying that petitioners were guilty of forgery and false swearing. That the newspaper's editor testified that he "believed" that the stories were true may give the jury additional basis for finding for the defendant, but his testimony does not require any such result as a matter of federal law. The jury as a matter of federal law is at liberty to totally disbelieve him, or to find that his belief was not reasonably justified. *St. Amant* v. *Thompson*, *supra*.

Repeated citations in the opinion of the Supreme Court of New Jersey to this Court's decisions following *New York Times Co.* v. *Sullivan* satisfy me that the court is under the impression that as a matter of federal constitutional law it is required to reweigh testimony and reassess the credibility of witnesses in a trial for libel or slander. At the very least, we have jurisdiction on the basis set forth in *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 568 (1977), and I would exercise that jurisdiction by granting the petition for certiorari.

No. 82–280. SYLVAIN *v.* HENDERSON, EXECUTRIX. Sup. Ct. N. H. Motion of petitioner for leave to add party as respondent denied. Certiorari denied.

No. 82–145. SMITH *v.* GONZALES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 670 F. 2d 522.

JUSTICE WHITE, dissenting.

The respondent police officer Lane went to the local District Attorney's office with petitioner Smith's minor daughter, who averred that she had had sexual relations with her father. After hearing her story, an Assistant District Attorney swore out an affidavit and procured an arrest warrant from a judge. Lane, acting pursuant to the warrant, then arrested Smith on incest charges. After being tried and acquitted of these charges, Smith filed a 42 U. S. C. § 1983 damages action for deprivation of his constitutional rights, alleging, *inter alia*, that Lane's involvement in his arrest was malicious, harassing, and in bad faith.[1] After a trial, a jury returned a verdict in favor of Lane.

On appeal, the Court of Appeals held that the claim relating to the incest charges never should have gone to trial, but rather should have been dismissed. Assuming, *arguendo*, that Lane had, as alleged, acted maliciously by withholding evidence of Smith's innocence from the Assistant District Attorney who obtained the arrest warrant,[2] the court found that the officer was nevertheless insulated from § 1983 liability, because "if the facts supporting an arrest are put before an intermediary such as a magistrate or grand jury, the intermediary's decision to issue a warrant or return an indictment breaks the causal chain . . . ." 670 F. 2d 522, 526 (CA5 1982).

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[1] Smith's complaint also alleged that unconstitutional conduct of Lane caused him to be damaged in a number of other ways that I need not detail here.

[2] In his brief in opposition to certiorari, Lane argues at length that there was no evidence that he withheld any evidence or acted improperly in any manner. I do not reach this question. Had the Fifth Circuit rested its holding on this basis, this would be a different case. But the court did not do so; it was willing to at least assume that there was sufficient evidence that Lane's actions were wrongful.

The Fifth Circuit thus held that an officer cannot be liable even if, by wrongful means, he taints the independent judgment of the grand jury, magistrate, prosecutor, or other intermediary. This holding appears to conflict with statements of the courts in *Smiddy* v. *Varney*, 665 F. 2d 261 (CA9 1981), cert. denied, *ante*, p. 829; *Ames* v. *United States*, 600 F. 2d 183 (CA8 1979); and *Dellums* v. *Powell*, 184 U. S. App. D. C. 275, 566 F. 2d 167 (1977), cert. denied, 438 U. S. 916 (1978). The Ninth Circuit determined in *Smiddy* that an intermediary's independent decision breaks the causal chain and insulates the arresting officer from future liability if, but only if, the officer does not color the intermediary's independent judgment by, for example, exerting pressure or presenting false evidence. 665 F. 2d, at 266–267. The District of Columbia Circuit indicated in *Dellums* that pressure, undue influence, or knowing misstatements by the police could rebut the presumption of independent judgment by United States Attorneys and extend the "chain of causation." 184 U. S. App. D. C., at 300–301, 566 F. 2d, at 192–193. Likewise, the Eighth Circuit in *Ames* stated that "the presentation of false evidence or the withholding of evidence" might preclude an immunization of officers from tort liability. 600 F. 2d, at 185. See also Restatement (Second) of Torts § 653 (1977); W. Prosser, Law of Torts 836–837 (4th ed. 1971).

The differing approaches to the causation problem are typified by three contrasting opinions in *Rodriguez* v. *Ritchey*, 556 F. 2d 1185 (CA5 1977) (en banc), cert. denied, 434 U. S. 1047 (1978), which the court below in the present case purported to follow. The six plurality judges in *Rodriguez* reasoned that the defendant officers could not be liable for a wrongful arrest because an indictment by a properly constituted grand jury "conclusively" determined the existence of probable cause. 556 F. 2d, at 1191 (opinion of Tjoflat, J.). Two specially concurring judges indicated that the plurality's rule might not be applicable should an officer "maliciously or in bad faith seek to obtain an indictment from a grand jury."

Id., at 1195 (opinion of Hill, J.). Six dissenting judges felt that even an officer acting in subjective good faith in procuring an indictment could still be liable if his conduct was not within the "'bounds of reason.'" *Id.*, at 1207 (opinion of Goldberg, J.) (quoting *Wood* v. *Strickland*, 420 U. S. 308, 321 (1975)).

Section 1983 actions for wrongful arrest and prosecution are frequently brought against police officers. The causation issue will be important, if not dispositive, in many of these cases. I would grant certiorari to resolve this significant, recurring question that has divided the lower courts.

No. 82–277. SCHWIMMER, DBA SUPERSONIC ELECTRONICS CO. *v.* SONY CORPORATION OF AMERICA; and

No. 82–362. VENTURE TECHNOLOGY, INC. *v.* NATIONAL FUEL GAS DISTRIBUTION CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: No. 82–277, 677 F. 2d 946; No. 82–362, 685 F. 2d 41.

JUSTICE WHITE, dissenting.

The Court's refusal to review these cases is doubly inexplicable: they pose two substantial issues on which the lower courts are divided.

In both cases, juries found that respondents had conspired to impose a restraint of trade in violation of § 1 of the Sherman Act, 15 U. S. C. § 1. In *Schwimmer* v. *Sony Corp. of America*, 677 F. 2d 946 (CA2 1982), it was alleged that Sony, in conspiracy with certain retailers, terminated Schwimmer's dealership because it had sold Sony products to other dealers at lower than normal prices. In *Venture Technology, Inc.* v. *National Fuel Gas Distribution Corp.*, 685 F. 2d 41 (CA2 1982), the complaint was that respondent National Fuel Gas had conspired to prevent Venture Technology from entering the western New York gas production business. There was no direct evidence of conspiracy in either case; rather, the petitioners' cases were based on the respondents refusal to

deal with petitioners after receiving complaints from other companies.

On appeal, different panels of the Second Circuit reversed, holding that the evidence was insufficient as a matter of law to permit a jury to find that respondents had conspired. Relying on an earlier Second Circuit decision, *H. L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F. 2d 935, 941 (1981), cert. denied, *ante*, p. 880, both panels stated that "[e]ven where a termination follows the receipt of complaints from wholesalers or agents, there is no basis for inferring the existence of concerted action, absent some other evidence of a tacit understanding or agreement with them." *Schwimmer*, *supra*, at 953; *Venture Technology*, *supra*, at 45. This view of the evidence necessary to create a jury question under the Sherman Act is shared by the Third Circuit. *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F. 2d 105 (1980), cert. denied, 451 U. S. 911 (1981). The Seventh and the Eight Circuits, however, clearly reject this position. *Spray-Rite Service Corp.* v. *Monsanto Co.*, 684 F. 2d 1226, 1238–1239 (CA7 1982); *Battle* v. *Lubrizol Corp.*, 673 F. 2d 984 (CA8 1982).[1] Because illegal conspiracies can rarely be proved through evidence of explicit agreement, but must usually be established through inferences from the conduct of the alleged conspirators, this disagreement in the Circuits over the nature of proof required is especially significant.

This first conflict is parlayed by a second concerning the portion of the evidence a court is to consider in ruling upon a

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[1] The opinion for the Seventh Circuit in *Spray-Rite Service Corp.* v. *Monsanto Co.*, 684 F. 2d, at 1238–1239, makes the conflict unmistakable:

"We believe . . . that proof of termination following competitor complaints is sufficient to support an inference of concerted action. In *Battle* v. *Lubrizol Corp.*, 673 F. 2d 984 (8th Cir. 1982), the Eighth Circuit declined to follow *Sweeney* and held that 'proof of a dealer's complaints to the manufacturer about a competitor dealer's price cutting and the manufacturer's action *in response* to such complaints would be sufficient to raise an inference of concerted action.' *Id.*, at 991 (emphasis in original). We agree" (footnote omitted).

motion for judgment notwithstanding the verdict. These cases indicate that it is the Second Circuit's practice to examine all of the evidence in a manner most favorable to the nonmoving party.[2] This is also the position of at least the Fifth and Seventh Circuits. *Boeing Co.* v. *Shipman*, 411 F. 2d 365, 374–375 (CA5 1969); *Panter* v. *Marshall Field & Co.*, 646 F. 2d 271, 281–282 (CA7 1981). In the Eighth Circuit, however, it appears that only evidence which supports the verdict winner is to be considered. *Simpson* v. *Skelly Oil Co.*, 371 F. 2d 563 (1967). The First and Third Circuits follow a middle ground: the reviewing court may consider uncontradicted, unimpeached evidence from disinterested witnesses. *Layne* v. *Vinzant*, 657 F. 2d 468, 472 (CA1 1981); *Inventive Music Ltd.* v. *Cohen*, 617 F. 2d 29, 33 (CA3 1980). Thus, the Federal Courts of Appeals follow three different approaches to determining whether evidence is sufficient to create a jury issue. See 9 C. Wright & A. Miller, Federal Practice and Procedure § 2529, p. 572 (1971). Because the scope of review will often be influential, if not dispositive, of a motion for judgment n.o.v., this disagreement among the Federal Courts of Appeals is of far more than academic interest.

For both these reasons, I would grant the petitions for certiorari.

No. 82–365. LOVE, WARDEN, ET AL. *v.* STACY. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 679 F. 2d 1209.

No. 82–396. TWIN CITY SPORTSERVICE, INC., ET AL. *v.* CHARLES O. FINLEY & CO., INC., ET AL. C. A. 9th Cir.

[2] In *Schwimmer*, the court noted: "'If, however, *after viewing all the evidence* most favorably to plaintiff, we cannot say that the jury could reasonably have returned the verdict in his favor, our duty is to reverse the judgment below.'" 677 F. 2d, at 952, quoting *H. L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F. 2d 935, 941 (CA2 1981) (emphasis added), cert. denied, *ante*, p. 880.

Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 676 F. 2d 1291.

No. 82–444. GREITZER & LOCKS ET AL. *v.* JOHNS-MANVILLE CORP. ET AL. C. A. 4th Cir. Motion of respondents to defer consideration of the petition for writ of certiorari denied. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this motion and this petition. Reported below: 681 F. 2d 813.

No. 82–453. FRANCIS OIL & GAS, INC., ET AL. *v.* EXXON CORP. ET AL. Temp. Emerg. Ct. App. Motions of Independent Petroleum Association of America et al. and Texas Independent Producers Legal Action Association et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 687 F. 2d 484.

No. 82–5053. MCCALLUM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 677 F. 2d 1024.

No. 82–5315. JOHN BB ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 56 N. Y. 2d 482, 438 N. E. 2d 864.

Rehearing Denied

No. 81–2392. PHILLIPS PETROLEUM CO. *v.* SAUCEDO, *ante*, p. 839;

No. 81–6766. SUDRANSKI *v.* VETERANS ADMINISTRATION, *ante*, p. 845;

No. 81–6836. WADE *v.* UNITED STATES, *ante*, p. 848;

No. 81–6854. DAVIS *v.* GEORGIA, *ante*, p. 891; and

No. 81–6931. BOLES *v.* GUILFORD TECHNICAL INSTITUTE, *ante*, p. 852. Petitions for rehearing denied.

No. 81–6979. SHAPIRO *v.* UNITED STATES VETERANS ADMINISTRATION, *ante*, p. 855;

No. 82–318. STROOM *v.* CARTER, *ante*, p. 866;

No. 82–5006. BORRELLI *v.* CUYLER ET AL., *ante*, p. 866;

No. 82–5076. BORRELLI *v.* CICCITTO ET AL., *ante*, p. 870;

No. 82–5166. IN RE HOOVER, *ante*, p. 818; and

No. 82–5326. IN RE BARNEY, *ante*, p. 818. Petitions for rehearing denied.

NOVEMBER 15, 1982

Appeals Dismissed

No. 82–149. BLACK CONSTRUCTION CORP. *v.* AGSALUD, DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS OF HAWAII, ET AL. Appeal from Sup. Ct. Haw. dismissed for want of substantial federal question. Reported below: 64 Haw. 274, 639 P. 2d 1088.

No. 82–482. HAMILTON ET AL. *v.* VIRGINIA. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question.

No. 82–5433. CAVANAUGH, DBA TOT COLLEGE *v.* COLORADO DEPARTMENT OF SOCIAL SERVICES. Appeal from Sup. Ct. Colo. dismissed for want of substantial federal question. Reported below: 644 P. 2d 1.

No. 82–519. COUNIHAN, TEMPORARY ADMINISTRATOR, ET AL. *v.* DEPARTMENT OF TRANSPORTATION OF GEORGIA ET AL. Appeal from Ct. App. Ga. dismissed for want of jurisdiction. JUSTICE BLACKMUN and JUSTICE O'CONNOR would dismiss the appeal for want of a properly presented federal question. Reported below: 162 Ga. App. 374, 290 S. E. 2d 514.

No. 82–592. FOULDS *v.* PENNSYLVANIA. Appeal from Super. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 297 Pa. Super. 523, 441 A. 2d 452.

Certiorari Dismissed

No. 81–1055. POYTHRESS, SECRETARY OF STATE OF GEORGIA, ET AL. *v.* DUNCAN ET AL. C. A. 11th Cir. [Certiorari granted, 455 U. S. 937.] Writ of certiorari dismissed as improvidently granted.

Miscellaneous Orders

No. A–392. ALBANO ET AL. *v.* UNITED STATES. C. A. 11th Cir. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–402 (82–711). RAILWAY LABOR EXECUTIVES' ASSN. *v.* SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY. Sp. Ct. R. R. R. A. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. 8, Orig. ARIZONA *v.* CALIFORNIA ET AL. Motion of Quechan Tribe for modification of the order granting divided argument denied. JUSTICE MARSHALL took no part in the consideration or decision of this motion. [For earlier order herein, see, *e. g.*, *ante*, p. 940.]

No. 81–89. ZANT, WARDEN *v.* STEPHENS. C. A. 5th Cir. [Certiorari granted, 454 U. S. 814; question certified, 456 U. S. 410.] The parties are invited to file within 30 days supplemental memoranda addressing the opinion of the Supreme Court of Georgia, Case No. 38763, decided October 27, 1982 [250 Ga. 97, 297 S. E. 2d 1], and its effect on the case pending before this Court.

No. 81–1114. ILLINOIS *v.* ABBOTT & ASSOCIATES, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 455 U. S. 1015.] Motion of respondents for divided argument denied.

No. 81–1284. EICKE *v.* EICKE. Ct. App. La., 3d Cir. [Certiorari granted, 456 U. S. 970.] Motion of Martin S. Sanders, Jr., Esquire, to permit Martin S. Sanders III, Esquire, to present oral argument *pro hac vice* on behalf of respondent granted.

No. 81–1476. UNITED STATES *v.* RODGERS ET AL.; and UNITED STATES *v.* INGRAM ET AL. C. A. 5th Cir. [Certiorari granted, 456 U. S. 904.] Motion of respondents for divided argument granted.

No. 81–1756. LEHR *v.* ROBERTSON ET AL. Ct. App. N. Y. [Probable jurisdiction postponed, 456 U. S. 970.] Motion of New York for leave to file an out-of-time motion for divided argument denied.

No. 81–2150. JIM MCNEFF, INC. *v.* TODD ET AL. C. A. 9th Cir. [Certiorari granted, 458 U. S. 1120.] Motions of American Federation of Labor and Congress of Industrial Organizations et al. and Carpenters Trust Funds of Southern California et al. for leave to file briefs as *amici curiae* granted.

No. 81–2169. HARING, LIEUTENANT, ARLINGTON COUNTY POLICE DEPARTMENT, ET AL. *v.* PROSISE. C. A. 4th Cir. [Certiorari granted, *ante*, p. 904.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted.

No. 81–2245. NEVADA *v.* UNITED STATES ET AL.;
No. 81–2276. TRUCKEE-CARSON IRRIGATION DISTRICT *v.* UNITED STATES ET AL.; and
No. 82–38. PYRAMID LAKE PAIUTE TRIBE OF INDIANS *v.* TRUCKEE-CARSON IRRIGATION DISTRICT ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 904.] Motion of petitioners for divided argument granted.

No. 82–791. TEACHERS INSURANCE & ANNUITY ASSN. ET AL. *v.* SPIRT ET AL. C. A. 2d Cir. Motion of petitioners to expedite consideration of the petition for writ of certiorari denied.

No. 82–5612. IN RE SEITU; and
No. 82–5616. IN RE JOHNSON. Petitions for writs of habeas corpus denied.

Certiorari Granted

No. 82–276. DIRKS *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari granted. Reported below: 220 U. S. App. D. C. 309, 681 F. 2d 824.

No. 82–331. NEW MEXICO ET AL. *v.* MESCALERO APACHE TRIBE. C. A. 10th Cir. Certiorari granted. Reported below: 677 F. 2d 55.

No. 82–502. PALLAS SHIPPING AGENCY, LTD. *v.* DURIS. C. A. 6th Cir. Certiorari granted. Reported below: 684 F. 2d 352.

No. 82–168. NATIONAL LABOR RELATIONS BOARD *v.* TRANSPORTATION MANAGEMENT CORP. C. A. 1st Cir. Motion of Council on Labor Law Equality for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 674 F. 2d 130.

Certiorari Denied. (See also No. 82–592, *supra.*)

No. 81–2152. WASSERMAN ET AL. *v.* WASSERMAN. C. A. 4th Cir. Certiorari denied. Reported below: 671 F. 2d 832.

No. 81–2324. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 670 F. 2d 185.

No. 81–6820. BORCHERDING *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1224.

No. 81–6844. DESANTIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 670 F. 2d 889.

No. 81–6870. CHAKA *v.* MORRIS ET AL. C. A. 7th Cir. Certiorari denied.

No. 81–6875. FASICK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 810.

No. 81–6883. MORALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 2d 505.

No. 81–6905. ROBINSON *v.* SHEA ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 220 U. S. App. D. C. 85, 679 F. 2d 262.

No. 81–6955. MACDONALD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 670 F. 2d 910.

No. 81–6983. QUICK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 675 F. 2d 1152.

No. 81–6994. COTTON *v.* MABRY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 674 F. 2d 701.

No. 82–47. GAMBREL *v.* KENTUCKY BOARD OF DENTISTRY. Ct. App. Ky. Certiorari denied.

No. 82–101. TRAVELERS INDEMNITY CO. ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 230 Ct. Cl. 867.

No. 82–148. JAMES SNYDER CO., INC., ET AL. *v.* ASSOCIATED GENERAL CONTRACTORS OF AMERICA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 677 F. 2d 1111.

No. 82–157. SMITH *v.* OLSON, REGISTRAR OF VOTERS, ORANGE COUNTY, CALIFORNIA, ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 82–179. SACCHINELLI *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 161 Ga. App. 763, 288 S. E. 2d 894.

No. 82–183. UNITED STATES *v.* DOE. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 688.

No. 82–186. SHAHID *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 415 So. 2d 1368.

No. 82–263. BOULAHANIS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 677 F. 2d 586.

No. 82–289. GREEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 678 F. 2d 81.

No. 82–322. ROMANO *v.* UNITED STATES; and
No. 82–329. ROMANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 684 F. 2d 1057.

No. 82–392. MONEX INTERNATIONAL, LTD., ET AL. *v.* COMMODITY FUTURES TRADING COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 677 F. 2d 522.

No. 82–450. CRAMER *v.* FAHNER, ATTORNEY GENERAL OF ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 683 F. 2d 1376.

No. 82–473. SYMANOWICZ *v.* ARMY AND AIR FORCE EXCHANGE SERVICE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 672 F. 2d 638.

No. 82–476. SAUSALITO PHARMACY, INC. *v.* BLUE SHIELD OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 677 F. 2d 47.

No. 82–477. HERZOG *v.* DAYTON BAR ASSN. ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 70 Ohio St. 2d 261, 436 N. E. 2d 1037.

No. 82–491. UNITED STATES. *v.* RSR CORP. C. A. 5th Cir. Certiorari denied. Reported below: 664 F. 2d 1249.

No. 82–496. COFFEY *v.* DEPARTMENT OF SOCIAL AND HEALTH SERVICES OF WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 82–503. SHAVER *v.* HUNTER ET AL. Ct. App. Tex., 7th Sup. Jud. Dist. Certiorari denied. Reported below: 626 S. W. 2d 574.

No. 82–504. ARMIJO, PERSONAL REPRESENTATIVE OF THE ESTATE OF ARMIJO *v.* TANDYSH. Ct. App. N. M.

Certiorari denied. Reported below: 98 N. M. 181, 646 P. 2d 1245.

No. 82–507. EVRA CORP., FORMERLY HYMAN-MICHAELS CO. *v.* SWISS BANK CORP. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 951.

No. 82–509. BANKSTON *v.* TEXAS. Ct. App. Tex., 5th Sup. Jud. Dist. Certiorari denied.

No. 82–511. DRAGAN ET AL. *v.* MILLER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 679 F. 2d 712.

No. 82–513. REICHEL *v.* SHASTA COUNTY, CALIFORNIA, SUPERIOR COURT JUDGES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 676 F. 2d 712.

No. 82–518. ACKERMAN, SUPERINTENDENT, FORT WAYNE STATE HOSPITAL AND TRAINING CENTER *v.* DELESSTINE. C. A. 7th Cir. Certiorari denied. Reported below: 682 F. 2d 130.

No. 82–529. MURILLO *v.* BAMBRICK, CLERK OF THE SUPERIOR COURT OF NEW JERSEY. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 898.

No. 82–531. MORGAN WALTON PROPERTIES, INC., ET AL. *v.* INTERNATIONAL CITY BANK & TRUST CO. ET AL.; and MORGAN ET UX. *v.* INTERNATIONAL CITY BANK & TRUST CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 675 F. 2d 666 (first case); 675 F. 2d 669 (second case).

No. 82–534. MORRELL *v.* DUKE UNIVERSITY, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 884.

No. 82–548. DUSANEK *v.* O'DONNELL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 677 F. 2d 538.

No. 82–609. SEDCO INTERNATIONAL, S.A., ET AL. *v.* CORY ET AL., EXECUTORS OF THE ESTATE OF CARVER. C. A. 8th Cir. Certiorari denied. Reported below: 683 F. 2d 1201.

No. 82–625. DEAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 447.

No. 82–634. CURTIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 683 F. 2d 769.

No. 82–644. GRAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 898.

No. 82–657. FRANCO-GOMEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 849.

No. 82–671. OGGOIAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 678 F. 2d 671.

No. 82–679. CAVALE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 1098.

No. 82–5024. MORGAN *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 676 F. 2d 476.

No. 82–5087. CERKONEY *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 292 S. E. 2d 575.

No. 82–5094. RICKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 886.

No. 82–5098. KLEINBART *v.* SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied.

No. 82–5116. MCCASKILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 676 F. 2d 995.

No. 82–5136. MCCOY *v.* BORDENKIRCHER. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 883.

No. 82–5157. RANSOM *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 82–5196. ROCHKIND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 18.

No. 82–5200. HARDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 448.

No. 82–5203. JONES *v.* BARTLE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 821.

No. 82–5236. WEST *v.* JONES, SUPERINTENDENT, GREAT MEADOWS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 82–5238. MOSLEY *v.* ROSE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 564.

No. 82–5239. MANCUSO *v.* HARRIS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 677 F. 2d 206.

No. 82–5251. HOLLENBECK *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 672 F. 2d 451.

No. 82–5253. EICHELBERGER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 91 Ill. 2d 359, 438 N. E. 2d 140.

No. 82–5286. WILSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 104 Ill. App. 3d 1208, 437 N. E. 2d 947.

No. 82–5302. PICCIOTTI *v.* COURT OF APPEALS OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 295.

No. 82–5392. MCCROSKEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 681 F. 2d 1152.

No. 82–5431. DAVIS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 416 So. 2d 444.

No. 82–5438. REITER *v.* HARDING ET AL. C. A. 5th Cir. Certiorari denied.

No. 82–5441. LARACUENTE-MATOS *v.* PUERTO RICO DEPARTMENT OF LABOR AND HUMAN RESOURCES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 685 F. 2d 420.

No. 82–5446. HOHMAN *v.* PRINCE WILLIAM COUNTY, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 882.

No. 82–5450. ROSE *v.* ABSHIRE. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 457.

No. 82–5452. EMMONS *v.* WYRICK. C. A. 8th Cir. Certiorari denied.

No. 82–5453. PRINCE *v.* COMMON PLEAS COURT OF ALLEGHENY COUNTY. C. A. 3d Cir. Certiorari denied.

No. 82–5454. MOAWAD *v.* TALLAHATCHIE COUNTY CIRCUIT COURT. Sup. Ct. Miss. Certiorari denied.

No. 82–5457. KORDOWER *v.* BORODINSKY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 82–5458. HARVEY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 82–5461. BARBOZA *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 387 Mass. 105, 438 N. E. 2d 1064.

No. 82–5462. KNEE *v.* WYRICK, WARDEN, MISSOURI STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied.

No. 82–5471. SPEAR *v.* ROBERTS. C. A. 8th Cir. Certiorari denied. Reported below: 679 F. 2d 768.

No. 82–5480. GRUZEN *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 276 Ark. 149, 634 S. W. 2d 92.

No. 82–5487. MILLS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 686 F. 2d 135.

No. 82–5496. ALONZO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 681 F. 2d 997.

No. 82–5506. COOPER *v.* REES, SUPERINTENDENT, KENTUCKY STATE REFORMATORY. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 560.

No. 82–5517. TRUESDALE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 82–5520. ERMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 849.

No. 82–5533. YOUNG *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 682 F. 2d 1105.

No. 82–5555. NEARIS *v.* MASSACHUSETTS. Ct. App. Mass. Certiorari denied.

No. 82–5588. BLACK ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 685 F. 2d 132.

No. 82–5591. SINGLETERRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 683 F. 2d 122.

No. 82–5592. POLAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 849.

No. 82–5601. FILLIPPONIO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 844.

No. 81–2344. A *v.* X ET AL. Sup. Ct. Wyo. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE BLACKMUN would grant certiorari. Reported below: 641 P. 2d 1222.

No. 82–184. L. B. B. CORP. *v.* CHARLES O. FINLEY & CO., INC. C. A. 7th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 676 F. 2d 699.

No. 82–228. BARRETT ET AL. *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. JUSTICE BRENNAN and JUS-

TICE MARSHALL would grant the petition for writ of certiorari and reverse the convictions. Reported below: 278 S. C. 92, 292 S. E. 2d 590.

No. 82–501. EUSTER ET AL. *v.* PENNSYLVANIA HORSE RACING COMMISSION ET AL. C. A. 3d Cir. Motion of Jockeys' Guild, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 677 F. 2d 992.

No. 82–5378. FORD *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 276 Ark. 98, 633 S. W. 2d 3.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would grant certiorari and vacate the death sentence on this basis alone. However, even if I accepted the prevailing view that the death penalty can constitutionally be imposed under certain circumstances, I would grant certiorari and vacate petitioner's death sentence on the ground that prior criminal convictions irrelevant to any statutory aggravating circumstance were improperly introduced at the sentencing proceeding.

Petitioner was charged with the murder of a policeman and tried in the Circuit Court of Mississippi County, Arkansas. He was found guilty of capital murder, and a sentencing hearing was held before the same jury. To support its request for a death sentence, the State introduced three prior criminal convictions that were not relevant to any aggravating circumstance set forth in the Arkansas death penalty statute. See Ark. Stat. Ann. § 41–1303 (1977). The jury sentenced petitioner to death by electrocution. On appeal, the Supreme Court of Arkansas affirmed petitioner's conviction and sentence. 276 Ark. 98, 633 S. W. 2d 3 (1982). Although the court acknowledged that the prior convictions had no bearing on any aggravating circumstance and should not have been

admitted, it concluded that the error was not "prejudicial." *Id.*, at 110, 633 S. W. 2d, at 10.

Under the decisions of this Court, the death sentence imposed in this case must be set aside. The State's use of petitioner's criminal record injected an extraneous factor into the capital sentencing proceeding. In *Furman* v. *Georgia*, 408 U. S. 238 (1972), this Court concluded that discretionary capital sentencing, unchannelled by legislatively defined criteria, violates the Eighth Amendment because it is "pregnant with discrimination," *id.*, at 257 (Douglas, J., concurring), because it allows the death penalty to be "wantonly" and "freakishly" imposed, *id.*, at 310 (Stewart, J., concurring), and because it affords "no meaningful basis for distinguishing the few cases in which [the death sentence] is imposed from the many cases in which it is not," *id.*, at 313 (WHITE, J., concurring). The Court has held that the death penalty can be imposed only under statutory schemes that limit the sentencer's discretion "by requiring examination of specific factors that argue in favor of or against imposition of the death penalty." *Proffitt* v. *Florida*, 428 U. S. 242, 258 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). See also, *e. g.*, *Gregg* v. *Georgia*, 428 U. S. 153, 189–193 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.).

To be effective, restrictions on sentencing discretion must not only appear in a statute, they must also be enforced. Criteria set forth in a statute serve no purpose if prosecutors are free to ignore them. In this case, the Supreme Court of Arkansas, without discussing any of this Court's decisions, affirmed petitioner's death sentence on the ground that it did not find the prosecutor's blatant disregard of the statutory sentencing criteria "to have been prejudicial." 276 Ark., at 110, 633 S. W. 2d, at 10.

I would grant certiorari and reject this cavalier use of the harmless-error doctrine. The prejudice inherent in the proof of past crimes is the very reason such proof is forbidden in the first place. See, *e. g.*, *Michelson* v. *United States*, 335

U. S. 469, 475–476 (1948); *Boyd* v. *United States*, 142 U. S. 450, 458 (1892). There is certainly no basis for concluding beyond a reasonable doubt that the jury would have sentenced petitioner to death had it not been informed of his prior convictions. See *Chapman* v. *California*, 386 U. S. 18, 24 (1967).

I therefore dissent.

Rehearing Denied

No. 81–2040. MOORE *v.* MOORE, *ante*, p. 878;

No. 81–2364. GEE *v.* GEE ET AL., *ante*, p. 838;

No. 81–2410. GEE *v.* GEE, *ante*, p. 840;

No. 81–2411. GEE *v.* DAWSON ET AL., *ante*, p. 840;

No. 81–5634. TISON *v.* ARIZONA (two cases), *ante*, p. 882;

No. 81–6660. NEWLON *v.* MISSOURI, *ante*, p. 884;

No. 81–6796. WILSON *v.* BROWN, WARDEN, ET AL., *ante*, p. 846;

No. 81–6822. LORENTZEN *v.* TRUSTEES OF BOSTON COLLEGE ET AL., *ante*, p. 847;

No. 81–6855. MARTINEZ *v.* HARRIS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL., *ante*, p. 849;

No. 81–6884. MARTIN *v.* SAMPLE ET AL., *ante*, p. 850;

No. 81–6917. HANSON *v.* UNITED STATES, *ante*, p. 805;

No. 82–5033. PHILSON *v.* UNITED STATES, *ante*, p. 911;

No. 82–5184. IN RE VELILLA, *ante*, p. 819;

No. 82–5230. TOSON *v.* ANDALE CO. ET AL., *ante*, p. 913;

No. 82–5235. STONEMAN *v.* AURELIUS, *ante*, p. 913;

No. 82–5255. BULLOCK *v.* NATIONAL RAILROAD ADJUSTMENT BOARD ET AL., *ante*, p. 913;

No. 82–5258. THIBODEAUX *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 876; and

No. 82–5337. MITCHELL *v.* MARYLAND, *ante*, p. 915. Petitions for rehearing denied.

No. 80–812. MESCALERO APACHE TRIBE *v.* O'CHESKEY, COMMISSIONER OF REVENUE OF NEW MEXICO, ET AL., 450 U. S. 959 and 455 U. S. 929. Second motion for leave to file petition for rehearing denied.

NOVEMBER 23, 1982

Dismissal Under Rule 53

No. 81–876. ST. LUKE'S FEDERATION OF NURSES & HEALTH PROFESSIONALS *v.* PRESBYTERIAN/ST. LUKE'S MEDICAL CENTER; BETH ISRAEL FEDERATION OF NURSES & HEALTH PROFESSIONALS *v.* BETH ISRAEL HOSPITAL AND GERIATRIC CENTER; and ST. ANTHONY FEDERATION OF NURSES & HEALTH PROFESSIONALS *v.* ST. ANTHONY HOSPITAL SYSTEMS. C. A. 10th Cir. Stipulation to dismiss the petition for writ of certiorari to review the judgments entered July 8, 1981, July 20, 1981, and August 4, 1981, was filed, and the cases were dismissed pursuant to this Court's Rule 53. Reported below: 653 F. 2d 450 (first case); 677 F. 2d 1343 (second case); 655 F. 2d 1028 (third case).

NOVEMBER 29, 1982

Dismissal Under Rule 53

No. 81–872. TURNER, FORMER DIRECTOR OF CENTRAL INTELLIGENCE *v.* JORDAN. C. A. D. C. Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 212 U. S. App. D. C. 205, 659 F. 2d 251.

Affirmed on Appeal

No. 82–574. STEVENSON ET AL. *v.* SOUTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., ET AL. Affirmed on appeal from D. C. S. C. Reported below: 533 F. Supp. 1178.

Appeals Dismissed

No. 82–567. WILLIAMS ET AL. *v.* CHEETWOOD & DAVIES. Appeal from Ct. App. Ohio, Wood County, dismissed for want of substantial federal question.

No. 82–573. SOUTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., ET AL. *v.* RILEY, GOVERNOR OF SOUTH CAROLINA, ET AL. Appeal from D. C. S. C. dismissed for want of jurisdiction. Reported below: 533 F. Supp. 1178.

No. 82–576. PIERCE ET UX. *v.* BIERER ET AL. Appeal from Sup. Ct. Del. dismissed for want of substantial federal question. Reported below: 447 A. 2d 1189.

JUSTICE WHITE, dissenting.

I would note probable jurisdiction. The reasons for doing so which I stated in dissent from dismissal in *Hill* v. *Garner*, 434 U. S. 989 (1977), are more telling now than they were then.

Certiorari Granted—Reversed and Remanded. (See No. 82–158, *ante*, p. 42.)

Certiorari Granted—Vacated and Remanded. (See also No. 82–5082, *ante*, p. 56.)

No. 82–327. CHICAGO BOARD OPTIONS EXCHANGE, INC. *v.* BOARD OF TRADE OF THE CITY OF CHICAGO; OPTIONS CLEARING CORP. *v.* BOARD OF TRADE OF THE CITY OF CHICAGO; and

No. 82–526. SECURITIES AND EXCHANGE COMMISSION *v.* BOARD OF TRADE OF THE CITY OF CHICAGO ET AL. (two cases). C. A. 7th Cir. Motion of Securities Industry Association for leave to file a brief as *amicus curiae* in No. 82–327 granted. Upon consideration of the suggestions of mootness filed by the petitioners, the petitions for writs of certiorari are granted, the judgments are vacated, and the cases are remanded with directions to dismiss the petitions for review as moot. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). JUSTICE WHITE took no part in the consideration or decision of this motion and these cases. Reported below: Nos. 82–327 (first case) and 82–526 (first case), 677 F. 2d

1137; Nos. 82–327 (second case) and 82–526 (second case), 679 F. 2d 894.

Vacated and Remanded After Certiorari Granted

No. 81–1998. PRICE WATERHOUSE *v.* PANZIRER ET AL. C. A. 2d Cir. [Certiorari granted, 458 U. S. 1105.] In light of the respondents' suggestion of mootness and the petitioner's response, the judgment is vacated and the case is remanded to the Court of Appeals with directions that it instruct the United States District Court for the Southern District of New York to dismiss the complaint with prejudice.

Miscellaneous Orders

No. ——. WAMPANOAG INDIAN NATION ET AL. *v.* MASSACHUSETTS. Motion of plaintiffs for leave to proceed *in forma pauperis* denied.

No. A–419 (82–769). TUCKER *v.* UNITED STATES. C. A. 5th Cir. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. 80–1832. IMMIGRATION AND NATURALIZATION SERVICE *v.* CHADHA ET AL. C. A. 9th Cir. [Probable jurisdiction postponed, 454 U. S. 812];

No. 80–2170. UNITED STATES HOUSE OF REPRESENTATIVES *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 9th Cir. [Certiorari granted, 454 U. S. 812]; and

No. 80–2171. UNITED STATES SENATE *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 9th Cir. [Certiorari granted, 454 U. S. 812.] Motion of petitioner in No. 80–2170 for leave to file a supplemental brief on reargument granted. Motion of petitioner in No. 80–2171 for leave to file a supplemental brief on reargument granted.

No. D–292. IN RE DISBARMENT OF FENDLER. Robert Harold Fendler, of Phoenix, Ariz., having requested to resign as a member of the Bar of this Court, it is ordered that

his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on September 9, 1982 [458 U. S. 1128], is hereby discharged.

No. 81–430. ILLINOIS *v.* GATES ET UX. Sup. Ct. Ill. [Certiorari granted, 454 U. S. 1140.] Case restored to calendar for reargument. In addition to the question presented in the petition for certiorari and previously argued here, the parties are requested to address the question whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Weeks* v. *United States*, 232 U. S. 383 (1914), should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

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

Earlier this year the Court decided not to allow the Illinois Attorney General to argue the question it now asks the parties to address. That decision was consistent with the Court's settled practice of not permitting a party to advance a ground for reversal that was not presented below. The reversal today of the Court's earlier decision is not only a flagrant departure from its settled practice, but also raises serious questions concerning the Court's management of its certiorari jurisdiction. I am therefore unable to join the Court's decision to order reargument of this case.

I

As a matter of ordinary procedure, the burdens of litigation are minimized and the decisional process is expedited if a court is consistent in its rulings as a case progresses. We set a poor example for other judges when we suddenly reverse our prior rulings in the same case.

On February 8, 1982, the State of Illinois filed a motion seeking leave to amend or enlarge the question presented for review in this case. The motion asked the Court to incorporate the following question:

> "Assuming, arguendo, that the information used to obtain the search warrant did not satisfy *Aguilar* v. *Texas*, 378 U. S. 108 (1964), should the evidence obtained under the warrant nevertheless be admitted at trial because the police acted in a reasonable good faith belief in the validity of the warrant?"

On March 1, 1982, the Court unanimously denied that motion. 455 U. S. 986. On October 13, 1982, the parties presented an hour of argument; they respected our decision and did not attempt to argue the question of good faith. Today, the Court asks the parties to reargue the case in order to address the very question it would not allow the parties to argue last month. This type of inconsistent decisionmaking always imposes unnecessary costs on litigants and is wasteful of the judiciary's most scarce resource—time.

II

As a matter of appellate practice, it is generally undesirable to permit a party to seek reversal of a lower court's judgment on a ground that the lower court had no opportunity to consider.[1] It is especially poor practice to do so when the basis for reversal involves a factual issue on which neither party adduced any evidence. Those considerations apply with added force when the judgment of the highest court of a sovereign State is being reviewed.[2]

[1] Of course, there is no impediment to presenting a new argument as an alternative basis for *affirming* the decision below. *E. g.*, *Hankerson* v. *North Carolina*, 432 U. S. 233, 240, n. 6 (1977).

[2] Writing for the Court in *Cardinale* v. *Louisiana*, 394 U. S. 437 (1969), JUSTICE WHITE made it clear that this view represents the Court's traditional stance.

"The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before

Each of these considerations applies to the additional question on which the Court has ordered reargument. Neither party gave the Circuit Court of Du Page County, the Appellate Court of Illinois, Second District, or the Supreme Court of Illinois an opportunity to consider the question. Neither party offered any evidence concerning the state of mind of the Magistrate when he issued the warrant, the state of mind of the officers who obtained the warrant, or the state of mind of the officers who executed the warrant. In short, the new issue was not "fairly presented" to the state courts. Cf. *Picard* v. *Connor*, 404 U. S. 270 (1971).

III

As a matter of power, the Court's action is subject to question. That question is serious whether one assumes that the Illinois courts decided the Fourth Amendment question correctly or incorrectly.

On the one hand, if it is assumed that the Supreme Court of Illinois correctly decided the only federal question that was presented to it,[3] this Court has a duty to affirm its judgment. See *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 317

[*Crowell* v. *Randell*, 10 Pet. 368 (1836)], *Miller* v. *Nicholls*, 4 Wheat. 311, 315 (1819), and since, *e. g.*, *Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Assn., Inc.*, 360 U. S. 334, 342, n. 7 (1959); *State Farm Mutual Automobile Ins. Co.* v. *Duel*, 324 U. S. 154, 160–163 (1945); *McGoldrick* v. *Compagnie General Transatlantique*, 309 U. S. 430, 434–435 (1940); *Whitney* v. *California*, 274 U. S. 357, 362–363 (1927); *Dewey* v. *Des Moines*, 173 U. S. 193, 197–201 (1899); *Murdock* v. *City of Memphis*, 20 Wall. 590 (1875).

". . . Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Id.*, at 438–439.

See also *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 317 (1937); *Wilson* v. *Cook*, 327 U. S. 474, 483–484 (1946); *Lear, Inc.* v. *Adkins*, 395 U. S. 653, 677–682 (1969) (WHITE, J., concurring in part). See generally R. Stern & E. Gressman, Supreme Court Practice 456–465 (5th ed. 1978).

[3] The Supreme Court of Illinois held that the Fourth Amendment prohibits a magistrate from issuing a search warrant on the basis of an affidavit such as that filed by the police officer in this case.

(1937). If the only federal question presented by a certiorari petition is unworthy of review, or does not identify a legitimate basis for reversal, this Court has no power to grant certiorari simply because it would like to address some other federal question. For neither Article III of the Constitution nor the jurisdictional statutes enacted by Congress vest this Court with any roving authority to decide federal questions that have not been properly raised in adversary litigation.

On the other hand, if it is assumed that the Supreme Court of Illinois has incorrectly decided the federal question that was presented to it, this Court has a duty to reverse its judgment. That duty could be performed by simply answering the question decided below, without reaching the additional question on which the Court orders reargument today. It is, of course, a settled canon of our constitutional jurisprudence that we do not decide constitutional questions unless it is necessary to do so to resolve an actual case or controversy. See, *e. g.*, *Minnick* v. *California Dept. of Corrections*, 452 U. S. 105, 122–127 (1981).

Thus, however the Court resolves the merits of the federal question that has already been argued, the action it takes today sheds a distressing light on the Court's conception of the scope of its powers. Accordingly, I respectfully dissent.

No. 81–1114. ILLINOIS *v.* ABBOTT & ASSOCIATES, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 455 U. S. 1015.] Motion of the Solicitor General to permit Richard G. Wilkins, Esquire, to present oral argument *pro hac vice* granted.

No. 81–1476. UNITED STATES *v.* RODGERS ET AL.; and UNITED STATES *v.* INGRAM ET AL. C. A. 5th Cir. [Certiorari granted, 456 U. S. 904.] Motion of the Solicitor General to permit George W. Jones, Jr., Esquire, to present oral argument *pro hac vice* granted.

No. 81–1335. DISTRICT OF COLUMBIA COURT OF APPEALS ET AL. *v.* FELDMAN ET AL. C. A. D. C. Cir. [Cer-

tiorari granted, 458 U. S. 1105.] Motion of respondents for divided argument granted.

No. 81–1282. NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL. *v.* IDAHO ET AL., *ante*, p. 809; and

No. 81–1312. CARMEN, ADMINISTRATOR OF GENERAL SERVICES *v.* IDAHO ET AL., *ante*, p. 809. Motion of appellees to retax costs denied.

No. 81–1284. EICKE *v.* EICKE. Ct. App. La., 3d Cir. [Certiorari granted, 456 U. S. 970.] The parties are directed to file within 30 days supplemental memoranda addressing the Parental Kidnaping Prevention Act, 28 U. S. C. § 1738A (1976 ed., Supp. IV), and its effect on the case pending before this Court. Oral argument in this case, presently scheduled for December 6, 1982, is postponed and the case of *United States* v. *Knotts*, No. 81–1802 [certiorari granted, 457 U. S. 1131], is set for oral argument in its stead.

No. 81–1463. UNITED STATES *v.* HASTING ET AL. C. A. 7th Cir. [Certiorari granted, 456 U. S. 971.] Motion for appointment of counsel granted, and it is ordered that Paul Victor Esposito, Esquire, of Chicago, Ill., be appointed to serve as counsel for respondent Gable D. Gibson in this case.

No. 81–1889. PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK *v.* MID-LOUISIANA GAS CO. ET AL.;

No. 81–1958. ARIZONA ELECTRIC POWER COOPERATIVE, INC. *v.* MID-LOUISIANA GAS CO. ET AL.;

No. 81–2042. MICHIGAN *v.* MID-LOUISIANA GAS CO. ET AL.; and

No. 82–19. FEDERAL ENERGY REGULATORY COMMISSION *v.* MID-LOUISIANA GAS CO. ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 820.] Motion of the parties to dispense with printing the joint appendix granted. Motion of Public Utilities Commission of California et al. for leave to file a brief as *amici curiae* granted.

No. 81–1891. MORRISON-KNUDSEN CONSTRUCTION CO. ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION

PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 820.] Motions of Shipbuilders Council of America, Alliance of American Insurers et al., National Association of Stevedores, National Council of Self-Insurers, and American Insurance Association for leave to file briefs as *amici curiae* granted.

No. 82–131. JONES & LAUGHLIN STEEL CORP. *v.* PFEIFER. C. A. 3d Cir. [Certiorari granted, *ante*, p. 821.] Motion of Southeastern Pennsylvania Transportation Authority for leave to file a brief as *amicus curiae* granted.

No. 82–195. MUELLER ET AL. *v.* ALLEN ET AL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 820.] Motion of Minnesota Association of School Administrators et al. for leave to file a brief as *amici curiae* granted.

No. 82–629. THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION *v.* WOLD ENGINEERING, P.C., ET AL. Sup. Ct. N. D. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 82–794. PETERS ET AL. *v.* WAYNE STATE UNIVERSITY ET AL. C. A. 6th Cir. Motion of petitioners to expedite consideration of the petition for writ of certiorari denied.

No. 82–5464. IN RE JOHNSON. Petition for writ of mandamus denied.

No. 82–5522. IN RE DIDIO. Petition for writ of prohibition denied.

No. 82–610. IN RE HOPFMANN ET AL. Application for injunction, presented to JUSTICE BRENNAN, and by him referred to the Court, denied. Petition for writ of prohibition and/or mandamus and/or injunction denied.

Certiorari Granted

No. 82–215. UNITED STATES *v.* WHITING POOLS, INC. C. A. 2d Cir. Certiorari granted. Reported below: 674 F. 2d 144.

No. 82–486. UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 610, AFL–CIO, ET AL. *v.* SCOTT ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 680 F. 2d 979.

No. 81–2386. DELCOSTELLO *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS ET AL. C. A. 4th Cir.; and

No. 81–2408. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC, ET AL. *v.* FLOWERS ET AL. C. A. 2d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 81–2386, 679 F. 2d 879; No. 81–2408, 671 F. 2d 87.

No. 82–524. BALTIMORE GAS & ELECTRIC CO. ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC.;

No. 82–545. UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.; and

No. 82–551. COMMONWEALTH EDISON CO. ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. C. A. D. C. Cir. Motion of Scientists & Engineers for Secure Energy, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. JUSTICE POWELL took no part in the consideration or decision of this motion and these petitions. Reported below: 222 U. S. App. D. C. 9, 685 F. 2d 459.

No. 82–5119. BELL *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 678 F. 2d 547.

Certiorari Denied

No. 81–2381. TODD SHIPYARDS CORP. ET AL. *v.* ALLAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 666 F. 2d 399.

No. 81–2390. RUTSTEIN *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 230 Ct. Cl. 874.

No. 81–2409. SECURITY GAS & OIL INC. ET AL. *v.* KRAMAS. C. A. 9th Cir. Certiorari denied. Reported below: 672 F. 2d 766.

No. 81–6821. HAMILTON *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 673 F. 2d 1325.

No. 81–6938. RAEEN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 903.

No. 81–6953. BOYER *v.* RILEY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 675 F. 2d 185.

No. 82–98. SCALZITTI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 826.

No. 82–164. FELICE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 230 Ct. Cl. 918.

No. 82–218. NIXON *v.* CARMEN, ADMINISTRATOR OF GENERAL SERVICES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 216 U. S. App. D. C. 188, 670 F. 2d 346.

No. 82–247. MANCHESTER ENVIRONMENTAL COALITION ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 998.

No. 82–265. RAINERI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 670 F. 2d 702.

No. 82–313. PAVONE ET AL. *v.* GIUFFRIDA, DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 295.

No. 82–341. NUECES COUNTY NAVIGATION DISTRICT NO. 1 *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 674 F. 2d 1055.

No. 82–344. UNITED OIL MANUFACTURING CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 1208.

No. 82–378. MANDALAY SHORES COOPERATIVE HOUSING ASSN., INC. *v.* PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 667 F. 2d 1195.

No. 82–404. HILTON HOTELS CORP., SUCCESSOR TO FLAMINGO RESORT, INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 664 F. 2d 1387.

No. 82–414. DEMJANJUK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 680 F. 2d 32.

No. 82–423. KOO ET AL. *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 647 P. 2d 889.

No. 82–425. MCWILLIAMS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 634 S. W. 2d 815.

No. 82–428. COWDEN, TRUSTEE *v.* CIAFFONI ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 498 Pa. 267, 446 A. 2d 225.

No. 82–447. SENTRY INSURANCE ET AL. *v.* TODD SHIPYARDS CORP. ET AL.; and

No. 82–528. TRAVELERS INSURANCE CO. *v.* TODD SHIPYARDS CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 674 F. 2d 401.

No. 82–467. SPLIT ROCK NURSING HOME *v.* OFFICE OF HEALTH SYSTEMS MANAGEMENT OF THE DEPARTMENT OF HEALTH OF NEW YORK ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 56 N. Y. 2d 932, 439 N. E. 2d 395.

No. 82–468. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* LARSON, SECRETARY OF TRANSPORTATION OF PENNSYLVANIA, ET AL.; and

No. 82–505. STEAMSHIP OPERATORS INTERMODAL COMMITTEE *v.* LARSON, SECRETARY OF TRANSPORTATION OF

PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 683 F. 2d 787.

No. 82–469. FIKE, EXECUTRIX, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 672 F. 2d 756.

No. 82–475. NORTHERN ELECTRIC CO., A DIVISION OF SUNBEAM CORP. *v.* HARRELL. C. A. 5th Cir. Certiorari denied. Reported below: 672 F. 2d 444 and 679 F. 2d 31.

No. 82–499. COLE *v.* WESTINGHOUSE BROADCASTING CO., INC., ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 386 Mass. 303, 435 N. E. 2d 1021.

No. 82–517. VOLVO PENTA OF AMERICA *v.* KENNEDY ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 97 Wash. 2d 544, 647 P. 2d 30.

No. 82–520. BEERY *v.* TURNER. C. A. 10th Cir. Certiorari denied. Reported below: 680 F. 2d 705.

No. 82–525. M. W. ZACK METAL CO. *v.* INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 675 F. 2d 525.

No. 82–533. AVCO CORP. *v.* PRECISION AIR PARTS, INC. C. A. 11th Cir. Certiorari denied. Reported below: 676 F. 2d 494.

No. 82–536. BERGER *v.* BERGER. Super. Ct. N. J., App. Div. Certiorari denied.

No. 82–537. JOLLY *v.* LISTERMAN, REGIONAL REPRESENTATIVE, BUREAU OF RETIREMENT AND SURVIVORS, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 217 U. S. App. D. C. 373, 672 F. 2d 935, and 219 U. S. App. D. C. 83, 675 F. 2d 1308.

No. 82–542. OHIO EX REL. EARNHART *v.* OHIO POWER SITING BOARD ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 82–550. SHOP & SAVE FOOD MARKETS, INC. *v.* PNEUMO CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 683 F. 2d 27.

No. 82–554. MCKENZIE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 678 F. 2d 629.

No. 82–555. WATSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 678 F. 2d 765.

No. 82–561. JOHNSON *v.* MARSH, SECRETARY OF THE ARMY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 882.

No. 82–564. DIIULIO ET AL. *v.* BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF NORTHLAKE, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 682 F. 2d 666.

No. 82–568. COUSINO *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 679 F. 2d 604.

No. 82–571. PAYNE ET AL. *v.* TRAVENOL LABORATORIES, INC., ET AL.; and

No. 82–589. TRAVENOL LABORATORIES, INC., ET AL. *v.* PAYNE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 673 F. 2d 798.

No. 82–572. GREAT LAKES PRESS CORP. ET AL. *v.* HOWES. C. A. 2d Cir. Certiorari denied. Reported below: 679 F. 2d 1023.

No. 82–578. BRADY *v.* ALLSTATE INSURANCE CO. C. A. 4th Cir. Certiorari denied. Reported below: 683 F. 2d 86.

No. 82–580. DEMASI ET AL. *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 82–582. ASHMORE ET AL. *v.* TARRANT COUNTY ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 635 S. W. 2d 417.

No. 82–597. TREPANY ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 409 So. 2d 529.

No. 82–600. HINSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 418 So. 2d 980.

No. 82–604. BLOCH *v.* COMPTON ET AL. Sup. Ct. Va. Certiorari denied.

No. 82–607. DUNN *v.* NATIONAL RAILROAD PASSENGER CORP., AKA AMTRAK. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 820.

No. 82–617. PFEIFFER *v.* ESSEX WIRE CORP. C. A. 7th Cir. Certiorari denied. Reported below: 682 F. 2d 684.

No. 82–621. TOWN CONCRETE PIPE OF WASHINGTON, INC. *v.* LABORERS INTERNATIONAL UNION LOCAL 252. C. A. 9th Cir. Certiorari denied. Reported below: 680 F. 2d 1284.

No. 82–636. J. L. LESTER & SON, INC. *v.* SMITH, ADMINISTRATRIX, ESTATE OF SMITH. Ct. App. Ga. Certiorari denied. Reported below: 162 Ga. App. 506, 291 S. E. 2d 251.

No. 82–641. POMPANO *v.* MICHAEL SCHIAVONE & SONS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 680 F. 2d 911.

No. 82–652. CASEY *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 231 Ct. Cl. 812.

No. 82–653. WADE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 844.

No. 82–661. WALKER *v.* SUN SHIP, INC. C. A. 3d Cir. Certiorari denied. Reported below: 684 F. 2d 266.

No. 82–668. GONZALEZ *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 211 Neb. 697, 320 N. W. 2d 107.

No. 82–683. MELLIES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 449.

No. 82–684. HAYES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 676 F. 2d 1359.

No. 82–705. ASTORGA-TORRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 682 F. 2d 1331.

No. 82–731. MCNEELY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 673 F. 2d 1331.

No. 82–746. HABIB ET AL. *v.* RAYTHEON CO. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 221 U. S. App. D. C. 510, 684 F. 2d 1032.

No. 82–5038. BURKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 447.

No. 82–5071. PHILLIPS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 674 F. 2d 647.

No. 82–5210. ROBINSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 51 Md. App. 752.

No. 82–5211. ARCHIBONG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 677 F. 2d 116.

No. 82–5215. CARLSON *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 318 N. W. 2d 308.

No. 82–5222. HINKLE *v.* SCURR, WARDEN, IOWA STATE PENITENTIARY, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 677 F. 2d 667.

No. 82–5304. ROBERTS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 826.

No. 82–5346. BEECROFT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 825.

No. 82–5347. BRUINGTON, BY HIS MOTHER AND NEXT FRIEND, EZELLE, ET AL. *v.* CONN, SECRETARY, KENTUCKY DEPARTMENT FOR HUMAN RESOURCES, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 674 F. 2d 582.

No. 82–5409. SETZER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 654 F. 2d 354.

No. 82–5432. JOHNSON *v.* HARRIS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 682 F. 2d 49.

No. 82–5460. KIRK *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 685 F. 2d 430.

No. 82–5465. GREAVES *v.* WARREN. Sup. Ct. Ore. Certiorari denied. Reported below: 293 Ore. 340, 648 P. 2d 853.

No. 82–5469. HOLLAND ET AL. *v.* HUNTER COLLEGE CAMPUS SCHOOLS ET AL.; and HOLLAND *v.* RCA CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 291 (first case).

No. 82–5470. READ *v.* KUBINSKI ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 452 A. 2d 651.

No. 82–5472. KYLE *v.* DONOVAN, SECRETARY OF LABOR. C. A. 6th Cir. Certiorari denied. Reported below: 671 F. 2d 194.

No. 82–5475. COTTON *v.* FEDERAL LAND BANK OF COLUMBIA ET AL.; and

No. 82–5476. COTTON *v.* FEDERAL LAND BANK OF COLUMBIA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 676 F. 2d 1368.

No. 82–5478. MOORE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 415 So. 2d 1210.

No. 82–5482. HENRY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied.

No. 82–5484. SIMON *v.* REID, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 82–5489. WEAVER *v.* HAYES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 685 F. 2d 432.

No. 82–5490. TIPPETT *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 842.

No. 82–5492. RODRIGUEZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 87 App. Div. 2d 1008, 450 N. Y. S. 2d 643.

No. 82–5493. THOMAS *v.* WARDEN, MARYLAND STATE PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 683 F. 2d 83.

No. 82–5494. WILLIAMS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 274 Ark. 9, 621 S. W. 2d 686, and 276 Ark. xxiii.

No. 82–5498. BUNTING *v.* TARD, SUPERINTENDENT, TRENTON STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 82–5504. CONNOLLY *v.* NEW JERSEY ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 91 N. J. 258, 450 A. 2d 573.

No. 82–5505. CONNOLLY *v.* NEW JERSEY ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 91 N. J. 258, 450 A. 2d 573.

No. 82–5507. BOYER *v.* GUARINI, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 82–5509. COUNTRY *v.* PARRATT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 684 F. 2d 588.

No. 82–5511. HARGETT *v.* ANTHONY PLAZA, LTD., ET AL. C. A. 9th Cir. Certiorari denied.

No. 82–5512. CHIN *v.* NADEL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 289.

No. 82–5514. FORET *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 683 F. 2d 1371.

No. 82–5518. SLOCUM *v.* GEORGIA STATE BOARD OF PARDONS AND PAROLES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 678 F. 2d 940.

No. 82–5523. ANDERSON *v.* BONIN. C. A. 5th Cir. Certiorari denied.

No. 82–5525. TAYLOR *v.* HOUSEWRIGHT, DIRECTOR, NEVADA STATE PRISONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 848.

No. 82–5530. HUNTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 685 F. 2d 434.

No. 82–5544. CHAMORRO, AKA HERNANDEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 687 F. 2d 1.

No. 82–5565. BRADY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 825.

No. 82–5569. FOLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 683 F. 2d 273.

No. 82–5600. BLACK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 684 F. 2d 481.

No. 82–5611. ROBERTS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 673 F. 2d 1331.

No. 82–5614. SOEHNLEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 459.

No. 82–5615. PERRINE *v.* MOSSINGHOFF, COMMISSIONER OF PATENTS AND TRADEMARKS. C. A. D. C. Cir. Certiorari denied.

No. 82–5625. PURKEYPYLE *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied.

No. 82–5627. FLEISHMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 684 F. 2d 1329.

No. 82–5634. DUARTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 691 F. 2d 508.

No. 82–5639. ROSARIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 300.

No. 82–5642. JACKSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 82–5643. HARPER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 688 F. 2d 851.

No. 82–5645. DUDLEY *v.* LAYMAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 880.

No. 82–5650. SURRIDGE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 687 F. 2d 250.

No. 82–5661. EMERY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 682 F. 2d 493.

No. 82–5665. ALLEN, ADMINISTRATRIX OF THE ESTATE OF BROWN *v.* MCCUTCHEON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1305.

No. 81–6665. JAMES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

Opinion of JUSTICE BRENNAN, with whom JUSTICE BLACKMUN joins, respecting the denial of the petition for writ of certiorari.

Opinions supporting denial of petitions for certiorari are understandably seldom filed, but this in my view is one of the

rare cases where the filing of such an opinion is justified. Cf. *Estate of Wilson* v. *Aiken Industries, Inc.*, 439 U. S. 877 (1978) (BLACKMUN, J., concurring in denial of writ of certiorari); *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912 (1950) (Frankfurter, J., opinion respecting denial of writ of certiorari).

Petitioner, after conviction on federal criminal charges, filed a timely motion for reduction of sentence under Federal Rule of Criminal Procedure 35. The motion was denied on July 7, 1981. For some reason, however, notice of the denial from the Clerk of the District Court was not received by either petitioner or the United States Attorney. Petitioner—who was incarcerated the entire time—first learned of it by happenstance in September 1981. He promptly requested leave from the District Court to appeal out of time, and that court, after due investigation of the circumstances, granted his request.

The Government explicitly refused to contest the propriety of the appeal before the Court of Appeals for the Ninth Circuit. Nevertheless, the Court of Appeals *sua sponte* dismissed the appeal, holding that district courts may not grant leave to appeal after the maximum extension period has passed. See Fed. Rule App. Proc. 4(b). The court implied that the rigidity of Rule 4(b) could not be set aside even though this petitioner was ignorant, through no fault of his own, of the denial of his Rule 35 motion throughout the period of an allowable extension. Cf. Fed. Rule Crim. Proc. 49(c).[1] Petitioner sought certiorari here, and the Solicitor General informed us that he "do[es] not oppose vacation of the judgment of dismissal and remand to the [C]ourt of [A]ppeals." Memorandum for United States 1.

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[1] In response to a letter from petitioner which the Court of Appeals construed as a motion for reconsideration, the court reaffirmed its dismissal, but expressed the view that petitioner could file a new motion under Rule 35, and then perfect an appeal from denial of such a motion. See n. 2, *infra*.

I do not question the correctness of the Court of Appeals' construction of Federal Rule of Appellate Procedure 4(b), nor that its *sua sponte* action is consistent with the plain language of Federal Rule of Criminal Procedure 49(c). Nevertheless, if Rules 4(b) and 49(c) were truly the last word in defining petitioner's opportunity to appeal under our federal system of procedure, I would have serious doubts about the constitutionality of that system of procedure. Simply put, the application of these Rules to penalize an uncounseled and incarcerated criminal defendant for a clerical error that was none of his doing and of which he had no knowledge would seem to me not only unduly harsh but resoundingly unjust. See *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 433–437 (1982); *Boddie* v. *Connecticut*, 401 U. S. 371, 377–379 (1971); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313–315 (1950).[2] But I do not think that the Court of Appeals was precluded by those Rules from affording petitioner redress. For, at least with respect to the pair of Civil Rules that directly parallel the provisions at issue here,[3] Courts of Appeals have held that in certain "unique" or "extraordinary" circumstances it would not be inconsistent with the Rules or the intent of Congress for the district court to vacate and reenter the original order to create a fresh judgment from which timely appeals could be perfected.[4] Au-

[2] If the Court of Appeals were right that petitioner could file a new motion under Federal Rule of Criminal Procedure 35, see n. 1, *supra*, the problems posed by its decision might be significantly mitigated. But Rule 35 sets a 120-day time limit on motions to reduce a legal sentence, and I do not understand how petitioner could bring a new Rule 35 motion at this time without facing jurisdictional obstacles even more serious than those apparent in the appeal dismissed by the Court of Appeals.

[3] See Fed. Rule App. Proc. 4(a); Fed. Rule Civ. Proc. 77(d).

[4] See, *e. g.*, *Buckeye Cellulose Corp.* v. *Braggs Electric Construction Co.*, 569 F. 2d 1036, 1038–1039 (CA8 1978); *Fidelity & Deposit Co. of Maryland* v. *USAFORM Hail Pool, Inc.*, 523 F. 2d 744, 747–751 (CA5 1975), cert. denied, 425 U. S. 950 (1976); *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institute*, 163 U. S. App. D. C. 140, 500 F. 2d 808 (1974). The Ninth Circuit itself has recognized that district

thority to do this has been found in Federal Rule of Civil Procedure 60(b), which was designed, in large part, to replace the common-law writ of *coram nobis* in civil cases. In criminal cases, the writ of *coram nobis* itself remains available whenever resort to a more usual remedy would be inappropriate.[5] See *United States* v. *Morgan*, 346 U. S. 502 (1954). Rather than *sua sponte* dismissing petitioner's appeal, the Court of Appeals might thus have considered whether the circumstances of this case warranted both treating petitioner's request to the District Court for leave to file an out-of-time notice of appeal as a motion for a writ of *coram nobis* to vacate and reenter its July 7 order, and treating the District Court's order allowing the notice of appeal to be filed as having granted such a motion. Cf. *Browder* v. *Director, Illinois Dept. of Corrections*, 434 U. S. 257, 272 (1978) (BLACKMUN, J., concurring).[6] Moreover, I would not regard the Court of Appeals' failure to take that course as foreclosing petitioner's right, within a reasonable time after our denial of certiorari today, to apply anew to the District Court for a writ of *coram nobis*. If petitioner successfully files such a motion, the Court of Appeals on appeal may, admittedly, be as inhospita-

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courts could employ this procedure under the proper circumstances, although it has not, as best as I can tell, ever actually found such circumstances to have been shown. See *Rodgers* v. *Watt*, 680 F. 2d 1295, 1298 (1982); *Kramer* v. *American Postal Workers Union, AFL–CIO*, 556 F. 2d 929 (1977).

[5] Title 28 U. S. C. § 2255, which has taken over most of the function of the writ of *coram nobis* in federal criminal procedure, only applies to collateral attacks on underlying sentences, and could not be employed to vacate and reenter an order denying a motion under Rule 35.

[6] In the alternative, the Court of Appeals might have exercised its own residual appellate jurisdiction and remanded the matter to the District Court to allow it to vacate and reenter the order from which petitioner sought appeal. Cf. *Moody* v. *Flowers*, 387 U. S. 97, 104 (1967); *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16, 18–19 (1934). Neither of these approaches could possibly have prejudiced the Government, since it has consistently declined to contest the jurisdictional basis of petitioner's appeal.

able to that motion as it was to his request to file an out-of-time notice of appeal. But consideration of any constitutional implications of such a holding may appropriately await the event.[7] In light of these possible avenues of relief, I agree that review by this Court at this time is not warranted, and therefore vote to deny the petition for certiorari.

No. 82–235. MORRIS ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Motion of petitioners to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 676 F. 2d 711.

No. 82–267. MCCARTHY *v.* HINMAN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 676 F. 2d 343.

No. 82–294. LOUISIANA *v.* MARSHELL. Sup. Ct. La. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 414 So. 2d 684.

No. 82–480. MCCOMBS, CHAIRMAN, ILLINOIS PRISONER REVIEW BOARD *v.* SCOTT. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 669 F. 2d 1185.

No. 82–521. JONES, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY, ET AL. *v.* ARROYO. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 685 F. 2d 35.

No. 82–346. SKEHAN *v.* BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE ET AL. C. A. 3d Cir. Mo-

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[7] I suppose also that a holding is possible that, although *coram nobis* is an appropriate vehicle for mitigating the harshness of Rule 4(b), petitioner's circumstances are not sufficiently "extraordinary" for him to merit such relief. In that event, what constitutional issues arise in the case will at least be significantly more focused.

tion of petitioner to amend petition for writ of certiorari granted. Certiorari denied. Reported below: 669 F. 2d 142 and 675 F. 2d 72.

No. 82–386. KERR-MCGEE CHEMICAL CORP. *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 677 F. 2d 571.

Opinion of JUSTICE BLACKMUN respecting the denial of the petition for writ of certiorari.

I realize that it is a tradition here that one seldom writes in support of the Court's decision to deny a petition for a writ of certiorari. See, however, *Castorr* v. *Brundage*, *ante*, p. 928 (STEVENS, J.); *James* v. *United States*, *ante*, p. 1044 (BRENNAN, J.); *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912 (1950) (Frankfurter, J.).

The reason I write in this case is that I fear that the content of the final paragraphs of the dissent will tend to create confusion in an area of law that seems to me to be fairly clear. It has been well established for many years that federal-question jurisdiction is present "only when the plaintiff's statement of his own cause of action shows that it is based upon [federal] laws or [the Federal] Constitution." *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149, 152 (1908). It is insufficient "that the defendant would set up in defense certain laws of the United States." *Id.*, at 153.

The dissent asserts, *post*, at 1051, that the Second Circuit in *North American Phillips Corp.* v. *Emery Air Freight Corp.*, 579 F. 2d 229 (1978), held that "the lack of reference to federal law in the complaint does not control the determination whether a federal question is presented." It would be more accurate to say that the Second Circuit held that lack of reference to federal law does not control the determination whether a federal *claim* is presented by the complaint. In the present case, as the dissent explains, *post*, at 1052, the issue is whether "a defendant's federal pre-emption claim presents a federal question." In other words, the issue is

whether a federal question is presented by a federal *defense* to a state-law *claim*. If a federal claim is presented by the complaint, there is federal-question jurisdiction even if the complaint is phrased in state-law terms; if, however, the complaint presents only a state-law claim, a federal defense does not create federal-question jurisdiction.

I thus perceive no conflict between the present case and *North American Phillips*, and no conflict between the present case and other cases cited by petitioner. In each of those cases, the courts followed *Mottley* and focused on the federal basis for the plaintiff's claim. Here, in contrast, the plaintiff's claim has no federal basis. The plaintiff could not have stated a federal cause of action no matter how it pleaded its case. Because there is no conflict, the Court, it seems to me, is on sound ground in denying the petition for a writ of certiorari.

JUSTICE WHITE, with whom JUSTICE MARSHALL joins, dissenting.

Petitioner Kerr-McGee Chemical Corp. (Kerr-McGee) owns a facility within the city limits of West Chicago, Ill., that has been used since World War II to produce compounds derived from radioactive natural ores. Since 1956, the facility has been licensed by the Nuclear Regulatory Commission or its predecessor. Although the facility has not been in active operation since 1973, some nuclear materials continue to be stored at the site.

In 1980, respondent State of Illinois filed a complaint against petitioner in an Illinois state court alleging that the operation and maintenance of the facility violate the Illinois Environmental Protection Act, Ill. Rev. Stat., ch. 111½, ¶ 1001 *et seq.* (1979), and other state statutes pertaining to the disposal of hazardous wastes. Kerr-McGee petitioned to have the State's case removed to federal court, arguing that the state regulations have been pre-empted by the Atomic Energy Act of 1954, 68 Stat. 921, as amended, 42 U. S. C.

§ 2011 *et seq.* (1976 ed., Supp. IV), which places the regulation of radioactive materials within the exclusive province of the Nuclear Regulatory Commission. The United States District Court for the Northern District of Illinois denied the State's motion to remand the case to the state court. The District Court found that the complaint necessarily involved the interpretation of federal law and thus was a claim "arising under . . . the laws of the United States" within the meaning of the removal statute, 28 U. S. C. § 1441(b).* The complaint was dismissed by the District Court on pre-emption grounds.

On appeal, the United States Court of Appeals for the Seventh Circuit held that removal was improper. The Court of Appeals found that the State's complaint did not rely on or even allude to federal statutes or case law and that there was no basis for concluding that the State had drafted the complaint in order to defeat removal. 677 F. 2d 571, 577 (1982). The issue of federal pre-emption, the court held, is "merely a defense to state law claims"; a defense based on federal law cannot be a ground for removal. *Id.*, at 578. The District Court's decision was reversed and the case was remanded with instructions to remand it to the state court. Petitioner now seeks review of the Seventh Circuit's decision.

The holding in the present case is in direct conflict with a decision in the Second Circuit, *North American Phillips Corp.* v. *Emery Air Freight Corp.*, 579 F. 2d 229 (1978). In *North American Phillips*, the Second Circuit found that the lack of reference to federal law in the complaint does not control the determination whether a federal question is presented. The court held that the substance of the allegations

*Section 1441(b) provides:

"Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

must be reviewed in order to determine "whether a federal law is a pivotal issue in the case, one that is basic in the determination of the conflict between the parties." *Id.*, at 233.

The issue whether, or under what circumstances, a defendant's federal pre-emption claim presents a federal question sufficient to support removal of a state plaintiff's complaint which on its face raises only state claims, is a substantial one going to the heart of the power of federal courts to determine claims raised in state-court proceedings. The Court should grant this petition to resolve the conflict. Accordingly, I dissent from the denial of certiorari.

No. 82–446. DALLAS COUNTY HOSPITAL DISTRICT *v.* DALLAS ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari and give this case plenary consideration. Reported below: 670 F. 2d 629.

JUSTICE REHNQUIST, dissenting.

The Court of Appeals for the Fifth Circuit held in this case that under the First and Fourteenth Amendments a hospital, like city streets and parks, is a "public forum" which must be made available to protestors and demonstrators subject only to reasonable "time, place, and manner" restrictions. 670 F. 2d 629 (1982). I think the Court of Appeals misunderstood the distinction in our cases between public property, such as city streets and parks, which has been historically treated as a "public forum," see *Hague* v. *CIO*, 307 U. S. 496 (1939), and public property, such as jails, military bases, and postal delivery boxes, which has been held not to be a public forum. See *Adderley* v. *Florida*, 385 U. S. 39 (1966); *Greer* v. *Spock*, 424 U. S. 828 (1976); *United States Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U. S. 114 (1981). The decision of the Court of Appeals, mistakenly I believe, thus requires a hospital to promulgate a set of "regulations" which would provide for access to at least a part of its premises by such protest groups as respondents. To say that the deci-

sion severely limits the ability of public hospitals to devote their premises to the purpose of furnishing medical care to the sick would be an understatement.

The Court of Appeals relied primarily on our decisions in *Shuttlesworth* v. *Birmingham*, 394 U. S. 147 (1969), and *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S. 530 (1980). Neither one of these cases speaks to the issue here. *Shuttlesworth* involved the public streets of Birmingham, Ala. *Consolidated Edison* represented no effort on the part of private individuals to obtain access to public property; as the Court in that case pointed out:

> "Consolidated Edison has not asked to use the offices of the Commission as a forum from which to promulgate its views. Rather, it seeks merely to utilize its own billing envelopes to promulgate its views on controversial issues of public policy." 447 U. S., at 539–540.

We have recently summarized the teachings of this Court's cases as to the kind of government property involved here in *United States Postal Service* v. *Council of Greenburgh Civic Assns.*, *supra:*

> "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." 453 U. S., at 129.

The Court of Appeals also expressed dissatisfaction with the "regulation" upon which the hospital had relied to exclude

demonstrators, a regulation which simply prohibited demonstrations without prior written approval of the hospital administrator. While such regulations have been held constitutionally defective because of their potential for discriminatory application when public streets and parks are involved, see *Shuttlesworth* v. *Birmingham*, *supra*, we have never applied this sort of analysis to "regulations" governing access to government property which was not a public forum. Indeed, it is difficult to know why local government authorities charged with the administration of jails, prisons, and hospitals should be under any obligation to promulgate a detailed code of "regulations" governing access to the premises by outsiders. When confronted with an analogous attack on a congressional statute regulating access to postal boxes in *United States Postal Service*, *supra*, we said:

> "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. . . . 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." 453 U. S., at 132.

Here, as in *United States Postal Service*, there is no tenable claim that the hospital regulation was applied other than in a content-neutral manner. The demonstration which respondents actually conducted in Parkland Hospital was clearly sub-

ject to the regulation of the hospital, and equally clearly could have been prohibited by the hospital. In the fall of 1978, approximately 45 members of respondents' organization invaded the hospital premises without permission, and proceeded to hold a press conference in the front lobby of Parkland. This "media event" was covered by, among other representatives of the media, two television stations, each with camera equipment in tow. As would be expected, the demonstration also attracted a crowd of the interested and the curious. The congestion engendered by the "event" blocked the flow of patients and their family members and medical personnel in the lobby itself and from the lobby into various clinics.

The Court of Appeals apparently conceded that this particular demonstration could have been constitutionally prohibited by the hospital, but only under a "valid" set of regulations. Unless we are to accede to the idea that hospitals must henceforth retain house counsel whose job shall be to draft, interpret, and aid in the application of detailed regulations such as those contemplated by the Court of Appeals, I think the writ of certiorari should be granted.

No. 82–530. KNAPP ET AL. *v.* CARDWELL ET AL. C. A. 9th Cir.;

No. 82–5319. SIMON *v.* TENNESSEE. Sup. Ct. Tenn.;

No. 82–5519. MORGAN *v.* FLORIDA. Sup. Ct. Fla.; and

No. 82–5534. WHITE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 82–530, 667 F. 2d 1253; No. 82–5319, 635 S. W. 2d 498; No. 82–5519, 415 So. 2d 6; No. 82–5534, 415 So. 2d 719.

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. 82–620. PRICE ET AL. *v.* PITTSBURGH TERMINAL CORP. ET AL.; and

No. 82–622. BALTIMORE & OHIO RAILROAD CO. ET AL. *v.* PITTSBURGH TERMINAL CORP. ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 680 F. 2d 933.

No. 82–5335. SMITH *v.* NORTH CAROLINA;

No. 82–5352. WILLIAMS *v.* NORTH CAROLINA; and

No. 82–5353. PINCH *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: No. 82–5335, 305 N. C. 691, 292 S. E. 2d 264; No. 82–5352, 305 N. C. 656, 292 S. E. 2d 243; No. 82–5353, 306 N. C. 1, 292 S. E. 2d 203.

Opinion of JUSTICE STEVENS respecting the denial of the petitions for writ of certiorari.

In each of these three capital cases the trial judge instructed the jury that it had a duty to impose the death penalty if it found: (1) that one or more aggravating circumstances existed; (2) that the aggravating circumstances were sufficiently substantial to call for the death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances. There is an ambiguity in these instructions that may raise a serious question of compliance with this Court's holding in *Lockett* v. *Ohio*, 438 U. S. 586 (1978).*

On the one hand, the instructions may be read as merely requiring that the death penalty be imposed whenever the

*"There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates *the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.* When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." 438 U. S., at 605 (plurality opinion) (emphasis added).

aggravating circumstances, discounted by whatever mitigating factors exist, are sufficiently serious to warrant the extreme penalty. Literally read, however, those instructions may lead the jury to believe that it is required to make two entirely separate inquiries: First, do the aggravating circumstances, considered apart from the mitigating circumstances, warrant the imposition of the death penalty? And second, do the aggravating circumstances outweigh the mitigating factors? It seems to me entirely possible that a jury might answer both of those questions affirmatively and yet feel that a comparison of the totality of the aggravating factors with the totality of mitigating factors leaves it in doubt as to the proper penalty. But the death penalty can be constitutionally imposed only if the procedure assures reliability in the determination that "'death is the appropriate punishment in a specific case.'" *Lockett*, *supra*, at 601 (plurality opinion), quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.).

A quotation from a recent opinion by the Utah Supreme Court, which takes a less rigid approach to this issue, will illustrate my point. In *State* v. *Wood*, 648 P. 2d 71, 83 (1982), that court wrote:

> "It is our conclusion that the appropriate standard to be followed by the sentencing authority—judge or jury—in a capital case is the following:
>
> "After considering the totality of the aggravating and mitigating circumstances, you must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and you must further be persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances.'
>
> "These standards require that the sentencing body compare the totality of the mitigating against the totality of the aggravating factors, not in terms of the relative numbers of the aggravating and the mitigating factors,

but in terms of their respective substantiality and persuasiveness. Basically, what the sentencing authority must decide is how compelling or persuasive the totality of the mitigating factors are when compared against the totality of the aggravating factors. The sentencing body, in making the judgment that aggravating factors 'outweigh,' or are more compelling than, the mitigating factors, must have no reasonable doubt as to that conclusion, and as to the additional conclusion that the death penalty is justified and appropriate *after considering all the circumstances*." (Emphasis added.)

The petitions for certiorari in these three cases request the Court to review the decision of the Supreme Court of North Carolina affirming the death penalty in each case. I do not criticize the Court's action in denying certiorari because the question whether the instructions to the juries are consistent with *Lockett* remains open for consideration in collateral proceedings. Moreover, even if relief may not be warranted in these cases, the North Carolina judiciary may find it appropriate to make slight changes in the form of its instructions to avoid the ambiguity I have identified.

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.

Rehearing Denied

No. 81–2015. CHURCHILL AREA SCHOOL DISTRICT *v.* HOOTS ET AL., *ante*, p. 877;

No. 81–2030. EDGEWOOD SCHOOL DISTRICT ET AL. *v.* HOOTS ET AL., *ante*, p. 824; and

No. 81–2094. CLANCY ET AL. *v.* JARTECH, INC., ET AL., *ante*, p. 826. Petitions for rehearing denied.

No. 81–2095. CLANCY ET AL. *v.* JARTECH, INC., ET AL., *ante*, p. 879;

No. 81–2096. CLANCY ET AL. *v.* JARTECH, INC., ET AL., *ante*, p. 826;

No. 81–2114. GUNTER ET UX. *v.* HUTCHESON ET AL., *ante*, p. 826;

No. 81–2143. THOMPSON *v.* COVINGTON HOUSING DEVELOPMENT CORP. ET AL., *ante*, p. 828;

No. 81–2163. CHESTNUTT ET AL. *v.* FOGEL ET AL., *ante*, p. 828;

No. 81–2210. GREYHOUND LINES, INC. *v.* PRICE, *ante*, p. 831;

No. 81–2306. LOCAL 66, BOSTON TEACHERS UNION, AFT, AFL–CIO *v.* BOSTON SCHOOL COMMITTEE ET AL., *ante*, p. 881;

No. 81–2310. ELLERBE *v.* OTIS ELEVATOR CO., *ante*, p. 802;

No. 81–2346. REXROAT *v.* THORELL, *ante*, p. 837;

No. 81–2389. STEPAK *v.* RUTGERS MEDICAL SCHOOL ET AL., *ante*, p. 804;

No. 81–2407. MISKOVSKY *v.* OKLAHOMA PUBLISHING CO., *ante*, p. 923;

No. 81–6480. FIELDS *v.* TEXAS, *ante*, p. 841;

No. 81–6710. MICHAELIS *v.* NEBRASKA STATE BAR ASSN., *ante*, p. 804;

No. 81–6777. CAPE *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC CLASSIFICATION CENTER, *ante*, p. 882;

No. 81–6779. WILLIAMS *v.* INDIANA, *ante*, p. 808;

No. 81–6818. CHRISTENSEN *v.* UTAH, *ante*, p. 802;

No. 81–6837. JOHN *v.* GOVERNMENT OF THE VIRGIN ISLANDS, *ante*, p. 848;

No. 81–6918. KNOTT *v.* MABRY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, *ante*, p. 851; and

No. 81–6930. DIN *v.* LONG ISLAND LIGHTING CO., *ante*, p. 852. Petitions for rehearing denied.

No. 81–6969. LACE ET AL. *v.* UNITED STATES, *ante*, p. 854;

No. 81–6998. OGROD ET AL. *v.* SCHOOL DISTRICT OF PHILADELPHIA, *ante*, p. 805;

No. 82–5. SUPERIOR OIL CO. *v.* CITY OF PORT ARTHUR, TEXAS, ET AL., *ante*, p. 802;

No. 82–66. MAZALESKI *v.* MAY, *ante*, p. 859;

No. 82–199. VALERINO *v.* VALERINO, *ante*, p. 864;

No. 82–240. THEOHAROUS *v.* DEER RUN SHORES PROPERTY OWNERS ASSN., INC., *ante*, p. 899;

No. 82–279. MARTIN *v.* UNITED STATES, *ante*, p. 865;

No. 82–5001. SMITH *v.* GEORGIA, *ante*, p. 882;

No. 82–5027. HUDAK *v.* CURATORS OF THE UNIVERSITY OF MISSOURI ET AL., *ante*, p. 867;

No. 82–5088. JOHNSON *v.* TENNESSEE, *ante*, p. 882;

No. 82–5090. BROOKS *v.* ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, *ante*, p. 882;

No. 82–5188. BREEDLOVE *v.* FLORIDA, *ante*, p. 882;

No. 82–5190. WENDT *v.* MACDOUGALL, *ante*, p. 912;

No. 82–5204. WAYLAND *v.* REGISTRY OF DEEDS, SALEM, ET AL., *ante*, p. 899;

No. 82–5209. BUCHANAN *v.* JEFFERSON COUNTY ET AL., *ante*, p. 912;

No. 82–5225. PENICK *v.* VIRGINIA, *ante*, p. 913;

No. 82–5227. DICKERSON *v.* JOHNSON, ADMINISTRATOR, VETERANS ADMINISTRATION, ET AL., *ante*, p. 875;

No. 82–5234. JOHL *v.* TOWN OF GROTON ET AL., *ante*, p. 913;

No. 82–5264. IN RE SIMS, *ante*, p. 903;

No. 82–5288. SELLARS *v.* CITY OF LOS ANGELES, CALIFORNIA, ET AL., *ante*, p. 946; and

No. 82–5362. DIXON *v.* MACDOUGALL, *ante*, p. 915. Petitions for rehearing denied.

DECEMBER 6, 1982

Appeals Dismissed

No. 82–638. LOUISIANA *v.* HRYHORCHUK ET AL. Appeal from Ct. App. La., 3d Cir., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 412 So. 2d 197.

No. 82–5678. WAYLAND *v.* UNITED STATES. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Miscellaneous Orders

No. A–453. STULL ET AL. *v.* UNITED STATES. Application for bail, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–504. BROOKS *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. This matter was presented to JUSTICE WHITE on December 2, 1982, on an application for a stay of execution, and by him referred to the Court.

When the matter came before the Court the opinion of the United States Court of Appeals for the Fifth Circuit dated December 6, 1982, was before us. That opinion after a review of the facts and procedural history concluded as follows:

> "Despite the eleventh-hour presentation of new issues, we have reviewed each of the new issues carefully and again reviewed each of the issues previously presented to us. Each member of this panel is acutely aware that Brooks' life may depend on our action. Each of us is determined to fulfill our sworn obligation to up-

hold and defend the Constitution and Laws of the United States, doing justice to the rich and to the poor alike, favoring neither the rich because he is rich, nor the poor because he is poor. We have the same duty to act impartially between the condemned and the state, favoring neither the state nor the condemned. That duty compels us to declare that we find no substantial question presented.

. . . . . .

"The merits of Brooks' claims have been presented by a total of twelve lawyers, in nine separate hearings, and have by this time been reviewed by 23 judges, state and federal. Despite this, we would not hesitate to grant the stay were we aware of any argument of substance, any contention that would benefit by further briefing and oral argument. The application for stay has received the sober, reasoned, and deliberate consideration of Brooks' claim that the irrevocable nature of the penalty demands. Our granting of yet another stay at this late hour for further review of claims so often considered and of such little merit would be abdication of our duty to face and decide the issue before us in accordance with the Constitution and Laws of the United States.

"For these reasons, the application for stay is denied."

(1) Addressing first the application for a stay of execution, reconsideration of which was denied by the United States Court of Appeals for the Fifth Circuit, the application for a stay of execution is hereby denied.

(2) This Court denied applicant's petition for a writ of certiorari on June 29, 1981, *Brooks* v. *Texas*, 453 U. S. 913, and denied rehearing on September 23, 1981, 453 U. S. 950; treating the papers filed since then as a second petition for rehearing of the denial of certiorari, the same is hereby denied.

(3) Treating the papers filed since December 2, 1982, as a petition for certiorari, or alternatively as a petition for certiorari before judgment, the same is hereby denied.

JUSTICES BRENNAN, MARSHALL, and STEVENS, dissenting.

We would grant petitioner's application for a stay of execution. Our cases make it absolutely clear that where a certificate of probable cause to appeal from the denial of habeas relief has been issued, a court of appeals *must* consider and decide the merits of that appeal. A court of appeals cannot fulfill that obligation if a State is permitted to execute a prisoner prior to the consideration and decision of his appeal.

I

On September 10, 1977, Brooks was indicted in Tarrant County, Tex., for the capital murder of David Gregory. At trial the State presented evidence that Brooks went to a used-car lot and asked to test-drive a car. He was permitted to drive the car accompanied by Gregory, an employee. Brooks picked up a friend, Woody Loudres, and drove to the motel where Loudres lived. Brooks and Loudres took Gregory into a motel room. A single shot was fired, killing Gregory.

The jury returned a verdict of guilty. In the penalty phase of the trial, the judge instructed the jury, pursuant to Tex. Code Crim. Proc. Ann., Arts. 37.071(b)(1) and (2) (Vernon 1981), to give "yes" or "no" answers to the following questions:

> (1) "Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?"
>
> (2) "Do you find from the evidence beyond a reasonable doubt that there is a probability the defendant

would commit criminal acts of violence that would constitute a continuing threat to society?"

The judge told the jurors that affirmative answers to both questions would result in a death sentence. Over Brooks' objection, the judge also instructed the jurors that they could not consider or discuss the effect of their answers. The jury answered "yes" to both questions, and the court accordingly imposed the mandatory sentence of death.

Following the affirmance of his conviction and sentence on direct appeal, *Brooks* v. *State*, 599 S. W. 2d 312 (Tex. Crim. App. 1979), cert. denied, 453 U. S. 913 (1981), Brooks filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Texas. On October 28, 1982, the District Court denied the petition. The District Court's order was accompanied by a 26-page opinion discussing Brooks' claims.

On November 9, 1982, the District Court issued a certificate of probable cause to appeal but denied Brooks' application for a stay of execution pending appeal. Brooks immediately filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit, and on November 12 he applied to that court for a stay of execution. In his application he described the constitutional claims that he planned to present on appeal if afforded the opportunity to do so. On November 17 the State filed a brief statement opposing the application. Oral argument on the application was held before the Court of Appeals on November 26. Later that same day, the Court of Appeals denied the application in a five-sentence order that did not dispose of the still pending appeal. Although the Court of Appeals has filed an additional opinion today, it still has not acted on the merits of the appeal.

II

Petitioner is entitled to a stay of execution in order to protect his right to appeal the District Court's denial of habeas corpus relief. This conclusion follows inexorably from the

District Judge's issuance of a certificate of probable cause to appeal, for "if an appellant persuades an appropriate tribunal that probable cause for an appeal exists, he *must* then be afforded an opportunity to address the underlying merits." *Garrison* v. *Patterson*, 391 U. S. 464, 466 (1968) *(per curiam)* (emphasis added).

A district judge's order denying an application for habeas corpus "shall be subject to review, on appeal," so long as a judge or Circuit Justice issues a certificate of probable cause. 28 U. S. C. § 2253. In order for the district court to issue a certificate of probable cause, a petitioner must make a "'substantial showing of the denial of [a] federal right.'" *Stewart* v. *Beto*, 454 F. 2d 268, 270, n. 2 (CA5 1971), cert. denied, 406 U. S. 925 (1972); *Harris* v. *Ellis*, 204 F. 2d 685, 686 (CA5 1953). Once the certificate has been issued, the habeas petitioner is entitled to a review and decision on the merits of his appeal, according to the decisions of this Court.

In *Nowakowski* v. *Maroney*, 386 U. S. 542 (1967) *(per curiam)*, we reviewed a Court of Appeals' summary denial of a habeas petition after the District Judge had issued a certificate of probable cause under 28 U. S. C. § 2253. We unanimously concluded that the Court of Appeals had erred in denying the right to appeal and held that "when a district judge grants such a certificate, the court of appeals *must* . . . proceed to a disposition of the appeal in accord with its ordinary procedure." *Id.*, at 543 (emphasis added). See *Carafas* v. *LaVallee*, 391 U. S. 234, 242 (1968) (*Nowakowski* requires that appeal be duly considered on its merits where a certificate of probable cause has been issued).

Our decision in *Garrison* v. *Patterson*, *supra*, is particularly relevant. There, a habeas petitioner was under sentence of death for murder. The District Court had denied a certificate of probable cause but had granted a stay of execution to allow time to appeal from that denial. The petitioner then requested that the Court of Appeals issue the certificate and also requested from that court a further stay of execu-

tion. After a hearing, the Court of Appeals issued an order granting the certificate of probable cause. At the same time, however, the court simply affirmed the District Court's denial of habeas corpus without receiving further submissions on the merits. JUSTICE WHITE, sitting as Circuit Justice, granted a stay of execution pending review by this Court. Relying on *Nowakowski*, the full Court reversed the judgment of the Court of Appeals and remanded for further consideration of Garrison's appeal on the merits. Moreover, the Court continued the stay of execution pending the disposition of the appeal. 391 U. S., at 464.

The Courts of Appeals have consistently followed the mandate of *Nowakowski* that a court of appeals must review the merits of an appeal when a certificate of probable cause has been issued. See, *e. g.*, *Dobbert* v. *Strickland*, 670 F. 2d 938, 939 (CA11 1982) (upon issuance of the certificate "[a] review on the merits is required"); *Gross* v. *Bishop*, 377 F. 2d 492, 492 (CA8 1967) (when the certificate is issued, the court of appeals "must review"). As then-Judge Blackmun stated, *Nowakowski* requires that "when the district court issue[s] the certificate *the appellate court must indulge in a full review.*" Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases, 43 F. R. D. 343, 351 (1967) (emphasis added).

As previously noted, in this case the District Court granted a certificate of probable cause to appeal on November 9, 1982. On November 12 petitioner applied to the Fifth Circuit for a stay of execution pending his appeal to that court. On November 17 the State opposed the stay of execution. The State also requested that the court require an expedited briefing schedule and determine the merits of the appeal as soon as possible, but the Court of Appeals did not grant the request. Instead, after hearing oral argument on the application for stay on November 26, the court that same day simply denied the stay in a one-paragraph order.

On this record it is manifest that the Court of Appeals did not "proceed to a disposition of the appeal," *Nowakowski*, *supra*, at 543, and that it clearly failed to afford petitioner an opportunity "to make his argument on the underlying issues in full." *Garrison*, *supra*, at 467, n. 2. Indeed, the lower court did not even order briefing on the merits under an expedited schedule as permitted by its own rules. In the absence of the appellate review that must follow from the grant of a certificate of probable cause, a stay of execution is required. Any other conclusion would eviscerate the prior holdings of this Court as to the significance of the issuance of a certificate of probable cause. "[I]f there is probable cause for the appeal it would be a mockery of federal justice to execute [petitioner] pending its consideration." *Fouquette* v. *Bernard*, 198 F. 2d 96, 97 (CA9 1952) (Denman, C. J.).

III

For the foregoing reasons, we would grant the application for a stay of execution.

No. 88, Orig. CALIFORNIA *v.* TEXAS ET AL. Motion of plaintiff for issuance of a preliminary injunction granted. Comments by counsel for the defendants concerning the form of the proposed order submitted by the plaintiff are to be filed with the Court and served upon opposing counsel and the Special Master on or before December 8, 1982. [For earlier order herein, see, *e. g.*, *ante*, p. 963.]

No. 81–1889. PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK *v.* MID-LOUISIANA GAS CO. ET AL.;

No. 81–1958. ARIZONA ELECTRIC POWER COOPERATIVE, INC. *v.* MID-LOUISIANA GAS CO. ET AL.;

No. 81–2042. MICHIGAN *v.* MID-LOUISIANA GAS CO. ET AL.; and

No. 82–19. FEDERAL ENERGY REGULATORY COMMISSION *v.* MID-LOUISIANA GAS CO. ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 820.] Motion of Edmund G.

Brown, Jr., Governor of California, for leave to file a brief as *amicus curiae* granted.

No. 81–2337. BLOCK, SECRETARY OF AGRICULTURE, ET AL. *v.* NORTH DAKOTA EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS. C. A. 8th Cir. [Certiorari granted, *ante*, p. 820.] Motion of North Dakota and *amicus curiae* California for divided argument to permit California to present oral argument as *amicus curiae* and for additional time for argument denied.

No. 82–56. SIMMONS ET AL. *v.* SEA-LAND SERVICES, INC., ET AL., *ante*, p. 931. Respondents are requested to file a response to the petition for rehearing within 30 days.

No. 82–131. JONES & LAUGHLIN STEEL CORP. *v.* PFEIFER. C. A. 3d Cir. [Certiorari granted, *ante*, p. 821.] Motion of Alcoa Steamship Co., Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 82–167. CHAPPELL ET AL. *v.* WALLACE ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 966.] Motion for appointment of counsel granted, and it is ordered that John Murcko, Esquire, of Oakland, Cal., be appointed to serve as counsel for respondents in this case.

No. 82–268. FIRST PENNSYLVANIA BANK, N.A. *v.* LANCASTER COUNTY TAX CLAIM BUREAU ET AL. Sup. Ct. Pa. Motion of appellee Della Becker to expedite consideration of the statement as to jurisdiction denied.

No. 82–5580. IN RE DAVIS. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 82–5576. PICKETT ET AL. *v.* BROWN ET AL. Appeal from Sup. Ct. Tenn. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 638 S. W. 2d 369.

Certiorari Granted

No. 82–411. NEWPORT NEWS SHIPBUILDING & DRY DOCK CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 4th Cir. Certiorari granted. Reported below: 682 F. 2d 113.

No. 82–342. PHILKO AVIATION, INC. *v.* SHACKET ET UX. C. A. 7th Cir. Certiorari granted limited to Question A presented by the petition. Reported below: 681 F. 2d 506.

Certiorari Denied. (See also Nos. 82–638, 82–5678, and A–504, *supra.*)

No. 81–2219. TRAN QUI THAN *v.* REGAN, SECRETARY OF THE TREASURY. C. A. 9th Cir. Certiorari denied. Reported below: 658 F. 2d 1296.

No. 82–137. LAMMERS *v.* BOYDEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 443.

No. 82–188. OKLAHOMA *v.* HARRIS. Ct. Crim. App. Okla. Certiorari denied. Reported below: 645 P. 2d 1036.

No. 82–260. ELLIS ET AL. *v.* JUDGE OF THE PUTNAM CIRCUIT COURT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 669 F. 2d 510.

No. 82–303. CALLICO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 679 F. 2d 249.

No. 82–326. MAHANNA *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 415 So. 2d 1386.

No. 82–368. HUDSON FARMS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 681 F. 2d 1105.

No. 82–422. BIERWIRTH ET AL. *v.* DONOVAN, SECRETARY OF LABOR. C. A. 2d Cir. Certiorari denied. Reported below: 680 F. 2d 263.

No. 82–437. COUNTY OF MAHNOMEN, MINNESOTA, ET AL. *v.* WHITE EARTH BAND OF CHIPPEWA INDIANS ET AL.; and

No. 82–635. ALEXANDER ET AL. *v.* WHITE EARTH BAND OF CHIPPEWA INDIANS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 683 F. 2d 1129.

No. 82–489. TEMORA TRADING CO., LTD. *v.* PERRY, TRUSTEE. Sup. Ct. Nev. Certiorari denied. Reported below: 98 Nev. 229, 645 P. 2d 436.

No. 82–498. ALVESTAD, REPRESENTATIVE OF THE ESTATE OF ALVESTAD, ET AL. *v.* MONSANTO CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 671 F. 2d 908.

No. 82–595. DEAN *v.* ST. BERNARD PARISH SCHOOL BOARD. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 414 So. 2d 862.

No. 82–642. FRANKS *v.* NATIONAL RAILROAD PASSENGER CORP., AKA AMTRAK. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 820.

No. 82–645. REPUBLIC NATIONAL LIFE INSURANCE CO. ET AL. *v.* SPARKS ET AL. Sup. Ct. Ariz. Certiorari denied. Reported below: 132 Ariz. 529, 647 P. 2d 1127.

No. 82–656. POMEROY *v.* SOUTHERN BELL TELEPHONE & TELEGRAPH CO. ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 410 So. 2d 647.

No. 82–663. KARAM ET AL. *v.* ALLSTATE INSURANCE CO. ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 70 Ohio St. 2d 227, 436 N. E. 2d 1014.

No. 82–664. KARAPINKA *v.* UNION CARBIDE CORP. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 822.

No. 82–669. SOFFER *v.* CITY OF COSTA MESA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 901.

No. 82–670. HOWARD *v.* CENTRAL OF GEORGIA RAILROAD CO. Sup. Ct. Ga. Certiorari denied. Reported below: 249 Ga. 713, 293 S. E. 2d 346.

No. 82–673. GIANNI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 678 F. 2d 956.

No. 82–697. O'CONNOR *v.* NEVADA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 686 F. 2d 749.

No. 82–700. BURRUS *v.* UNITED TELEPHONE COMPANY OF KANSAS, INC. C. A. 10th Cir. Certiorari denied. Reported below: 683 F. 2d 339.

No. 82–723. MCCLATCHY NEWSPAPERS, DBA THE SACRAMENTO BEE *v.* CENTRAL VALLEY TYPOGRAPHICAL UNION NO. 46, INTERNATIONAL TYPOGRAPHICAL UNION. C. A. 9th Cir. Certiorari denied. Reported below: 686 F. 2d 731.

No. 82–726. CEL-A-PAK *v.* CALIFORNIA AGRICULTURAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 680 F. 2d 664.

No. 82–730. EAGLE *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (AMERICAN TELEPHONE & TELEGRAPH CO., REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 82–757. COTHRAN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 681 F. 2d 817.

No. 82–763. PROVENZANO *v.* UNITED STATES; and
No. 82–765. COTLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 194.

No. 82–769. TUCKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 686 F. 2d 230.

No. 82–780. REAGAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 843.

No. 82–5146. KING *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 82–5160. CONNOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 889.

No. 82–5192. DREW *v.* U. S. DEPARTMENT OF THE NAVY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 217 U. S. App. D. C. 344, 672 F. 2d 197.

No. 82–5247. GREEN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 680 F. 2d 520.

No. 82–5313. GRIFFIN *v.* ROSE, WARDEN, TENNESSEE STATE PENITENTIARY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 561.

No. 82–5314. BRAMBLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 680 F. 2d 590.

No. 82–5339. BOWMAN *v.* UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL PRISON SYSTEM. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 876.

No. 82–5440. SISK ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 685 F. 2d 993.

No. 82–5443. EVANS *v.* FENTON, SUPERINTENDENT, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 82–5529. CRUZ *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 82–5538. PAGE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 249 Ga. 648, 292 S. E. 2d 850.

No. 82–5540. MILLER *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 677 F. 2d 1080.

No. 82–5543. LEGG *v.* FAYETTE COUNTY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 883.

No. 82–5546. KNIGHT *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 82–5547. CHRISTIAN *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 82–5548. WHITE *v.* ELLISON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 688 F. 2d 836.

No. 82–5551. HERMAN *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 685 F. 2d 435.

No. 82–5553. IN RE FIACCO. C. C. P. A. Certiorari denied. Reported below: 681 F. 2d 823.

No. 82–5554. CRONIC *v.* CHAMBERS LUMBER CO. Sup. Ct. Ga. Certiorari denied. Reported below: 249 Ga. 722, 292 S. E. 2d 852.

No. 82–5557. SALAH *v.* REDMAN, SUPERINTENDENT, DELAWARE CORRECTIONAL CENTER, ET AL. C. A. 3d Cir. Certiorari denied.

No. 82–5561. MILLER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 82–5563. ROBINSON *v.* JEFFES, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION, ET AL. C. A. 3d Cir. Certiorari denied.

No. 82–5568. READ *v.* DELAWARE STATE BAR ASSN. ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 452 A. 2d 651.

No. 82–5572. BRYANT *v.* CHERRY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 687 F. 2d 48.

No. 82–5636. DANIELS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 418 So. 2d 185.

No. 82–5653. ANTONELLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 82–5656. SLOAN *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 82–5658. MULVILLE *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 8th Cir. Certiorari denied. Reported below: 691 F. 2d 504.

No. 82–5659. LAY *v.* BETHLEHEM STEEL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 681 F. 2d 814.

No. 82–5662. HEGWOOD *v.* MARTIN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 82–5667. SEIDERS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 82–5669. MAURICIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 685 F. 2d 143.

No. 82–5671. DUARTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 691 F. 2d 508.

No. 82–5674. VALDOVINOS-CORTEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 691 F. 2d 509.

No. 82–5677. HILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 688 F. 2d 18.

No. 82–5691. HANSEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 691 F. 2d 508.

No. 81–2296. NATIONAL FOOTBALL LEAGUE ET AL. *v.* NORTH AMERICAN SOCCER LEAGUE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 670 F. 2d 1249.

JUSTICE REHNQUIST, dissenting.

This lawsuit is an attack under § 1 of the Sherman Act, 26 Stat., as amended, 15 U. S. C. § 1, by the North American Soccer League (NASL) and most of its member teams on the cross-ownership rule imposed by the National Football League (NFL) on the owners of its member teams. The rule, in essence, prohibits NFL owners from obtaining a controlling interest in any other major league professional sports team. The Court of Appeals found that the rule violates § 1 under the Rule of Reason, and enjoined the NFL from enforcing it.

The NASL's complaint alleged that the cross-ownership rule excludes it from a substantial share of the market for "professional sports capital and entrepreneurial skill." The NFL contended that the relevant market was for capital generally, and that the rule does not exclude anyone from a significant share of the capital market. The District Court decided that the relevant market is in between—a market for "sports capital"—but did not define precisely the extent of this market. It then decided that any competition between the NFL and the NASL in that market is competition between two single economic entities. 505 F. Supp. 659 (SDNY 1980). It thus held that § 1 of the Sherman Act does not apply because the NFL is a single economic entity that cannot combine or conspire with itself. *Id.*, at 689.

The Court of Appeals rejected this view. 670 F. 2d 1249 (CA2 1982). It thought "[t]he characterization of NFL as a single economic entity does not exempt from the Sherman Act an agreement between its members to restrain competition." *Id.*, at 1257. See *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 141–142 (1968); *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 598 (1951). The Court of Appeals thought the objective of the cross-ownership rule is to protect individual teams as well as the league from competition.

At this point, the Court of Appeals had dealt with the District Court's entire holding. The District Court expressly declined to consider whether the cross-ownership rule violates the Rule of Reason. 505 F. Supp., at 689. The application of the Rule of Reason is to be made by "the factfinder [who] weighs all of the circumstances of a case." *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 49 (1977). See, *e. g.*, *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F. 2d 263, 302 (CA2 1979). The proper course for the Court of Appeals thus would have been to remand for findings by the District Court. However, it proceeded to decide the merits on its own.

The Court of Appeals first decided that there is a market for "sports capital and skill," which is a submarket of the capital market. 670 F. 2d, at 1260. "[A]n owner may in practice sell his franchise only to a relatively narrow group of eligible purchasers, not to any financier." *Ibid.* It did not define this market except to say that it is "not limited to existing or potential major sports team owners," but "is relatively limited in scope and is only a small fraction of the total capital funds market." *Ibid.* It is not clear whether the Court of Appeals was attempting to define the relevant market differently than did the District Court. If it was, it should have applied the clearly-erroneous standard to the District Court's finding rather than substituting its own judgment. *Associated Radio Service Co.* v. *Page Airways, Inc.*, 624 F. 2d 1342, 1348–1349 (CA5 1980); *Martin B. Glauser Dodge Co.* v. *Chrysler Corp.*, 570 F. 2d 72, 82, n. 18 (CA3 1977); *Telex Corp.* v. *International Business Machines Corp.*, 510 F. 2d 894, 915 (CA10 1975) *(per curiam)*. See *Pullman-Standard* v. *Swint*, 456 U. S. 273, 287 (1982).

The Court of Appeals then proceeded to apply the Rule of Reason. There is no dispute as to the proper statement of the Rule. "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918).

On the basis of the facts as described by the Court of Appeals I seriously doubt whether the Rule of Reason was violated. The Court of Appeals held the cross-ownership rule is anticompetitive because it restricts the access of NASL teams to sports capital, and that this anticompetitive effect outweighs any procompetitive effects of the rule. It rejected the argument that the rule enables NFL owners to compete effectively in the entertainment market by assuring them of the undivided loyalty of fellow owners.

I believe the Court of Appeals gave too little weight to the procompetitive features of the cross-ownership rule and engaged in excessive speculation as to its anticompetitive effect.

The NFL owners are joint venturers who produce a product, professional football, which competes with other sports and other forms of entertainment in the entertainment market. Although individual NFL teams compete with one another on the playing field, they rarely compete in the marketplace. The NFL negotiates its television contracts, for example, in a single block. The revenues from broadcast rights are pooled. Indeed, the only interteam competition occurs when two teams are located in one major city, such as New York or Los Angeles. These teams compete with one another for home game attendance and local broadcast revenues. In all other respects, the league competes as a unit against other forms of entertainment.

This arrangement, like the arrangement in *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1 (1979), is largely a matter of necessity. If the teams were entirely independent, there could be no consistency of staffing, rules, equipment, or training. All of these are at least arguably necessary to permit the league to create an appealing product in the entertainment market. Thus, NFL football is a different product from what the NFL teams could offer independently, and the NFL, like ASCAP, is "not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its [product], of which the individual [teams] are raw material. [The NFL], in short, made a market in which individual [teams] are inherently unable to compete fully effectively." *Id.*, at 22–23.

The cross-ownership rule, then, is a covenant by joint venturers who produce a single product not to compete with one another. The rule governing such agreements was set out over 80 years ago by Judge (later Chief Justice) Taft: A covenant not to compete is valid if "it is merely ancillary to the

main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 282 (CA6 1898), aff'd as modified, 175 U. S. 211 (1899).

The cross-ownership rule seems to me to meet this test. Its purposes are to minimize disputes among the owners and to prevent some owners from using the benefits of their association with the joint venture to compete against it. Participation in the league gives the owner the benefit of detailed knowledge about market conditions for professional sports, the strength and weaknesses of the other teams in the league, and the methods his co-venturers use to compete in the marketplace. It is only reasonable that the owners would seek to prevent their fellows from giving these significant assets, which are in some respects analogous to trade secrets, to their competitors.

The courts have not, to my knowledge, prohibited businesses from requiring employees to agree not to compete with their employer while they remain employed. See, *e. g.*, *Lektro-Vend Corp.* v. *Vendo Co.*, 660 F. 2d 255 (CA7 1981), cert. denied, 455 U. S. 921 (1982). I cannot believe the Court of Appeals would expect a law firm to countenance its partners working part time at a competing firm while remaining partners. Indeed, this Court has noted that the Rule of Reason does not prohibit a seller of a business from contracting not to compete with the buyer in a reasonable geographic area for a reasonable time *after* he has terminated his relationship with the business. *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 688–689 (1978) (citing *Mitchel* v. *Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711)). It is difficult for me to understand why the cross-ownership rule is not valid under this standard.

The anticompetitive element of the restraint, as found by the Court of Appeals, is that competitors are denied access

to "sports capital and skill." In defining this market, the Court of Appeals noted that although capital is fungible, the skills of successful sports entrepreneurs are not. This entrepreneural skill, however, is precisely what each NFL owner, as co-venturer, contributes to every other owner.

The validity of covenants not to compete does not depend upon the availability to competing firms of similarly qualified individuals, but rests on the principle that competitors may seek to maintain their ability to compete effectively without running afoul of the antitrust laws. The Court of Appeals seems to me to have implicitly adopted the view that businesses must arrange their affairs so as to make it possible for would-be competitors to compete successfully. This Court has explicitly stated the contrary: The inquiry under the Rule of Reason is concerned only with "impact on competitive conditions." *Professional Engineers*, *supra*, at 688, 690. "The antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.'" *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 488 (1977) (quoting *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 320 (1962)) (emphasis in original). Indeed, the Second Circuit has applied this principle in the past: "We should always be mindful lest the Sherman Act be invoked perversely in favor of those who seek protection against the rigors of competition." *Berkey Photo*, 603 F. 2d, at 273. The Court of Appeals should have been more mindful of its own admonition.

The Court of Appeals also faulted the NFL for failing to show that its restriction was as narrow as possible. Although the Court of Appeals did not cite any authority for this objection, it seems to be relying on the requirement of *Addyston*, *supra*, that the restraint be "necessary to protect the covenantee." 85 F., at 282. The Court of Appeals has taken this statement too far by adopting the least restrictive alternative analysis that is sometimes used in constitutional law. The antitrust laws impose a standard of reasonableness, not a standard of absolute necessity. The Court of Ap-

peals ignored its own holding that the proper standard is that the constraint be "'reasonably necessary.'" *Berkey Photo*, *supra*, at 303 (quoting *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F. 2d 1230, 1249 (CA3 1975)). Accord, *Lektro-Vend*, *supra*, at 265. The Court of Appeals also ignored its own holding that the possibility of less restrictive alternatives is only one among many proper considerations for the factfinder. *Berkey Photo*, *supra*, at 303.

In any event, it seems to me that the cross-ownership rule is narrowly drawn to vindicate the legitimate interests described above. The owners are limited only in areas where the special knowledge and skills provided by their co-owners can be expected to be of significant value. They are not prohibited from competing with the NFL in areas of the entertainment market other than professional sports. An owner may invest in television movies, rock concerts, plays, or anything else that suits his fancy.

It simply does not appear that the positive effects of the challenged restraint in helping the NFL to compete in the economic marketplace are outweighed by their negative effects on competition. The antitrust laws do not require the NFL to operate so as to make it easier for another league to compete against it. I fear that, under the decision below, the maxim that the antitrust laws exist to protect competition, not competitors, may be reduced to a dead letter.

I would grant certiorari.

No. 82–5308. OTEY *v.* NEBRASKA. Sup. Ct. Neb.; and No. 82–5542. BROWN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: No. 82–5308, 212 Neb. 103, 321 N. W. 2d 453; No. 82–5542, 306 N. C. 151, 293 S. E. 2d 569.

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.

Rehearing Denied. (See also No. A–504, *supra.*)

No. 81–2261. KIM ET AL. *v.* TAYLOR ET AL., *ante*, p. 833;

No. 82–84. GENS ET AL. *v.* UNITED STATES, *ante*, p. 906;

No. 82–487. STULBACH *v.* UNITED STATES PATENT AND TRADEMARK OFFICE, *ante*, p. 972;

No. 82–514. MORTON *v.* PROVIDENCE HOSPITAL, *ante*, p. 945;

No. 82–5372. MA *v.* COMMUNITY BANK, *ante*, p. 962;

No. 82–5386. RESPRES *v.* GEORGIA, *ante*, p. 975; and

No. 82–5488. WAYLAND *v.* INTERNAL REVENUE SERVICE ET AL., *ante*, p. 984. Petitions for rehearing denied.

DECEMBER 13, 1982

Appeals Dismissed

No. 81–583. BENEFICIAL FINANCE OF KANSAS, INC. *v.* UNITED STATES ET AL. Appeal from C. A. 10th Cir. dismissed as moot. Reported below: 642 F. 2d 1193.

No. 82–640. PALMGREN ET AL. *v.* KANSAS EX REL. MURRAY, COUNTY ATTORNEY OF THOMAS COUNTY, KANSAS, ET AL. Appeal from Sup. Ct. Kan. dismissed for want of substantial federal question. Reported below: 231 Kan. 524, 646 P. 2d 1091.

No. 82–691. PERLMAN ET AL. *v.* ATTORNEY GENERAL OF NEW JERSEY ET AL. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. Reported below: 90 N. J. 361, 447 A. 2d 1335.

No. 82–5074. BOVE *v.* NEW JERSEY. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. Reported below: 91 N. J. 216, 450 A. 2d 544.

No. 82–5630. TAYLOR *v.* TEXAS. Appeal from Ct. App. Tex., 2d Sup. Jud. Dist., dismissed for want of substantial federal question. Reported below: 632 S. W. 2d 697.

Certiorari Granted—Vacated and Remanded

No. 81–1866. COMMONWEALTH NATIONAL BANK *v.* ASHE ET AL., T/A C&S FUEL SERVICE, ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Security Industrial Bank, ante*, p. 70. Reported below: 669 F. 2d 105.

Miscellaneous Orders

No. — – ——. FEDERAL GRAND JURY ET AL. *v.* UNITED STATES ATTORNEY ET AL. Motion to direct the Clerk to file the petition for writ of certiorari that does not comply with the Rules of this Court and to waive payment of docket fee denied.

No. A–469 (82–5772). SHAFFER ET AL. *v.* BOARD OF SCHOOL DIRECTORS OF THE ALBERT GALLATIN AREA SCHOOL DISTRICT ET AL. C. A. 3d Cir. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. D–268. IN RE DISBARMENT OF CYPHERS. Disbarment entered. [For earlier order herein, see 456 U. S. 957.]

No. D–275. IN RE DISBARMENT OF BOBBITT. Disbarment entered. [For earlier order herein, see 457 U. S. 1103.]

No. D–283. IN RE DISBARMENT OF NADEL. Disbarment entered. [For earlier order herein, see 458 U. S. 1126.]

No. D–287. IN RE DISBARMENT OF BONDS. Disbarment entered. [For earlier order herein, see 458 U. S. 1127.]

No. D–289. IN RE DISBARMENT OF BRISBOIS. Disbarment entered. [For earlier order herein, see 458 U. S. 1127.]

No. D–303. IN RE DISBARMENT OF OTIS. It is ordered that Sheldon P. Otis, of Detroit, Mich., be suspended from

the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–304. IN RE DISBARMENT OF MCCONNELL. It is ordered that W. Stephen McConnell, of Annandale, Va., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–305. IN RE DISBARMENT OF WOOD. It is ordered that Gary M. Wood, of Surfside Beach, S. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–306. IN RE DISBARMENT OF PHILLIPS. It is ordered that Duncan B. Phillips, of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 88, Orig. CALIFORNIA *v.* TEXAS ET AL. It is hereby ordered that all parties to this action, and their officers, agents, servants, employees, attorneys, and all people in active concert with them, be and hereby are restrained from instituting or prosecuting any proceeding in any state or United States court, other than this Court, which will or would lead to a determination of the domicile of Howard Robard Hughes, Jr., for death tax purposes pending further order of this Court. [For earlier order herein, see, *e. g.*, *ante*, p. 1067.]

No. 81–523. CONTAINER CORPORATION OF AMERICA *v.* FRANCHISE TAX BOARD. Ct. App. Cal., 1st App. Dist. [Probable jurisdiction noted, 456 U. S. 960.] Motion of ap-

pellee for divided argument to permit Multistate Tax Commission to present oral argument as *amicus curiae* denied. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 81–1251. CONNICK, DISTRICT ATTORNEY IN AND FOR THE PARISH OF ORLEANS, LOUISIANA *v.* MYERS. C. A. 5th Cir. [Certiorari granted, 455 U. S. 999.] Motion of petitioner for leave to file a supplemental brief after argument granted.

No. 81–1271. FALLS CITY INDUSTRIES, INC. *v.* VANCO BEVERAGE, INC. C. A. 7th Cir. [Certiorari granted, 455 U. S. 988.] Motion of respondent for leave to file a supplemental brief after argument granted.

No. 81–1891. MORRISON-KNUDSEN CONSTRUCTION CO. ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 820.] Motion of the Solicitor General for divided argument granted.

No. 81–2147. ARIZONA ET AL. *v.* SAN CARLOS APACHE TRIBE OF ARIZONA ET AL.; ARIZONA ET AL. *v.* NAVAJO TRIBE OF INDIANS ET AL.; and

No. 81–2188. MONTANA ET AL. *v.* NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 821.] Motion of petitioners in No. 81–2147 for review of Clerk's action granting respondents' request for an extension of time for filing briefs on the merits denied. Motion of the Solicitor General for divided argument granted. Motion of petitioners in No. 81–2188 for divided argument granted. Motion of petitioners in No. 81–2188 for additional time for oral argument denied. Motion of petitioners in No. 81–2147 for divided argument granted, and request for additional time for oral argument denied. Motion of Wyoming for leave to participate in oral argument as *amicus curiae* and for additional time for argument denied.

No. 81–2408. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC, ET AL. *v.* FLOWERS ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 1034.] Motion of respondents for leave to proceed further herein *in forma pauperis* granted.

No. 82–131. JONES & LAUGHLIN STEEL CORP. *v.* PFEIFER. C. A. 3d Cir. [Certiorari granted, *ante*, p. 821.] Motion of petitioner and *amici curiae* Alcoa Steamship Co., Inc., et al. for additional time for oral argument denied. Motion of *amici curiae* Alcoa Steamship Co., Inc., et al. for divided argument denied.

No. 82–195. MUELLER ET AL. *v.* ALLEN ET AL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 820.] Motion of United Americans for Public Schools for leave to file a brief as *amicus curiae* granted.

No. 82–5738. IN RE KAHEY ET AL. Petition for writ of habeas corpus denied.

No. 82–5606. IN RE MAGEE. Petition for writ of mandamus denied.

Probable Jurisdiction Postponed

No. 82–695. FRANCHISE TAX BOARD OF CALIFORNIA *v.* CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA ET AL. Appeal from C. A. 9th Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 679 F. 2d 1307.

Certiorari Granted

No. 82–5279. DIXSON *v.* UNITED STATES; and

No. 82–5331. HINTON *v.* UNITED STATES. C. A. 7th Cir. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 683 F. 2d 195.

Certiorari Denied

No. 82–155. CREDITHRIFT OF AMERICA, INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 674 F. 2d 796.

No. 82–409. HECHT ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 687 F. 2d 577.

No. 82–435. COMMONWEALTH EDISON CO. ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 219 U. S. App. D. C. 327, 677 F. 2d 915.

No. 82–445. MIZRAHI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 849.

No. 82–479. ORR, GOVERNOR OF INDIANA, ET AL. *v.* BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 677 F. 2d 1185.

No. 82–549. VICTORY BAPTIST TEMPLE, INC. *v.* INDUSTRIAL COMMISSION OF OHIO ET AL. Ct. App. Ohio, Lorain County. Certiorari denied. Reported below: 2 Ohio App. 3d 418, 442 N. E. 2d 819.

No. 82–552. UNITED STATES *v.* 156.81 ACRES OF LAND, MORE OR LESS, SITUATE IN COUNTY OF MARIN, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 2d 336.

No. 82–631. TIMMS, DBA PETROL EXPRESS, ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 678 F. 2d 831.

No. 82–651. SANTA FE ENGINEERS, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 230 Ct. Cl. 1048.

No. 82–672. BARNES *v.* SANZO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 680 F. 2d 3.

No. 82–676. FERREN *v.* HENRICHSEN. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 82–678. ITEL CORP. *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 448 A. 2d 261.

No. 82–686. COSTANTINI, DBA UNITED TRAVEL SERVICE ET AL. *v.* TRANS WORLD AIRLINES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 681 F. 2d 1199.

No. 82–688. CAPITOL INDUSTRIES-EMI, INC. *v.* BENNETT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 681 F. 2d 1107.

No. 82–689. COMEAU ET UX. *v.* CITY OF BROOKSIDE VILLAGE ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 633 S. W. 2d 790.

No. 82–692. SHELL OIL CO. ET AL. *v.* WILLIAMS. C. A. 5th Cir. Certiorari denied. Reported below: 677 F. 2d 506.

No. 82–693. ILLINOIS *v.* STRUEBIN, ANCILLARY ADMINISTRATOR OF THE ESTATE OF STRUEBIN, ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 322 N. W. 2d 84.

No. 82–694. COFFRAN ET VIR *v.* HITCHCOCK CLINIC, INC. C. A. 1st Cir. Certiorari denied. Reported below: 683 F. 2d 5.

No. 82–699. CHAMPION PRODUCTS INC. *v.* UNIVERSITY OF PITTSBURGH. C. A. 3d Cir. Certiorari denied. Reported below: 686 F. 2d 1040.

No. 82–710. KAPLAN *v.* BLACK. C. A. 1st Cir. Certiorari denied. Reported below: 692 F. 2d 745.

No. 82–711. RAILWAY LABOR EXECUTIVES' ASSN. *v.* SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AU-

THORITY. Sp. Ct. R. R. R. A. Certiorari denied. Reported below: 547 F. Supp. 884.

No. 82–712. IOWA BEEF PROCESSORS, INC. *v.* UNITED FOOD & COMMERCIAL WORKERS, LOCAL NO. 222, AFL–CIO. C. A. 8th Cir. Certiorari denied. Reported below: 683 F. 2d 283.

No. 82–717. TERRACE WEST, INC. *v.* CITY OF PLATTSBURGH, NEW YORK, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 87 App. Div. 2d 733, 449 N. Y. S. 2d 343.

No. 82–718. STATE FARM MUTUAL AUTOMOBILE INSURANCE, AKA STATE FARM FIRE & CASUALTY CO. *v.* BELL. C. A. 5th Cir. Certiorari denied. Reported below: 680 F. 2d 435.

No. 82–721. GABRIEL *v.* MISSOURI PACIFIC RAILROAD COMPANY OF MISSOURI ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 820.

No. 82–724. CHILDREN OF THE CHIPPEWA, OTTAWA, AND POTAWATOMY TRIBES, ET AL. *v.* REGENTS OF THE UNIVERSITY OF MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 104 Mich. App. 482, 305 N. W. 2d 522.

No. 82–760. BALEJKO ET AL. *v.* MILTON HOSPITAL, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 685 F. 2d 422.

No. 82–764. WHITE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 450.

No. 82–789. WILKETT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 689 F. 2d 154.

No. 82–802. MARTIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 682 F. 2d 506.

No. 82–806. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 680 F. 2d 1145.

No. 82–807. FIELDS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 689 F. 2d 122.

No. 82–824. STANSBURY, PERSONAL REPRESENTATIVE OF THE ESTATE OF STANSBURY *v.* CHEVRON U.S.A. INC. C. A. 5th Cir. Certiorari denied. Reported below: 681 F. 2d 948.

No. 82–5131. CONSAGRA *v.* FLORIDA PAROLE AND PROBATION COMMISSION. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 415 So. 2d 1363.

No. 82–5271. ARMSTRONG *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 31 Wash. App. 1031.

No. 82–5283. GOLDBERG *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 88 App. Div. 2d 622, 450 N. Y. S. 2d 642.

No. 82–5290. WATTS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 891.

No. 82–5375. GOODWIN *v.* DAVIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 681 F. 2d 813.

No. 82–5423. LEVESQUE ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 681 F. 2d 75.

No. 82–5427. PRIDE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 82–5513. BACHELER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 825.

No. 82–5562. PATRICK *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 249 Ga. 708, 293 S. E. 2d 329.

No. 82–5577. TUBWELL *v.* HARGETT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 683 F. 2d 1371.

No. 82–5578. THOMAS *v.* MANSON. C. A. 2d Cir. Certiorari denied.

No. 82–5581. SELLNER *v.* PRINCE GEORGE'S COUNTY, MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 685 F. 2d 431.

No. 82–5582. CANDELARIA *v.* QUINLAN, CORRECTIONAL OFFICER, ET AL. C. A. 10th Cir. Certiorari denied.

No. 82–5584. CURTIS *v.* CAMPBELL-TAGGART, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 687 F. 2d 336.

No. 82–5586. BRADLEY *v.* CITY OF BERKELEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 440.

No. 82–5594. SINGER *v.* TELE-FEATURES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 446.

No. 82–5596. SOTO *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 82–5599. CLARK ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 89 App. Div. 2d 820, 453 N. Y. S. 2d 525.

No. 82–5602. JENKINS *v.* OREGON DEPARTMENT OF ADULT AND FAMILY SERVICES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 846.

No. 82–5603. HOLSEY *v.* KELLER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 882.

No. 82–5604. WILSON *v.* WHITE. C. A. 4th Cir. Certiorari denied. Reported below: 688 F. 2d 836.

No. 82–5605. McRORIE *v.* OSHIRO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 691 F. 2d 507.

No. 82–5607. WATERS *v.* DUCKWORTH, WARDEN, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied.

No. 82–5622. LIPSCOMB *v.* STEWART ET AL. C. A. 11th Cir. Certiorari denied.

No. 82–5640. RAY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 683 F. 2d 1116.

No. 82–5655. STEBBING *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 51 Md. App. 753.

No. 82–5657. MORROW *v.* RAINES, SUPERINTENDENT, ARIZONA STATE PRISON, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 847.

No. 82–5664. LEGATO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 682 F. 2d 180.

No. 82–5686. RUSH *v.* UNITED STATES DEPARTMENT OF JUSTICE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 82–5702. PUCKETT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 692 F. 2d 663.

No. 82–5710. KIRSCH *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 292.

No. 82–5715. MAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 681 F. 2d 815.

No. 82–5728. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 691 F. 2d 508.

No. 81–982. FIRST NATIONAL BANK OF BOSTON (INTERNATIONAL) *v.* BANCO NACIONAL DE CUBA. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE and JUSTICE POWELL would grant certiorari. Reported below: 658 F. 2d 895.

No. 82–335. PEOPLE FOR FREE SPEECH AT SAC ET AL. *v.* UNITED STATES AIR FORCE ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 675 F. 2d 1010.

No. 82–497. ALBERTA GAS CHEMICALS, LTD. *v.* CELANESE CORP. ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 697 F. 2d 287.

No. 82–659. PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE *v.* GARDNER ET AL. C. A. 3d Cir. Motion of respondent Donald Eugene Gardner for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 685 F. 2d 106.

No. 82–5567. WILSON *v.* ZANT. Sup. Ct. Ga. Certiorari denied. Reported below: 249 Ga. 373, 290 S. E. 2d 442.

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 sentence in this case.

No. 82–5589. FLORES *v.* IBM CORP. C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 685 F. 2d 441.

Rehearing Denied

No. 81–6610. SCOTT *v.* UNITED STATES, 456 U. S. 994;

No. 81–6866. SETTLE ET AL. *v.* ESPIEFS, TRUSTEE, *ante*, p. 849; and

No. 81–6876. BLUE THUNDER *v.* UNITED STATES, *ante*, p. 850. Motions for leave to file petitions for rehearing denied.

No. 81–6904. ANONYMOUS *v.* O'BRIEN ET AL., *ante*, p. 968;

No. 82–88. IN RE RICE, *ante*, p. 903;

No. 82–123. TIMMONS *v.* ANDREWS ET AL., *ante*, p. 862;

No. 82–345. COOPER, CITY ATTORNEY OF SANTA ANA, CALIFORNIA *v.* MITCHELL BROTHERS' SANTA ANA THEATER ET AL., *ante*, p. 944;

No. 82–5344. MALLOY *v.* SULLIVAN, *ante*, p. 974;

No. 82–5425. KOMOROWSKI *v.* COLUMBIA GAS OF OHIO, INC., *ante*, p. 993; and

No. 82–5545. LONG *v.* UNITED STATES, *ante*, p. 994. Petitions for rehearing denied.

No. 82–431. LABAR ET AL. *v.* UNITED STATES, *ante*, p. 945. Petition of LaBar for rehearing denied. Petition of Romanowski for rehearing denied.

DECEMBER 17, 1982

Dismissal Under Rule 53

No. 82–776. PENNSYLVANIA STATE UNIVERSITY ET AL. *v.* AMERICAN FUTURE SYSTEMS, INC., ET AL. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 688 F. 2d 907.

DECEMBER 20, 1982

Dismissal Under Rule 53

No. 82–836. HOFF *v.* WASHINGTON. Ct. App. Wash. Certiorari dismissed under this Court's Rule 53. Reported below: 31 Wash. App. 809, 644 P. 2d 763.

DECEMBER 23, 1982

Miscellaneous Orders

No. 82–1022. ALABAMA FURNITURE CO. *v.* STILL, TRUSTEE, ET AL. C. A. 6th Cir. Motion of petitioner to ex-

pedite consideration of the petition for writ of certiorari denied.

No. 81–150. NORTHERN PIPELINE CONSTRUCTION CO. *v.* MARATHON PIPE LINE CO. ET AL.; and

No. 81–546. UNITED STATES *v.* MARATHON PIPE LINE CO. ET AL., 458 U. S. 50, and *ante*, p. 813. Application of the Solicitor General to further extend the stay of judgment denied.

JANUARY 7, 1983

Miscellaneous Order

No. A–556 (82–863). HASTINGS, UNITED STATES DISTRICT JUDGE *v.* UNITED STATES ET AL. C. A. 11th Cir. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

JANUARY 10, 1983

Appeals Dismissed

No. 82–563. GRANT-OLIVER CORP. ET AL. *v.* MOON AREA SCHOOL DISTRICT. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 498 Pa. 286, 446 A. 2d 234.

No. 82–743. LINCOLN CREDIT CO. ET AL. *v.* PEACH, CIRCUIT ATTORNEY OF THE CITY OF ST. LOUIS, MISSOURI, ET AL. Appeal from Sup. Ct. Mo. dismissed for want of substantial federal question. Reported below: 636 S. W. 2d 31.

No. 82–926. ST. MARIE *v.* IOWA. Appeal from Sup. Ct. Iowa dismissed for want of substantial federal question. Reported below: 322 N. W. 2d 76.

No. 82–5688. SCOTT ET AL. *v.* KIMERLING. Appeal from Sup. Ct. Ala. dismissed for want of substantial federal question.

No. 82–704. CLEVELAND ELECTRIC ILLUMINATING CO. *v.* PUBLIC UTILITIES COMMISSION OF OHIO ET AL. Appeal

from Sup. Ct. Ohio dismissed for want of properly presented federal question.

No. 82–744. COWGER *v.* MONGIN ET AL. Appeal from App. Div., Sup. Ct. N. Y., 3d Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 87 App. Div. 2d 932, 450 N. Y. S. 2d 81.

No. 82–5764. MEDLIN *v.* CITY AND BOROUGH OF SITKA. Appeal from Super. Ct. Alaska, 1st Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Vacated and Remanded on Appeal

No. 82–611. DONOVAN, SECRETARY OF LABOR *v.* BLITZ. Appeal from D. C. D. C. Judgment vacated and case remanded with instructions to dismiss the complaint as moot. Reported below: 538 F. Supp. 1119.

Certiorari Granted—Vacated and Remanded

No. 82–353. CITY OF LONG BEACH *v.* BOZEK. Sup. Ct. Cal. Certiorari granted, judgment vacated, and case remanded to the Supreme Court of California 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: 31 Cal. 3d 527, 645 P. 2d 137.

No. 82–458. TULARE LAKE CANAL CO. ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted, judgment of the Court of Appeals is vacated, and case is remanded to the United States District Court for the Eastern District of California with directions to dismiss the action as moot. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). Reported below: 677 F. 2d 713.

No. 82–820. BRIGHAM YOUNG UNIVERSITY *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari granted, judg-

ment vacated, and case remanded to consider the question of mootness presented by the memorandum for respondents filed December 8, 1982. Reported below: 679 F. 2d 1345.

Miscellaneous Orders

No. A–474. HANLON *v.* UNITED STATES. C. A. 2d Cir. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A–485 (82–1070). BENEDETTO *v.* UNITED STATES. C. A. 2d Cir. Application for stay, addressed to JUSTICE POWELL and referred to the Court, denied.

No. A–500. JAMES *v.* UNITED STATES. Application for bond, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–523 (82–891). PHOENIX UNION HIGH SCHOOL DISTRICT ET AL. *v.* UNITED STATES. C. A. 9th Cir. Application for stay, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied.

No. A–536. SEVERO *v.* UNITED STATES. C. A. 9th Cir. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–544. SOUTHERN PACIFIC TRANSPORTATION CO. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL.;

No. A–545. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. *v.* INTERSTATE COMMERCE COMMISSION; and

No. A–546. KANSAS CITY SOUTHERN RAILWAY CO. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. Applications for stay of an order of the Interstate Commerce Commission, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

No. 88, Orig. CALIFORNIA *v.* TEXAS ET AL. Plaintiff having submitted a Notice of Dismissal of Certain Defendants, dated August 12, 1982, and a Notice of Dismissal of an Additional Defendant, dated December 9, 1982, and all par-

ties having informed the Special Master that they do not oppose the dismissal of the defendants named in the Notices of Dismissal referred to, and the Special Master having recommended said dismissal by letter dated January 3, 1983, it is ordered that defendants William Rice Lummis, individually; Howard Hughes Gano; Doris Gano Wallace; Annette Gano Gragg; Janet Houstoun Davis; Aileen Lummis Russell; Annette Gano Lummis Neff; Frederick Rice Lummis; Sarah Houstoun Lindsey; Mrs. William Kent Gano, Executrix of the Estate of William Kent Gano; John McIntosh Houstoun; Margot Houstoun (Ritchie); James Wilkin Houstoun; Richard Alexander Houstoun; Southern National Bank of Houston, Independent Executor of the Estate of James Patrick Houstoun, Jr.; George Neff, Executor of the Estate of Annette Gano Lummis; Summa Corp.; Barbara Cameron; Elspeth Depould; Agnes Roberts; and Richard C. Gano, individually and as California General Administrator of the Estate of Howard R. Hughes, Jr., are dismissed from this action on the terms and conditions set forth in the Stipulation attached as Exhibit "A" to the Notice of Dismissal of Certain Defendants dated August 12, 1982, said Stipulation providing, *inter alia*, that each of said defendants (other than Summa Corp.) will be bound by a final judgment of this Court on the issue of domicile at death of Howard R. Hughes, Jr., for state death taxation purposes. [For earlier order herein, see, *e. g.*, *ante*, p. 1083.]

No. 80–1832. IMMIGRATION AND NATURALIZATION SERVICE *v.* CHADHA ET AL. C. A. 9th Cir. [Probable jurisdiction postponed, 454 U. S. 812];

No. 80–2170. UNITED STATES HOUSE OF REPRESENTATIVES *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 9th Cir. [Certiorari granted, 454 U. S. 812]; and

No. 80–2171. UNITED STATES SENATE *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 9th Cir. [Certiorari granted, 454 U. S. 812.] Motion of the Solicitor

General for leave to file a third supplemental brief after argument granted.

No. 81–984. FIRST NATIONAL CITY BANK *v.* BANCO PARA EL COMERCIO EXTERIOR DE CUBA. C. A. 2d Cir. [Certiorari granted, *ante*, p. 942.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 82–256. MICHIGAN *v.* LONG. Sup. Ct. Mich. [Certiorari granted, *ante*, p. 904.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 81–1180. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS *v.* NEW BANNER INSTITUTE, INC. C. A. 4th Cir. [Certiorari granted, 455 U. S. 1015.] Motion of the Solicitor General for leave to file a supplemental brief after argument granted.

No. 81–1251. CONNICK, DISTRICT ATTORNEY IN AND FOR THE PARISH OF ORLEANS, LOUISIANA *v.* MYERS. C. A. 5th Cir. [Certiorari granted, 455 U. S. 999.] Motion of respondent for leave to file a supplemental brief after argument granted.

No. 81–1717. AMERICAN BANK & TRUST CO. ET AL. *v.* DALLAS COUNTY ET AL.; BANK OF TEXAS ET AL. *v.* CHILDS ET AL.; and WYNNEWOOD BANK & TRUST ET AL. *v.* CHILDS ET AL. Ct. App. Tex., 5th Sup. Jud. Dist. [Certiorari granted, *ante*, p. 966.] Motions of Dale National Bank and American Bankers Association for leave to file briefs as *amici curiae* granted. JUSTICE O'CONNOR took no part in the consideration or decision of these motions.

No. 81–1985. EDWARD J. DEBARTOLO CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 904.] Motion of the Solicitor General for divided argument denied.

No. 81–1889. PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK *v.* MID-LOUISIANA GAS CO. ET AL.;

No. 81–1958. ARIZONA ELECTRIC POWER COOPERATIVE, INC. *v.* MID-LOUISIANA GAS CO. ET AL.;

No. 81–2042. MICHIGAN *v.* MID-LOUISIANA GAS CO. ET AL.; and

No. 82–19. FEDERAL ENERGY REGULATORY COMMISSION *v.* MID-LOUISIANA GAS CO. ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 820.] Motion of Public Service Commission of New York for divided argument denied. Motion of Arizona Electric Power Cooperative, Inc., for divided argument denied.

No. 82–34. AMERICAN PAPER INSTITUTE, INC. *v.* AMERICAN ELECTRIC POWER SERVICE CORP. ET AL.; and

No. 82–226. FEDERAL ENERGY REGULATORY COMMISSION *v.* AMERICAN ELECTRIC POWER SERVICE CORP. ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 904.] Motion of the Solicitor General for divided argument denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 82–118. CROWN, CORK & SEAL CO., INC. *v.* PARKER. C. A. 4th Cir. [Certiorari granted, *ante*, p. 986.] Motion of Equal Employment Advisory Council for leave to file a brief as *amicus curiae* granted.

No. 82–131. JONES & LAUGHLIN STEEL CORP. *v.* PFEIFER. C. A. 3d Cir. [Certiorari granted, *ante*, p. 821.] Motion of International Longshoremen's & Warehousemen's Union for leave to file a brief as *amicus curiae* granted.

No. 82–185. BOSTON FIREFIGHTERS UNION, LOCAL 718 *v.* BOSTON CHAPTER, NAACP, ET AL.;

No. 82–246. BOSTON POLICE PATROLMEN'S ASSN., INC. *v.* CASTRO ET AL.; and

No. 82–259. BEECHER ET AL. *v.* BOSTON CHAPTER, NAACP, ET AL. C. A. 1st Cir. [Certiorari granted, *ante*,

p. 967.] Motions of Washington Legal Foundation, American Federation of Labor and Congress of Industrial Organizations et al., and Pacific Legal Foundation for leave to file briefs as *amici curiae* granted. JUSTICE MARSHALL took no part in the consideration or decision of these motions.

No. 82–195. MUELLER ET AL. *v.* ALLEN ET AL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 820.] Motions of Baptist Joint Committee on Public Affairs, Americans United for Separation of Church and State, National School Boards Association, and National Committee for Public Education and Religious Liberty et al. for leave to file briefs as *amici curiae* granted.

No. 82–215. UNITED STATES *v.* WHITING POOLS, INC. C. A. 2d Cir. [Certiorari granted, *ante*, p. 1033.] Motion of the parties to dispense with printing the joint appendix granted.

No. 82–492. SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY *v.* HELM. C. A. 8th Cir. [Certiorari granted, *ante*, p. 986.] Motion for appointment of counsel granted, and it is ordered that John Joseph Burnett, Esquire, of Rapid City, S. D., be appointed to serve as counsel for respondent in this case.

No. 82–834. WALCK *v.* AMERICAN STOCK EXCHANGE, INC., ET AL. C. A. 3d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 82–5119. BELL *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, *ante*, p. 1034.] Motion for appointment of counsel granted, and it is ordered that Roy W. Allman, Esquire, of Fort Lauderdale, Fla., be appointed to serve as counsel for petitioner in this case.

No. 82–5576. PICKETT ET AL. *v.* BROWN ET AL. Sup. Ct. Tenn. [Probable jurisdiction noted, *ante*, p. 1068.] Motion for appointment of counsel granted, and it is ordered that

Harold W. Horne, Esquire, of Memphis, Tenn., be appointed to serve as counsel for appellants in this case.

No. 82–5818. IN RE GREEN. Petition for writ of habeas corpus denied.

No. 82–5706. IN RE PITTS. Petition for writ of mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 82–585. ALOHA AIRLINES, INC. *v.* DIRECTOR OF TAXATION OF HAWAII; and

No. 82–586. HAWAIIAN AIRLINES, INC. *v.* DIRECTOR OF TAXATION OF HAWAII. Appeals from Sup. Ct. Haw. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 65 Haw. 1, 647 P. 2d 263.

No. 82–500. SOUTHLAND CORP. ET AL. *v.* KEATING ET AL. Appeal from Sup. Ct. Cal. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 31 Cal. 3d 584, 645 P. 2d 1192.

No. 81–2159. SILKWOOD, ADMINISTRATOR OF THE ESTATE OF SILKWOOD *v.* KERR-MCGEE CORP. ET AL. Appeal from C. A. 10th Cir. Motion of Wisconsin et al. for leave to file a brief as *amici curiae* granted. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 667 F. 2d 908.

Certiorari Granted

No. 82–374. FLANAGAN ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. Reported below: 679 F. 2d 1072.

No. 82–472. RUSSELLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. Reported below: 681 F. 2d 952.

No. 82–618. KOSAK *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. Reported below: 679 F. 2d 306.

No. 82–738. MIGRA *v.* WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 703 F. 2d 564.

No. 82–766. SECRETARY OF STATE OF MARYLAND *v.* JOSEPH H. MUNSON CO., INC. Ct. App. Md. Certiorari granted. Reported below: 294 Md. 160, 448 A. 2d 935.

No. 82–599. COMMISSIONER OF INTERNAL REVENUE *v.* ENGLE ET UX. C. A. 7th Cir.; and

No. 82–774. FARMAR ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 82–599, 677 F. 2d 594; No. 82–774, 231 Ct. Cl. 642, 689 F. 2d 1017.

Certiorari Denied. (See also Nos. 82–744 and 82–5764, *supra.*)

No. 81–839. SKLAR ET AL. *v.* SHORES, EXECUTOR. C. A. 5th Cir. Certiorari denied. Reported below: 647 F. 2d 462.

No. 82–175. SWAREK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 677 F. 2d 41.

No. 82–220. ARMSTRONG *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 230 Ct. Cl. 966.

No. 82–252. DEBENEDICTIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 676 F. 2d 713.

No. 82–261. FRIEL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 825.

No. 82–317. KNIGHT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 680 F. 2d 470.

No. 82–332. FUJIMOTO ET AL. *v.* CITY OF HAPPY VALLEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 676 F. 2d 709.

No. 82–337. FERRETTI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 825.

No. 82–356. STIGLER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 415 So. 2d 686.

No. 82–376. WAITE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 230 Ct. Cl. 731.

No. 82–427. GUMBHIR *v.* KANSAS STATE BOARD OF PHARMACY. Sup. Ct. Kan. Certiorari denied. Reported below: 231 Kan. 507, 646 P. 2d 1078.

No. 82–451. COSTELLO ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 230 Ct. Cl. 1037.

No. 82–459. PARCINSKI *v.* OUTLET CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 673 F. 2d 34.

No. 82–461. PHILLIPS PETROLEUM CO. *v.* DUCKWORTH, DISTRICT JUDGE, 26TH JUDICIAL DISTRICT OF KANSAS, ET AL. Sup. Ct. Kan. Certiorari denied.

No. 82–462. INSURANCE & PREPAID BENEFITS TRUST ET AL. *v.* DONOVAN, SECRETARY OF LABOR. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 443.

No. 82–532. WEISS *v.* LEHMAN. C. A. 9th Cir. Certiorari denied. Reported below: 676 F. 2d 1320.

No. 82–543. NORTH CAROLINA ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 890.

No. 82–546. BIRCH *v.* LEHMAN, SECRETARY OF THE NAVY. C. A. 4th Cir. Certiorari denied. Reported below: 677 F. 2d 1006.

No. 82–565. MACDONALD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 688 F. 2d 224.

No. 82–577. CAMPBELL INDUSTRIES, INC., ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 678 F. 2d 836.

No. 82–579. FLORIDA *v.* COUNTY OF MONROE, NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 678 F. 2d 1124.

No. 82–581. MILA ET AL. *v.* DISTRICT DIRECTOR OF THE DENVER, COLORADO, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 10th Cir. Certiorari denied. Reported below: 678 F. 2d 123.

No. 82–588. FIRST NATIONAL BANK OF OMAHA, EXECUTOR OF THE ESTATE OF MCININCH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 681 F. 2d 534.

No. 82–593. CITY OF BURBANK *v.* UNITED STATES ET AL.; and

No. 82–762. UNITED STATES ET AL. *v.* CITY OF BURBANK. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 441.

No. 82–596. BUFALINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 683 F. 2d 639.

No. 82–614. REBHAN ET AL. *v.* FIAT MOTORS OF NORTH AMERICA, INC. C. A. 11th Cir. Certiorari denied. Reported below: 673 F. 2d 1234 and 680 F. 2d 105.

No. 82–619. EXXON CORP. ET AL. *v.* HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 683 F. 2d 69.

No. 82–632. AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL–CIO, LOCAL 2017, ET AL. *v.* WEINBERGER, SECRETARY OF DEFENSE, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 680 F. 2d 722.

No. 82–637. SAVE THE VALLEY, INC. *v.* ENVIRONMENTAL PROTECTION AGENCY. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 180.

No. 82–658. CONSOLIDATED SERVICE CORP. ET AL. *v.* ROBINSON, TRUSTEE IN BANKRUPTCY OF D. C. SULLIVAN & CO., INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 685 F. 2d 729.

No. 82–680. FIRE EQUIPMENT MANUFACTURERS' ASSN., INC., ET AL. *v.* DONOVAN, SECRETARY OF LABOR, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 679 F. 2d 679.

No. 82–682. RICHARDSON *v.* REGAN, SECRETARY OF THE TREASURY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 808.

No. 82–685. CONLEY *v.* CITY OF MONTGOMERY, ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 414 So. 2d 58.

No. 82–690. GENERAL MOTORS CORP. *v.* INTERNATIONAL TRADE COMMISSION ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 687 F. 2d 476.

No. 82–719. AVONDALE SHIPYARDS, INC. *v.* KAISER ALUMINUM & CHEMICAL SALES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 677 F. 2d 1045.

No. 82–728. COMPUTER SCIENCES CORP. ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 689 F. 2d 1181.

No. 82–733. PULLMAN STANDARD, INC. *v.* PINKARD. C. A. 11th Cir. Certiorari denied. Reported below: 678 F. 2d 1211.

No. 82–735. GOLDEN STATE TRANSIT CORP., DBA YELLOW CAB OF LOS ANGELES *v.* CITY OF LOS ANGELES. C. A. 9th Cir. Certiorari denied. Reported below: 686 F. 2d 758.

No. 82–737. ICE CREAM INDUSTRY DRIVERS & ICE CREAM EMPLOYEES UNIONS PENSION FUND *v.* NOVEMBRE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 691 F. 2d 491.

No. 82–748. WEIN *v.* COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 685 F. 2d 435.

No. 82–750. MCCLOUD *v.* NATIONAL RAILROAD PASSENGER CORP. (AMTRAK). Ct. App. D. C. Certiorari denied.

No. 82–752. FERGUS ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 418 So. 2d 594.

No. 82–753. FRANKLIN COUNTY SHERIFF'S OFFICE *v.* SELLERS ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 97 Wash. 2d 317, 646 P. 2d 113.

No. 82–755. TOOMEY *v.* TOOMEY. Sup. Ct. Mo. Certiorari denied. Reported below: 636 S. W. 2d 313.

No. 82–758. CAMPBELL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 82–761. KUCHTA ET AL. *v.* ALLSTATE INSURANCE CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 822.

No. 82–767. WILLIAMS *v.* VISION CARE SERVICE, INC. C. A. D. C. Cir. Certiorari denied. Reported below: 221 U. S. App. D. C. 511, 684 F. 2d 1033.

No. 82–768. PVM REDWOOD CO., INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 686 F. 2d 1327.

No. 82–770. BENDA *v.* MEDTRONIC, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 689 F. 2d 645.

No. 82–775. GREEN BAY PACKAGING INC. ET AL. *v.* TECHNICON MEDICAL INFORMATION SYSTEMS CORP. C. A.

7th Cir. Certiorari denied. Reported below: 687 F. 2d 1032.

No. 82–778. JOHNSON *v.* CENTRAL VALLEY SCHOOL DISTRICT NO. 356. Sup. Ct. Wash. Certiorari denied. Reported below: 97 Wash. 2d 419, 645 P. 2d 1088.

No. 82–779. HOLMES *v.* J. RAY MCDERMOTT & CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 682 F. 2d 1143.

No. 82–781. WHITE *v.* BOARD OF TRUSTEES OF WESTERN WYOMING COMMUNITY COLLEGE DISTRICT ET AL. Sup. Ct. Wyo. Certiorari denied. Reported below: 648 P. 2d 528.

No. 82–782. OLSEN, AN INCOMPETENT BY OLSEN, HIS GUARDIAN, ET AL. *v.* FORD MOTOR CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 823.

No. 82–783. DIEFENTHAL ET AL. *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 681 F. 2d 1039.

No. 82–790. BARTEL *v.* JOHNSON COUNTY ET AL. Ct. App. Iowa. Certiorari denied. Reported below: 322 N. W. 2d 901.

No. 82–795. WATTS *v.* JOSEPH HORNE CO., INC. C. A. 3d Cir. Certiorari denied. Reported below: 691 F. 2d 491.

No. 82–801. HARKINS & CO. ET AL. *v.* ELLIOTT ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 415 So. 2d 678.

No. 82–808. SHAY *v.* TEXAS. Ct. App. Tex., 5th Sup. Jud. Dist. Certiorari denied.

No. 82–810. LANG ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 681 F. 2d 817.

No. 82–823. PIELET ET AL. *v.* PIELET ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 686 F. 2d 1210.

No. 82–838. GOTTHEINER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 82–845. GIELLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 682 F. 2d 1075.

No. 82–846. JONES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 842.

No. 82–847. TORRES-TORRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 682 F. 2d 1331.

No. 82–860. MADONNA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 293.

No. 82–861. CARPENTIER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 689 F. 2d 21.

No. 82–865. KALISH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 690 F. 2d 1144.

No. 82–870. SNOWDEN ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 689 F. 2d 191.

No. 82–879. BUTERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 677 F. 2d 1376.

No. 82–880. THOMPSON ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 680 F. 2d 1145.

No. 82–881. FORTNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 691 F. 2d 498.

No. 82–884. A & D DAVENPORT TRANSPORTATION, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 844.

No. 82–894. MASTRO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 692 F. 2d 750.

No. 82–899. PINTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 82–902. MIRANNE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 688 F. 2d 980.

No. 82–921. EWING ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 692 F. 2d 766.

No. 82–923. NORTHWEST EXCAVATING, INC. *v.* WAGGONER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 1224.

No. 82–941. PARSONS & WHITTEMORE ALABAMA MACHINERY & SERVICE CORP. ET AL. *v.* YEARGIN CONSTRUCTION CO. C. A. 11th Cir. Certiorari denied. Reported below: 683 F. 2d 1374.

No. 82–956. HAYES *v.* VALLEY BANK OF NEVADA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 442.

No. 82–5014. SANTUCCI ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 674 F. 2d 624.

No. 82–5191. HERRERA *v.* IOWA ET AL. C. A. 8th Cir. Certiorari denied.

No. 82–5242. WESER *v.* ATKINS, DIRECTOR, KANSAS STATE PENITENTIARY, ET AL. C. A. 10th Cir. Certiorari denied.

No. 82–5266. CANNON *v.* CANNON. Sup. Ct. N. C. Certiorari denied. Reported below: 292 S. E. 2d 5.

No. 82–5277. SPENCER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 684 F. 2d 220.

No. 82–5281. HALL *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 276 Ark. 245, 634 S. W. 2d 115.

No. 82–5341. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 683 F. 2d 418.

No. 82–5350. SMITH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 680 F. 2d 255.

No. 82–5356. UNITED STATES EX REL. BASSETT *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 843.

No. 82–5371. LEMM ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 680 F. 2d 1193.

No. 82–5374. OWENS *v.* MARKS. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 823.

No. 82–5395. LANGONE *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 682 F. 2d 287 and 688 F. 2d 816.

No. 82–5408. GANTT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 419 So. 2d 1197.

No. 82–5411. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 684 F. 2d 296.

No. 82–5418. MACIAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 448.

No. 82–5426. PAYNE *v.* COUGHLIN ET AL. C. A. 2d Cir. Certiorari denied.

No. 82–5428. ROGERS *v.* MCMULLEN, SUPERINTENDENT, DESOTO CORRECTIONAL INSTITUTION. C. A. 11th Cir. Certiorari denied. Reported below: 673 F. 2d 1185.

No. 82–5434. REGGIE *v.* ZIMMERMAN. Sup. Ct. Pa. Certiorari denied.

No. 82–5442. JORDAN *v.* HAMMOCK, CHAIRMAN, NEW YORK STATE BOARD OF PAROLE. C. A. 2d Cir. Certiorari denied. Reported below: 682 F. 2d 52.

No. 82–5456. SMITH ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 683 F. 2d 1236.

No. 82–5468. CRAIG *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 842.

No. 82–5473. LYNCH *v.* WILSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 564.

No. 82–5479. SACCO *v.* KEOHANE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 296.

No. 82–5497. CHODOS *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 289.

No. 82–5526. SHIGEMURA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 682 F. 2d 699.

No. 82–5541. RILEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 684 F. 2d 542.

No. 82–5573. ALLARD *v.* BENNER ET AL. C. A. D. C. Cir. Certiorari denied.

No. 82–5593. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 679 F. 2d 504.

No. 82–5595. KELE *v.* HANBERRY, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 82–5598. PRINCE *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 688 F. 2d 837.

No. 82–5610. MANNING *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 323 N. W. 2d 217.

No. 82–5613. COLEMAN, PERSONAL REPRESENTATIVE OF THE ESTATE OF COLEMAN *v.* CITY OF WINSTON-SALEM ET AL. Ct. App. N. C. Certiorari denied. Reported below: 57 N. C. App. 137, 291 S. E. 2d 155.

No. 82–5617. BENNETT *v.* WHITE ET AL. C. A. 5th Cir. Certiorari denied.

No. 82–5618. KENNEDY *v.* MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 563.

No. 82–5626. STEVENS *v.* HUNT, GOVERNOR OF NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 691 F. 2d 497.

No. 82–5628. SMITH *v.* GOODLANDER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 691 F. 2d 497.

No. 82–5635. BOLDER *v.* WYRICK, WARDEN. Sup. Ct. Mo. Certiorari denied.

No. 82–5638. MCDONALD *v.* DRAPER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 455.

No. 82–5644. HUNTLEY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 418 So. 2d 538.

No. 82–5647. CARTER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 82–5651. WILLIAMS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 681 F. 2d 732.

No. 82–5652. HOWELL *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 386 Mass. 738, 437 N. E. 2d 1067.

No. 82–5654. TIJERINA *v.* OVERBERG, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTE. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 458.

No. 82–5660. JONES *v.* KEMP, WARDEN, CHATHAM COUNTY CORRECTIONAL INSTITUTION. C. A. 11th Cir. Certiorari denied. Reported below: 678 F. 2d 929.

No. 82–5663. LAKE *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Ct. Crim. App. Tex. Certiorari denied.

No. 82–5670. TOWNES *v.* WAKE COUNTY EX REL. CARRINGTON. Sup. Ct. N. C. Certiorari denied. Reported below: 306 N. C. 333, 293 S. E. 2d 95.

No. 82–5672. HOLT *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 82–5673. COOPER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 52 Md. App. 767.

No. 82–5675. ROSS *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 296.

No. 82–5676. MILLER *v.* MILLER. Ct. App. Ohio, Sandusky County. Certiorari denied.

No. 82–5679. SMITH *v.* LINAHAN ET AL. C. A. 11th Cir. Certiorari denied.

No. 82–5680. WILLIAMS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 82–5682. ROUGHTON *v.* COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 82–5685. MCQUEEN *v.* STATEN. C. A. 11th Cir. Certiorari denied. Reported below: 685 F. 2d 1388.

No. 82–5689. WORTHON *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 82–5690. TYLER *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 82–5692. JONES *v.* CHRYSLER CREDIT CORP. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 417 So. 2d 425.

No. 82–5693. GARRETT *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 685 F. 2d 158.

No. 82–5694. THOMAS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 82–5695. MANIS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 82–5696. POOL *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 82–5697. SMITH *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 82–5699. OLGUIN *v.* GRIFFIN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 82–5701. JACOBS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 412 So. 2d 540.

No. 82–5703. PAUTH-ARZUZA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 679 F. 2d 1373.

No. 82–5704. GADSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 692 F. 2d 750.

No. 82–5705. EVANS *v.* ZIMMERMAN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 82–5707. LOFTON ET AL. *v.* SCHABARUM ET AL. C. A. 9th Cir. Certiorari denied.

No. 82–5711. FLYNN *v.* MAINE EMPLOYMENT SECURITY COMMISSION ET AL. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 448 A. 2d 905.

No. 82–5712. SMITH *v.* SMITH. Ct. App. D. C. Certiorari denied. Reported below: 445 A. 2d 666.

No. 82–5718. LONZO *v.* FRANZEN. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 841.

No. 82–5720. KENT *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 637 S. W. 2d 119.

No. 82–5722. RICHARDSON *v.* RAY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 688 F. 2d 834.

No. 82–5724. SANTANA *v.* FENTON, SUPERINTENDENT, RAHWAY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 685 F. 2d 71.

No. 82–5725. JONES *v.* MARKS ET AL. C. A. 3d Cir. Certiorari denied.

No. 82–5726. MOORE ET AL. *v.* ROSS, INDUSTRIAL COMMISSIONER OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 687 F. 2d 604.

No. 82–5727. EDWARDS *v.* JERNIGAN, WARDEN, MACON CORRECTIONAL CENTER. C. A. 11th Cir. Certiorari denied. Reported below: 688 F. 2d 851.

No. 82–5729. WOLFEL *v.* SANBORN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 691 F. 2d 270.

No. 82–5730. HARTMAN, ADMINISTRATRIX OF THE ESTATE OF HARTMAN *v.* NORTHERN INDIANA PUBLIC SERVICE CO. C. A. 7th Cir. Certiorari denied. Reported below: 685 F. 2d 434.

No. 82–5731. CURTIS *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 688 F. 2d 837.

No. 82–5732. QUINONES-NAVARETTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 691 F. 2d 508.

No. 82–5733. SIMS *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 82–5736. LEUSCHNER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 52 Md. App. 788.

No. 82–5741. DOHERTY *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 230 Ct. Cl. 1027.

No. 82–5742. CALDWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 692 F. 2d 765.

No. 82–5746. GABRIEL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 692 F. 2d 759.

No. 82–5749. PARADISO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 689 F. 2d 28.

No. 82–5751. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 687 F. 2d 147.

No. 82–5752. SHERMAN *v.* MARSH, SECRETARY OF THE ARMY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 684 F. 2d 464.

No. 82–5755. WEBSTER *v.* TEXAS. Ct. App. Tex., 2d Sup. Jud. Dist. Certiorari denied. Reported below: 627 S. W. 2d 818.

No. 82–5765. HOLT *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 680 F. 2d 1388.

No. 82–5766. LANEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 681 F. 2d 817.

No. 82–5767. BAILEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 567.

No. 82–5783. PETRIE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 300.

No. 82–5782. WRIGHT *v.* UNITED STATES; and
No. 82–5788. SALISBURY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 689 F. 2d 1262.

No. 82–5784. MCGOUGH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 692 F. 2d 750.

No. 82–5792. WRIGHT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 681 F. 2d 817.

No. 82–5796. MADISON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 689 F. 2d 1300.

No. 82–5797. ZINERCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 301.

No. 82–5798. GRIFFIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 691 F. 2d 508.

No. 82–5808. BOLS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 459.

No. 82–5810. ZANI *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 82–5815. GOLDBERG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 689 F. 2d 191.

No. 82–5827. BANKS *v.* UNITED STATES; and
No. 82–5828. BANKS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 682 F. 2d 841.

No. 82–5831. BLISS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 445 A. 2d 625 and 452 A. 2d 172.

No. 82–5843. SIMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 449.

No. 82–5850. PATTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 690 F. 2d 906.

No. 82–5860. SLOTCAVAGE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 692 F. 2d 750.

No. 82–5862. BOGGS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 684 F. 2d 481.

No. 81–6937. WHITE *v.* ESTELLE. C. A. 5th Cir. Certiorari denied. Reported below: 669 F. 2d 973.

JUSTICE MARSHALL, dissenting.

The Court of Appeals held that the appropriate standard to be applied to petitioner's due process claim was whether, "[v]iewing the evidence in the light most favorable to the [finding of competence], . . . any rational trier of fact could conclude that the evidence does not predominate in favor of the appellant's claim of incompetence." 669 F. 2d 973, 977 (1982). While noting that "[t]his is, admittedly, a close case," *ibid.*, the appellate court concluded that the evidence was sufficient for a rational trier of fact to find White competent to stand trial. For the reasons set forth below, I would grant the petition for certiorari in order to determine whether petitioner's constitutional claim should be reconsidered under a less deferential standard that until now has been applicable to such claims on federal habeas review.

I

On February 11, 1975, petitioner Robert Lee White was indicted in Lubbock County, Tex., on the charge of capital murder. Shortly thereafter, petitioner's competency to stand trial was called into question by his attorneys. On June 28, 1975, the trial court granted defense counsel's motion for a private psychiatric examination and evaluation of the defendant, directing that White be released from jail for testing at the Southwest Center for Psychological and Vocational Testing. On three occasions, the court granted defense counsel's motions for further neurological and psychiatric examinations. On September 3, 1976, the court ordered an examination by a disinterested, qualified expert

to determine White's competence to stand trial.[1] The appointed psychiatrist reported that White had been psychotic "for at least seven to eight years."

In January 1977, the court, finding that there was some evidence that White was not competent, empaneled a jury to determine White's competency to stand trial. At the competency hearing, defense counsel called the court-appointed psychiatrist and two psychologists who had also previously examined White. Based upon their diagnostic tests and observations, the experts testified that White was "chronically psychotic," that is, he suffered from schizophrenia of long standing, characterized by hallucinations and an inability to distinguish between reality and fantasy. They also testified that petitioner's IQ of 69–75 indicated "borderline mental retardation." The defendant's experts concluded that while he understood the charges against him, White's mental disorders rendered him incompetent to consult with his attorneys. One of the defendant's attorneys gave testimony confirming that White was not able to assist in his defense.

The prosecution called two experts, a neurologist and a radiologist, who testified that they found no evidence of organic brain damage, but expressed no view as to White's competence. The prosecution's remaining witnesses, White's jailer and a Deputy Sheriff, stated that White behaved like other prisoners and appeared to communicate normally with his attorneys. Based primarily upon the testimony of these lay witnesses and his cross-examination of the defense witnesses, the prosecutor urged that the defendant had misled his examiners into believing that he was mentally disturbed.

The judge instructed the jury that "a person is incompetent to stand trial if he does not have sufficient present ability

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[1] Texas Code Crim. Proc. Ann., Art. 46.02, § 3(a) (Vernon 1979), permits a court to "appoint disinterested experts experienced and qualified in mental health or mental retardation to examine the defendant with regard to his competency to stand trial and to testify at any trial or hearing on this issue."

to consult with his lawyer with a reasonable degree of rational understanding; or, a rational as well as factual understanding of the proceedings against him." The jury returned a verdict that stated simply: "We, the jury, find the defendant, ROBERT LEE WHITE, competent to stand trial at the time of this trial, to-wit: January 5, 1977." White was then tried and convicted of capital murder. On appeal, the Texas Court of Criminal Appeals found that it lacked jurisdiction to consider whether White had properly been found competent to stand trial. *White* v. *State*, 591 S. W. 2d 851, 854–856 (1979).

White then petitioned for a writ of habeas corpus in the United States District Court for the Northern District of Texas. Relying on the opinion of the Texas Court of Criminal Appeals, the District Court denied the petition on the ground that "[t]he evidence adduced was legally sufficient to enable a rational trier of facts to make the same findings which the jury made."

The Court of Appeals affirmed. In searching for the proper standard of review to be applied to the jury verdict of competency to stand trial, the Court of Appeals noted that in *Drope* v. *Missouri*, 420 U.S 162 (1975), this Court found it necessary to undertake its own analysis of the facts concerning the defendant's competency so that "'the appropriate enforcement of the federal right may be assured.'" *Id.*, at 174–175, and n. 10. Nevertheless, the Court of Appeals rejected the "hard look" given the trial court's conclusion in *Drope*. 669 F. 2d, at 976. In its place, the Court of Appeals adopted the more deferential review set forth in *Jackson* v. *Virginia*, 443 U. S. 307 (1979), which governs claims that the evidence at trial was insufficient to prove the elements of a crime beyond a reasonable doubt. Under *Jackson* a court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*, at 319 (emphasis in original).

Applying this standard to the issue of competency, the court below determined that there had been sufficient evidence for a rational trier to find White competent to stand trial.

II

Whether a defendant is competent to stand trial is a question of federal constitutional law. Due process forbids a State to try or convict a defendant who is incompetent to stand trial. *Drope* v. *Missouri*, *supra*; *Pate* v. *Robinson*, 383 U. S. 375 (1966). To be competent to stand trial for the purposes of the Due Process Clause, the defendant must have the "capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Drope* v. *Missouri*, *supra*, at 171.[2]

A federal court acting on a petition for a writ of habeas corpus must make an independent decision on the question of competence, see *Drope* v. *Missouri*, *supra*, at 175, and n. 10, just as it must decide any other federal constitutional question independently of a state-court determination.[3] In each case, "the federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of

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[2] This Court has approved a test of incompetence which seeks to determine whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky* v. *United States*, 362 U. S. 402, 402 (1960). The State of Texas has adopted essentially the same standard. Tex. Code Crim. Proc. Ann., Art. 46.02, § 1(a) (Vernon 1979).

[3] Thus, on collateral review of a state conviction, a federal court must independently determine that a defendant's confession was voluntary under the Fifth Amendment, that postindictment delay did not violate the Sixth Amendment right to a speedy trial, that the defendant was provided effective assistance of counsel, or that the right to an impartial jury was not impaired by extraneous influences. See, *e. g.*, *Cuyler* v. *Sullivan*, 446 U. S. 335, 341–342 (1980); *Brewer* v. *Williams*, 430 U. S. 387, 401–403 (1977); *Brown* v. *Allen*, 344 U. S. 443 (1953); *Watts* v. *Indiana*, 338 U. S. 49, 51–52 (1949) (opinion of Frankfurter, J.).

the United States Constitution is entitled to have the federal habeas court make its own independent determination . . . on the merits of that claim." *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977).

In making an independent appraisal of the habeas petitioner's constitutional claim, a federal district judge must sometimes defer to a state court's resolution of "issues of fact" underlying its determination. 28 U. S. C. § 2254(d). Those antecedent findings which a habeas court may be required to accept are limited "to what are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators. . . .'" *Townsend* v. *Sain*, 372 U. S. 293, 309, n. 6 (1963), quoting *Brown* v. *Allen*, 344 U. S. 443, 506 (1953) (opinion of Frankfurter, J.). Express factual determinations by a state court after a full and fair evidentiary hearing generally must be accepted unless they are not fairly supported by the record. *Sumner* v. *Mata*, 449 U. S. 539 (1981); *Townsend* v. *Sain*, *supra*, at 312–313, 316; 28 U. S. C. § 2254(d)(8). Even where the state trier has made no express findings, this presumption of correctness must also be afforded to findings of fact which "the District Court [can] reconstruct" either because the trier's "view of the facts is plain from his opinion or because of other indicia." 372 U. S., at 314–315.

In this case, the jury was not asked to make and did not make any express findings to support its legal conclusion. Nor can such findings be fairly reconstructed.[4] Therefore,

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[4] A federal district court may "reconstruct the findings of the state trier of fact" when the state court's "view of the facts is plain from [its] opinion." *Townsend* v. *Sain*, 372 U. S. 293, 314 (1963). In addition, when a determination in favor of the constitutional claim follows inexorably from particular findings of fact, a federal district court "may assume that the state trier found the facts against the petitioner" in rejecting the constitutional claim. *Id.*, at 315. In this case, no particular view of the facts can be inferred from the conclusory language of the jury's one-sentence verdict, and there are no findings of fact upon which the competency determination necessarily turned. Therefore, "[t]he federal court cannot exclude the

the District Court was obligated to make its own factual determinations on the basis of the record of the state proceeding and, if necessary to resolve disputed issues of fact, on an evidentiary hearing. *Townsend* v. *Sain*, *supra*, at 313–316, 318–319.[5]

This Court's opinion in *Drope* v. *Missouri*, 420 U. S. 162 (1975), indicates that when a state-court determination of competency is unaccompanied by findings of fact, a federal court must undertake independent factfinding, as it would in comparable "situation[s] in which the 'so-called facts and their constitutional significance [are] . . . so blended that they cannot be severed in consideration.'" *Townsend* v. *Sain*, *supra*, at 315, quoting *Rogers* v. *Richmond*, 365 U. S. 534, 546 (1961). The question in *Drope* was whether the defendant "was deprived of due process of law by the failure of the trial court to order a psychiatric examination with

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possibility that the [trier] believed facts which showed a deprivation of constitutional rights and yet (erroneously) concluded that relief should be denied." *Id.*, at 315–316.

[5] "In any event, even if it is clear that the state trier of fact utilized the proper standard, a hearing is sometimes required if his decision presents a situation in which the 'so-called facts and their constitutional significance [are] . . . so blended that they cannot be severed in consideration. . . .' Unless the district judge can be reasonably certain that the state trier would have granted relief if he had believed petitioner's allegations, he cannot be sure that the state trier in denying relief disbelieved these allegations. If any combination of the facts alleged would prove a violation of constitutional rights and the issue of law on those facts presents a difficult or novel problem for decision, any hypothesis as to the relevant factual determinations of the state trier involves the purest speculation. The federal court cannot exclude the possibility that the trial judge believed facts which showed a deprivation of constitutional rights and yet (erroneously) concluded that relief should be denied. Under these circumstances it is impossible for the federal court to reconstruct the facts, and a hearing must be held." *Townsend* v. *Sain*, *supra*, at 315–316. See also Wright & Sofaer, Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility, 75 Yale L. J. 895, 935–946 (1966); Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1135–1137 (1970).

respect to his competence to stand trial." 420 U. S., at 163–164. The state courts had "viewed the evidence as failing to show that during trial petitioner had acted in a manner that would cause the trial court to doubt his competence." *Id.*, at 178. This Court did not consider itself bound by the state courts' view of the evidence, for "in such circumstances we believe it is 'incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured.'" *Id.*, at 175. See also *id.*, at 175, n. 10. The Court concluded, based upon its independent examination of the record, that "[n]otwithstanding the difficulty of making evaluations of the kind required in these circumstances, . . . the record reveals a failure to give proper weight to the information suggesting incompetence." *Id.*, at 179.

In the instant case, the constitutional question is somewhat different from the question in *Drope*. The due process question is not whether the evidence of incompetency was such as to require a hearing, but whether the evidence adduced at a hearing indicated that the defendant was incompetent to stand trial. But this difference does not warrant any greater deference to the state conclusion with regard to competency than was accorded by this Court in *Drope*.

Jackson v. *Virginia*, 443 U. S. 307 (1979), does not call for a more deferential attitude toward state-court conclusions of law than has been required by *Townsend* v. *Sain* and succeeding cases. *Jackson* involved federal review of a claim that the defendant was convicted in the absence of proof sufficient to convince the trier of fact of guilt beyond a reasonable doubt. See 443 U. S., at 309; *id.*, at 326 (STEVENS, J., concurring in judgment); cf. *In re Winship*, 397 U. S. 358, 361 (1970). The Court concluded that the proper standard of review "is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U. S., at 319. When a federal ha-

beas court makes this legal determination as to the sufficiency of the evidence, it does so independently of the state court's determination of the same legal question. Both the state courts and the federal courts must conduct the same inquiry as to sufficiency. The *Jackson* standard is thus completely consistent with the traditional scope of habeas review. See *id.*, at 318 (citing *Drope* v. *Missouri* and *Townsend* v. *Sain*).

III

The courts below faced the difficult question whether petitioner's mental disorders made him unable to consult with his attorney and prepare his defense to the extent required by due process. Unfortunately, such a determination can never be made with certainty or precision. Courts must consider many factors. The testimony of expert witnesses recounting their observations of the defendant's behavior and mental processes, along with their professional diagnoses, is, of course, highly relevant. The court also must take into account the observations of lay witnesses, and particularly the observations of the defendant's counsel, with respect to the defendant's ability to reason, to remember, to cooperate, and to communicate. The court's own observations of the defendant may also be relevant, though even the most irrational individual may appear normal to an untrained observer. The defendant's mental condition must be considered in the context of the totality of the circumstances of the case, including the complexity of the charges and of the defense, and the likely length of the trial.

In this case, the jury initially made the difficult due process determination after a legally correct, though undetailed, instruction on the applicable standard of competency to stand trial. While the jury may be equally qualified to make the findings of fact upon which the determination must be based, I have little doubt that a judge ordinarily is better qualified to resolve the constitutional question on the basis of whatever facts are found. See *Lyles* v. *United States*, 103 U. S.

App. D. C. 22, 27, 254 F. 2d 725, 730 (1958) (opinion of Prettyman and Burger, JJ.) ("the competency of the accused at the time of trial to understand the charges against him and to assist in his defense is a legal question for the judge, not for the jury"), cert. denied, 356 U. S. 961 (1958). A judge is generally aware of what a defendant must do to participate in his defense. A judge may be guided by his reading of previous cases resolving questions of competency to stand trial and may develop useful experience in making the competency determination. Yet in this case, every state and federal court that faced the question simply deferred to the jury's application of constitutional law once it was found that there was "sufficient" evidence upon which to conclude that White was competent to stand trial.

The deferential review undertaken by the federal courts below denied petitioner his right to an independent determination of his constitutional claim. It was improper to assume, in the absence of any express findings of fact, that the jury resolved all disputed issues of fact in the manner most favorable to a determination that the defendant was competent to stand trial. Instead, the District Court was required to make an independent resolution of disputed factual issues and then to apply the constitutional standard to the facts that it found. I would grant certiorari to address the lower courts' departure from these accepted principles for collateral review of a state-court conviction. I dissent from the Court's refusal to do so.

No. 82–281. TREEN, GOVERNOR OF LOUISIANA, ET AL. *v.* WILLIAMS ET AL. C. A. 5th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 671 F. 2d 892.

No. 82–352. PUEBLO AIRCRAFT SERVICE, INC. *v.* CITY OF PUEBLO, COLORADO, ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 679 F. 2d 805.

No. 82–494. BATH IRON WORKS CORP. ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. 1st Cir. Motion of respondent Donald J. Simpson for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE O'CONNOR would grant certiorari. Reported below: 681 F. 2d 81.

No. 82–512. PUBLIC SERVICE COMPANY OF INDIANA, INC. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 7th Cir. Motion of Indiana Air Pollution Control Board for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 682 F. 2d 626.

No. 82–628. ENERGY RESERVES GROUP, INC., ET AL. *v.* HODEL, SECRETARY OF ENERGY, ET AL. Temp. Emerg. Ct. App. Certiorari denied. JUSTICE WHITE, JUSTICE POWELL, and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 690 F. 2d 1375.

No. 82–649. FLORIDA BUSINESSMEN FOR FREE ENTERPRISE ET AL. *v.* CITY OF HOMESTEAD, FLORIDA. C. A. 11th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 679 F. 2d 252.

No. 82–727. MUSTANG TRANSPORTATION CO. ET AL. *v.* RYDER TRUCK LINES, INC., ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 688 F. 2d 823.

No. 82–754. FLORIDA *v.* COLER. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 418 So. 2d 238.

No. 82–965. LINAHAN, WARDEN *v.* MACHETTI, AKA SMITH. C. A. 11th Cir. Motion of respondent for leave to

proceed *in forma pauperis* granted. Certiorari denied. Reported below: 679 F. 2d 236.

No. 82–787. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* GREAT COASTAL EXPRESS, INC. C. A. 4th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE BLACKMUN would grant certiorari. Reported below: 675 F. 2d 1349.

No. 82–796. STONER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 418 So. 2d 171.

No. 82–1022. ALABAMA FURNITURE CO. *v.* STILL, TRUSTEE, ET AL. C. A. 6th Cir. Certiorari before judgment denied.

No. 82–5444. HARVARD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 414 So. 2d 1032.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The issue presented by this case is whether a violation of *Gardner* v. *Florida*, 430 U. S. 349 (1977), can be remedied by a remand to the original sentencing judge for a limited hearing in which the burden is placed upon the defendant to rebut or explain the information which had not been disclosed to him at the initial sentencing proceeding.

I

In 1974 petitioner was convicted after a jury trial of the first-degree murder of his ex-wife. In a separate sentencing proceeding a majority of the jury voted to recommend a death sentence. Under the Florida capital sentencing statute the jury's verdict in the sentencing proceeding is only advisory; the actual sentence is determined by the judge. See Fla. Stat. § 921.141 (1981). In this case the judge found that

two statutory aggravating circumstances were applicable. He determined that the defendant had previously been convicted of a felony involving the use of violence to the person, and that the murder was especially heinous, atrocious, or cruel. The judge also found that none of the statutorily enumerated mitigating circumstances were applicable. He concluded that a death sentence should be imposed.

On appeal, the Florida Supreme Court affirmed petitioner's conviction and sentence in a brief *per curiam* opinion, with two judges dissenting from the affirmance of the death sentence. 375 So. 2d 833 (1977), cert. denied, 441 U. S. 956 (1979). Petitioner sought rehearing in light of *Gardner* v. *Florida*, *supra*, suggesting that the trial judge, in making his sentencing decision, may have "considered matters not provided to the jury or defense counsel." The Florida Supreme Court issued an order directing the trial judge to indicate whether he had in fact relied on undisclosed information. In response the judge stated that he had examined a confidential portion of a presentence report as well as information furnished by the United States Marine Corps concerning the defendant's military record. After receiving this response, the Florida Supreme Court vacated petitioner's death sentence and remanded to the trial judge for resentencing following a hearing concerning the previously undisclosed information. 375 So. 2d, at 835 (1978).

On remand the trial judge denied petitioner's motion to substitute another judge. A hearing was held in the trial court on February 9, 1979. The scope of the hearing was narrowly limited. The judge provided petitioner with the previously undisclosed material and invited him to correct or rebut any misstatements. The presentence report discussed a prior assault committed by petitioner against his first wife and her sister. Since one of the aggravating circumstances that the judge had found at the initial sentencing proceeding was that petitioner had previously been convicted of a felony involving violence, petitioner's counsel attempted to show

that the offense in question, for which petitioner had received only a 3-month jail sentence, was not as serious as the presentence report indicated.

Following the hearing the judge took the matter under advisement. More than six months later, on August 22, 1979, he indicated that he would reimpose the death sentence. In March 1980 the judge issued proposed findings of fact and requested comment concerning whether four aggravating circumstances that he proposed to find applicable would "pass appellate review." Following comment by the parties, the judge limited his order to two aggravating circumstances.

The trial court finally issued its sentencing order in May 1980. The order stated that the evidence offered by petitioner at the 1979 hearing "did not contradict the information provided this Court in the confidential portion of the presentence investigation." The court refused to consider evidence and argument presented at the hearing unless it rebutted or explained the previously undisclosed information. In addition, the court made clear that even evidence or argument that was relevant to the previously undisclosed information was "beyond the scope of the resentencing Mandate" and would not be considered if it could have been presented in the initial sentencing proceeding to rebut or explain testimony given in that proceeding. Specifically, the court refused to consider efforts by petitioner to impeach testimony at the first proceeding concerning the assault upon his first wife, ruling that "[s]uch impeachment should have been done at trial and it therefore appears that this was a wrongful attempt to belatedly impeach evidence presented by the State to the advisory jury." The court concluded that "the sentence, as originally imposed, was appropriate."

On appeal, the Florida Supreme Court affirmed the death sentence. 414 So. 2d 1032 (1982). The court rejected petitioner's claim that the proceeding on remand had been inadequate to remedy the earlier due process violation. It emphasized that the trial judge's "conclusion that the death

sentence was again appropriate clearly indicates that his finding is based upon the failure of the defense to present sufficient evidence at resentencing to rebut the information contained in the confidential portion of the presentence investigation report or in the military records." *Id.*, at 1034. Justice Boyd dissented.

II

I continue to adhere to my view that the death penalty is unconstitutional under all circumstances. I would therefore grant certiorari and vacate the death sentence on this basis alone. If the State is to be permitted to impose this uniquely irreversible penalty, however, it should at least be required to do so through procedures that provide some assurance of fairness and reliability in the sentencing determination. In this case petitioner was initially sentenced to death in 1974 after a proceeding in which the trial judge considered highly material information which he had not disclosed to petitioner or his counsel. The Florida Supreme Court has now held that this clear constitutional violation was remedied by a narrowly circumscribed hearing held by the same trial judge five years later—a hearing at which the burden was shifted to petitioner to explain or rebut the previously undisclosed information and thereby persuade the judge not to reimpose the death sentence. Even accepting the prevailing view that the death penalty can constitutionally be imposed under certain conditions, this restricted hearing was plainly inadequate to remedy the blatant violation of due process at the first sentencing proceeding. For the reasons set forth below, I believe the only adequate remedy would have been a new sentencing proceeding before a different judge.

A

In *Gardner* v. *Florida*, 430 U. S. 349 (1977), this Court held that it is a denial of due process for the sentencer in a capital case to consider information that the defendant "had no opportunity to deny or explain." *Id.*, at 362. As the plu-

rality opinion in *Gardner* stated, "[o]ur belief that debate between adversaries is often essential to the truth-seeking functions of trials requires us . . . to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases." *Id.*, at 360. A litigant simply cannot "present his case effectively" unless he is "cognizant of all the facts before the [decisionmaker]." *Gonzalez* v. *United States*, 348 U. S. 407, 413 (1955).

It is undisputed that the procedure followed in the first sentencing proceeding denied petitioner the right to confront all the evidence against him. In response to the Florida Supreme Court's inquiry, the trial judge explicitly stated that some of the information he had considered had not been disclosed to petitioner. This undisclosed information consisted of petitioner's military record and a portion of a presentence report. At the initial sentencing hearing petitioner had no opportunity whatsoever to rebut or explain this information.

B

The remedy for a *Gardner* violation must take account of the nature of a capital sentencing proceeding. For constitutional purposes, such a proceeding is analogous to a trial. See *Bullington* v. *Missouri*, 451 U. S. 430, 438 (1981) (a capital sentencing proceeding is "in all relevant respects . . . like the immediately preceding trial on the issue of guilt or innocence"). See also *Green* v. *Georgia*, 442 U. S. 95, 97 (1979) (defendant is entitled to "a fair trial on the issue of punishment"). The decision whether a defendant shall live or die does not simply depend upon the exercise of discretion based on all the evidence before the sentencer, as does the typical sentencing decision in a noncapital case. It depends instead upon proof of specific facts. Just as the State must prove the elements of the crime to obtain a conviction, it must likewise prove one or more statutory aggravating circumstances to obtain a death sentence. Moreover, the State must convince

the sentencer that the statutory aggravating circumstances, if any, outweigh any mitigating circumstances. Only if the State discharges these burdens can it obtain a death sentence.

Because a capital sentencing proceeding has "the hallmarks of [a] trial on guilt or innocence," *Bullington* v. *Missouri*, *supra*, at 439, a defendant who has been denied a fair sentencing proceeding is entitled to a new sentencing proceeding, just as a defendant who has been denied a fair trial is entitled to a new trial. A *Gardner* violation is always reversible error, for reliance on information that was not disclosed to the defendant is at odds with the basic premises of the adversary process and thus inevitably denies the defendant a fair sentencing proceeding. See *Gardner* v. *Florida*, *supra*, at 362 (rejecting the suggestion that it would be a sufficient remedy for the Florida Supreme Court to consider the undisclosed information in reviewing the appropriateness of the death sentence); *Chapman* v. *California*, 386 U. S. 18, 23 (1967) ("there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error") (footnote omitted). The remedy for a *Gardner* violation must therefore be a new sentencing proceeding.[1]

Nothing short of a new sentencing proceeding can afford the defendant the fair sentencing determination to which he is entitled under the Constitution. When a trial court commits reversible constitutional error in the course of a criminal trial, an appellate court does not remand for a hearing in which the correctness of the earlier verdict is presumed and the defendant is saddled with the burden of demonstrating that the verdict should have been different. This Court has never approved such a procedure. To obtain a conviction following reversal on appeal, the State must afford the defendant "a new trial free of constitutional infirmity." *Haynes* v. *Washington*, 373 U. S. 503, 518–519 (1963) (admis-

[1] Since the undisclosed information was not considered by the advisory jury, there is no need to convene a new jury.

sion of coerced confession). See also, *e. g.*, *Sheppard* v. *Maxwell*, 384 U. S. 333, 363 (1966) (prejudicial publicity prior to and during trial); *Glasser* v. *United States*, 315 U. S. 60, 76 (1942) (infringement of right to counsel). To sentence petitioner to death, the State must likewise afford him a new sentencing proceeding free of constitutional infirmity.

C

The narrowly circumscribed hearing held on remand in this case was a poor substitute for a new sentencing proceeding. An opportunity for rebuttal, explanation, and persuasion that comes only after the sentencer has come to a decision, and that is limited to the previously undisclosed information, can scarcely replace an opportunity to address *all* the information to be considered by the sentencer *before* he makes a decision.

First, an opportunity to address the undisclosed information in isolation from all the other evidence in the case cannot be equated with an opportunity to address the information as part of counsel's overall presentation. The presentation made by petitioner's counsel at the initial sentencing proceeding might well have differed in any number of ways had he known that, though his client had received only a 3-month sentence for the prior offense, the judge had in front of him a report that said petitioner "fully intended to kill" his first wife and his sister-in-law. For example, he might have deemed it necessary to subject petitioner's first wife and sister-in-law to more intensive cross-examination. Similarly, he might have chosen to introduce different or additional evidence in an attempt to demonstrate mitigating circumstances.

Second, the hearing on remand was inadequate because the judge had heard all the other pertinent evidence five years earlier. Even if he went back and read the transcript of the earlier proceedings, a cold record cannot recreate testimony. A witness may be credible on paper but not on the stand. In evaluating petitioner's new evidence and argument, and in

considering it in the context of all the evidence introduced with respect to sentencing, the judge could have taken the credibility of the witnesses into account only in the unlikely event that he somehow remembered his impression of the testimony at the first proceeding.

Third, the judge had already decided once that petitioner deserved a death sentence. When a decisionmaker has made so difficult a choice, the natural human tendency is to rationalize it and suppress doubts that the decisionmaker may have had. However fairminded the judge may have been, "a certain reluctance is to be expected after the [judge], albeit on incomplete presentation, has rejected the [defendant's] claim" that he should receive a life sentence. *Gonzalez* v. *United States*, 348 U. S., at 417.[2] The Court has recognized in other contexts that, notwithstanding the faith typically placed in trial judges to act impartially, fairness may require that resentencing be entrusted to a different judge. In *Santobello* v. *New York*, 404 U. S. 257 (1971), where the prosecutor breached a plea bargain by recommending the maximum sentence and the judge imposed such a sentence, the Court held that "the interests of justice" demanded, at a minimum, "resentenc[ing] by a different judge," *id.*, at 262 and 263, even though the original sentencing judge had stated that the prosecutor's recommendation did not influence him and the Court stated that it had "no reason to doubt that," *id.*, at 262.[3] In a capital case such as this, the interests of justice surely require no less.

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[2] In *Gonzalez* the Government failed to provide a draft registrant who claimed conscientious objector status with a copy of its recommendation to the Appeal Board. The Court held that the denial of an opportunity to rebut the report was not remedied by a procedure whereby, *after* the Appeal Board made its decision, the registrant could obtain the report and request a reopening of his classification. 348 U. S., at 417.

[3] Although in many contexts the law assumes that a judge can fairly reconsider a case even though he has previously reached a decision which for some reason has been set aside on appeal, reliance on information not disclosed to the defendant can be particularly prejudicial where a judge rather

III

A defendant is denied due process when he is sentenced to death by a judge who relied on information that the defendant had no opportunity to contest or rebut. That denial of due process can only be remedied by a new sentencing proceeding conducted in conformity with the Constitution. It is not remedied by a remand to the original sentencing judge for a hearing in which the defendant bears the burden of rebutting or explaining the information, and in which the judge will not consider any evidence or argument that is not in the nature of rebuttal or that could have been presented at the initial proceeding. This sort of limited hearing might conceivably be appropriate to correct an evidentiary error in a civil antitrust action, but it is scarcely sufficient to correct a due process violation where a man's life is at stake. I therefore dissent.

No. 82–5448. UNDERWOOD *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

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than a jury is the decisionmaker. When a jury considers such information, there may at least be an exchange of views among the jurors as to its significance. There is no opportunity for such an exchange if the information is considered only by the judge. Cf. *Herring* v. *New York*, 422 U. S. 853, 863–864, n. 15 (1975) (in a bench trial in a criminal case, defense counsel cannot be denied an opportunity to make a closing argument):

"[T]he 'collective judgment' of the jury 'tends to compensate for individual shortcomings and furnishes some assurance of a reliable decision.' Powell, Jury Trial of Crimes, 23 Wash. & Lee L. Rev. 1, 4 (1966). In contrast, the judge who tries a case presumably will reach his verdict with deliberation and contemplation, but must reach it without the stimulation of opposing viewpoints inherent in the collegial decisionmaking process of a jury."

In this case the possibility that a different sentence might have been imposed but for the *Gardner* violation is underscored by the fact that in the jury phase of the first sentencing proceeding—the only phase in which petitioner was afforded a fair opportunity to meet the evidence against him—4 of the 12 jurors voted to recommend a life sentence.

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

For the reasons set forth in the dissenting opinion in *Holloway* v. *Florida*, 449 U. S. 905 (1980), I would grant the petition for certiorari and afford this case plenary consideration. See also *Spaziano* v. *Florida*, 454 U. S. 1037, 1041 (1981) (dissenting opinions).

No. 82–5648. BOLDER *v.* MISSOURI. Sup. Ct. Mo.; and

No. 82–5698. MELSON *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: No. 82–5648, 635 S. W. 2d 673; No. 82–5698, 638 S. W. 2d 342.

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.

Rehearing Denied

No. 81–2129. EISENBERG *v.* CROWLEY, *ante*, p. 827;

No. 81–2251. WILLIAMS *v.* COOK COUNTY CIVIL SERVICE COMMISSION ET AL., *ante*, p. 833;

No. 81–6813. ELLEDGE *v.* FLORIDA, *ante*, p. 981;

No. 81–6820. BORCHERDING *v.* UNITED STATES ET AL., *ante*, p. 1014;

No. 81–6861. WHITLEY *v.* VIRGINIA, *ante*, p. 882;

No. 81–6875. FASICK *v.* UNITED STATES, *ante*, p. 1014;

No. 81–6953. BOYER *v.* RILEY ET AL., *ante*, p. 1035;

No. 82–145. SMITH *v.* GONZALES ET AL., *ante*, p. 1005;

No. 82–179. SACCHINELLI *v.* GEORGIA, *ante*, p. 1015;

No. 82–371. BEHAR *v.* SOUTHEAST BANK TRUST CO., N.A., PERSONAL REPRESENTATIVE OF THE ESTATE OF BEHAR, *ante*, p. 970; and

No. 82–442. CALVO *v.* LOS ANGELES UNIFIED SCHOOL DISTRICT ET AL., *ante*, p. 989. Petitions for rehearing denied.

No. 82–482. HAMILTON ET AL. *v.* VIRGINIA, *ante*, p. 1011;

No. 82–506. SAFIR *v.* LEWIS, SECRETARY OF TRANSPORTATION, ET AL., *ante*, p. 972;

No. 82–5177. CELESTINE *v.* CROWN CENTER HOTEL, *ante*, p. 973;

No. 82–5317. BERRYHILL *v.* GEORGIA, *ante*, p. 981;

No. 82–5328. THOMAS *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, *ante*, p. 982;

No. 82–5329. MILLER *v.* MILLER, *ante*, p. 973;

No. 82–5348. RILEY *v.* FLORIDA, *ante*, p. 981;

No. 82–5405. MCPEEK ET AL. *v.* YOUNG, UNITED STATES DISTRICT JUDGE, ET AL., *ante*, p. 992;

No. 82–5471. SPEAR *v.* ROBERTS, *ante*, p. 1020; and

No. 82–5658. MULVILLE *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, *ante*, p. 1074. Petitions for rehearing denied.

No. 81–2361. GROSSMAN *v.* FIDELITY MUNICIPAL BOND FUND, INC., ET AL., *ante*, p. 838;

No. 81–6947. VELASQUEZ *v.* COLORADO, *ante*, p. 805;

No. 82–5030. CHAVIS-EL *v.* GREER ET AL., *ante*, p. 945; and

No. 82–5218. COLLINS *v.* CHICAGO BOARD OF EDUCATION, *ante*, p. 913. Motions for leave to file petitions for rehearing denied.

No. 82–362. VENTURE TECHNOLOGY, INC. *v.* NATIONAL FUEL GAS DISTRIBUTION CORP. ET AL., *ante*, p. 1007. Motion of petitioner for joint consideration with other cases denied. Petition for rehearing denied.

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Appeals Dismissed. (See also No. 81–2394, *infra.*)

No. 82–639. BOARD OF EDUCATION, CITY SCHOOL DISTRICT, ROCHESTER, NEW YORK, ET AL. *v.* NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL.; and

No. 82–655. BOARD OF EDUCATION, LEVITTOWN UNION FREE SCHOOL DISTRICT, NASSAU COUNTY, ET AL. *v.* NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL. Appeals from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 57 N. Y. 2d 27, 439 N. E. 2d 359.

No. 82–5714. DYER, A MINOR, BY DYER, HER PARENT AND NATURAL GUARDIAN *v.* LOWER BUCKS COUNTY HOSPITAL. Appeal from Super. Ct. Pa. dismissed for want of substantial federal question. Reported below: 298 Pa. Super. 609, 443 A. 2d 398.

No. 82–5773. MOORE *v.* GUILFORD COUNTY DEPARTMENT OF SOCIAL SERVICES. Appeal from Sup. Ct. N. C. dismissed for want of substantial federal question. Reported below: 306 N. C. 394, 293 S. E. 2d 127.

No. 82–5754. BETKA *v.* OREGON ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Dismissed

No. 81–1284. EICKE *v.* EICKE. Ct. App. La., 3d Cir. [Certiorari granted, 456 U. S. 970.] Writ of certiorari dismissed as improvidently granted.

Vacated and Remanded After Certiorari Granted

No. 81–1774. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* BULLARD. C. A. 5th Cir. [Certiorari granted, 457 U. S. 1116.] Judgment vacated and case remanded for consideration of whether the Texas Constitution, as interpreted by the Court of Criminal Appeals of Texas in *Ex parte Augusta*, 639 S. W. 2d 481 (1982), offers respondent relief on grounds independent of the United States Constitution so as to render inappropriate a decision on federal constitutional grounds. *City of Mesquite* v. *Aladdin's Cas-*

tle, Inc., 455 U. S. 283 (1982); *Mills* v. *Rogers*, 457 U. S. 291 (1982).

Miscellaneous Orders

No. — – ——. GUARANTEED INVESTORS CORP. *v.* OKLAHOMA PUBLIC EMPLOYEES RETIREMENT SYSTEM. Motion to direct the Clerk to file the petition for writ of certiorari out of time denied.

No. A–576. SIMOPOULOS *v.* BALILES, ATTORNEY GENERAL OF VIRGINIA, ET AL. Application for stay of condition imposed on reinstatement of physician's medical license, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–281. IN RE DISBARMENT OF SANDS. Disbarment entered. [For earlier order herein, see 458 U. S. 1126.]

No. D–284. IN RE DISBARMENT OF FISHMAN. Disbarment entered. [For earlier order herein, see 458 U. S. 1126.]

No. D–291. IN RE DISBARMENT OF SUNDOCK. Disbarment entered. [For earlier order herein, see 458 U. S. 1128.]

No. D–300. IN RE DISBARMENT OF GRUBOR. Disbarment entered. [For earlier order herein, see *ante*, p. 985.]

No. D–307. IN RE DISBARMENT OF GARY. It is ordered that Benjamin Gary, of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–308. IN RE DISBARMENT OF ODENDAHL. It is ordered that Frederick Richard Odendahl, of Monmouth, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–309. IN RE DISBARMENT OF MCCLELLAN. It is ordered that Oliver Barr McClellan, of Houston, Tex., be

suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–310. IN RE DISBARMENT OF TILYOU. It is ordered that Frank Sheridan Tilyou, Jr., of Scottsdale, Ariz., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–311. IN RE DISBARMENT OF MASON. It is ordered that Frank Ebaugh Mason, Jr., of Easton, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–312. IN RE DISBARMENT OF ERGAZOS. It is ordered that John William Ergazos, of Canton, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–313. IN RE DISBARMENT OF GRIMES. It is ordered that Robert A. Grimes, of Flint, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–315. IN RE DISBARMENT OF COBURN. It is ordered that James L. Coburn, of Freeport, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 67, Orig. IDAHO EX REL. EVANS, GOVERNOR OF IDAHO, ET AL. *v.* OREGON ET AL. Idaho's Exceptions to the Final Report of the Special Master are set for oral argument in due course. [For earlier order herein, see, *e. g.*, *ante*, p. 811.]

No. 81–1717. AMERICAN BANK & TRUST CO. ET AL. *v.* DALLAS COUNTY ET AL.; BANK OF TEXAS ET AL. *v.* CHILDS ET AL.; and WYNNEWOOD BANK & TRUST ET AL. *v.* CHILDS ET AL. Ct. App. Tex., 5th Sup. Jud. Dist. [Certiorari granted, *ante*, p. 966.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of respondents for divided argument granted. JUSTICE O'CONNOR took no part in the consideration or decision of these motions.

No. 81–2101. PENNHURST STATE SCHOOL AND HOSPITAL ET AL. *v.* HALDERMAN ET AL. C. A. 3d Cir. [Certiorari granted, 457 U. S. 1131.] Motion of the parties for divided argument granted.

No. 81–2125. BELL, SECRETARY OF EDUCATION *v.* NEW JERSEY ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 820.] Motion of respondents for divided argument granted. Request for additional time for oral argument denied.

No. 81–2245. NEVADA *v.* UNITED STATES ET AL.;

No. 81–2276. TRUCKEE-CARSON IRRIGATION DISTRICT *v.* UNITED STATES ET AL.; and

No. 82–38. PYRAMID LAKE PAIUTE TRIBE OF INDIANS *v.* TRUCKEE-CARSON IRRIGATION DISTRICT ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 904.] Motion of the Solicitor General for divided argument granted.

No. 81–2338. REGAN, SECRETARY OF THE TREASURY, ET AL. *v.* TAXATION WITH REPRESENTATION OF WASHINGTON. C. A. D. C. Cir. [Probable jurisdiction noted, *ante*, p. 819.] Motion of Disabled American Veterans et al. for leave to participate in oral argument as *amici curiae*, for divided argu-

ment, and for additional time for argument denied. Motion of American Legion et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for argument denied.

No. 81–2408. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC, ET AL. *v.* FLOWERS ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 1034.] Motion for appointment of counsel granted, and it is ordered that Isaac N. Groner, Esquire, of Washington, D. C., be appointed to serve as counsel for respondents in this case.

No. 82–23. MARSH, NEBRASKA STATE TREASURER, ET AL. *v.* CHAMBERS. C. A. 8th Cir. [Certiorari granted, *ante*, p. 966.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for argument denied. Motion of Jon Garth Murray et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for argument denied.

No. 82–185. BOSTON FIREFIGHTERS UNION, LOCAL 718 *v.* BOSTON CHAPTER, NAACP, ET AL.;

No. 82–246. BOSTON POLICE PATROLMEN'S ASSN., INC. *v.* CASTRO ET AL.; and

No. 82–259. BEECHER ET AL. *v.* BOSTON CHAPTER, NAACP, ET AL. C. A. 1st Cir. [Certiorari granted, *ante*, p. 967.] Motion of Boston Firefighters Union, Local 718, for divided argument denied. Motion of Boston Firefighters Union, Local 718, for additional time for oral argument denied. Motion of Boston Police Patrolmen's Association, Inc., for divided argument denied. Motion of Boston Police Patrolmen's Association, Inc., for additional time for oral argument denied. Motion of Nancy B. Beecher et al. for divided argument granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied. JUSTICE MARSHALL took no part in the consideration or decision of these motions.

No. 82–195. MUELLER ET AL. *v.* ALLEN ET AL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 820.] Motion of respondents for divided argument denied. Motion of Mountain States Legal Foundation et al. for leave to file a brief as *amici curiae* granted.

No. 82–708. SUMMA CORP. *v.* CALIFORNIA EX REL. STATE LANDS COMMISSION ET AL. Sup. Ct. Cal. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 82–840. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS *v.* HENRY. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 82–1066. UNITED STATES *v.* PTASYNSKI ET AL. Appeal from D. C. Wyo. Motion of the Solicitor General to expedite consideration of the statement as to jurisdiction denied. JUSTICE BLACKMUN and JUSTICE O'CONNOR would grant this motion.

Probable Jurisdiction Noted

No. 81–2394. WESTINGHOUSE ELECTRIC CORP. *v.* TULLY ET AL. Appeal from Ct. App. N. Y. Probable jurisdiction noted limited to Question 1 presented by the statement as to jurisdiction. With respect to Question 2 presented by the statement as to jurisdiction, the appeal is dismissed for want of substantial federal question. Reported below: 55 N. Y. 2d 364, 434 N. E. 2d 1044.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

While I agree with the Court's conclusion that the second question in the jurisdictional statement is insubstantial, I do not believe a court of law has the power simultaneously to dismiss and to accept jurisdiction of a single appeal from a single judgment, I therefore do not join the Court's order.

Certiorari Granted

No. 82–647. KIRKPATRICK *v.* CHRISTIAN HOMES OF ABILENE, INC., ET AL. Ct. App. Tex., 11th Sup. Jud. Dist. Certiorari granted. Reported below: 628 S. W. 2d 261.

No. 82–799. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 672 F. 2d 732.

No. 82–827. MINNESOTA *v.* MURPHY. Sup. Ct. Minn. Certiorari granted. Reported below: 324 N. W. 2d 340.

No. 82–818. NATIONAL LABOR RELATIONS BOARD *v.* BILDISCO & BILDISCO, DEBTOR-IN-POSSESSION, ET AL.; and No. 82–852. LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 682 F. 2d 72.

No. 81–2332. NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY *v.* CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF VIRGINIA ET AL. C. A. 4th Cir. Motion of United States Conference of Mayors for leave to file a brief as *amicus curiae* granted. Certiorari granted. JUSTICE POWELL took no part in the consideration or decision of this motion and this petition. Reported below: 674 F. 2d 298.

Certiorari Denied. (See also No. 82–5754, *supra.*)

No. 81–2359. AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. *v.* PHONETELE, INC. C. A. 9th Cir. Certiorari denied. Reported below: 664 F. 2d 716.

No. 82–198. FEDERAL ELECTION COMMISSION *v.* HALL-TYNER ELECTION CAMPAIGN COMMITTEE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 678 F. 2d 416.

No. 82–481. COTTON BELT INSURANCE CO., INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 447.

No. 82–541. SAM ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 230 Ct. Cl. 596, 682 F. 2d 925.

No. 82–654. ATLAS TILE & MARBLE CO. ET AL. *v.* SHAHADY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 221 U. S. App. D. C. 19, 682 F. 2d 968.

No. 82–701. NEW CASTLE AREA TRANSIT AUTHORITY *v.* KRAMER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 677 F. 2d 308.

No. 82–714. SEATH *v.* REGULATIONS AND PERMITS ADMINISTRATION ET AL. Sup. Ct. P. R. Certiorari denied.

No. 82–734. DEL JUNCO ET AL. *v.* CONOVER, COMPTROLLER OF THE CURRENCY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 682 F. 2d 1338.

No. 82–742. FOUNDATION FOR THE HANDICAPPED *v.* DEPARTMENT OF SOCIAL AND HEALTH SERVICES OF WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 97 Wash. 2d 691, 648 P. 2d 884.

No. 82–812. STEVENSON ET AL. *v.* GENERAL ELECTRIC CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 458.

No. 82–813. DUBOIS ET AL. *v.* CITY OF COLLEGE PARK ET AL. Ct. App. Md. Certiorari denied. Reported below: 293 Md. 676, 447 A. 2d 838.

No. 82–826. WALKER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 82–828. ARRINGTON *v.* NEW YORK TIMES CO. ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 55 N. Y. 2d 433, 434 N. E. 2d 1319.

No. 82–831. KOCK *v.* QUAKER OATS CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 681 F. 2d 649.

No. 82–842. RAY *v.* TENNESSEE VALLEY AUTHORITY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 677 F. 2d 818.

No. 82–851. MURRAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 686 F. 2d 1320.

No. 82–855. JORDAN *v.* BOLGER, POSTMASTER GENERAL OF THE UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 685 F. 2d 1384.

No. 82–858. TAYLOR *v.* HOWARD ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 686 F. 2d 1346.

No. 82–866. VAUGHN *v.* HINCHY, WITTE, WOOD, ANDERSON, HODGES & BOSTWICK. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 449.

No. 82–910. LINS *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 231 Ct. Cl. 579, 688 F. 2d 784.

No. 82–942. DECRANE ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 231 Ct. Cl. 951.

No. 82–946. BOX *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 419 So. 2d 604.

No. 82–5474. AHRENDT ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 687 F. 2d 1270.

No. 82–5495. STEVENS *v.* NORTH CAROLINA. Super. Ct. N. C., Mecklenburg County. Certiorari denied.

No. 82–5503. APEL *v.* WAINWRIGHT. C. A. 11th Cir. Certiorari denied. Reported below: 677 F. 2d 116.

No. 82–5515. WENTZEL *v.* MONTGOMERY GENERAL HOSPITAL, INC., ET AL. Ct. App. Md. Certiorari denied. Reported below: 293 Md. 685, 447 A. 2d 1244.

No. 82–5531. THETFORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 676 F. 2d 170.

No. 82–5549. REYES-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 82–5556. SMITH *v.* KAYE. C. A. 4th Cir. Certiorari denied. Reported below: 688 F. 2d 835.

No. 82–5558. ROLFE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 687 F. 2d 1315.

No. 82–5564. WILSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 460.

No. 82–5566. JORDAN *v.* VETERANS ADMINISTRATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 291.

No. 82–5587. CARTER *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 288.

No. 82–5641. FLORES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 173.

No. 82–5735. BAINCH *v.* RAINES ET AL. C. A. 9th Cir. Certiorari denied.

No. 82–5740. ALEXANDER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 82–5745. THOMAS *v.* GREENSPAN. C. A. D. C. Cir. Certiorari denied.

No. 82–5748. BURCH *v.* HARDEE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 688 F. 2d 830.

No. 82–5750. SCOTT *v.* PARRATT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 691 F. 2d 504.

No. 82–5756. SANDS *v.* SANDS. Sup. Ct. Conn. Certiorari denied. Reported below: 188 Conn. 98, 448 A. 2d 822.

No. 82–5757. ROGERS *v.* TRIGG, SUPERINTENDENT, INDIANA WOMEN'S PRISON, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 692 F. 2d 759.

No. 82–5758. WILLIAMS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 82–5759. WILLIAMS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 400 So. 2d 542.

No. 82–5760. THOMPSON *v.* LLOYD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 458.

No. 82–5761. TAYLOR *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 438 N. E. 2d 275.

No. 82–5762. HAUPTMANN *v.* LACEY, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 82–5770. MINER *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 82–5775. FILIPAS ET AL. *v.* LEMONS. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 561.

No. 82–5776. HARDEN *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 441 N. E. 2d 215.

No. 82–5777. GILBERT *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 637 F. 2d 632.

No. 82–5778. PEVLOR *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 638 S. W. 2d 272.

No. 82–5779. HOOVER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 419 So. 2d 590.

No. 82–5780. HOHMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 688 F. 2d 836.

No. 82–5790. BREWER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 650 P. 2d 54.

No. 82–5802. KIRK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 691 F. 2d 498.

No. 82–5805. ENGELKE *v.* SHERING, JUDGE OF JUSTICE COURT, CLARK COUNTY, NEVADA. C. A. 9th Cir. Certiorari denied.

No. 82–5813. PISKACEK *v.* ODESSA COLLEGE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 683 F. 2d 1371.

No. 82–5820. CALVIN *v.* RYAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 692 F. 2d 751.

No. 82–5829. ANTONELLI *v.* ILLINOIS BELL TELEPHONE CO. Sup. Ct. Ill. Certiorari denied.

No. 82–5848. PRUNTY *v.* DEPARTMENT OF THE NAVY. C. A. 9th Cir. Certiorari denied. Reported below: 692 F. 2d 764.

No. 82–5871. GARZA *v.* MILLER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 480.

No. 81–1972. PORCHER, CLAIMS ADJUDICATOR, SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION, ET AL. *v.* BROWN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 1001.

JUSTICE WHITE, with whom JUSTICE POWELL and JUSTICE REHNQUIST join, dissenting.

Every State in the Union maintains an unemployment compensation system which provides partial wage replacement for the unemployed. The Federal Government credits employer contributions to state unemployment programs meeting certain federal requirements against the amount owing under the Federal Unemployment Tax Act, 26 U. S. C. § 3301 *et seq.* One of the requirements which state plans

must meet is that "no person shall be denied [unemployment] compensation under . . . State law solely on the basis of pregnancy or termination of pregnancy." 26 U. S. C. § 3304(a)(12). The Fourth Circuit, in the opinion below, 660 F. 2d 1001 (1981), held that the South Carolina Unemployment Compensation System did not meet the requirements of § 3304(a)(12), and upheld a District Court order requiring the South Carolina Employment Security Commission (Commission) to make retroactive payments to claimants that had been denied compensation since January 1, 1978. In so doing, the Fourth Circuit decided three issues that merit this Court's attention.

The most important issue now presented for this Court's consideration involves the meaning of § 3304(a)(12). South Carolina Code § 41–35–120 (Supp. 1982) provides that a person will not be eligible for unemployment benefits "if the Commission finds that he has left voluntarily, without good cause, his most recent work." The Commission has determined that resignation due to pregnancy or to an illness unrelated to the claimant's job makes the claimant ineligible for unemployment benefits. The Fourth Circuit held that § 41–35–120, as interpreted, did not satisfy the dictates of § 3304(a)(12). It said: "Regardless of how the Commission treats employees with other disabilities, the mandate of [§ 3304(a)(12)] is clear: the Commission cannot deny compensation 'solely on the basis of pregnancy or termination of pregnancy.'" 660 F. 2d, at 1004.

It is by no means clear, however, that § 3304(a)(12) does not simply provide that pregnancy must be treated like all other disabilities—that pregnancy simply cannot be singled out for unfavorable treatment. The Department of Labor adheres to such an interpretation, and thus disagrees with the Fourth Circuit's interpretation of § 3304(a)(12). The Department of Labor is responsible for annually determining whether state unemployment compensation programs meet the requirements set out in federal law. 26 U. S. C.

§ 3304(c). Moreover, the Department played a role in the development of the 1976 legislation that added § 3304(a)(12) to the Federal Unemployment Tax Act. Unemployment Compensation Amendments of 1976, § 312(a), 90 Stat. 2679. The Department of Labor has repeatedly certified that South Carolina's program, as well as the programs of eight other jurisdictions with provisions similar to that of South Carolina,* meet the requirements of § 3304(a)(12). In addition, the Administrator of the Department's Unemployment Insurance Service submitted, on the Department's behalf, a letter to the District Court reiterating the Department's position with respect to South Carolina's program. The Administrator explained that the South Carolina program was consistent with § 3304(a)(12) because "'it does not distinguish between pregnant claimants or any other unemployed individuals whose separation is determined to be due to illness.'" Brief for United States as *Amicus Curiae* 13 (quoting Administrator's letter).

At the very least then, § 3304(a)(12) is the subject of substantial uncertainty, given the clear and direct conflict between the Fourth Circuit and the Department of Labor—the agency to whom Congress entrusted administration of the statute. The conflict the Court now leaves unresolved makes it difficult for conscientious administrators of unemployment compensation programs to determine what is required of them by the Federal Government. The position of the unemployment insurance administrators in the eight jurisdictions, in addition to South Carolina, that deny benefits both to those who resigned because of pregnancy and to those who resigned because of some non-job-related illness is clearly perplexing. The question presented is of obvious importance to the States; South Carolina is paying additional benefits at a rate of almost $1.5 million per year as a result of

*The District of Columbia, Louisiana, Missouri, Nebraska, New Mexico, Oklahoma, West Virginia, and, to a lesser extent, Vermont. Brief for United States as *Amicus Curiae* 18, and n. 21.

the decision below. See Application for Stay of Enforcement of Judgment ¶ 7. The question is also surely important to large numbers of pregnant women for whom unemployment compensation may constitute a substantial portion of their financial resources. Apparently the question is one of "substantial concern" to the Department of Labor as well. Brief for United States as *Amicus Curiae* 7.

The second issue of significance relates to the Eleventh Amendment. This Court has held that the Eleventh Amendment prevents federal courts from entering judgments that are to be satisfied out of the State's general revenues, *Edelman* v. *Jordan*, 415 U. S. 651 (1974), or out of state segregated tax revenues, *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U. S. 573 (1946), and *Great Northern Life Insurance Co.* v. *Read*, 322 U. S. 47 (1944). In the decision below the Fourth Circuit concluded that it could award a judgment against the South Carolina unemployment compensation fund because: (1) the fund is "a special fund administered separate and apart from all public moneys or funds of the State," (2) the fund consists of employer contributions, federal funding, investment income, and other receipts, and (3) neither the State nor the Commission is liable for any excess in obligations on the fund over its resources. 660 F. 2d, at 1006. Reliance on these distinctions is certainly questionable under this Court's previous cases. The question of whether there are some state funds that do not enjoy Eleventh Amendment immunity is important, and this case presents the Court with an opportunity to address the issue.

The third issue of significance is whether 42 U. S. C. § 1983 (1976 ed., Supp. IV) provides a cause of action to redress a State's failure to meet the standard set out in § 3304(a)(12). In *Maine* v. *Thiboutot*, 448 U. S. 1 (1980), the Court held that a plaintiff could sue to enforce a federal statute under § 1983. In *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981), we held that a plaintiff could not use § 1983 to enforce provisions of the Developmentally

Disabled Assistance and Bill of Rights Act of 1975, 42 U. S. C. § 6001 *et seq.* (1976 ed. and Supp. IV). We explained that a federal statute may be enforced by a § 1983 suit only if Congress has not foreclosed private enforcement of that statute in the enactment itself and if the statute created enforceable "rights" under § 1983. 451 U. S., at 28. In *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981), we reaffirmed our holding in *Pennhurst*, *supra*, refusing to allow a § 1983 suit to enforce provisions of the Federal Water Pollution Control Act, 33 U. S. C. § 1251 *et seq.* (1976 ed. and Supp. V), and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U. S. C. § 1401 *et seq.* (1976 ed. and Supp. V). Consideration of the difficult and unanswered question of whether the Federal Unemployment Tax Act is enforceable by way of § 1983 would provide guidance to the lower federal courts on the application of *Thibotout*, *Pennhurst*, and *Middlesex County Sewerage Authority*.

I would grant certiorari to consider these issues.

No. 82–490. DAVIS *v.* GOODSON. Sup. Ct. Ark. Certiorari denied. Reported below: 276 Ark. 337, 635 S. W. 2d 226.

JUSTICE STEVENS, concurring.

Because the petition for a writ of certiorari does not affirmatively show that a federal question was presented to or decided by the Supreme Court of Arkansas, I believe the Court correctly denies the writ.

JUSTICE MARSHALL, dissenting.

Petitioner was summarily held in contempt for advising his client that he had a privilege not to submit to a breath-analysis test. In citing petitioner for contempt, the judge made no finding that the advice was given in bad faith. Given the absence of such a finding, I would grant certiorari to decide whether petitioner's conviction and sentence for contempt

are constitutionally infirm in light of this Court's decision in *Maness* v. *Meyers*, 419 U. S. 449 (1975), where we held that "an advocate is not subject to the penalty of contempt for advising his client, in good faith, to assert the Fifth Amendment privilege against self-incrimination in any proceeding embracing the power to compel testimony." *Id.*, at 468. See also *id.*, at 472 (Stewart, J., concurring in result); *In re Watts*, 190 U. S. 1, 29 (1903) ("if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment").

No. 82–516. SOUTH CAROLINA ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 685 F. 2d 431.

No. 82–788. JONES *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 82–5744. MEEKS *v.* FLORIDA. Sup. Ct. Fla.; and
No. 82–5789. PARKS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: No. 82–788, 648 P. 2d 1251; No. 82–5744, 418 So. 2d 987; No. 82–5789, 651 P. 2d 686.

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. 82–805. LUBBOCK INDEPENDENT SCHOOL DISTRICT ET AL. *v.* LUBBOCK CIVIL LIBERTIES UNION. C. A. 5th Cir. Motions of The Freedom Council, Ad Hoc Group of Students and Parents in Lubbock Independent School District, Texas Association of School Boards, National Association of Evangelicals et al., Mark O. Hatfield et al., and National Council of Churches of Christ in the United States of America et al.

for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 669 F. 2d 1038 and 680 F. 2d 424.

No. 82–822. FORT PIERCE UTILITIES AUTHORITY ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 11th Cir. Motion of Potomac Electric Power Co. for leave to file a brief as *amicus curiae* granted. Certiorari denied.

No. 82–829. ALASKA ET AL. *v.* BOISE CASCADE ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 685 F. 2d 810.

No. 82–830. MENORA, ON BEHALF OF MENORA, A MINOR, ET AL. *v.* ILLINOIS HIGH SCHOOL ASSN. ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE MARSHALL and JUSTICE BLACKMUN would grant certiorari. Reported below: 683 F. 2d 1030.

No. 82–833. FLORIDA *v.* SIMPSON. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 418 So. 2d 984.

No. 82–5285. CHAPARRO-ALMEIDA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 679 F. 2d 423.

No. 82–5528. BUTTRUM *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 249 Ga. 652, 293 S. E. 2d 334.

JUSTICE BRENNAN, dissenting.

Adhering to my view 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 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

I continue to adhere to my view that the death penalty is unconstitutional in all circumstances, and I would vacate petitioner's death sentence on that basis alone. However, even if I accepted the prevailing view that the death penalty can constitutionally be imposed under certain conditions, I would vacate the death sentence imposed in this case. The trial judge permitted a psychologist who had never examined petitioner to make a prediction as to her future dangerousness that was based in substantial part on hearsay statements that were not in evidence.[1] This was the only testimony presented by the prosecution in the sentencing phase of the trial. It is well recognized that predictions of violent behavior are generally unreliable even under the best of circumstances.[2] In my view, when this general unreliability is compounded by the obvious risks inherent in relying on hearsay statements that were not made under oath and were not subject to cross-examination, and the person making the prediction has never even examined the individual in question, the State has "introduce[d] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Beck* v. *Alabama*, 447 U. S. 625, 643 (1980).

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[1] The psychologist relied on medical and psychiatric reports that he had examined and on out-of-court statements made to him by a guard and by one of petitioner's fellow inmates.

Petitioner was 17 at the time of the offense.

[2] See, *e. g.*, Cocozza & Steadman, The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence, 29 Rutgers L. Rev. 1084 (1976) (reviewing the studies on this subject); Report of the Task Force on the Role of Psychology in the Criminal Justice System, 33 Am. Psychologist 1099, 1110 (1978) ("the validity of psychological predictions of violent behavior, at least in the sentencing and release situations . . . is extremely poor").

In *People* v. *Murtishaw*, 29 Cal. 3d 733, 631 P. 2d 446 (1981), cert. denied, 455 U. S. 922 (1982), the California Supreme Court concluded that predictions of violent conduct are too unreliable to be admissible in capital sentencing proceedings absent a showing of exceptional circumstances supporting the prediction. 29 Cal. 3d, at 767–775, 631 P. 2d, at 466–471.

No. 82–5590. MILLER *v.* FLORIDA. Sup. Ct. Fla. Motion of Florida Public Defenders Association, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 415 So. 2d 1262.

JUSTICE BRENNAN, dissenting.

Adhering to my view 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 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

I continue to adhere to my view that the death penalty is unconstitutional under all circumstances. I would therefore grant certiorari and vacate the death sentence on this basis alone. However, even if I accepted the prevailing view that the death penalty can constitutionally be imposed under certain circumstances, I would grant certiorari in this case to consider whether a trial judge may reject a jury's recommendation of life imprisonment and impose the death sentence based in part on a different jury's recommendation that the defendant's accomplice be sentenced to death.

Petitioner Ernest Lee Miller and his stepbrother, William Riley Jent, were indicted for first-degree murder. Following trials before the same judge but before separate juries, both defendants were found guilty. The trials were followed by hearings at which each jury was directed to consider "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death." Fla. Stat. §§ 921.141(2)(b) and (c) (1981). The jury that heard petitioner's case recommended life imprisonment, but in Jent's case the jury recommended a death sentence.

Under the Florida capital sentencing procedure, the jury's sentencing decision is only advisory; the actual sentence is

determined by the trial judge. Here the judge who conducted both trials sentenced both petitioner and his accomplice Jent. In the case of Jent, the judge accepted the jury's recommendation and imposed a death sentence.

In the case of petitioner, the judge was faced with a jury recommendation of life imprisonment. Under Florida law, a sentencing judge can reject such a recommendation only if "'the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.'" *Proffitt* v. *Florida*, 428 U. S. 242, 249 (1976), quoting *Tedder* v. *State*, 322 So. 2d 908, 910 (Fla. 1975). In deciding to impose the death sentence despite the jury's recommendation, the judge relied heavily on the fact that in Jent's case the jury recommended a death sentence:

> "The United States Supreme Court has determined that if the death penalty is to be imposed by the states, the United States Constitution demands that it be imposed with regularity, rationality and consistency.
>
> "The jury for the defendant Jent has recommended death and this court finds that the weight of the aggravating and mitigating circumstances demand death sentences for both defendants. Therefore, if the recommendation of the jury for the defendant Miller were followed, that would result in two co-perpetrators who participated equally in a crime having disparate sentences. It would cause a hollow ring in the Florida halls of justice if the sentences in these cases were not to be equalized." Findings in Support of Sentences 6 (citations omitted).
>
> "The goal in the law is regularity or uniformity in the application of those available sentences. Now, the Court, our Supreme Court in Florida has also said that . . . [the fact that] two coperpetrators who participated equally in the crime would have [disparate] sentences if the jury recommendation were to be accepted has to be a strong consideration." Tr. 16–17.

In sentencing petitioner to death, the judge expressly relied on the recommendation made by a different jury following the separate trial of a different defendant. There is much force to petitioner's contention that this reliance on the recommendation made by Jent's jury was inconsistent with the judge's constitutional duty to decide whether to impose a death sentence on the basis of an "objective consideration of the *particularized* circumstances of the individual offense *and the individual offender.*" *Jurek* v. *Texas*, 428 U. S. 262, 274 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.) (emphasis added). See, *e. g.*, *Eddings* v. *Oklahoma*, 455 U. S. 104, 110–112 (1982); *Lockett* v. *Ohio*, 438 U. S. 586, 606 (1978) (plurality opinion); *Roberts* v. *Louisiana*, 431 U. S. 633, 637 (1977) *(per curiam); Woodson* v. *North Carolina*, 428 U. S. 280, 303–304 (1976) (plurality opinion of Stewart, POWELL, and STEVENS, JJ.). Our cases make clear that in capital cases "[t]he fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender." *Woodson* v. *North Carolina*, *supra*, at 304.

Although it is impossible to determine the precise extent to which the recommendation of the jury in Jent's case persuaded the judge to minimize or disregard the differences between petitioner and Jent,* it is undeniable that the judge

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*Petitioner had no history of prior criminal activity. In addition, a clinical psychologist testified that petitioner did not have a violent nature, but had "basically a dependent personality." The psychologist testified that petitioner had come under the negative influence of Jent but would respond positively to the influence of "a stronger person [who] is a favorable, community oriented individual." The trial judge gave no weight to this testimony. If the judge who sentenced petitioner had not also sentenced Jent, or if the jury had recommended life imprisonment for Jent, the judge may well have been willing to take this testimony into account.

The court also declined to admit additional testimony offered by the clinical psychologist regarding petitioner's capacity for rehabilitation. The court's exclusion of such mitigating evidence may itself have been a viola-

allowed that recommendation to influence his choice of petitioner's sentence. There is, at the very least, a substantial question whether the judge thereby relied on a constitutionally impermissible consideration, for the jury that recommended a death sentence for Jent heard none of the mitigating evidence presented by petitioner, and petitioner had no opportunity to challenge the evidence and arguments presented by the State in Jent's trial and sentencing proceeding.

In my view, the trial judge in this case confused his inquiry as sentencer with that undertaken by an appellate court in determining whether a sentence of death was warranted. An appellate court, in the performance of the reviewing function which this Court has held indispensable to a constitutionally acceptable capital punishment scheme, must examine the sentences imposed in all capital cases in the jurisdiction in order "to ensure that similar results are reached in similar cases." *Proffitt* v. *Florida*, *supra*, at 258 (joint opinion of Stewart, POWELL, and STEVENS, JJ.). See also, *e. g.*, *Godfrey* v. *Georgia*, 446 U. S. 420, 433 (1980) (plurality opinion). The sentencer has a different role. The sentencer's duty is to determine in the first instance whether a death sentence is warranted for a particular defendant. That determination can only be made on the basis of the evidence that the judge has heard with respect to that defendant, and, under the Florida procedure, on the recommendation made by the jury that heard that evidence. A capital sentencing determination cannot properly be made on the basis of evidence presented in another trial or a recommendation made by another jury.

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tion of due process. The sentencer may "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion) (emphasis in original) (footnotes omitted). See *Eddings* v. *Oklahoma*, 455 U. S. 104, 110–112 (1982).

It is no answer to say that a sentencing judge's failure to consider the recommendations made by juries in other cases will make it difficult or impossible to produce a rational pattern of sentences. If this is true, the fault lies in the capital sentencing scheme itself. The remedy is not to deny a defendant the individualized consideration to which he is entitled, but to review the sentences that are actually imposed and to set aside death sentences in those cases that cannot be distinguished from cases in which life sentences were imposed.

No. 82–5646. CHASSON *v.* PONTE ET AL. C. A. 1st Cir.; and

No. 82–5763. RIVERA *v.* COOMBE, SUPERINTENDENT, EASTERN NEW YORK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: No. 82–5646, 692 F. 2d 745; No. 82–5763, 683 F. 2d 697.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

In *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), this Court held that a defendant's right to due process is violated when the trial judge, charging the jury on the issue of criminal intent, instructs the jury to presume that each person intends the natural consequences of his act. We left open the possibility that the impermissible effects of such a jury instruction might be "removed" by other instructions that are "rhetorically inconsistent with a conclusive or burden-shifting presumption." *Id.*, at 518–519, n. 7. In each of these cases the trial judge gave an instruction concerning intent that was improperly cast in the form of a mandatory presumption. In each case the Court of Appeals held that the improper instruction was cured by other instructions concerning intent, even though the additional instructions were *not* rhetorically inconsistent with the improper charge. I would grant certiorari in order to address this misinterpretation of this Court's decision in *Sandstrom*.

In No. 82–5763, petitioner Edwin Rivera was convicted in state court of first-degree manslaughter and misdemeanor possession of a weapon. The trial judge's instruction concerning intent began with the following statement: "I shall now define intent for you. A person is presumed to intend the natural consequence of his act." This statement is substantively identical to the instruction in *Sandstrom* which we held improper because "a reasonable juror could have given the presumption conclusive or persuasion-shifting effect." *Id.*, at 519. See *id.*, at 513. Accordingly, on collateral review the District Court granted a writ of habeas corpus. *Rivera* v. *Coombe*, 534 F. Supp. 980 (SDNY 1982).

The decision of the Court of Appeals for the Second Circuit reversing the District Court, 683 F. 2d 697 (1982), cannot be squared with our holding in *Sandstrom*. The Court of Appeals' conclusion that the charge as a whole was proper rested on the existence of later statements in the charge suggesting that the presumption is permissive, and on boilerplate language concerning the State's burden of proof and the jury's duty to consider all relevant evidence. Conspicuously absent from the lower court's opinion is the conclusion that any of these additional statements were rhetorically inconsistent with the impermissible mandatory-presumption language. The reason is clear: the additional instructions reasonably could have been understood by the jury in a manner entirely consistent with the improper mandatory presumption.[1]

[1] Indeed, the trial judge's further instructions reinforced the impermissible presumption:

"Under our law every person is presumed to intend the natural and inevitable consequences of his own voluntary acts and unless such acts were done under circumstances which would preclude the existence of such intent, the jury has a right to infer from the results produced, the intention to effect such result."

The jury reasonably could have interpreted this instruction as a mandatory rebuttable presumption which, like a mandatory conclusive presumption, violates due process. *Sandstrom* v. *Montana*, 442 U. S. 510, 519

The presence of some arguably permissive-presumption language in the judge's charge on intent merely created the "possibility that some jurors may have interpreted the challenged instruction as permissive." *Sandstrom*, 442 U. S., at 519. As in *Sandstrom*, this possibility did not entitle the court to "discount the [other] possibility that [Rivera's] jurors actually did proceed upon" an impermissible, mandatory presumption.[2] *Ibid.* Nor were the defective instructions cured by the presence of familiar language concerning the burden of proof and the duty to consider all evidence. As we explained in *Sandstrom*, general instructions such as these are "not rhetorically inconsistent with a conclusive or burden-shifting presumption." *Id.*, at 518, n. 7. Because there were no rhetorically inconsistent instructions that removed the effects of the impermissible mandatory-presumption instructions, the charge as a whole was defective and Rivera's conviction cannot stand.[3]

(1979). Even if the jury interpreted the latter portion of the instruction as describing only a permissive presumption it would not be rhetorically inconsistent with the earlier defective instructions. See *Rivera* v. *Coombe*, 534 F. Supp. 980, 991–993 (SDNY 1982). However it was interpreted, this additional instruction clearly did not remove the impermissible effects of the trial judge's initial instruction concerning intent.

[2] For example, the instruction that "'intent may be inferred from all the circumstances of the case,'" 683 F. 2d 697, 701 (CA2 1982), did not preclude the jury from employing a mandatory presumption to find intent; nor is it inconsistent with such a reliance, since it could reasonably have been interpreted as permitting the jury to consider circumstantial (as opposed to direct) evidence as to Rivera's acts from which intent is automatically presumed. Similarly, the instruction that intent is a "'question of fact,'" *ibid.*, is entirely consistent with a mandatory presumption of intent based on factual findings as to certain acts.

[3] The Court of Appeals found it significant that the jury acquitted Rivera of second-degree murder. *Id.*, at 702. However, this in no way precludes the possibility that some jurors may have employed the mandatory presumption to find that Rivera intended to cause serious physical injury, an element of the manslaughter conviction. See *id.*, at 704 (Oakes, J., dissenting). The Court of Appeals also suggested in passing that *Sandstrom* v. *Montana*, *supra*, should be limited to those situations where the only

For similar reasons, petitioner Chasson's conviction in No. 82–5646 must also be vacated. At Chasson's trial for first-degree murder, the state trial court instructed the jury that "[w]hen one does an unlawful act he is by law presumed to have intended to do it and to have intended its ordinary and natural consequences. . . ." This instruction is substantively identical to the instruction found impermissible in *Sandstrom*. In this case the trial judge also charged with respect to "deliberate premeditation" that the jury must find "the prior formation of a purpose to kill." The District Court denied Chasson's writ of habeas corpus, and the Court of Appeals for the First Circuit affirmed. The Court of Appeals held that *Sandstrom* was not violated because, in light of the charge on premeditation, the improper "'instruction by itself [did not] so infec[t] the entire trial that the resulting conviction violates due process,' *Cupp* v. *Naughten*, 414 U. S. 141 (1973); *Henderson* v. *Kibbe*, 431 U. S. 145, 154 (1977)."

The Court of Appeals' interpretation of *Sandstrom* is clearly improper. The additional instruction in this case was entirely consistent with the impermissible presumption of intent. Indeed, the jury reasonably could have applied the presumption to its finding of premeditation in the belief that when one does the unlawful act of killing he is "presumed" to have formed the prior purpose to kill. 442 U. S., at 525–526. I would grant certiorari to correct the misinterpretation of *Sandstrom*.

Rehearing Denied

No. 82–378. MANDALAY SHORES COOPERATIVE HOUSING ASSN., INC. *v.* PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., *ante*, p. 1036; and

No. 82–5475. COTTON *v.* FEDERAL LAND BANK OF COLUMBIA ET AL., *ante*, p. 1041. Petitions for rehearing denied.

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defense is intent. 683 F. 2d, at 700. Nothing in *Sandstrom* supports such a narrow reading of that decision.

No. 82–5512. CHIN *v.* NADEL ET AL., *ante*, p. 1043. Petition for rehearing denied.

No. 82–117. NUNZIATA *v.* UNITED STATES, *ante*, p. 907. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

JANUARY 20, 1983

Dismissal Under Rule 53

No. 82–5631. BROWN *v.* GEORGIA. Ct. App. Ga. Certiorari dismissed under this Court's Rule 53. Reported below: 163 Ga. App. 209, 294 S. E. 2d 305.

JANUARY 24, 1983

Affirmed on Appeal

No. 82–857. BUSBEE, GOVERNOR OF GEORGIA, ET AL. *v.* SMITH, ATTORNEY GENERAL, ET AL. Affirmed on appeal from D. C. D. C. Reported below: 549 F. Supp. 494.

Appeals Dismissed

No. 82–646. YATEMAN *v.* YATEMAN. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question.

No. 82–943. ROSSON ET AL., T/A DOCTOR'S ANSWERING SERVICE ET AL. *v.* CITY OF MANASSAS ET AL. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question. Reported below: 224 Va. 12, 294 S. E. 2d 799.

No. 82–5637. BERRY *v.* PENNSYLVANIA. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question.

Certiorari Granted—Vacated and Remanded

No. 82–53. MCCARTHY *v.* THE BARK PEKING ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Director*,

OWCP v. *Perini North River Associates*, *ante*, p. 297. Reported below: 676 F. 2d 42.

No. 82–333. MICHIGAN *v.* MILLER. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Ross*, 456 U. S. 798 (1982), and *New York* v. *Belton*, 453 U. S. 454 (1981). Reported below: 110 Mich. App. 270, 312 N. W. 2d 225.

No. 82–815. OHIO *v.* KOVACS, DBA B & W ENTERPRISES ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded to consider the question of mootness. Reported below: 681 F. 2d 454.

No. 82–886. UNITED STATES *v.* EAGLE ELK. 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 *Wyrick* v. *Fields*, *ante*, p. 42. Reported below: 682 F. 2d 168.

Miscellaneous Orders

No. A–478. WIDGERY *v.* UNITED STATES. Application for bond, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–316. IN RE DISBARMENT OF HARRIS. It is ordered that H. Reed Harris, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Exceptions to the Report of the Special Master are set for oral argument in due course. [For earlier order herein, see, *e. g.*, *ante*, p. 940.]

No. 82–65. BROWN ET AL. *v.* THOMSON, SECRETARY OF STATE OF WYOMING, ET AL. D. C. Wyo. [Probable juris-

diction noted, *ante*, p. 819.] Motion of Peter J. Mulvaney, Esquire, to permit Randall T. Cox, Esquire, to present oral argument *pro hac vice* on behalf of appellees granted.

No. 82–185. BOSTON FIREFIGHTERS UNION, LOCAL 718 *v.* BOSTON CHAPTER, NAACP, ET AL.;

No. 82–246. BOSTON POLICE PATROLMEN'S ASSN., INC. *v.* CASTRO ET AL.; and

No. 82–259. BEECHER ET AL. *v.* BOSTON CHAPTER, NAACP, ET AL. C. A. 1st Cir. [Certiorari granted, *ante*, p. 967.] Motion of Thomas R. Kiley, Esquire, to permit Thomas A. Barnico, Esquire, to present oral argument *pro hac vice* on behalf of petitioners in No. 82–259 granted. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 82–905. SOONER FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* OKLAHOMA TAX COMMISSION ET AL. Appeal from Sup. Ct. Okla. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 82–5279. DIXSON *v.* UNITED STATES; and

No. 82–5331. HINTON *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, *ante*, p. 1085.] Motions for appointment of counsel granted, and it is ordered that Donald V. Morano, Esquire, of Chicago, Ill., be appointed to serve as counsel for petitioners in these cases.

Certiorari Granted

No. 82–15. OLIVER *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted. Reported below: 686 F. 2d 356.

No. 82–357. MICHIGAN *v.* CLIFFORD ET AL. Ct. App. Mich. Certiorari granted.

No. 82–432. LOCAL NO. 82, FURNITURE & PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN & PACKERS, ET AL. *v.* CROWLEY ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 679 F. 2d 978.

No. 82–485. KEETON *v.* HUSTLER MAGAZINE, INC., ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 682 F. 2d 33.

No. 82–556. PRESS-ENTERPRISE CO. *v.* SUPERIOR COURT OF CALIFORNIA, RIVERSIDE COUNTY. Ct. App. Cal., 4th App. Dist. Certiorari granted.

No. 82–849. UNITED STATES *v.* MENDOZA. C. A. 9th Cir. Certiorari granted. Reported below: 672 F. 2d 1320.

No. 82–940. HISHON *v.* KING & SPALDING. C. A. 11th Cir. Motions of Connecticut Women's Educational and Legal Fund, Inc., et al. and Women's Bar Association of Illinois for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 678 F. 2d 1022.

No. 82–6080. BAREFOOT *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Application for stay of execution of sentence of death was presented to JUSTICE WHITE and referred to the Court. Treating the application as a petition for writ of certiorari before judgment, certiorari granted. The parties are directed to brief and argue the question presented by the application, namely, the appropriate standard for granting or denying a stay of execution pending disposition of an appeal by a federal court of appeals by a death-sentenced federal habeas corpus petitioner, and also the issues on the appeal before the United States Court of Appeals for the Fifth Circuit. Execution and enforcement of the sentence of death set for Tuesday, January 25, 1983, is stayed pending the sending down of the judgment of this Court.

Certiorari Denied

No. 81–1039. WILEY N. JACKSON CO. ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 659 F. 2d 54.

No. 81–1109. ROBERT W. KIRK & ASSOCIATES, INC. *v.* HOLCOMB ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 655 F. 2d 589.

No. 81–2278. UNION ELECTRIC CO. *v.* CITY OF KIRKWOOD, MISSOURI. C. A. 8th Cir. Certiorari denied. Reported below: 671 F. 2d 1173.

No. 82–4. B. F. DIAMOND CONSTRUCTION CO. ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 676 F. 2d 547.

No. 82–523. SANGER BOATS, INC., ET AL. *v.* SCHWABENLAND. C. A. 9th Cir. Certiorari denied. Reported below: 683 F. 2d 309.

No. 82–527. HARDLINE ELECTRIC, INC. *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1547. C. A. 9th Cir. Certiorari denied. Reported below: 680 F. 2d 622.

No. 82–557. HANAHAN *v.* LUTHER, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 693 F. 2d 629.

No. 82–566. ZAPATA-HAYNIE CORP. ET AL. *v.* WARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 684 F. 2d 1114.

No. 82–605. A.W.I., INC. *v.* AMERICAN INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 680 F. 2d 1034.

No. 82–624. HARTLEY ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 678 F. 2d 961.

No. 82–709. SCARFO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 685 F. 2d 842.

No. 82–732. STURMAN ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 679 F. 2d 840.

No. 82–745. GREYHOUND RENT-A-CAR, INC. *v.* CITY OF PENSACOLA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 676 F. 2d 1380.

No. 82–751. INTERNATIONAL UNION OF THE UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 219 U. S. App. D. C. 32, 675 F. 2d 1257.

No. 82–773. BOARD OF PUBLIC UTILITIES OF SPRINGFIELD, MISSOURI, DBA CITY UTILITIES, ET AL. *v.* BILL'S COAL CO., INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 682 F. 2d 883.

No. 82–797. BATES ET AL. *v.* BRUNER. C. A. 6th Cir. Certiorari denied. Reported below: 684 F. 2d 422.

No. 82–832. SHUPPER *v.* COMMITTEE ON CHARACTER AND FITNESS OF THE SUPREME COURT OF SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 82–854. PECHANGA BAND OF MISSION INDIANS *v.* KACOR REALTY, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 680 F. 2d 71.

No. 82–856. SCARPELLI *v.* FISCELLA, DIRECTOR OF DEPARTMENT OF PROBATION AND COURT SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 687 F. 2d 1012.

No. 82–868. RECORD WIDE DISTRIBUTORS, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 682 F. 2d 204.

No. 82–871. A. H. ROBINS CO., INC. *v.* ABED ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 693 F. 2d 847.

No. 82–875. IRISH PEOPLE, INC. *v.* SMITH, ATTORNEY GENERAL OF THE UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 221 U. S. App. D. C. 406, 684 F. 2d 928.

No. 82–885. PANTOJA ET AL. *v.* ALL-AMERICAN TRANSPORT, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 692 F. 2d 759.

No. 82–887. LOCAL UNION NO. 680, MILK DRIVERS & DAIRY EMPLOYEES *v.* NOVEMBRE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 691 F. 2d 491.

No. 82–895. MARSHALL *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 82–906. HOWARD *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 324 N. W. 2d 216.

No. 82–907. PROCTOR *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 58 N. C. App. 631, 294 S. E. 2d 240.

No. 82–909. INTERNATIONAL RECTIFIER CORP. ET AL. *v.* PFIZER, INC. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 357.

No. 82–911. HARVEY *v.* BARD; and HARVEY *v.* BARD ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 105 Ill. App. 3d 1200, 439 N. E. 2d 1113 (first case); 106 Ill. App. 3d 1150 (second case).

No. 82–917. CORY, CONTROLLER OF THE STATE OF CALIFORNIA, ET AL. *v.* OLSON ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 134 Cal. App. 3d 85, 184 Cal. Rptr. 325.

No. 82–919. CITY OF PHILADELPHIA ET AL. *v.* TACYNEC ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 687 F. 2d 793.

No. 82–922. LUTZ *v.* OHIO. Ct. App. Ohio, Coshocton County. Certiorari denied.

No. 82–924. ROSENFIELD ET AL. *v.* NEW ENGLAND MERCHANTS NATIONAL BANK. C. A. 11th Cir. Certiorari denied. Reported below: 679 F. 2d 467.

No. 82–932. UITERWYK CORP. *v.* CTI-CONTAINER LEASING CORP. C. A. 11th Cir. Certiorari denied. Reported below: 685 F. 2d 1284.

No. 82–938. PAUER *v.* OHIO. Ct. App. Ohio, Geauga County. Certiorari denied.

No. 82–950. LABORDE *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 686 F. 2d 715.

No. 82–988. DUFRIEND *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 691 F. 2d 948.

No. 82–989. MANOCCHIO *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. Reported below: —— R. I. ——, 448 A. 2d 761.

No. 82–995. SMITH *v.* LEHMAN, SECRETARY OF THE NAVY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 689 F. 2d 342.

No. 82–997. WEARDON, AKA AQUILA, DBA HERBAL EDUCATION CENTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 119.

No. 82–1015. DERICKSON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 568.

No. 82–1028. ROMO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 685 F. 2d 1384.

No. 82–1035. BURNS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 683 F. 2d 1056.

No. 82–1055. WINSLOW *v.* MORGAN COUNTY COMMISSIONERS ET AL. Ct. App. Colo. Certiorari denied.

No. 82–5332. GRANGER *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 680 F. 2d 1387.

No. 82–5463. FITE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 902.

No. 82–5483. BRAKE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 825.

No. 82–5501. LOPEZ-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 683 F. 2d 1226.

No. 82–5521. GUZMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 843.

No. 82–5524. JONES *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 82–5559. FAYNE *v.* MARSHALL. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 453.

No. 82–5571. LEROY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 687 F. 2d 610.

No. 82–5609. BURNS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 684 F. 2d 1066.

No. 82–5620. HABERSKI *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 449 A. 2d 373.

No. 82–5621. TORRES *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 3d Cir. Certiorari denied. Reported below: 682 F. 2d 109.

No. 82–5629. ROUSE ET AL. *v.* LEWIS, SECRETARY OF TRANSPORTATION, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 296.

No. 82–5717. GRAVES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 692 F. 2d 750.

No. 82–5781. THOMAS *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 687 F. 2d 235.

No. 82–5785. WOODS *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 691 F. 2d 499.

No. 82–5786. ROBINSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 116.

No. 82–5787. POLLAK *v.* WILLIAM MARSH RICE UNIVERSITY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 690 F. 2d 903.

No. 82–5794. ANDERSON *v.* SPALDING, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 82–5795. TYREE *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 387 Mass. 191, 439 N. E. 2d 263.

No. 82–5800. JACKSON *v.* OKLAHOMA. Sup. Ct. Okla. Certiorari denied.

No. 82–5801. HADDIX *v.* OHIO LIQUOR CONTROL COMMISSION. Sup. Ct. Ohio. Certiorari denied.

No. 82–5803. FLEEK *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 52 Md. App. 787.

No. 82–5804. BENNETT *v.* TULL, DIRECTOR, CAMDEN COUNTY BOARD OF SOCIAL SERVICES. C. A. 3d Cir. Certiorari denied. Reported below: 692 F. 2d 747.

No. 82–5807. LARGEN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 82–5811. ORYNICZ *v.* WEST VIRGINIA STATE WORKMEN'S COMPENSATION COMMISSIONER. Sup. Ct. App. W. Va. Certiorari denied.

No. 82–5814. TOWNSEND *v.* HOOD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 688 F. 2d 835.

No. 82–5817. ROUTTENBERG *v.* ALHAMBRA CITY SCHOOL DISTRICT. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 82–5819. CUMBER *v.* CHERRY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 688 F. 2d 830.

No. 82–5825. FINNEY *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 638 S. W. 2d 709.

No. 82–5832. BROWNSTEIN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 105 Ill. App. 3d 459, 434 N. E. 2d 505.

No. 82–5841. REYNOLDS *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 105 Ill. App. 3d 698, 434 N. E. 2d 776.

No. 82–5844. JONES *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 250 Ga. 11, 295 S. E. 2d 71.

No. 82–5849. MCMILLAN *v.* BULLARD, SUPERINTENDENT, WAGRAM CORRECTIONAL CENTER. C. A. 4th Cir. Certiorari denied. Reported below: 692 F. 2d 752.

No. 82–5851. MORROW *v.* GEM CITY SAVINGS ASSN. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 82–5856. IN RE NEARIS. C. A. 1st Cir. Certiorari denied.

No. 82–5859. MARTIN *v.* PENNSYLVANIA UNEMPLOYMENT COMPENSATION BOARD OF REVIEW. Pa. Commw. Ct. Certiorari denied. Reported below: 66 Pa. Commw. 341, 444 A. 2d 819.

No. 82–5865. NEWCOMB *v.* NEW YORK STATE BOARD OF PAROLE. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 88 App. Div. 2d 1098, 452 N. Y. S. 2d 912.

No. 82–5866. SMITH *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 82–5870. JONES *v.* KEOHANE, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 692 F. 2d 769.

No. 82–5878. DISILVESTRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 289.

No. 82–5891. BEASON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 690 F. 2d 439.

No. 82–5893. OMERNICK *v.* CAROW ET AL. C. A. 7th Cir. Certiorari denied.

No. 82–5901. RUSSELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 692 F. 2d 766.

No. 82–5907. PETTEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 691 F. 2d 498.

No. 82–5908. RAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 688 F. 2d 250.

No. 82–5917. BAYSDEN *v.* DEPARTMENT OF THE NAVY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 688 F. 2d 829.

No. 82–5927. CARR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 690 F. 2d 678.

No. 81–2362. B. F. DIAMOND CONSTRUCTION CO., INC., ET AL. *v.* LEMELLE ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 674 F. 2d 296.

No. 82–314. WHITE, SUPERINTENDENT, MISSOURI TRAINING CENTER FOR MEN *v.* THOMPSON. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 680 F. 2d 1173.

No. 82–603. NEW YORK *v.* SAWYER. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 57 N. Y. 2d 12, 438 N. E. 2d 1133.

No. 82–918. PENNSYLVANIA *v.* LOVETTE ET AL. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 498 Pa. 665, 450 A. 2d 975.

No. 82–455. JOHN CUNEO, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 220 U. S. App. D. C. 283, 681 F. 2d 11.

JUSTICE REHNQUIST, with whom JUSTICE POWELL joins, dissenting.

In affirming the National Labor Relations Board's decision in this case, the Court of Appeals for the District of Columbia Circuit held, *inter alia*, that (1) a bargaining order to the employer was an appropriate remedy; (2) the bargaining order could be retroactively applied from the date the employer first denied recognition of the Union; and (3) because of the employer's actions during the strike, what began as an economic strike was converted into an unfair labor practices strike *ab initio*, justifying reinstatement of striking employees irrespective of whether the employer had hired replacements for the strikers. *Road Sprinkler Fitters Local Union No. 669* v. *NLRB*, 220 U. S. App. D. C. 283, 681 F. 2d 11 (1982). In my opinion, all three of these holdings raise serious and important questions which recur with frequency before the NLRB. Because the NLRB and Court of Appeals, in resolving these questions, have charted new courses in areas previously mapped out only by this Court, I would grant certiorari to review these determinations.

Petitioner, located in Chattanooga, Tenn., manufactures and sells fire protection sprinkler systems. On September 15, 1977, representatives of the Road Sprinkler Fitters Local

Union No. 669 presented to the Company president, Bob Splawn, Union authorization cards signed by 11 of the Company's 14 fabrication shop employees. Splawn refused to recognize the Union. On September 21 the 11 employees went on strike; the strike continued until November 14, when 7 of the strikers made unconditional offers to return to work.

The NLRB determined that the Company committed several unfair labor practices throughout this period in violation of §§ 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U. S. C. §§ 158(a)(1), (3), and (5). While contested below, these findings of fact are not at issue here. First, on two separate days before the strike, Company officials interrogated a senior employee, Gerald Hall, seeking to ascertain the identities of the employees who signed Union authorization cards; at one point Hall was threatened with discharge if he did not cooperate, but soon thereafter Company officials disclaimed a desire to discharge Hall. Second, the Company created the "impression of surveillance" by two actions: prior to the strike, a Company supervisor was directed to find out who had signed the Union authorization cards; and on two separate days early in the strike, Company officials took photographs of picketing strikers. Third, after the strike was terminated, the Company unnecessarily delayed in reinstating striking employers to available positions. Fourth, when the first two striking employees were reinstated in February 1978, Splawn told them not to talk about the Union on the job. Fifth, in February 1978 the Company promulgated a new rule providing that an employee would be discharged if late for work three times; the new rule was discriminatorily applied against the reinstated strikers.

The Bargaining Order. In *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 614 (1969), this Court held that if "at one point the union had a majority" and the employer has engaged in unfair labor practices "to undermine majority strength and impede the election processes," then the NLRB can consider

issuing a "bargaining order." Such an order requires the employer to negotiate with the union, forgoing the normal election procedures in which the union must demonstrate its majority status. The Court cautioned, however, that this remedy was to be used sparingly, in situations where the NLRB "finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." *Id.*, at 614–615. The Court emphasized that there are "less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order." *Id.*, at 615.

The Court of Appeals' application of these principles is debatable in two respects. First, the court determined the seriousness of the Company's unfair labor practices by focusing on the type of practice committed, rather than the extent to which the practices occurred. The Court of Appeals said that "[c]ourt and [b]oard cases often have viewed unfair labor practices similar to the ones in this case—interrogation, threatened discharge, surveillance, discriminatory application of work rules—as conduct which supports the issuance of a bargaining order." 220 U. S. App. D. C., at 295, 681 F. 2d, at 23. Most any "type" of unfair labor practice would rise to the level of misconduct contemplated by *Gissel* if committed with sufficient frequency; but *Gissel* contemplated that the extent of the practices should be given significant weight in determining the seriousness of an unfair labor practice.

Second, the court ruled that "'*Gissel* does not require a finding that no other remedy could suffice, only that the bargaining order better protects employees' expressed union preference.'" 220 U. S. App. D. C., at 296, 681 F. 2d, at 24 (quoting *Amalgamated Clothing Workers* v. *NLRB*, 174 U. S. App. D. C. 20, 24, 527 F. 2d 803, 807 (1975), cert. de-

nied *sub nom. Jimmy-Richard Co.* v. *NLRB*, 426 U. S. 907 (1976)). The Court spoke plainly in *Gissel*, however, emphasizing that in addition to finding that the employees' union preference would be better protected, before a bargaining order is issued it must be determined that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight." 395 U. S., at 614.

The so-called *Gissel* bargaining order was never intended to be used routinely. It is a remedy designed for cases where traditional remedies are insufficient. Since in this case the bargaining order has been sanctioned without a finding that the special circumstances required by *Gissel* exist, we should determine whether this newly adopted approach is a proper one.

Retroactivity of the Bargaining Order. The NLRB and the Court of Appeals determined not only that the facts of this case supported the issuance of a bargaining order, but also that the order should be retroactive from the first time the Company refused to recognize the Union. Prior to 1975 the NLRB did not issue retroactive bargaining orders. See *Trading Port, Inc.*, 219 N. L. R. B. 298 (1975). In its decision below, the Court of Appeals did not purport to accept a new policy which uses retroactive orders only. Rather, the court said it will approve "the issuance of retroactive bargaining orders where, as here, the union had majority support within the bargaining unit, the employer refused to bargain with the union, and the employer engaged in serious and pervasive unfair labor practices sufficient to justify a bargaining order under *Gissel*." 220 U. S. App. D. C., at 297, 681 F. 2d, at 25.

While stated as a limited principle, however, under the standard set forth by the Court of Appeals the NLRB will be at liberty to make all bargaining orders retroactive. Before any bargaining order can issue, all three of the so-called requirements for retroactivity need to be present under *Gissel*.

The hurdle which a "retroactive" bargaining order must clear is therefore no higher than the hurdle which must be cleared by *any* bargaining order.

Reinstatement of the Striking Employees. It is undisputed that the Company did not commit an unfair labor practice by refusing to recognize the Union in September 1977. The Company was free to require the Union to show its majority status in the bargaining unit by an election. See *Linden Lumber Division* v. *NLRB*, 419 U. S. 301 (1974). In fact, the Court of Appeals affirmed the NLRB's determination that when the strike began on September 21, 1977, it was not in response to unfair labor practices; the employees were not "striking for any reason other than to gain recognition of the Union as their bargaining representative." 220 U. S. App. D. C., at 292, 681 F. 2d, at 20. Therefore, at the inception of their protests, the employees were engaged in an "economic strike" and not an "unfair labor practices" strike.

During an "economic strike," this Court has held that an employer has the right to hire replacements for the striking employees and "he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them." *NLRB* v. *MacKay Radio & Telegraph Co.*, 304 U. S. 333, 345–346 (1938). Nevertheless, in this case the Court of Appeals affirmed the NLRB's order requiring the Company to rehire the strikers as of the date they offered to return to work, irrespective of whether any replacements were filling the strikers' positions.

To reach this result, the NLRB and the Court of Appeals relied on *Drug Package Co.*, 228 N. L. R. B. 108 (1977). In that case, the NLRB ruled that "when employees strike for recognition which should have been granted at the time they went on strike and where the employer engaged in contemporaneous widespread illegal conduct designed to frustrate the statutory scheme, and bargaining in particular, the striking

employees are unfair labor practice strikers." *Id.*, at 112 (footnote omitted). As applied in this case, the *Drug Package* rule seems patently contrary to our cases. First, in light of *Linden Lumber Division*, *supra*, there is no legal reason why recognition of the Union "should have been granted at the time [the employees] went on strike." Second, converting an "economic strike" into an "unfair labor practices" strike *ab initio* because of unfair labor practices committed subsequent to the initiation of the strike diminishes the rights of replacement workers, as well as the rights of employers, which this Court established in *MacKay Radio*, *supra*.

All three of these issues present important questions which recur with some frequency in labor disputes. I would grant certiorari to review the Court of Appeals' decision on each issue.

No. 82–623. TREASURE ISLE, INC. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 678 F. 2d 961.

No. 82–702. METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, ET AL. *v.* KELLEY ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 687 F. 2d 814.

No. 82–897. DOE ET AL. *v.* KELLY, ATTORNEY GENERAL OF MICHIGAN, ET AL. Ct. App. Mich. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 106 Mich. App. 169, 307 N. W. 2d 438.

No. 82–5632. BAKER *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 636 S. W. 2d 902.

JUSTICE BRENNAN, dissenting.

Adhering to my view 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 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

I continue to adhere to my view that the death penalty is unconstitutional in all circumstances, and would grant certiorari and vacate petitioner's death sentence on this basis alone. However, even if I accepted the prevailing view that the death penalty can constitutionally be imposed under certain circumstances, I would grant certiorari and vacate the death sentence because the Missouri Supreme Court improperly upheld the sentence on the basis of an aggravating circumstance that had never been considered by the sentencer.

I

Petitioner Robert Baker was convicted of capital murder in the Circuit Court of the city of St. Louis. The victim, a police officer assigned as an undercover agent, was dressed in street clothes at the time of the shooting. When his body was discovered in the front seat of his unmarked police car, his police badge was in his wallet.

At the sentencing stage, the jury was instructed that it may impose the death penalty if it found that the murder "was committed against a peace officer while engaged in the performance of his official duty."[1] The jury was not instructed that it also had to find that petitioner knew or should have known that the victim was a police officer. The jury imposed the sentence of death solely on the basis of this aggravating circumstance.[2]

The Missouri Supreme Court affirmed the conviction and the death sentence, with two judges dissenting. 636 S. W.

[1] The statutory aggravating circumstance at issue in this case was as follows: "The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty." Mo. Rev. Stat. § 565.012.2(8) (Supp. 1982).

[2] The existence of at least one statutory aggravating circumstance is necessary to authorize the imposition of the death sentence. § 565.012.5.

2d 902 (1982). The majority held that based on its review of the record "[t]he evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that appellant knew [the victim] was a police officer. *Jackson* v. *Virginia*, 443 U. S. 307 [(1979)]." *Id.*, at 907. It therefore "decline[d] to address the inscrutable question of *mens rea*." *Ibid.*, citing *Morissette* v. *United States*, 342 U. S. 246 (1952); *Powell* v. *Texas*, 392 U. S. 514 (1968).

II

The Missouri Supreme Court improperly affirmed the death sentence on a ground neither presented to nor found by the sentencing jury. The jury instruction authorized the imposition of the death sentence on the basis of a bare finding that the victim was a police officer on duty. The jury clearly did not base its imposition of the death sentence on a finding that petitioner knew or should have known the identity of his victim. In affirming the death sentence on the ground that there was sufficient evidence for a rational finder to find that petitioner had the requisite knowledge, the Missouri Supreme Court improperly relied on *Jackson* v. *Virginia*, 443 U. S. 307 (1979), which established a test for reviewing findings actually made, to "affirm" a finding that was not made.[3]

"[F]undamental principles of procedural fairness" prohibit a reviewing court from affirming a death sentence on the basis of an aggravating circumstance not properly found by the sentencing jury. *Presnell* v. *Georgia*, 439 U. S. 14, 16

[3] In so doing, the Missouri Supreme Court completely usurped the sentencing jury's function. Moreover, the reviewing court did not itself find that petitioner had the requisite knowledge, but simply held that if a jury had found that petitioner knew or should have known the identity of the victim, that hypothetical finding would be supported by sufficient evidence. As a result, petitioner's death sentence was imposed without an actual finding by any tribunal, least of all the jury that sentenced him, that petitioner knew or should have known that the victim was a police officer.

(1978).[4] As Justice Black stated for a unanimous Court in *Cole* v. *Arkansas*, 333 U. S. 196, 202 (1948), "[t]o conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." We have stated that this principle applies "with no less force at the penalty phase of a trial in a capital case than [it does] in the guilt-determining phase of any criminal trial." *Presnell* v. *Georgia*, *supra*, at 16.

Moreover, the death sentence in this case may not be upheld on the ground that it was properly imposed in the absence of a finding that petitioner knew or should have known the identity of his victim. If the Missouri statute does not require knowledge as an element of the aggravating circumstance charged in this case, its application in this case would violate the Constitution.

Petitioner received the death sentence solely because the victim of his crime was by chance an undercover police officer on duty. If his victim had been a private citizen as his appearance indicated,[5] the death sentence could not have been imposed under Missouri law. Nor can the death sentence be imposed on other persons who have committed or may com-

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[4] Missouri law equally forbids the imposition of a death sentence based on aggravating circumstances that were not found by the jury. The Missouri Supreme Court is authorized to review "[w]hether the evidence supports the jury's or judge's *finding* of a statutory aggravating circumstance as enumerated in section 565.012." § 565.014.3(2) (1978) (emphasis added). Where the jury has not properly found the existence of a statutory aggravating circumstance, nothing in § 565.014 authorizes the Supreme Court to determine *de novo* whether such a finding should be or could have been made.

[5] It was "a disputed issue of fact" whether petitioner knew the identity of his victim. 636 S. W. 2d 902, 911 (1982) (Seiler, J., dissenting). Petitioner testified at the guilt stage of the trial that he did not know that the victim was a police officer, and "[e]ven in his first taped confession (the second was suppressed because of the beatings), there is *nothing to indicate* that defendant knew that the victim was a police officer on duty." *Ibid.* (emphasis added).

mit similar acts, and whose *conduct*, and *mens rea* are in all respects identical, but whose victims are private citizens. Petitioner has been singled out to receive the death sentence because of the "entirely fortuitous circumstance that the victim, who was dressed in civilian clothes and who to all appearances was a private citizen, turned out to be, unknown to [him], a police officer." 636 S. W. 2d, at 913 (Seiler, J., dissenting).

We have made clear that a State may not authorize the imposition of a death sentence on the basis of an arbitrary factor. While there is undoubtedly a difference between petitioner's case and cases in which the victims are private citizens, not every difference can justify a State's decision to execute a defendant. Instead, a constitutionally acceptable death penalty scheme must provide a "*principled* way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey* v. *Georgia*, 446 U. S. 420, 433 (1980) (plurality opinion) (emphasis added). See also *Proffitt* v. *Florida*, 428 U. S. 242, 258 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.) ("similar results . . . in similar cases"); *Furman* v. *Georgia*, 408 U. S. 238, 313 (1972) (WHITE, J., concurring) ("*meaningful* basis for distinguishing the few cases in which it is imposed from the many cases in which it is not") (emphasis added).

In my view the imposition of the death sentence based solely on the identity of the victim, unknown to the accused, would result in the ultimate punishment of death being meted out in an unprincipled fashion. The identity of the victim, standing alone, has nothing to do with an accused's blameworthiness.[6] In this case the State was not required to prove a single fact about petitioner indicating that he was any more deserving of a death sentence than any defendant convicted of murder. Nor is the goal of deterrence rationally

[6] Cf. *Enmund* v. *Florida*, 458 U. S. 782, 801 (1982) (death penalty must be imposed on the basis of "personal responsibility and moral guilt").

furthered, since the enhanced penalty for the killing of a police officer could not deter an individual who is ignorant of the identity of his victim.[7]

For the foregoing reasons, I would grant certiorari and vacate the death sentence in this case.

No. 82–5793. HORTON *v.* GEORGIA. Sup. Ct. Ga.;
No. 82–5834. BLAIR *v.* MISSOURI. Sup. Ct. Mo.; and
No. 82–5861. TRIMBLE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: No. 82–5793, 249 Ga. 871, 295 S. E. 2d 281; No. 82–5834, 638 S. W. 2d 739; No. 82–5861, 638 S. W. 2d 726.

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[7] This view is fully consistent with our decision in *Roberts* v. *Louisiana*, 431 U. S. 633 (1977) *(per curiam)*. In striking down a statute which imposed a mandatory death sentence for the killing of a police officer, we acknowledged in *Roberts* that society has a "special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property." *Id.*, at 636 (footnote omitted). Given the assumption, which I do not share, that the death penalty is constitutional under certain conditions, this interest may justify the State in treating the fact that the defendent knew his victim was a police officer as an aggravating circumstance in order to deter such killings, and to give effect to a State's judgment that the intentional killing of police officers is especially heinous. Yet where the accused had no knowledge that his victim was a police officer, he was not "forewarned," *id.*, at 647 (REHNQUIST, J., dissenting), and therefore could not have been deterred by the possibility of an enhanced penalty for the killing of a police officer. Moreover, it is irrational to treat as equally reprehensible the premeditated murder of a police officer, and the murder of someone who, unbeknownst to the accused, turns out to have been a police officer. It is similarly irrational to treat differently two murderers simply because in one case the victim, unknown to the perpetrator, was a police officer. Although several Members of the Court dissented in *Roberts* v. *Louisiana* and would have upheld Louisiana's mandatory death penalty statute, the Louisiana statute required that the accused have the "specific intent" to kill or seriously injure a police officer. It was in this context that the dissenting opinions expressed support for a mandatory death penalty when the killing of a peace officer was "intentional," *id.*, at 642 (BLACKMUN, J., dissenting); *id.*, at 644, 648 (REHNQUIST, J., dissenting), or " deliberat[e]," *id.*, at 646, 647, 650; or "premeditated," *id.*, at 644, 649.

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.

Rehearing Denied

No. 82–43. ASAM *v.* STANLEY, DBA POODLE PALACE, ET AL., *ante*, p. 859;

No. 82–193. LAMPKIN-ASAM *v.* MIAMI DAILY NEWS, INC., DBA THE MIAMI NEWS, ET AL., *ante*, p. 806;

No. 82–445. MIZRAHI *v.* UNITED STATES, *ante*, p. 1086;

No. 82–5271. ARMSTRONG *v.* WASHINGTON, *ante*, p. 1089;

No. 82–5352. WILLIAMS *v.* NORTH CAROLINA, *ante*, p. 1056;

No. 82–5353. PINCH *v.* NORTH CAROLINA, *ante*, p. 1056;

No. 82–5476. COTTON *v.* FEDERAL LAND BANK OF COLUMBIA ET AL., *ante*, p. 1041;

No. 82–5534. WHITE *v.* FLORIDA, *ante*, p. 1055; and

No. 82–5581. SELLNER *v.* PRINCE GEORGE'S COUNTY, MARYLAND, ET AL., *ante*, p. 1090. Petitions for rehearing denied.

No. 79–1853. DURHAM DISTRIBUTORS, INC., ET AL. *v.* BOMBARDIER LTD. ET AL., 449 U. S. 890; and

No. 82–5051. JUDD *v.* UNITED STATES, *ante*, p. 869. Motions for leave to file petitions for rehearing denied.

No. 82–277. SCHWIMMER, DBA SUPERSONIC ELECTRONICS CO. *v.* SONY CORPORATION OF AMERICA, *ante*, p. 1007. Motion of petitioner for joint consideration with other cases denied. Petition for rehearing denied.

No. 82–5589. FLORES *v.* IBM CORP., *ante*, p. 1092. Petition for rehearing denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

JANUARY 31, 1983

Dismissal Under Rule 53

No. 82–968. REBSTOCK *v.* LOUISIANA. Sup. Ct. La. Certiorari dismissed under this Court's Rule 53. Reported below: 418 So. 2d 1306.

FEBRUARY 9, 1983

Dismissal Under Rule 53

No. 81–2305. PENNZOIL CO. *v.* UNITED STATES DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari dismissed under this Court's Rule 53. Reported below: 680 F. 2d 156.

FEBRUARY 17, 1983

Dismissal Under Rule 53

No. 82–1139. FORD MOTOR CO. *v.* HASSON, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, HASSON, ET AL. Sup. Ct. Cal. Certiorari dismissed under this Court's Rule 53. Reported below: 32 Cal. 3d 388, 650 P. 2d 1171.

FEBRUARY 22, 1983

Affirmed for Absence of Quorum

No. 82–287. ARIZONA ET AL. *v.* ASH GROVE CEMENT CO. ET AL. C. A. 9th Cir. Four Members of the Court have disqualified themselves in this case. Because of this absence of a quorum, 28 U. S. C. § 1, and since a majority of the qualified Justices are of the opinion that the case cannot be heard and determined at the next Term of Court, the judgment and order are affirmed under 28 U. S. C. § 2109, which provides that under these circumstances "the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court." Reported below: 673 F. 2d 1020.

No. 82–675. ARIZONA ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA (KAISER CEMENT & GYPSUM CORP. ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Four Members of the Court have disqualified themselves in this case. Because of this absence of a quorum, 28 U. S. C. § 1, and since a majority of the qualified Justices are of the opinion that the case cannot be heard and determined at the next Term of Court, the judgment and order are affirmed under 28 U. S. C. § 2109, which provides that under these circumstances "the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court." Reported below: 688 F. 2d 1297.

Appeals Dismissed

No. 82–677. PHILLIPS CRANE & RIGGING OF SAN ANTONIO, INC., ET AL. *v.* SHAW ET AL. Appeal from Sup. Ct. Tex. dismissed for want of substantial federal question. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 636 S. W. 2d 186.

No. 82–835. THOMPSON ET AL. *v.* PEOPLES LIBERTY BANK. Appeal from Ct. App. Ky. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 82–891. PHOENIX UNION HIGH SCHOOL DISTRICT ET AL. *v.* UNITED STATES. Appeal from C. A. 9th 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: 681 F. 2d 1235.

No. 82–1037. TROST *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY (ROTHBERG, REAL PARTY IN INTEREST). Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 82–1019. QUALITY HEALTH SERVICE, INC., ET AL. *v.* JOHNSTON, CHAIRMAN, INDUSTRIAL COMMISSION OF OHIO, ET AL. Appeal from Ct. App. Ohio, Franklin County, dismissed for want of substantial federal question.

No. 82–1027. GOLDEN RAIN FOUNDATION OF LAGUNA HILLS *v.* LAGUNA PUBLISHING CO. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of substantial federal question. Reported below: 131 Cal. App. 3d 816, 182 Cal. Rptr. 813.

No. 82–1053. HAAS, PERSONAL REPRESENTATIVE OF THE ESTATE OF CATALDI, ET AL. *v.* UNITED TECHNOLOGIES CORP. Appeal from Sup. Ct. Del. dismissed for want of substantial federal question. Reported below: 450 A. 2d 1173.

No. 82–1100. GLUSMAN ET AL. *v.* NEVADA ET AL. Appeal from Sup. Ct. Nev. dismissed for want of substantial federal question. Reported below: 98 Nev. 412, 651 P. 2d 639.

Certiorari Granted—Vacated and Remanded

No. 80–2200. WYRICK, WARDEN *v.* WILLIAMS. Sup. Ct. Mo. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Missouri* v. *Hunter*, *ante*, p. 359.

No. 81–625. MISSOURI *v.* HAGGARD; MISSOURI *v.* COLLINS; MISSOURI *v.* HELTON; MISSOURI *v.* SINCLAIR; MISSOURI *v.* CREWS; MISSOURI *v.* TUNSTALL; MISSOURI *v.* CREWS; MISSOURI *v.* LOWERY; MISSOURI *v.* WILLIAMS; MISSOURI *v.* KENDRICK; MISSOURI *v.* WILLIAMS; MISSOURI *v.* COUNSELMAN; MISSOURI *v.* WHITE; MISSOURI *v.* PAYNE; MISSOURI *v.* GREER; MISSOURI *v.* BROWN; MISSOURI *v.* MARTIN; MISSOURI *v.* GREER; MISSOURI *v.* HAWKINS; MISSOURI *v.* FLETCHER; MISSOURI *v.* GASKIN; and MISSOURI *v.* PENNINGTON. Sup. Ct. Mo. Motions of respondents Donnie L. Collins, Eddie Greer, Harold Hawkins, Jackie

Martin, Terry Gene Crews, Hanford Gaskin, Marlon Payne, Willie Tunstall, Michael White, Robert Lee Haggard, Timothy Crews, Tommy Bryant Kendrick, William Brown, Johnny Williams, Rollan Anthony Williams, Randy Sinclair, Donald Greer, Robert Lowery, Carl Fletcher, Edward H. Pennington, Jr., and Wallace D. Counselman, Jr., for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Missouri* v. *Hunter*, *ante*, p. 359. Reported below: 619 S. W. 2d 44 (1st case); 619 S. W. 2d 66 (2d case); 619 S. W. 2d 69 (3d case); 619 S. W. 2d 73 (4th case); 619 S. W. 2d 78 (5th case); 619 S. W. 2d 71 (6th case); 619 S. W. 2d 76 (7th case); 619 S. W. 2d 77 (8th case); 619 S. W. 2d 63 (9th case); 619 S. W. 2d 61 (10th case); 619 S. W. 2d 82 (11th case); 619 S. W. 2d 72 (12th case); 619 S. W. 2d 79 (13th case); 619 S. W. 2d 75 (14th case); 619 S. W. 2d 65 (15th case); 619 S. W. 2d 68 (16th case); 619 S. W. 2d 80 (17th case); 619 S. W. 2d 62 (18th case); 619 S. W. 2d 64 (19th case); 619 S. W. 2d 57 (20th case); 618 S. W. 2d 620 (21st case); 618 S. W. 2d 614 (22d case).

No. 81–2117. MISSOURI *v.* KANE; MISSOURI *v.* THOMPSON; and MISSOURI *v.* ARNOLD. Sup. Ct. Mo. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgments vacated and cases remanded for further consideration in light of *Missouri* v. *Hunter*, *ante*, p. 359. Reported below: 629 S. W. 2d 372 (first case); 629 S. W. 2d 369 (second case); 628 S. W. 2d 665 (third case).

No. 82–3. JOINT COUNCIL OF TEAMSTERS NO. 42 ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Shepard* v. *NLRB*, *ante*, p. 344. Reported below: 702 F. 2d 168.

No. 82–272. MISSOURI *v.* MCKINNEY. Ct. App. Mo., Western 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 *Missouri* v. *Hunter*, *ante*, p. 359. Reported below: 633 S. W. 2d 164.

Vacated and Remanded After Certiorari 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.] Judgment vacated and cases remanded to consider the question of mootness and, should the cases not be moot, for further consideration in light of Pub. L. 97–415.

Miscellaneous Orders

No. A–654. KAVANAGH *v.* COVEN. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A–660. CINTOLO *v.* UNITED STATES ET AL. D. C. Mass. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. D–299. IN RE DISBARMENT OF OLKON. Disbarment entered. [For earlier order herein, see *ante*, p. 985.]

No. D–305. IN RE DISBARMENT OF WOOD. Gary M. Wood, of Surfside Beach, S. C., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on December 13, 1982 [*ante*, p. 1083], is hereby discharged.

No. D–307. IN RE DISBARMENT OF GARY. Disbarment entered. [For earlier order herein, see *ante*, p. 1140.]

No. 81–430. ILLINOIS *v.* GATES ET UX. Sup. Ct. Ill. [Certiorari granted, 454 U. S. 1140.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral

argument granted, and 15 additional minutes allotted for that purpose. Respondents also allotted an additional 15 minutes for oral argument. Motion of Florida for leave to participate in oral argument as *amicus curiae* and for additional time for argument denied. Motion of respondents for divided argument to permit American Bar Association to present oral argument as *amicus curiae* denied. JUSTICE BRENNAN and JUSTICE STEVENS would grant this motion.

No. 81–1180. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS *v.* NEW BANNER INSTITUTE, INC. C. A. 4th Cir. [Certiorari granted, 455 U. S. 1015.] Motion of the Solicitor General for leave to file a second supplemental brief after argument granted.

No. 81–1717. AMERICAN BANK & TRUST CO. ET AL. *v.* DALLAS COUNTY ET AL.; BANK OF TEXAS ET AL. *v.* CHILDS ET AL.; and WYNNEWOOD BANK & TRUST ET AL. *v.* CHILDS ET AL. Ct. App. Tex., 5th Sup. Jud. Dist. [Certiorari granted, *ante*, p. 966.] Motion of Texas Association of Appraisal Districts et al. for leave to file a brief as *amici curiae* granted. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 81–1985. EDWARD J. DEBARTOLO CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 904.] Motion of respondent Florida Gulf Coast Building Trades Council, AFL–CIO, for leave to file motion for divided argument out of time denied.

No. 81–2257. BILL JOHNSON'S RESTAURANTS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. [Certiorari granted, *ante*, p. 942.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 81–2386. DELCOSTELLO *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 1034]; and

No. 81–2408. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC, ET AL. *v.* FLOWERS ET AL. C. A. 2d Cir.

[Certiorari granted, *ante*, p. 1034.] Motion of Teamsters for a Democratic Union for leave to file a brief as *amicus curiae* in No. 81–2386 granted. Motion of petitioners for divided argument granted, and divided argument on behalf of respondents granted. Motion of respondents in No. 81–2408 for divided argument and for additional time for oral argument denied. Motion of respondents in No. 81–2386 for divided argument denied.

No. 82–34. AMERICAN PAPER INSTITUTE, INC. *v.* AMERICAN ELECTRIC POWER SERVICE CORP. ET AL.; and

No. 82–226. FEDERAL ENERGY REGULATORY COMMISSION *v.* AMERICAN ELECTRIC POWER SERVICE CORP. ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 904.] Motion of Edison Electric Institute for leave to file a brief as *amicus curiae* granted.

No. 82–168. NATIONAL LABOR RELATIONS BOARD *v.* TRANSPORTATION MANAGEMENT CORP. C. A. 1st Cir. [Certiorari granted, *ante*, p. 1014.] Motion of New England Legal Foundation et al. for leave to file a brief as *amici curiae* granted.

No. 82–185. BOSTON FIREFIGHTERS UNION, LOCAL 718 *v.* BOSTON CHAPTER, NAACP, ET AL.;

No. 82–246. BOSTON POLICE PATROLMEN'S ASSN., INC. *v.* CASTRO ET AL.; and

No. 82–259. BEECHER ET AL. *v.* BOSTON CHAPTER, NAACP, ET AL. C. A. 1st Cir. [Certiorari granted, *ante*, p. 967.] Motion of National Education Association for leave to file a brief as *amicus curiae* granted. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 82–195. MUELLER ET AL. *v.* ALLEN ET AL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 820.] Motions for leave to file briefs as *amici curiae* by the following were granted: Citizens for Educational Freedom, Catholic League for Religious and Civil Rights, United States Catholic Con-

ference, Parents Rights, Inc., Council for American Private Education et al., and National Jewish Commission on Law and Public Affairs.

No. 82–242. GORSUCH, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* SIERRA CLUB ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 942.] Motion of respondents for leave to file motion for divided argument out of time denied.

No. 82–331. NEW MEXICO ET AL. *v.* MESCALERO APACHE TRIBE. C. A. 10th Cir. [Certiorari granted, *ante*, p. 1014.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 82–354. MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., ET AL. *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL.;

No. 82–355. CONSUMER ALERT ET AL. *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL.; and

No. 82–398. UNITED STATES DEPARTMENT OF TRANSPORTATION ET AL. *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 987.] Motion of respondents for divided argument denied. Motion of the Solicitor General for divided argument granted. Motion of petitioners in No. 82–355 for divided argument denied.

No. 82–438. NATIONAL LABOR RELATIONS BOARD *v.* BEHRING INTERNATIONAL, INC. C. A. 3d Cir. Motion of respondent to expedite consideration of the petition for writ of certiorari and other relief denied.

No. 82–799. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1145.] Motion of the parties to dispense with printing the joint appendix granted.

No. 82–401. RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA *v.* REHNER. C. A. 9th Cir. [Certiorari granted, *ante*, p. 966.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 82–599. COMMISSIONER OF INTERNAL REVENUE *v.* ENGLE ET UX. C. A. 7th Cir. [Certiorari granted, *ante*, p. 1102.] Motion of the parties to dispense with printing the joint appendix granted.

No. 82–1166. ZURN INDUSTRIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Motion of petitioner to expedite briefing denied.

No. 82–5576. PICKETT ET AL. *v.* BROWN ET AL. Sup. Ct. Tenn. [Probable jurisdiction noted, *ante*, p. 1068.] Motion of Children's Defense Fund et al. for leave to file a brief as *amici curiae* granted.

No. 82–6057. IN RE WEST; and

No. 82–6079. IN RE TANNER. Petitions for writs of habeas corpus denied.

No. 82–5806. IN RE DEJARNETTE; and

No. 82–5919. IN RE FARACI. Petitions for writs of mandamus denied.

No. 82–1242. IN RE KEENE CORP. ET AL. Motion of petitioners to expedite consideration of the petition for writ of prohibition and/or mandamus denied. Petition for writ of prohibition and/or mandamus denied.

No. 82–5880. IN RE HANSON. Petition for writ of prohibition and/or mandamus denied.

Probable Jurisdiction Noted

No. 82–729. REGAN, SECRETARY OF THE TREASURY, ET AL. *v.* TIME, INC. Appeal from D. C. S. D. N. Y. Probable jurisdiction noted. Reported below: 539 F. Supp. 1371.

No. 82–975. MEMBERS OF THE CITY COUNCIL OF THE CITY OF LOS ANGELES ET AL. *v.* TAXPAYERS FOR VINCENT ET AL. Appeal from C. A. 9th Cir. Probable jurisdiction noted. Reported below: 682 F. 2d 847.

No. 82–1066. UNITED STATES *v.* PTASYNSKI ET AL. Appeal from D. C. Wyo. Probable jurisdiction noted. Reported below: 550 F. Supp. 549.

Certiorari Granted

No. 82–687. UNITED STATES *v.* ARTHUR YOUNG & CO. ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 677 F. 2d 211.

No. 82–792. GROVE CITY COLLEGE ET AL. *v.* BELL, SECRETARY OF EDUCATION, ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 687 F. 2d 684.

No. 82–825. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* SHELL OIL CO. C. A. 8th Cir. Certiorari granted. Reported below: 676 F. 2d 322 and 689 F. 2d 757.

No. 82–862. CONSOLIDATED RAIL CORPORATION *v.* LESTRANGE. C. A. 3d Cir. Certiorari granted. Reported below: 687 F. 2d 767.

No. 82–1041. DICKMAN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari granted. Reported below: 690 F. 2d 812.

No. 82–1047. UNITED STATES *v.* ONE ASSORTMENT OF 89 FIREARMS. C. A. 4th Cir. Certiorari granted. Reported below: 685 F. 2d 913.

No. 82–660. UNITED STATES *v.* CRONIC. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 675 F. 2d 1126.

No. 82–1135. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* WIGGINS. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certio-

rari granted. Reported below: 681 F. 2d 266 and 691 F. 2d 213.

No. 82–874. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* EDWARDS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted.

No. 82–5298. SEGURA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 697 F. 2d 300.

No. 82–5466. WELSH *v.* WISCONSIN. Sup. Ct. Wis. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 108 Wis. 2d 319, 321 N. W. 2d 245.

Certiorari Denied. (See also Nos. 82–835, 82–891, and 82–1037, *supra.*)

No. 81–6661. MOSS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 69 Ohio St. 2d 515, 433 N. E. 2d 181.

No. 82–418. GAIU LOCAL 13–B, GRAPHIC ARTS INTERNATIONAL UNION *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 682 F. 2d 304.

No. 82–495. CROWN ZELLERBACH CORP. *v.* ARONSEN. C. A. 9th Cir. Certiorari denied. Reported below: 662 F. 2d 584.

No. 82–575. AMERICAN POSTAL WORKERS UNION, AFL–CIO *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 682 F. 2d 1280.

No. 82–598. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 692 F. 2d 658.

No. 82–612. WRACSARICHT ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 450.

No. 82–633. LEICHTLING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 684 F. 2d 553.

No. 82–662. MIDDLESEX COUNTY UTILITIES AUTHORITY *v.* CITY OF NEW BRUNSWICK ET AL.; and

No. 82–703. BOROUGH OF MILLTOWN *v.* CITY OF NEW BRUNSWICK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 686 F. 2d 120.

No. 82–681. HORTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 676 F. 2d 1165.

No. 82–696. A. S. HORNER, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied.

No. 82–706. TILLMAN *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 275 Ark. 275, 630 S. W. 2d 5.

No. 82–720. ASHCROFT ET AL. *v.* UNITED STATES DEPARTMENT OF THE INTERIOR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 196.

No. 82–725. GILBOE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 684 F. 2d 235.

No. 82–741. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO *v.* LUBBERS, GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 681 F. 2d 598.

No. 82–749. BARABAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 665 F. 2d 352.

No. 82–756. ESTATE OF FROCK ET AL. *v.* UNITED STATES RAILROAD RETIREMENT BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 685 F. 2d 1041.

No. 82–759. KAWASAKI MOTORS CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 691 F. 2d 507.

No. 82–771. UNION OIL COMPANY OF CALIFORNIA ET AL. *v.* UNITED STATES DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 688 F. 2d 797.

No. 82–772. HUBBARD BROADCASTING, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 684 F. 2d 594.

No. 82–784. JONES *v.* BIRDSONG ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 679 F. 2d 24.

No. 82–785. FORT BELKNAP INDIAN COMMUNITY ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 231 Ct. Cl. 871.

No. 82–793. HUDSON *v.* HUDSON. Ct. App. Ind. Certiorari denied. Reported below: 434 N. E. 2d 107.

No. 82–798. COLETTA ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 682 F. 2d 820.

No. 82–800. WOOTEN, AS FATHER AND NEXT FRIEND OF WOOTEN *v.* AMERICAN MOTORISTS INSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 681 F. 2d 712.

No. 82–817. CARMICHAEL ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 685 F. 2d 903.

No. 82–821. STROH *v.* WASHINGTON STATE BAR ASSN. Sup. Ct. Wash. Certiorari denied. Reported below: 97 Wash. 2d 289, 644 P. 2d 1161.

No. 82–839. AMERICANA HEALTHCARE CORP. ET AL. *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 1072.

No. 82–843. WHEELING-PITTSBURGH STEEL CORP. *v.* DONOVAN, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 828.

No. 82–850. GORDON *v.* TERRY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 684 F. 2d 736.

No. 82–863. HASTINGS, UNITED STATES DISTRICT JUDGE *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 681 F. 2d 706.

No. 82–864. IMHOFF ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 691 F. 2d 491.

No. 82–867. FAITH CENTER, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 220 U. S. App. D. C. 84, 679 F. 2d 261.

No. 82–872. LEGNER *v.* UNION PACIFIC RAILROAD CO. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 899.

No. 82–883. MICHIGAN *v.* GALLAGHER. Ct. App. Mich. Certiorari denied. Reported below: 116 Mich. App. 283, 323 N. W. 2d 366.

No. 82–888. HART *v.* UNIVERSITY OF TEXAS AT HOUSTON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 685 F. 2d 1384.

No. 82–890. CITY OF NEW ORLEANS ET AL. *v.* MARTIN. C. A. 5th Cir. Certiorari denied. Reported below: 678 F. 2d 1321.

No. 82–892. HANIGAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 681 F. 2d 1127.

No. 82–903. EMI LTD. *v.* BENNETT ET AL. C. A. 9th Cir. Certiorari before judgment denied.

No. 82–908. REDHEAD, CO-EXECUTRIX OF THE ESTATE OF REDHEAD, ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 686 F. 2d 178.

No. 82–915. DONNELL ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 220 U. S. App. D. C. 405, 682 F. 2d 240.

No. 82–916. HERBERT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 108 Ill. App. 3d 143, 438 N. E. 2d 1255.

No. 82–920. CAIN *v.* MEDTRONIC, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 689 F. 2d 645.

No. 82–933. BROOKSIDE LIMITED PARTNERSHIP *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 231 Ct. Cl. 944.

No. 82–934. BASIC/FOUR CORP. *v.* CENTRAL MICROFILM SERVICE CORP. C. A. 8th Cir. Certiorari denied. Reported below: 688 F. 2d 1206.

No. 82–937. ROBINSON, TRUSTEE IN BANKRUPTCY OF D. C. SULLIVAN & CO., INC. *v.* CONSOLIDATED SERVICE CORP. ET AL.; and

No. 82–1004. SULLIVAN *v.* ROBINSON, TRUSTEE IN BANKRUPTCY OF D. C. SULLIVAN & CO., INC. C. A. 1st Cir. Certiorari denied. Reported below: 685 F. 2d 729.

No. 82–939. REQUENA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 105 Ill. App. 3d 831, 435 N. E. 2d 125.

No. 82–951. KEITH *v.* SMITH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 220 U. S. App. D. C. 84, 679 F. 2d 261.

No. 82–955. WOOD ET AL. *v.* LEIST ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 691 F. 2d 509.

No. 82–961. SOUTH DAKOTA EX REL. AURORA COUNTY ET AL. *v.* OLGILVIE, TRUSTEE OF CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. C. A. 7th Cir. Certiorari denied. Reported below: 692 F. 2d 759.

No. 82–966. WEST *v.* ROADWAY EXPRESS, INC. Ct. App. Ohio, Summit County. Certiorari denied.

No. 82–969. AERONAUTICAL MACHINISTS LODGE 709, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO *v.* LOCKHEED GEORGIA CO., DIVISION OF LOCKHEED CORP. C. A. 11th Cir. Certiorari denied. Reported below: 683 F. 2d 419.

No. 82–970. LAGUARDIA *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 302 Pa. Super. 616, 448 A. 2d 1187.

No. 82–971. HOLWAY *v.* SMITH. Sup. Ct. Va. Certiorari denied.

No. 82–980. SADLAK *v.* CELESTE, GOVERNOR OF OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 457.

No. 82–981. CLARK OIL & REFINING CORP. *v.* ALDERSON. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 637 S. W. 2d 84.

No. 82–985. VIERTHALER ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 685 F. 2d 1387.

No. 82–987. MCDONALD ET AL. *v.* TEXAS. Ct. App. Tex., 2d Sup. Jud. Dist. Certiorari denied. Reported below: 631 S. W. 2d 222.

No. 82–991. NATIONAL ASSOCIATION OF HOME HEALTH AGENCIES ET AL. *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. D. C. Cir. Certiorari denied. Reported below: 223 U. S. App. D. C. 209, 690 F. 2d 932.

No. 82–993. PATRICK *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 82–1000. HALSELL *v.* KIMBERLY-CLARK CORP. C. A. 8th Cir. Certiorari denied. Reported below: 683 F. 2d 285.

No. 82–1002. CARNATION CO. *v.* NEW YORK STATE DIVISION OF HUMAN RIGHTS. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 86 App. Div. 2d 977, 448 N. Y. S. 2d 330.

No. 82–1003. SWANGER, EXECUTRIX OF THE ESTATE OF SWANGER *v.* MUTUAL LIFE INSURANCE COMPANY OF NEW YORK. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 458.

No. 82–1011. FLEMING *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 82–1012. GULDEN ET AL. *v.* MCCORKLE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 680 F. 2d 1070 and 685 F. 2d 157.

No. 82–1013. BROOKLIER ET AL. *v.* UNITED STATES;
No. 82–1014. DRAGNA *v.* UNITED STATES;
No. 82–5824. LOCICERO *v.* UNITED STATES; and
No. 82–5988. RIZZITELLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 1208.

No. 82–1018. SHUFFMAN, EXECUTRIX OF THE ESTATE OF SHUFFMAN *v.* HARTFORD TEXTILE CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 681 F. 2d 895.

No. 82–1030. CAMPBELL *v.* WASHINGTON STATE BAR ASSN. C. A. 9th Cir. Certiorari denied. Reported below: 692 F. 2d 762.

No. 82–1034. CIRILLO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 809.

No. 82–1036. CHRISTOFFERSON *v.* CHURCH OF SCIENTOLOGY MISSION OF DAVIS ET AL. Ct. App. Ore. Certiorari denied. Reported below: 57 Ore. App. 203, 644 P. 2d 577.

No. 82–1038. MICHAELS, TRUSTEE OF MARIN MOTOR OIL, INC. *v.* OFFICIAL UNSECURED CREDITORS' COMMITTEE; and

No. 82–1094. MARIN MOTOR OIL, INC., ET AL. *v.* OFFICIAL UNSECURED CREDITORS' COMMITTEE. C. A. 3d Cir. Certiorari denied. Reported below: 689 F. 2d 445.

No. 82–1040. NORTH RIVER INSURANCE CO. *v.* WHITMAN, SHERIFF, BIENVILLE PARISH, LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 690 F. 2d 903.

No. 82–1043. KELSAW *v.* UNION PACIFIC RAILROAD CO. C. A. 9th Cir. Certiorari denied. Reported below: 686 F. 2d 819.

No. 82–1045. NEWTON ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 681 F. 2d 1354.

No. 82–1048. MORIAL *v.* COUNCIL OF THE CITY OF NEW ORLEANS ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 413 So. 2d 185.

No. 82–1049. ERWIN *v.* TEXAS. Ct. App. Tex., 10th Sup. Jud. Dist. Certiorari denied.

No. 82–1056. MARSHALL FIELD & CO. *v.* ALLEN ET AL. C. A. 7th Cir. Certiorari denied.

No. 82–1058. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* CONNECTICUT ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 221 U. S. App. D. C. 457, 684 F. 2d 979.

No. 82–1061. BEGASSAT *v.* COSMOPOLITAN NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST NO. 13199, ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 104 Ill. App. 3d 1199, 437 N. E. 2d 942.

No. 82–1062. ARMSTRONG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 679 F. 2d 845.

No. 82–1063. COOK *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 420 So. 2d 289.

No. 82–1064. MEEKER *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied.

No. 82–1067. GAMBREL ET AL. *v.* KENTUCKY BOARD OF DENTISTRY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 689 F. 2d 612.

No. 82–1068. ALVAREZ *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 419 So. 2d 348.

No. 82–1072. KOVIC *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 1098.

No. 82–1073. YOUNG *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 52 Md. App. 785.

No. 82–1077. KEYSTONE CABLE-VISION CORP. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 82–1082. RUPE *v.* BLAKE ET AL. Sup. Ct. Wyo. Certiorari denied. Reported below: 651 P. 2d 1096.

No. 82–1087. INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, LOCAL 1509 *v.* WATTLETON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 686 F. 2d 586.

No. 82–1091. THIAN *v.* RAY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 683 F. 2d 416.

No. 82–1096. ZINGER CONSTRUCTION CO., INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 231 Ct. Cl. 926.

No. 82–1099. FULTON COUNTY JAIL (STAFF), ATLANTA, GEORGIA *v.* FRYER. C. A. 11th Cir. Certiorari denied. Reported below: 690 F. 2d 906.

No. 82–1101. SENTINEL FINANCIAL INSTRUMENTS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 113.

No. 82–1102. GREY *v.* CITY OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 692 F. 2d 748.

No. 82–1108. SIEGEL *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 691 F. 2d 620.

No. 82–1115. KONDRAT *v.* CITY OF WILLOUGHBY HILLS. Ct. App. Ohio, Lake County. Certiorari denied.

No. 82–1116. ALTMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 449.

No. 82–1120. TORAASON *v.* BURKART. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 105 Ill. App. 3d 1207, 439 N. E. 2d 1117.

No. 82–1122. JOHMANN *v.* JOHMANN. Super. Ct. N. J., App. Div. Certiorari denied.

No. 82–1123. LABOKE ET AL. *v.* LOWDERMILK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 694 F. 2d 717.

No. 82–1136. CUMIS INSURANCE SOCIETY, INC. *v.* GOVERNMENT EMPLOYEES CREDIT UNION ET AL. C. A. 5th Cir. Certiorari denied.

No. 82–1140. MCLEAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 688 F. 2d 242.

No. 82–1145. ROTHBALLER ET AL. *v.* WANLESS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 106 Ill. App. 3d 1161, 439 N. E. 2d 1331.

No. 82–1151. LEATHERSMITH OF LONDON, LTD. *v.* ALLEYN. C. A. 1st Cir. Certiorari denied. Reported below: 695 F. 2d 27.

No. 82–1170. STUART-CABALLERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 686 F. 2d 890.

No. 82–1176. BENNETT, ADMINISTRATRIX OF THE ESTATE OF BENNETT *v.* ENSTROM HELICOPTER CORP. C. A. 6th Cir. Certiorari denied. Reported below: 679 F. 2d 630 and 686 F. 2d 406.

No. 82–1197. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 730.

No. 82–1210. GIACOMINO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 692 F. 2d 760.

No. 82–1232. BULGATZ ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 693 F. 2d 728.

No. 82–1239. DENEEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 459.

No. 82–5417. ANGLE, AKA MCCLURE *v.* BOWEN ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 89 N. J. 595, 446 A. 2d 871.

No. 82–5467. COSTANZO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 675 F. 2d 46.

No. 82–5500. LONG *v.* UNITED STATES; and
No. 82–5708. CROWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 848.

No. 82–5516. BOWMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 798.

No. 82–5552. GREEN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 220 U. S. App. D. C. 147, 680 F. 2d 183.

No. 82–5570. BELL *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 322 N. W. 2d 93.

No. 82–5574. LASWELL ET AL. *v.* WEINBERGER, SECRETARY OF DEFENSE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 683 F. 2d 261.

No. 82–5575. KELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 687 F. 2d 938.

No. 82–5579. MATTHEWS *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 686 F. 2d 147.

No. 82–5583. CUNNINGHAM *v.* NOVAK. Sup. Ct. Iowa. Certiorari denied. Reported below: 322 N. W. 2d 60.

No. 82–5608. FRAZIER *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 97 Wash. 2d 493, 647 P. 2d 6.

No. 82–5619. BANCROFT *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 298 Pa. Super. 614, 446 A. 2d 666.

No. 82–5623. BONUCHI *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 636 S. W. 2d 338.

No. 82–5624. CABRERA-MARTINEZ *v.* UNITED STATES; and

No. 82–5747. BAUTISTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 684 F. 2d 1286.

No. 82–5633. KUNITAKE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 459.

No. 82–5668. SLOTNICK *v.* O'LONE, SUPERINTENDENT, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 683 F. 2d 60.

No. 82–5681. MINSHEW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 686 F. 2d 250.

No. 82–5684. MARTIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 691 F. 2d 1235.

No. 82–5687. LINAM *v.* GRIFFIN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 685 F. 2d 369.

No. 82–5700. RUTHERFORD *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 60.

No. 82–5709. JESSEN *v.* CITY OF SPOKANE. Sup. Ct. Wash. Certiorari denied. Reported below: 97 Wash. 2d 1033.

No. 82–5713. BROWN *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 636 S. W. 2d 929.

No. 82–5721. SHARRIEFF *v.* HILTON, SUPERINTENDENT, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 824.

No. 82–5723. ANDERSON *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 82–5734. STONE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 57 N. Y. 2d 762, 440 N. E. 2d 1337.

No. 82–5739. DAY *v.* FRANZEN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 844.

No. 82–5743. MORENO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 82–5753. MCCRUISTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 687 F. 2d 967.

No. 82–5772. SHAFFER ET AL. *v.* BOARD OF SCHOOL DIRECTORS OF THE ALBERT GALLATIN AREA SCHOOL DISTRICT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 687 F. 2d 718.

No. 82–5809. CUNNINGHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 691 F. 2d 511.

No. 82–5816. HARRIS *v.* UNITED STATES DEPARTMENT OF JUSTICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 680 F. 2d 1109.

No. 82–5823. LEE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 58 N. Y. 2d 693, 444 N. E. 2d 1019.

No. 82–5826. FOSTER *v.* WAINWRIGHT. C. A. 11th Cir. Certiorari denied. Reported below: 686 F. 2d 1382.

No. 82–5833. BELL *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 105 Ill. App. 3d 208, 434 N. E. 2d 35.

No. 82–5835. WIENER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 52 Md. App. 784.

No. 82–5836. BALLENTINE *v.* HARRIS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 82–5837. ADAMS *v.* BALLENTINE. C. A. 11th Cir. Certiorari denied.

No. 82–5842. WALKER *v.* ORKIN EXTERMINATING CO., INC. C. A. 10th Cir. Certiorari denied.

No. 82–5846. CARDWELL *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 683 F. 2d 415.

No. 82–5854. MORGAN *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 82–5855. WALKER *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 82–5858. TARR *v.* MAGGIO, WARDEN, LOUISIANA STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 688 F. 2d 837.

No. 82–5863. GADSON *v.* RIZZO, PHILADELPHIA FIRE COMMISSIONER, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 696 F. 2d 982.

No. 82–5867. PIATKOWSKA *v.* EMPLOYERS INSURANCE OF WAUSAU. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 847.

No. 82–5869. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 690 F. 2d 60.

No. 82–5872. CARUTH *v.* PINKNEY, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 683 F. 2d 1044.

No. 82–5874. GARRETT *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 82–5875. FELTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 688.

No. 82–5883. FENG-MING TUNG *v.* BREWSTER. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 290.

No. 82–5884. SMITH *v.* GENERAL MOTORS ACCEPTANCE CORP. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 458.

No. 82–5885. WASHINGTON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 82–5886. MOODY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 418 So. 2d 989.

No. 82–5888. PHILLIPS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 32 Wash. App. 1033.

No. 82–5889. PRESLEY *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 82–5892. KRAUS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 82–5894. MUNTNER *v.* CONTROL DATA CORP. ET AL. C. A. 8th Cir. Certiorari denied.

No. 82–5896. SCHREIBER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 104 Ill. App. 3d 618, 432 N. E. 2d 1316.

No. 82–5897. REESE *v.* SISTER SUZANNE MARIE ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 297 Pa. Super. 589, 443 A. 2d 367.

No. 82–5898. THOMPSON *v.* KESTEN. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 458.

No. 82–5899. NASSAR *v.* REAGAN, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 1st Cir. Certiorari denied.

No. 82–5900. SMITH *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 681 F. 2d 820.

No. 82–5903. BROADWAY *v.* STAFFORD, U. S. DISTRICT JUDGE. C. A. 11th Cir. Certiorari denied.

No. 82–5904. MCFADDEN *v.* OHIO. Ct. App. Ohio, Warren County. Certiorari denied. Reported below: 7 Ohio App. 3d 215, 455 N. E. 2d 1.

No. 82–5905. MCCLAIN *v.* OKLAHOMA. C. A. 10th Cir. Certiorari denied.

No. 82–5906. SHAW *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 686 F. 2d 273.

No. 82–5912. HENSON *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 689 F. 2d 189.

No. 82–5913. DILLARD *v.* WAYNE COUNTY PROSECUTOR. Sup. Ct. Mich. Certiorari denied. Reported below: 414 Mich. 926.

No. 82–5914. COMBS *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 82–5918. ATHERTON *v.* FALCONE, GARY & ROSENFELD, LTD., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 685 F. 2d 429.

No. 82–5923. WISE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 88 App. Div. 2d 1113, 452 N. Y. S. 2d 473.

No. 82–5924. SCOTT *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 691 F. 2d 500.

No. 82–5925. MCCOLPIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 82–5928. ELENES-CAZARES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 692 F. 2d 766.

No. 82–5930. SHAUMYAN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 297.

No. 82–5931. WEBSTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 690 F. 2d 906.

No. 82–5932. WATNICK *v.* ELGIN STATE HOSPITAL. C. A. 7th Cir. Certiorari denied.

No. 82–5933. BRIGHT *v.* GARRISON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 692 F. 2d 751.

No. 82–5937. FORD *v.* SUPERINTENDENT, KENTUCKY STATE PENITENTIARY. C. A. 6th Cir. Certiorari denied. Reported below: 687 F. 2d 870.

No. 82–5938. HIGGINS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 82–5940. BAILEY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 691 F. 2d 498.

No. 82–5941. GIPSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 693 F. 2d 109.

No. 82–5942. BALLANCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 691 F. 2d 500.

No. 82–5943. KEENE *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 232 Kan. 876.

No. 82–5945. SULLIVAN ET AL. *v.* REES, SUPERINTENDENT, KENTUCKY STATE REFORMATORY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 458.

No. 82–5946. RENE *v.* FEDERAL BUREAU OF PRISONS. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 116.

No. 82–5947. PELAEZ-NAVARRO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1234.

No. 82–5949. SIMS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 52 Md. App. 781.

No. 82–5951. DOROSHOW *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 298.

No. 82–5952. HALL *v.* KILANIK ET AL. C. A. 2d Cir. Certiorari denied.

No. 82–5953. COCKRELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 729.

No. 82–5954. BYRD *v.* CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 615.

No. 82–5955. BARKER *v.* MARINE TRANSPORTATION LINES, INC., ET AL. C. A. 2d Cir. Certiorari denied.

No. 82–5956. GALLAGHER *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 82–5957. EASTERWOOD *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 82–5958. GRAY *v.* BORDENKIRCHER, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 692 F. 2d 752.

No. 82–5959. BERTIE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 82–5960. SMART *v.* ALLSBROOK, SUPERINTENDENT, ODOM COMPLEX, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 691 F. 2d 497.

No. 82–5962. GAMBILL *v.* MARSHALL. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 723.

No. 82–5964. ELENES-CARDENAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 692 F. 2d 766.

No. 82–5966. WILSON *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 652 P. 2d 595.

No. 82–5967. WHIDDEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 691 F. 2d 510.

No. 82–5969. MUMIN ET AL. *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 691 F. 2d 500.

No. 82–5970. MACON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 118.

No. 82–5972. COTE *v.* EAGLE STORES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 32.

No. 82–5973. COOK *v.* FLORIDA PAROLE AND PROBATION COMMISSION. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 423 So. 2d 492.

No. 82–5975. KARKENNY *v.* MARYLAND. Ct. App. Md. Certiorari denied.

No. 82–5976. JENKINS *v.* JAGO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 454.

No. 82–5978. CUMMINGS *v.* INDIANA ET AL. C. A. 7th Cir. Certiorari denied.

No. 82–5979. CRABTREE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 692 F. 2d 750.

No. 82–5980. LOSINNO ET AL. *v.* BAY STATE NATIONAL BANK. Ct. App. Mass. Certiorari denied. Reported below: 14 Mass. App. 1302.

No. 82–5981. HILSON *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. Ct. Crim. App. Tex. Certiorari denied.

No. 82–5982. LUCIEN *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 109 Ill. App. 3d 412, 440 N. E. 2d 899.

No. 82–5983. GADSON *v.* MELLEBY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 696 F. 2d 982.

No. 82–5984. PAPPAGEORGE *v.* SUMNER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 1294.

No. 82–5985. WOJCIK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 691 F. 2d 500.

No. 82–5986. PENDARVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 694 F. 2d 718.

No. 82–5990. JOHL *v.* JOHL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 291.

No. 82–5991. KLAYER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 459.

No. 82–5993. MANKO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 694 F. 2d 1125.

No. 82–5994. MORRIS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 224 Ct. Cl. 648, 650 F. 2d 287.

No. 82–5996. YOUNG *v.* MIROCK, SPECIAL AGENT, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, ET AL.; and

YOUNG *v.* REED, U. S. DISTRICT JUDGE. C. A. 11th Cir. Certiorari denied.

No. 82–5997. MCMILLION *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 52 Md. App. 788.

No. 82–5998. PAUL *v.* MAGGIO, WARDEN, LOUISIANA STATE PENITENTIARY. Sup. Ct. La. Certiorari denied. Reported below: 423 So. 2d 1143.

No. 82–5999. SCARBOROUGH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 683 F. 2d 1323.

No. 82–6002. COLVIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 696 F. 2d 1000.

No. 82–6010. LOTT *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 455.

No. 82–6012. FIORINI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 729.

No. 82–6013. EMANUEL *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 98 Mich. App. 163, 295 N. W. 2d 875.

No. 82–6014. HICKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 693 F. 2d 32.

No. 82–6015. NURSE *v.* DEPARTMENT OF THE AIR FORCE. C. A. D. C. Cir. Certiorari denied.

No. 82–6016. HEATON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1233.

No. 82–6018. BURSEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 694 F. 2d 723.

No. 82–6022. HARP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 729.

No. 82–6024. COLLINS, AKA CROSS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 729.

No. 82–6028. GREISINGER *v.* DAVIS, SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 82–6029. SCHARSTEIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 730.

No. 82–6037. HAYWARD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 113.

No. 82–6038. MOLOVINSKY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 688 F. 2d 243.

No. 82–6042. WADE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 82–6048. DOVER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 250 Ga. 209, 296 S. E. 2d 710.

No. 82–6053. HOLLIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 687 F. 2d 257.

No. 82–6058. MATHIS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 691 F. 2d 504.

No. 82–6061. BARROS *v.* UNITED STATES;
No. 82–6072. PEREZ-MUNOZ *v.* UNITED STATES; and
No. 82–6073. RIVAS-IGLESIAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 681 F. 2d 1372 and 692 F. 2d 116.

No. 82–6063. SCHLOMANN *v.* RALSTON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 691 F. 2d 401.

No. 82–6065. SPELLMAN *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 82–6070. PYLES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 690 F. 2d 906.

No. 82–6083. HUMPHREY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 696 F. 2d 72.

No. 82–6087. GUERRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 694 F. 2d 898.

No. 82–6088. LYNN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 693 F. 2d 132.

No. 82–6093. BELTRAN-PAYAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 696 F. 2d 1004.

No. 82–6094. CAULEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 486.

No. 82–6096. HERNANDEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 693 F. 2d 996.

No. 82–6099. HANSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 82–6100. YAZZIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 693 F. 2d 102.

No. 82–319. MASSACHUSETTS *v.* PODGURSKI ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 386 Mass. 385, 436 N. E. 2d 150.

THE CHIEF JUSTICE, dissenting.

In my view, only the limitations of the Court's time preclude our granting review of this case. I would grant certiorari and summarily reverse the judgment of the Supreme Judicial Court of Massachusetts.

JUSTICE REHNQUIST, dissenting.

This case began when the manager of a clothing store in Canton Center, Mass., observed an unfamiliar blue van in the

rear parking lot, which the store owned. From his vantage point about 15 feet away, the manager saw two men in the van cutting up a suspicious looking substance. He reported his observation to the police. The Canton Police Department dispatched Officer Brown to "check '[t]wo men inside a van acting suspicious.'" 386 Mass. 385, 386, 436 N. E. 2d 150, 151 (1982). When the officer approached within about 10 feet of the van, he noticed two people in the rear of the van and that the sliding door on the passenger side stood approximately 18 inches ajar. Officer Brown then stuck his head through the door. He observed respondents Podgurski and Collins cutting hashish. Respondents were arrested and the hashish was seized.

Respondents were charged with possession of hashish. The trial court granted their motion to suppress the evidence of the hashish and the Commonwealth appealed. The Massachusetts Supreme Judicial Court affirmed. It held that Officer Brown had searched the van before viewing the hashish, and that respondents had a legitimate expectation of privacy in the van, even though the door was open. The court apparently thought that Officer Brown should have tried "to question or communicate with" respondents before putting his head inside the door. *Id.*, at 390, 436 N. E. 2d, at 153. It held that Officer Brown had not conducted a "'lawful threshold inquiry'" under *Terry* v. *Ohio*, 392 U. S. 1 (1968), because he was conducting a "search." 386 Mass., at 390, 436 N. E. 2d, at 153. It also thought that there would be no constitutional problem if Officer Brown had looked through the windshield or one of the windows, or had kept his head outside the open door. *Id.*, at 388, 436 N. E. 2d, at 152.

I am not persuaded that the Supreme Judicial Court misconstrued this Court's decisions in finding that respondents had a legitimate expectation of privacy. However, I am concerned that it took too narrow a view of our cases permitting police officers to make brief investigative stops and searches.

In *Terry*, *supra*, we held that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." 392 U. S., at 22. *Terry* approved a search for weapons. In this case, Officer Brown merely sought to initiate a routine investigation by looking in an open door to a van. It is true that the only information available to Officer Brown was the store manager's report of suspicious activity in a van parked on store property, relayed to him by his dispatcher. However, "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams* v. *Williams*, 407 U. S. 143, 145 (1972).

Of course, absent probable cause, Officer Brown may not have been permitted to search the glove compartment, or under the seat, or a partitioned section of the interior, but that is not this case. By putting his head inside the door, he intruded only slightly into respondents' "personal security." *Terry*, *supra*, at 19. The intrusion would not have been materially different if he had kept his head outside the door, as the Supreme Judicial Court indicated would have been permissible.

The police officer in this case had less specific information than did the officers in *Terry* and *Adams*, but he did have a citizen's report of "suspicious activity." This seems to me to be an articulable suspicion that was sufficiently concrete to justify the minimal intrusion at issue here. Officer Brown seems to have engaged in ordinary, everyday police work. Our decisions in *Terry* and *Adams* are by no means limited to "stops"; they embrace searches as well as seizures. In *Terry*, the officer conducted a patdown search. In *Adams*, the officer both searched for and seized the pistol.

We have also held that neither probable cause nor an articulable suspicion is necessary to justify a minimal intrusion

into individual privacy. In *United States* v. *Martinez-Fuerte*, 428 U. S. 543 (1976), we held that a regular checkpoint stop near the border might be made without *any* articulated individual suspicion. The Court referred to the visual inspection that accompanied the stop as part of the "objective intrusion," and therefore may have felt it was dealing with a search as well as a seizure.

I think that the facts available to Officer Brown would "'warrant a man of reasonable caution in the belief' that the action taken was appropriate." *Terry*, *supra*, at 22, quoting *Beck* v. *Ohio*, 379 U. S. 89, 96 (1964). *Terry* and *Adams* permit searches on articulable suspicion in appropriate circumstances. *Martinez-Fuerte* permits minimal intrusions even without an articulable suspicion. I believe that the Court should grant certiorari to further consider the extent to which the *Terry* line of cases applies to minimal intrusions such as this search when they occur in the initial stages of police investigations.

No. 82–601. PARRATT, WARDEN OF THE NEBRASKA STATE PENITENTIARY *v.* HOLTAN. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 683 F. 2d 1163.

No. 82–928. BASKERVILLE *v.* STAMPER. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 82–996. RENT-IT CORP. *v.* CLARK. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 685 F. 2d 245.

No. 82–1009. COLORADO *v.* HENDERSHOTT. Sup. Ct. Colo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 653 P. 2d 385.

No. 82–1083. SOUTH DAKOTA *v.* LOHNES. Sup. Ct. S. D. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 324 N. W. 2d 409.

No. 82–715. BRAINERD *v.* BURGER, CHIEF JUSTICE OF THE UNITED STATES, ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari.

No. 82–740. MOODY *v.* ALABAMA EX REL. FORRESSTER, COMMISSIONER OF INSURANCE OF ALABAMA, ET AL. Sup. Ct. Ala. Motions of Conservative Caucus, Inc., Washington Legal Foundation, Texas Institute of Government, and American Civil Liberties Union et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 418 So. 2d 93.

No. 82–957. DOUBLEDAY SPORTS, INC. *v.* EASTERN MICROWAVE, INC. C. A. 2d Cir. Motions of CBS, Inc., and Motion Picture Association of America, Inc., for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 691 F. 2d 125.

No. 82–982. TRIBUNE PUBLISHING CO., DBA COLUMBIA DAILY TRIBUNE, ET AL. *v.* HYDE ET AL. Ct. App. Mo., Western Dist. Motion of respondent Sandra K. Hyde for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 637 S. W. 2d 251.

No. 82–994. ROBERT WELCH, INC. *v.* GERTZ. C. A. 7th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 680 F. 2d 527.

No. 82–1010. NEUBAUER, PERSONAL REPRESENTATIVE OF THE ESTATE OF NEUBAUER, ET AL. *v.* OWENS-CORNING FIBERGLAS CORP. ET AL. C. A. 7th Cir. Certiorari de-

nied. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 686 F. 2d 570.

No. 82–1020. SMITH *v.* SOUTHERN RAILWAY CO. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 691 F. 2d 497.

No. 82–1059. EHMANN *v.* WEBSTER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 223 U. S. App. D. C. 323, 690 F. 2d 1060.

No. 82–1025. CHURCH OF SCIENTOLOGY MISSION OF DAVIS ET AL. *v.* CHRISTOFFERSON. Ct. App. Ore. Motion of Churches for Fairness for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 57 Ore. App. 203, 644 P. 2d 577.

No. 82–1032. DOUCET *v.* DIAMOND M DRILLING CO. C. A. 5th Cir. Motion of Mississippi Trial Lawyers Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 683 F. 2d 886.

No. 82–1075. CPG PRODUCTS CORP. ET AL. *v.* ANTI-MONOPOLY, INC. C. A. 9th Cir. Motions for leave to file briefs as *amici curiae* by the following were granted: United States Trademark Association, Committee on Trademarks and Unfair Competition of the Association of the Bar of the City of New York, Grocery Manufacturers of America, Inc., Bar Association of the District of Columbia et al., Chamber of Commerce of the United States, National Association of Manufacturers, Toy Manufacturers of America, Inc., and Procter & Gamble Co. Certiorari denied. Reported below: 684 F. 2d 1316.

No. 82–1110. ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., ET AL. *v.* CLIPPER EXXPRESS. C. A. 9th Cir.

Motion of American Trucking Associations, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 690 F. 2d 1240.

No. 82–1125. HAAS *v.* HASH ET UX. Ct. App. Ariz. Certiorari denied. JUSTICE REHNQUIST took no part in the consideration or decision of this petition.

No. 82–5585. BRUSCINO *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner to strike the brief of the United States denied. Certiorari denied. Reported below: 687 F. 2d 938.

No. 82–5666. RIDING *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Motion of respondent for damages denied. Certiorari denied.

No. 82–5839. ROBINSON *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 104 Ill. App. 3d 20, 432 N. E. 2d 340.

No. 82–5853. FITZGERALD *v.* VIRGINIA. Sup. Ct. Va.;
No. 82–5877. JOHNSON *v.* ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Sup. Ct. Ga.;
No. 82–5879. DAUGHERTY *v.* FLORIDA. Sup. Ct. Fla.;
No. 82–5902. STEVENS *v.* FLORIDA. Sup. Ct. Fla.; and
No. 82–5909. PEEK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 82–5853, 223 Va. 615, 292 S. E. 2d 798; No. 82–5877, 249 Ga. 812, 295 S. E. 2d 63; No. 82–5879, 419 So. 2d 1067; No. 82–5902, 419 So. 2d 1058; No. 82–5909, 422 So. 2d 843.

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.

Rehearing Denied

No. 80, Orig. COLORADO *v.* NEW MEXICO ET AL., *ante*, p. 176;

No. 81–1008. BURLINGTON NORTHERN INC. ET AL. *v.* UNITED STATES ET AL., *ante*, p. 131;

No. 82–187. LUJAN *v.* UNITED STATES DEPARTMENT OF THE INTERIOR ET AL., *ante*, p. 969;

No. 82–497. ALBERTA GAS CHEMICALS, LTD. *v.* CELANESE CORP. ET AL., *ante*, p. 1092;

No. 82–615. JERSEY SANITATION CO., INC., ET AL. *v.* UNITED STATES, *ante*, p. 991;

No. 82–640. PALMGREN ET AL. *v.* KANSAS EX REL. MURRAY, COUNTY ATTORNEY OF THOMAS COUNTY, KANSAS, ET AL., *ante*, p. 1081;

No. 82–669. SOFFER *v.* CITY OF COSTA MESA ET AL., *ante*, p. 1070;

No. 82–721. GABRIEL *v.* MISSOURI PACIFIC RAILROAD COMPANY OF MISSOURI ET AL., *ante*, p. 1088;

No. 82–761. KUCHTA ET AL. *v.* ALLSTATE INSURANCE CO. ET AL., *ante*, p. 1106;

No. 82–5266. CANNON *v.* CANNON, *ante*, p. 1109;

No. 82–5426. PAYNE *v.* COUGHLIN ET AL., *ante*, p. 1110;

No. 82–5584. CURTIS *v.* CAMPBELL-TAGGART, INC., ET AL., *ante*, p. 1090;

No. 82–5638. MCDONALD *v.* DRAPER ET AL., *ante*, p. 1112;

No. 82–5712. SMITH *v.* SMITH, *ante*, p. 1115;

No. 82–5779. HOOVER *v.* MISSISSIPPI, *ante*, p. 1149; and

No. 82–5834. BLAIR *v.* MISSOURI, *ante*, p. 1188. Petitions for rehearing denied.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1229 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

CALIFORNIA *v.* RAMOS

ON REAPPLICATION FOR STAY

No. A–349 (81–1893). Decided October 26, 1982

California's reapplication to stay the California Supreme Court's judgment vacating respondent's death sentence and remanding for a new sentencing proceeding, is granted pending this Court's disposition of the case, pursuant to the previously granted writ of certiorari.

JUSTICE REHNQUIST, Circuit Justice.

Respondent Marcelino Ramos was convicted of capital murder and sentenced to death in the California courts. The trial judge had, pursuant to state statute, informed the sentencing jury that a sentence of life imprisonment without possibility of parole may be commuted by the Governor to a sentence that permits parole. The California Supreme Court vacated the death sentence and remanded for a new sentencing proceeding on the ground that respondent was denied due process in violation of the Fifth, Eighth, and Fourteenth Amendments. 30 Cal. 3d 553, 639 P. 2d 908.

In March 1982, the State of California applied for a stay of the California Supreme Court's judgment. I referred the application to the full Court, which denied the stay. 455 U. S. 1011. In April, the State filed a petition for a writ of certiorari. On October 4, 1982, the Court granted the petition for certiorari, *ante*, p. 821, and California now has reapplied for a stay. It states that the new penalty proceeding is scheduled to begin on November 8, 1982. Respondent has stated that he does not object to issuance of a stay.

I have therefore decided that petitioner's reapplication for a stay pending disposition of the case by this Court should be granted.

It is so ordered.

KPNX BROADCASTING CO. ET AL. *v.* ARIZONA SUPERIOR COURT ET AL.

ON APPLICATION FOR STAY

No. A–543. Decided December 23, 1982

An application of a broadcasting company and several reporters and courtroom sketch artists to stay—pending review in the Arizona Supreme Court—orders of a state trial court that (1) prohibited court personnel, counsel, witnesses, and jurors in a murder case from speaking directly with the press, and (2) directed that all sketches of jurors be reviewed by the court before being broadcast on television, is denied. Given the procedural posture of this case, a stay is not warranted unless there is a risk of irreparable injury together with a demonstrable departure by the trial court from the law laid down in this Court's cases. Those elements are not present here.

JUSTICE REHNQUIST, Circuit Justice.

Applicants, KPNX Broadcasting Co. and several reporters and courtroom sketch artists, ask that I stay two orders issued by the Superior Court of Maricopa County, Ariz. Applicants are reporting on a murder case presently being tried before one of the judges of that court in Phoenix. This is the third trial to arise out of the same murder; three accomplices have been convicted in two previous jury trials. The crime allegedly involves several conspiracies and other connections with organized crime, and has generated extensive publicity. Some members of the jury venire expressed a fear for personal and family safety if they were selected as jurors. The trial court responded that it would do whatever was possible to prevent their pictures from being displayed. Early in the course of this trial, a magazine in Phoenix published an article about one of the prosecuting attorneys.

The trial has been open to the public and press at all times. There has not been any restriction on the reporting of the proceedings in open court. The trial court has, however, entered two orders that "restrict" the press from covering the trial as it would like to do.

First, the trial court ordered court personnel, counsel, witnesses, and jurors not to speak directly with the press. The court appointed a court employee as "Liaison with the media" to provide a "unified and singular source for the media concerning these proceedings."

Second, on November 30 the trial judge observed two of the applicants, who are television sketch artists, drawing the jurors. The court ordered that all drawings of jurors that are to be broadcast on television be reviewed by the court before being broadcast.

After the second order was issued, an organization calling itself the First Amendment Coalition sought a conference with the trial judge to object to these orders. Nothing was resolved at this conference, and the trial was then recessed until December 6. On that day, the First Amendment Coalition filed a petition for special action with the Supreme Court of Arizona, asking that court to vacate the two orders and enjoin the trial judge from issuing any similar orders. The Arizona Supreme Court dismissed this petition on December 8 on the ground that the First Amendment Coalition lacked standing and the petitioners had failed to join as parties the defendants in the murder trial.

On December 12, the present applicants filed a similar petition for special action and an application for a stay of the two orders. The following day, the Arizona Supreme Court denied the application for a stay and set the petition for oral argument for hearing on January 18. On December 14, the trial court held a hearing on applicants' standing to challenge the orders in that court. The trial court decided that applicants have standing, and set a hearing on their application to vacate the orders on December 17. Applicants also filed this application on December 17.

On December 20, the trial court entered an order explaining its earlier orders and declining to vacate them. With respect to the order that participants in the case not communicate with the press, the trial court stated that it had eval-

uated the press' First Amendment rights against the defendants' Sixth Amendment rights to a fair trial. It found that the least restrictive course of conduct that would protect the defendants' rights was to restrict the participants' outside contact with the press and appoint a court official to answer questions about the proceedings. As to the sketch order, the court held that the sketches of jurors by television artists were used in lieu of actual video recording of the jurors during the proceedings. It held that there is no constitutional right to broadcast pictures of the jurors, relying on *Chandler* v. *Florida*, 449 U. S. 560 (1981), and *Nixon* v. *Warner Communications, Inc.*, 435 U. S. 589 (1978).

Applicants contend that the order that trial participants not communicate with the press conflicts with *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976), and with several decisions from the Federal Courts of Appeals. Applicants contend there was no showing that the order was necessary to protect the defendants' right to a fair trial. Respondents contend that this order is supportable on the merits because the trial court has struck a proper balance between the defendants' right to a fair trial and the press' First Amendment rights. They point out that nothing in the order limits the press' right to attend the trial and report anything it observes.

Applicants also contend that the order prohibiting broadcast of sketches of the jurors is an unconstitutional prior restraint. They contend the decision conflicts with *Stuart*, *supra*, and with the decisions of several State Supreme Courts. Respondents contend that this order is based on an interpretation of the Arizona Supreme Court's guideline concerning television coverage of trials. Since the order applies only to television, respondents contend that it is correct under *Chandler* v. *Florida*, *supra*.

These facts seem to place the issues in the general area of constitutional law that is covered by our decisions in cases

such as *Globe Newspaper Co.* v. *Superior Court for County of Norfolk*, 457 U. S. 596 (1982); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555 (1980); *Gannett Co.* v. *DePasquale*, 443 U. S. 368 (1979); and *Nebraska Press Assn.* v. *Stuart*, *supra*. It does not appear that stays were sought from this Court in any but the last of these four cases; and the present case is in a posture very similar to that of *Stuart*, *supra*, when that case was before JUSTICE BLACKMUN on an application for stay. 423 U. S. 1319 (1975); 423 U. S. 1327 (1975). The applicants there, like the applicants in this case, were seeking a stay of a state trial court order pending review of that order in the State Supreme Court. As JUSTICE BLACKMUN pointed out, "[i]t is highly desirable, of course, that the issue, concerning, as it does, an order by a . . . state court, should be decided in the first instance by the Supreme Court" of the State. 423 U. S., at 1325; 423 U. S., at 1328. There, as here, the State Supreme Court had given some indication that it would not rule on the case for several weeks.

In these circumstances, JUSTICE BLACKMUN noted that where "a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment." *Id.*, at 1329. JUSTICE BLACKMUN thought that parts of the order at issue in *Stuart* created irreparable injuries that required him to act before the State Supreme Court. The applicants in that case were prohibited from "reporting of the details of the crimes, of the identities of the victims, [and] of the testimony of the pathologist at the preliminary hearing." *Id.*, at 1331. At the same time, JUSTICE BLACKMUN declined to stay other parts of the order, including a complete prohibition on reporting that the accused had confessed, *id.*, at 1332–1333, a ban on photography in the courthouse, and restrictions on trial participants' contacts with the media, *id.*, at 1334. JUSTICE BLACKMUN thought it proper to stay only "the most obvious features that require resolution immediately and without one moment's further delay." *Ibid.*

Given the procedural posture of this case, it would seem that in order for a stay to be granted before the case is heard by the highest court of the State, there should be a risk of irreparable injury together with a demonstrable departure on the part of the trial court from the law laid down in our cases. I simply do not find those elements to be present here. The orders at issue in this case do not prohibit the reporting of any facts on the public record. The trial has never been closed, and all the proceedings may be reported and commented upon. With respect to the court's order barring communication between trial participants and the press, it seems to me that the following language from *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966), quoted with approval in *Stuart*, *supra*, at 553–554, goes far towards sustaining the action of the trial court:

> "Due process requires that the accused receive a trial by an impartial jury free from outside influences. . . . The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor the enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." 384 U. S., at 362–363.

So far as communication between the trial participants and the press during actual sessions of the court in the courtroom and its immediate environs, I do not have the slightest doubt that a trial judge may insist that the only performance which goes on in the courtroom is the trial of the case at hand. The fact that media coverage has transformed events such as professional sports contests into a framework designed to accommodate that coverage does not mean that the First Amendment requires criminal trials to undergo the same

transformation. The mere potential for confusion if unregulated communication between trial participants and the press at a heavily covered trial were permitted is enough to warrant a measure such as the trial judge took in this case. Continuation of the proscription against communication to hours and places where the court is not in session appears to me to be warranted under the above-quoted language from *Sheppard*, *supra*.

I find the requirement of clearance with the trial judge before sketches of the jurors may be shown on television the more troubling of the two orders issued by the trial judge. The judge limited the order to sketches drawn for television showing, and did not include within it sketches to be reproduced in newspapers. He apparently made this distinction because *Chandler* v. *Florida*, 449 U. S. 560 (1981), suggests a greater latitude in trial courts for regulating television coverage of a trial than for regulation of coverage by the press. For this purpose I am somewhat at a loss to know why the print media and the electronic media should be treated differently, since whatever potential for disruption or distortion may exist would appear to be the same whether the sketches are ultimately reprinted in newspapers or shown on television.

But I cannot accept applicants' conclusion, drawn from this distinction, that the limitation of the regulation of sketches indicates that the trial judge did not regard it as essential; I think he regarded it as essential, and probably would have extended it to all sketches if he thought that the First Amendment permitted him to do it. Likewise, the requirement of previous clearance of the sketches smacks, at least in the abstract, of the notion of "prior restraint," which has been roundly condemned in a long line of our cases beginning with *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931). I think that in all probability the trial judge's order would be more defensible on federal constitutional grounds if he had flatly banned courtroom sketching of the jurors, and if he had

extended the ban to those who sketch for the print media as well as to those who sketch for television.

But balancing the doubts that this portion of the judge's second order generates against the procedural posture of the case, I conclude that the application for a stay should be denied. Surely all of the lofty historical reasons which have been advanced in our opinions to support the right of public and press access to criminal trials contemplate the traditional criminal trial as a public governmental procedure of some importance to every citizen. I would think that of all conceivable reportorial messages that could be conveyed by reporters or artists watching such trials, one of the least necessary to appreciate the significance of the trial would be individual juror sketches.

Stuart is a prototypical example of a recent case in this area which has admonished trial courts to employ their usually considerable discretion to search for other alternatives than prior restraints in order to protect the defendant's constitutional right to a fair trial and the State's interest in a verdict which may be upheld on appeal. I am satisfied that the trial judge has indeed sought for these alternatives here, and I do not find them so demonstrably impermissible as to warrant a stay at this stage of the proceedings. The application is therefore

Denied.

CONFORTE *v.* COMMISSIONER OF INTERNAL REVENUE

ON APPLICATION FOR STAY

No. A–584. Decided January 12, 1983

An application for a stay, pending the filing and disposition of a petition for certiorari, of the Court of Appeals' judgment—which dismissed applicant's appeal from the Tax Court's determination upholding the Internal Revenue Service's calculations of taxes due from applicant and his wife—is denied. Relying on *Molinaro* v. *New Jersey*, 396 U. S. 365, the Court of Appeals had dismissed applicant's appeal because he was a fugitive from justice for federal convictions, but ruled that he could move to reinstate his appeal if he submitted himself within a specified number of days to the District Court from which he was a fugitive. Although absent a stay, applicant may be injured because the period for surrendering expired on the day that he filed his application for a stay, nevertheless a stay is not appropriate since there is no reasonable possibility that four Justices will vote to grant certiorari to consider whether *Molinaro* should apply only to appeals from criminal convictions and not to appeals in civil cases, as here.

JUSTICE REHNQUIST, Circuit Justice.

This controversy began when the Internal Revenue Service (IRS) issued tax deficiencies and penalties against applicant and his wife for the years 1973 through 1976. The Confortes filed tax returns for the years in question stating a "net income," but without disclosing their gross income and deductions; they claimed these details would be incriminating. Based on projections of income and expenses, the IRS determined that the Confortes had a greater tax liability than their "net income" revealed.

The Confortes petitioned to the Tax Court for a redetermination. That court sustained the calculations made by the IRS. 74 T. C. 1160 (1980). Pursuant to 26 U. S. C. § 7482 (1976 ed. and Supp. V), the Confortes appealed to the United States Court of Appeals for the Ninth Circuit. On November 5, 1982, the Court of Appeals affirmed in part and re-

versed in part as to Mrs. Conforte. 692 F. 2d 587. Applicant's appeal, however, was dismissed. Applicant seeks a stay of that dismissal.

The Court of Appeals found that applicant is a fugitive from justice for convictions on four counts of willfully attempting to evade federal employment taxes. See *United States* v. *Conforte*, 624 F. 2d 869 (CA9 1980). Relying on this Court's decision in *Molinaro* v. *New Jersey*, 396 U. S. 365 (1970) *(per curiam)*, the court held that as a fugitive from justice applicant should not be allowed to prosecute an appeal in the federal courts.

The court rejected applicant's argument that *Molinaro* only applies to appeals from criminal convictions. The court noted that "the rule should apply with greater force in civil cases where an individual's liberty is not at stake," 692 F. 2d, at 589, and cited a series of cases from the Courts of Appeals so holding. See *Doyle* v. *Department of Justice*, 215 U. S. App. D. C. 338, 668 F. 2d 1365 (1981) *(per curiam)*, cert. denied, 455 U. S. 1002 (1982); *Broadway* v. *City of Montgomery*, 530 F. 2d 657 (CA5 1976); *United States ex rel. Bailey* v. *Commanding Officer*, 496 F. 2d 324 (CA1 1974). The court also said it need not determine whether *Molinaro* would apply where the criminal conviction and the civil appeal are unrelated because here the issues of the two cases "are each related components of a general tax evasion scheme." 692 F. 2d, at 590. Finally, relying on its own decisions in *United States* v. *Wood*, 550 F. 2d 435 (1976), and *Johnson* v. *Laird*, 432 F. 2d 77 (1970), the court held that *Molinaro* is not limited to discretionary appeals.

The Court of Appeals did not leave applicant without recourse. The court ruled that "[i]f within 56 days he submits himself to the jurisdiction of the District Court of Nevada [the court from which he is a fugitive], he may move to reinstate his appeal." 692 F. 2d, at 590. With a three-day extension because of the New Year's Eve holiday, the 56 days expired on January 3, 1983. On the same day applicant filed

in this Court for a stay of the Court of Appeals' decision pending his filing of a petition for certiorari and our disposition of that petition.

Applicant argues that a stay should be granted because "the 56 day limitation will expire before the application for a writ of certiorari can be completed and filed." He maintains that should this Court deny his yet-to-be filed petition for certiorari he desires to have time remaining to comply with the Court of Appeals' directive. The 56 days expired on the day applicant filed for this stay. Except in extreme circumstances the Court generally is unable to provide same-day service. While it might be within our jurisdiction to grant a stay retroactively, an applicant detracts from the urgency of his situation where he makes a last-minute claim and offers no explanation for his procrastination.

Applicant may be injured if a stay does not issue. Assuming he files a petition for certiorari, unless we grant that petition and reverse the lower court the running of the 56 days will bar applicant from reinstating his appeal by surrendering to the authorities. A stay is appropriate, however, only where there is a reasonable possibility that four Justices of this Court will vote to grant certiorari. See *Houchins* v. *KQED, Inc.*, 429 U. S. 1341, 1344 (1977) (REHNQUIST, J., in chambers); *Graves* v. *Barnes*, 405 U. S. 1201, 1203 (1972) (POWELL, J., in chambers). I do not believe that a reasonable possibility exists here.[1]

In *Molinaro* v. *New Jersey*, *supra*, the Court said that while a litigant's status as a fugitive from justice "does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the [litigant] to call upon the resources of the Court for determination of his claims."

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[1] While applicant alleges injury in his request for a stay, he does not set forth a legal argument on the merits. Thus, the application could be denied for applicant's failure to carry his burden of overcoming the presumptive correctness of the Court of Appeals' decision. *Whalen* v. *Roe*, 423 U. S. 1313, 1316 (1975) (MARSHALL, J., in chambers).

Id., at 366. See also *Smith* v. *United States*, 94 U. S. 97 (1876). While this Court has never extended the "fugitive from justice" rule beyond the facts of *Molinaro* and *Smith* (*i. e.*, where the criminal conviction from which the litigant is a fugitive is the judgment being challenged on appeal), the court below correctly points out that the Courts of Appeals have done so on a number of occasions. Since we have denied certiorari in this type case in the past, I do not believe it likely that applicant's petition will be granted. See, *e. g.*, *Doyle* v. *Department of Justice*, *supra*.[2]

For these reasons the application is denied.

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[2] Applicant's failure to seek a stay in the Court of Appeals provides an alternative ground for denial of the stay. "An application for a stay or injunction to a Justice of this Court shall not be entertained, except in the most extraordinary circumstances, unless application for the relief sought first has been made to the appropriate court or courts below, or to a judge or judges thereof." This Court's Rule 44.4. Applicant seeks to be excused from his failure to comply with this Rule, not because of any "extraordinary circumstances," but because, according to applicant, the Court of Appeals "has ruled that [he] has forfeited any right to seek relief from the judicial processes of" that court. To the contrary, the court found only that applicant could not pursue his civil appeal unless he turned himself in within 56 days.

BONURA ET AL. *v.* CBS, INC., ET AL.

ON APPLICATION TO VACATE STAY

No. A–622. Decided January 16, 1983

An application to vacate the Court of Appeals' stay of the District Court's order forbidding the broadcast by CBS in the Dallas area of a particular segment of a designated program, is denied.

JUSTICE WHITE, Circuit Justice.

There is no doubt that as Circuit Justice I have the power to set aside the stay issued by the Court of Appeals in this case. Only the weightiest considerations, however, would warrant such action by a Circuit Justice. *New York* v. *Kleppe*, 429 U. S. 1307, 1310 (1976) (MARSHALL, J., in chambers); *O'Rourke* v. *Levine*, 80 S. Ct. 623, 624, 4 L. Ed. 2d 615, 616 (1960) (Harlan, J., in chambers).

I have examined the transcript of the hearing held by the District Judge at 8:30 p. m. on January 15, 1983, in New Orleans, the order issued after the hearing forbidding the broadcast by CBS in the Dallas area of a particular segment of a designated program, the order issued by a divided panel of the Court of Appeals staying the District Court's order, and the application to me to vacate the stay of the Court of Appeals. I am not myself convinced that the Court of Appeals was in error in issuing the stay; and I do not think that if the application were before the full Court, five Justices would vote to vacate the stay. Accordingly, I deny the application to vacate the stay.

JAFFREE ET AL. *v.* BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY ET AL.

ON APPLICATION FOR STAY

No. A–663. Decided February 11, 1983

An application for a stay of the District Court's judgment, pending an appeal to the Court of Appeals, is granted. That judgment dismissed applicants' complaint and dissolved a preliminary injunction in an action challenging Alabama statutes that provided for a daily one-minute period for meditation or voluntary prayer in the public schools and that permitted teachers to lead their classes in prayer. The District Court correctly recognized that conducting prayers as part of a public school program is unconstitutional under this Court's decisions. Unless and until this Court reconsiders these decisions, the District Court is obligated to follow them. Similarly, a Circuit Justice's authority is limited by controlling decisions of the full Court.

JUSTICE POWELL, Circuit Justice.

This is an application for a stay of the judgment of the United States District Court for the Southern District of Alabama pending an appeal to the United States Court of Appeals for the Eleventh Circuit. Applicant Ishmael Jaffree is the father of minor applicants Jamael Aakki Jaffree, Makeba Green, and Chioke Saleem Jaffree, three students in the Mobile County, Alabama, public schools. Respondents are various school and state officials. The application was filed here on Feburary 2. In my capacity as Circuit Justice, I entered an order staying the judgment of the District Court until respondents were afforded an opportunity to respond. Their responses are now in hand, and I have considered the merits of the application for a stay.

The situation, quite briefly, is as follows: Beginning in the fall of 1981, teachers in the minor applicants' schools conducted prayers in their regular classes, including group recitations of the Lord's Prayer. At the time, an Alabama statute provided for a one-minute period of silence "for

meditation or voluntary prayer" at the commencement of each day's classes in the public elementary schools. Ala. Code § 16–1–20.1 (Supp. 1982). In 1982, Alabama enacted a statute permitting public school teachers to lead their classes in prayer. 1982 Ala. Acts 735.

Applicants, objecting to prayer in the public schools, filed suit to enjoin the activities. They later amended their complaint to challenge the applicable state statutes. After a hearing, the District Court granted a preliminary injunction. *Jaffree* v. *James*, 544 F. Supp. 727 (1982). It recognized that it was bound by the decisions of this Court, *id.*, at 731, and that under those decisions it was "obligated to enjoin the enforcement" of the statutes, *id.*, at 733.

In its subsequent decision on the merits, however, the District Court reached a different conclusion. *Jaffree* v. *Board of School Commissioners of Mobile County*, 554 F. Supp. 1104 (1983). It again recognized that the prayers at issue, given in public school classes and led by teachers, were violative of the Establishment Clause of the First Amendment as that Clause has been construed by this Court. The District Court nevertheless ruled "that the United States Supreme Court has erred." *Id.*, at 1128. It therefore dismissed the complaint and dissolved the injunction.

There can be little doubt that the District Court was correct in finding that conducting prayers as part of a school program is unconstitutional under this Court's decisions. In *Engel* v. *Vitale*, 370 U. S. 421 (1962), the Court held that the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment, prohibits a State from authorizing prayer in the public schools. The following Term, in *Murray* v. *Curlett*, decided with *Abington School District* v. *Schempp*, 374 U. S. 203 (1963), the Court explicitly invalidated a school district's rule providing for the reading of the Lord's Prayer as part of a school's opening exercises, despite the fact that participation in those exercises was voluntary.

Unless and until this Court reconsiders the foregoing decisions, they appear to control this case. In my view, the District Court was obligated to follow them. Similarly, my own authority as Circuit Justice is limited by controlling decisions of the full Court. Accordingly, I am compelled to grant the requested stay.

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GAS PRICE CONTROLS. See **Constitutional Law, V.**

GUILTY PLEAS. See **Criminal Law.**

HABEAS CORPUS. See also **Criminal Law.**

State-court conviction—Federal relief—Exhaustion of state remedies.—Title 28 U. S. C. § 2254's requirement of exhaustion of state remedies was not met where federal habeas corpus petitioner's claim had been interpreted by Michigan Court of Appeals, in affirming his state-court murder conviction, as being predicated on state-law rule that malice should not be implied from fact that a weapon was used, and where argument that trial court's jury instruction as to malice unconstitutionally shifted burden of proof and was inconsistent with presumption of innocence had never been presented to, or considered by, Michigan courts. Anderson v. Harless, p. 4.

HANDICAPPED PERSONS. See **Rehabilitation Act of 1973.**

HARBOR WORKERS. See **Longshoremen's and Harbor Workers' Compensation Act.**

HEARING-IMPAIRED PERSONS. See **Rehabilitation Act of 1973.**

"HOT CARGO" CONTRACTS. See **National Labor Relations Board.**

HOUSEHOLD FURNISHINGS AND APPLIANCES OF DEBTOR. See **Bankruptcy.**

ILLINOIS. See **Criminal Law.**

IMMIGRATION AND NATIONALITY ACT OF 1952. See also **Aliens.**

Exclusion of permanent resident alien—INS's authority.—Immigration and Naturalization Service had authority under Act to proceed by an exclusion hearing (rather than by deportation proceedings) to determine whether respondent—a permanent resident alien who left country for a brief visit to Mexico that involved an attempt to smuggle aliens across border upon her return—was attempting to "enter" United States and whether she was excludable; on remand, Court of Appeals, which had affirmed District Court judgment vacating INS's exclusion order, should consider whether respondent was afforded due process to which she was entitled in her exclusion hearing. Landon v. Plasencia, p. 21.

IMMIGRATION AND NATURALIZATION SERVICE. See **Aliens; Immigration and Nationality Act of 1952.**

IMMUNITY FOR TESTIMONY. See **Constitutional Law, VI, 1.**

IMMUNITY OF FEDERAL OBLIGATIONS FROM STATE TAXATION. See **State Bank Taxes.**

IMPAIRMENT OF CONTRACTS. See **Constitutional Law, V.**

IMPLIED CAUSES OF ACTION. See **Securities Regulation.**

IMPLIED MALICE. See **Habeas Corpus.**

IMPORTS. See **State and Local Personal Property Taxes.**

INTERROGATION BY POLICE. See **Constitutional Law,** VII.

INTERSTATE COMMERCE ACT. See **Interstate Commerce Commission.**

INTERSTATE COMMERCE COMMISSION.

Railroad rates—ICC's orders—Judicial review.—Where ICC, acting on a shipper's complaint, first issued a temporary order in 1976 establishing petitioner railroads' rate for moving coal, then, in 1978, acting on railroads' petition, raised rate, and in 1979, again raised rate, Court of Appeals, acting on petitions filed by all parties for review of 1978 and 1979 orders, should have deferred to ICC on questions concerning applicable rates, and court erred in concluding that effect of its decision that 1978 and 1979 orders were arbitrary and capricious was to reinstate 1976 order; court's authority to reject ICC rate orders extended to orders alone and not to rates, reasonableness of which lies within ICC's primary jurisdiction. Burlington Northern Inc. v. United States, p. 131.

INTRASTATE GAS PRICE CONTROLS. See **Constitutional Law,** V.

JURISDICTION. See also **Interstate Commerce Commission.**

Court of Appeals—Notice of appeal.—Under Federal Rule of Appellate Procedure 4(a)(4), governing filing of notices of appeals, a court of appeals lacks jurisdiction to act when a notice of appeal is filed before district court acts on a motion to alter or amend judgment previously filed in district court pursuant to Federal Rule of Civil Procedure 59, and a new notice of appeal is not filed after district court's disposition of Rule 59 motion. Griggs v. Provident Consumer Discount Co., p. 56.

JUSTICIABILITY.

Coverage of Longshoremen's and Harbor Workers' Compensation Act—Standing to seek review of decision.—In an action involving a Court of Appeals' decision that an individual was not covered by Longshoremen's and Harbor Workers' Compensation Act at time of his injury, there was a justiciable controversy before this Court since such individual, as a party respondent under this Court's Rule 19.6, filed a brief arguing for his coverage under Act, and thus it was unnecessary to determine whether petitioner Director of Office of Workers' Compensation Programs had Art. III standing to seek review of decision below. Director, OWCP v. Perini North River Associates, p. 297.

KANSAS. See **Constitutional Law,** V.

LABOR UNIONS. See **Antitrust Acts; Damages; National Labor Relations Board.**

LICENSING OF LIQUOR ESTABLISHMENTS. See **Constitutional Law, III.**

LICENSING OF TELEVISION STATIONS. See **Rehabilitation Act of 1973.**

LIENS ON HOUSEHOLD FURNISHINGS AND APPLIANCES. See **Bankruptcy.**

LIQUOR LICENSES. See **Constitutional Law, III.**

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT. See also **Justiciability.**

Coverage of Act—Employee "engaged in maritime employment."—A construction firm's employee, injured while performing his job on deck of a barge being used in construction of a sewage treatment plant extending over a navigable river, was "engaged in maritime employment" within meaning of § 2(3) of Act, and thus was covered by Act. Director, OWCP v. Perini North River Associates, p. 297.

MAJORITY-VOTE REQUIREMENT FOR ELECTIONS. See **Voting Rights Act of 1965.**

MALICE. See **Habeas Corpus.**

MARITIME EMPLOYMENT. See **Longshoremen's and Harbor Workers' Compensation Act.**

MASSACHUSETTS. See **Constitutional Law, III.**

MICHIGAN. See **Habeas Corpus.**

MINOR POLITICAL PARTIES. See **Constitutional Law, IV, 1.**

MIRANDA WARNINGS. See **Constitutional Law, VII.**

MISREPRESENTATIONS. See **Securities Regulation.**

MISSOURI. See **Constitutional Law, I.**

MULTIEMPLOYER ASSOCIATIONS. See **Antitrust Acts; National Labor Relations Board.**

MULTIPLE PUNISHMENTS FOR SAME OFFENSE. See **Constitutional Law, I.**

MUNICIPAL ELECTIONS. See **Voting Rights Act of 1965.**

NATIONAL LABOR RELATIONS ACT. See **National Labor Relations Board.**

NATIONAL LABOR RELATIONS BOARD.

Unfair labor practices—Remedies—Board's authority.—Where Board, holding that union and contractors had violated National Labor Relations Act by agreeing not to do business with nonunion dump truck owners and operators, issued a cease-and-desist order, Board acted within its authority in deciding that Act's policies would not be effectuated by an order requiring union and contractors to reimburse truck owners and operators who were compelled to join union for amounts paid as dues, fees, and fringe benefit contributions. Shepard v. NLRB, p. 344.

NATURAL GAS POLICY ACT OF 1978. See **Constitutional Law,** V.

NAVIGABLE WATERS. See **Longshoremen's and Harbor Workers' Compensation Act.**

NEW MEXICO. See **Water Rights.**

NEWS MEDIA COVERAGE OF CRIMINAL CASE. See **Stays,** 4.

NOTICE OF APPEAL. See **Jurisdiction.**

OFFICE OF WORKERS' COMPENSATION PROGRAMS. See **Justiciability.**

OHIO. See **Constitutional Law,** IV, 1; **Criminal Law.**

PENNSYLVANIA. See **Constitutional Law,** II.

PERMANENT RESIDENT ALIENS. See **Aliens; Immigration and Nationality Act of 1952.**

PERSONAL PROPERTY TAXES. See **State and Local Personal Property Taxes.**

PLURALITY-VOTE REQUIREMENT FOR ELECTIONS. See **Voting Rights Act of 1965.**

POLICE INTERROGATION. See **Constitutional Law,** VII.

POLITICAL FUNDS OF CORPORATIONS. See **Constitutional Law,** IV, 2.

POLITICAL PARTIES. See **Constitutional Law,** IV, 1.

POLYGRAPH TESTS. See **Constitutional Law,** VII.

PORT ARTHUR, TEX. See **Voting Rights Act of 1965.**

PRAYERS IN PUBLIC SCHOOLS. See **Stays,** 3.

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See **State and Local Personal Property Taxes.**

PREPONDERANCE OF EVIDENCE. See **Securities Regulation.**

PRESENCE OF COUNSEL AT POLYGRAPH TEST. See **Constitutional Law,** VII.

PRESUMPTION OF INNOCENCE. See **Habeas Corpus.**

PRICE CONTROLS ON INTRASTATE GAS. See **Constitutional Law,** V.

PRIOR APPROPRIATION OF RIVER WATER. See **Water Rights.**

PRIOR CONVICTIONS. See **Criminal Law.**

PRISONS AND PRISONERS. See **Constitutional Law,** II.

PRIVATE CAUSES OF ACTION. See **Securities Regulation.**

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law,** VI.

PUBLIC TELEVISION STATION LICENSES. See **Rehabilitation Act of 1973.**

PUNISHMENT FOR SEPARATE CONVICTIONS ARISING FROM SAME CONDUCT. See **Constitutional Law,** I.

RACIAL DISCRIMINATION. See **Voting Rights Act of 1965.**

RAILROAD RATES. See **Interstate Commerce Commission.**

REFUSAL TO TAKE BLOOD-ALCOHOL TEST. See **Constitutional Law,** VI, 2.

REGISTRATION STATEMENTS FOR SECURITIES. See **Securities Regulation.**

REHABILITATION ACT OF 1973.

Public television station licenses—Programming for deaf and hearing-impaired persons.—Section 504 of Act, prohibiting discrimination against handicapped persons under any federally funded program, does not require Federal Communications Commission to review a public television station's license renewal application—particularly with regard to programming for deaf and hearing-impaired persons—under a different standard than applies to a commercial licensee's renewal application. Community Television of Southern California v. Gottfried, p. 498.

RETROSPECTIVE APPLICATION OF STATUTES. See **Bankruptcy.**

RIGHT OF ASSOCIATION. See **Constitutional Law,** IV.

RIGHT TO COUNSEL. See **Constitutional Law,** VII.

RIGHT TO FAIR TRIAL. See **Stays,** 4.

RIOTS IN PRISONS. See **Constitutional Law,** II.

"SAME OFFENSE" FOR DOUBLE JEOPARDY PURPOSES. See **Constitutional Law,** I.

SCHOOLS. See **Constitutional Law,** III; **Stays,** 3.

SCHOOLS' CONTROL OF ISSUANCE OF LIQUOR LICENSES. See **Constitutional Law,** III.

SECURITIES ACT OF 1933. See **Securities Regulation.**

SECURITIES EXCHANGE ACT OF 1934. See **Securities Regulation.**

SECURITIES REGULATION.

Misrepresentations in registration statement—Purchasers' cause of action—Standard of proof.—Availability under § 11 of Securities Act of 1933 of an express remedy to purchasers of a registered security against certain enumerated parties for false or misleading information in a registration statement does not preclude purchasers allegedly defrauded by misrepresentations in a registration statement from maintaining an action under § 10(b) of Securities Exchange Act of 1934; persons seeking recovery under § 10(b) need prove their cause of action by a preponderance of evidence only, not by clear and convincing evidence. Herman & MacLean v. Huddleston, p. 375.

SEGREGATION OF PRISONERS. See **Constitutional Law,** II.

SELF-INCRIMINATION. See **Constitutional Law,** VI.

SIXTH AMENDMENT. See **Stays,** 4.

SKETCHES OF JURORS. See **Stays,** 4.

SOUTH DAKOTA. See **Constitutional Law,** VI, 2.

STANDING. See **Antitrust Acts; Justiciability.**

STATE AND LOCAL PERSONAL PROPERTY TAXES.

Tax on imports stored in customs warehouse—Pre-emption by federal law.—State and local personal property taxes on imported goods stored under bond in a customs warehouse until they are exported, are pre-empted by Congress' comprehensive regulation of customs duties. Xerox Corp. v. County of Harris, p. 145.

STATE BANK TAXES.

Taxation of interest on federal obligations—Validity of Tennessee tax.—Tennessee bank tax—imposed on net earnings, including interest received on obligations of United States and of other States but not interest received on obligations of Tennessee and its political subdivisions—violates immunity of obligations of United States from state taxation and cannot be characterized as a nondiscriminatory franchise tax permissible under 31 U. S. C. § 742. Memphis Bank & Trust Co. v. Garner, p. 392.

STAYS.

1. *Broadcast of program.*—Application to vacate Court of Appeals' stay of District Court's order forbidding broadcast in Dallas area of a particu-

STAYS—Continued.

lar segment of a designated program, is denied. Bonura v. CBS, Inc. (WHITE, J., in chambers), p. 1313.

2. *Court of Appeals' judgment—Dismissal of appeal because of fugitive status.*—Application to stay Court of Appeals' judgment—which, because applicant was a fugitive from justice for federal convictions, dismissed his appeal from Tax Court's determination upholding Internal Revenue Service's calculations of taxes due from applicant and his wife—is denied. Conforte v. Commissioner (REHNQUIST, J., in chambers), p. 1309.

3. *District Court judgment—Prayers in public schools.*—Application to stay (pending appeal to Court of Appeals) District Court's judgment—which dismissed applicants' complaint and dissolved a preliminary injunction in an action challenging Alabama statutes that provided for a period for meditation or voluntary prayer in public schools and permitted teachers to lead classes in prayer—is granted. Jaffree v. Board of School Commissioners of Mobile County (POWELL, J., in chambers), p. 1314.

4. *State trial court orders—Prohibition of contact with news media and telecast of sketches of jurors.*—Application to stay—pending review in Arizona Supreme Court—state trial court's orders (1) prohibiting court personnel, counsel, witnesses, and jurors in a murder case from speaking directly with press, and (2) directing that all sketches of jurors be reviewed by court before being broadcast on television, is denied. KPNX Broadcasting Co. v. Arizona Superior Court (REHNQUIST, J., in chambers), p. 1302.

5. *Vacation of death sentence.*—State's reapplication to stay California Supreme Court's judgment vacating respondent's death sentence and remanding for a new sentencing proceeding, is granted. California v. Ramos (REHNQUIST, J., in chambers), p. 1301.

SUPREMACY CLAUSE. See **State Bank Taxes.**

SUPREME COURT.

1. Proceedings in memory of Justice Fortas, p. VII.

2. Notation of the death of Mrs. Brennan, p. V.

3. Assignment of THE CHIEF JUSTICE as Circuit Justice for the Federal Circuit, p. IV.

TAKINGS CLAUSE. See **Bankruptcy.**

TAXES. See **State and Local Personal Property Taxes; State Bank Taxes; Stays,** 2.

TELEVISION COVERAGE OF CRIMINAL CASE. See **Stays,** 4.

TELEVISION STATION LICENSES. See **Rehabilitation Act of 1973.**

TENNESSEE. See **State Bank Taxes.**

TRANSACTIONAL IMMUNITY. See **Constitutional Law,** VI, 1.

TREBLE-DAMAGES ACTIONS. See **Antitrust Acts.**

UNFAIR LABOR PRACTICES. See **National Labor Relations Board.**

UNIONS. See **Antitrust Acts; Damages; National Labor Relations Board.**

USE IMMUNITY. See **Constitutional Law,** VI, 1.

VOLUNTARINESS OF GUILTY PLEAS. See **Criminal Law.**

VOTING RIGHTS ACT OF 1965.

Federal approval of city voting plan—Majority-vote requirement—Impact upon black voters.—In appellant city's action under § 5 of Act for federal preclearance of changed voting plan involving expansion of municipal borders and at-large election of certain city councilmen by a majority vote, District Court did not exceed its authority in conditioning approval of plan on change of majority-vote requirement to a plurality-vote requirement so as to neutralize to extent possible plan's adverse impact upon black voters. Port Arthur v. United States, p. 159.

WAIVER OF RIGHT TO COUNSEL'S PRESENCE AT POLYGRAPH TEST. See **Constitutional Law,** VII.

WATER RIGHTS.

Diversion of river water—Equitable apportionment.—In action by Colorado to establish right to divert for future uses water of Vermejo River, all of which was being appropriated presently by users in New Mexico, Special Master properly concluded that flexible principle of equitable apportionment, rather than strict rule of prior appropriation, should be applied; proceedings are remanded to Special Master for additional findings to enable Court to assess correctness of his application of principle of equitable apportionment to facts of case. Colorado v. New Mexico, p. 176.

WEAPONS. See **Constitutional Law,** I.

WORDS AND PHRASES.

1. *"Engaged in maritime employment."* § 2(3), Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 902(3). Director, OWCP v. Perini North River Associates, p. 297.

2. *"Person . . . injured . . . by reason of anything forbidden in the antitrust laws."* § 4, Clayton Act, 15 U. S. C. § 15. Associated General Contractors of California v. Carpenters, p. 519.

WORKERS' COMPENSATION. See **Justiciability; Longshoremen's and Harbor Workers' Compensation Act.**

ZONING POWER. See **Constitutional Law,** III.