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UNITED STATES REPORTS

VOLUME 460

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1982

FEBRUARY 23 THROUGH APRIL 19, 1983

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.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1982

MOSES H. CONE MEMORIAL HOSPITAL *v.* MERCURY CONSTRUCTION CORP.

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

No. 81–1203. Argued November 2, 1982—Decided February 23, 1983

Petitioner, a hospital located in North Carolina, entered into a contract with respondent contractor, an Alabama corporation, for construction of additions to the hospital building. Contract disputes were to be initially referred to the architect who was hired to design and oversee the construction project. Disputes decided by the architect or not decided within a specified time could be submitted to binding arbitration under an arbitration clause in the contract. Subsequently, during construction, respondent submitted claims to the architect for extended overhead or increase in construction costs due to petitioner's delay or inaction. But the claims were not resolved, and petitioner refused to pay them. Petitioner then filed an action in a North Carolina state court against respondent and the architect, seeking a declaratory judgment that there was no right to arbitration, that petitioner was not liable to respondent, and that if it was liable it would be entitled to indemnity from the architect. A few days later petitioner obtained an *ex parte* injunction from the state court forbidding respondent to take any steps toward arbitration, but when respondent objected the stay was dissolved. Respondent then filed a diversity-of-citizenship action in Federal District Court, seeking an order compelling arbitration under § 4 of the United States Arbitration Act. The District Court stayed the action pending resolution of the state-court suit because the two suits involved the identical issue of the arbitrability of respondent's claims. The Court of Appeals, holding that it had jurisdiction under 28 U. S. C. § 1291, reversed the

District Court's stay order and remanded the case with instructions to enter an order to arbitrate.

Held:

1. The District Court's stay order was appealable as a "final decision" to the Court of Appeals under 28 U. S. C. § 1291. Since the order was based on the conclusion that the federal and state actions involved the identical issue of arbitrability, and this issue was the only substantive issue present in the federal action, a stay of the federal action pending resolution of the state action meant that there would be no further litigation in the federal court. Thus, respondent was "effectively out of court" so that the stay order amounted to a dismissal of the federal action. Moreover, even if the stay order was not final for appealability purposes, it was nevertheless appealable within the finality rule exception that applies where an order conclusively determines the disputed question, resolves an important issue completely separate from the merits, and is effectively unreviewable on appeal from a final judgment. *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541. Pp. 8–13.

2. The District Court abused its discretion in granting the stay. Pp. 13–28.

(a) A federal district court may decline to exercise its jurisdiction because of parallel state-court litigation only in exceptional circumstances; only the clearest of justifications will warrant dismissal. *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800, 818–819. The decision whether to stay or dismiss a federal action on grounds of wise judicial administration does not rest on a mechanical checklist but on a careful balancing of the important factors (which court first assumed jurisdiction over property involved in the litigation, inconvenience of the federal forum, avoidance of piecemeal litigation, and the order in which the concurrent forums obtained jurisdiction) relevant to the decision as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction. *Ibid.* Pp. 13–16.

(b) The exceptional-circumstances test set forth in *Colorado River*, *supra*, was not undermined by *Will* v. *Calvert Fire Insurance Co.*, 437 U. S. 655. Pp. 16–19.

(c) There was no showing of the requisite exceptional circumstances to justify the District Court's stay order. Concededly, there was no assumption by either court of jurisdiction over any res or property or any contention that the federal court was any less convenient to the parties than the state court. The other factors—avoidance of piecemeal litigation and the order in which the current forums obtained jurisdiction—rather than supporting the stay, counsel against it. The fact that if respondent obtains an arbitration order, petitioner will be forced to resolve

the dispute with respondent and the related dispute with the architect in different forums is not the result of any choice between federal and state courts but occurs because the relevant federal law, the Arbitration Act, requires piecemeal resolution when necessary to give effect to an arbitration agreement. Hence, a decision to allow the issue of arbitrability to be decided in federal rather than state court does not cause piecemeal resolution of the parties' underlying disputes. And the fact that the state-court suit was filed before the federal suit is not sufficient reason to justify the stay order, where because petitioner's refusal to arbitrate did not occur until less than a day before it filed its state suit, respondent had no reasonable opportunity to file its federal suit first. Moreover, priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions. Here, no substantial proceedings had taken place in the state suit at the time of the District Court's stay order, whereas in the federal suit the parties had taken most of the steps necessary to a resolution of the arbitrability issue. The stay order thus frustrated the Arbitration Act's policy of rapid and unobstructed enforcement of arbitration agreements. Pp. 19–23.

(d) The fact that federal law in the terms of the Arbitration Act governs the issue of the arbitrability of the dispute between petitioner and respondent in either the state or the federal court is another factor militating against the District Court's stay order. See *Calvert*, *supra*. Pp. 23–26.

(e) Finally, an important reason against allowing a stay is the probable inadequacy of the state suit to protect respondent's rights, since it is doubtful that respondent could obtain from the state court an order compelling petitioner to arbitrate. Pp. 26–27.

(f) The fact that the District Court stayed the federal action rather than dismissing it outright does not render the *Colorado River* exceptional-circumstances test inapplicable. Pp. 27–28.

3. The Court of Appeals acted within its authority in deciding that the contractual dispute was arbitrable under the Arbitration Act and the contract, where the court had briefs and evidentiary submissions from both parties on the merits of arbitrability. P. 29.

656 F. 2d 933, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and O'CONNOR, J., joined, *post*, p. 30.

Jack W. Floyd argued the cause for petitioner. With him on the briefs were *Stephen P. Millikin* and *Douglas W. Ey, Jr.*

A. H. Gaede, Jr., argued the cause for respondent. With him on the brief were *Joseph B. Mays, Jr.*, *Charles Nichols*, and *Frank H. McFadden.*

JUSTICE BRENNAN delivered the opinion of the Court.

This case, commenced as a petition for an order to compel arbitration under § 4 of the United States Arbitration Act of 1925 (Arbitration Act or Act), 9 U. S. C. § 4, presents the question whether, in light of the policies of the Act and of our decisions in *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800 (1976), and *Will* v. *Calvert Fire Insurance Co.*, 437 U. S. 655 (1978), the District Court for the Middle District of North Carolina properly stayed this diversity action pending resolution of a concurrent state-court suit. The Court of Appeals for the Fourth Circuit reversed the stay. 656 F. 2d 933, rehearing denied, 664 F. 2d 936 (1981). We granted certiorari. 455 U. S. 937 (1982). We affirm.

I

Petitioner Moses H. Cone Memorial Hospital (Hospital) is located in Greensboro, N. C. Respondent Mercury Construction Corp. (Mercury), a construction contractor, has its principal place of business in Alabama. In July 1975, Mercury and the Hospital entered into a contract for the construction of additions to the Hospital building. The contract, drafted by representatives of the Hospital, included provisions for resolving disputes arising out of the contract or its breach. All disputes involving interpretation of the contract or performance of the construction work were to be referred in the first instance to J. N. Pease Associates (Architect), an independent architectural firm hired by the Hospital to design and oversee the construction project. With certain

stated exceptions,[1] any dispute decided by the Architect (or not decided by it within a stated time) could be submitted by either party to binding arbitration under a broad arbitration clause in the contract:

> "All claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof, . . . shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." App. 29–30.

The contract also specified the time limits for arbitration demands.[2]

Construction on the project began in July 1975. Performance was to be completed by October 1979.[3] In fact, construction was substantially completed in February 1979, and final inspections were made that June.

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[1] The Architect was given final say on "matters relating to artistic effect." App. 28–29. The contract also excluded arbitration on any claim waived by the making or acceptance of final payment. *Id.*, at 29. Neither of these exceptions is asserted to apply in this case.

[2] The contract provided that no demand for arbitration could be made later than 30 days after the Architect's written final decision. In the case of arbitrable disputes not subject to submission to the Architect, the demand was required to be made "within a reasonable time after the claim . . . has arisen," and in no event after the applicable statute of limitations had run. *Id.*, at 29–30.

The contract also set a starting time limit for arbitration demands. No demand could be made earlier than 10 days after presentation of evidence to the Architect, unless the Architect rendered a written decision before that time. *Id.*, at 29.

[3] The completion date, originally set as November 14, 1978, was extended to October 1979 by agreement of the parties.

At a meeting in October 1977 (during construction), attended by representatives of Mercury, the Hospital, and the Architect, Mercury agreed, at the Architect's request, to withhold its claims for delay and impact costs (*i. e.*, claims for extended overhead or increase in construction costs due to delay or inaction by the Hospital) until the work was substantially completed. On this record, the Hospital does not contest the existence of this agreement, although it asserts that the Architect lacked authority to agree to a delay in presentation of claims or to entertain claims after the contract work was completed.

In January 1980, Mercury submitted to the Architect its claims for delay and impact costs. Mercury and the Architect discussed the claims over several months, substantially reducing the amount of the claims. According to the Hospital, it first learned of the existence of Mercury's claims in April 1980; its lawyers assumed active participation in the claim procedure in May. The parties differ in their characterizations of the events of the next few months—whether there were "ongoing negotiations," or merely an "investigation" by the Hospital. In any event, it appears from the record that lawyers for the Hospital requested additional information concerning Mercury's claims. As a result, on August 12, 1980, Mercury gave a detailed presentation of its claims at a meeting attended by Mercury's representatives and lawyers, the Hospital's representatives and lawyers, and representatives of the Architect. Mercury agreed to send copies of its files to an expert hired by the Hospital, and the parties agreed to meet again on October 13.

On October 6, Mercury's counsel telephoned the Hospital's counsel to confirm that the scheduled meeting would go forward. The Hospital's counsel said he would call back the next day. When he did, he informed Mercury's counsel that the Hospital would pay nothing on Mercury's claim. He also said that the Hospital intended to file a declaratory judgment action in North Carolina state court.

True to its word, the Hospital filed an action on the morning of October 8 in the Superior Court of Guilford County, N. C., naming Mercury and the Architect as defendants. The complaint alleged that Mercury's claim was without factual or legal basis and that it was barred by the statute of limitations. It alleged that Mercury had lost any right to arbitration under the contract due to waiver, laches, estoppel, and failure to make a timely demand for arbitration. The complaint also alleged various delinquencies on the part of the Architect. As relief, the Hospital sought a declaration that there was no right to arbitration; a stay of arbitration; a declaration that the Hospital bore no liability to Mercury; and a declaration that if the Hospital should be found liable in any respect to Mercury, it would be entitled to indemnity from the Architect. The complaint was served on Mercury on October 9. On that same day, Mercury's counsel mailed a demand for arbitration.

On October 15, without notice to Mercury, the Hospital obtained an *ex parte* injunction from the state court forbidding Mercury to take any steps directed toward arbitration. Mercury objected, and the stay was dissolved on October 27. As soon as the stay was lifted, Mercury filed the present action in the District Court, seeking an order compelling arbitration under § 4 of the Arbitration Act, 9 U. S. C. § 4.[4] Jurisdiction was based on diversity of citizenship. On the Hospital's motion, the District Court stayed Mercury's federal-court suit pending resolution of the state-court suit because the two suits involved the identical issue of the arbitrability of Mercury's claims. App. to Pet. for Cert. A–38.

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[4] Simultaneously, Mercury filed a petition for removal of the Hospital's state-court action. The District Court remanded the removed case on the ground that, because the Hospital and the Architect are both North Carolina corporations, there was no complete diversity. The propriety of the removal or remand is not before this Court.

Mercury sought review of the District Court's stay by both a notice of appeal and a petition for mandamus. A panel of the Court of Appeals for the Fourth Circuit heard argument in the case, but before the panel issued any decision, the court informed the parties that it would consider the case en banc. After reargument, the en banc court held that it had appellate jurisdiction over the case under 28 U. S. C. § 1291. It reversed the District Court's stay order and remanded the case to the District Court with instructions for entry of an order to arbitrate.

II

Before we address the propriety of the District Judge's stay order, we must first decide whether that order was appealable to the Court of Appeals under 28 U. S. C. § 1291.[5]

Mercury sought appellate review through two alternative routes—a notice of appeal under § 1291, and a petition for mandamus under the All Writs Act, 28 U. S. C. § 1651.[6] Mercury expressly stated that its appeal was based only on § 1291, and not on 28 U. S. C. § 1292 (relating to interlocutory appeals). The Hospital contends that the order appealed from was not a "final decisio[n]" within § 1291. We

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[5] Section 1291 provides in relevant part:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court."

[6] The Hospital argues that because Mercury's filing in the Court of Appeals was styled a petition for mandamus first and a notice of appeal only "in the alternative," the Hospital was somehow entitled to have the Court of Appeals apply the stricter standards of review that obtain under the mandamus procedure before considering any appeal. Brief for Petitioner 30–31. We do not understand why this order of proceeding would be of any benefit to the Hospital; but in any event the contention is frivolous. In the first place, Mercury also filed a proper notice of appeal in the District Court, see Fed. Rule App. Proc. 3(a). More fundamentally, a court of appeals has no occasion to engage in extraordinary review by mandamus "in aid of [its] jurisdictio[n]," 28 U. S. C. § 1651, when it can exercise the same review by a contemporaneous ordinary appeal. See, *e. g.*, *Hines* v. *D'Artois*, 531 F. 2d 726, 732, and n. 10 (CA5 1976).

disagree and hold that the stay order was final for purposes of appellate jurisdiction.

Idlewild Liquor Corp. v. *Epstein*, 370 U. S. 713 (1962), is instructive in this regard. There the plaintiff brought a federal suit challenging the constitutionality of a state statute. The District Judge declined to convene a three-judge court and stayed the federal suit under the *Pullman* abstention doctrine.[7] We held that the District Court's action was final and therefore reviewable by the Court of Appeals, stating:

> "The Court of Appeals properly rejected the argument that the order of the District Court 'was not final and hence unappealable under 28 U. S. C. §§ 1291, 1292,' pointing out that '[a]ppellant was effectively out of court.'" 370 U. S., at 715, n. 2.[8]

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[7] *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941).

[8] The plaintiff in *Idlewild* had requested injunctive relief against enforcement of the state statute. Nevertheless, it is clear that neither the Court of Appeals nor this Court based the holding of appealability on the argument that the District Court had effectively denied injunctive relief. See generally 28 U. S. C. § 1292(a)(1); *Carson* v. *American Brands, Inc.*, 450 U. S. 79 (1981). Section 1292 in terms applies only to *interlocutory* orders, and therefore could hardly have been the basis for a holding that the orders were "final."

There is no basis for the dissent's attempt, *post*, at 33, to distinguish *Idlewild* on the basis that in that case there was no pending state-court action when the District Court's stay issued. Neither the Court of Appeals nor this Court suggested in *Idlewild* that the state court's doors were anything but wide open to the plaintiff. "[E]ffectively out of court" means effectively out of *federal* court—in keeping with the fact that the decision under appeal is the refusal to exercise *federal* jurisdiction.

Moreover, the dissent's resolution of the appealability issue would yield the odd result that *Pullman* abstention orders would be immediately appealable in Texas but not in the other 49 States. Compare *American Trial Lawyers Assn.* v. *New Jersey Supreme Court*, 409 U. S. 467 (1973) (stays appropriate in *Pullman* cases), with *Harris County Commissioners Court* v. *Moore*, 420 U. S. 77, 88–89, and n. 14 (1975) (dismissal permissible to accommodate Texas jurisdictional requirements). This oddity illustrates the artificiality of resting appealability on an otherwise substanceless distinction between stays and dismissals in the present context. See Part IV–E, *infra*.

Here, the argument for finality of the District Court's order is even clearer. A district court stay pursuant to *Pullman* abstention is entered with the expectation that the federal litigation will resume in the event that the plaintiff does not obtain relief in state court on state-law grounds.[9] Here, by contrast, the District Court predicated its stay order on its conclusion that the federal and state actions involved "the identical issue of arbitrability of the claims of Mercury Construction Corp. against the Moses H. Cone Memorial Hospital." App. to Pet. for Cert. A–38. That issue of arbitrability was the only substantive issue present in the federal suit. Hence, a stay of the federal suit pending resolution of the state suit meant that there would be no further litigation in the federal forum; the state court's judgment on the issue would be res judicata.[10] Thus, here, even more surely than in *Idlewild*, Mercury was "effectively out of court." Hence, as the Court of Appeals held, this stay order amounts to a dismissal of the suit.[11]

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[9] See *England* v. *Louisiana Bd. of Medical Examiners*, 375 U. S. 411 (1964).

[10] See, *e. g.*, *Ultracashmere House, Ltd.* v. *Meyer*, 664 F. 2d 1176, 1183–1184 (CA11 1981); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Haydu*, 637 F. 2d 391, 397–398 (CA5 1981).

[11] See 656 F. 2d 933, 937–938, and n. 6 (CA4 1981), citing as dispositive *Amdur* v. *Lizars*, 372 F. 2d 103, 105–106 (CA4 1967). See also *Federman* v. *Empire Fire & Marine Insurance Co.*, 597 F. 2d 798, 808, and n. 15 (CA2 1979); *Baltimore Bank for Cooperatives* v. *Farmers Cheese Cooperative*, 583 F. 2d 104, 108–109 (CA3 1978); *Sun Oil Co.* v. *FEA*, 572 F. 2d 867 (Temp. Emerg. Ct. App. 1978); *Rancho Palos Verdes Corp.* v. *Laguna Beach*, 547 F. 2d 1092, 1093, n. 1 (CA9 1976); *Hines* v. *D'Artois*, *supra*, at 730–732; *Drexler* v. *Southwest Dubois School Corp.*, 504 F. 2d 836, 838 (CA7 1974) (en banc); *Druker* v. *Sullivan*, 458 F. 2d 1272, 1274, n. 3 (CA1 1972). But see *Acton Corp.* v. *Borden, Inc.*, 670 F. 2d 377, 380–382 (CA1 1982); *State Farm Mutual Automobile Insurance Co.* v. *Scholes*, 601 F. 2d 1151, 1153–1154 (CA10 1979); *Frederick L.* v. *Thomas*, 578 F. 2d 513, 515–516 (CA3 1978) (dictum).

Of course, as these cases recognize, *Idlewild* does not disturb the usual rule that a stay is not ordinarily a final decision for purposes of § 1291, since

In any event, if the District Court order were not final for appealability purposes, it would nevertheless be appealable within the exception to the finality rule under *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541 (1949). The factors required to show finality under this exception have been summarized as follows:

> "To come within the 'small class' of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal

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most stays do not put the plaintiff "effectively out of court." See, *e. g.*, *Amdur*, *supra*, at 105–106. *Idlewild*'s reasoning is limited to cases where (under *Colorado River*, abstention, or a closely similar doctrine) the object of the stay is to require all or an essential part of the federal suit to be litigated in a state forum.

This answers the dissent's argument, *post*, at 33–34, that *Idlewild* was overruled by that part of *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469–477 (1978), which rejected the "death knell" doctrine of appealability. The "death knell" doctrine rested on the argument that in some situations an interlocutory decision (such as a refusal to certify a class) might terminate a suit as a practical matter because the named plaintiff would lack an economic incentive to pursue his individual claim. In a "death knell" case, however, the order sought to be appealed had no *legal* effect on the named plaintiff's ability to proceed with his individual claim in federal court. There is an obvious difference between a case in which the plaintiff himself *may choose* not to proceed, and a case in which the district court *refuses to allow* the plaintiff to litigate his claim in federal court. Appeal from a stay on abstention or *Colorado River* grounds, therefore, presents no prospect of "appeals of right from nonfinal orders that turn on the facts of a particular case," as in *Coopers & Lybrand*, *supra*, at 476. We foresee no great difficulty in determining when a district court has surrendered jurisdiction over a federal lawsuit.

For much the same reason, the dissent errs in likening the stay in this case to an ordinary delay in the interest of docket control, *post*, at 30–31. We do not hold that an order becomes final merely because it may have the practical effect of allowing a state court to be the first to rule on a common issue. We hold only that a stay order is final when the sole purpose and effect of the stay are precisely to surrender jurisdiction of a federal suit to a state court.

from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978) (footnote omitted).[12]

There can be no dispute that this order meets the second and third of these criteria. An order that amounts to a refusal to adjudicate the merits plainly presents an important issue separate from the merits.[13] For the same reason, this order would be entirely unreviewable if not appealed now. Once the state court decided the issue of arbitrability, the federal court would be bound to honor that determination as res judicata.

The Hospital contends nevertheless that the District Court's stay order did not meet the first of the criteria, namely that it "conclusively determine the disputed question." But this is true only in the technical sense that every order short of a final decree is subject to reopening at the discretion of the district judge.[14] In this case, however, there is

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[12] Accord, *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S. 368, 375 (1981); *United States* v. *MacDonald*, 435 U. S. 850, 854–855 (1978); *Abney* v. *United States*, 431 U. S. 651, 658–659 (1977).

[13] The "completely separate from the merits" requirement is a distillation of the principle that there should not be piecemeal review of "steps towards final judgment in which they will merge." *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546 (1949). In this case, of course, there is no step towards final judgment, but a refusal to proceed at all.

[14] See Fed. Rule Civ. Proc. 54(b); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4478, pp. 788–792 (1981).

Coopers & Lybrand held that the *Cohen* rule did not apply to a class decertification order because, among other reasons, such an order is "inherently tentative" under Federal Rule of Civil Procedure 23(c)(1), which provides that such an order may be "altered or amended before the decision on the merits." 437 U. S., at 469, and n. 11. Of course, as Rule 54(b) provides, virtually all interlocutory orders may be altered or amended before final judgment if sufficient cause is shown; yet that does not make all pretrial orders "inherently tentative" in the sense of that phrase in *Coopers & Lybrand*. The rationale behind Rule 23(c)(1) is that a certification decision should be made "[a]s soon as practicable," even though later events or discoveries may mandate a different result. Many other orders, by contrast, are made with the expectation that they will be the final word on the sub-

no basis to suppose that the District Judge contemplated any reconsideration of his decision to defer to the parallel state-court suit. He surely would not have made that decision in the first instance unless he had expected the state court to resolve all relevant issues adequately. See Part IV–E, *infra*. It is not clear why the judge chose to stay the case rather than to dismiss it outright; for all that the record shows, there was no reason other than the form of the Hospital's motion. Whatever the reason, however, the practical effect of his order was entirely the same for present purposes, and the order was appealable.

III

We turn now to the principal issue to be addressed, namely, the propriety of the District Court's decision to stay this federal suit out of deference to the parallel litigation brought in state court. *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800 (1976), provides persuasive guidance in deciding this question.

A

Colorado River involved the effect of the McCarran Amendment, 66 Stat. 560, 43 U. S. C. § 666, on the existence and exercise of federal-court jurisdiction to adjudicate federal water rights, 28 U. S. C. § 1345. The Amendment waives the Government's sovereign immunity to permit the joinder of the United States in some state-court suits for the adjudication of water rights. In *Colorado River*, however, the Government proceeded in Federal District Court, bringing suit against some 1,000 nonfederal water users, seeking a declaration of the water rights of certain federal entities and Indian tribes. Shortly thereafter, a defendant in that suit

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ject addressed. Certainly that was true of the order at issue in this case. The reasoning of *Coopers & Lybrand* does not reach all pretrial orders that are formally subject to revision, but only those as to which some revision might reasonably be expected in the ordinary course of litigation.

sought to join the United States in a state-court proceeding for the comprehensive adjudication and administration of all water rights within the river system that was the subject of the federal-court suit. The District Court dismissed the federal suit, holding that the abstention doctrine required deference to the state-court proceedings. The Court of Appeals for the Tenth Circuit reversed, holding that the suit of the United States was within the District Court's jurisdiction under 28 U. S. C. § 1345 and that abstention was inappropriate. We reversed the judgment of the Court of Appeals and affirmed the judgment of the District Court dismissing the complaint.

We began our analysis by examining the abstention doctrine in its various forms. We noted:

> "Abstention from the exercise of federal jurisdiction is the exception, not the rule. 'The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.'" [15]

After canvassing the three categories of abstention, we concluded that none of them applied to the case at hand. 424 U. S., at 813–817.[16]

Nevertheless, we held that the District Court's dismissal was proper on another ground—one resting not on considerations of state-federal comity or on avoidance of constitu-

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[15] 424 U. S., at 813, quoting *County of Allegheny* v. *Frank Mashuda Co.*, 360 U. S. 185, 188–189 (1959).

[16] There is no contention here that any of the categories of the abstention doctrine apply to this case.

tional decisions, as does abstention, but on "considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'"[17] We noted that "'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction,'" and that the federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them."[18] We continued:

> "Given this obligation, and the absence of weightier considerations of constitutional adjudication and state-federal relations, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention. The former circumstances, though exceptional, do nevertheless exist." *Id.*, at 818.

We declined to prescribe a hard-and-fast rule for dismissals of this type, but instead described some of the factors relevant to the decision.

> "It has been held, for example, that the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts. . . . In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; and the order in which jurisdiction was obtained by the concurrent forums. No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise juris-

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[17] 424 U. S., at 817, quoting *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U. S. 180, 183 (1952).

[18] 424 U. S., at 817, quoting *McClellan* v. *Carland*, 217 U. S. 268, 282 (1910).

diction and the combination of factors counselling against that exercise is required. *Only the clearest of justifications will warrant dismissal.*" *Id.*, at 818–819 (emphasis added; citations omitted).

As this passage makes clear, the decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction. The weight to be given to any one factor may vary greatly from case to case, depending on the particular setting of the case. *Colorado River* itself illustrates this principle in operation. By far the most important factor in our decision to approve the dismissal there was the "clear federal policy . . . [of] avoidance of piecemeal adjudication of water rights in a river system," *id.*, at 819, as evinced in the McCarran Amendment. We recognized that the Amendment represents Congress' judgment that the field of water rights is one peculiarly appropriate for comprehensive treatment in the forums having the greatest experience and expertise, assisted by state administrative officers acting under the state courts. *Id.*, at 819–820. In addition, we noted that other factors in the case tended to support dismissal—the absence of any substantial progress in the federal-court litigation; the presence in the suit of extensive rights governed by state law; the geographical inconvenience of the federal forum; and the Government's previous willingness to litigate similar suits in state court. *Id.*, at 820.

B

Before discussing the application of *Colorado River*'s exceptional-circumstances test, we must address the Hospital's argument that that test was undermined by our subsequent decision in *Will* v. *Calvert Fire Insurance Co.*, 437 U. S. 655 (1978). We find no merit in this argument for at least two reasons.

The Hospital relies on the opinion of JUSTICE REHNQUIST, announcing the judgment of the Court. The Hospital argues that JUSTICE REHNQUIST's opinion, if not expressly overruling *Colorado River*, at least modifies its holding substantially. But it is clear that a majority of the Court reaffirmed the *Colorado River* test in *Calvert*. JUSTICE REHNQUIST's opinion commanded only four votes. It was opposed by the dissenting opinion, in which four Justices concluded that the *Calvert* District Court's stay was impermissible under *Colorado River*. 437 U. S., at 668–669, 672–674 (BRENNAN, J., joined by BURGER, C. J., and MARSHALL and POWELL, JJ., dissenting). JUSTICE BLACKMUN, although concurring in the judgment, agreed with the dissent that *Colorado River*'s exceptional-circumstances test was controlling; he voted to remand to permit the District Court to apply the *Colorado River* factors in the first instance.[19] 437 U. S., at 667–668. On remand, the Court of Appeals correctly recognized that the four dissenting Justices and JUSTICE BLACKMUN formed a majority to require application of the *Colorado River* test. *Calvert Fire Insurance Co.* v. *Will*, 586 F. 2d 12 (CA7 1978).[20]

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[19] Our decision in *Colorado River* came down after the District Court's stay order in *Calvert* but before the Court of Appeals issued its mandamus in that case.

[20] On remand from our decision in *Calvert*, the District Court and Court of Appeals concluded that the stay should be continued, but rested that decision on a ground not addressed in the prior Court of Appeals decision (*Calvert Fire Insurance Co.* v. *Will*, 560 F. 2d 792 (CA7 1977)) or in any of this Court's opinions in the case. They concluded that the filing of the federal suit was a "defensive tactical maneuver" based on a contrived federal claim; hence, a stay was called for as "a means to deter vexatious use of the federal courts." The courts also noted that, in the interim, the basis for the plaintiff's assertion of exclusive federal jurisdiction had vanished. *Calvert Fire Insurance Co.* v. *American Mutual Reinsurance Co.*, 600 F. 2d 1228, 1234–1236 (CA7 1979), aff'g 459 F. Supp. 859 (ND Ill. 1978). The case did not come before this Court for review a second time.

The Court of Appeals in this case relied on similar reasoning. It concluded that, despite chronological priority of filing, the Hospital's state-

Even on the basis of JUSTICE REHNQUIST's opinion, however, there is an obvious distinction between *Calvert* and this case. The key to *Calvert* was the standard for issuance of a writ of mandamus under 28 U. S. C. § 1651.[21] As JUSTICE REHNQUIST stressed, such extraordinary writs are used in aid of appellate jurisdiction only to confine an inferior court to a lawful exercise of its prescribed authority, or to compel it to exercise its authority when it is its duty to do so. The movant must show that his right to the writ is clear and indisputable. 437 U. S., at 661–662, 664, 665–666 (opinion of REHNQUIST, J.). JUSTICE REHNQUIST concluded that the movant in *Calvert* had failed to meet this burden. At the same time, he noted that the movant might have succeeded on a proper appeal. *Id.*, at 665. In this case we have held that the Court of Appeals did have appellate jurisdiction; it properly exercised that jurisdiction to find that the District Court's stay was impermissible under *Colorado River*.

The Hospital further contends that *Calvert* requires reversal here because the opinions of JUSTICE REHNQUIST and

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court suit was a contrived, defensive reaction to Mercury's expected claim for relief and for arbitration. 656 F. 2d, at 944–945.

The reasoning of the Courts of Appeals in this case and in *Calvert*—that the vexatious or reactive nature of either the federal or the state litigation may influence the decision whether to defer to a parallel state litigation under *Colorado River*—has considerable merit. We need not rely on such reasoning here, however, for we conclude *infra* that even if the Hospital acted in complete good faith there were no exceptional circumstances warranting the District Court's stay.

[21] The Court of Appeals in *Calvert* had held that it lacked jurisdiction to entertain an ordinary appeal, apparently because a portion of the federal litigation was the subject of exclusive federal jurisdiction and would therefore remain to be disposed of in federal court after the conclusion of state-court proceedings. *Calvert Fire Insurance Co.* v. *Will*, 560 F. 2d, at 794, citing *Cotler* v. *Inter-County Orthopaedic Assn.*, 526 F. 2d 537, 540 (CA3 1975). Cf. *Drexler* v. *Southwest Dubois School Corp.*, 504 F. 2d, at 838 (stay of litigation pending exhaustion of state remedies is final under *Idlewild*). The issue of appellate jurisdiction was not presented to this Court in *Calvert*.

JUSTICE BLACKMUN require greater deference to the discretion of the District Court than was given by the Court of Appeals in this case. Under both *Calvert* and *Colorado River*, of course, the decision whether to defer to the state courts is necessarily left to the discretion of the district court in the first instance. Yet to say that the district court has discretion is not to say that its decision is unreviewable; such discretion must be exercised under the relevant standard prescribed by this Court. In this case, the relevant standard is *Colorado River*'s exceptional-circumstances test, as elucidated by the factors discussed in that case. As we shall now explain, we agree with the Court of Appeals that the District Court in this case abused its discretion in granting the stay.

IV

Applying the *Colorado River* factors to this case, it is clear that there was no showing of the requisite exceptional circumstances to justify the District Court's stay.

The Hospital concedes that the first two factors mentioned in *Colorado River* are not present here. There was no assumption by either court of jurisdiction over any res or property, nor is there any contention that the federal forum was any less convenient to the parties than the state forum. The remaining factors—avoidance of piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums—far from supporting the stay, actually counsel against it.

A

There is no force here to the consideration that was paramount in *Colorado River* itself—the danger of piecemeal litigation.

The Hospital points out that it has two substantive disputes here—one with Mercury, concerning Mercury's claim for delay and impact costs, and the other with the Architect, concerning the Hospital's claim for indemnity for any liability it may have to Mercury. The latter dispute cannot be sent

to arbitration without the Architect's consent, since there is no arbitration agreement between the Hospital and the Architect. It is true, therefore, that if Mercury obtains an arbitration order for its dispute, the Hospital will be forced to resolve these related disputes in different forums. That misfortune, however, is not the result of any choice between the federal and state courts; it occurs because the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement.[22] Under the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.[23] If the dispute between Mercury and the Hospital *is* arbitrable under the Act, then the Hospital's two disputes will be resolved separately—one in arbitration, and the other (if at all) in state-court litigation. Conversely, if the dispute between Mercury and the Hospital *is not* arbitrable, then both disputes will be resolved in state court. But neither of those two outcomes depends at all on *which court* decides the question of arbitrability. Hence, a decision to allow that issue to be decided in federal rather than state court does not cause piecemeal resolution of the parties' underlying disputes. Al-

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[22] This provides a sharp contrast with the key statute at issue in *Colorado River*—the McCarran Amendment. There, as we stressed, the primary policy of the statute was the *avoidance* of piecemeal litigation. 424 U. S., at 819–820.

[23] *E. g., C. Itoh & Co.* v. *Jordan International Co.*, 552 F. 2d 1228, 1231–1232 (CA7 1977); *Acevedo Maldonado* v. *PPG Industries, Inc.*, 514 F. 2d 614, 617 (CA1 1975); *Hamilton Life Insurance Co.* v. *Republic National Life Insurance Co.*, 408 F. 2d 606, 609 (CA2 1969).

In some cases, of course, it may be advisable to stay litigation among the nonarbitrating parties pending the outcome of the arbitration. That decision is one left to the district court (or to the state trial court under applicable state procedural rules) as a matter of its discretion to control its docket. See generally *Landis* v. *North American Co.*, 299 U. S. 248, 254–255 (1936).

though the Hospital will have to litigate the arbitrability issue in federal rather than state court, that dispute is easily severable from the merits of the underlying disputes.

B

The order in which the concurrent tribunals obtained and exercised jurisdiction cuts against, not for, the District Court's stay in this case. The Hospital argues that the stay was proper because the state-court suit was filed some 19 days before the federal suit. In the first place, this argument disregards the obvious reason for the Hospital's priority in filing. An indispensable element of Mercury's cause of action under § 4 for an arbitration order is the Hospital's refusal to arbitrate. See n. 27, *infra*. That refusal did not occur until less than a day before the Hospital filed its state suit. Hence, Mercury simply had no reasonable opportunity to file its § 4 petition first. Moreover, the Hospital succeeded in obtaining an *ex parte* injunction from the state court forbidding Mercury to take any steps to secure arbitration.[24] Mercury filed its § 4 petition the same day that the injunction was dissolved.[25]

That aside, the Hospital's priority argument gives too mechanical a reading to the "priority" element of the *Colorado River* balance. This factor, as with the other *Colorado River* factors, is to be applied in a pragmatic, flexible manner with a view to the realities of the case at hand. Thus, priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions. *Colorado River* illustrates

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[24] Of course we do not mean to say that the state court's injunction could properly have been applied to prevent Mercury from filing or prosecuting a federal lawsuit. See *General Atomic Co.* v. *Felter*, 434 U. S. 12 (1977); *Donovan* v. *City of Dallas*, 377 U. S. 408 (1964). Mercury was not obliged, however, to put itself in danger of contempt sanctions merely in order to cut short the period of the Hospital's priority of filing.

[25] See also n. 20, *supra*.

this point well. There, the federal suit was actually filed first. Nevertheless, we pointed out as a factor favoring dismissal "the apparent absence of any proceedings in the District Court, other than the filing of the complaint, prior to the motion to dismiss." 424 U. S., at 820. Here, the opposite was true. It was the state-court suit in which no substantial proceedings (excepting only the abortive temporary injunction) had taken place at the time of the decision to stay. In the federal suit, by contrast, the parties had taken most of the steps necessary to a resolution of the arbitrability issue.[26] In realistic terms, the federal suit was running well ahead of the state suit at the very time that the District Court decided to refuse to adjudicate the case.

This refusal to proceed was plainly erroneous in view of Congress' clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible. The Act provides two parallel devices for enforcing an arbitration agreement: a stay of litigation in any case raising a dispute referable to arbitration, 9 U. S. C. § 3, and an affirmative order to engage in arbitration, § 4. Both of these sections call for an expeditious and summary hearing, with only restricted inquiry into factual issues.[27] Assuming that the state court would

[26] Under § 6 of the Arbitration Act, 9 U. S. C. § 6, Mercury's application for a § 4 order was properly treated procedurally as a motion. Mercury submitted affidavits, legal briefs, and documentary evidence in support of the order sought. The Hospital responded with full briefing and extensive evidentiary submissions on the arbitrability issue, and it requested oral argument and a jury trial. At the same time, it made its successful motion for a stay. It is readily apparent that if the District Court had denied the stay, it doubtless could and should have gone on to decide the arbitrability point in very short order.

[27] Section 3 provides that if a suit is brought on the merits of a dispute covered by an arbitration agreement, "the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant

have granted prompt relief to Mercury under the Act,[28] there still would have been an inevitable delay as a result of the District Court's stay. The stay thus frustrated the statutory policy of rapid and unobstructed enforcement of arbitration agreements.

C

Besides the four factors expressly discussed in *Colorado River*, there is another that emerges from *Calvert*—the fact that federal law provides the rule of decision on the merits. The state-versus-federal-law factor was of ambiguous relevance in *Colorado River*.[29] In *Calvert*, however, both the four-vote dissenting opinion and JUSTICE BLACKMUN's opinion concurring in the judgment pointed out that the case involved issues of federal law. 437 U. S., at 667 (BLACKMUN, J., concurring in judgment); *id.*, at 668–677 (BRENNAN, J.,

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for the stay is not in default in proceeding with such arbitration." 9 U. S. C. § 3.

Section 4 provides that a district court must enter an order to arbitrate "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." If either of these points is in issue, § 4 provides that "the court shall proceed summarily" to a trial on that point. Section 6 further provides that a request for relief under either § 3 or § 4 is to be treated procedurally as a motion.

Moreover, the policy of the Arbitration Act requires a liberal reading of arbitration agreements, see *infra*, at 24–25. As a result, some issues that might be thought relevant to arbitrability are themselves arbitrable—further speeding the procedure under §§ 3 and 4. See, *e. g.*, *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967).

[28] See n. 34, *infra;* but cf. nn. 35, 36, *infra.*

[29] Although the dissenting Justices in *Colorado River* relied on this point, see 424 U. S., at 825–826, the majority concluded that the federal/state law point was not controlling for two reasons. First, there was an affirmative policy in federal law expressly approving litigation of federal water rights in state court—the McCarran Amendment. Second, although the water rights of the United States and the Indian tribes were governed in part by federal law, the bulk of the litigation would necessarily revolve around the state-law water rights of the thousand nonfederal parties in the case—a factor on which we expressly relied in approving the District Court's stay. *Id.*, at 820.

dissenting). See also *Colorado River*, 424 U. S., at 815, n. 21. It is equally apparent that this case involves federal issues.

The basic issue presented in Mercury's federal suit was the arbitrability of the dispute between Mercury and the Hospital. Federal law in the terms of the Arbitration Act governs that issue in either state or federal court. Section 2 is the primary substantive provision of the Act, declaring that a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. § 2.[30] Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act. In *Prima Paint Corp.* v. *Flood & Conklin Mfg. Corp.*, 388 U. S. 395 (1967), for example, the parties had signed a contract containing an arbitration clause, but one party alleged that there had been fraud in the inducement of the entire contract (although the alleged fraud did not go to the arbitration clause in particular). The issue before us was whether the issue of fraud in the inducement was itself an arbitrable controversy. We held that the language and policies of the Act required the conclusion that the fraud issue was arbitrable. *Id.*, at 402–404. Although our holding in *Prima Paint* extended only to the specific issue presented, the Courts of Appeals have since consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues

[30] "Maritime transactions" and "commerce" are defined in § 1 of the Arbitration Act, 9 U. S. C. § 1.

should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.[31]

To be sure, the source-of-law factor has less significance here than in *Calvert*, since the federal courts' jurisdiction to enforce the Arbitration Act is concurrent with that of the state courts.[32] But we emphasize that our task in cases such as this is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist "exceptional" circumstances, the "clearest of justifications," that can suffice under *Colo-*

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[31] *E. g.*, *Dickinson* v. *Heinold Securities, Inc.*, 661 F. 2d 638, 643 (CA7 1981); *Wick* v. *Atlantic Marine, Inc.*, 605 F. 2d 166, 168 (CA5 1979); *Becker Autoradio U. S. A., Inc.* v. *Becker Autoradiowerk GmbH*, 585 F. 2d 39, 43–45 (CA3 1978); *Hanes Corp.* v. *Millard*, 174 U. S. App. D. C. 253, 266, 531 F. 2d 585, 598 (1976); *Acevedo Maldonado* v. *PPG Industries, Inc.*, 514 F. 2d, at 616–617; *Germany* v. *River Terminal R. Co.*, 477 F. 2d 546, 547 (CA6 1973); *Coenen* v. *R. W. Pressprich & Co.*, 453 F. 2d 1209, 1211–1212 (CA2 1972); *Hart* v. *Orion Insurance Co.*, 453 F. 2d 1358, 1360–1361 (CA10 1971).

[32] See n. 34, *infra*.

The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U. S. C. § 1331 (1976 ed., Supp. V) or otherwise. Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue. *E. g.*, *Commercial Metals Co.* v. *Balfour, Guthrie, & Co.*, 577 F. 2d 264, 268–269 (CA5 1978), and cases cited. Section 3 likewise limits the federal courts to the extent that a federal court cannot stay a suit pending before it unless there is such a suit in existence. Nevertheless, although enforcement of the Act is left in large part to the state courts, it nevertheless represents federal policy to be vindicated by the federal courts where otherwise appropriate.

We need not address whether a federal court might stay a state-court suit pending arbitration under 28 U. S. C. § 2283.

rado River to justify the *surrender* of that jurisdiction. Although in some rare circumstances the presence of state-law issues may weigh in favor of that surrender, see n. 29, *supra*, the presence of federal-law issues must always be a major consideration weighing against surrender.[33]

D

Finally, in this case an important reason against allowing a stay is the probable inadequacy of the state-court proceeding to protect Mercury's rights. We are not to be understood to impeach the competence or procedures of the North Carolina courts. Moreover, state courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the Arbitration Act.[34] It is less clear, however, whether the same is true of an order to compel arbitration under § 4 of the Act.[35] We need not resolve that question here; it suffices to say that there was, at a minimum, substantial room for doubt that Mercury could obtain from the state court an order compel-

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[33] Cf. n. 20, *supra*.

[34] Although § 3 refers ambiguously to a suit "in any of the courts of the United States," the state courts have almost unanimously recognized that the stay provision of § 3 applies to suits in state as well as federal courts, requiring them to issue the same speedy relief when a dispute is referable to arbitration. (The North Carolina Supreme Court has so held, although not until after the District Court ordered this stay. *Burke County Public Schools Board of Education* v. *Shaver Partnership*, 303 N. C. 408, 279 S. E. 2d 816 (1981).) This is necessary to carry out Congress' intent to mandate enforcement of all covered arbitration agreements; Congress can hardly have meant that an agreement to arbitrate can be enforced against a party who attempts to litigate an arbitrable dispute in federal court, but not against one who sues on the same dispute in state court. See also *Prima Paint*, 388 U. S., at 404.

[35] Section 4, unlike § 3, speaks only of a petition to "any United States district court." Nonetheless, at least one state court has held that § 4 does require state courts to issue § 4 orders to arbitrate where the section's conditions are met. *Main* v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, 67 Cal. App. 3d 19, 24–25, 136 Cal. Rptr. 378, 380–381 (1977).

ling the Hospital to arbitrate.[36] In many cases, no doubt, a § 3 stay is quite adequate to protect the right to arbitration. But in a case such as this, where the party opposing arbitration is the one from whom payment or performance is sought, a stay of litigation alone is not enough. It leaves the recalcitrant party free to sit and do nothing—neither to litigate nor to arbitrate. If the state court stayed litigation pending arbitration but declined to compel the Hospital to arbitrate, Mercury would have no sure way to proceed with its claims except to return to federal court to obtain a § 4 order—a pointless and wasteful burden on the supposedly summary and speedy procedures prescribed by the Arbitration Act.

E

The Hospital argues that the *Colorado River* test is somehow inapplicable because in this case the District Court merely stayed the federal litigation rather than dismissing the suit outright, as in *Colorado River*. It contends that Mercury remains free to seek to reopen the federal suit on a showing that the state suit has failed to adjudicate its rights, and that a stay is less onerous than a dismissal. We have already rejected this distinction, for purposes of this case, in discussing appellate jurisdiction. *Supra*, at 12–13. We reject it in this context for the same reasons.

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[36] As a historical matter, there was considerable doubt at the time of the District Court's stay that the North Carolina court would have granted even a § 3 stay of litigation. The then-controlling precedent in North Carolina was to the effect that a contract such as that between Mercury and the Hospital was not subject to the Arbitration Act at all, on the reasoning that a construction project is not "commerce" within the meaning of §§ 1 and 2 of the Act. *Burke County Public Schools Board of Education* v. *Shaver Partnership*, 46 N. C. App. 573, 265 S. E. 2d 481 (1980); *Bryant-Durham Electric Co.* v. *Durham County Hospital Corp.*, 42 N. C. App. 351, 256 S. E. 2d 529 (1979). The North Carolina Supreme Court has, however, since repudiated those decisions. *Burke County Public Schools Board of Education* v. *Shaver Partnership*, 303 N. C. 408, 279 S. E. 2d 816 (1981).

We have no occasion in this case to decide whether a dismissal or a stay should ordinarily be the preferred course of action when a district court properly finds that *Colorado River* counsels in favor of deferring to a parallel state-court suit.[37] We can say, however, that a stay is as much a refusal to exercise federal jurisdiction as a dismissal. When a district court decides to dismiss or stay under *Colorado River*, it presumably concludes that the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties. If there is any substantial doubt as to this, it would be a serious abuse of discretion to grant the stay or dismissal at all. See Part IV–D, *supra; McNeese* v. *Board of Education*, 373 U. S. 668, 674–676 (1963). Thus, the decision to invoke *Colorado River* necessarily contemplates that the federal court will have nothing further to do in resolving any substantive part of the case, whether it stays or dismisses. See 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4247, pp. 517–519 (1978).

Moreover, assuming that for some unexpected reason the state forum does turn out to be inadequate in some respect, the Hospital's argument fails to make out any genuine difference between a stay and a dismissal. It is true that Mercury could seek to return to federal court if it proved necessary; but that would be equally true if the District Court had dismissed the case. It is highly questionable whether this Court would have approved a dismissal of a federal suit in *Colorado River* (or in any of the abstention cases, see *supra*, at 14) if the federal courts did not remain open to a dismissed plaintiff who later demonstrated the inadequacy of the state forum.

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[37] This reservation, of course, applies only to cases under *Colorado River*. Cf., *e. g.*, *American Trial Lawyers Assn.* v. *New Jersey Supreme Court*, 409 U. S. 467 (1973) (stay rather than dismissal in *Pullman* abstention).

V

In addition to reversing the District Court's stay, the Court of Appeals decided that the underlying contractual dispute between Mercury and the Hospital is arbitrable under the Arbitration Act and the terms of the parties' arbitration agreement. It reversed the District Court's judgment and remanded the case "with directions to proceed in conformity herewith." 656 F. 2d, at 946. In effect, the Court of Appeals directed the District Court to enter a § 4 order to arbitrate.

In this Court, the Hospital does not contest the substantive correctness of the Court of Appeals' holding on arbitrability. It does raise several objections to the procedures the Court of Appeals used in considering and deciding this case. In particular, it points out that the only issue formally appealed to the Court of Appeals was the propriety of the District Court's stay order. Ordinarily, we would not expect the Court of Appeals to pass on issues not decided in the District Court. In the present case, however, we are not disposed to disturb the court's discretion in its handling of the case in view of the special interests at stake and the apparent lack of any prejudice to the parties. Title 28 U. S. C. § 2106 gives a court of appeals some latitude in entering an order to achieve justice in the circumstances. The Arbitration Act calls for a summary and speedy disposition of motions or petitions to enforce arbitration clauses. The Court of Appeals had in the record full briefs and evidentiary submissions from both parties on the merits of arbitrability, and held that there were no disputed issues of fact requiring a jury trial before a § 4 order could issue. Under these circumstances, the court acted within its authority in deciding the legal issues presented in order to facilitate the prompt arbitration that Congress envisaged.

Affirmed.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

In its zeal to provide arbitration for a party it thinks deserving, the Court has made an exception to established rules of procedure. The Court's attempt to cast the District Court's decision as a final judgment fails to do justice to the meaning of the word "final," to the Act of Congress that limits the jurisdiction of the courts of appeals, or to the district judges who administer the laws in the first instance.

If the District Court had not stayed the proceeding, but had set a trial date two months away, there would be no doubt that its order was interlocutory, subject to review only by mandamus or pursuant to 28 U. S. C. § 1292(b). This would be true even though § 4 of the Arbitration Act provides that "the court shall proceed summarily" to trial, because an order setting a trial date only guides the course of litigation, and does not, of its own force, dispose of it on the merits. Such an order is tentative; that is, it is subject to change at any time on the motion of a party or by the court, *sua sponte*.

The order the District Court actually entered is no more final. It delayed further proceedings until the completion of pending litigation in the state courts. This order was also tentative; it was subject to change on a showing that the state proceedings were being delayed, either by the Hospital or by the court, or that the state courts were not applying the federal Act, or that some other reason for a change had arisen. This order did not dispose of the case on the merits. If the state court had found that there was no agreement to arbitrate within the meaning of the United States Arbitration Act, the District Court would have been bound by that finding. But res judicata or collateral estoppel would apply if the state court reached a decision before the District Court in the absence of a stay. The likelihood that a state court of competent jurisdiction may enter a judgment that may determine some issue in a case does not render final a federal district court's decision to take a two-day recess, or to order ad-

ditional briefing by the parties in five days or five months, or to take a case under advisement rather than render an immediate decision from the bench. Such a possibility did not magically change that character of the order the District Judge entered in this case.

Section 1291 of the Judicial Code is a congressional command to the federal courts of appeals not to interfere with the district courts' management of ongoing proceedings. Unless the high standards for a writ of mandamus can be met, or the district court certifies an interlocutory appeal pursuant to § 1292(b), Congress has directed that the district courts be permitted to conduct their cases as they see fit. The reason for this rule is simple:

> "Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause." *Cobbledick* v. *United States*, 309 U. S. 323, 325 (1940) (Frankfurter, J., for a unanimous Court).

The Court's decision places an unwarranted limitation upon the power of district courts to control their own cases. The Court's opinion does not establish a broad exception to § 1291, see *ante*, at 10–11, n. 11, but it does create uncertainty about when a district court order in a pending case can be appealed. This uncertainty gives litigants opportunities to disrupt or delay proceedings by taking colorable appeals from interlocu-

tory orders, not only in cases nearly identical to this but also in cases which the ingenuity of counsel disappointed by a district court's ruling can analogize to this one. Section 1291 established a policy that district judges should conduct their own cases from beginning to end. The occasional injustice to a litigant that results from an erroneous district court decision is far outweighed by the far greater systemic disruption created by encouraging parties to attempt interlocutory appeals. The former attracts the Court's attention because the legal error it perceives is apparent on the surface of the case. The latter receives inadequate attention because it does not appear in published decisions or in petitions for certiorari. It is, rather, obscured by the "merits" of cases and hidden among statistics on the cost and seeming interminable nature of litigation. Both respect for district judges and concern for the course of litigation generally should make the Court hesitate before creating another exception, however narrow, to § 1291.

The Court has acknowledged the importance of the rule of finality as recently as *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463 (1978), which rejected the so called "death knell" exception to § 1291. In *Coopers*, a putative representative plaintiff whose motion for class certification had been denied by the District Court sought to appeal under § 1291. We accepted his argument that this order effectively put him out of court, *id.*, at 470, but held that this circumstance did not justify an exception to the statute. "[A]llowing appeals of right from nonfinal orders that turn on the facts of a particular case thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule—'that of maintaining the appropriate relationship between the respective courts. . . . This goal, in the absence of most compelling reasons to the contrary, is very much worth preserving.'" *Id.*, at 476 (quoting *Parkinson* v. *April Industries, Inc.*, 520 F. 2d 650, 654 (CA2 1975) (concurring opinion)).

The Court has not given any sound, principled justification for permitting the Court of Appeals to thrust itself into the trial process in this case. It begins by citing *Idlewild Liquor Corp.* v. *Epstein*, 370 U. S. 713 (1962). There the District Court had stayed an action challenging the constitutionality of a state statute "to give the state courts an opportunity to pass upon the constitutional issues presented, although there was no relevant litigation then pending in the state courts." *Id.*, at 714. This Court held that the order was appealable because the plaintiff "was effectively out of court." *Id.*, at 715, n. 2. *Idlewild* does not control this case.

First, Mercury is less "effectively out of court" than was Idlewild. There was no pending state proceeding that might have resolved the issues in the case, and Idlewild might well have been obliged to take the risk of violating the statute and challenging it in an enforcement proceeding in state court.

More importantly, however, the decision in *Idlewild* cannot be good law after *Coopers*, *supra*. The Court describes *Coopers* as holding only that the collateral-order doctrine of *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541 (1949), does not apply to a class decertification order under Federal Rule of Civil Procedure 23(c)(1). *Ante*, at 12–13, n. 14. We did hold that "the collateral-order doctrine is not applicable to" a decertification order. 437 U. S., at 468–469. We then went on to reject the argument that the decertification order was final under the so-called "death knell" doctrine, holding that an order does not become final simply because the plaintiff will be unable to pursue his claim if the order stands. *Id.*, at 469–477. We declined to attach any importance to the fact that the plaintiff in *Coopers* was just as "effectively out of court" as Idlewild or Mercury. We noted that "if the 'death knell' doctrine has merit, it would apply equally to the many interlocutory orders in ordinary litigation . . . that may have such tactical economic significance that a defeat is tantamount to a 'death knell' for the entire case." *Id.*, at 470. We also noted that 28 U. S. C. § 1292(b) provides for review

of certain nonfinal orders, and that the "death knell" doctrine circumvents its restrictions. 437 U. S., at 474–475. By ignoring this discussion and holding from *Coopers*, the Court has created an unjustified exception to § 1291.

The Court also states that the stay order in this case is appealable under *Cohen*, *supra*. It quotes the formulation of the *Cohen* collateral-order doctrine from *Coopers:*

> "[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." 437 U. S., at 468, quoted, *ante*, at 11–12.

The District Court's order did not "conclusively determine the disputed question" for the reasons stated above. The Court's assertion to the contrary, *ante*, at 12–13, is nothing short of sheer speculation about the state of mind of the District Judge. Such speculation is hardly the "practical rather than . . . technical construction"* of § 1291 contemplated by *Cohen*, *supra*, at 546. In *Cohen* itself, the District Court denied the defendant's motion to require the plaintiff to post a bond on the ground that the statute requiring the bond did not apply. That order "conclusively determined" the question whether a bond was required because no conceivable change of circumstances could affect the basis of the District Court's decision. In this case, any number of plausible events might have convinced the District Court that a necessary basis of its decision—that the state court would proceed promptly and fairly to adjudicate the issue of the existence of an agreement to arbitrate—no longer applied.

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*As a practical matter, it is not at all clear to me that the Court of Appeals' course would have provided arbitration more quickly than that of the District Court, even if this Court had not granted certiorari. If the Court of Appeals was correct that this dispute is plainly arbitrable, there is no reason to expect that the state courts would not have resolved that issue in the 11 months during which the case was before the Court of Appeals.

Furthermore, I am not as certain as is the Court that by staying this case the District Court resolved "an important issue." An issue should not be deemed "important" for these purposes simply because the court of appeals or this Court thinks the appellant should prevail. The issue here was whether the factual question whether there was an agreement to arbitrate should be adjudicated in a state or federal court. Unless there is some reason to believe that the state court will resolve this factual question wrongly, which the Court quite rightly disclaims, *ante*, at 26, I do not see how this issue is more important than any other interlocutory order that may place a litigant at a procedural disadvantage.

For these reasons, I do not believe the District Court's order was appealable. Interlocutory orders are committed by statute to the judgment of the district courts, and this Court ill-serves the judges of those courts and the overwhelming majority of litigants by devising exceptions to the statute when it believes a particular litigant has been wronged.

Given my view of appealability, I do not find it necessary to decide whether the District Court's order was proper in this case. I am disturbed, however, that the Court has sanctioned an extraordinary departure from the usual and accepted course of judicial proceedings by affirming the Court of Appeals decision on an issue that was not decided in the District Court.

The Court of Appeals ordered the District Court to enter an order compelling arbitration, even though that issue was not considered by the District Court. This Court has maintained the difference between appellate jurisdiction and original jurisdiction at least since *Marbury* v. *Madison*, 1 Cranch 137, 174–176 (1803) ("It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a case already instituted"). I do not understand how the Court can say that the Court of Appeals had discretion to perform a nonappellate act.

The Court relies on 28 U. S. C. § 2106, which provides that a court of appeals

> "may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

This statute does not grant the courts of appeals authority to constitute themselves as trial courts. Section 4 of the Arbitration Act gives the Hospital a right to a jury trial. See *ante*, at 23, n. 27. By deciding that there were no disputed issues of fact, the Court of Appeals seems to have decided a motion for summary judgment that was not before it. This is the kind of issue that district judges decide every day in the ordinary course of business. It is not the kind of issue that courts of appeals determine. The Court of Appeals did have before it the memoranda filed in the District Court but, contrary to the Court's intimation, *ante*, at 29, this issue was not argued in the Court of Appeals. See 656 F. 2d 933, 948, n. 1 (1981) (Hall, J., dissenting) ("No one argued that this court should decide that issue").

There was no reason to believe that the District Court would not have acted promptly to resolve the dispute on the merits after being reversed on the stay. That judges of a court of appeals believe they know how a case should be decided is no reason for them to substitute their own judgment for that of a district judge without regard to the normal course of appellate procedure.

The judgment below should be vacated and the case remanded to the Court of Appeals with directions to dismiss the appeal for want of jurisdiction. Failing that, even if the Court is correct that the stay order was an error, the judgment should be reversed insofar as it decides the question of arbitrability, and the case should be remanded to the District Court for further proceedings under the Arbitration Act.

PERRY EDUCATION ASSOCIATION *v.* PERRY LOCAL EDUCATORS' ASSOCIATION ET AL.

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

No. 81–896. Argued October 13, 1982—Decided February 23, 1983

Under a collective-bargaining agreement between the Board of Education of Perry Township, Ind., and Perry Education Association (PEA) as the exclusive bargaining representative for the School District's teachers, PEA was granted access to the interschool mail system and teacher mailboxes in the Perry Township schools. The bargaining agreement also provided that access rights to the mail facilities were not available to any rival union, such as Perry Local Educators' Association (PLEA). PLEA and two of its members filed suit in Federal District Court against PEA and individual members of the School Board, contending that PEA's preferential access to the internal mail system violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The court entered summary judgment for the defendants, but the Court of Appeals reversed.

Held:

1. The appeal is not proper under 28 U. S. C. § 1254(2), which grants this Court appellate jurisdiction over federal court of appeals' decisions holding a state statute repugnant to the Federal Constitution. Here, only certain provisions of the collective-bargaining agreement, not the Indiana statute authorizing such agreements, were held to be constitutionally invalid, and the bargaining agreement cannot be considered to be in essence a legislative act. However, regarding the jurisdictional statement as a petition for a writ of certiorari, certiorari is granted because the constitutional issues presented are important and the decision below conflicts with the judgments of other federal and state courts. Pp. 42–44.

2. The First Amendment is not violated by the preferential access to the interschool mail system granted to PEA. Pp. 44–54.

(a) With respect to public property that is not by tradition or government designation a forum for public communication, a State may reserve the use of the property for its intended purposes, communicative or otherwise, as long as a regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. The school mail facilities were not a "limited public forum" merely because the system had been opened for periodic use by

civic and church organizations, or because PLEA was allowed to use the school mail facilities on an equal footing with PEA prior to PEA's certification as the teachers' exclusive bargaining representative. Pp. 45–49.

(b) The differential access provided PEA and PLEA is reasonable because it is wholly consistent with the School District's legitimate interest in preserving the property for the use to which it was lawfully dedicated. Use of school mail facilities enables PEA to perform effectively its statutory obligations as exclusive representative of *all* Perry Township teachers. Conversely, PLEA does not have any official responsibility in connection with the School District and need not be entitled to the same rights of access to school mailboxes. The reasonableness of the limitations on PLEA's access to the school mail system is also supported by the substantial alternative channels that remain open for union-teacher communication to take place. Moreover, under Indiana law, PLEA is assured of equal access to all modes of communication while a representation election is in progress. Pp. 50–54.

3. The differential access provided the rival unions does not constitute impermissible content discrimination in violation of the Equal Protection Clause. Since the grant of exclusive access to PEA does not burden a fundamental right of PLEA, the School District's policy need only rationally further a legitimate state purpose. That purpose is clearly found in the special responsibilities of an exclusive bargaining representative. *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, and *Carey* v. *Brown*, 447 U. S. 455, distinguished. Pp. 54–55.

Appeal dismissed and certiorari granted; 652 F. 2d 1286, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, POWELL, and STEVENS, JJ., joined, *post*, p. 55.

Robert H. Chanin argued the cause for appellant. With him on the briefs were *Michael H. Gottesman*, *Robert M. Weinberg*, and *Richard J. Darko*.

Richard L. Zweig argued the cause for appellees. With him on the brief was *Lawrence M. Reuben.**

JUSTICE WHITE delivered the opinion of the Court.

Perry Education Association is the duly elected exclusive bargaining representative for the teachers of the Metropoli-

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**Edwin Vieira, Jr.*, filed a brief for the Public Service Research Council as *amicus curiae* urging affirmance.

Solicitor General Lee filed a memorandum for the United States Postal Service as *amicus curiae*.

tan School District of Perry Township, Ind. A collective-bargaining agreement with the Board of Education provided that Perry Education Association, but no other union, would have access to the interschool mail system and teacher mailboxes in the Perry Township schools. The issue in this case is whether the denial of similar access to the Perry Local Educators' Association, a rival teacher group, violates the First and Fourteenth Amendments.

I

The Metropolitan School District of Perry Township, Ind., operates a public school system of 13 separate schools. Each school building contains a set of mailboxes for the teachers. Interschool delivery by school employees permits messages to be delivered rapidly to teachers in the District.[1] The primary function of this internal mail system is to transmit official messages among the teachers and between the teachers and the school administration. In addition, teachers use the system to send personal messages, and individual school building principals have allowed delivery of messages from various private organizations.[2]

Prior to 1977, both the Perry Education Association (PEA) and the Perry Local Educators' Association (PLEA) represented teachers in the School District and apparently had equal access to the interschool mail system. In 1977, PLEA

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[1] The United States Postal Service, in a submission as *amicus curiae*, suggests that the interschool delivery of material to teachers at various schools in the District violates the Private Express statutes, 18 U. S. C. §§ 1693–1699 and 39 U. S. C. §§ 601–606, which generally prohibit the carriage of letters over postal routes without payment of postage. We agree with the Postal Service that this question does not directly bear on the issues before the Court in this case. Accordingly, we express no opinion on whether the mail delivery practices involved here comply with the Private Express statutes or other Postal Service regulations.

[2] Local parochial schools, church groups, YMCA's, and Cub Scout units have used the system. The record does not indicate whether any requests for use have been denied, nor does it reveal whether permission must separately be sought for every message that a group wishes delivered to the teachers.

challenged PEA's status as *de facto* bargaining representative for the Perry Township teachers by filing an election petition with the Indiana Education Employment Relations Board (Board). PEA won the election and was certified as the exclusive representative, as provided by Indiana law. Ind. Code § 20–7.5–1–2(l) (1982).

The Board permits a school district to provide access to communication facilities to the union selected for the discharge of the exclusive representative duties of representing the bargaining unit and its individual members without having to provide equal access to rival unions.[3] Following the election, PEA and the School District negotiated a labor contract in which the School Board gave PEA "access to teachers' mailboxes in which to insert material" and the right to use the interschool mail delivery system to the extent that the School District incurred no extra expense by such use. The labor agreement noted that these access rights were being accorded to PEA "acting as the representative of the teachers" and went on to stipulate that these access rights shall not be granted to any other "school employee organization"—a term of art defined by Indiana law to mean "any organization which has school employees as members and one of whose primary purposes is representing school employees

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[3] See *Perry Local Educators' Assn.* v. *Hohlt*, 652 F. 2d 1286, 1291, and n. 13 (CA7 1981). It is an unfair labor practice under state law for a school employer to "dominate, interfere or assist in the formation or administration of any school employee organization or contribute financial or other support to it." Ind. Code § 20–7.5–1–7(a)(2) (1982). The Indiana Education Employment Relations Board has held that a school employer may exclude a minority union from organizational activities which take place on school property and may deny the rival union "nearly all organizational conveniences." *Pike Independent Professional Educators* v. *Metropolitan School Dist. of Pike Township*, No. U–76–16–5350 (Oct. 22, 1976) (holding that denying rival union use of a school building for meetings was not unfair labor practice, but that denying union use of school bulletin boards was unfair labor practice).

in dealing with their school employer."[4] The PEA contract with these provisions was renewed in 1980 and is presently in force.

The exclusive-access policy applies only to use of the mailboxes and school mail system. PLEA is not prevented from using other school facilities to communicate with teachers. PLEA may post notices on school bulletin boards; may hold meetings on school property after school hours; and may, with approval of the building principals, make announcements on the public address system. Of course, PLEA also may communicate with teachers by word of mouth, telephone, or the United States mail. Moreover, under Indiana law, the preferential access of the bargaining agent may continue only while its status as exclusive representative is insulated from challenge. Ind. Code § 20–7.5–1–10(c)(4) (1982). While a representation contest is in progress, unions must be afforded equal access to such communication facilities.

PLEA and two of its members filed this action under 42 U. S. C. § 1983 against PEA and individual members of the Perry Township School Board. Plaintiffs contended that PEA's preferential access to the internal mail system violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. They sought injunctive and declaratory relief and damages. Upon cross-motions for summary judgment, the District Court entered judgment for the defendants. *Perry Local Educators' Assn.* v. *Hohlt*, IP 79–189–C (SD Ind., Feb. 25, 1980).

The Court of Appeals for the Seventh Circuit reversed. *Perry Local Educators' Assn.* v. *Hohlt*, 652 F. 2d 1286 (1981). The court held that once the School District "opens its internal mail system to PEA but denies it to PLEA, it violates both the Equal Protection Clause and the First Amendment." *Id.*, at 1290. It acknowledged that PEA had "legal duties to the teachers that PLEA does not have" but rea-

[4] Ind. Code § 20–7.5–1–2(k) (1982).

soned that "[w]ithout an independent reason why equal access for other labor groups and individual teachers is undesirable, the special duties of the incumbent do not justify opening the system to the incumbent alone." *Id.*, at 1300.

PEA now seeks review of this judgment by way of appeal. We postponed consideration of our jurisdiction to the hearing of the case on the merits. 454 U. S. 1140 (1982).

II

We initially address the issue of our appellate jurisdiction over this case. PEA submits that its appeal is proper under 28 U. S. C. § 1254(2), which grants us appellate jurisdiction over cases in the federal courts of appeals in which a state statute has been held repugnant to the Constitution, treaties, or laws of the United States. We disagree. No state statute or other legislative action has been invalidated by the Court of Appeals. The Court of Appeals has held only that certain sections of the collective-bargaining agreement entered into by the School District and PEA are constitutionally invalid; the Indiana statute authorizing such agreements is left untouched.

PEA suggests, however, that because a collective-bargaining contract has "continuing force and [is] intended to be observed and applied in the future," it is in essence a legislative act, and, therefore a state statute within the meaning of § 1254(2). *King Manufacturing Co.* v. *City Council of Augusta*, 277 U. S. 100, 104 (1928). In support of its position, PEA points to our decisions treating local ordinances and school board orders as state statutes for § 1254(2) purposes, *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 927, n. 2 (1975); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 (1948); *Hamilton* v. *Regents of Univ. of Cal.*, 293 U. S. 245, 257–258 (1934). In these cases, however, legislative action was involved—the unilateral promulgation of a rule with continuing legal effect. Unlike a local ordinance or even a school board rule, a collective-bargaining agreement is not

unilaterally adopted by a lawmaking body; it emerges from negotiation and requires the approval of both parties to the agreement. Not every government action which has the effect of law is legislative action. We have previously emphasized that statutes authorizing appeals are to be strictly construed, *Fornaris* v. *Ridge Tool Co.*, 400 U. S. 41, 42, n. 1 (1970), and in light of that policy, we do not find that § 1254(2) extends to cover this case.[5] We therefore dismiss the appeal for want of jurisdiction. See, *e. g.*, *Lockwood* v. *Jefferson Area Teachers Assn.*, 459 U. S. 804 (1982) (appeal dismissed for want of jurisdiction and certiorari denied).

Nevertheless, the decision below is subject to our review by writ of certiorari. 28 U. S. C. § 2103; *Palmore* v. *United States*, 411 U. S. 389, 396 (1973). The constitutional issues presented are important and the decision below conflicts with the judgment of other federal and state courts.[6] Therefore,

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[5] PEA's reliance upon *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), is misplaced. In *Abood*, appellate jurisdiction under 28 U. S. C. § 1257(2) was proper because the constitutionality of the state statute authorizing the negotiation of agency shop agreements was at issue. See Juris. Statement in *Abood* v. *Detroit Bd. of Ed.*, O. T. 1976, No. 75–1153, p. 5.

[6] Constitutional objections to similar access policies have been rejected by all but one other federal or state court to consider the issue. See *Connecticut State Federation of Teachers* v. *Board of Ed. Members*, 538 F. 2d 471 (CA2 1976); *Memphis American Federation of Teachers Local 2032* v. *Board of Ed.*, 534 F. 2d 699 (CA6 1976); *Teachers Local 3724* v. *North St. Francois County School District*, 103 LRRM 2865 (ED Mo. 1979); *Haukedahl* v. *School District No. 108*, No. 75–C–3641 (ND Ill., May 14, 1976); *Federation of Delaware Teachers* v. *De La Warr Board of Ed.*, 335 F. Supp. 385 (Del. 1971); *Local 858, American Federation of Teachers* v. *School District No. 1*, 314 F. Supp. 1069 (Colo. 1970); *Maryvale Educators Assn.* v. *Newman*, 70 App. Div. 2d 758, 416 N. Y. S. 2d 876, appeal denied, 48 N. Y. 2d 605, 424 N. Y. S. 2d 1025 (1979); *Geiger* v. *Duval County School Board*, 357 So. 2d 442 (Fla. App. 1978); *Clark Classroom Teachers Assn.* v. *Clark County School District*, 91 Nev. 143, 532 P. 2d 1032 (1975) *(per curiam)*. The only case holding unconstitutional a school district's refusal to grant a minority union access to teacher's mailboxes or other facilities while granting such privileges to a majority union is *Teachers Local*

regarding PEA's jurisdictional statement as a petition for a writ of certiorari, we grant certiorari.

III

The primary question presented is whether the First Amendment, applicable to the States by virtue of the Fourteenth Amendment, is violated when a union that has been elected by public school teachers as their exclusive bargaining representative is granted access to certain means of communication, while such access is denied to a rival union. There is no question that constitutional interests are implicated by denying PLEA use of the interschool mail system. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker* v. *Des Moines School District*, 393 U. S. 503, 506 (1969); *Healy* v. *James*, 408 U. S. 169 (1972). The First Amendment's guarantee of free speech applies to teacher's mailboxes as surely as it does elsewhere within the school, *Tinker* v. *Des Moines School District*, *supra*, and on sidewalks outside, *Police Department of Chicago* v. *Mosley*, 408 U. S. 92 (1972). But this is not to say that the First Amendment requires equivalent access to all parts of a school building in which some form of communicative activity occurs. "[N]owhere [have we] suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for . . . unlimited expressive purposes." *Grayned* v. *City of Rockford*, 408 U. S. 104, 117–118 (1972). The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.

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399 v. *Michigan City Area Schools*, No. 72–S–94 (ND Ind., Jan. 24, 1973), vacated on other grounds, 499 F. 2d 115 (CA7 1974).

A

In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *CIO*, 307 U. S. 496, 515 (1939). In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Carey* v. *Brown*, 447 U. S. 455, 461 (1980). The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *United States Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U. S. 114, 132 (1981); *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S. 530, 535–536 (1980); *Grayned* v. *City of Rockford*, *supra*, at 115; *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Schneider* v. *State*, 308 U. S. 147 (1939).

A second category consists of public property which the State has opened for use by the public as a place for expressive activity. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. *Widmar* v. *Vincent*, 454 U. S. 263 (1981) (university meeting facilities); *City of Madison Joint School District* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167 (1976) (school board meeting); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975) (municipal the-

ater).[7] Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. *Widmar* v. *Vincent*, *supra*, at 269–270.

Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service* v. *Council of Greenburgh Civic Assns.*, *supra*, at 129. In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. 453 U. S., at 131, n. 7. As we have stated on several occasions, "'"[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."'" *Id.*, at 129–130, quoting *Greer* v. *Spock*, 424 U. S. 828, 836 (1976), in turn quoting *Adderley* v. *Florida*, 385 U. S. 39, 47 (1966).

The school mail facilities at issue here fall within this third category. The Court of Appeals recognized that Perry School District's interschool mail system is not a traditional public forum: "We do not hold that a school's internal mail system is a public forum in the sense that a school board may not close it to all but official business if it chooses." 652 F. 2d, at 1301. On this point the parties agree.[8] Nor do the parties dispute that, as the District Court observed, the

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[7] A public forum may be created for a limited purpose such as use by certain groups, *e. g.*, *Widmar* v. *Vincent* (student groups), or for the discussion of certain subjects, *e. g.*, *City of Madison Joint School District* v. *Wisconsin Public Employment Relations Comm'n* (school board business).

[8] See Brief for Appellees 9 and Tr. of Oral Arg. 41.

"normal and intended function [of the school mail facilities] is to facilitate internal communication of school-related matters to the teachers." *Perry Local Educators' Assn.* v. *Hohlt*, IP 79–189–C (SD Ind., Feb. 25, 1980), p. 4. The internal mail system, at least by policy, is not held open to the general public. It is instead PLEA's position that the school mail facilities have become a "limited public forum" from which it may not be excluded because of the periodic use of the system by private non-school-connected groups, and PLEA's own unrestricted access to the system prior to PEA's certification as exclusive representative.

Neither of these arguments is persuasive. The use of the internal school mail by groups not affiliated with the schools is no doubt a relevant consideration. If by policy or by practice the Perry School District has opened its mail system for indiscriminate use by the general public, then PLEA could justifiably argue a public forum has been created. This, however, is not the case. As the case comes before us, there is no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public. Permission to use the system to communicate with teachers must be secured from the individual building principal. There is no court finding or evidence in the record which demonstrates that this permission has been granted as a matter of course to all who seek to distribute material. We can only conclude that the schools do allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities. This type of selective access does not transform government property into a public forum. In *Greer* v. *Spock*, *supra*, at 838, n. 10, the fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not convert the military base into a public forum. And in *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (1974) (opinion of BLACKMUN, J.), a plurality of the Court concluded that a city transit system's rental of space in its vehicles for commercial advertising did not require it to accept partisan political advertising.

Moreover, even if we assume that by granting access to the Cub Scouts, YMCA's, and parochial schools, the School District has created a "limited" public forum, the constitutional right of access would in any event extend only to other entities of similar character. While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys' club, and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization such as PLEA, which is concerned with the terms and conditions of teacher employment.

PLEA also points to its ability to use the school mailboxes and delivery system on an equal footing with PEA prior to the collective-bargaining agreement signed in 1978. Its argument appears to be that the access policy in effect at that time converted the school mail facilities into a limited public forum generally open for use by employee organizations, and that once this occurred, exclusions of employee organizations thereafter must be judged by the constitutional standard applicable to public forums. The fallacy in the argument is that it is not the forum, but PLEA itself, which has changed. Prior to 1977, there was no exclusive representative for the Perry School District teachers. PEA and PLEA each represented its own members. Therefore the School District's policy of allowing both organizations to use the school mail facilities simply reflected the fact that both unions represented the teachers and had legitimate reasons for use of the system. PLEA's previous access was consistent with the School District's preservation of the facilities for school-related business, and did not constitute creation of a public forum in any broader sense.

Because the school mail system is not a public forum, the School District had no "constitutional obligation *per se* to let any organization use the school mail boxes." *Connecticut State Federation of Teachers* v. *Board of Ed. Members*, 538 F. 2d 471, 481 (CA2 1976). In the Court of Appeals' view, however, the access policy adopted by the Perry schools fa-

vors a particular viewpoint, that of PEA, on labor relations, and consequently must be strictly scrutinized regardless of whether a public forum is involved. There is, however, no indication that the School Board intended to discourage one viewpoint and advance another. We believe it is more accurate to characterize the access policy as based on the *status* of the respective unions rather than their views. Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.[9]

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[9] JUSTICE BRENNAN minimizes the importance of public forum analysis and all but rejects *Greer* v. *Spock*, 424 U. S. 828 (1976); *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (1974); and *Jones* v. *North Carolina Prisoners' Union*, 433 U. S. 119 (1977), in each of which, of course, he was in dissent. It will not do, however, to put aside the Court's decisions holding that not all public property is a public forum, or to dismiss *Greer*, *Lehman*, and *Jones* as decisions of limited scope involving "unusual forums." In *United States Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U. S. 114, 129 (1981), the Court rejected this argument stating that "[i]t 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* . . . , the jail or prison in *Adderley* v. *Florida*, 385 U. S. 39 (1966), and *Jones* . . . , or the advertising space made available in city rapid transit cars in *Lehman*." The Court went on to say that the mere fact that an instrumentality is used for the communication of ideas does not make a public forum, and to reaffirm JUSTICE BLACKMUN's observation in *Lehman:* "'Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities, immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.'" *United States Postal Service* v. *Council of Greenburgh Civic Assns.*, *supra*, at 130, n. 6, quoting 418 U. S., at 304.

JUSTICE BRENNAN also insists that the Perry access policy is a forbidden exercise of viewpoint discrimination. As noted in text, we disagree with

B

The differential access provided PEA and PLEA is reasonable because it is wholly consistent with the District's legitimate interest in "'"preserv[ing] the property . . . for the use

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this conclusion. The access policy applies not only to PLEA but also to all unions other than the recognized bargaining representative, and there is no indication in the record that the policy was motivated by a desire to suppress PLEA's views. Moreover, under JUSTICE BRENNAN's analysis, if PLEA and PEA were given access to the mailboxes, it would be equally imperative that any other citizen's group or community organization with a message for school personnel—the Chamber of Commerce, right-to-work groups, or any other labor union—also be permitted access to the mail system. JUSTICE BRENNAN's attempt to build a public forum with his own hands is untenable; it would invite schools to close their mail systems to all but school personnel. Although his viewpoint-discrimination thesis might indicate otherwise, JUSTICE BRENNAN apparently would not forbid the School District to close the mail system to all outsiders for the purpose of discussing labor matters while permitting such discussion by administrators and teachers. We agree that the mail service could be restricted to those with teaching and operational responsibility in the schools. But, by the same token—and upon the same principle—the system was properly opened to PEA, when it, pursuant to law, was designated the collective-bargaining agent for all teachers in the Perry schools. PEA thereby assumed an official position in the operational structure of the District's schools, and obtained a status that carried with it rights and obligations that no other labor organization could share. Excluding PLEA from the use of the mail service is therefore not viewpoint discrimination barred by the First Amendment.

Accordingly, the cases relied upon by JUSTICE BRENNAN are fully consistent with our approach to and resolution of this case. *Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Police Department of Chicago* v. *Mosley*, 408 U. S. 92 (1972); *City of Madison Joint School Dist.* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167 (1976); *Carey* v. *Brown*, 447 U. S. 455 (1980); and *Widmar* v. *Vincent*, 454 U. S. 263 (1981), are cases involving restricted access to public forums. *Tinker* v. *Des Moines School District*, 393 U. S. 503 (1969), did not involve the validity of an unequal access policy but instead involved an unequivocal attempt to prevent students from expressing their viewpoint on a political issue. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), and *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S. 530 (1980), do not concern access to government property and are, for that reason, inapposite. Indeed, in *Con-*

to which it is lawfully dedicated."'" *United States Postal Service*, 453 U. S., at 129–130. Use of school mail facilities enables PEA to perform effectively its obligations as exclusive representative of *all* Perry Township teachers.[10] Conversely, PLEA does not have any official responsibility in connection with the School District and need not be entitled to the same rights of access to school mailboxes. We observe that providing exclusive access to recognized bargaining representatives is a permissible labor practice in the public sector.[11] We have previously noted that the "designation

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solidated Edison, which concerned a utility's right to use its own billing envelopes for speech purposes, the Court expressly distinguished our public forum cases, stating that "the special interests of a government in overseeing the use of its property" were not implicated. *Id.*, at 539–540.

[10] The Court of Appeals refused to consider PEA's access justified as "official business" because the School District did not "endorse" the content of its communications. We do not see the necessity of such a requirement. PEA has official duties as representative of Perry Township teachers. In its role of communicating information to teachers concerning, for example, the collective-bargaining agreement and the outcome of grievance procedures, PEA neither seeks nor requires the endorsement of school administrators. The very concept of the labor-management relationship requires that the representative union be free to express its independent view on matters within the scope of its representational duties. The lack of an employer endorsement does not mean that the communications do not pertain to the "official business" of the organization.

[11] See, *e. g.*, *Broward County School Board*, 6 FPER ¶ 11088 (Fla. Pub. Emp. Rel. Comm'n, 1980); *Union County Board of Education*, 2 NJPER 50 (N. J. Pub. Emp. Rel. Comm'n, 1976). Differentiation in access is also permitted in federal employment, and, indeed, it may be an unfair labor practice under 5 U. S. C. § 7116(a)(3) (1976 ed., Supp. V) to grant access to internal communication facilities to unions other than the exclusive representative. That provision states that it shall be an unfair labor practice for an agency to "sponsor, control or otherwise assist any labor organization" aside from routine services provided other unions of "equivalent status." A number of administrative decisions construing this language as it earlier appeared in Exec. Order No. 11491, 3 CFR 861 § 19(a)(3) (1966–1970 Comp.), have taken this view. See, *e. g.*, Asst. Sec. Labor-Management Reports, Dept. of the Navy, Navy Commissary Store Complex, Oakland, A/SLMR No. 654 (U. S. Dept. of Labor, 1976); Commissary, Fort Meade,

of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones." *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 221 (1977). Moreover, exclusion of the rival union may reasonably be considered a means of insuring labor peace within the schools. The policy "serves to prevent the District's schools from becoming a battlefield for inter-union squabbles." [12]

The Court of Appeals accorded little or no weight to PEA's special responsibilities. In its view these responsibilities, while justifying PEA's access, did not justify denying equal access to PLEA. The Court of Appeals would have been

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Dept. of the Army, A/SLMR No. 793 (U. S. Dept. of Labor 1977); Dept. of the Air Force, Grissom Air Force Base, A/SLMR No. 852 (U. S. Dept. of Labor, 1977); Dept. of Transportation, Federal Aviation Administration, 2 FLRA No. 48 (1979).

Exclusive-access provisions in the private sector have not been directly challenged, and thus have yet to be expressly approved, but the National Labor Relations Board and the courts have invalidated only those restrictions that prohibit individual employees from soliciting and distributing union literature during nonworking hours in nonworking areas. *NLRB* v. *Magnavox Co.*, 415 U. S. 322 (1974); *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793 (1945); *NLRB* v. *Arrow Molded Plastics, Inc.*, 653 F. 2d 280, 283–284 (CA6 1981); *General Motors Corp.*, 212 N. L. R. B. 133, 134 (1974). The Court of Appeals' view that *NLRB* v. *Magnavox Co.*, *supra*, held that an exclusive-access provision such as this would be impermissible under the National Labor Relations Act, 29 U. S. C. §§ 151–169 (1976 ed. and Supp. V), is a clear misreading of our decision.

[12] *Haukedahl* v. *School District No. 108*, No. 75–C–3641 (ND Ill., May 14, 1976). This factor was discounted by the Court of Appeals because there is no showing in the record of past disturbances stemming from PLEA's past access to the internal mail system or evidence that future disturbance would be likely. We have not required that such proof be present to justify the denial of access to a nonpublic forum on grounds that the proposed use may disrupt the property's intended function. See, *e. g.*, *Greer* v. *Spock*, 424 U. S. 828 (1976).

correct if a public forum were involved here. But the internal mail system is not a public forum. As we have already stressed, when government property is not dedicated to open communication the government may—without further justification—restrict use to those who participate in the forum's official business.[13]

Finally, the reasonableness of the limitations on PLEA's access to the school mail system is also supported by the substantial alternative channels that remain open for union-teacher communication to take place. These means range from bulletin boards to meeting facilities to the United States mail. During election periods, PLEA is assured of equal access to all modes of communication. There is no showing here that PLEA's ability to communicate with teachers is seriously impinged by the restricted access to the internal mail system. The variety and type of alternative modes of access present here compare favorably with those in other nonpublic

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[13] The Court of Appeals was also mistaken in finding that the exclusive-access policy was not closely tailored to the official responsibilities of PEA. The Court of Appeals thought the policy overinclusive—because the collective-bargaining agreement does not limit PEA's use of the mail system to messages related to its special legal duties. The record, however, does not establish that PEA enjoyed or claimed unlimited access by usage or otherwise; indeed, the collective-bargaining agreement indicates that the right of access was accorded to PEA "acting as the representative of the teachers." In these circumstances, we do not find it necessary to decide the reasonableness of a grant of access for unlimited purposes.

The Court of Appeals also indicated that the access policy was underinclusive because the School District permits outside organizations with no special duties to teachers to use the system. As we have already noted in text, see *supra*, at 47–48, there was no District policy of open access for private groups and, in any event, the provision of access to these private groups does not undermine the reasons for not allowing similar access by a rival labor union. See *Greer* v. *Spock*, *supra*, at 838, n. 10 ("The fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix . . . surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever").

forum cases where we have upheld restrictions on access. See, *e. g.*, *Greer* v. *Spock*, 424 U. S., at 839 (servicemen free to attend political rallies off base); *Pell* v. *Procunier*, 417 U. S. 817, 827–828 (1974) (prison inmates may communicate with media by mail and through visitors).

IV

The Court of Appeals also held that the differential access provided the rival unions constituted impermissible content discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. We have rejected this contention when cast as a First Amendment argument, and it fares no better in equal protection garb. As we have explained above, PLEA did not have a First Amendment or other right of access to the interschool mail system. The grant of such access to PEA, therefore, does not burden a fundamental right of PLEA. Thus, the decision to grant such privileges to PEA need not be tested by the strict scrutiny applied when government action impinges upon a fundamental right protected by the Constitution. See *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 17 (1973). The School District's policy need only rationally further a legitimate state purpose. That purpose is clearly found in the special responsibilities of an exclusive bargaining representative. See *supra*, at 51–52.

The Seventh Circuit and PLEA rely on *Police Department of Chicago* v. *Mosley*, 408 U. S. 92 (1972), and *Carey* v. *Brown*, 447 U. S. 455 (1980). In *Mosley* and *Carey*, we struck down prohibitions on peaceful picketing in a public forum. In *Mosley*, the city of Chicago permitted peaceful picketing on the subject of a school's labor-management dispute, but prohibited other picketing in the immediate vicinity of the school. In *Carey*, the challenged state statute barred all picketing of residences and dwellings except the peaceful picketing of a place of employment involved in a labor dispute. In both cases, we found the distinction between classes of speech violative of the Equal Protection Clause.

The key to those decisions, however, was the presence of a public forum.[14] In a public forum, by definition, all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject.

When speakers and subjects are similarly situated, the State may not pick and choose. Conversely on government property that has not been made a public forum, not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used. As we have explained above, for a school mail facility, the difference in status between the exclusive bargaining representative and its rival is such a distinction.

V

The Court of Appeals invalidated the limited privileges PEA negotiated as the bargaining voice of the Perry Township teachers by misapplying our cases that have dealt with the rights of free expression on streets, parks, and other fora generally open for assembly and debate. Virtually every other court to consider this type of exclusive-access policy has upheld it as constitutional, see n. 6, *supra*, and today, so do we. The judgment of the Court of Appeals is

Reversed.

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

The Court today holds that an incumbent teachers' union may negotiate a collective-bargaining agreement with a school board that grants the incumbent access to teachers'

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[14] The Court emphasized the point in both cases. *Mosley*, 408 U. S., at 96 ("Selective exclusions from a public forum may not be based on content alone"); *Carey*, 447 U. S., at 461 ("When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests").

mailboxes and to the interschool mail system and denies such access to a rival union. Because the exclusive-access provision in the collective-bargaining agreement amounts to viewpoint discrimination that infringes the respondents' First Amendment rights and fails to advance any substantial state interest, I dissent.[1]

I

The Court properly acknowledges that teachers have protected First Amendment rights within the school context. See *Tinker* v. *Des Moines School District*, 393 U. S. 503, 506 (1969). In particular, we have held that teachers may not be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work." *Pickering* v. *Board of Education*, 391 U. S. 563, 568 (1968). See also *Mt. Healthy City Board of Education* v. *Doyle*, 429 U. S. 274, 284 (1977). We also have recognized in the school context the First Amendment right of "individuals to associate to further their personal beliefs," *Healy* v. *James*, 408 U. S. 169, 181 (1972), and have acknowledged the First Amendment rights of dissident teachers in matters involving labor relations. *City of Madison Joint School District* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167, 176, n. 10 (1976). Against this background it is clear that the exclusive-access policy in this case implicated the respondents' First Amendment rights by restricting their freedom of expression on issues important to the operation of the school system. As the Court of Appeals suggested, this speech is "if not at the very apex of any hierarchy of protected speech, at least not far below it." *Perry Local Educators' Assn.* v. *Hohlt*, 652 F. 2d 1286, 1299 (CA7 1981).

From this point of departure the Court veers sharply off course. Based on a finding that the interschool mail system

[1] I agree with the Court's conclusion that the appeal should be dismissed for want of appellate jurisdiction. See *ante*, at 43.

is not a "public forum," *ante*, at 48–49, the Court states that the respondents have no right of access to the system, *ibid.*, and that the School Board is free "to make distinctions in access on the basis of subject matter and speaker identity," *ante*, at 49, if the distinctions are "reasonable in light of the purpose which the forum at issue serves." *Ibid.* (footnote omitted). According to the Court, the petitioner's status as the exclusive bargaining representative provides a reasonable basis for the exclusive-access policy.

The Court fundamentally misperceives the essence of the respondents' claims and misunderstands the thrust of the Court of Appeals' well-reasoned opinion. This case does not involve an "absolute access" claim. It involves an "equal access" claim. As such it does not turn on whether the internal school mail system is a "public forum." In focusing on the public forum issue, the Court disregards the First Amendment's central proscription against censorship, in the form of viewpoint discrimination, in any forum, public or nonpublic.

A

The First Amendment's prohibition against government discrimination among viewpoints on particular issues falling within the realm of protected speech has been noted extensively in the opinions of this Court. In *Niemotko* v. *Maryland*, 340 U. S. 268 (1951), two Jehovah's Witnesses were denied access to a public park to give Bible talks. Members of other religious organizations had been granted access to the park for purposes related to religion. The Court found that the denial of access was based on public officials' disagreement with the Jehovah's Witnesses' views, *id.*, at 272, and held it invalid. During the course of its opinion, the Court stated: "The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body." *Ibid.* In an opinion concurring in the result, Justice

Frankfurter stated that "[t]o allow expression of religious views by some and deny the same privilege to others merely because they or their views are unpopular, even deeply so, is a denial of equal protection of the law forbidden by the Fourteenth Amendment." *Id.*, at 284. See also *Fowler* v. *Rhode Island*, 345 U. S. 67, 69 (1953).

In *Tinker* v. *Des Moines School District*, *supra*, we held unconstitutional a decision by school officials to suspend students for wearing black armbands in protest of the war in Vietnam. The record disclosed that school officials had permitted students to wear other symbols relating to politically significant issues. *Id.*, at 510. The black armbands, however, as symbols of opposition to the Vietnam War, had been singled out for prohibition. We stated: "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." *Id.*, at 511.

City of Madison Joint School District v. *Wisconsin Employment Relations Comm'n*, *supra*, considered the question of whether a State may constitutionally require a board of education to prohibit teachers other than union representatives from speaking at public meetings about matters relating to pending collective-bargaining negotiations. The board had been found guilty of a prohibited labor practice for permitting a teacher to speak who opposed one of the proposals advanced by the union in contract negotiations. The board was ordered to cease and desist from permitting employees, other than union representatives, to appear and to speak at board meetings on matters subject to collective bargaining. We held this order invalid. During the course of our opinion we stated: "Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech. See *Police Dept. of*

Chicago v. *Mosley*, 408 U. S. 92, 96 (1972)." 429 U. S., at 176 (footnote omitted).[2]

There is another line of cases, closely related to those implicating the prohibition against viewpoint discrimination, that have addressed the First Amendment principle of subject-matter, or content neutrality. Generally, the concept of content neutrality prohibits the government from choosing the subjects that are appropriate for public discussion. The content-neutrality cases frequently refer to the prohibition against viewpoint discrimination and both concepts have their roots in the First Amendment's bar against censorship. But unlike the viewpoint-discrimination concept, which is used to strike down government restrictions on speech by particular speakers, the content-neutrality principle is invoked when the government has imposed restrictions on speech related to an entire subject area. The content-neutrality principle can be seen as an outgrowth of the core First Amendment prohibition against viewpoint discrimination. See generally Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U. Chi. L. Rev. 81 (1978).

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[2] See also *Widmar* v. *Vincent*, 454 U. S. 263, 280 (1981) (STEVENS, J., concurring in judgment) ("[T]he university . . . may not allow its agreement or disagreement with the viewpoint of a particular speaker to determine whether access to a forum will be granted. If a state university is to deny recognition to a student organization—or is to give it a lesser right to use school facilities than other student groups—it must have a valid reason for doing so"); *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 784–786 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. . . . Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended" (citation omitted) (footnote omitted)); *Healy* v. *James*, 408 U. S. 169, 187–188 (1972) (the State "may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent").

We have invoked the prohibition against content discrimination to invalidate government restrictions on access to public forums. See, *e. g.*, *Carey* v. *Brown*, 447 U. S. 455 (1980); *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972); *Police Department of Chicago* v. *Mosley*, 408 U. S. 92 (1972). We also have relied on this prohibition to strike down restrictions on access to a limited public forum. See, *e. g.*, *Widmar* v. *Vincent*, 454 U. S. 263 (1981). Finally, we have applied the doctrine of content neutrality to government regulation of protected speech in cases in which no restriction of access to public property was involved. See, *e. g.*, *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S. 530 (1980); *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205 (1975). See also *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 513, 515, 516 (1981) (plurality opinion).

Admittedly, this Court has not always required content neutrality in restrictions on access to government property. We upheld content-based exclusions in *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (1974), in *Greer* v. *Spock*, 424 U. S. 828 (1976), and in *Jones* v. *North Carolina Prisoners' Union*, 433 U. S. 119 (1977). All three cases involved an unusual forum, which was found to be nonpublic, and the speech was determined for a variety of reasons to be incompatible with the forum. These cases provide some support for the notion that the government is permitted to exclude certain subjects from discussion in nonpublic forums.[3] They pro-

[3] There are several factors suggesting that these decisions are narrow and of limited importance. First, the forums involved were unusual. A military base was involved in *Greer* v. *Spock*, advertising space on a city transit system in *Lehman* v. *City of Shaker Heights*, and a prison in *Jones* v. *North Carolina Prisoners' Union*. Moreover, the speech involved was arguably incompatible with each forum, especially in *Greer*, which involved speeches and demonstrations of a partisan political nature on a military base, and in *Jones*, which involved labor union organizational activities in a prison. Finally, we have noted the limited scope of *Greer* and *Lehman* in subsequent opinions. See, *e. g.*, *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S. 530, 539–540 (1980); *Metromedia, Inc.* v.

vide no support, however, for the notion that government, once it has opened up government property for discussion of specific subjects, may discriminate among viewpoints on those topics. Although *Greer*, *Lehman*, and *Jones* permitted content-based restrictions, none of the cases involved viewpoint discrimination. All of the restrictions were viewpoint-neutral. We expressly noted in *Greer* that the exclusion was "objectively and evenhandedly applied." 424 U. S., at 839.[4]

Once the government permits discussion of certain subject matter, it may not impose restrictions that discriminate among viewpoints on those subjects whether a nonpublic forum is involved or not.[5] This prohibition is implicit in the *Mosley* line of cases, in *Tinker* v. *Des Moines School District*, 393 U. S. 503 (1969), and in those cases in which we have approved content-based restrictions on access to government property that is not a public forum. We have never held that government may allow discussion of a sub-

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San Diego, 453 U. S. 490, 514, n. 19 (1981) (plurality opinion); *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 209 (1975).

[4] In his concurring opinion in *Greer* v. *Spock*, JUSTICE POWELL noted the absence of any viewpoint discrimination in the regulations and stated that the military authorities would be barred from discriminating among viewpoints on political issues. 424 U. S., at 848, n. 3.

In other cases in which we have upheld restrictions on access to government property, the restrictions have been both content- and viewpoint-neutral. See, *e. g.*, *United States Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U. S. 114 (1981); *Adderley* v. *Florida*, 385 U. S. 39 (1966).

[5] This is not to suggest that a government may not close a nonpublic forum altogether or limit access to the forum to those involved in the "official business" of the agency. Restrictions of this type are consistent with the government's right "'to preserve the property under its control for the use to which it is lawfully dedicated.'" *Ante*, at 46 (quoting *United States Postal Service* v. *Council of Greenburgh Civic Assns.*, *supra*, at 129–130). Limiting access to a nonpublic government forum to those involved in the "official business" of the agency also protects the interest of the government, *qua* government, in speaking clearly and definitively.

ject and then discriminate among viewpoints on that particular topic, even if the government for certain reasons may entirely exclude discussion of the subject from the forum. In this context, the greater power does not include the lesser because for First Amendment purposes exercise of the lesser power is more threatening to core values. Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of "free speech."

B

Against this background, it is clear that the Court's approach to this case is flawed. By focusing on whether the interschool mail system is a public forum, the Court disregards the independent First Amendment protection afforded by the prohibition against viewpoint discrimination.[6] This

[6] Lower courts have recognized that the prohibition against viewpoint discrimination affords speakers protection independent of the public forum doctrine. See, *e. g.*, *National Black United Fund, Inc.* v. *Devine*, 215 U. S. App. D. C. 130, 136, 667 F. 2d 173, 179 (1981); *Jaffe* v. *Alexis*, 659 F. 2d 1018, 1020–1021, n. 2 (CA9 1981); *Bonner-Lyons* v. *School Committee of City of Boston*, 480 F. 2d 442, 444 (CA1 1973). In *Jaffe*, the Ninth Circuit stated: "When the content of the speaker's message forms the basis for its selective regulation, public forum analysis is no longer crucial; the government must still justify the restriction and the justification 'must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove of the speaker's views."'" 659 F. 2d, at 1020–1021, n. 2 (citations omitted). See also *United States Postal Service* v. *Council of Greenburgh Civic Assns.*, *supra*, at 136, 140 (BRENNAN, J., concurring in judgment).

In *Greer* v. *Spock*, *supra*, I suggested that an undue focus on public forum issues can blind the Court to proper regard for First Amendment interests. After noting that "the notion of 'public forum' has never been the touchstone of public expression," *id.*, at 859 (dissenting opinion), I stated:

"Those cases permitting public expression without characterizing the locale involved as a public forum, together with those cases recognizing the existence of a public forum, albeit qualifiedly, evidence the desirability of a flexible approach to determining whether public expression should be pro-

case does not involve a claim of an absolute right of access to the forum to discuss any subject whatever. If it did, public forum analysis might be relevant. This case involves a claim of equal access to discuss a subject that the Board has approved for discussion in the forum. In essence, the respondents are not asserting a right of access at all; they are asserting a right to be free from discrimination. The critical inquiry, therefore, is whether the Board's grant of exclusive access to the petitioner amounts to prohibited viewpoint discrimination.

II

The Court addresses only briefly the respondents' claim that the exclusive-access provision amounts to viewpoint discrimination. In rejecting this claim, the Court starts from the premise that the school mail system is not a public forum[7] and that, as a result, the Board has no obligation to

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tected. Realizing that the permissibility of a certain form of public expression at a given locale may differ depending on whether it is asked if the locale is a public forum or if the form of expression is compatible with the activities occurring at the locale, it becomes apparent that there is need for a flexible approach. Otherwise, with the rigid characterization of a given locale as not a public forum, there is the danger that certain forms of public speech at the locale may be suppressed, even though they are basically compatible with the activities otherwise occurring at the locale." *Id.*, at 859–860.

[7] It is arguable that the school mail system could qualify for treatment as a public forum of some description if one focuses on whether " 'the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.' *Grayned* v. *City of Rockford*, [408 U. S.], at 116." *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U. S., at 136 (BRENNAN, J., concurring in judgment). It is difficult to see how granting the respondents access to the mailboxes would be incompatible with the normal activities of the school especially in view of the fact that the petitioner and outside groups enjoy such access. The petitioner's messages, and certainly those of the outside groups, do not appear to be any more compatible with the normal activity of the school than the respondents' messages would be. It is not necessary to reach this issue, however, in view of the existence of impermissible viewpoint discrimination.

grant access to the respondents. The Court then suggests that there is no indication that the Board intended to discourage one viewpoint and to advance another. In the Court's view, the exclusive-access policy is based on the status of the respective parties rather than on their views. The Court then states that "[i]mplicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity." *Ante*, at 49. According to the Court, "[t]hese distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property." *Ibid.*

As noted, whether the school mail system is a public forum or not the Board is prohibited from discriminating among viewpoints on particular subjects. Moreover, whatever the right of public authorities to impose content-based restrictions on access to government property that is a nonpublic forum,[8] once access is granted to one speaker to discuss a certain subject access may not be denied to another speaker based on his viewpoint. Regardless of the nature of the forum, the critical inquiry is whether the Board has engaged in prohibited viewpoint discrimination.

The Court responds to the allegation of viewpoint discrimination by suggesting that there is no indication that the Board intended to discriminate and that the exclusive-access policy is based on the parties' status rather than on their views. In this case, for the reasons discussed below, see *infra*, at 66–71, the intent to discriminate can be inferred from the effect of the policy, which is to deny an effective channel of communication to the respondents, and from other

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[8] The Court's reference to the government's right to make distinctions in access based on "speaker identity" might be construed as a reference to the government's interest in restricting access to a nonpublic forum to those involved in the "official business" of the particular agency. See n. 5, *supra*. The "speaker identity" distinction in this case, however, cannot be justified on this basis. See n. 10, *infra*.

facts in the case. In addition, the petitioner's status has nothing to do with whether viewpoint discrimination in fact has occurred. If anything, the petitioner's status is relevant to the question of whether the exclusive-access policy can be justified, not to whether the Board has discriminated among viewpoints. See *infra*, at 66–69.

Addressing the question of viewpoint discrimination directly, free of the Court's irrelevant public forum analysis, it is clear that the exclusive-access policy discriminates on the basis of viewpoint. The Court of Appeals found that "[t]he access policy adopted by the Perry schools, in form a speaker restriction, favors a particular viewpoint on labor relations in the Perry schools . . . : the teachers inevitably will receive from [the petitioner] self-laudatory descriptions of its activities on their behalf and will be denied the critical perspective offered by [the respondents]." *Perry Local Educators' Assn.* v. *Hohlt*, 652 F. 2d, at 1296. This assessment of the effect of the policy is eminently reasonable. Moreover, certain other factors strongly suggest that the policy discriminates among viewpoints.

On a practical level, the only reason for the petitioner to seek an exclusive-access policy is to deny its rivals access to an effective channel of communication. No other group is explicitly denied access to the mail system. In fact, as the Court points out, *ante*, at 47–48, many other groups have been granted access to the system. Apparently, access is denied to the respondents because of the likelihood of their expressing points of view different from the petitioner's on a range of subjects. The very argument the petitioner advances in support of the policy, the need to preserve labor peace, also indicates that the access policy is not viewpoint-neutral.

In short, the exclusive-access policy discriminates against the respondents based on their viewpoint. The Board has agreed to amplify the speech of the petitioner, while repressing the speech of the respondents based on the respondents' point of view. This sort of discrimination amounts to censor-

ship and infringes the First Amendment rights of the respondents. In this light, the policy can survive only if the petitioner can justify it.

III

In assessing the validity of the exclusive-access policy, the Court of Appeals subjected it to rigorous scrutiny. *Perry Local Educators' Assn.* v. *Hohlt*, *supra*, at 1296. The court pursued this course after a careful review of our cases and a determination that "no case has applied any but the most exacting scrutiny to a content or speaker restriction that substantially tended to favor the advocacy of one point of view on a given issue." 652 F. 2d, at 1296. The Court of Appeals' analysis is persuasive. In light of the fact that viewpoint discrimination implicates core First Amendment values, the exclusive-access policy can be sustained "only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S., at 540. Cf. *Carey* v. *Brown*, 447 U. S., at 461–462 (to be valid, legislation must be "finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized"); *Police Department of Chicago* v. *Mosley*, 408 U. S., at 98–99 (discriminations "must be tailored to serve a substantial governmental interest").

A

The petitioner attempts to justify the exclusive-access provision based on its status as the exclusive bargaining representative for the teachers and on the State's interest in efficient communication between collective-bargaining representatives and the members of the unit. The petitioner's status and the State's interest in efficient communication are important considerations. They are not sufficient, however, to sustain the exclusive-access policy.

As the Court of Appeals pointed out, the exclusive-access policy is both "overinclusive and underinclusive" as a means

of serving the State's interest in the efficient discharge of the petitioner's legal duties to the teachers. *Perry Local Educators' Assn.* v. *Hohlt*, 652 F. 2d, at 1300. The policy is overinclusive because it does not strictly limit the petitioner's use of the mail system to performance of its special legal duties and underinclusive because the Board permits outside organizations with no special duties to the teachers, or to the students, to use the system. *Ibid.* The Court of Appeals also suggested that even if the Board had attempted to tailor the policy more carefully by denying outside groups access to the system and by expressly limiting the petitioner's use of the system to messages relating to its official duties, "the fit would still be questionable, for it might be difficult—both in practice and in principle—effectively to separate 'necessary' communications from propaganda." *Ibid.* The Court of Appeals was justly concerned with this problem, because the scope of the petitioner's "legal duties" might be difficult, if not impossible, to define with precision. In this regard, we alluded to the potential scope of collective-bargaining responsibilities in *City of Madison Joint School District* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167 (1976), when we stated: "[T]here is virtually no subject concerning the operation of the school system that could not also be characterized as a potential subject of collective bargaining." *Id.*, at 177.[9]

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[9] The Court rejects the Court of Appeals' finding that the exclusive-access policy was overinclusive on the ground that "the record . . . does not establish that [the petitioner] enjoyed or claimed unlimited access by usage or otherwise; indeed, the collective-bargaining agreement indicates that the right of access was accorded to [the petitioner] 'acting as the representative of the teachers.'" *Ante*, at 53, n. 13. Under these circumstances, the Court suggests that it is unnecessary "to decide the reasonableness of a grant of access for unlimited purposes." *Ibid.* This argument is flawed in three ways. First, the Court of Appeals found that "the collective bargaining agreement [did] not limit [the petitioner's] use of the mail system to messages related to its special legal duties," *Perry Local Educators'*

Putting aside the difficulties with the fit between this policy and the asserted interests, the Court of Appeals properly pointed out that the policy is invalid "because it furthers no discernible state interest." *Perry Local Educators' Assn.* v. *Hohlt*, 652 F. 2d, at 1300. While the Board may have a legitimate interest in granting the petitioner access to the system, it has no legitimate interest in making that access exclusive by denying access to the respondents. As the Court of Appeals stated: "Without an independent reason why equal access for other labor groups and individual teachers is unde-

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Assn. v. *Hohlt*, 652 F. 2d 1286, 1300 (CA7 1981), and there is nothing in the record to indicate that the petitioner did *not* enjoy unlimited access. Second, we noted above the nearly limitless scope of collective-bargaining responsibilities. See *supra*, at 67. With no apparent monitoring of the petitioner's messages by the board, *Perry Local Educators' Assn.* v. *Hohlt*, *supra*, at 1293, n. 29, it is clear that there is no real limit to the petitioner's "special legal duties." Finally, even assuming that the Board had a narrowly tailored policy that expressly limited the petitioner's access to official messages and included school monitoring of the messages, it still would be difficult, as the Court of Appeals pointed out, "to separate 'necessary' communications from propaganda." 652 F. 2d, at 1300.

The Court rejects the Court of Appeals' determination that the policy was underinclusive on the ground that there was no District policy of "open access for private groups and, in any event, the provision of access to these private groups does not undermine the reasons for not allowing similar access by a rival labor union." *Ante*, at 53, n. 13 (citing *Greer* v. *Spock*, 424 U. S., at 838, n. 10). Even though there was no apparent policy of open access, the provision of access to outside groups certainly undermines the petitioner's asserted justification for the policy and establishes that the policy is overinclusive with respect to that justification. Moreover, if *all* unions were denied access to the mail system, there might be some force to the Court's reliance on *Greer* for the notion that granting access to some groups does not undermine the reasons for denying it to others. But in a case where the government grants access to one labor group, and denies it to another, *Greer* is irrelevant because even read broadly *Greer* does not support a right on the part of the government to discriminate among viewpoints on subjects approved for discussion in the forum. See *supra*, at 60–61.

sirable, the special duties of the incumbent do not justify opening the system to the incumbent alone." *Ibid.* In this case, for the reasons discussed below, there is no independent reason for denying access to the respondents.[10]

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[10] A variant of the "special legal duties" justification for the exclusive-access policy is the "official business" justification. As noted, see n. 5, *supra*, the government has a legitimate interest in limiting access to a nonpublic forum to those involved in the "official business" of the agency. This interest may justify restrictions based on speaker identity, as for example, when a school board denies access to a classroom to persons other than teachers. Such a speaker identity restriction may have a viewpoint discriminatory effect, but it is justified by the government's interest in clear, definitive classroom instruction.

In this case, an "official business" argument is inadequate to justify the exclusive-access policy for many of the same reasons that the "special legal duties" rationale is inadequate. As with its relation to the "special legal duties" argument, the exclusive-access policy is both overinclusive and underinclusive with respect to an "official business" justification. First, as the Court of Appeals pointed out, the School Board neither monitors nor endorses the petitioner's messages. *Perry Local Educators' Assn.* v. *Hohlt*, *supra*, at 1293, n. 29. In this light, it is difficult to consider the petitioner an agent of the Board. Moreover, in light of the virtually unlimited scope of a union's collective-bargaining duties, it expands the definition of "official business" beyond any clear meaning to suggest that the petitioner's messages are always related to the school system's "official business."

More importantly, however, the only Board policy discernible from this record involves a denial of access to one group: the respondents. The Board has made no explicit effort to restrict access to those involved in the "official business" of the schools. In fact, access has been granted to outside groups such as parochial schools, church groups, YMCA's, and Cub Scout units. See *ante*, at 47–48. It is difficult to discern how these groups are involved in the "official business" of the school. The provision of access to these groups strongly suggests that the denial of access to the respondents was not based on any desire to limit access to the forum to those involved in the "official business" of the schools; instead, it suggests that it was based on hostility to the point of view likely to be expressed by the respondents. The Board simply has agreed to shut out one voice on a subject approved for discussion in the forum. This is impermissible.

B

The petitioner also argues, and the Court agrees, *ante*, at 52, that the exclusive-access policy is justified by the State's interest in preserving labor peace. As the Court of Appeals found, there is no evidence on this record that granting access to the respondents would result in labor instability. 652 F. 2d, at 1301.[11] In addition, there is no reason to assume that the respondents' messages would be any more likely to cause labor discord when received by members of the majority union than the petitioner's messages would when received by the respondents. Moreover, it is noteworthy that both the petitioner and the respondents had access to the mail system for some time prior to the representation election. See *ante*, at 39. There is no indication that this policy resulted in disruption of the school environment.[12]

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[11] The Court suggests that proof of disruption is not necessary "to justify the denial of access to a nonpublic forum on grounds that the proposed use may disrupt the property's intended function," *ante*, at 52, n. 12, and again cites *Greer* v. *Spock*, *supra*. In *Tinker* v. *Des Moines School District*, 393 U. S. 503 (1969), which is discussed *supra*, at 58, we noted that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." 393 U. S., at 508. Later, we stated that "where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained." *Id.*, at 509 (citation omitted). Finally, we stated that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." *Id.*, at 511. It is noteworthy that *Tinker* involved what the Court would be likely to describe as a nonpublic forum. See also *City of Madison Joint School District* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167, 173–174 (1976); *Healy* v. *James*, 408 U. S., at 190–191. These cases establish that the State must offer evidence to support an allegation of potential disruption in order to sustain a restriction on protected speech.

[12] It appears, therefore, that the exclusive-access provision was included solely at the demand of the majority union in collective-bargaining negotia-

Although the State's interest in preserving labor peace in the schools in order to prevent disruption is unquestionably substantial, merely articulating the interest is not enough to sustain the exclusive-access policy in this case. There must be some showing that the asserted interest is advanced by the policy. In the absence of such a showing, the exclusive-access policy must fall.[13]

C

Because the grant to the petitioner of exclusive access to the internal school mail system amounts to viewpoint discrimination that infringes the respondents' First Amendment rights and because the petitioner has failed to show that the policy furthers any substantial state interest, the policy must be invalidated as violative of the First Amendment.

IV

In order to secure the First Amendment's guarantee of freedom of speech and to prevent distortions of "the marketplace of ideas," see *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting), governments generally are prohibited from discriminating among viewpoints on is-

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tions. We note that, in this case, the School Board did not even seek review of the Court of Appeals' holding that the mailboxes and the interschool mail system must be open to both unions.

[13] The Court also cites the availability of alternative channels of communication in support of the "reasonableness" of the exclusive-access policy. *Ante*, at 53. In a detailed discussion, the Court of Appeals properly concluded that the other channels of communication available to the respondents were "not nearly as effective as the internal mail system." *Perry Local Educators' Assn.* v. *Hohlt*, 652 F. 2d, at 1299. See also *id.*, at 1299–1300. In addition, the Court apparently disregards the principle that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U. S. 147, 163 (1939). In this case, the existence of inferior alternative channels of communication does not affect the conclusion that the petitioner has failed to justify the viewpoint-discriminatory exclusive-access policy.

sues within the realm of protected speech. In this case the Board has infringed the respondents' First Amendment rights by granting exclusive access to an effective channel of communication to the petitioner and denying such access to the respondents. In view of the petitioner's failure to establish even a substantial state interest that is advanced by the exclusive-access policy, the policy must be held to be constitutionally infirm. The decision of the Court of Appeals should be affirmed.

Syllabus

CONNECTICUT *v.* JOHNSON

CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

No. 81–927. Argued October 13, 1982—Decided February 23, 1983

Upon a jury trial in a Connecticut state court, respondent was convicted of all the charges under a multicount information, including charges of attempted murder and robbery. The trial court's general instructions to the jury included an instruction that "a person's intention may be inferred from his conduct and every person is conclusively presumed to intend the natural and necessary consequences of his act." In specific instructions on the elements of each crime, the charge as to attempted murder again referred to a conclusive presumption of intent, but the instructions on robbery did not contain any further discussion of intent. While respondent's appeal was pending, this Court decided *Sandstrom* v. *Montana*, 442 U. S. 510, which held that the Due Process Clause of the Fourteenth Amendment was violated by a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts," because a reasonable juror might have viewed it as creating a conclusive presumption of intent or as shifting the burden of proof as to intent. *Sandstrom* left open the question whether, if a jury is so instructed, the error can ever be harmless. Thereafter, the Connecticut Supreme Court, while affirming respondent's convictions on other counts in the information, reversed his convictions for attempted murder and robbery. Without discussing the State's argument that the *Sandstrom* violation was harmless, the court concluded that the unconstitutional "conclusive presumption" language in the general instructions was not cured by the specific instructions on attempted murder and robbery.

Held: The judgment is affirmed.

185 Conn. 163, 440 A. 2d 858, affirmed.

JUSTICE BLACKMUN, joined by JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL, concluded that the instructional error deprived respondent of "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," *Chapman* v. *California*, 386 U. S. 18, 23. No matter how strong the prosecution's evidence, a reviewing court cannot find beyond a reasonable doubt that a *Sandstrom* error did not contribute to the jury's verdict. A trial judge may not direct a jury to return a guilty verdict regardless of how overwhelmingly the evidence may point in that direction, and a conclusive presumption on the issue of intent is the functional equivalent of a directed verdict on that issue. Respondent's jurors reasonably could have

interpreted the instructions as requiring a conclusive presumption on the issue of intent, an element of the crimes charged, leading them to ignore the evidence—including evidence relating to respondent's apparent defense that he intended to borrow rather than steal the victim's car and that he did not intend to kill the victim—in finding that the State had proved respondent guilty beyond a reasonable doubt. If so, a reviewing court cannot hold that the error did not contribute to the verdict, since the fact that the reviewing court may view the evidence of intent as overwhelming is irrelevant. While there may be rare situations in which the reviewing court can be confident that a *Sandstrom* error did not play any role in the jury's verdict—such as where, by raising a particular defense or by his other actions, the defendant himself has taken the issue of intent from the jury—such an exception, regardless of its boundaries, does not apply here. Pp. 81–88.

JUSTICE STEVENS concluded that no federal question was raised by the Connecticut Supreme Court's refusal to consider whether the *Sandstrom* error here was harmless and that therefore the writ of certiorari should simply be dismissed. However, because a fifth vote was necessary to authorize the entry of a Court judgment, he joined the disposition allowing the Connecticut Supreme Court's judgment to stand. Pp. 88–90.

BLACKMUN, J., announced the judgment of the Court, and delivered an opinion, in which BRENNAN, WHITE, and MARSHALL, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 88. BURGER, C. J., filed a dissenting opinion, *post*, p. 90. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 90.

Linda K. Lager, Special Assistant State's Attorney, argued the cause for petitioner. With her on the brief was *John T. Redway*, Assistant State's Attorney.

Jerrold H. Barnett argued the cause for respondent. With him on the brief was *Jon C. Blue*.

JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion, in which JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL joined.

In *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), this Court held that the Due Process Clause of the Fourteenth Amendment was violated by a jury instruction that "the law pre-

sumes that a person intends the ordinary consequences of his voluntary acts." *Id.*, at 512. We expressly left open in that case the question whether, if a jury is so instructed, the error can ever be harmless. *Id.*, at 526–527. Since *Sandstrom*, courts have taken different approaches to the harmless-error problem.[1] We therefore granted certiorari in this litigation to resolve the conflict. 455 U. S. 937 (1982).

I

A

Respondent Lindsay B. Johnson was accused in a four-count information of attempted murder, kidnaping in the second degree, robbery in the first degree, and sexual assault in the first degree. His jury trial in Connecticut Superior Court concluded with a verdict of guilty on all counts.

The evidence at trial revealed the following sequence of events: At approximately 11 p. m. on December 20, 1975, respondent and three male companions were in an automobile

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[1] Several state and federal courts have assumed or held that *Sandstrom* errors may well be harmless, and have then gone on to decide whether the evidence of guilt was overwhelming. See, *e. g.*, *Lamb* v. *Jernigan*, 683 F. 2d 1332, 1342–1343 (CA11 1982), cert. pending, No. 82–5768; *Jacks* v. *Duckworth*, 651 F. 2d 480, 487 (CA7 1981), cert. denied, 454 U. S. 1147 (1982); *People* v. *Wright*, 408 Mich. 1, 30–32, 289 N. W. 2d 1, 10–12 (1980); *State* v. *McKenzie*, 186 Mont. 481, 533–535, 608 P. 2d 428, 458–459, cert. denied, 449 U. S. 1050 (1980). Other courts have taken a narrower view, holding that whether an unconstitutional presumption is harmless depends on whether intent was a disputed issue in the case. See, *e. g.*, *United States* v. *Winter*, 663 F. 2d 1120, 1144–1145 (CA1 1981), cert. pending, No. 81–1392; *McGuinn* v. *Crist*, 657 F. 2d 1107, 1108–1109 (CA9 1981), cert. denied, 455 U. S. 990 (1982); *Washington* v. *Harris*, 650 F. 2d 447, 453–454 (CA2 1981) (dictum), cert. denied, 455 U. S. 951 (1982); see also *People* v. *Thomas*, 50 N. Y. 2d 467, 477, 407 N. E. 2d 430, 436 (1980) (concurring opinion). Still other courts have suggested that *Sandstrom* errors can never be harmless. See, *e. g.*, *Hammontree* v. *Phelps*, 605 F. 2d 1371, 1380 (CA5 1979); *State* v. *Truppi*, 182 Conn. 449, 466, 438 A. 2d 712, 721 (1980), cert. denied, 451 U. S. 941 (1981). See also *Dietz* v. *Solem*, 640 F. 2d 126, 131 (CA8 1981).

in Norwalk, Conn. A young woman who had lost her way stopped her car and asked them for directions. Respondent offered to ride with her to show her the way. She agreed, and the two drove off. Respondent's companions followed in the other car.

When the woman reached a location familiar to her, she stopped and waited for respondent to get out of the car. Instead, respondent pulled her over to the passenger side of the car, and one of his companions entered on the other side and started to drive. The woman was told that the men needed a car. Shortly thereafter the second car was abandoned, and its two occupants got into the woman's car. The four men verbally abused her, threatened her with bodily harm, displayed a knife, and told her that the driver had a gun. The group stopped again in Norwalk to pick up a fifth man. During still another stop, one of the men placed a fully loaded, semiautomatic rifle in the trunk. When the woman asked the group to take the car and leave her alone, they replied that she would be given money and left near her home at the end of the evening.

The men then drove the car eastward on the Connecticut Turnpike to New Haven. Respondent, who is black, remarked that he had "never had a white woman before." Tr. 50, 262. The group arrived in New Haven in the early morning and stopped for gas. Respondent then directed the driver to a large apartment complex, where he pulled the woman from the car and into a lavatory on the first floor of the building. There, all five men sexually assaulted her.

When the woman was returned to the car, respondent bound her hands with telephone cord. Respondent told her that she would be left with a dime near a telephone booth so she could call home while they made their getaway. After directing the driver to a bridge, respondent pulled the woman out of the car and forced her to run with him to the middle of the bridge. They struggled and respondent threw her over the railing. She landed on a large pipe but jumped

into the river when she saw respondent pursuing her. She then eluded respondent by hiding under the bridge; she was able to untie her hands. She remained hidden for a while because she heard voices shouting, but eventually she sought refuge from the cold.[2] Shortly after 4 a. m., the residents of a nearby house admitted her when they heard her moaning, "please let me in . . . they were trying to kill me." *Id.*, at 390.

Relying on information provided by the woman, police arrested respondent and the other four men in Norwalk a few hours later. Two days thereafter, the victim identified all five from an array of 15 photographs. She also identified respondent in court,[3] describing him as the most vicious and violent of her assailants.

The defense theory, as indicated by the cross-examination of the State's witnesses,[4] apparently was that the woman had consented to travel with the group and to have sex with them, and that respondent did not plan to keep the woman's car or to kill her. For example, respondent's attorney asked the woman whether any mention had been made of going to a motel or having sex, whether she had consented to the sexual acts, and whether any of the men had said that the car would be returned in the morning with a full tank of gas. When the

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[2] For the period between midnight and 4:30 a. m. on December 21, the National Weather Service in Bridgeport reported an air-temperature range of 23°–28° F, a wind-chill factor of —10° F, and a water temperature of 46° F. Approximately four inches of snow had accumulated from a snowfall that began on December 20.

[3] Respondent was tried alone. His companions were named in the information as coparticipants, but pleaded guilty to various charges before trial.

[4] Respondent did not testify at his trial. The defense called one witness, a detective who testified only about the accuracy of a stenographic transcription of a taped interview of the victim. The record does not reflect how the attorneys presented the facts to the jury in summation. Pursuant to Conn. Gen. Stat. § 51–61 (Supp. 1982), the arguments of counsel were not recorded.

woman stated that she was behind the wheel after the car became stuck in a snowbank on the turnpike, counsel asked how many of the men had got out of the car to push it or, indeed, whether all of them had done so. Cross-examination also revealed that when the woman went to the hospital on December 21, she told the examining physician that she had had sexual relations with her boyfriend the previous morning. According to the doctor, this might have accounted for sperm observed in gynecological tests. Finally, police descriptions of the bridge were arguably contrary to the victim's description of the area as "secluded."

B

The trial court's charge to the jury began with general instructions on applicable principles of law. The jury was told to accept the court's pronouncements of the law but to be the sole judge of the facts. The court explained the presumption of innocence and the State's burden of proving the existence of every element of the crimes charged beyond a reasonable doubt. The court then described intent as

> "a question of fact that is solely within your province as jurors. However, you should be aware of a rule of law that will be helpful to you and that is that a person's intention may be inferred from his conduct and every person is conclusively presumed to intend the natural and necessary consequences of his act." App. 22A–23A.

The court then gave specific instructions on the elements of each crime. With respect to attempted murder, the court again spoke of a conclusive presumption.[5] The charge on

[5] The specific charge on attempted murder was:

"Now, [no] one can look into a man's mind and see what his intention is. The only way to decide that question is to infer from the accused's conduct in the light of the surrounding circumstances. But as previously stated, every person is conclusively presumed to intend the natural and necessary consequences of his act." App. 25A.

The jury was told that if it believed the victim's testimony about respondent's conduct at the bridge, it might "presume [respondent] intended what

kidnaping in the second degree, on the other hand, referred to intent as "very largely a matter of inference."[6] The instructions on robbery in the first degree and sexual assault in the first degree did not contain any further discussion of intent. The charge concluded with a reminder as to the State's burden of proof and the jury's duty to base its verdict on the evidence presented and on the law given by the court.

C

Respondent filed a timely appeal in December 1976, but because of problems with the reporter in obtaining a complete transcript the appeal was not briefed and argued until February 1981. In the interim, this Court decided *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). Respondent argued on appeal that the "conclusively presumed" language in the jury instructions on intent rendered the instructions unconstitutional under *Sandstrom*.[7] The State argued that the error, if any, was harmless.

The Supreme Court of Connecticut affirmed respondent's convictions for kidnaping and sexual assault, but reversed

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would be the natural and necessary consequences of his actions, under the prevailing circumstances and conditions; for example, the temperature of air and water and the force used against her person." *Ibid.*

[6] Specifically, the court stated:

"I have already instructed you that what a man's intention has been is necessarily very largely a matter of inference. . . . The only way in which you can determine in a case such as this what a man's intention was at any given time is by determining what his conduct was and what the circumstances were surrounding that conduct and from those infer what his intention was.

"As stated before, to draw such an inference is not only the privilege but also the duty of a juror provided, of course, the inference to draw is a reasonable inference." *Id.*, at 28A.

[7] Respondent also argued, unsuccessfully, that he was denied his right to self-representation and that the trial judge failed properly to instruct the jury on a defense to the kidnaping charge. These issues are not now before us, because respondent's own petition for a writ of certiorari was denied. *Johnson* v. *Connecticut*, 454 U. S. 1101 (1981).

the convictions for attempted murder and robbery on the basis of the instructions regarding intent.[8] 185 Conn. 163, 440 A. 2d 858 (1981). In accordance with *Sandstrom*, the court analyzed the charge as a whole to determine how the jury might have interpreted it; the court balanced other portions of the charge against the challenged language essentially to determine whether "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp* v. *Naughten*, 414 U. S. 141, 147 (1973). The court first found that the general instructions were infirm, because the inferential language in that portion of the charge was not "sufficient to prevent the jury from interpreting the [conclusive] presumption in the way it was expressed to them." 185 Conn., at 171, 440 A. 2d, at 863. The court then turned to the specific instructions "to determine whether the *Sandstrom* error in the general instructions was repeated, incorporated, or possibly cured by the specific language used." *Id.*, at 172, 440 A. 2d, at 863.

The specific instruction on attempted murder had repeated the erroneous-presumption language, so the court reversed respondent's conviction on that count. *Id.*, at 173, 440 A. 2d, at 863. The kidnaping instruction, however, had been couched in the permissive language of inference. Finding that this language had a "significant curative effect," *id.*, at 174, 440 A. 2d, at 864, the court affirmed respondent's kidnaping conviction. With respect to the robbery count, the court refused to assume that the jury had applied the permissive inferences contained in the instruction on kidnaping, rather than the conclusive presumption earlier described as applicable to all the offenses. It thus reversed that conviction. *Id.*, at 174–176, 440 A. 2d, at 864–865. Finally, the

[8] Although respondent had not objected to the charge, the Connecticut Supreme Court accepted the issue for resolution on the merits under its "exceptional circumstances" rule expounded in *State* v. *Evans*, 165 Conn. 61, 69–70, 327 A. 2d 576, 581 (1973). The decision on the merits is therefore properly before us. *Engle* v. *Isaac*, 456 U. S. 107, 135, n. 44 (1982); *County Court of Ulster County* v. *Allen*, 442 U. S. 140, 147–154 (1979).

court upheld respondent's conviction for sexual assault; it ruled that sexual assault was not a specific-intent crime, and thus that the jury was not influenced by the erroneous general instruction. *Id.*, at 176, 440 A. 2d, at 865.

The court did not discuss the State's argument that the *Sandstrom* violation was harmless, seemingly relying on its recent decision in *State* v. *Truppi*, 182 Conn. 449, 438 A. 2d 712 (1980), cert. denied, 451 U. S. 941 (1981).[9] In its petition for certiorari, the State claimed that the *Sandstrom* error should have been analyzed for harmlessness under *Chapman* v. *California*, 386 U. S. 18 (1967).[10]

II

A

In *Chapman*, this Court noted that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Id.*, at 23, and n. 8 (citing *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (right to counsel); *Payne* v. *Arkansas*, 356 U. S. 560 (1958) (coerced confession); *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (impartial judge)). Resolving the question reserved three years earlier in *Fahy* v. *Connecticut*, 375 U. S. 85, 86 (1963), the Court held that some constitutional errors may be considered harm-

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[9] In *Truppi* the court, citing *Chapman* v. *California*, 386 U. S. 18, 23 (1967), held that infringements of the rights at issue in *Sandstrom* can never be harmless because those rights are essential to a fair trial. 182 Conn., at 465, 438 A. 2d, at 721. That conclusion was based on federal rather than state law. This Court held in *Chapman* that whether a federal constitutional error can be harmless is a federal question. 386 U. S., at 21. State courts, of course, are free to interpret their own constitutions and laws to permit fewer applications of the harmless-error rule than does the Federal Constitution. See *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 81 (1980); *Oregon* v. *Hass*, 420 U. S. 714, 719 (1975); *Cooper* v. *California*, 386 U. S. 58, 62 (1967). We do not read *Truppi*, however, as having taken this approach.

[10] The State did not seek review of the Connecticut Supreme Court's decision that the charge as a whole was unconstitutional under *Sandstrom*. That issue, accordingly, is not before us.

less if the beneficiary of the error "prove[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U. S., at 24. See also *Milton* v. *Wainwright*, 407 U. S. 371 (1972); *Harrington* v. *California*, 395 U. S. 250 (1969).

Chapman continued a trend away from the practice of appellate courts in this country and in England of "revers[ing] judgments for the most trivial errors." R. Traynor, The Riddle of Harmless Error 13 (1970) (hereafter Traynor). Even with the enactment of harmless-error statutes designed to eliminate reversals based on technical errors,[11] it was assumed well into this century that "automatic reversal was required in any case involving the violation of a right guaranteed by the Federal Constitution." Note, Harmless Error: The Need for a Uniform Standard, 53 St. John's L. Rev. 541, 544 (1979). Before that assumption was altered in *Chapman*, however, the Court had decided certain cases that remain instructive here.

In *Bollenbach* v. *United States*, 326 U. S. 607 (1946), the jury returned a guilty verdict just five minutes after receiving a supplemental instruction containing an improper presumption. This Court reversed the conviction, noting that to "say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them . . . would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks." *Id.*, at 613–614. The Court rejected the Government's contention that the error was harmless in view of the abundant evidence on the issue in question, stating:

> "This is to disregard the vital fact that for seven hours the jury was unable to find guilt in the light of the main

[11] The federal harmless-error statute provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U. S. C. § 2111.

> charge, but reached a verdict of guilty under the conspiracy count five minutes after their inquiry was answered by an untenable legal proposition. It would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous 'presumption' given them as a guide. . . . [T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts." *Id.*, at 614.

The following year the Court decided *Carpenters* v. *United States*, 330 U. S. 395 (1947). In that case the defendants, who were unions charged with conspiracy to violate the Sherman Act, unsuccessfully had requested an instruction that a union can be found guilty for its agents' unlawful acts only if the union actually participated in, authorized, or ratified the acts. This Court held that the requested instruction correctly stated the law, and refused to find the error harmless even though there was evidence showing the unions' participation in the conspiracy:

> "[A] judge may not direct a verdict of guilty no matter how conclusive the evidence. There is no way of knowing here whether the jury's verdict was based on facts within the condemned instructions . . . or on actual authorization or ratification of such acts . . . . A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction." *Id.*, at 408–409 (footnotes omitted).

B

We agree with the State that, in light of *Chapman*, these cases cannot be read for the broad proposition that instructional error of constitutional dimensions may *never* be harmless. This is not to say, however, that *any* form of instructional error should be analyzed for harmlessness. The question here is whether a charge that might reasonably

have been interpreted to require a conclusive presumption on the issue of intent may be considered harmless.

The Court consistently has held that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction." *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 572–573 (1977); see *Carpenters* v. *United States*, 330 U. S., at 408; *Sparf & Hansen* v. *United States*, 156 U. S. 51, 105 (1895). And *Sandstrom* makes it clear, we think, that a conclusive presumption on the issue of intent is the functional equivalent of a directed verdict on that issue.

In *Sandstrom* the jury was instructed that "the law presumes that a person intends the ordinary consequences of his voluntary acts." 442 U. S., at 512. We held that instruction unconstitutional because a reasonable juror might have viewed it as creating a conclusive or burden-shifting presumption on intent. Rather than evaluating the evidence to determine if the State had overcome the presumption of innocence and proved beyond a reasonable doubt that the defendant had intended to kill, the jurors might have believed that, upon finding certain preliminary facts, "they were directed to find against defendant on the element of intent." *Id.*, at 523.[12]

The Supreme Court of Connecticut, in holding the charge at issue unconstitutional under *Sandstrom*, found that respondent's jurors, like Sandstrom's, reasonably could have interpreted the court's charge as a conclusive presumption on the issue of intent. Such an interpretation would have led them to ignore the evidence in finding that the State had proved respondent guilty beyond a reasonable doubt. For example, the jury conclusively could have presumed that respondent intended to kill the victim once it found that the

[12] The Supreme Court of Montana on the remand of *Sandstrom* found that the error was not harmless. *State* v. *Sandstrom*, 184 Mont. 391, 603 P. 2d 244 (1979).

natural consequence of his acts was to cause the victim's death. The jury thus would have failed to consider whether there was any evidence tending to cast doubt on this element of the crime of attempted murder, such as the victim's own testimony that she had been told she would be left near a phone booth at the end of the evening.

Because a conclusive presumption eases the jury's task, "there is no reason to believe the jury would have deliberately undertaken the more difficult task" of evaluating the evidence of intent. *Sandstrom*, 442 U. S., at 526, n. 13; see Note, Presumptive Intent Jury Instructions After Sandstrom, 1980 Wis. L. Rev. 366, 388.[13] Given the uncontroverted evidence of respondent's participation in the events that occurred on December 20 and 21, his most likely defense was that he intended to borrow rather than steal the car, and that he did not intend to kill the victim. The trial court's instruction removed this defense from the jury and directed it to find that the State had proved the intent element of the offenses.

An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence.[14] If the jury may have failed to consider

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[13] "The pivotal concept of *Sandstrom* is that the *possibility* that the jury reached its decision in an impermissible manner requires reversal even though the jury may also have reached the same result in a constitutionally acceptable fashion." Schmolesky, *County Court of Ulster County v. Allen* and *Sandstrom v. Montana:* The Supreme Court Lends an Ear but Turns its Face, 33 Rutgers L. Rev. 261, 272 (1981) (emphasis in original); see *id.*, at 295, and n. 193.

[14] Chief Justice Traynor notes in his monograph on harmless error: "In the absence of definitive studies to the contrary, we must assume that juries for the most part understand and faithfully follow instructions. The concept of a fair trial encompasses a decision by a tribunal that has understood and applied the law to all material issues in the case." Traynor 73–74 (footnote omitted). If a jury followed instructions it reasonably interpreted as calling for a conclusive presumption on the issue of intent, the jury would not consider the evidence on that issue.

evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict. The fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant.[15] To allow a reviewing court to perform the jury's function of evaluating the evidence of intent, when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made. The Court in *Bollenbach* v. *United States*, 326 U. S., at 614–615, stated: "All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished." See *County Court of Ulster County* v. *Allen*, 442 U. S. 140, 160 (1979) ("[It is] irrelevant in analyzing a mandatory presump-

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[15] Apparently, the dissent believes that a jury first evaluates the evidence of intent and *then* decides whether to apply the conclusive presumption; it assumes that the jury turns to the presumption only when the evidence is not overwhelming. Because we lack the dissent's confidence in predicting the sequence of a jury's deliberations, we find it impossible to conclude beyond a reasonable doubt that a conscientious jury, following its instructions, will evaluate the evidence of intent and reach a conclusion on that issue before considering the applicability of the conclusive presumption about which it has been instructed. As we note in the text, if the jury simply applies the presumption at the point in its deliberations when it has determined that the defendant committed the acts in question, it will have no need to consider the evidence of intent.

JUSTICE POWELL's dissent suggests that when "the character and quality" of the defendant's acts "are themselves dispositive of intent, the presumption becomes unnecessary to the jury's task of finding intent." *Post*, at 97. See also *post*, at 101 ("The jury, consistent with its instructions, could have regarded these facts as dispositive of intent and not relied on the presumption"). We agree that the presumption was "unnecessary" here, in the sense that the evidence was sufficient for a properly instructed jury to find that respondent acted with the requisite intent. A reviewing court cannot conclude beyond a reasonable doubt, however, that the jury based its finding of intent on that evidence. The jury might well have believed that respondent's acts, as a matter of law, were accompanied by the requisite intent.

tion . . . that there is ample evidence in the record other than the presumption to support a conviction").

There may be rare situations in which the reviewing court can be confident that a *Sandstrom* error did not play any role in the jury's verdict. For example, if the erroneous instruction was given in connection with an offense for which the defendant was acquitted and if the instruction had no bearing on the offense for which he was convicted, it would be appropriate to find the error harmless. See, *e. g.*, *Hearn* v. *James*, 677 F. 2d 841, 843 (CA11 1982); *State* v. *Sheldon*, 301 N. W. 2d 604, 613 (N. D. 1980), cert. denied, 450 U. S. 1002 (1981). In addition, a *Sandstrom* error may be harmless if the defendant conceded the issue of intent. See, *e. g.*, *Krzeminski* v. *Perini*, 614 F. 2d 121, 125 (CA6), cert. denied, 449 U. S. 866 (1980). See also *Washington* v. *Harris*, 650 F. 2d 447, 453–454 (CA2 1981), cert. denied, 455 U. S. 951 (1982). In presenting a defense such as alibi, insanity, or self-defense, a defendant may in some cases admit that the act alleged by the prosecution was intentional, thereby sufficiently reducing the likelihood that the jury applied the erroneous instruction as to permit the appellate court to consider the error harmless. See Traynor 73. We leave it to the lower courts to determine whether, by raising a particular defense or by his other actions, a defendant himself has taken the issue of intent away from the jury.[16]

Such an exception, regardless of its precise boundaries, does not apply here. Respondent did not concede the issue of intent with respect to either of the counts at issue. As noted above, the instruction was not "so ill-suited to both the theory on which the case was tried and the evidence that was presented," *United States* v. *Winter*, 663 F. 2d 1120, 1145 (CA1 1981), cert. pending, No. 81–1392, that it can be deemed harmless. The conclusive presumption the jury was

[16] We note that a defendant in a criminal trial is justified, of course, in defending solely in reliance on the presumption of his innocence and the State's burden of proof.

instructed to apply permitted the jury to convict respondent without ever examining the evidence concerning an element of the crimes charged. Such an error deprived respondent of "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman* v. *California*, 386 U. S., at 23.

The judgment of the Supreme Court of Connecticut is affirmed.

It is so ordered.

JUSTICE STEVENS, concurring in the judgment.

If federal constitutional error occurs in a state criminal trial, federal law places certain limits on the state appellate court's disposition of the case. If the error is sufficiently grievous, it *must* reverse.[1] If the error is less grievous, it also must reverse unless it declares its conviction beyond a reasonable doubt that the federal error was harmless.[2] But federal law does not *require* a state appellate court to make a harmless-error determination; it merely *permits* the state court to do so in appropriate cases.[3] This is all the Court held in *Chapman* v. *California*, 386 U. S. 18 (1967).

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[1] See *Chapman* v. *California*, 386 U. S. 18, 23, n. 8 (1967).

[2] The harmless-error rule which may be applied when federal constitutional error has been committed, see *Chapman* v. *California*, *supra*, is not to be confused with either the federal harmless-error rule that is applied in federal courts when nonconstitutional error occurs, see *Kotteakos* v. *United States*, 328 U. S. 750 (1946), or with a State's own harmless-error rule applicable to errors of state law, see, *e. g.*, Conn. Gen. Stat. § 52–265 (1960).

[3] I recognize that the State has argued in this Court that the Federal Constitution *requires* the Connecticut Supreme Court to make a harmless-error determination in every case presenting a *Sandstrom* issue. Pet. for Cert. 7; Tr. of Oral Arg. 9–10. The following colloquy took place at oral argument:

"[Petitioner]: It appears that the Connecticut Supreme Court as a matter of federal constitutional law sometimes entertains the instruction—the challenge that the error was harmless and sometimes it does not. The only stated position that the Connecticut Supreme Court has given in this

In this case, the Connecticut prosecutor requested the Connecticut Supreme Court to declare that the *Sandstrom* error was harmless and that court refused to do so. That action does not even raise a federal question.[4] I therefore would simply dismiss the writ of certiorari. Because a fifth

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regard is the one in State against Truppi, is that we sometimes apply the harmless error rule. . . .

"QUESTION: Well, is it your position that they must apply it in every case?

"[Petitioner]: No, Your Honor, my position is not that they must apply the harmless error rule in every case, but if the prosecution asks the Connecticut Supreme Court to review an error for its harmlessness as a matter of federal constitutional law, that it must at least use the harmless error test.

"QUESTION: Let me just state it to be sure I understand it correctly. As a matter of federal constitutional law, a state supreme court must entertain a harmless—must make a harmless error examination every time the prosecutor asks it to.

"[Petitioner]: In the context of an unconstitutional jury instruction, yes."

This position is so clearly erroneous that it does not merit the Court's review by writ of certiorari.

[4] No federal question arises when a state court has decided for itself that it will decline to apply the *Chapman* harmless-error test at all once it has found *Sandstrom* error. That is all the Connecticut Supreme Court did in *State* v. *Truppi*, 182 Conn. 449, 466, 438 A. 2d 712, 721 (1980). After discussing the guarantees afforded defendants by the reasonable-doubt standard, the court wrote: "Therefore we decline to weigh the evidence of guilt against the uncured damage done by the harmful portion of the instructions." It cited two other State Supreme Court cases which had followed a different practice and noted that this Court had denied certiorari in one of them. *Id.*, at 466, n. 12, 438 A. 2d, at 721, n. 12, citing *People* v. *Wright*, 408 Mich. 1, 30–32, 289 N. W. 2d 1, 10–11 (1980); *State* v. *Hamilton*, 185 Mont. 522, 539–542, 605 P. 2d 1121, 1131–1133, cert. denied, 447 U. S. 924 (1980). In my view, the state court reversed for its own reasons. Neither in *Truppi* nor in this case did it state or suggest that federal constitutional law compelled automatic reversal.

Whether the Connecticut court's refusal to review the evidence in this case was based on a decision to follow its earlier holding in *Truppi*, or on its own conclusion that the error in the case before it was not harmless, the holding does not even arguably violate any federal rule.

vote is necessary to authorize the entry of a Court judgment, however, I join the disposition which will allow the judgment of the Connecticut Supreme Court to stand.

CHIEF JUSTICE BURGER, dissenting.

I join JUSTICE POWELL's dissenting opinion, and write separately only to emphasize that the Court today does not adopt a rule of automatic reversal for *Sandstrom* error. Only four Justices would adopt a rule requiring reversal for *Sandstrom* error, whether harmless or not, in all cases. Such a rule is contrary to this Court's holding, with only one dissent, in *Chapman* v. *California*, 386 U. S. 18, 21–22 (1967), which rejected a rule of automatic reversal for all constitutional errors.

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

Today a plurality of this Court finds that an instruction given in violation of *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), cannot be considered harmless except in certain "rare situations." The effect of the plurality's opinion, if it became a binding holding of the Court, would be to create an automatic reversal rule whenever a *Sandstrom*-type instruction is given, regardless of the conclusiveness of the evidence of intent. In my view, this is serious error.

I

It is necessary to address the jurisdictional issue raised in JUSTICE STEVENS' concurrence before considering the plurality's disposition of the merits. JUSTICE STEVENS would not reach the merits because the Connecticut Supreme Court, when requested to determine whether the *Sandstrom* error was harmless, declined to do so. Accordingly he concludes that no federal question is presented. It is unclear whether he takes the view that a state court may apply the federal harmless-error rule to provide a defendant with *greater* protection than *Chapman* v. *California*, 386 U. S. 18

(1967), would require or whether he finds that the State Supreme Court's refusal to consider this question rests on an independent and adequate state ground. In my opinion, each of these views is erroneous.

The harmless-error rule announced in *Chapman* was designed to establish the federal standard necessary "to protect people from infractions by the States of federally guaranteed rights." *Id.*, at 21. A State, of course, may apply a more stringent *state* harmless-error rule than *Chapman* would require. See *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 81 (1980). "But . . . a State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." *Oregon* v. *Hass*, 420 U. S. 714, 719 (1975) (emphasis in original). Accordingly, if Connecticut wishes to impose a more stringent standard than the federal rule, it must do so as a matter of state law.

An examination of Connecticut cases establishes that the State has not taken this course. Connecticut has enacted a state harmless-error statute applicable only to errors of state law or procedure. See Conn. Gen. Stat. § 52–265 (1960); *State* v. *L'Heureux*, 166 Conn. 312, 323–324, 348 A. 2d 578, 584 (1974). The state rule is strikingly less stringent than the federal since it places the burden of proving that the error was "materially injurious" on the party who claims the trial court erred. Connecticut does not apply its state standard to federal constitutional error. It applies instead a federal rule. As the Connecticut Supreme Court explained in *State* v. *Coleman*, 167 Conn. 260, 355 A. 2d 11 (1974):

> "The usual rule is that the appellant bears the burden of establishing that an error was 'materially injurious' to him. General Statutes § 52–265; *State* v. *L'Heureux*, 166 Conn. 312, 323, 348 A. 2d 578. When, however, a federal constitutional error has occurred, the burden shifts to the state, and before the error can be held harmless, this court 'must be able to declare a belief that

> it was harmless beyond a reasonable doubt.' *Chapman* v. *California*, 386 U. S. 18, 24 [1967], see also *State* v. *L'Heureux*, supra." *Id.*, at 278–279, 355 A. 2d, at 20 (footnote omitted).

The state court has adhered consistently to this distinction. See, *e. g.*, *State* v. *Cooper*, 182 Conn. 207, 212–213, 438 A. 2d 418, 421 (1980); *State* v. *Ruth*, 181 Conn. 187, 196–197, 435 A. 2d 3, 7–8 (1980); *Aillon* v. *State*, 168 Conn. 541, 547–548, 363 A. 2d 49, 53 (1975).

As both the plurality opinion and JUSTICE STEVENS note, the State Supreme Court did not address the State's argument in this case that the *Sandstrom* error was harmless. Its silence was based apparently on its decision in *State* v. *Truppi*, 182 Conn. 449, 438 A. 2d 712 (1980), where it held that *Sandstrom* error may never be harmless. *Truppi* therefore must be examined to determine whether the State intended to depart from its longstanding rule that it will apply a federal test to federal error.

Truppi prefaced its discussion of harmless error with a reference to the less demanding state harmless-error rule. See 182 Conn., at 465, 438 A. 2d, at 721. It then articulated the two classes of error recognized by *Chapman*, those errors that can never be harmless and those that can. 182 Conn., at 465, 438 A. 2d, at 721 (citing *Chapman*, *supra*, at 23). In its subsequent discussion, *Truppi* contrasted federal errors that "d[o] not significantly impair the truth finding function of the trial" with *Sandstrom* error. See 182 Conn., at 466, 438 A. 2d, at 721. It determined that the instructional nature of a *Sandstrom* error poses a risk that the jury will fail to consider the evidence and deprives a defendant of the protection afforded by requiring proof of guilt beyond a reasonable doubt. 182 Conn., at 466, 438 A. 2d, at 721. It is in this context that *Truppi* concludes "we decline to weigh the evidence of guilt." *Ibid.* It reasoned that to do so would constitute an invasion of the jury's function by an appellate

court. *Ibid.* (citing *Bollenbach* v. *United States*, 326 U. S. 607, 614 (1946)).

Thus, the Connecticut court in *Truppi* appears to have adopted—as the federal rule—the view that today's plurality seems to favor: *Sandstrom* error falls within that class of federal errors that can never be harmless.[1] If one is to read *Truppi* otherwise, it is necessary to assume that Connecticut undertook an unannounced departure from its longstanding practice of applying the *Chapman* rule to federal constitutional error. It also would require this Court to assume that having prefaced its harmless-error discussion with a reference to the less demanding state standard, the *Truppi* court then applied a more stringent state harmless-error rule than that announced in *Chapman*. I decline to attribute such illogic to the Connecticut Supreme Court and agree with the plurality that Connecticut was applying its perception of federal constitutional law. See *ante*, at 81, n. 9. Accordingly, it is appropriate to consider the question presented—whether *Sandstrom* error may be harmless.

II

In *Sandstrom* the trial court instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." 442 U. S., at 513. The Court held that, where intent is an essential element of the crime, the giving of such an instruction is constitutional error. As we noted, on finding only that Sandstrom had caused the victim's death and had acted voluntarily, the ju-

[1] In determining whether the Connecticut Supreme Court was applying federal or state law, it should be remembered that this Court has never held that a *Sandstrom* error inevitably requires reversal. See *ante*, p. 88 (STEVENS, J., concurring in judgment). Indeed, rather than foreclosing consideration of this federal issue, the *Sandstrom* Court remanded to allow the state court to make this determination initially. See 442 U. S., at 526–527. It would be consistent with our opinion in *Sandstrom* for the Connecticut Supreme Court to have undertaken this same federal inquiry.

rors "could reasonably have concluded that they were directed to find against [the] defendant on the element of intent." *Id.*, at 523. Alternatively, an instruction that was viewed as shifting the burden of persuasion to the defendant could lead to a similar error. The jury "could have concluded that upon proof by the State of the slaying, and of additional facts not themselves establishing the element of intent, the burden was shifted to the defendant to prove that he lacked the requisite mental state."[2] *Id.*, at 524.

The plurality today goes much further. It interprets *Sandstrom* as establishing that a conclusive presumption instruction on the issue of intent is the "functional equivalent" of a directed verdict on that issue. See *ante*, at 84. The plurality qualifies this categorical statement where "a defendant himself has taken the issue away from the jury"—*i. e.*, it would view the error as harmless only where "the defendant concede[s] the issue of intent." *Ante*, at 87. This is hardly an exception. Indeed, where intent to kill is conceded—as where self-defense is pleaded—there would be no occasion to give a *Sandstrom* instruction. The effect of the plurality's holding is that this type of instruction can never be harmless.

III

In *Chapman* v. *California*, 386 U. S. 18 (1967), the Court rejected the argument that "all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful." *Id.*, at 21. It recognized that in the context of a particular case, some errors have little, if any, likelihood of affecting the jury's verdict. Accordingly, the proper inquiry is whether a court may say "beyond a reasonable

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[2] Having found that the instruction violated due process, *Sandstrom* noted but left open the question of whether the error was harmless. It remanded for a determination of this issue by the Montana Supreme Court. See *ibid.* On remand, the court determined that the error was not harmless. See *State* v. *Sandstrom*, 184 Mont. 391, 392–393, 603 P. 2d 244, 245 (1979).

doubt that the error complained of did not contribute to the verdict obtained." *Id.*, at 24. In applying *Chapman*'s test, a court must assess the effect of the error in light of the facts of each case. See *Harrington* v. *California*, 395 U. S. 250, 254 (1969). For it is only by assessing the weight of the evidence against the defendant that the effect of the error on the jury's verdict can be judged. *Ibid.*

Today the plurality substantially limits *Chapman*'s harmless-error doctrine. It establishes a rule of automatic reversal because of the difficulty in determining the effect of a *Sandstrom* error on a jury's verdict. This difficulty, it reasons, derives from the error's instructional nature, particularly a perceived resemblance to a directed verdict. See *ante*, at 83–88. The analogy the plurality draws, however, between a conclusive *Sandstrom* instruction and a directed verdict is inapt. A directed verdict removes an issue completely from the jury's consideration. Such a presumption, by contrast, leaves the issue ultimately to the jury. A trial court's instructions are not limited to the presumption. A court also, as was done in this case, will charge that the defendant is presumed innocent and that the State must prove beyond a reasonable doubt each element of the crime—including the element of intent. See *infra*, at 101. In the context of these instructions, the presumption provides the jury only with one means by which the State's burden of persuasion may be satisfied.[3] See *Sandstrom*, 442 U. S., at

[3] Because a presumption does not remove the issue of intent from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue. See *Jackson* v. *Virginia*, 443 U. S. 307, 320, n. 14 (1979) ("failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error"); *Carpenters* v. *United States*, 330 U. S. 395, 408–409 (1947) (failure to instruct jury on proper level of review not harmless); *Weiler* v. *United States*, 323 U. S. 606, 610–611 (1945) (erroneous instruction that perjury could be proved by uncorroborated oath of one witness not harmless). In *Bollenbach* v. *United States*, 326 U. S. 607 (1946), the Court found that the use of an erroneous presumption was not harmless. In that case, how-

518, n. 7. While a jury may rely on the presumption instruction as a means of finding intent, there may be many cases in which the facts and circumstances so conclusively establish this element that the instruction is wholly superfluous.

The plurality seeks to justify its automatic reversal rule by the view that a conclusive presumption permits a jury to convict a defendant "without ever examining the evidence concerning an element of the crimes charged." *Ante*, at 88. While this accurately describes the effect of a directed verdict, it misperceives the way a presumption instruction, conclusive or otherwise, functions. A presumption instruction informs the jury that once a party has proved A, the basic fact, the jury can or must presume B, the presumed fact.[4] Contrary to the plurality's assumption, a *Sandstrom*-type presumption does not operate independently of the evidence. The jury must look to the evidence initially to see if the basic facts have been proved before it can consider whether it is appropriate to apply the presumption. In this case, for example, the *Sandstrom* instruction was that "a person's intention may be inferred from his conduct and every person is conclusively presumed to intend the natural and necessary consequences of his act." App. 23A. Thus, it was necessary for the jury

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ever, the jury had deliberated for seven hours. In response to a question from the jury, the trial court delivered the erroneous presumption instruction, and the jury returned a verdict in five minutes. This Court rejected the argument that the error was harmless, not because a presumption may never be harmless but because the course of events revealed graphically that the error had affected the jury's verdict. See *id.*, at 614.

[4] Although the term "presumption" often is used to describe a wide range of procedural effects, a presumption typically refers to an evidentiary device that allows "the existence of one fact [to be] presumed from another." See Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L. J. 1325, 1335 (1979). *Sandstrom* makes clear that the instruction in that case functioned in this fashion. There we observed that the presumption instruction allowed the jury to conclude that the defendant possessed the requisite intent on the basis of facts that would establish only criminal negligence. See 442 U. S., at 523–524.

to look to the facts and circumstances to determine what respondent did—*i. e.*, to consider the character and quality of his acts—before it could define the natural and necessary consequences of those acts. If, however, these basic facts are themselves dispositive of intent, the presumption becomes unnecessary to the jury's task of finding intent. Because the presumption does not remove the issue of intent from the jury's consideration, it does not preclude a reviewing court from determining whether the error was "harmless beyond a reasonable doubt."[5] See *Chapman*, 386 U. S., at 24. See also *Lamb* v. *Jernigan*, 683 F. 2d 1332, 1342 (CA11 1982), cert. pending, No. 82–5768; *Jacks* v. *Duckworth*, 651 F. 2d 480, 487 (CA7 1981).

As indicated above, the effect of the plurality opinion is to create an automatic reversal rule whenever a *Sandstrom* instruction is given, regardless of the conclusiveness of the evidence of intent.[6] In so doing, the plurality disregards the

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[5] In determining whether a *Sandstrom* error was harmless, the inquiry is not, as the plurality intimates, whether the presumption was unnecessary to the jury's verdict "in the sense that the evidence was sufficient for a properly instructed jury to find that respondent acted with the requisite intent." *Ante*, at 86, n. 15. Instead, the inquiry is whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption. See *infra*, at 101.

Despite this standard, the plurality reasons that the error always is harmful because it remains possible that a juror might have relied on the unconstitutional presumption rather than the evidence. This argument begs the question. In every harmless-error case, there is always a possibility that the error affected the jury's verdict. As has been noted: "Obviously, there will be trials in which the evidence supporting the inference to be drawn will be so persuasive that any additional prompting procured by the [unconstitutional presumption] must be regarded as inconsequential. In such cases, the validity of the presumption will be regarded as irrelevant because whatever error it might embody can be regarded as harmless." Jeffries & Stephan, *supra*, at 1388, n. 192.

[6] There is some facial ambivalence in the plurality opinion in this respect, as it expresses the view that a *Sandstrom* error may be harmless where "the defendant concede[s] the issue of intent." *Ante*, at 87. But the opin-

reasoning underlying *Chapman*'s rejection of such a rule. While agreeing that in some circumstances an error may be so fundamental that reversal is mandatory, Justice Black, writing for the Court, said:

> "We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a holding, as petitioners correctly point out, would require an *automatic reversal* of their convictions and make further discussion unnecessary. We decline to adopt any such rule." 386 U. S., at 21–22 (emphasis added).

Chapman recognized that jury trials involve an infinite variety of "facts and circumstances." It therefore is hardly in the interest of a rational criminal justice system to adopt automatic and absolute rules that deprive courts of perhaps the single most important element of judging: the exercise of judicial discretion. Yet this is precisely what the plurality's opinion does. Its holding would require reversals of convic-

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ion leaves no doubt that it has established an automatic rule of reversal. It concludes that *Sandstrom* error deprives a defendant of " 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.' " *Ante*, at 88 (quoting *Chapman* v. *California*, 386 U. S., at 23).

Chapman, however, makes clear that although some constitutional errors can never be treated as harmless, not "all trial errors which violate the Constitution automatically call for reversal." *Ibid.* The question—the one critical to the decision of this case—is in which category of error a *Sandstrom* instruction falls. In my view, it is not the type of error that invariably and "automatically" compels reversal. This is what the plurality today finds, subject to the rare situation in which the defendant "concedes" intent. The result of its opinion is to create a class of cases in which courts are deprived of their traditional discretion to see that both society and the defendant are treated justly. A *Sandstrom* error, however, is not comparable to an instruction that can never be harmless—for example, an instruction that fails to inform the jury that it must find guilt beyond a reasonable doubt. See n. 3, *supra*. The question of intent is one of fact and, as discussed in the above text, before a jury even reaches the presumption instruction it must find facts that are a predicate for the presumption.

tions in many situations in which the defendant's actions establish intent as conclusively as if it were unequivocally conceded. If, for example, an execution-style slaying occurred, in which the defendant tied up his victim and shot him repeatedly in the head, it would be clear beyond a reasonable doubt that the presence of a conclusive-presumption instruction would not have affected a jury's finding of intent.[7] The point is not that an execution-style slaying equals a concession of intent. It is instead that the plurality's limitation on the harmless-error doctrine fails to recognize that the impact of the presumption on the jury's verdict will vary with the facts and circumstances of each case.

IV

Neither the respondent nor any of the four other participants in these crimes testified at the trial. The State's evidence—from the victim, the people who sheltered her after she escaped, the police, and the State's expert witnesses—was uncontradicted.[8] Reviewing this testimony, the Su-

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[7] This hypothetical is not the unusual case. Numerous cases coming to this Court illustrate the frequency with which cases arise in which no rational person could doubt intent to murder. Although the recent cases cited below did not involve a *Sandstrom* error, they illustrate factual situations in which the Court's opinion would preclude the application of the harmless-error doctrine. See, *e. g.*, *White* v. *State*, 415 So. 2d 719, 720 (Fla.) (members of motorcycle gang stabbed woman 14 times and slit her throat twice), cert. denied, 459 U. S. 1055 (1982); *Arango* v. *State*, 411 So. 2d 172 (Fla.) (defendant beat victim with a blunt instrument, wrapped a wire around his neck, stuffed a towel into his mouth, and shot him twice in head), cert. denied, 457 U. S. 1140 (1982); *State* v. *Mercer*, 618 S. W. 2d 1 (Mo.) (defendant strangled rape victim until his companion, who was monitoring her pulse, told him it had ceased), cert. denied, 454 U. S. 933 (1981).

There was no "concession" of intent to kill in any of these cases. Yet intent in each is clear beyond a reasonable doubt. If a *Sandstrom* instruction had been given in any of these cases, the plurality opinion today would preclude consideration of the harmless-error doctrine.

[8] The testimony of the only witness for respondent is irrelevant to the issue of intent.

preme Court of Connecticut found that the jury "could reasonably have found the following facts":

> "On December 20, 1975, at approximately 10:30 p. m., the female victim dropped her boyfriend off at the Norwalk railroad station and started to return to her home in West Redding. Unfamiliar with Norwalk, and in cold and snowy weather, the victim lost her way. While still in Norwalk, she stopped her car and asked the occupants of another automobile for directions. The defendant, one of the four men in this automobile, offered to ride in her car to show her the way to route 7. When her car arrived at route 7, the defendant pulled the victim to the passenger side of the car and another man from the second automobile entered the victim's car and drove it away. The victim was told that the men needed a car.[9] She was threatened, at various times, with bodily harm, was shown a knife and was told that there was a gun. Sometime later, while still in Norwalk, the second car was abandoned and its other two occupants entered the victim's car. At another stop, a fifth man was picked up. Eventually, the car was driven on the Connecticut Turnpike toward New Haven. Sometime in the early morning hours of December 21, 1975, the vehicle was stopped near an apartment building in the New Haven area. The victim was forced into the building where she was sexually assaulted by all five men. When the victim was returned to the car her hands were bound with wire. The car was driven to a bridge on the New Haven-West Haven line where the defendant forced the victim to run across the bridge. At about the midway point, she and the defendant struggled and he threw her over the railing. Initially she landed on a pipe outside of the railing, but jumped into the river and

[9] When respondent took the victim's automobile, he said: "We need a car, we are going to take your car and you are going to come with us." Tr. 37. He kept the car until he was arrested by the police.

went under the water when the defendant pursued her. She managed to elude him by hiding under the bridge. Sometime later she made her way to a nearby residence from which the police were called. The defendant and others were arrested in Norwalk between 5 and 6 a. m. the same morning in or near the victim's car." 185 Conn. 163, 165–166, 440 A. 2d 858, 860 (1981) (footnote added).

On these facts, a reviewing court might well say beyond a reasonable doubt that the jury found the presumption unnecessary to its task of determining intent. With respect to the charge of robbery, the uncontradicted evidence was that respondent stated: "We need a car, we are going to take your car . . . ." His actions confirmed his unequivocal statements: he overpowered the woman, took her car and never returned it. One would think that intent to rob could not have been clearer. The evidence of respondent's intent on the attempted murder charge could be viewed as only marginally less compelling. Having participated in a gang-type rape of this woman, respondent bound her hands with wire and threw her into an icy river in the middle of December.

The jury, consistent with its instructions, could have regarded these facts as dispositive of intent and not relied on the presumption. As indicated above, the court instructed the jury that the State had the burden of proving intent beyond a reasonable doubt. It stressed that "[t]he State, in other words, can sustain the burden resting on it only if the evidence before you establishes the existence of every element constituting the crime charged beyond a reasonable doubt." App. 17A. Indeed, it prefaced the conclusive-presumption instruction by stating that intent is a question of fact solely within the province of the jury.[10] See *id.*, at

[10] The Connecticut Supreme Court held that the *Sandstrom* error was not cured by the remainder of the instructions. See 185 Conn. 163, 172–176, 440 A. 2d 858, 863–865 (1981). The correctness of that decision is not before us.

22A–23A. Although the instructions left the issue of intent to the jury, the plurality finds that neither we nor the state courts may assess the effect of the presumption on the jury's verdict. It imposes instead an automatic reversal rule that would be applicable even when proof of intent to murder is established beyond any doubt. See n. 6, *supra*. Such a rule is precisely what *Chapman* rejected.

V

For the reasons stated, I think this Court properly could decide the question of harmless error. Normally, however, this is a question more appropriately left to the courts below. The Connecticut Supreme Court did not address the question, nor has it been briefed extensively here. There may be facts and circumstances not apparent from the record before us. I therefore would reverse the judgment and remand the case for consideration of whether the error was harmless beyond a reasonable doubt.

Syllabus

DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS *v.* NEW BANNER INSTITUTE, INC.

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

No. 81–1180. Argued November 29, 1982—Decided February 23, 1983

Title IV of the Gun Control Act of 1968, 18 U. S. C. §§ 922(g)(1) and (h)(1), makes it unlawful for any person "who has been convicted . . . of . . . a crime punishable by imprisonment for a term exceeding one year" to ship, transport, or receive any firearm or ammunition in interstate commerce. Title IV also makes it unlawful to engage in the business of importing, manufacturing, or dealing in firearms without a license from the Secretary of the Treasury. One ground for denial of a license is where the applicant is under the prohibitions imposed by §§ 922(g)(1) and (h)(1), and if the applicant is a corporation, a license will be denied if a person with power to direct the management of the corporation is under such prohibitions. One Kennison, the chairman of the board and a shareholder of respondent corporation, after plea negotiations, pleaded guilty in an Iowa state court to the state crime of carrying a concealed handgun. This crime was punishable by a fine or imprisonment for not more than five years, or both. The state court, however, pursuant to an Iowa statute, "deferred" entry of a formal judgment and placed Kennison on probation. At the completion of his probation term he was discharged, also pursuant to a state statute, and his record with respect to the deferred judgment was expunged. Subsequently, respondent applied to the Treasury Department's Bureau of Alcohol, Tobacco and Firearms (Bureau) for licenses as a firearms and ammunition dealer and manufacturer, but did not disclose Kennison's plea of guilty to the Iowa concealed weapon charge. The licenses were issued but were later revoked when the Bureau learned of the Iowa charge. The District Court upheld the revocation, but the Court of Appeals reversed, holding that although Kennison had been "convicted" of an offense that triggered firearms disabilities, that fact could not serve as a predicate for a Gun Control Act violation or license revocation because the conviction had been expunged under the Iowa deferred judgment procedure.

Held: The firearms disabilities imposed by §§ 922(g)(1) and (h)(1) apply to Kennison and were not removed by the expunction of the record of his guilty plea to the concealed weapon charge. Pp. 110–122.

(a) For purposes of the federal gun control laws, a plea of guilty to a disqualifying crime and its notation by a state court, followed by a sentence of probation, is equivalent to being "convicted" within the language of §§ 922(g)(1) and (h)(1). Pp. 111–114.

(b) Iowa's expunction provisions, as carried out in Kennison's case prior to respondent's license applications, did not nullify his conviction for purposes of the federal statute. Expunction under state law does not alter the legality of the previous conviction, does not open the way to a license despite the conviction, and does not signify that the defendant was innocent of the crime to which he pleaded guilty. Expunction in Iowa means no more than that the State has provided a means for the trial court not to accord a conviction certain continuing effects under state law. Pp. 114–115.

(c) Provisions of the federal gun control laws other than the provisions in question, as well as related federal statutes, support the conclusion that Congress did not intend expunction of a state conviction automatically to remove the firearms disabilities imposed by §§ 922(g)(1) and (h)(1). Pp. 115–118.

(d) There is nothing in the legislative history of Title IV or related federal statutes to suggest an opposite intent. Title IV's purpose to curb crime by keeping firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency, would be frustrated by a ruling that gave effect to state expunctions. In the absence of a plain indication to the contrary, it is assumed that Congress did not intend to make the application of Title IV dependent on state law. Title IV is carefully constructed gun control legislation. Congress knew the significance and meaning of the language it employed. Pp. 118–121.

(e) A rule that would give effect to expunction under varying state statutes would seriously hamper effective enforcement of Title IV. Pp. 121–122.

649 F. 2d 216, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BRENNAN, STEVENS, and O'CONNOR, JJ., joined, *post*, p. 122.

Deputy Solicitor General Geller argued the cause for petitioner. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General McGrath*, *Samuel A. Alito, Jr.*, *William Kanter*, and *Douglas Letter*.

Lewis C. Lanier argued the cause for respondent. With him on the brief was *Jack R. McGuinn.**

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether firearms disabilities imposed by 18 U. S. C. §§ 922(g) and (h) apply with respect to a person who pleads guilty to a state offense punishable by imprisonment for more than one year, when the record of the proceeding subsequently is expunged under state procedure following a successfully served term of probation.

I

Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 226, was amended by the Gun Control Act of 1968, 82 Stat. 1214, and now appears as 18 U. S. C. § 921 *et seq.* (1976 ed. and Supp. V). Title IV makes it unlawful for any person "who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year"[1] to ship, transport, or receive any firearm or ammunition in interstate commerce. §§ 922(g) and (h). Title IV also makes it unlawful to engage in the business of importing, manufacturing, or dealing in firearms without a license from the Secretary of the Treasury. §§ 922(a) and 923(a). One ground, specified by the statute, for denial of a license is the fact that the applicant is barred by §§ 922(g) and (h) from transporting, shipping, or receiving firearms or ammunition. § 923(d)(1)(B). The same statute provides that where the applicant is a corporation, partnership, or association, a license will be denied

**David T. Hardy* and *Richard E. Gardiner* filed a brief for the National Rifle Association of America as *amicus curiae* urging affirmance.

[1] The Act provides exemptions from its proscriptions for certain business and commercial crimes, such as antitrust violations, punishable by imprisonment for more than one year, and for nonfirearms and nonexplosives state offenses classified by the State as misdemeanors and punishable by imprisonment for two years or less. 18 U. S. C. § 921(a)(20). These exemptions are of no relevance here.

if an individual possessing, directly or indirectly, the power to direct the management and policies of the entity is under the prohibitions imposed by §§ 922(g) and (h). Title IV also makes it a crime to violate any of its provisions or to make a willful misrepresentation with respect to information required to be furnished. § 924(a).

Although, as noted above, Title IV imposes disabilities upon any "person who has been convicted . . . of a crime punishable by imprisonment for a term exceeding one year," it does permit certain persons in that category to apply to the Secretary for relief from those disabilities. Under § 925(c), the Secretary may grant relief "if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." When the Secretary grants relief, he must publish notice of his action promptly in the Federal Register, together with a statement of reasons. *Ibid.*

II

David F. Kennison, a resident of Columbia, S. C., is a director, chairman of the board, and a shareholder of respondent New Banner Institute, Inc., a corporation. In September 1974, when Kennison was in Iowa, he was arrested and charged with kidnaping his estranged wife. After plea negotiation, see Tr. of Oral Arg. 40–41, he pleaded guilty to the state crime of carrying a concealed handgun, and the kidnaping charge was dismissed. The concealed weapon offense, under then Iowa law, see Iowa Code §§ 695.2 and .3 (1977), was punishable by a fine of not more than $1,000 or by imprisonment for not more than five years, or both.[2] In ac-

[2] The court, however, in its discretion, in the case of a first offense, could reduce that punishment. See Iowa Code § 695.3 (1977). Sections 695.2 and .3 were repealed effective January 1, 1978, and are now replaced by Iowa Code §§ 724.4 and 903.1 (1981).

cord with the provisions of Iowa Code § 789A.1 (1977), then in effect,[3] the state court entered an order reciting that Kennison had "entered a plea of guilty to the charge of carrying a concealed weapon," that "the defendant has consented to a deferment of sentence in this matter," that "he has stable employment," and that there were "unusual circum-

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[3] Section 789A.1 then read in pertinent part:

"The trial court may, upon a plea of guilty, verdict of guilty, or a special verdict upon which a judgment of conviction may be rendered, exercise either of the options contained in subsections 1 and 2. However, this section shall not apply to the crimes of treason, murder, or violation of [other specified statutes].

"1. With the consent of the defendant, the court may defer judgment and place the defendant on probation upon such terms and conditions as it may require. Upon fulfillment of the terms of probation the defendant shall be discharged without entry of judgment. Upon violation of the terms, the court may enter an adjudication of guilt and proceed as otherwise provided.

"However, this subsection shall not be available if any of the following is true:

"[Here are recited specific exceptions to the availability of the procedure outlined in subsection 1.]

"2. By record entry at time of or after sentencing, the court may suspend the sentence and place the defendant on probation upon such terms and conditions as it may require.

"Before exercising either of the options contained in subsections 1 and 2, the court shall first determine which of them will provide maximum opportunity for the rehabilitation of the defendant and protection of the community from further offenses by the defendant and others. In making this determination the court shall consider the age of the defendant, his prior record of convictions, if any, his employment circumstances, his family circumstances, the nature of the offense committed, whether a dangerous weapon or force was used in the commission of such offense, and such other factors as shall be appropriate. The court shall file a specific written statement of its reasons for and the facts supporting its decision to defer judgment or to suspend sentence and its decision on the length of probation."

Section 789A.1 was enacted by 1973 Iowa Acts, ch. 295, § 1. It was repealed by 1976 Iowa Acts, ch. 1245, § 526, effective January 1, 1978. The current replacement statutes are Iowa Code §§ 907.3, .4, and .5 (1981).

stances" in the case. The order then stated that the court "deferred" entry of a formal judgment and placed Kennison on probation.

Kennison returned to South Carolina where he completed his probation term. When that term expired in February 1976, he was discharged pursuant to Iowa Code § 789A.6 (1977), then in effect,[4] and the Iowa court's record with reference to the deferred judgment was expunged.

In May 1976, respondent filed three applications with the Treasury Department's Bureau of Alcohol, Tobacco and Firearms (Bureau), for licenses as a dealer in firearms and ammunition, as a manufacturer of ammunition, and as a collector of curios and relics. On the application forms, respondent listed Kennison as a "responsible person," that is, an individual possessing direct or indirect power to control the management and policies of respondent. See 18 U. S. C. § 923(d)(1)(B). In answering an inquiry on the forms as to whether such person had been convicted of a crime punishable by a prison term exceeding one year, respondent did not disclose the Iowa events or Kennison's plea of guilty in that State. The requested licenses were issued.

The Bureau, however, subsequently learned of the Iowa concealed weapon charge and the plea of guilty. In conformity with the provisions of §§ 923(e) and (f)(1) and of 27 CFR

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[4] Section 789A.6 then read in pertinent part:

"At any time that the court determines that the purposes of probation have been fulfilled, the court may order the discharge of any person from probation. . . . A person who has been discharged from probation shall no longer be held to answer for his offense. Upon discharge from probation, if judgment has been deferred under section 789A.1, the court's criminal record with reference to the deferred judgment shall be expunged. The record maintained by the supreme court administrator required by section 789A.1 shall not be expunged. . . ."

Section 789A.6 was also enacted in 1973 and was repealed, effective January 1, 1978, by the same Iowa statutes cited in the last paragraph of n. 3, *supra*. The current statute replacing § 789A.6 is Iowa Code § 907.9 (1981).

§ 178.75 (1982), it mailed respondent Notices of Contemplated Revocation of Licenses. After an informal hearing, the Bureau's Regional Regulatory Administrator issued the revocation notices. Respondent, pursuant to § 923(f)(2), then requested and received a formal hearing before an Administrative Law Judge. At that hearing, the Bureau contended that respondent's licenses should be revoked because respondent had failed to reveal that Kennison had been convicted of a felony and also because respondent had not been entitled to the licenses in the first place.

The Administrative Law Judge recommended against revocation. App to Pet. for Cert. 41a. Although he concluded that Kennison's plea of guilty "represented a conviction . . . within the meaning of Section 922(g) and (h)," *id.*, at 47a, he also concluded that respondent's statements in the applications did not justify revocation because its representatives had a good-faith belief that Kennison had not been convicted within the meaning of the federal statute.

On review, the Director of the Bureau, petitioner here, ruled that willful misrepresentation had not been shown; that Kennison, however, possessed the power to direct respondent's management and policies; that Kennison had been convicted in Iowa of an offense that brought him within the prohibitions of §§ 922(g) and (h); and that the licenses should be revoked because respondent was ineligible for them under § 923(d)(1)(B). App. to Pet. for Cert. 23a. The Director ordered the issuance of Final Notices of Revocation. *Id.*, at 40a.

Respondent then filed a timely petition for review in the United States District Court for the District of South Carolina. See § 923(f)(3). On cross-motions for summary judgment, the Director's motion was granted. On respondent's appeal, however, the United States Court of Appeals for the Fourth Circuit reversed. 649 F. 2d 216 (1981). It concluded, *id.*, at 219, that although Kennison indeed had been "convicted" of an offense that triggered firearms disabilities,

that fact could not serve as a predicate for a Gun Control Act violation or license revocation because the conviction had been expunged under the Iowa deferred judgment procedure. The court acknowledged, *id.*, at 220, that other Courts of Appeals entertained contrary views.[5] Because of the importance of the issue and the obvious need for its resolution, we granted certiorari. 455 U. S. 1015 (1982).

III

This is not the first time the Court has examined firearms provisions of the Omnibus Crime Control and Safe Streets Act and of the Gun Control Act. See *Lewis* v. *United States*, 445 U. S. 55 (1980); *Scarborough* v. *United States*, 431 U. S. 563 (1977); *Barrett* v. *United States*, 423 U. S. 212 (1976); *Huddleston* v. *United States*, 415 U. S. 814 (1974); *United States* v. *Bass*, 404 U. S. 336 (1971).

Despite the fact that the slate on which we write is thus not a clean one, we state once again the obvious when we note that, in determining the scope of a statute, one is to look first at its language. *Lewis* v. *United States*, 445 U. S., at 60; *United States* v. *Turkette*, 452 U. S. 576, 580 (1981). If the language is unambiguous, ordinarily it is to be regarded as conclusive unless there is "'a clearly expressed legislative intent to the contrary.'" *Ibid.*, quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). It would seem, therefore, from the clear words of the statute ("any person . . . who has been convicted"), that, for respondent to be deprived of its licenses, Kennison must have been "convicted" of the type of crime specified by the statute, and the Iowa deferred judgment procedure and "ex-

[5] See *United States* v. *Bergeman*, 592 F. 2d 533 (CA9 1979); *United States* v. *Mostad*, 485 F. 2d 199 (CA8 1973), cert. denied, 415 U. S. 947 (1974); *United States* v. *Lehmann*, 613 F. 2d 130 (CA5 1980). See also, *e. g.*, *United States* v. *Padia*, 584 F. 2d 85 (CA5 1978); *United States* v. *Gray*, 692 F. 2d 352 (CA5 1982); *United States* v. *Nord*, 586 F. 2d 1288 (CA8 1978); *United States* v. *Kelly*, 519 F. 2d 794 (CA8), cert. denied, 423 U. S. 926 (1975).

punction" must not have operated to nullify that conviction. If Kennison was not "convicted" in the first place, or if he was and that conviction somehow was rendered a nullity, respondent should not be ineligible for licenses on the grounds asserted by the Bureau.

A

We turn first to the issue of conviction. The salient fact is Kennison's plea of guilty to a state charge punishable by more than a year's imprisonment. The usual entry of a formal judgment upon a jury verdict or upon a court's specific finding of guilt after a bench trial is absent. Present, however, are (a) the charge of a crime of the disqualifying type, (b) the plea of guilty to that charge, and (c) the court's placing Kennison upon probation.

In *Lewis* v. *United States*, *supra*, we had under consideration § 1202(a)(1) of Title VII of the 1968 Act, 18 U. S. C. App. § 1202(a)(1), a gun control statute similar to and partially overlapping §§ 922(g) and (h). The language of § 1202 (a)(1) that is pertinent for present purposes is familiar, for it concerns any person who "has been convicted . . . of a felony." The Court there characterized the language of the statute as "sweeping." 445 U. S., at 60. Despite the fact that Lewis' conviction was subject to collateral attack on constitutional grounds, the Court held that conviction to be disabling. What was important to the Court was the presence or fact of the conviction. In speaking of Title VII, we said: "No modifier is present, and nothing suggests any restriction on the scope of the term 'convicted.'" *Ibid.* Still further: "'Nothing on the face of the statute suggests a congressional intent to limit its coverage . . . .'" *Ibid.*, quoting *United States* v. *Culbert*, 435 U. S. 371, 373 (1978). And, finally: "Actually, . . . we detect little significant difference between Title IV and Title VII." 445 U. S., at 64.

Whether one has been "convicted" within the language of the gun control statutes is necessarily, as the Court of Appeals in the present case correctly recognized, 649 F. 2d, at

219, a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State. *United States* v. *Benson*, 605 F. 2d 1093, 1094 (CA9 1979). This makes for desirable national uniformity unaffected by varying state laws, procedures, and definitions of "conviction."

In *Lewis*, the possible, and indeed probable, vulnerability of the predicate conviction to collateral attack on constitutional grounds did not affect the disqualification. This followed from the statute's plain language and from a legislative history that, as we have repeatedly observed, makes clear that "'Congress sought to rule broadly—to keep guns out of the hands of those who have demonstrated that "they may not be trusted to possess a firearm without becoming a threat to society."'" 445 U. S., at 63, quoting *Scarborough* v. *United States*, 431 U. S., at 572. Like considerations apply here with respect to whether Kennison was one who was "convicted" within the meaning of the federal statute.[6] He voluntarily, in negotiation, entered a plea of guilty to a disqualifying crime. In some circumstances, we have considered a guilty plea alone enough to constitute a "conviction": "A plea of guilty differs in purpose and effect from a mere

[6] To be sure, the terms "convicted" or "conviction" do not have the same meaning in every federal statute. In some statutes those terms specifically are made to apply to one whose guilty plea has been accepted whether or not a final judgment has been entered. See, *e. g.*, 15 U. S. C. §§ 80a–2(10) and 80b–2(6). In other federal statutes, however, the term "convicted" is clearly limited to persons against whom a formal judgment has been entered. See, *e. g.*, 18 U. S. C. § 4251(e) and 28 U. S. C. § 2901(f).

The term "convicted" in §§ 922(g) and (h) is not there defined, but we have no reason whatsoever to suppose that Congress meant that term to apply only to one against whom a formal judgment has been entered. Congress' intent in enacting §§ 922(g) and (h) and § 1202 was to keep firearms out of the hands of presumptively risky people. See *United States* v. *Bass*, 404 U. S. 336, 345 (1971). In this connection, it is significant that §§ 922(g) and (h) apply not only to a person convicted of a disqualifying offense but also to one who is merely under indictment for such a crime.

admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence." *Kercheval* v. *United States*, 274 U. S. 220, 223 (1927). Accord, *Boykin* v. *Alabama*, 395 U. S. 238, 242 (1969).[7]

Here, we do have more. The state judge who noted Kennison's plea placed him on probation. To be sure, there was no written adjudication of guilt and there was no formal pronouncement of a sentence of imprisonment for a specified term. But that was due to special provisions of Iowa statutory law and procedure. It was plainly irrelevant to Congress whether the individual in question actually receives a prison term; the statute imposes disabilities on one convicted of "a crime *punishable* by imprisonment for a term exceeding one year." § 922(g) (emphasis supplied). It is also plain that one cannot be placed on probation if the court does not

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[7] As noted in n. 6, *supra*, the meaning of the terms "convicted" and "conviction" vary from statute to statute. In *Lott* v. *United States*, 367 U. S. 421 (1961), for example, the Court had under consideration Federal Rule of Criminal Procedure 34 and a plea of *nolo contendere*, rather than a plea of guilty. The question was whether the time within which certain motions could be made began to run at the time the *nolo* plea was entered or at the time judgment was pronounced and sentence imposed. The Court spoke of the possibility of the plea's being withdrawn before sentence was imposed and therefore said that "it is the judgment of the court—not the plea—that constitutes the 'determination of guilt.'" *Id.*, at 427. In construing Rule 34, of course, the Court had before it no evidence of a congressional intent to rule broadly to protect the public comparable to that animating Title IV. Moreover, in *Lott* the Court did not deal with the situation where probation is imposed on the basis of the plea. Under the Iowa expunction statute, one who has pleaded guilty is treated identically to one who has been found guilty by a jury. See n. 3, *supra*. There is no suggestion in the Iowa statutes, and respondent has not suggested, that once the plea was noted and probation imposed Kennison could withdraw his plea. Indeed, it was a negotiated plea accompanied by the dismissal of the kidnaping charge.

deem him to be guilty of a crime[8]—in this case a crime that Congress considered demonstrative of unreliability with firearms. Thus, for purposes of the federal gun control laws, we equate a plea of guilty and its notation by the state court, followed by a sentence of probation, with being "convicted" within the language of §§ 922(g) and (h). See *United States* v. *Woods*, 696 F. 2d 566, 570 (CA8 1982) ("once guilt has been established whether by plea or by verdict and nothing remains to be done except pass sentence, the defendant has been convicted within the intendment of Congress").

B

That, however, is not an end to the matter. We still must determine whether Iowa's expunction provisions, as carried out in Kennison's case prior to respondent's license applications, nullified his conviction for purposes of the federal statute.[9]

We recognized in *Lewis* that a qualifying pardon, see 27 CFR § 178.142 (1982), or a consent from the Secretary of the Treasury would operate to relieve the disability. 445 U. S., at 60–61.[10] So far as the face of the statute is concerned,

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[8] Counsel acknowledged that during the period of Kennison's probation, respondent was disqualified for a license. Tr. of Oral Arg. 36–37.

[9] For purposes of Iowa's own gun control statute, Iowa Code § 724.26 (1981), it might be argued that the conviction was nullified. See *State* v. *Walton*, 311 N. W. 2d 110, 112 (Iowa 1981). Nevertheless, the Supreme Court of Iowa has observed that the "word 'conviction' is of equivocal meaning, and its use in a statute presents a question of legislative intent." *State* v. *Hanna*, 179 N. W. 2d 503, 507 (1970). Presumably, therefore, if the Supreme Court of Iowa were called upon to construe the term "convicted" in a statute like §§ 922(g) and (h), that court would look to "legislative intent."

In any event, Iowa's law is not federal law, and it does not control our decision here. We therefore look to federal considerations in resolving the present case.

[10] Title VII, which we construed in *Lewis*, explicitly provides that pardons granted by the President of the United States or a state governor, specifying that the recipient is authorized to receive, possess, or transport firearms, lift the disabilities imposed by that Title. 18 U. S. C. App.

however, expunction under state law does not alter the historical fact of the conviction, and does not open the way to a license despite the conviction, as does positive or "affirmative action," *ibid.*, by way of the Secretary's consent on the conditions specified by § 925(c). In *Lewis*, it is true, we recognized an obvious exception to the literal language of the statute for one whose predicate conviction had been vacated or reversed on direct appeal. 445 U. S., at 61, n. 5; see Note, Prior Convictions and the Gun Control Act of 1968, 76 Colum. L. Rev. 326, 334, n. 42 (1976). But, in contrast, expunction does not alter the legality of the previous conviction and does not signify that the defendant was innocent of the crime to which he pleaded guilty. Expunction in Iowa means no more than that the State has provided a means for the trial court not to accord a conviction certain continuing effects under state law. Clearly, firearms disabilities may be attached constitutionally to an expunged conviction, see *Lewis* v. *United States*, 445 U. S., at 65–68, and an exception for such a conviction, unlike one reversed or vacated due to trial error, is far from obvious. In *Lewis* we held that the exception for convictions reversed or vacated on direct appeal did not make ambiguous the statute's clear application to convictions arguably vulnerable to collateral attack. We perceive no more ambiguity in the statute here than we did in *Lewis*.

IV

Other provisions of the federal gun control laws and related federal statutes fortify our conclusion that expunction of a state conviction was not intended by Congress automatically to remove the federal firearms disability.

1. Even conviction is not necessary for disqualification. The mere existence of an outstanding indictment is sufficient

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§ 1203(2). Except § 925(c), permitting the Secretary to remove the disabilities in specified circumstances, there is no comparable provision in Title IV. By regulation, the Secretary has given Presidential pardons, but not gubernatorial pardons, automatic enabling effect under Title IV. 27 CFR § 178.142 (1982).

under §§ 922(g) and (h). Congress was reaching far and was doing so intentionally.

2. Sections 922(g) and (h) impose the same disabilities upon a person who "*is* under indictment" for certain crimes, or who "*is* a fugitive from justice," or who "*is*" a drug addict or an unlawful user of certain drugs, or who "*has been* convicted in any court" of certain crimes, or who "*has been* adjudicated as a mental defective," or who "*has been* committed to a mental institution" (emphasis supplied). This use of the respective tenses is significant and demonstrates that Congress carefully distinguished between present status and a past event. We have noted this distinction in tenses in § 922, and its significance, before:

> "Congress knew the significance and meaning of the language it employed. It used the present perfect tense elsewhere in the same section . . . , in contrast to its use of the present tense ('who is') in §§ 922(h)(1), (2), and (3). The statute's pattern is consistent and no unintended misuse of language or of tense is apparent." *Barrett* v. *United States*, 423 U. S., at 217.

And in *Scarborough* v. *United States*, 431 U. S., at 570, we observed: "It is obvious that the tenses used throughout Title IV were chosen with care."

3. The imposition, by §§ 922(g)(4) and (h)(4), of continuing disability on a person who "has been" adjudicated a mental defective or committed to a mental institution is particularly instructive. A person adjudicated as a mental defective may later be adjudged competent, and a person committed to a mental institution later may be deemed cured and released. Yet Congress made no exception for subsequent curative events. The past adjudication or commitment disqualifies. Congress obviously felt that such a person, though unfortunate, was too much of a risk to be allowed firearms privileges. See *United States* v. *Bass*, 404 U. S., at 344–345. In the face of this fact, we cannot believe that Congress in-

tended to have a person convicted of a firearms felony under state law become eligible for firearms automatically because of a state expunction for whatever reason.

4. Section 925(c) empowers the Secretary to grant relief from these disabilities in certain cases. The Secretary may not grant such relief, however, to one convicted of a crime involving the use of a firearm or of a federal firearms offense, and may not grant relief in any event unless specific conditions are met to his satisfaction. Again, it is highly unlikely that Congress intended to permit its own circumscription of the ability of the Secretary to grant relief to be overcome by the vagaries of state law. That would be too easy a route to follow in order to circumvent the federal statute. See S. Rep. No. 666, 89th Cong., 1st Sess., 2 (1965).

5. Provisions of Title VII, enacted simultaneously with Title IV, are helpful to our analysis. We have treated Titles VII and IV as *in pari materia* in construing statutory language identical to that at issue here. *Lewis* v. *United States*, 445 U. S., at 61–62. Title 18 U. S. C. App. § 1203(2) exempts from Title VII "any person who has been pardoned by the President of the United States or the chief executive of a State and has expressly been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm." Thus, in that statute, even a pardon is not sufficient to remove the firearms disabilities unless there is express authorization to have the firearm. It is inconceivable that Congress could have so provided and yet have intended, as the Court of Appeals concluded, 649 F. 2d, at 220–221, to give a state expunction a contrary and unconditional effect. After all, expunction devices were not unknown or unusual when Title IV came into being in 1968. See Comment, Expungement in California: Legislative Neglect and Judicial Abuse of the Statutory Mitigation of Felony Convictions, 12 U. San Fran. L. Rev. 155, 161 (1977); 1909 Cal. Stats., ch. 232, § 1. And the Federal

Youth Corrections Act, in which Congress itself provided for expunction in certain circumstances, see 18 U. S. C. § 5021, was enacted as far back as 1950. See 64 Stat. 1089.

6. Title 21 U. S. C. § 844(b) is a federal expunction statute providing that a first offender found guilty of simple possession of a controlled substance may be placed on probation without entry of judgment, and that, upon successful completion of the probation, the court shall discharge the defendant and dismiss the proceeding against him. But Congress also specifically provided in § 844(b)(1) that such discharge or dismissal "shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime . . . or for any other purpose." This provision would be superfluous if Congress had believed that expunction automatically removes the disqualification. Congress obviously knew the plain meaning of the terms it employed in statutes of this kind, and when it wished to create an exception for an expunged conviction, it did so expressly.

V

"As in all cases of statutory construction, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600, 608 (1979). In our previous cases we have recognized and given weight to the Act's broad prophylactic purpose:

> "When Congress enacted [18 U. S. C. § 921 *et seq.*] it was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest. . . . The principal purpose of federal gun control legislation, therefore, was to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.'"

Huddleston v. *United States*, 415 U. S., at 824, quoting S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968).

See also *Barrett* v. *United States*, 423 U. S., at 220–221.

In order to accomplish this goal, Congress obviously determined that firearms must be kept away from persons, such as those convicted of serious crimes, who might be expected to misuse them. Such persons are also barred from obtaining licenses to deal in firearms or ammunition. This latter provision is particularly important because Title IV and federal gun laws generally funnel access to firearms almost exclusively through dealers. See *Huddleston* v. *United States*, 415 U. S., at 825. "The principal agent of federal enforcement is the dealer." *Id.*, at 824.

Although we have searched diligently, we have found nothing in the legislative history of Title IV or related federal firearms statutes that suggests, even remotely, that a state expunction was intended automatically to remove the disabilities imposed by §§ 922(g)(1) and (h)(1). See, *e. g.*, S. Rep. No. 1501, 90th Cong., 2d Sess. (1968); S. Rep. No. 1097, 90th Cong., 2d Sess. (1968); H. R. Rep. No. 1577, 90th Cong., 2d Sess. (1968); H. R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. (1968); H. R. Rep. No. 488, 90th Cong., 1st Sess. (1967). This lack of evidence is significant for several reasons. First, the purpose of the statute would be frustrated by a ruling that gave effect to state expunctions; a state expunction typically does not focus upon the question with which Title IV is concerned, namely, whether the convicted person is fit to engage in the firearms business or to possess a firearm. Second, "'[i]n the absence of a plain indication to the contrary, . . . it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law.'" *NLRB* v. *Natural Gas Utility Dist.*, 402 U. S. 600, 603 (1971), quoting *NLRB* v. *Randolph Electric Membership Corp.*, 343 F. 2d 60, 62–63 (CA4 1965). This is because the application of federal legislation is nationwide and

at times the federal program would be impaired if state law were to control. *Jerome* v. *United States*, 318 U. S. 101, 104 (1943). The legislative history reveals that Congress believed a uniform national program was necessary to assist in curbing the illegal use of firearms. See S. Rep. No. 1097, 90th Cong., 2d Sess., 28, 76–77 (1968). Third, Title IV "is a carefully constructed package of gun control legislation. . . . 'Congress knew the significance and meaning of the language it employed.'" *Scarborough* v. *United States*, 431 U. S., at 570, quoting *Barrett* v. *United States*, 423 U. S., at 217. And Congress carefully crafted a procedure for removing those disabilities in appropriate cases. § 925(c).

Congress, of course, did use state convictions to trigger Title IV's disabilities in the first instance. This, however, was not because Congress wanted to tie those disabilities to the intricacies of state law, but because such convictions provide a convenient, although somewhat inexact, way of identifying "especially risky people." *United States* v. *Bass*, 404 U. S., at 345. There is no inconsistency in the refusal of Congress to be bound by postconviction state actions, such as expunctions, that vary widely from State to State and that provide less than positive assurance that the person in question no longer poses an unacceptable risk of dangerousness. Any potential harshness of the federal rule is alleviated by the power given the Secretary to grant relief where relief is appropriate based on uniform federal standards.

The facts of the present case are illustrative. Because Kennison had "stable employment" at home in South Carolina and no previous conviction, he was placed on probation and allowed to go home. App. to Pet. for Cert. 45a–46a. Although he had no previous conviction, Kennison did have prior arrests for "assault and battery of a high and aggravated nature" and for "child abuse." Record, Govt. Exh. 13. According to him, his supervision during probation consisted of "occasionally report[ing] that [he] had not been arrested." App. to Brief in Opposition 157a. In short, the circum-

stances surrounding the expunction of his conviction provide little, if any, assurance that Kennison is a person who can be trusted with a dangerous weapon.

VI

Finally, a rule that would give effect to expunctions under varying state statutes would seriously hamper effective enforcement of Title IV. Over half the States have enacted one or more statutes that may be classified as expunction provisions that attempt to conceal prior convictions or to remove some of their collateral or residual effects. These statutes differ, however, in almost every particular. Some are applicable only to young offenders, *e. g.*, Mich. Comp. Laws §§ 780.621 and .622 (1982). Some are available only to persons convicted of certain offenses, *e. g.*, N. J. Stat. Ann. § 2C:52–2(b) (West 1982); others, however, permit expunction of a conviction for any crime including murder, *e. g.*, Mass. Gen. Laws Ann., ch. 276, § 100A (West Supp. 1982–1983). Some are confined to first offenders, *e. g.*, Okla. Stat., Tit. 22, § 991c (Supp. 1982–1983). Some are discretionary, *e. g.*, Minn. Stat. § 638.02(2) (Supp. 1982), while others provide for automatic expunction under certain circumstances, *e. g.*, Ariz. Rev. Stat. Ann. § 13–912 (1978). The statutes vary in the language employed to describe what they do. Some speak of expunging the conviction, others of "sealing" the file or of causing the dismissal of the charge. The statutes also differ in their actual effect. Some are absolute; others are limited. Only a minority address questions such as whether the expunged conviction may be considered in sentencing for a subsequent offense or in setting bail on a later charge, or whether the expunged conviction may be used for impeachment purposes, or whether the convict may deny the fact of his conviction. Some statutes, too, clearly were not meant to prevent use of the conviction in a subsequent prosecution. See, *e. g.*, Ariz. Rev. Stat. § 13–907 (1978); *United States* v. *Herrell*, 588 F. 2d 711 (CA9

1978), cert. denied, 440 U. S. 964 (1979). These and other differences provide nothing less than a national patchwork.

In this case, for example, although the Court of Appeals referred to Iowa's deferred judgment statute as "unconditional and absolute," 649 F. 2d, at 221, it is obvious from the face of the statute that that description is not entirely accurate. At the time of expunction, a separate record is maintained, not destroyed, by the Supreme Court administrator. Iowa Code § 907.4 (1981). See Tr. of Oral Arg. 44. In addition, all "criminal history data" may be released to "criminal justice agencies." Iowa Code §§ 692.1(5) and 692.2 (1981). In short, the record of a conviction expunged under Iowa law is not expunged completely.

Under the decision below, perplexing problems would confront those required to enforce federal gun control laws as well as those bound by their provisions. Because, as we have noted, Title IV "is a carefully constructed package of gun control legislation," *Scarborough* v. *United States*, 431 U. S., at 570, Congress, in framing it, took pains to avoid the very problems that the Court of Appeals' decision inevitably would create, such as individualized federal treatment of every expunction law. Congress used unambiguous language in attaching gun control disabilities to any person "who has been convicted" of a qualifying offense. We give full effect to that language.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE REHNQUIST, with whom JUSTICE BRENNAN, JUSTICE STEVENS, and JUSTICE O'CONNOR join, dissenting.

The Gun Control Act provides that any person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" is ineligible for a federal license to ship, transport, or receive any firearm or ammunition in interstate commerce. 18 U. S. C. §§ 922(g) and (h). Thus, as the Court points out, "[i]f Kennison was not

'convicted' in the first place . . . respondent should not be ineligible for licenses on the grounds asserted by the Bureau." *Ante*, at 111. Contrary to the conclusion reached by the Court, I do not believe that Kennison was "convicted." Accordingly, I dissent.

I agree with the Court that whether one has been convicted within the meaning of the Gun Control Act is a question of federal, rather than state, law. *Ante*, at 111–112. Congress did not, however, expressly define the term "conviction" in the Act. Where Congress has defined the term, the Court recognizes that it has given the term different meanings in different statutes. *Ante*, at 112, n. 6. In the Investment Company Act of 1940, Congress expressly provided that the term "convicted" includes "a verdict, judgment, or plea of guilty, or a finding of guilt on a plea of nolo contendere, if such verdict, judgment, plea, or finding has not been reversed, set aside, or withdrawn, whether or not sentence has been imposed." 15 U. S. C. § 80a–2(a)(10). The same definition was used in the Investment Advisers Act of 1940. 15 U. S. C. § 80b–2(a)(6). Congress used a more narrow definition in two sections of the Narcotic Addict Rehabilitation Act of 1966, providing that "'[c]onviction' and 'convicted' mean the final judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere, and do not include a final judgment which has been expunged by pardon, reversed, set aside, or otherwise rendered nugatory." 18 U. S. C. § 4251(e); 28 U. S. C. § 2901(f). Finally, in the Federal Youth Corrections Act, Congress has provided that the term "'conviction' means the judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere." 18 U. S. C. § 5006(g).

Thus at the most, Congress has required the entry of a formal judgment as the signpost of a "conviction." At the least, Congress has required the *acceptance* of a plea. In this case, we have neither. The Court relies on *Kercheval* v. *United States*, 274 U. S. 220 (1927), and *Boykin* v. *Alabama*, 395

U. S. 238 (1969), for the proposition that "[i]n some circumstances, we have considered a guilty plea alone enough to constitute a 'conviction.'" *Ante*, at 112. The Court concludes that in this case "we . . . have more," because the state trial judge "noted" the plea and placed Kennison on probation. *Ante*, at 113. I cannot agree.

Even if *Kercheval* and *Boykin* would otherwise be relevant to our interpretation of the Gun Control Act, both cases spoke of an accepted guilty plea. Whatever a trial court does when it "notes" a plea, it is less, instead of more, than an acceptance of the plea which is preceded by an examination of the defendant to insure that the plea is voluntary.

Where the Iowa deferred judgment statute can be used, "[t]he trial court may, *upon a plea of guilty [and] [w]ith the consent of the defendant* . . . defer judgment and place the defendant on probation." Iowa Code § 789A.1 (1977) (emphasis added) (current version at Iowa Code § 907.3 (1981)). Congress has never before considered such circumstances sufficient for a finding of a "conviction"; there is nothing in the Gun Control Act to infer that Congress has adopted such a standard now. It is likely that at the most Congress intended that a "conviction" be represented by a formal entry of judgment, or at the least an acceptance of a guilty plea. But in either case, such criteria are absent where, following a guilty plea, the Iowa deferred judgment statute is invoked.*

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*The Court points out that respondent acknowledged in oral argument that during the period of Kennison's probation, respondent was disqualified for a license. *Ante*, at 114, n. 8. This disqualification, if it existed, however, would be based on the provision of the Gun Control Act applying to any person "who is under indictment," 18 U. S. C. §§ 922(g) and (h), rather than on a "conviction."

Syllabus

CITY OF LOCKHART *v.* UNITED STATES ET AL.

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

No. 81–802. Argued November 3, 1982—Decided February 23, 1983

Prior to 1973, appellant Texas city was a "general law" city governed by a commission consisting of a mayor and two commissioners, all serving the same 2-year terms. These offices were filled in even-numbered years through at-large elections using a "numbered post" system whereby the two commission posts were designated by number, and each candidate specified the post for which he or she sought election. In 1973, appellant became a "home rule" city, and adopted a new charter whereby it would be governed by a mayor and four councilmen serving staggered 2-year terms, with the mayor and two councilmen being elected in even-numbered years through at-large elections using the numbered-post system and the other two councilmen being similarly elected in odd-numbered years. Forty-seven percent of appellant's population are Mexican-American, but, as of 1977, less than 30% of the registered voters were Mexican-American. A Federal District Court in Texas, in a 1979 suit by the individual appellee and other Mexican-Americans, enjoined further elections under the new plan pending preclearance of electoral changes in the charter under § 5 of the Voting Rights Act of 1965. The Attorney General precleared the changes except to the extent that they incorporate at-large elections, the numbered-post system, and staggered terms for councilmen. Appellant then filed suit under § 5 in the Federal District Court for the District of Columbia, seeking a declaratory judgment that the remaining changes did not have the purpose or effect of denying the voting rights guaranteed by § 5. The District Court compared the new plan to what the old practice would have been without numbered posts on the ground that under Texas law appellant as a general-law city was not entitled to use a numbered-post system. The court held that numbered posts and staggered terms each have the effect of discriminating against protected minorities, particularly in view of the history of racial bloc voting in the city.

Held:

1. Appellant's entire 1973 election plan is subject to preclearance under § 5. Appellant admits that the addition of two seats to its governing body and the introduction of staggered terms are subject to § 5. Appellant also changed the nature of the "continuing" seats, since council posts one and two are not identical to the old commission posts one and two. Moreover, the discriminatory effect of the new seats cannot be de-

termined in isolation from the "pre-existing" elements of the council. Similarly, the impact of any of the seats cannot be evaluated without considering the fact that they are all filled in elections using numbered posts. Pp. 131–132.

2. The 1973 election plan will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. Pp. 132–136.

(a) The proper comparison for purposes of § 5 is between the new system and the system actually in effect under the old practice, regardless of what state law might have required. Section 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practices already in effect. Pp. 132–133.

(b) Under the principle that § 5's purpose is to insure that no changes in voting procedures will be made that would lead to retrogression in minority voting strength, *Beer* v. *United States*, 425 U. S. 130, the new system, when compared to the prior practice, does not have the effect of denying the right to vote guaranteed by § 5. Here, where appellant has used numbered posts for many years, effective single-shot voting would be equally impossible under both the old and new systems, and individual races could be highlighted under both systems. Similarly, the introduction of staggered terms has not reduced the opportunity for single-shot voting or increased the highlighting of individual races. Although there may have been no improvement in minorities' voting strength, neither has there been any retrogression. Pp. 133–136.

559 F. Supp. 581, vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined, and in Parts I and II of which BLACKMUN, J., joined. MARSHALL, J., *post*, p. 136, and BLACKMUN, J., *post*, p. 148, filed opinions concurring in part and dissenting in part. WHITE, J., dissented.

Walter H. Mizell argued the cause for appellant. With him on the briefs was *Douglas K. Spaulding*.

Jose Garza argued the cause for appellee Cano. With him on the brief were *Joaguin G. Avila*, *Morris J. Baller*, *William L. Robinson*, and *Norman J. Chachkin*. *Solicitor General Lee*, *Assistant Attorney General Reynolds*, and *Brian K. Landsberg* filed briefs for the United States.

JUSTICE POWELL delivered the opinion of the Court.

This case requires us to consider the application of § 5 of the Voting Rights Act to the election plan adopted by appellant City of Lockhart in 1973.

I

The City of Lockhart is a community of just under 8,000 people in Caldwell County, Texas, 30 miles south of Austin. According to the most recent census figures, almost 47% of the city's population are Mexican-American. As of 1977, however, fewer than 30% of the city's registered voters were Mexican-American.

Before 1973, Lockhart was a "general law" city. Under Texas law, general-law cities have only those powers that the State specifically permits them to possess. As authorized by state law, Lockhart was governed by a commission consisting of a mayor and two commissioners, all serving the same 2-year terms. These offices were filled in April of even-numbered years through at-large elections using a "numbered post" system. Under this system, the two commissioner posts were designated by number, and each candidate for commissioner specified the post for which he or she sought election. Thus each race was effectively a separate election for a separate office.[1]

In 1973, Lockhart adopted a new charter and became a "home rule" city. In contrast to a general-law city, a home-rule city has authority to do whatever is not specifically prohibited by the State. This includes discretion to define the form of city government and to establish the procedures for city elections. As part of its new charter, Lockhart chose to be governed by a city council consisting of a mayor and four

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[1] This numbered-post system may be contrasted with a system in which all of the candidates for the two commissioner posts run in a single election, and the two receiving the greatest number of votes are elected.

councilmen serving staggered 2-year terms. The mayor and two of the councilmen are elected in April of even-numbered years through at-large elections using the numbered-post system. The other two councilmen are similarly elected in odd-numbered years.

Under § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c,[2] covered jurisdictions may enforce changes in their election laws only after obtaining "preclearance" in one of two ways: (i) they may obtain a declaratory judgment in the United States District Court for the District of Columbia that the changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a

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[2] Section 5 provides, in relevant part, as follows:

"[W]henever a State or political subdivision [such as Lockhart] shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, 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 4(f)(2) [42 U. S. C. § 1973b(f)(2) (prohibiting discrimination against members of language minority groups)], 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 . . . . Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. . . . Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of [28 U. S. C. § 2284] and any appeal shall lie to the Supreme Court."

language minority group, or (ii) they may submit the changes to the Attorney General, who then has 60 days in which to object. The Act was extended to the State of Texas in 1975, covering changes in election procedures from those in effect on November 1, 1972. See 40 Fed. Reg. 43746 (1975).

In 1977, four Mexican-Americans, including appellee Alfred Cano, challenged the constitutionality of Lockhart's election procedures under the 1973 charter. *Cano* v. *Kirksey*, No. A–77–CA–133 (WD Tex., dism'd Oct. 8, 1982), appeal pending *sub nom. Cano* v. *Chesser*, No. 82–1616 (CA5, filed Nov. 8, 1982). In the course of that suit, the plaintiffs discovered that Lockhart had never obtained approval under § 5 for the changes instituted in 1973. A second suit then was brought to enjoin the city from using the new election procedures pending § 5 preclearance. The United States District Court for the Western District of Texas granted injunctive relief.[3] *Cano* v. *Chesser*, No. A–79–CA–0032 (Mar. 2, 1979) (three-judge court).

Once future elections were enjoined pending § 5 approval, Lockhart sought preclearance. The Attorney General, however, interposed an objection to the election procedures under the 1973 charter to the extent that they incorporate at-large elections, the numbered-post system, and staggered terms for councilmen. Lockhart then filed the present suit for a declaratory judgment in the United States District Court for the District of Columbia. Cano intervened as a defendant. As required by § 5, a three-judge court was convened to decide the case.

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[3] In granting the injunction, the District Court lacked jurisdiction to pass on the discriminatory purpose or effect of the changes. All it could do was determine (i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy was appropriate. See, *e. g.*, *United States* v. *Board of Supervisors of Warren County*, 429 U. S. 642, 645–647 (1977) *(per curiam)*. Lockhart did not appeal the District Court's finding that the 1973 charter included changes that are covered by § 5.

The District Court, recognizing that the city must prove both the absence of discriminatory effect and discriminatory purpose, bifurcated the trial. Addressing only the first issue, it held, over the dissent of Chief Judge Spottswood Robinson of the United States Court of Appeals for the District of Columbia Circuit, that Lockhart's election procedures have the effect of discriminating against protected minorities.[4] The court first decided that the entire election plan was subject to § 5's requirements. It then compared Lockhart's current system to that used before the 1973 charter, except that the court refused to recognize the city's prior use of numbered posts. This was justified on the ground that the use of numbered posts was not explicitly authorized by Texas law, and thus was illegal for a general-law city. The court concluded that numbered posts and staggered terms each have a discriminatory impact, particularly in view of the history of racial bloc voting in Lockhart.

Chief Judge Robinson, in dissent, agreed with the majority that Lockhart's city-council election procedures were subject to § 5 preclearance, and that the use of numbered posts and staggered terms tended to curb the ability of minorities to elect minority candidates. But relying on *Beer* v. *United States*, 425 U. S. 130 (1976), he concluded that there was no retrogression in minority voting strength.

The city appealed the judgment to this Court, contending that the District Court misconstrued the scope of § 5, and that, in any event, there has been no retrogression in minority voting strength. The United States, which defended the suit below, now agrees with Lockhart that the changes have no retrogressive effect on the voting rights of Mexican-Americans. Cano continues to defend the result below. We noted probable jurisdiction. 455 U. S. 987 (1982).

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[4] In view of its decision on discriminatory effect, it was unnecessary for the District Court to reach the issue of discriminatory purpose.

II

We consider first the scope of § 5's coverage in the circumstances of this case. Lockhart concedes that § 5 applies to its electoral changes, and that the addition of two seats to its governing body and the introduction of staggered terms are covered changes. It contends, however, that § 5 does not apply to the "continuation" of the two old seats and the continued use of numbered posts. We conclude that there has been a change with respect to all of the council seats and to the use of numbered places.

In moving from a three-member commission to a five-member council, Lockhart has changed the nature of the seats at issue. Council posts one and two are not identical to the old commission posts one and two. For example, they now constitute only 40% of the council, rather than 67% of the commission. Moreover, one cannot view these seats in isolation, for they are an integral part of the council. The possible discriminatory purpose or effect of the new seats, admittedly subject to § 5, cannot be determined in isolation from the "pre-existing" elements of the council. Similarly, the numbered-post system is an integral part of the new election plan. The impact of any of the seats cannot be evaluated without considering the fact that they are all filled in elections using numbered posts.[5] We therefore hold that the

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[5] Lockhart seeks to rely on *Beer* v. *United States*, 425 U. S. 130 (1976), but that decision is readily distinguishable on this point. In *Beer*, we considered the reapportionment of the New Orleans councilmanic districts. The New Orleans City Council was composed of seven members, two elected at large and five elected from districts. New Orleans had reapportioned these districts through a city ordinance. "The ordinance . . . made no reference to the at-large councilmanic seats. Indeed, since those seats had been established . . . by the city charter, an ordinance could not have altered them; any change in the charter would have required approval by the city's voters." *Id.*, at 138–139. Furthermore, the ordinance did not affect the at-large councilmen in any other way. It did not change their titles. It did not increase or decrease the size of the city council. In

entire system introduced in the 1973 charter is subject to preclearance.

III

Having decided that Lockhart's entire 1973 election plan is subject to § 5, we now determine whether the plan's changes that have not been precleared by the Attorney General have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

A

The first step is to identify the appropriate comparison. The District Court compared the new plan to what the old practice would have been without numbered posts. It justified this comparison on the ground that a general-law city such as Lockhart was not entitled under Texas law to use a numbered-post system. The court, distinguishing *Perkins* v. *Matthews*, 400 U. S. 379 (1971), reasoned that recognition of the actual practice rather than the legal requirement would reward the city for its past illegality. It preferred instead to draw its comparison in a way that would maximize the reach of § 5.

Texas law is not entirely clear on this point,[6] but that is essentially irrelevant. The proper comparison is between the new system and the system actually in effect on November 1, 1972,[7] regardless of what state law might have required. This basis of comparison was established in *Perkins* v. *Matthews*, *supra*. There a city conducted the relevant

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short, the ordinance affected only the district councilmen. It was only in these circumstances that "[t]he at-large seats . . . were not subject to review . . . under § 5." *Id.*, at 139.

[6] There does not appear to be any Texas case law on the subject. Lockhart had used its numbered-post system for over 50 years without challenge, suggesting a presumption of legality under state law.

[7] Since no election was held on November 1, 1972, we consider the system that would have been in effect if there had been an election then. That, presumably, is the system that was used without exception between 1917 and 1973. See *Perkins* v. *Matthews*, 400 U. S., at 394–395.

election for aldermen by wards, despite a state statute requiring at-large elections. As the *Perkins* Court explained:

> "In our view, § 5's reference to the procedure 'in force or effect on November 1, 19[72],' must be taken to mean the procedure that would have been followed if the election had been held on that date." 400 U. S., at 394.

This conclusion was based on the plain reading of the section's language. It is, moreover, in accord with the Act's underlying policy. Section 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practices already in effect.[8]

B

We now consider whether the aspects of the new system to which the Attorney General objected, when compared to the practices in use in Lockhart prior to the new charter, have the effect of denying or abridging the right to vote guaranteed by § 5. Our inquiry is guided by the principles of *Beer* v. *United States*, 425 U. S. 130 (1976).[9]

Beer involved the reapportionment of the New Orleans councilmanic districts. Prior to the reapportionment, black citizens had a clear majority of the population and a bare majority of the registered voters in one of the five districts. In a second district, they had just under a majority of the population. Under the new plan, blacks had slightly larger popu-

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[8] We also believe that the Attorney General and the District Court for the District of Columbia should be free to decide preclearance questions on the essentially factual issues of discriminatory purpose and effect. We doubt that Congress intended to force either into speculation as to state law.

[9] Cano argues on appeal that Congress altered the *Beer* standard with the recent amendment to § 2 of the Voting Rights Act, 79 Stat. 437, as amended, 42 U. S. C. § 1973, see Voting Rights Act Amendments of 1982, Pub. L. 97–205, 96 Stat. 131. The District Court did not pass on this argument, and we decline to review it in the first instance. The issue remains open on remand.

lation and voter majorities in the first district, and a bare majority of the population in the second. Although the new plan may have remained discriminatory, it nevertheless was not a regressive change. The Court explained that "[t]he language of § 5 clearly provides that it applies only to proposed changes in voting procedures." *Id.*, at 138. "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.*, at 141.[10] Since the new plan did not increase the degree of discrimination against blacks, it was entitled to § 5 preclearance.

We apply these principles to the two aspects of the new system that remain at issue in this case: the numbered-post system and staggered terms for councilmen.[11] It is recognized that a numbered-post system, in some circumstances, may have the effect of discriminating against minorities in a

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[10] Contrary to the suggestion in JUSTICE MARSHALL's dissent, *post*, at 142–143, the *Beer* Court did not distinguish between ameliorative changes and changes that simply preserved current minority voting strength. The Court explained that the purpose of § 5 was to prohibit only retrogressive changes. 425 U. S., at 141. It then applied this standard to the New Orleans reapportionment, agreeing that an ameliorative change was *a fortiori* permissible. *Ibid.* The only suggestion in the several *Beer* opinions that there might be a distinction between ameliorative and nonameliorative changes was not in the Court's opinion; rather it was in JUSTICE MARSHALL's dissent, *id.*, at 150, n. 6, and he explained why the distinction is "unrealistic," *ibid.* Cf. *id.*, at 143 (WHITE, J., dissenting) ("I cannot agree [with the Court] that § 5 . . . reaches only those changes in election procedures that are more burdensome to the complaining minority than pre-existing procedures"); see also *City of Richmond* v. *United States*, 422 U. S. 358, 388 (1975) (BRENNAN, J., dissenting) ("[T]he fundamental objective of § 5 [is] the protection of *present* levels of voting effectiveness for the black population") (emphasis in original). JUSTICE MARSHALL's current dissenting opinion essentially reiterates the position stated forcefully in his *Beer* dissent—a position rejected by a majority of the Court at that time.

[11] The Attorney General also objected to the use of at-large elections, but the District Court did not hold, and the parties before us do not argue, that the continued existence of at-large elections has a retrogressive effect.

city where racial bloc voting predominates. Use of numbered posts may frustrate the use of "single-shot voting," a technique that permits concentrating support behind a single candidate. Lockhart has used numbered posts, however, consistently since 1917. Effective single-shot voting may be impossible now, but it was equally impossible under the old system. The new system may highlight individual races, but so did the old. As Chief Judge Robinson concluded, "the voting strength of Lockhart's minorities, whether or not enhanced, [has not been] diminished one whit." 559 F. Supp. 581, 595 (1981). The District Court erred in finding that the continued use of numbered posts has a retrogressive effect on minority voting strength.

The use of staggered terms also may have a discriminatory effect under some circumstances, since it, too, might reduce the opportunity for single-shot voting or tend to highlight individual races. But the introduction of staggered terms has not diminished the voting strength of Lockhart's minorities. Under the old system, the voters faced two at-large elections with numbered posts every two years. Now they face two at-large elections with numbered posts every year. The inability to use single-shot voting is identical. The degree of highlighting of individual races is identical. Minorities are in the same position every year that they used to be in every other year. Although there may have been no improvement in their voting strength, there has been no retrogression either.

Cano argues that the increased frequency of elections made necessary by staggered terms has resulted in retrogression. The more frequent elections are said to reduce voter turnout, and this has a disproportionate impact on minority voters. In support of this argument, he cites figures from the April 1975 election. That year, when voter turnout was unusually low, only 5.7% of the voters were Mexican-Americans. In other years since 1973, the percentage of Mexican-American voters has been three to six times as great. These

figures, however, are misleading. In the April 1975 election, both council candidates were running unopposed, and neither candidate was Mexican-American. This undoubtedly explains both the lower overall turnout and the lower turnout among Mexican-Americans. For other elections since 1973, the overall turnout and the Mexican-American turnout were consistently higher than they were before the new charter, despite the fact that the population increased only slightly. In 1978, a Mexican-American candidate was elected in Lockhart for the first time in its history, after five years of annual elections. The record, therefore, contradicts Cano's argument. The District Court erred in finding that the introduction of staggered terms has had a retrogressive effect on minority voting strength.

IV

Applying the standards of *Beer* v. *United States*, we conclude that the election changes introduced by the 1973 Lockhart City Charter will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. The District Court's findings to the contrary were clearly erroneous. We accordingly vacate the District Court's judgment, and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE dissents.

JUSTICE MARSHALL, concurring in part and dissenting in part.

I disagree fundamentally with the Court's view that § 5 of the Voting Rights Act permits jurisdictions with a history of voting discrimination to adopt new voting schemes which perpetuate that discrimination. Congress intended the preclearance requirement to be a powerful measure for advancing the goals of the Fifteenth Amendment, and specifically reaffirmed that intention when it reenacted the Voting

Rights Act in 1982. By holding that § 5 forbids only electoral changes that *increase* discrimination, the Court reduces § 5 to a means of maintaining the status quo. Because the Court's interpretation of § 5 is flatly inconsistent with both the language and the purpose of that provision and is not supported by the decision in *Beer* v. *United States*, 425 U. S. 130 (1976), I dissent from Parts III and IV of the Court's opinion.

I would affirm the judgment below on the basis of the District Court's conclusion, which this Court in no way questions, that the city of Lockhart's "imposition of the numbered-post and staggered-term provisions has clearly had and *will continue to have*" a discriminatory effect on Mexican-American voters. 559 F. Supp. 581, 588 (1981) (emphasis added).[1]

Indeed, it bears repeating and should be reemphasized that the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson*, 307 U. S. 268, 275 (1939).

I

The Court's view that § 5 of the Voting Rights Act permits the adoption of a discriminatory election scheme, so long as the scheme is not more discriminatory than its predecessor, is inconsistent with both the language and the purpose of that provision. In focusing exclusively on whether Lockhart's new election scheme worsens the position of minority voters, and ignoring whether the new scheme itself has a discriminatory effect, see *ante*, at 133–136, the Court substitutes an inquiry of its own invention for the inquiry mandated by § 5. For the reasons elaborated below, I believe that § 5 forbids preclearance of a proposed election procedure that perpetuates existing discrimination.

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[1] I also agree with JUSTICE BLACKMUN that the decision below should be affirmed on the separate ground that the District Court's factual finding that the electoral changes had a retrogressive effect is not clearly erroneous.

A

The Court's interpretation of § 5 is inconsistent with the language of that provision. Section 5 provides that a covered jurisdiction must obtain preclearance of any new "voting qualification, or prerequisite to voting, or standard, practice, or procedure with respect to voting." 79 Stat. 439, as amended, 42 U. S. C. § 1973c. The jurisdiction bears the burden of proving that the proposed

> "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . will not have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group] . . . ." *Ibid.*

By its terms § 5 focuses on the effect of the new voting procedure itself, *not* on the difference between the new procedure and its predecessor. The statute specifically requires that the new procedure not have the effect of denying or abridging the right to vote on a discriminatory basis. Although it is relevant for purposes of § 5 whether the change to the new practice diminishes minority voting strength, to say that the effect of the change is part of the § 5 inquiry is far different from holding, as the Court does, that this is the *sole* inquiry in determining whether a new procedure has a discriminatory effect. Nothing in the language of § 5 in any way suggests that a discriminatory election procedure satisfies § 5 as long as the procedure does not increase the degree of discrimination.

B

The Court's view is also wholly inconsistent with the purpose of § 5. The legislative history of the Voting Rights Act leaves no doubt that Congress intended § 5 to prohibit the covered jurisdictions from adopting voting procedures which perpetuate past discrimination, which is precisely what the procedures proposed by Lockhart would do. Moreover, Congress reaffirmed this intent when it reenacted the Voting Rights Act in 1982.

The Voting Rights Act of 1965 was enacted as a direct response to the failure of prior efforts to implement the guarantees of the Fifteenth Amendment. Congress recognized that voting discrimination was a nationwide problem, and it therefore enacted a general prohibition of discriminatory practices. See, *e. g.*, §§ 2, 3, 79 Stat. 437, as amended, 42 U. S. C. §§ 1973, 1973a. Congress was particularly concerned, however, with the "systematic exclusion of Negroes from the polls that characterizes certain regions of this Nation." H. R. Rep. No. 439, 89th Cong., 1st Sess., 8 (1965). It identified a number of jurisdictions that had "engaged in widespread violations of the 15th amendment over a period of time," *id.*, at 14,[2] and provided that these jurisdictions would be subject to certain stringent remedial measures that were not made applicable nationwide. The most important of these remedial measures was the preclearance requirement of § 5.

The specific purpose of § 5 was to prevent these jurisdictions from continuing the pervasive practice of adopting new voting procedures which perpetuated existing discrimination. Congress was alarmed at the success with which certain States had evaded the strictures of earlier voting laws by resorting to "the extraordinary stratagem of contriving new rules . . . for the sole purpose of *perpetuating* voting discrimination in the face of adverse federal court decrees." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 335 (1966) (footnote omitted) (emphasis added). The historical experience of attempts to enforce voting laws in those States revealed that "[b]arring one contrivance too often has caused no change in result, only in methods." H. R. Rep. No. 439, *supra*, at 10. See also S. Rep. No. 162, 89th Cong., 1st

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[2] See also H. R. Rep. No. 94–196, p. 16 (1975) (explaining expansion of list of covered jurisdictions to include those with a "systematic pattern of voting discrimination and exclusion against minority group citizens" who are from environments in which the dominant language is other than English).

Sess., pt. 3, p. 5 (1965).[3] Congress concluded that enforcement of the Fifteenth Amendment and the specific prohibitions of the Voting Rights Act of 1965 would not be effective if these States remained free to adopt new electoral procedures that continued to discriminate against minority voters. See *South Carolina* v. *Katzenbach*, *supra*, at 335.

In order to prevent such evasive maneuvers, Congress required jurisdictions with a pervasive history of voting discrimination to obtain preclearance of any new voting plan. As this Court has recognized, § 5 was designed to suspend "all new voting regulations pending review by federal authorities to determine whether their use would *perpetuate* voting discrimination." 383 U. S., at 316 (emphasis added). "After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress . . . shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victims." *Id.*, at 328.

When Congress reenacted the Act in 1970, 1975, and 1982, it consistently reaffirmed the central purpose of § 5: to promote the attainment of voting equality by preventing the adoption of new voting procedures which perpetuate past discrimination. The House Report accompanying the 1970 extension of the Act viewed § 5 as a means of "preclud[ing]" the covered States from resorting to "new voting rules . . . in order to *perpetuate* discrimination." H. R. Rep. No. 91–397, pp. 6–7 (1969) (emphasis added).[4] Similarly, when

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[3] The House Report accompanying the 1965 Act described at great length the "ingenuity and dedication of those determined to circumvent the guarantees of the 15th amendment." H. R. Rep. No. 439, 89th Cong., 1st Sess., 10 (1965). Certain jurisdictions would adopt facially neutral changes in voting requirements which ensured that "white political supremacy was unlawfully *maintained*." S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3, p. 8 (1965) (emphasis added).

[4] The Senate Judiciary Committee stated:

"If it had not been for Section 5 of the present Act, there is no telling to what extent the states and communities covered might have legislated and manipulated *to continue their historical practice* of excluding Negroes from

Congress extended and amended the Act in 1975, it stated unequivocally that § 5 was adopted "[i]n order to insure that any future practices of these jurisdictions be free of both discriminatory purpose and effect." H. R. Rep. No. 94–196, p. 8 (1975); S. Rep. No. 94–295, p. 15 (1975). See also H. R. Rep. No. 94–196, *supra*, at 8, 57; S. Rep. No. 94–295, *supra*, at 15–18. When Congress reenacted the Voting Rights Act in 1982, it stressed that § 5 is "designed to insure that old devices for disenfranchisement would not simply be replaced by new ones," to prohibit new "complex and subtle . . . schemes [that] perpetuate the results of past voting discrimination," and to "eradicat[e] the continuing effects of past discrimination." S. Rep. No. 94–417, pp. 6, 12, 44 (1982).[5]

The Court's interpretation of § 5 disregards the central purpose of that provision. The Court holds that § 5 is satisfied as long as a change in electoral procedure does not increase the level of discrimination, even if the new procedure perpetuates past discrimination. In holding that § 5 prevents only the adoption of procedures that worsen the position of minority voters, the Court completely ignores the very reason why Congress imposed the preclearance requirement on jurisdictions with a pervasive history of voting dis-

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the Southern political process." Joint Views of Ten Members of the (Senate) Judiciary Committee Relating to Extension of the Voting Rights Act of 1965, 91st Cong., 2d Sess., printed at 116 Cong. Rec. 5521 (1970) (emphasis added), cited in S. Rep. No. 97–417, p. 7 (1982).

[5] This Court's decisions have consistently recognized that § 5 was designed to prevent the adoption of new electoral procedures that would maintain pre-existing voting discrimination. In *Allen* v. *State Board of Elections*, 393 U. S. 544, 548 (1969), the Court stated that Congress enacted § 5 to counter the historical practice of some States "of simply enacting new and slightly different requirements with *the same discriminatory effect*" (emphasis added) (footnote omitted). Most recently, in *City of Rome* v. *United States*, 446 U. S. 156, 182 (1980), the Court observed that Congress readopted the § 5 preclearance requirement in 1975 in order "to *promote further amelioration* of voting discrimination" and "to *counter the perpetuation* of 95 years of pervasive voting discrimination" (emphasis added) (quoted in S. Rep. No. 97–417, *supra*, at 10, n. 19, 53.

crimination: to prevent the *perpetuation* of past discrimination through the adoption of new discriminatory procedures. The Court's interpretation of § 5 permits a covered jurisdiction to circumvent the Fifteenth Amendment and the general prohibitions of the Voting Rights Act in precisely the way that Congress sought to foreclose.

II

The Court's interpretation of § 5 is not supported by the decision in *Beer* v. *United States*, 425 U. S. 130 (1976). *Beer* did not hold that a nonameliorative change in electoral procedure should be precleared even if the new procedure perpetuates past discrimination. Today's decision represents an extension of *Beer* which is unsupported by any of the purposes of the Voting Rights Act and is inconsistent with Congress' understanding of § 5 when it reenacted the Voting Rights Act in 1982.

A

The Court's decision in *Beer* concerned an electoral change that improved the voting strength of minorities. In *Beer* the Court found that the reapportionment plan at issue *enhanced* the position of Negro voters, since it increased the number of districts in which they constituted a majority. 425 U. S., at 141–142. The Court stated its holding as follows: "We conclude . . . that such an *ameliorative* new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." *Id.*, at 141 (emphasis added). That the Court viewed the ameliorative nature of the reapportionment as central to its holding is confirmed by footnote 14 of the opinion, which states: "It is possible that a legislative reapportionment could be a substantial improvement over its predecessor in terms of lessening racial discrimination, and yet nonetheless continue so to discriminate on the basis of race or color as to be unconstitutional." *Id.*, at 142, n. 14.[6]

[6] It is hardly an answer to say, as the Court does, *ante*, at 134, n. 10, that *Beer* did not "distinguish between" ameliorative changes and changes that

Beer did not involve a change in electoral procedure which, like the one before us, preserves the existing level of discrimination against minority voters. A new electoral scheme which does nothing more than perpetuate past discrimination differs in a critical way from a voting scheme which enhances minority voting strength. By improving the position of minority voters, an ameliorative change represents some progress in attaining voting equality, the fundamental goal of the Voting Rights Act. In contrast, an electoral scheme that does not enhance minority voting strength but merely maintains existing discrimination does not further any conceivable purpose of the Act. Although the reapportionment in *Beer* may not have eliminated past discrimination, at least it enhanced the political position of minority voters. This cannot be said of Lockhart's 1973 charter, which merely continues the pattern of voting discrimination that has prevailed in that city.

While I dissented in *Beer* on the ground that preclearance of any electoral plan which has a discriminatory effect is inconsistent with the mandate of § 5, the departure in *Beer* from the plain language of § 5 was at least reconcilable with the broad purposes of the Voting Rights Act. There is no similar justification for today's decision. In light of the language and purpose of § 5 and the overall purposes of the Act, it is perverse to interpret § 5 to authorize preclearance of

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do not enhance minority voting strength. The decision in *Beer*, as Congress recognized when it reenacted § 5 in 1982, see *infra*, at 145–146, concerned only an ameliorative reapportionment, and the Court specifically stated its holding in terms of a change in electoral procedure that is ameliorative. It simply had no occasion to consider the proper treatment under § 5 of discriminatory electoral procedures that do not lessen past discrimination. Today's decision extends *Beer* to cover electoral schemes that are not ameliorative. The Court does not even attempt to demonstrate that this extension can be squared with the language, purpose, and legislative history of § 5, or that it serves any purpose of the Voting Rights Act. The reason for the Court's silence is obvious: Congress clearly intended § 5 to prohibit the adoption of electoral procedures that perpetuate past discrimination.

electoral changes that maintain a discriminatory status quo. The Court's interpretation of § 5 robs it of its basic function of preventing the perpetuation of past discrimination, without in any way advancing a single purpose of the Voting Rights Act.

B

To support its interpretation of § 5, the Court relies solely on a statement in *Beer* to the effect that § 5 is designed to prevent retrogression in the position of minority voters. *Ante*, at 134, citing 425 U. S., at 141. That statement, which was made in an opinion addressing an electoral change that *reduced* discrimination, rested on an isolated passage in the legislative history of the 1975 reenactment of the Voting Rights Act. That passage does not support today's decision. The passage appears in a section of a House Judiciary Committee Report which criticized the narrow view of § 5 that had prevailed within the Department of Justice. The Committee noted that the Department of Justice had chosen to focus exclusively on "whether the administration of [an electoral] change has been, is, or will be without bias." H. R. Rep. No. 94–196, p. 60 (1975). The Committee criticized this view of § 5 as unduly narrow:

> "We recommend that the Department of Justice, in determining whether a change affecting voting will have the effect of discriminating on the basis of race or color, apply the standard as Congress intended it and as the Supreme Court of the United States has interpreted it. That standard is not fully satisfied by an indication that the administration of the change affecting voting will be impartial or neutral. Rather that standard can only be fully satisfied by determining . . . whether the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change affecting voting in

> view of the political, sociological, economic, and psychological circumstances within the community proposing the change." *Ibid.*

It may be inferred from this passage that the Committee intended § 5 to prohibit changes that would diminish the voting strength of minorities. There is no indication, however, that in criticizing the Department of Justice for ignoring the effect of the change as part of the "broader inquiry" into discriminatory effect under § 5, *ibid.*, the Committee meant to suggest that a discriminatory scheme should be precleared as long as it does not increase the existing level of discrimination. The Report simply does not address the proper treatment of such a scheme.

C

When Congress reenacted § 5 in 1982, it did so on the understanding that § 5 does not allow covered jurisdictions to adopt voting procedures which maintain existing discrimination. Congress reenacted § 5 on the assumption that the rule laid down in *Beer* governed *ameliorative* changes. In a section of its Report specifically addressing the reenactment of § 5, the Senate Judiciary Committee stated:

> "Under the rule in *Beer* v. *United States*, 425 U. S. 130 (1976), a voting change which is ameliorative is not objectionable unless the change 'itself so discriminates on the basis of race or color as to violate the Constitution.' 425 U. S., at 141; see also 142, n. 14 (citing to the dilution cases from *Forston* v. *Dorsey*[, 379 U. S. 433 (1965),] through *White* v. *Regester*[, 412 U. S. 755 (1973]). In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2." S. Rep. No. 97–417, p. 12, n. 31 (1982).

In stating the "rule in *Beer*" in terms of the holding of that decision, the Committee clearly indicated its understanding that that rule applies to *ameliorative* changes. There is no

indication that the Committee understood *Beer* also to apply to nonameliorative changes. Indeed, the implication is to the contrary, and the legislative history of the 1982 Amendments, including the same Report from which this passage is taken, shows that Congress repeatedly stressed that § 5 is intended to prevent covered jurisdictions from adopting voting schemes that perpetuate existing discrimination. See *supra*, at 141.

In addition, the second sentence of the passage quoted above confirms that Congress did not intend to limit the focus of § 5 to whether an electoral change worsens the position of minority voters. The Committee indicated that a new procedure would be denied preclearance under § 5 if it violated the standards governing the amended § 2. A voting procedure violates § 2 if it "results in a denial or abridgement" of the right to vote on a discriminatory basis, whether or not the procedure worsens the position of minority voters. Pub. L. 97–205, § 3, 96 Stat. 134, 42 U. S. C. § 1973 (1982 ed.).[7] In reenacting § 5 with the intent that a voting pro-

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[7] Section 2 provides:

"(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

"(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

cedure violating § 2 should be denied preclearance under § 5, Congress surely made clear its understanding that § 5 forbids the adoption of a voting procedure that maintains existing discrimination whether or not the change is retrogressive.

There is no justification for the Court's refusal to consider the 1982 reenactment of § 5 and amendment of § 2. *Ante*, at 133, n. 9. Both went into effect immediately and are applicable to this case. Pub. L. 97–205, § 6, 96 Stat. 135. In deciding that Lockhart's 1973 charter does not have the "effect of abridging or denying the right to vote" within the meaning of § 5, the Court is bound to apply the law as it now stands. Although Congress reenacted § 5 without change, its understanding of the scope of that provision is plainly relevant to the issue before us. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 384–388 (1982). By extending *Beer* and holding that discriminatory electoral schemes may be precleared as long as they do not increase the level of discrimination, the Court has interpreted § 5 in a manner squarely inconsistent with Congress' intent in reenacting that provision.

III

In my view § 5 does not authorize the preclearance of any electoral scheme that is discriminatory in effect and that does not reduce past discrimination. The very purpose of § 5 is to prevent covered jurisdictions from circumventing the protections of the Voting Rights Act and the Constitution by the adoption of electoral schemes which perpetuate past discrimination. The considerations that may support the preclearance of ameliorative schemes have no application to electoral changes which perpetuate past discrimination or which actually increase the level of discrimination.

An electoral change which preserves the status quo should be denied preclearance if the new procedure continues to deny minority voters an equal chance to participate in the

electoral process and elect candidates of their choice.[8] The District Court noted that although Mexican-Americans constitute over 40% of the population of Lockhart, only one Mexican-American has ever served on the governing body. Because of the established pattern of racial bloc voting in Lockhart, Mexican-American voters can elect candidates of their choice only by leveraging their vote through single-shot voting. As the District Court recognized, the imposition of numbered posts and staggered elections, both features of the 1973 charter, diminishes this leverage to the detriment of minority-supported candidates.[9] The District Court concluded that the use of staggered terms and numbered seats in Lockhart has had and will continue to have a "discriminatory effect on Mexican-American voters' ability to elect candidates of their choice." Since this conclusion is undisturbed by the Court, § 5 preclearance should be denied for the simple reason that preclearance of a voting scheme that will perpetuate a history of voting discrimination is flatly inconsistent with the very purpose of § 5.

JUSTICE BLACKMUN, concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion, but I dissent from Parts III and IV. My review of the record convinces me that the three-judge District Court's factual finding that the electoral changes introduced in 1973 had a retrogressive

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[8] This is the test that governs the determination of whether a voting procedure "results in a denial or abridgement" of the right to vote in violation of § 2 as recently amended. See n. 7, *supra*. See also S. Rep. No. 97–417, p. 28 (1982); see generally *id.*, at 15–43.

[9] Congress specifically identified numbered posts and staggered terms as "discriminatory elements of the elections process" which "often dilute emerging minority political strength" "in the covered jurisdictions, where there is severe racially polarized voting." H. R. Rep. No. 97–227, p. 18 (1981). See also S. Rep. No. 97–417, *supra*, at 10 (identifying numbered posts as one of the "impediments that still face minority voters").

effect on the voting rights of Mexican-Americans in the city of Lockhart is not clearly erroneous. I therefore would affirm the judgment of the District Court. At the very least, I would remand the case to that court for it to determine whether the Voting Rights Act Amendments of 1982, Pub. L. 97–205, 96 Stat. 131, have altered the applicable standard under § 5.

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC. *v.* ABBOTT LABORATORIES ET AL.

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

No. 81–827. Argued November 8, 1982—Decided February 23, 1983

Petitioner trade association of retail pharmacists and pharmacies filed an antitrust suit in Federal District Court against respondent pharmaceutical manufacturers, the Board of Trustees of the University of Alabama, which operates pharmacies in connection with its hospitals, and a county hospital pharmacy. Petitioner alleged that respondent manufacturers violated the price-discrimination proscriptions of the Robinson-Patman Act by selling their products to respondent hospital pharmacies at prices lower than those charged petitioners' members for like products, and that respondent pharmacies knowingly induced such lower prices in violation of the Act and sold the drugs to the general public in direct competition with privately owned pharmacies. The District Court granted respondents' motions to dismiss the complaint, holding that state purchases are beyond the Act's intended reach. The Court of Appeals affirmed.

Held: The sale of pharmaceutical products to state and local government hospitals for resale in competition with private pharmacies is not exempt from the Act's proscriptions. Pp. 153–171.

(a) The Act by its terms does not exempt state purchases, and the statutory language is sufficiently broad to cover governmental bodies. Thus, the Act's plain language strongly suggests that there is no exemption for state purchases to compete with private enterprise. Pp. 154–157.

(b) Such an exemption is not supported by the purposes of the antitrust laws, including the Robinson-Patman Act. Those laws represent a carefully studied attempt to bring within them every person engaged in business whose activities might restrain or monopolize commercial intercourse among the States. And the Act's history does not reveal any legislative intention to enable a State, by an unexpressed exemption, to enter private competitive markets with congressionally approved price advantages. Pp. 157–162.

(c) Nor is respondents' contention that state purchases are outside the Act's scope clearly supported by subsequent legislative events (particularly the hearings on the Act held in the late 1960's) or by court decisions or the interpretations of commentators and executive officials.

Thus, Congress cannot be said to have left untouched a universally held interpretation of the Act. Pp. 163–170.

(d) It is not for this Court to indulge in the business of policymaking in the field of antitrust legislation. The legislative history is replete with references to the economic evil of large organizations purchasing from other large organizations for resale in competition with small, local retailers. To create an exemption in this case clearly would be contrary to Congress' intent. Pp. 170–171.

656 F. 2d 92, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, and BLACKMUN, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 171. O'CONNOR, J., filed a dissenting opinion, in which BRENNAN, REHNQUIST, and STEVENS, JJ., joined, *post*, p. 174.

Joe L. Tucker, Jr., argued the cause and filed briefs for petitioner.

David Klingsberg argued the cause for respondents. With him on the brief for respondents Abbott Laboratories et al. was *Michael Malina*. *John J. Coleman, Jr.*, *E. Mabry Rogers*, and *Ina B. Leonard* filed a brief for respondent Board of Trustees of the University of Alabama.*

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the sale of pharmaceutical products to state and local government hospitals for resale in competition with private retail pharmacies is exempt from the proscriptions of the Robinson-Patman Act.

I

Petitioner, a trade association of retail pharmacists and pharmacies doing business in Jefferson County, Alabama,

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*Briefs of *amici curiae* urging reversal were filed by *Paul L. O'Brien* and *Frank M. Northam* for the American Pharmaceutical Association; and by *John S. Hoff* and *Fred W. Geldon* for the National Association of Retail Druggists.

George H. Cross filed a brief for the National Association of Counties as *amicus curiae*.

commenced this action in 1978 in the District Court for the Northern District of Alabama as the assignee of its members' claims. Respondents are 15 pharmaceutical manufacturers, the Board of Trustees of the University of Alabama, and the Cooper Green Hospital Pharmacy. The University operates a medical center, including hospitals, and a medical school. Located in the University's medical center are two pharmacies. Cooper Green Hospital is a county hospital, existing as a public corporation under Alabama law.

The complaint seeks treble damages and injunctive relief under §§ 4 and 16 of the Clayton Act, 38 Stat. 731, 737, 15 U. S. C. §§ 15 and 26, for alleged violations of §§ 2(a) and (f) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act (Act), 49 Stat. 1526, 15 U. S. C. §§ 13(a) and (f). Petitioner contends that the respondent manufacturers violated § 2(a)[1] by selling their products to the University's two pharmacies and to Cooper Green Hospital Pharmacy at prices lower than those charged petitioner's members for like products. Petitioner alleges that the respondent hospital pharmacies knowingly induced such lower prices in violation of § 2(f)[2] and sold the drugs to the general public in direct competition with privately owned pharmacies. Petitioner

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[1] Section 2(a), 15 U. S. C. § 13(a), provides in relevant part:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . , and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."

[2] Section 2(f), 15 U. S. C. § 13(f), provides:

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

also alleges that the price discrimination is not exempted from the proscriptions of the Act by 15 U. S. C. § 13c.[3]

Respondents moved to dismiss the complaint on the ground that state purchases[4] are exempt as a matter of law from the sanctions of § 2. In granting respondents' motions, the District Court expressly accepted as true the allegations that local retail pharmacies had been injured by the challenged price discrimination and that at least some of the state purchases were not exempt under § 13c. 656 F. 2d 92, 98 (CA5 1981) (reprinting District Court's opinion as Appendix). The District Court held that "governmental purchases are, without regard to 15 U. S. C. § 13c, beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes." *Id.*, at 102. The Court of Appeals for the Fifth Circuit, in a divided *per curiam* decision, affirmed "on the basis of the district court's Memorandum of Opinion." *Id.*, at 93.[5]

We granted certiorari to resolve this important question of federal law. 455 U. S. 999 (1982). We now reverse.

II

The issue here is narrow. We are not concerned with sales to the Federal Government, nor with state purchases

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[3] Section 13c provides:

"Nothing in [the Robinson-Patman Act] shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

[4] "State purchases" are defined as sales to and purchases by a State and its agencies.

[5] The District Court, and thus the Court of Appeals, agreed that "[t]he claims against the Board must . . . be treated as equivalent to claims against the State itself." 656 F. 2d, at 99. Accordingly, both courts held that the Eleventh Amendment bars petitioner's claim for damages against the University. Petitioner did not challenge this holding in its appeal from the District Court's decision.

for *use* in traditional governmental functions.[6] Rather, the issue before us is limited to state purchases for the purpose of competing against private enterprise—with the advantage of discriminatory prices—in the retail market.[7]

The courts below held, and respondents contend, that the Act exempts all state purchases. Assuming, without deciding, that Congress did not intend the Act to apply to state purchases for consumption in traditional governmental functions, and that such purchases are therefore exempt, we conclude that the exemption does not apply where a State has chosen to compete in the private retail market.

III

The Robinson-Patman Act by its terms does not exempt state purchases. The only express exemption is that for

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[6] Respondents argue that application of the Act to purchases by the State of Alabama would present a significant risk of conflict with the Tenth Amendment and that we therefore should avoid any construction of the Act that includes such purchases. See *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 501 (1979). There is no risk, however, of a constitutional issue arising from the application of the Act in this case: The retail sale of pharmaceutical drugs is not "indisputably" an attribute of state sovereignty. See *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 288 (1981). It is too late in the day to suggest that Congress cannot regulate States under its Commerce Clause powers when they are engaged in proprietary activities. See, *e. g.*, *Parden* v. *Terminal Railway of Alabama State Docks Dept.*, 377 U. S. 184, 187–193 (1964). If the Tenth Amendment protects certain state purchases from the Act's limitations, such as for consumption in traditional governmental functions, those purchases must be protected on a case-by-case basis. Cf. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 413, and n. 42 (1978) (plurality opinion).

[7] Special solicitude for the plight of indigents is a traditional concern of state and local governments. If, in special circumstances, sales were made by a State to a class of indigents, the question presented, that we need not decide, would be whether such sales are "in competition" with private enterprise. The District Court correctly assumed that the private and state pharmacies in this case are "competing pharmacies." 656 F. 2d, at 98. See also n. 8, *infra*.

nonprofit institutions contained in 15 U. S. C. § 13c.[8] Moreover, as the courts below conceded, "[t]he statutory language—'persons' and 'purchasers'—is sufficiently broad to cover governmental bodies. 15 U. S. C. §§ 12, 13(a, f)." 656 F. 2d, at 99.[9] This concession was compelled by several of this Court's decisions.[10] In *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 395 (1978), for example, we stated without qualification that "the definition of 'person' or 'persons' embraces both cities and States."[11]

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[8] The District Court properly assumed, for purposes of making its summary judgment, that at least some of the hospital purchases would not be covered by the § 13c exemption. See n. 3, *supra*, and accompanying text. Therefore, we need not consider whether this express exemption would support summary judgment in cases against state hospitals purchasing for their own use. See n. 20, *infra*.

[9] The words "person" and "persons" are used repeatedly in the antitrust statutes. See 15 U. S. C. §§ 7, 12, 15.

[10] See, *e. g.*, *Georgia* v. *Evans*, 316 U. S. 159, 162 (1942) (State is a "person" under § 7 of the Sherman Act); *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390, 396 (1906) (municipality is a "person" within the meaning of § 8 of the Sherman Act). See also *Pfizer Inc.* v. *Government of India*, 434 U. S. 308, 318 (1978) (foreign nation is a "person" under § 4 of the Clayton Act).

The Court has not considered it at all "anomalous to require compliance by municipalities with the substantive standards of other federal laws which impose . . . sanctions upon 'persons.'" *City of Lafayette* v. *Louisiana Power & Light Co.*, *supra*, at 400. See *California* v. *United States*, 320 U. S. 577, 585–586 (1944); *Ohio* v. *Helvering*, 292 U. S. 360, 370 (1934). One case is of particular relevance. In *Union Pacific R. Co.* v. *United States*, 313 U. S. 450 (1941), the Court considered the applicability to a city of § 1 of the Elkins Act, 32 Stat. 847, as amended, 34 Stat. 587, 49 U. S. C. § 41(1) (repealed 1978), "a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act." *City of Lafayette*, *supra*, at 402, n. 19. The *Union Pacific* Court expressly found that a municipality was a "person" within the meaning of the statute. 313 U. S., at 462–463. See also *City of Lafayette*, *supra*, at 401, n. 19.

[11] The word "purchasers" has a meaning as inclusive as the word "person." See 80 Cong. Rec. 6430 (1936) (remarks of Sen. Robinson) ("The Clayton Antitrust Act contains terms general to all purchasers. The

Respondents would distinguish *City of Lafayette* from the case before us because it involved the Sherman Act rather than the Robinson-Patman Act.[12] Such a distinction ignores the specific reference to the Robinson-Patman Act in our discussion of the all-inclusive nature of the term "person." *Id.*, at 397, n. 14. We do not perceive any reason to construe the word "person" in that Act any differently than we have in the Clayton Act, which it amends,[13] and it is undisputed that the Clayton Act applies to States. See *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 260–261 (1972).[14] In sum, the plain lan-

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pending bill does not segregate any particular class of purchasers, or exempt any special class of purchasers").

[12] The only apparent difference between the scope of the relevant laws is the extent to which the activities complained of must affect interstate commerce. Congress' decision in the Robinson-Patman Act not to cover all transactions within its reach under the Commerce Clause, see *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 199–201 (1974), does not mean that Congress chose not to cover the same range of "persons" whose conduct "in commerce" is otherwise subject to the Act.

[13] Indeed, the House and Senate Committee Reports specifically state that "[t]he special definitions of section 1 of the Clayton Act will apply without repetition to the terms concerned where they appear in this bill, since it is designed to become by amendment a part of that act." H. R. Rep. No. 2287, 74th Cong., 2d Sess., pt. 1, p. 7 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess., 3 (1936). See 80 Cong. Rec. 3116 (1936) (remarks of Sen. Logan) ("[M]any have complained because the provisions of the bill apply to 'any person engaged in commerce.' . . . The original Clayton Act contains that exact language, and it is carried into the bill under consideration. The language of the Clayton Act was used because it has been construed by the courts"). Given their common purposes, it should not be surprising that the common terms of the Clayton and Robinson-Patman Acts should be construed consistently with each other. See *id.*, at 8137 (remarks of Rep. Michener) ("The Patman-Robinson bill does not suggest a new policy or a new theory. The Clayton Act was enacted in 1914, and it was the purpose of that act to do just what this law sets out to do"); *id.*, at 3119 (remarks of Sen. Logan) (purpose of Robinson-Patman bill is to strengthen Clayton Act); *id.*, at 6151 (address by Sen. Logan) (same).

[14] JUSTICE O'CONNOR, in her dissenting opinion, questions our use of antitrust cases to define a word common to the antitrust laws. She would distinguish all of these cases uniformly holding States to be included in the

guage of the Act strongly suggests that there is no exemption for state purchases to compete with private enterprise.

IV

The plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act. An examination of the legislative purpose and history here reveals no such contrary intention.

A

Our cases have been explicit in stating the purposes of the antitrust laws, including the Robinson-Patman Act. On numerous occasions, this Court has affirmed the comprehensive coverage of the antitrust laws and has recognized that these laws represent "a carefully studied attempt to bring within [them] every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states." *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 553 (1944).[15] In *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), the Court observed that "our cases have repeatedly established that there is a heavy pre-

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word "persons," because none has held "that States or local governments are persons for purposes of exposure to *liability* as purchasers under the provisions of the Clayton Act." *Post*, at 177 (emphasis in original). The dissent takes no notice, however, of our decision last Term in *Community Communications Co.* v. *City of Boulder*, 455 U. S. 40, 56 (1982), in which the Court stated that the antitrust laws, "like other federal laws imposing civil or criminal sanctions upon 'persons,' of course apply to municipalities as well as to other corporate entities." No authority is cited for the dissent's distinction between "persons" entitled to sue under the antitrust laws and "persons" subject to suit under those laws.

[15] See, *e. g.*, *Pfizer Inc.* v. *Government of India*, *supra*, at 312–313 (noting "broad scope of the remedies provided by the antitrust laws") (applying Sherman Act cases to construe Clayton Act); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948) ("[Sherman] Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by *whomever* they may be perpetrated") (emphasis added).

sumption against implicit exemptions" from the antitrust laws. *Id.*, at 787 (citing *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 350–351 (1963); *California* v. *FPC*, 369 U. S. 482, 485 (1962)).[16] In *City of Lafayette*, *supra*, applying antitrust laws to a city in competition with a private utility, we held that no exemption for local governments would be implied. The Court emphasized the purposes and scope of the antitrust laws: "[T]he economic choices made by public corporations . . . , designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders." 435 U. S., at 403. See also *id.*, at 408.[17]

These principles, and the purposes they further, have been helpful in interpreting the language of the Robinson-Patman

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[16] See, *e. g.*, *National Gerimedical Hospital & Gerontology Center* v. *Blue Cross of Kansas City*, 452 U. S. 378, 388 (1981); *City of Lafayette*, 435 U. S., at 398, 399; *Abbott Laboratories* v. *Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 11–12 (1976); *United States* v. *National Assn. of Securities Dealers, Inc.*, 422 U. S. 694, 719–720 (1975).

[17] In one important sense, retail competition from state agencies can be more invidious than that from chainstores, the particular targets of the Robinson-Patman Act. Volume purchasing permits any large, relatively efficient, retail organization to pass on cost savings to consumers, and, to that extent, consumers benefit merely from economy of scale. But to the extent that lower prices are attributable to lower overhead, resulting from federal grants, state subsidies, free public services, and freedom from taxation, state agencies merely redistribute the burden of costs from the actual consumers to the citizens at large. An exemption from the Robinson-Patman Act could give state agencies a significant *additional* advantage in certain commercial markets, perhaps enough to eliminate marginal or small private competitors. Consumers, as citizens, ultimately will pay for the full costs of the drugs sold by the state agencies involved in this case. Because there is no reason to assume that such agencies will provide retail distribution more efficiently than private retail pharmacists, consumers will suffer to the extent that state retail activities eliminate more efficient, private retail distribution systems.

Act. As JUSTICE BLACKMUN stated for the Court in *Abbott Laboratories* v. *Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 11–12 (1976):

> "It has been said, of course, that the antitrust laws, and Robinson-Patman in particular, are to be construed liberally, and that the exceptions from their application are to be construed strictly. *United States* v. *McKesson & Robbins*, 351 U. S. 305, 316 (1956); *FMC* v. *Seatrain Lines, Inc.*, 411 U. S. 726, 733 (1973); *Perkins* v. *Standard Oil Co.*, 395 U. S. 642, 646–647 (1969). The Court has recognized, also, that Robinson-Patman 'was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.' *FTC* v. *Broch & Co.*, 363 U. S. 166, 168 (1960); *FTC* v. *Fred Meyer, Inc.*, 390 U. S. 341, 349 (1968). Because the Act is remedial, it is to be construed broadly to effectuate its purposes. See *Tcherepnin* v. *Knight*, 389 U. S. 332, 336 (1967); *Peyton* v. *Rowe*, 391 U. S. 54, 65 (1968)."

B

The legislative history falls far short of supporting respondents' contention that there is an exemption for state purchases of "commodities" for "resale." There is nothing whatever in the Senate or House Committee Reports, or in the floor debates, focusing on the issue.[18] Some Members of Congress were aware of the possibility that the Act would

[18] JUSTICE O'CONNOR's dissenting opinion repeatedly emphasizes that Congress in 1936 did not focus specifically on the issue presented here. See *post*, at 180, 182, 187, and n. 10. This may well be true, as the likelihood of state entities competing in the private sector was remote in 1936. It cannot be contended, however, that Congress specifically intended to *allow* the competition at issue here. In any event, the absence of congressional focus is immaterial where the plain language applies. See, *e. g.*, *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 556–558 (1944); *Browder* v. *United States*, 312 U. S. 335, 339 (1941); *De Lima* v. *Bidwell*, 182 U. S. 1, 197 (1901).

apply to governmental purchases. Most Members, however, were concerned not with state purchases, but with possible limitations on the Federal Government. The most relevant legislative history is the testimony of the Act's principal draftsman, H. B. Teegarden, before the House Judiciary Committee.[19] Although the testimony is ambiguous on the

[19] "[Rep.] LLOYD: Would this bill, in your judgment, prevent the granting of discounts to the United States Government?

"Mr. TEEGARDEN: Not unless the present Clayton Act does so. . . .

"[Rep.] LLOYD: For instance, the Government gets huge discounts. . . . Now, would that discount be barred by this bill?

"Mr. TEEGARDEN: I do not see why it should, unless a discount contrary to the present bill would be barred—that is, the present law—would be barred by that bill.

"Aside from that, my answer would be this: *The Federal Government is not in competition* with other buyers from these concerns. . . .

. . . . . .

"The Federal Government is saved by the same distinction . . . . They are not in competition with anyone else who would buy.

"[Rep.] HANCOCK: It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

"Mr. TEEGARDEN: You mean competitive bidding on Government orders?

"[Rep.] HANCOCK: Government, State, city, municipality.

"Mr. TEEGARDEN: No; I think not.

"[Rep.] MICHENER: If it did do it, you would not want it, would you?

"Mr. TEEGARDEN: No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

"[Rep.] HANCOCK: You would have to bid to the city, county, exactly the same as anybody else; same quantity, same price, same quality?

"Mr. TEEGARDEN: No.

"[Rep.] HANCOCK: *Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?*

"Mr. TEEGARDEN: I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. *If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill.* If they are not in competition with each other, then they are in a different sphere.

application of the Act to state purchases for consumption, one conclusion is certain: Teegarden expressly stated that the Act would apply to the purchases of municipal hospitals in at least some circumstances.[20] Thus, his comments directly contradict the exemption found by the courts below for all such purchasing.[21] In the absence of any other relevant evi-

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"The facts of the situation are not present upon which to predicate a discrimination, in the nature of the case. I do not see that that question becomes any different under this bill from what it is under the present section 2 of the Clayton Act, for that bill also prohibits discrimination generally in the same terms that this does. But it differs in the breadth of the exceptions. That is the only difference between the two bills." Hearings on H. R. 8442 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess., 208–209 (1935) (emphasis added) (hereinafter 1935 Hearings).

[20] JUSTICE STEVENS agrees that state and local governments may be "purchasers" within the meaning of the Robinson-Patman Act. See *post*, at 171. He joins in JUSTICE O'CONNOR's dissent, however, on the basis of a novel theory: that state and local agencies may never be in "competition" with private parties within the meaning of the Act. See *ibid.* This is an economic fiction: If in fact a State participates in the private retail pharmaceutical market, it competes with the private participants. JUSTICE STEVENS relies on one statement by witness Teegarden in the 1935 House Hearings, but attaches no significance to a further statement by the same witness: "In the final analysis, it would depend upon *numerous questions of fact in a particular case.* If the two hospitals are *in competition* with each other, I should say then that the fact that one is operated by the city does not save it from the bill." See 1935 Hearings, at 209 (emphasis added).

[21] Teegarden subsequently submitted a written brief to the House Committee. He first rejected outright the desirability of *any* exemptions. See *id.*, at 249. He then posed the question whether "the bill [would] prevent competitive bidding on Governmental purchases below trade price levels." He stated that "[t]he answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives, or privileges of the sovereign unless it so expressly provides—a principle inherited by American jurisprudence from the common law . . . ." But he also noted that "requiring a showing of effect upon competition . . . will further preclude any possibility of the bill affecting the Government." *Id.*, at 250.

All the cases Teegarden cited suggest that this sovereign-exception rule of statutory construction simply means that a government, when *it* passes

dence, we find no legislative intention to enable a State, by an unexpressed exemption, to enter private competitive markets with congressionally approved price advantages.[22]

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a law, gives up only what it expressly surrenders. While the Robinson-Patman Act was pending before Congress, the Court stated that it could "perceive no reason for extending [the presumption against binding the sovereign by its own statute] so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." *United States* v. *California*, 297 U. S. 175, 186 (1936). See *California* v. *Taylor*, 353 U. S. 553, 562–563 (1957). In the context of the Robinson-Patman Act, the rule of statutory construction on which Teegarden relied supports, at the most, an exemption for the *Federal* Government's purchases. The existence of such an exemption is not before us. Cf. *United States* v. *Cooper Corp.*, 312 U. S. 600, 604–605 (1941) (United States not a "person" under the Sherman Act for purposes of suing for treble damages). Moreover, Teegarden clearly assumed that governmental purchasing would not compete with private purchasing. That assumption, however, is inapplicable here.

[22] Six months after the Act was passed, the Attorney General of the United States responded to an inquiry from the Secretary of War regarding the Act's application "to government contracts for supplies." 38 Op. Atty. Gen. 539 (1936). In ruling that such contracts are outside the Act, the Attorney General explained:

"[S]tatutes regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government. . . .

"The [Robinson-Patman Act] merely amended the [Clayton Act] and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts." *Id.*, at 540.

Later in the letter, the Attorney General clarified that his reference was to "the Federal Government," *ibid.*, and gave other reasons "for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters," *id.*, at 541. The Attorney General expressly relied upon *Emergency Fleet Corp.* v. *Western Union Telegraph Co.*, 275 U. S. 415, 425 (1928), in which the Court upheld the granting of favorable telegraph rates to a *federal* corporation that competed with private enterprise.

V

Despite the plain language of the Act and its legislative history, respondents nevertheless argue that subsequent legislative events and decisions of District Courts confirm that state purchases are outside the scope of the Act. We turn therefore to these subsequent events.

The Attorney General's opinion says nothing about the Act's applicability to state agencies. Indeed, in the following year, the Attorney General of California expressly concluded that state purchases were within the Act's proscriptions. See 1932–1939 Trade Cases ¶ 55,156, pp. 415–416 (1937). Two other early State Attorney General opinions simply do not consider whether the Act applies to state purchases for *retail* sales. See Opinion of Attorney General of Minnesota, 1932–1939 Trade Cases ¶ 55,157, p. 416 (1937); 26 Wis. Op. Atty. Gen. 142 (1937).

Representative Patman "presumed that the [United States] Attorney General's reasons may be also applied to municipal and public institutions." W. Patman, The Robinson-Patman Act 168 (1938). See also W. Patman, Complete Guide to the Robinson-Patman Act 30 (1963) (interpreting Attorney General's opinion as exempting all governmental purchases). His interpretation is entitled to some weight, but he appears only to be interpreting—or erroneously extending—the Attorney General's opinion and reasoning. Representative Patman's personal intentions probably are better reflected in his introduction in 1951 and 1953 of bills to amend the Act to define "purchaser" to include "the United States, any State or any political subdivision thereof." H. R. 4452, 82d Cong., 1st Sess. (1951); H. R. 3377, 83d Cong., 1st Sess. (1953). There is no legislative history on these bills, but it is arguable that he believed that the original intent needed to be stated expressly to negate his reading of the Attorney General's contrary construction of the Act. In any case, Congress' failure to pass these bills may be attributable to a reluctance to subject *federal* purchases to the Act. For example, in 1955, 1957, 1959, and 1961, Representative Keogh also unsuccessfully introduced bills to extend the Act to federal purchases only *for resale*. See H. R. 430, 87th Cong., 1st Sess. (1961); H. R. 155, 86th Cong., 1st Sess. (1959); H. R. 722, 85th Cong., 1st Sess. (1957); H. R. 5213, 84th Cong., 1st Sess. (1955).

It bears repeating, moreover, that none of these views—including Representative Patman's—focuses on the state purchases alleged here: purchases to gain competitive advantage in the private market rather than purchases for use in traditional governmental functions. For the Department of Justice's most recent statements regarding an exemption or immunity for state enterprises, see n. 37, *infra*.

A

Respondents cite the hearings on the Robinson-Patman Act held in the late 1960's.[23] Testimony before the House Subcommittee investigating practices in the pharmaceutical industry indicated that the Act did not cover price discrimination in favor of state hospitals,[24] and Federal Trade Commission Chairman Paul Dixon disclaimed any authority over transactions involving state health care programs.[25] It

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[23] The most important relevant event in the Robinson-Patman Act's postenactment history is the amendment in 1938 excluding eleemosynary institutions, 52 Stat. 446, 15 U. S. C. § 13c. Whether the existence of an exemption in § 13c supports an exemption for certain state purchases depends upon whether § 13c is interpreted to apply to state agencies that perform the functions listed. That is a substantial issue in its own right. Compare H. R. Rep. No. 1983, 90th Cong., 2d Sess., 7–8, 78 (1968) (suggesting that § 13c does not include government agencies), with 81 Cong. Rec. 8706 (1937) (remarks of Rep. Walter) (§ 13c would apply to institutions financed by cities, counties, and States). See also *City of Lafayette*, 435 U. S., at 397, n. 14 (§ 13c includes "public libraries," which "are, by definition, operated by local government"); *Abbott Laboratories*, 425 U. S., at 18, n. 10; 81 Cong. Rec. 8705 (1937) (remarks of Rep. Walter) (exemption codifies the intention of the drafters of the Robinson-Patman Act). We need not address this issue here.

[24] See, *e. g.*, Small Business and the Robinson-Patman Act: Hearings before the Special Subcommittee on Small Business and the Robinson-Patman Act of the House Select Committee on Small Business, 91st Cong., 73–77 (1969–1970) (William McCamant, Director of Public Affairs, National Association of Wholesalers); *id.*, at 623 (Harold Halfpenny, counsel for the Automotive Service Industry Association); Small Business Problems in the Drug Industry: Hearings before the Subcommittee on Activities of Regulatory Agencies of the House Select Committee on Small Business, 90th Cong., 15–16 (1967–1968) (hereinafter 1967–1968 Hearings) (Earl Kintner, former FTC Commissioner, counsel for the National Association of Retail Druggists) (state purchases "probably" exempt). But see *id.*, at 80 (remarks of Charles Fort, President, Food Town Ethical Pharmacies, Inc.) ("Robinson-Patman Act may prohibit this practice"); *id.*, at 86 (same). There also was testimony that institutional purchasers frequently obtain drugs at lower prices than do retail pharmacies, see *id.*, at 14, 258, 318, 1093–1094, and many witnesses complained that this discrimination adversely affected competition, see *id.*, at A–140 to A–141, 253–262, 273, 292.

[25] See H. R. Rep. No. 1983, *supra* n. 23, at 74.

is not at all clear, however, whether Chairman Dixon contemplated cases in which the state agency competed with private retailers, although he was aware of such practices by institutional purchasers.[26] Other statements expressed little more than informed, interested opinions on the issue presented, and are not entitled to the consideration appropriate for the constructions given contemporaneously with the Act's passage.[27] See *supra*, at 159–162, and n. 22.

It is clear from the House Subcommittee's conclusions that it did not focus on the question presented by this case. The Subcommittee found that the difference between drug prices for retailers and government customers "is extremely substantial" and "not always fully explainable by either cost justifiable quantity discounts, economies of scale, or other factors inherent in bulk distribution." H. R. Rep. No. 1983, 90th Cong., 2d Sess., 77 (1968). In the next conclusion, it stated that "[n]umerous acts and policies of individual manufacturers seem . . . violative of the Robinson-Patman

[26] After hearing his testimony, the Subcommittee posed further questions for Chairman Dixon about the eroding influence on the retail druggists' market presented by: (i) expanding federal, state, and private group health care programs; (ii) the Federal Government's ability to purchase from drug manufacturers at prices substantially below wholesale cost; and (iii) instances of hospitals, "both nonprofit and proprietary, selling to outpatients or even nonpatients." *Id.*, at 73. In his response to the Subcommittee, Chairman Dixon declined to discuss further the last category, which involved § 13c issues. *Id.*, at 74. His disclaimer of FTC authority envisioned state purchases for welfare programs, not for resale in competition with private enterprise. Thus, the issue presented here is most similar to the issue *not* discussed by Chairman Dixon.

[27] Assuming that this postenactment commentary before the Subcommittee can be imputed to Congress—quite a leap given the failure of the Subcommittee Report to rely on it for its conclusions—"the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U. S. 304, 313 (1960). See, *e. g.*, *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 117–118, and n. 13 (1980); *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750, 758 (1979); *United Air Lines, Inc.* v. *McMann*, 434 U. S. 192, 200, n. 7 (1977) ("Legislative observations 10 years after passage of the Act are in no sense part of the legislative history").

Act . . . ." *Ibid.* Thus, it is quite possible that the Subcommittee considered some state purchasing at discriminatory prices—about which it had heard testimony—to be unlawful. The Subcommittee Report did include the awkwardly worded statement: "There is no basis apparent . . . why the mandate of the Robinson-Patman Act should not be applied to discriminatory drug sales favoring nongovernmental institutional purchasers, profit or nonprofit, to the extent there is prescription drug competition at the retail level with disfavored retail druggists." *Id.*, at 79. This unexceptional opinion, however, simply says that *private* institutional purchases may not facilitate unfair retail competition through sales at discriminatory prices. The Subcommittee said nothing expressly about the unfair competition at issue in this case.[28]

B

Respondents also argue that, without exception, courts considering the Act's coverage have concluded that it does not apply to government purchasers. They insist that no court has imposed liability upon a seller or buyer, under either § 2(a) or § 2(f), when the discriminatory price involved a sale to a State, city, or county. See Brief for Respondent Board of Trustees 31–32. There are serious infirmities in these broad assertions: (i) this Court has never held nor suggested that there is an exemption for state purchases;[29] (ii) the number of judicial decisions even *considering* the Act's applica-

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[28] The Subcommittee also concluded that the 1938 amendment was "designed to afford immunity to private nonprofit institutions . . . to the extent the sales are for the nonprofit institution's 'own use,'" H. R. Rep. No. 1983, *supra* n. 23, at 78, but that would indicate more the construction of § 13c than it would the intent of the 1936 Congress.

[29] Indeed, our opinions suggest precisely the opposite. See *City of Lafayette*, *supra*, at 397, n. 14; *Abbott Laboratories*, *supra*, at 18–19, n. 10; *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 513 (1972).

tion to purchases by state agencies is relatively small;[30] (iii) respondents cite no Court of Appeals decision that has expressly adopted their interpretation of § 2 before the decision below; (iv) some of the District Court cases upon which respondents rely are simply inapposite;[31] (v) it is not clear that *any* published District Court opinion has relied solely on a state purchase exemption to dismiss a Robinson-Patman Act claim alleging injury as a result of government competition in the private market;[32] and (vi) there are several cases that

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[30] The parties cite fewer than a dozen cases, many with unpublished opinions, that involve the application of the Robinson-Patman Act to state purchases. See nn. 31–33, *infra*. Cf. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 731 (1975) (affirming rule adopted by "virtually all lower federal courts facing the issue in the *hundreds* of *reported* cases presenting this question over the past quarter century") (emphasis added); *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S., at 200–201 (adopting consistent, "longstanding" construction of Robinson-Patman Act after "nearly four decades of litigation").

[31] See *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 1974–1 Trade Cases ¶ 75,054, p. 96,742 (Utah 1974) (dicta) (involving Federal Government as ultimate purchaser) (relying on Attorney General's opinion as sole support), aff'd in part and rev'd in part, 551 F. 2d 790, 798–799 (CA10) (finding legitimate competition despite different prices), cert. denied, 434 U. S. 879 (1977); *Sachs* v. *Brown-Forman Distillers Corp.*, 134 F. Supp. 9, 16 (SDNY 1955) (Act inapplicable because there was no proof that sales affected plaintiff adversely), aff'd on opinion below, 234 F. 2d 959 (CA2) *(per curiam)*, cert. denied, 352 U. S. 925 (1956); *General Shale Products Corp.* v. *Struck Constr. Co.*, 37 F. Supp. 598, 602–603 (WD Ky. 1941) (finding no "sale" under the Act and alternatively holding the Act inapplicable because "[n]either the government nor a city in its purchase of property considered necessary for the purposes of *carrying out its governmental functions* is in competition with another buyer who may be engaged in *buying and reselling* that article") (emphasis supplied), aff'd, 132 F. 2d 425, 428 (CA6 1942) (expressly reserving issue whether Act applies to sales to state agency), cert. denied, 318 U. S. 780 (1943). The *Sachs* court also indicated, in dicta, that it was unclear whether the Act applied to state purchases. 134 F. Supp., at 16.

[32] Cf. *Mountain View Pharmacy* v. *Abbott Laboratories*, No. C–77–0094 (Utah, Sept. 6, 1977) (unpublished opinion) (consent by plaintiffs to dismiss with prejudice Act claims based on sales to state agencies), aff'd in part and

suggest that the Robinson-Patman Act *is* applicable to state purchases for resale purposes.[33] This judicial track record is in no sense comparable to the unbroken chain of judical decisions upon which this Court previously has relied for ascertaining a construction of the antitrust laws that Congress over a long period of time has chosen to preserve. See cases cited, n. 27, *supra*.

Respondents also seek support in the interpretations of various commentators and executive officials. But the most authoritative of these sources indicate that the question pre-

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rev'd in part, 630 F. 2d 1383 (CA10 1980) (complaint insufficient because it failed to identify products or purchasers subject to discriminatory treatment); *Portland Retail Druggists Assn.* v. *Abbott Laboratories*, No. 71–543 (Ore., Sept. 11, 1972) (unpublished, oral opinion), vacated and remanded, 510 F. 2d 486 (CA9 1974) (§ 13c applied), vacated and remanded, 425 U. S. 1 (1976). One District Court has suggested in an alternative holding that there is an exemption for state purchases for nonconsumption use. *Logan Lanes, Inc.* v. *Brunswick Corp.*, No. 4–66–5, (Idaho, May 26, 1966) pp. 4–5 (unpublished opinion), aff'd, 378 F. 2d 212, 215–216 (CA9) (purchases by Utah State University within scope of § 13c; expressly declined to address "so-called governmental exemption"), cert. denied, 389 U. S. 898 (1967). All of these cases predate our decision in *City of Lafayette*.

[33] See *Burge* v. *Bryant Public School District*, 520 F. Supp. 328, 330–332 (ED Ark. 1980), aff'd, 658 F. 2d 611 (CA8 1981) *(per curiam); Champaign-Urbana News Agency, Inc.* v. *J. L. Cummins News Co.*, 479 F. Supp. 281, 286–287 (CD Ill. 1979) (although Act inapplicable to federal purchases, state agencies might face an opposite result), aff'd, 632 F. 2d 680 (CA7 1980); *A. J. Goodman & Son* v. *United Lacquer Manufacturing Corp.*, 81 F. Supp. 890, 893 (Mass. 1949). Other cases cut against *any* exemption for state purchases. See *Municipality of Anchorage* v. *Hitachi Cable, Ltd.*, 547 F. Supp. 633, 637–641 (Alaska 1982); *Sterling Nelson & Sons* v. *Rangen, Inc.*, 235 F. Supp. 393, 399 (Idaho 1964), aff'd, 351 F. 2d 851, 858–859 (CA9 1965), cert. denied, 383 U. S. 936 (1966); *Sperry Rand Corp.* v. *Nassau Research & Development Associates*, 152 F. Supp. 91, 95 (EDNY 1957). Cf. *Reid* v. *University of Minnesota*, 107 F. Supp. 439, 443 (ND Ohio 1952) (expressly not addressing whether state agency exempt from Act when engaged in a business in the same manner as other business corporations).

sented is unsettled;[34] others are not necessarily inconsistent with our holding;[35] and in some cases they support it.[36] Thus, Congress cannot be said to have left untouched a universally held interpretation of the Act.[37]

In sum, it is clear that postenactment developments—whether legislative, judicial, or in commentary—rarely have

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[34] See 5A Z. Cavitch, Business Organizations § 105D.01[8][c] (1973 and Supp. 1982) (opinions "divided" whether Act is applicable); 4 J. von Kalinowski, Antitrust Laws and Trade Regulation § 24.06, p. 24–70 (1982) ("there is some conflict among the authorities as to whether sales to states and municipalities are covered by the Act"); *id.*, § 24.06[2]; E. Kintner, A Robinson-Patman Primer 203 (1970) ("Although [the Attorney General's] opinion appears to have settled the matter where the federal government is concerned, some controversy has arisen over the applicability of the act to purchases by state and local governments"); F. Rowe, Price Discrimination Under the Robinson-Patman Act § 4.12, p. 84 (1962).

[35] Some deal only with sales to the Federal Government. See Letter from Comptroller General to Robert F. Sarlo, Veterans Administration (July 17, 1973), reprinted in 1973–2 Trade Cases ¶ 74,642. Almost all fail to mention, much less decide, whether the Act applies to state purchases for *retail* sales. See Report of the Attorney General Under Executive Order 10936, Identical Bidding in Public Procurement 11 (1962).

[36] See 62 Cal. Op. Atty. Gen. 741 (1979); 47 N. C. Atty. Gen. 112, 115 (1977); [1948–1949] Ga. Op. Atty. Gen. 723, 727 (1949) (if state agency competes with private enterprise, it is subject to Act).

[37] In its 1977 Report of the Task Group on Antitrust Immunities, at 25, the Department of Justice stated:

"The mere fact that a state has authorized a state-owned enterprise to engage in commercial activity should not be sufficient to immunize all activities of the enterprise from the antitrust laws. That test removes the clearly sovereign activities of a state from the antitrust scrutiny of the federal government while holding the commercial activities of a state-owned enterprise to the same standards requir[ed] of all who engage in commercial transactions in the market." Reprinted in Antitrust Exemptions and Immunities: Hearings before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, 95th Cong., 1st Sess., 1890 (1977).

Cf. *Victory Transport Inc.* v. *Comisaria General de Abastecimientos y Transportes*, 336 F. 2d 354, 360–362 (CA2 1964) (the charter of a ship to haul grain by a state instrumentality not a sovereign activity that would justify applying the sovereign immunity doctrine).

considered the specific issue before us. There is simply no unambiguous evidence of congressional intent to exempt purchases by a State for the purpose of competing in the private retail market with a price advantage.[38]

VI

The Robinson-Patman Act has been widely criticized, both for its effects and for the policies that it seeks to promote. Although Congress is well aware of these criticisms, the Act has remained in effect for almost half a century. And it certainly is "not for [this Court] to indulge in the business of policy-making in the field of antitrust legislation. . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress." *United States* v. *Cooper Corp.*, 312 U. S. 600, 606 (1941).

"A general application of the [Robinson-Patman] Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth." *South-Eastern Underwriters*, 322 U. S., at 553. The legislative history is replete with references to the economic evil of large organizations purchasing from other large organizations for resale in competition with the small, local retailers. There is no rea-

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[38] The dissent of JUSTICE O'CONNOR relies in large part, not on the words of the statute, or its legislative history, but on assertions that a "general consensus [existed] in the legal and business communities that sales to governmental entities are not covered by the Robinson-Patman Act." *Post*, at 182. See also *post*, at 174 (STEVENS, J., dissenting). JUSTICE O'CONNOR is correct that some in the business and legal community did think that an exemption existed for all state purchases. See *post*, at 185–187, and nn. 19 and 20. But to say there is a "consensus" is to disregard the opinion of commentators, see n. 34, *supra;* the views expressed that the Act is applicable to state purchases, see *supra*, at 161, 162–163, n. 22, and 169, and n. 37; and the most recent, relevant opinion of the Department of Justice, see *supra*, at 169, and n. 37. It is more accurate to say that this was an unsettled question of federal law that demanded this Court's attention.

son, in the absence of an explicit exemption, to think that Congressmen who feared these evils intended to deny small businesses, such as the pharmacies of Jefferson County, Alabama, protection from the competition of the strongest competitor of them all.[39] To create an exemption here clearly would be contrary to the intent of Congress.

VII

We hold that the sale of pharmaceutical products to state and local government hospitals for resale in competition with private pharmacies is not exempt from the proscriptions of the Robinson-Patman Act. The judgment of the Court of Appeals accordingly is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, dissenting.

While I join JUSTICE O'CONNOR's dissenting opinion, I believe an additional comment on the text of the Robinson-Patman Act may help to explain my vote. For purposes of interpreting that statute, I think that federal, state, and local agencies are "purchasers," but that such governmental agencies are not engaged in "competition" with private parties even when they resell purchased goods to consumers who might otherwise have patronized a private retailer. Both before and after the 1936 statute amended § 2 of the Clayton Act, the requirement of proving an adverse effect on "competition" played an important part in limiting the coverage of the statute.

It is universally agreed that federal purchases are not covered by the Act. Even though it has always been obvious that primary line competition might be injured by discrimina-

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[39] Under our interpretation, the Act's benefits would accrue, precisely as intended, to the benefit of small, private retailers. See 1935 Hearings, at 261 (Teegarden recommending passage "for the protection of private rights").

tory prices on sales to the Federal Government, and also that goods sold to military post exchanges would normally be resold at a substantial discount, no one in the 1936 legislative deliberations questioned the inapplicability of the Act to these sales. The explanation, in my opinion, does not rest on the sovereign status of the Federal Government,* but rather on the assumption embodied in the Act that federal agencies do not compete with nongovernmental entities.

Mr. Teegarden, the lobbyist, made this assumption clear in his statement at the 1935 House hearings, quoted in part by the opinion of the Court. *Ante*, at 160–161, n. 19:

> "Mr. LLOYD: Would this bill, in your judgment, prevent the granting of discounts to the United States Government?
>
> . . . . . .
>
> "For instance, the Government gets huge discounts. Take that electric fan, for instance. You go to the ordinary store and the list price is $35. The Procurement Division procures them delivered, one at a time, for $13.18. Now, would that discount be barred by this bill?
>
> "Mr. TEEGARDEN: I do not see why it should . . . .
>
> "Aside from that, my answer would be this: The Federal Government is not in competition with other buyers

*When Mr. Teegarden responded to specific written questions about the Act, he gave two reasons why the bill would not prevent competitive bidding on government purchases below trade price levels. First, he stated that a statute would not be construed to restrict the rights, prerogatives, or privileges of the sovereign unless it expressly so provided. This reason would apply only to the Federal Government, as the Court's opinion points out. *Ante*, at 159–161, nn. 18, 19. In addition, however, Mr. Teegarden gave a reason that applies to governmental entities at state and local levels as well. "The further insertion of the clause proposed under topic 4 below, requiring a showing of effect upon competition, will further preclude any possibility of the bill affecting the Government." Hearings on H. R. 8442 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess., 250 (1935).

> from these concerns. Therefore a discrimination—it is so applied universally in interstate commerce law, in the railroad law—to have a discrimination, there must be a relative position between the parties to the discrimination which constitutes an injury to one as against the other. I think the answer is to be found in that.
>
> "In other words, if seller A makes a price to a retailer in New York and a different price to a retailer in San Francisco, all other things aside, no case of discrimination could be predicated there, because the two are not in the same sphere at all.
>
> "The Federal Government is saved by the same distinction, not of location but of function. They are not in competition with any one else who would buy." Hearings on H. R. 8442 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess., 208–209 (1935).

I would interpret the "distinction, not of location but of function" somewhat more broadly than does the majority. It is not merely a question of whether government agencies do or do not resell the goods they have purchased. Even when they resell items to the public, governmental entities do not engage in competition with private retailers in the same sense that chainstores compete with independent retailers. Most importantly, their activities are seldom affected by a profitmaking motivation; rather they are undertaken in connection with the provision of services to the public. Further, their merchandising and price-setting decisions take a different set of factors into account. As the Court notes, *ante*, at 158, n. 17, they need not include a profit component, their overhead may be subsidized, and they may be exempt from state or federal taxation. In short, governmental agencies are in an entirely different category of market participants.

I am convinced that the same analysis applies to purchases and resales by state and local agencies. I do not believe that a municipal hospital that operates a pharmacy is any more en-

gaged in competition with a retail druggist than a military post exchange is engaged in competition with a retail grocer or a retail clothing store. To be sure, this analysis is not entirely consistent with the conclusion implied by Mr. Teegarden's somewhat equivocal answer to Congressman Hancock. Although he did not say that purchases by a city hospital would be covered by the bill, he did state that, "*[i]f the two hospitals are in competition with each other*," the fact that one was operated by the city would not save it from the bill. But he went on to stress: "*If they are not in competition with each other, then they are in a different sphere.*" Hearings on H. R. 8442, *supra*, at 209 (emphasis added). In my view, if not in Mr. Teegarden's, the differences between a city hospital and a private hospital justify the conclusion that, for purposes of construing this statute, they should not be considered in competition with each other.

I therefore would hold as a matter of law that neither purchases nor sales by governmental agencies—federal, state, or local—constitute "competition" with private persons to which the statute has any application. The Act has no impact on any governmental agency's ability to provide hospital and related services to its constituents. For the reasons JUSTICE O'CONNOR has set forth in greater detail, I believe such a holding more accurately reflects the understanding of the Congress that enacted the statute and the lawyers and businessmen who have lived with the statute on a day-to-day basis for almost half a century.

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN, JUSTICE REHNQUIST, and JUSTICE STEVENS join, dissenting.

The issue that confronts the Court is one of statutory construction: whether the Robinson-Patman Act covers purchases of commodities by state and local governments for resale in competition with private retailers.[1] The Court's

[1] This case does not require us to consider, as the cases cited by the majority suggest, *ante*, at 157–158, whether compliance with other federal

task, therefore, is to discern the intent of the 1936 Congress which enacted the Robinson-Patman Act. I do not agree with the majority that this issue can be resolved by reference to cases under the Sherman Act or other statutes, or by reliance on the broad remedial purposes of the antitrust laws generally. The 1936 Congress simply did not focus on this issue. The business and legal communities have assumed for the past four decades that such purchases are not covered. For these reasons, as explained more fully below, I respectfully dissent.

I

A

The majority relies extensively on the interpretation this Court has given to the term "person" under the Sherman Act and other statutes as a guide to whether the terms "person" and "purchasers," as used in § 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act (Act), 49 Stat. 1526, 15 U. S. C. § 13, include state and local governmental entities. See *ante*, at 155–156. In my view, such reliance is misplaced. The question of the Robinson-Patman Act's treatment of governmental purchases requires an independent examination of the legislative history of *that* Act to ascertain congressional intent.[2] Indeed, the cases cited by the major-

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statutes necessitates an implied exemption from the provisions of the Act. The question is simply one of congressional intent—*i. e.*, what Congress intended when it enacted the Robinson-Patman Act with respect to coverage of governmental purchases for resale.

[2] The majority cites *Pfizer Inc.* v. *Government of India*, 434 U. S. 308 (1978), as a case in which the Court applied Sherman Act cases to construe the Clayton Act, which the Robinson-Patman Act amends. *Ante*, at 157, n. 15. In *Pfizer* the Court held that a foreign nation is a "person" entitled to bring a treble damages action under § 4 of the Clayton Act, 15 U. S. C. § 15. As the Court acknowledged, 434 U. S., at 311, § 4 is a reenactment of the virtually identical language of § 7 of the Sherman Act. In fact, § 7 was eventually repealed as redundant. § 3, 69 Stat. 283; see S. Rep. No. 619, 84th Cong., 1st Sess., 2 (1955). Reliance on prior interpretation of § 7 of the Sherman Act was therefore uniquely appropriate.

ity emphasize that the key question regarding coverage or noncoverage of governmental entities is the intent of Congress *in enacting the statute in question.*[3] Resolution of the statutory construction question cannot be made to depend upon the abstract assertion that the term "person" is broad enough to embrace States and municipalities.[4] For these

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[3] See *Pfizer Inc.* v. *Government of India*, *supra*, at 315 (§ 4 of the Clayton Act) ("The word 'person' . . . is not a term of art with a fixed meaning wherever it is used, nor was it in 1890 when the Sherman Act was passed"); *Georgia* v. *Evans*, 316 U. S. 159, 161 (1942) (§ 7 of the Sherman Act) ("Whether the word 'person' . . . includes a State or the United States depends upon its legislative environment"); *Ohio* v. *Helvering*, 292 U. S. 360, 370 (1934) (Rev. Stat. §§ 3140, 3244) ("Whether the word 'person' or 'corporation' includes a state . . . depends upon the connection in which the word is found"). See also *United States* v. *Cooper Corp.*, 312 U. S. 600, 604–605 (1941) ("[T]here is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate intent, by the use of the term, to bring state or nation within the scope of the law").

It is also worth noting that many of the cases upon which the majority relies involved construction of the term "person" for the purpose of determining whether a particular governmental entity is a "person" entitled *to sue*. *Pfizer Inc.* v. *Government of India*, *supra*; *United States* v. *Cooper Corp.*, *supra* (United States is not "person" entitled to sue under § 7 of the Sherman Act); *Georgia* v. *Evans*, *supra* (State is "person" entitled to sue under § 7 of the Sherman Act); *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390 (1906) (municipality is "person" entitled to sue under § 7 of the Sherman Act).

[4] I would also note that the majority overstates the significance of Senator Robinson's remarks in connection with its observation that "[t]he word 'purchasers' has a meaning as inclusive as the word 'person.'" *Ante*, at 155, n. 11. The remarks of Senator Robinson should not be read to suggest that the word "purchasers," as used in the Robinson-Patman Act, embraces States or municipalities. The Senator's observation reflects an affirmative response to Senator Vandenberg's concern that, although the bill was drafted with a view toward the problems of large chain-store buying power in the retail merchandising field, the Act would apply to *private* enterprise in the field of industrial production as well. See 80 Cong. Rec. 6429–6430 (1936).

reasons, the mere fact that in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 397, n. 14 (1978), a Sherman Act case, the Court referred to the Robinson-Patman Act in its discussion of the breadth of the term "person" cannot resolve the question now before us.

Further, the majority opinion propounds a misleading syllogism when it (1) suggests that the term "person" in the Clayton and Robinson-Patman Acts should be construed similarly, (2) cites *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251 (1972), for the proposition that the Clayton Act applies to States, and (3) then opines that the terms "person" and "purchasers" under § 2 therefore should be construed to include state purchases. *Ante*, at 155–156. Because, as the majority observes, *ante*, at 156, n. 13, the definitional section of the Clayton Act, 15 U. S. C. § 12, was intended to apply to the Robinson-Patman Act, I do not dispute the first proposition. However, *Hawaii* v. *Standard Oil Co.* stated only that a State is a "person" for purposes of *bringing* a treble damages action under § 4 of the Clayton Act. 405 U. S., at 261.[5] Conspicuously absent from the majority's discussion is any authority holding that States or local governments are persons for purposes of exposure to *liability* as purchasers under the provisions of the Clayton Act.[6] Although Congress

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[5] Were Congress to consider the specific question of *liability* of governmental entities as purchasers under the Robinson-Patman Act, it seems reasonable to assume that it would approach that question with a different set of policy concerns than those bearing on the decision whether to extend the benefit of the Act's protections to those entities. Cf. *Parker* v. *Brown*, 317 U. S. 341, 351 (1943) ("In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress").

[6] Indeed, one basis for the United States Attorney General's conclusion in 1938 that the Robinson-Patman Act is inapplicable to purchases of supplies by the Federal Government was the absence of any judicial decision construing the Clayton Act, prior to its amendment by the Robinson-

might now decide that the purchasing activities of States and local governments *should* be subject to the limitations imposed by § 2, that is a policy judgment appropriately left to legislative determination.

B

Nor do I find persuasive the majority's invocation of presumptions regarding the liberal construction and broad remedial purposes of the antitrust laws generally. Without derogating the usefulness of those principles or suggesting that they should never play a role in the Robinson-Patman context, one may nevertheless candidly acknowledge that the Court also has identified a certain tension between the Robinson-Patman Act, on the one hand, and the Sherman Act and other antitrust statutes, on the other. The Court frequently has recognized that strict enforcement of the anti-price-discrimination provisions of the former may lead to price rigidity and uniformity in direct conflict with the goals of the latter. See, *e. g.*, *Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U. S. 69, 80, 83, n. 16 (1979); *Automatic Canteen Co.* v. *FTC*, 346 U. S. 61, 63, 74 (1953); *Standard Oil Co.* v. *FTC*, 340 U. S. 231, 249, and n. 15 (1951).[7]

Patman Act, to apply to governmental contracts. 38 Op. Atty. Gen. 539, 540 (1936).

Prior to 1929, courts interpreted the original § 2 as addressed only to the problem of primary line competition—*i. e.*, injury to competition among sellers. See, *e. g.*, *National Biscuit Co.* v. *FTC*, 299 F. 733 (CA2), cert. denied, 266 U. S. 613 (1924). Not until 1929 did this Court hold that § 2 also protected against the type of injury alleged in the present case—*i. e.*, secondary line injury, or injury to competition among buyers. See *George Van Camp & Sons Co.* v. *American Can Co.*, 278 U. S. 245, 253 (1929). The Robinson-Patman amendment to § 2 clarified that the Act was designed to redress the latter type of injury.

[7] Indeed, the tension between the Robinson-Patman policy of protection of competitors and the Sherman Act goal of protection of the competitive process has prompted the Court to achieve a partial reconciliation of the two by liberal interpretation of the "meeting competition" defense under § 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. § 13(b). See *Standard Oil Co.* v. *FTC*, 340 U. S., at 251.

At the very least, this recognition raises doubts that the Court should liberally construe the Robinson-Patman Act in favor of broader coverage. Those doubts are enhanced by the fact that Congress' principal aim in enacting the Robinson-Patman Act was to protect small retailers from the competitive injury suffered at the hands of large chain stores.[8] It is consistent with that intent for Congress also to have displayed special solicitude for the well-established, below-trade price-buying practices of governmental institutions.

II

As the majority documents, *ante*, at 160, n. 19, the legislative history of the Robinson-Patman Act clearly indicates that Congress envisioned *some* sort of immunity for governmental bodies.[9] The question before the Court is the extent

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[8] H. R. Rep. No. 2287, 74th Cong., 2d Sess., pt. 1, pp. 3–4 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess., 4 (1936); see FTC, Final Report on the Chain Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935).

[9] Members of the House expressed concern with the effect of the bill on the established below-market buying practices of federal, *state, county, and municipal governments.* Hearings on H. R. 8442 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess., 209 (1935). In response H. B. Teegarden, a principal draftsman of the Act, assured members of the House Judiciary Committee that he "would not want" the Act if it prohibited, all along the line, the competitive bidding practices of those governments. *Ibid.*

Moreover, with respect to subsequent legislative history, I find significant the fact that later attempts in Congress to expressly include governmental entities within the coverage of the Act failed. See H. R. 4452, 82d Cong., 1st Sess. (1951); H. R. 3377, 83d Cong., 1st Sess. (1953); H. R. 5213, 84th Cong., 1st Sess. (1955); H. R. 722, 85th Cong., 1st Sess. (1957); H. R. 155, 86th Cong., 1st Sess. (1959); H. R. 430, 87th Cong., 1st Sess. (1961). In particular, I would not dismiss as readily as does the majority, *ante*, at 163, n. 22, the bills introduced by Representative Patman in 1951 and 1953 to amend the Act to define "purchaser" to include "the United States, any State or any political subdivision thereof." The majority speculates that Representative Patman introduced these bills to reaffirm his original intent that these entities would be covered. In light of Representative Patman's agreement in his book, W. Patman, The Robinson-Patman Act 168 (1938), with the United States Attorney General's con-

of that immunity—in particular, whether the purchase of goods by state and local governments for resale in competition with private retailers is within the intended scope of the Robinson-Patman Act. As the majority acknowledges, *ante*, at 159, the 1936 Congress that enacted the Robinson-Patman Act did not focus on the precise issue before the Court. Notwithstanding this admission, the majority announces the surprising conclusion that "[t]o create an exemption here *clearly* would be contrary to the intent of Congress." *Ante*, at 171 (emphasis added).

The majority is correct in stating that it is not the business of this Court to engage in "'policy-making in the field of antitrust legislation'" in order to fill gaps where Congress has not clearly expressed its intent. *Ante*, at 170 (quoting *United States* v. *Cooper Corp.*, 312 U. S. 600, 606 (1941)). It is precisely because I concur in that admonition that I would refrain from attributing to Congress an intent to cover the state and local governmental purchases in question here.[10]

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struction of the Act to exclude purchases by the Federal Government and his extension of the Attorney General's rationale to "municipal and public institutions," *ibid.*, it is more plausible to infer that he viewed the bills as *extending* the Act's coverage.

[10] My resolution of the statutory issue here should not be construed to reflect a policy judgment that the Robinson-Patman Act *should* protect "a State's entrepreneurial personality." *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 422 (1978) (BURGER, C. J., concurring in part). We are not concerned here with whether the kind of activity in which these governmental entities are engaged *appropriately* exposes them to antitrust liability under the Act. Cf. *id.*, at 418. That question raises policy concerns lying peculiarly within the institutional province of Congress. "A court, without the benefit of legislative hearings that would illuminate the policy considerations if the question were left to Congress, is not competent in my opinion to resolve this question . . . . It is regrettable that the Court today finds it necessary to rush to this essentially legislative judgment." *Pfizer Inc.* v. *Government of India*, 434 U. S., at 331 (POWELL, J., dissenting) (footnote omitted). Because the question before us is one of congressional intent and it is far from clear that Congress has supplied an answer to that question, I would refrain from substituting the policy judgments of the judiciary for those Congress might embrace.

A

In attempting to supply the unexpressed intent of Congress, the majority fails to offer satisfactory guidelines for determining the scope of the Act's coverage of governmental agencies.[11] The majority assumes, "without deciding, that Congress did not intend the Act to apply to state purchases for consumption in traditional governmental functions" and suggests that state purchases of pharmaceuticals for the purpose of resale to indigent citizens may not expose the State to antitrust liability. *Ante*, at 154, and n. 7.

The majority's assumption, however, is inconsistent with the principles of statutory construction upon which it purports to rely. If, absent a clear expression of legislative intent to the contrary, the plain language of the statute controls, then by the majority's own assertions one would have to conclude that even purchases for the State's own use or for resale to indigents would fall within the Act's proscriptions. For, as the majority remarks, *ante*, at 155, the terms "person" and "purchasers" are broad enough to include governmental entities, and the legislative history is "ambiguous on the application of the Act to state purchases for consumption . . . ." *Ante*, at 160–161.

Moreover, to the extent the majority implies that a State's coverage or noncoverage under the Act turns on the distinction between purchases for resale and purchases for consumption,[12] that distinction is inconsistent with the compe-

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Cf. *id.*, at 320 (BURGER, C. J., dissenting); *id.*, at 330–331 (POWELL, J., dissenting).

[11] To the extent the majority purports to "divine" the will of Congress, it comes as no surprise, given Congress' inattention to this precise question, that no "bright lines" for coverage and noncoverage emerge from its opinion.

[12] The majority thus suggests, though it refrains from holding, that the scope of coverage under § 2(a) is coextensive with the "for their own use" line drawn by the Nonprofit Institutions Act of 1938, 15 U. S. C. § 13c, and interpreted by the Court in *Abbott Laboratories* v. *Portland Retail Druggists Assn., Inc.*, 425 U. S. 1 (1976). This proposed resale/consumption

tition rationale elsewhere suggested, *ante*, at 170, to underlie the prohibitions of § 2(a). For example, a state university hospital might limit the use of its pharmacy to its own faculty and staff, thereby falling within the "for their own use" exception.[13] Nevertheless, the university pharmacy may be inflicting competitive injury on private pharmacies that the university's faculty and staff might otherwise patronize.[14] Thus, the majority's conflicting suggestions leave in doubt what principle—the presence of functional competition or the consumption/resale dichotomy—guides the determination whether a state or local government's purchases fall within the Act's proscriptions.

B

Against the backdrop of a legislative history that even the majority concedes does not focus on the issue before us stands the general consensus in the legal and business communities that sales to governmental entities are not covered by the Robinson-Patman Act. The majority devotes considerable effort to distinguishing or undercutting the authorities cited by the respondents. In so doing, and in observing that these authorities cannot reveal Congress' intent in 1936, *ante*, at 165, n. 27, the majority misunderstands the significance of this evidence. These authorities simply illustrate the virtually unanimous assumption over the past 47 years of noncoverage of governmental entities—an assumption that has served as the basis of well-established governmental pur-

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distinction has no foundation in the language of § 2(a), which prohibits discrimination "in price between different purchasers of commodities . . . , where such commodities are sold *for use, consumption, or resale* . . . ." 15 U. S. C. § 13(a) (emphasis added).

[13] See *Abbott Laboratories* v. *Portland Retail Druggists Assn., Inc.*, *supra*, at 16–17.

[14] Or, to take another example, a cafeteria operated by a governmental agency for the benefit of its employees also might inflict some competitive injury on restaurants in the same area that otherwise might enjoy the employees' patronage.

chasing practices and marketing relationships. In the past the Court has relied upon the widespread understanding of the provisions of the Robinson-Patman Act in limiting the scope of the Act's prohibitions.[15] To do so here is no less appropriate.

Despite its attempt to discount the significance of the judicial authorities cited by the respondents, the majority cannot dispute that no court has imposed liability upon a seller or buyer, under either § 2(a) or § 2(f), 15 U. S. C. §§ 13(a) and (f), in a case involving an alleged price discrimination in favor of a federal, state, or municipal governmental purchaser.[16]

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[15] See *Standard Oil Co.* v. *FTC*, 340 U. S., at 246–247 (reliance on widespread understanding that the meeting-competition proviso of § 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, provides a complete defense to a charge of price discrimination).

[16] See *Champaign-Urbana News Agency, Inc.* v. *J. L. Cummins News Co.*, 632 F. 2d 680, 688–689 (CA7 1980) (Robinson-Patman Act inapplicable to purchases by instrumentality of Federal Government for resale); *Mountain View Pharmacy* v. *Abbott Laboratories*, No. C–77–0094 (Utah, Sept. 6, 1977) (unpublished opinion) (order of consent dismissing with prejudice Robinson-Patman claims based on sales to any governmental entity), aff'd in part and rev'd in part on other grounds, 630 F. 2d 1383 (CA10 1980); *Logan Lanes, Inc.* v. *Brunswick Corp.*, No. 4–66–5 (Idaho, May 26, 1966) (unpublished opinion) (sale of bowling equipment to State not within provisions of Act; alternative holding that sales exempt under 15 U. S. C. § 13c), aff'd, 378 F. 2d 212, 217 (CA9) (sales to state university within § 13c exemption), cert. denied, 389 U. S. 898 (1967); *Sperry Rand Corp.* v. *Nassau Research & Development Associates*, 152 F. Supp. 91, 96 (EDNY 1957) (disclaiming, on motion for reargument, any intention that original opinion could be "construed to suggest that sales to the Government can be thought to be subject to the provisions of the Robinson-Patman Act"); *Sachs* v. *Brown-Forman Distillers Corp.*, 134 F. Supp. 9, 16 (SDNY 1955) ("It is doubtful at best whether the Robinson-Patman Act applies at all to sales to Government agencies, state or federal") (holding Act inapplicable to sales by liquor distiller to state liquor commissions; alternative holding that no competitive injury suffered by plaintiff liquor wholesaler), aff'd on opinion below, 234 F. 2d 959 (CA2), cert. denied, 352 U. S. 925 (1956); *General Shale Products Corp.* v. *Struck Constr. Corp.*, 37 F. Supp. 598, 602–603 (WD Ky. 1941) (alternatively holding Robinson-Patman Act inapplicable to sales to municipal housing com-

Commentators confirm the general judicial consensus that sales to States and municipalities are not covered by the Act.[17] Moreover, Congress' failure to enact bills extending

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mission and suggesting that "the Act does not apply to sales to the government, state or municipalities"), aff'd, 132 F. 2d 425 (CA6 1942), cert. denied, 318 U. S. 780 (1943).

While one may concede that most of these cases do not focus on the precise situation of purchases by state or local governments for resale, they nonetheless reflect the consensus of judicial opinion that governmental bodies are not subject to liability under § 2 of the Clayton Act, as amended by the Robinson-Patman Act. The majority would dismiss many of these cases with the simple observation that they predate the Court's decision in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389 (1978). *Ante*, at 167–168, n. 32. For reasons already noted, however, in my view *City of Lafayette* does not resolve the issue before us in this case.

Moreover, cases that the majority suggests are supportive of its position, *ante*, at 168, n. 33, are similarly distinguishable. For example, both *Municipality of Anchorage* v. *Hitachi Cable, Ltd.*, 547 F. Supp. 633 (Alaska 1982), and *Sterling Nelson & Sons, Inc.* v. *Rangen, Inc.*, 235 F. Supp. 393 (Idaho 1964), aff'd, 351 F. 2d 851, 858–859 (CA9 1965), cert. denied, 383 U. S. 936 (1966), indicate only that the Robinson-Patman Act may apply where the State, as in *Sterling*, or the municipality, as in *Hitachi*, is the *victim* of commercial bribery under § 2(c), 15 U. S. C. § 13(c), rather than the favored customer.

[17] E. Kintner, A Robinson-Patman Primer 224 (2d ed. 1979) ("In spite of [any] contrary indications [among state attorneys general], it is generally believed that the exemption applies to governmental purchases at any level"); W. Patman, Complete Guide to the Robinson-Patman Act 30 (1963) (indicating the Act is inapplicable to sales to government, municipal, or public institutions); F. Rowe, Price Discrimination Under the Robinson-Patman Act 84 (1962) ("The preponderance of reasoned opinion treats State or municipal bodies on a par with the Federal Government's exemption"); 4 J. von Kalinowski, Antitrust Laws and Trade Regulation § 24.06, p. 24–70 (1982) ("[T]he prevailing view is that such sales [to States and municipalities] are excluded from Robinson-Patman liability"). See also 5A Z. Cavitch, Business Organizations § 105D.01[8][c] (1973) (indicating that lower federal courts have generally held the Act inapplicable to sales to States and municipalities, that one lower federal court has held the Act may be applicable if the State is the disfavored customer, and that opinions among state attorneys general are divided).

Although not specifically addressing any consumption/resale distinction, a past Attorney General of the United States also has opined that pur-

Robinson-Patman coverage to these entities buttresses this interpretation of the Act. See n. 9, *supra*.

This same understanding has been expressed in testimony before Congress. In 1967 and 1968 a congressional Subcommittee conducted public hearings on the problems of small businesses in the pharmaceutical industry. The Subcommittee heard testimony from both representatives of pharmaceutical manufacturers and retail pharmacists regarding the industrywide practice of price discrimination in sales of pharmaceuticals to governmental purchasers—federal, state, county, and municipal.[18] Several witnesses also directly expressed their assumption that the Robinson-Patman Act does not apply to such sales.[19]

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chases by state and local governments are not within the Act's prohibition against price discrimination. Report of the Attorney General Under Executive Order 10936, Identical Bidding in Public Procurement 11 (1962) (identical bidders on contracts with state and local governments cannot contend that the Act prohibits bidding below the schedule price, because the Act is not applicable to government contracts).

[18] Small Business Problems in the Drug Industry: Hearings before the Subcommittee on Activities of Regulatory Agencies of the House Select Committee on Small Business, 90th Cong., 1st Sess., 48 (1967–1968) (hereinafter 1967–1968 Hearings) (Merritt Skinner, community pharmacist); *id.*, at 258 (William Apple, executive director of the American Pharmaceutical Association); *id.*, at 296, 318–319 (Hyman Moore, H. L. Moore Drug Exchange, Inc.); *id.*, at 500 (Henry DeBoest, vice president of Eli Lilly & Co.); *id.*, at 705 (Donald van Roden, vice president and general manager of pharmaceutical operations for Smith Kline & French Laboratories); *id.*, at 792 (Joseph Ingolia, vice president and general manager of Schering Laboratories); *id.*, at 817 (Lyman Duncan, vice president of American Cyanamid Co.).

Based upon this overwhelming evidence, the Select Committee on Small Business concluded in its Report to the House: "The difference between drug prices charged retailers and wholesalers as compared to those charged . . . governmental customers is extremely substantial, often being over 50 percent." H. R. Rep. No. 1983, 90th Cong., 2d Sess., 77 (1968).

[19] See 1967–1968 Hearings, at 15–16 (Earl Kintner, former FTC Commissioner, counsel for the National Association of Retail Druggists) ("When a drug supplier sells drugs to Federal, State, or municipal government institutions, the price charged by the supplier may be without regard to the Robinson-Patman Act, because such sales are probably exempt from the

In 1969 and 1970, the same House Subcommittee investigated the problems of small businessmen under the Robinson-Patman Act. In these hearings witnesses again expressed the view that governmental purchases at any level are not covered, highlighting the problem of favorable prices on governmental purchases *for resale* and making a plea for a change in the law.[20]

Robinson-Patman Act"); *id.*, at 731 (W. Abrahamson, president of Ortho Pharmaceutical Corp.) ("[T]he only special pricing we have ever engaged in are *[sic]* in bidding situations to [federal, state, or local government] agencies excluded from the Robinson-Patman Act"); *id.*, at 1069 (C. Stetler, president of the Pharmaceutical Manufacturers Association) ("There is nothing immoral or unlawful about incremental cost pricing in cases—such as sales to the Government . . . —where the Robinson-Patman Act does not apply").

Even one Congressman on the Subcommittee expressed his understanding that the Act does not apply to governmental purchasers. See *id.*, at 1092 (Rep. Corman) ("[I]f there were no exemption under Robinson-Patman for the Government . . . , what would be the situation as to their purchases?"). The colloquy that followed Representative Corman's question further evidences the assumption that governmental purchases are outside the scope of the Act, *even in the case of resales.*

"Mr. STETLER. If there was no exemption under Robinson-Patman, I presume some of these practices would be illegal under Robinson-Patman.

"Mr. CUTLER. If I could try to answer that, [Representative] Corman. . . .

"[A]bsent the one case of these resales . . . , I suppose the lack of exemption would make no difference, because the Robinson-Patman Act would not apply for other reasons, because you are not discriminating between two people engaged in commerce and competing with one another.

"Further, there is a real question as to whether the Robinson-Patman Act applies *under any circumstances* where you are bidding under a competitive bid. So for both of these reasons, the answer to your question would be that the same pricing practices might still lawfully prevail under Robinson-Patman without *the exemption for the government . . . .*" *Ibid.* (emphasis added).

[20] William McCamant, Director of Public Affairs for the National Association of Wholesalers, testified:

"Over the years, the Robinson-Patman Act has not been extended to cover sales to the Government. In the days when Government purchases

III

The legislative history of the Robinson-Patman Act clearly reveals that Congress intended to exclude governmental entities from the Act's proscriptions to some extent. However, Congress did not focus on the issue before us and therefore did not provide a clear rationale governing coverage and noncoverage. In an area in which bright lines are needed to guide state and local governments in their purchasing practices, the majority fails to identify any principle triggering inclusion or exclusion.

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constituted a relatively small volume in the marketplace, this exemption posed few problems. But today, with the vast growth in Government purchases, Federal, State, and local, . . . the continued exemption creates many unfair competitive situations.

. . . . . .

"We believe that Congress must turn its attention to this problem." Small Business and the Robinson-Patman Act, Hearings before the Special Subcommittee on Small Business and the Robinson-Patman Act of the House Select Committee on Small Business, 91st Cong., 1st Sess., 73–74 (1969–1970).

See *id.*, at 76–77 (Everette MacIntyre, Acting Chairman of the Federal Trade Commission) (affirming that sales to the Federal Government, even in the resale context, are not subject to the Robinson-Patman Act).

Harold Halfpenny, legal counsel for the Automotive Service Industry Association, focused most precisely on the problem of which petitioners complain—*i. e.*, competitive injury to private industry when governmental entities receive more favorable prices on purchases of commodities for resale.

"[W]hile the Act is silent on the subject, its legislative history and subsequent interpretation support the proposition that sales made to Federal or *State governmental bodies* are not subject to the provisions of the Act.

"This may be injurious to competition in several ways. . . .

"[T]here are '*second line' situations where competition exists between the Government and private industry in the resale of commodities.*

. . . . . .

"The Federal Trade Commission has not recommended legislation to make the Robinson-Patman Act applicable to sales to governmental purchases. However, in our opinion, Congress should consider acting on its own volition." *Id.*, at 623 (emphasis added).

Moreover, one cannot doubt that state, county, and municipal governments and manufacturers of commodities have structured their marketing relationships with each other on the longstanding assumption that the Robinson-Patman Act does not apply to those transactions. That understanding finds substantial support among the courts and commentators. State and local governments have developed programs for providing services to the public, including medical care to the indigent and the medically needy,[21] based on the same assumption. The majority's holding that sales of commodities to state and local governments for resale in competition with private enterprise are covered by the Act will engender significant disruption—not only through government and industry reexamination and restructuring of marketing relationships, but also, unfortunately, through possible termination of services and supplies to needy citizens[22] and through litigation associated with the process of reexamination.[23] The Court rests its decision primarily on one statement in the legislative history,[24] taken in isolation from other remarks designed to assure concerned House Members that

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[21] See, *e. g.*, Cal. Welf. & Inst. Code Ann. §§ 14100–14126 (West 1980 and Supp. 1982); Ill. Ann. Stat., ch. 23, ¶¶ 5–1 to 5–14 (Supp. 1982–1983); Mont. Code Ann. §§ 53–6–103 to 53–6–144 (1981); N. Y. Soc. Serv. Law §§ 365, 365–a (McKinney 1976 and Supp. 1982–1983); Tex. Human Res. Code Ann. §§ 32.001–32.037 (1980); Va. Code §§ 63.1–134 to 63.1–140 (1980).

[22] The administrative burden of developing internal accounting and recordkeeping procedures to segregate commodities purchased for resale, plus the additional financial strain of paying higher prices for these purchases, may induce state and local governments to terminate programs and services already in place. More significantly, however, the uncertainty generated by the majority's failure to establish clear lines of demarcation for coverage and noncoverage and the fear of exposure to treble-damages liability might well cause cautious legislators facing budgetary dilemmas to eliminate these programs.

[23] I note that the Court has not indicated that today's holding will have only prospective effect.

[24] See *ante*, at 161.

the Act would *not* force the abandonment of governmental below-market buying practices which the majority's holding now calls into question. Given Congress' failure to delineate the extent of the Robinson-Patman Act's coverage or noncoverage of state and local governments, I would allow Congress to speak on this issue rather than disrupt long-standing practices and programs and judicially arm private litigants with a powerful treble-damages action against these governments. Therefore, I would affirm the judgment below.

LOCKHEED AIRCRAFT CORP. *v.* UNITED STATES ET AL.

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

No. 81–1181. Argued November 30, 1982—Decided February 23, 1983

A civilian employee of the United States Navy died in the crash of an aircraft operated by the United States Air Force and manufactured by petitioner. The United States paid death benefits to the employee's survivors under the Federal Employees' Compensation Act (FECA). Thereafter, the employee's administrator filed suit against petitioner in Federal District Court, seeking damages for the employee's wrongful death and for injuries suffered prior to her death. Petitioner, asserting a right to indemnification under the Federal Tort Claims Act, impleaded the United States as a third-party defendant. Petitioner settled the administrator's claim and moved for summary judgment in the third-party action. The Government moved to dismiss the third-party claim on the ground that it was barred by FECA's exclusive-liability provision, 5 U. S. C. § 8116(c), which prohibits actions against the United States by "an employee, his legal representative, spouse, dependents, next of kin, [or] any other person otherwise entitled to recover damages from the United States . . . because of the [employee's] injury or death." The District Court, concluding that § 8116(c) did not bar the indemnity claim, granted summary judgment for petitioner. The Court of Appeals reversed.

Held: Section 8116(c) does not bar petitioner's third-party indemnity action against the United States. Section 8116(c) was intended to govern only the rights of employees, their relatives, and people claiming through or on behalf of them. *Weyerhaeuser S.S. Co.* v. *United States*, 372 U. S. 597. These are the only categories of parties who benefit from the "*quid pro quo*" compromise of FECA commonly found in workers' compensation legislation whereby employees are guaranteed the right to immediate, fixed benefits, regardless of fault and without need for litigation, but in return lose the right to sue the Government. Pp. 193–199.

215 U. S. App. D. C. 27, 665 F. 2d 1330, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 199.

Warner W. Gardner argued the cause for petitioner. With him on the briefs were *Richard M. Sharp*, *Michael S. Giannotto*, *Jeffrey C. Martin*, *Carroll E. Dubuc*, and *Nicholas H. Cobbs*.

Carolyn F. Corwin argued the cause for the United States. With her on the brief were *Solicitor General Lee*, *Assistant Attorney General McGrath*, *Deputy Solicitor General Geller*, *William Kanter*, and *Katherine S. Gruenheck*.*

JUSTICE POWELL delivered the opinion of the Court.

Under the Federal Employees' Compensation Act, a federal employee may not bring a tort suit against the Government on the basis of a work-related injury, but may seek recovery from a third party. The issue here is whether such a third party may seek indemnity from the Government for its tort liability to the employee.

I

On April 4, 1975, a C–5A aircraft operated by the United States Air Force and manufactured by petitioner Lockheed Aircraft Corp. crashed near Saigon, South Vietnam.[1] Almost 150 people died in the crash, including Ann Nash Bottorff, a civilian employee of the United States Navy. The United States paid death benefits to Bottorff's survivors under the Federal Employees' Compensation Act (FECA), 5 U. S. C. § 8101 *et seq.*

Thereafter Bottorff's administrator filed suit against Lockheed, as the manufacturer of a "defective product," in the United States District Court for the District of Columbia.

**Dewey R. Villareal, Jr.*, filed a brief for the Britannia Steam Ship Insurance Association Limited et al. as *amici curiae*.

[1] The crash occurred during a mission to evacuate over 250 orphans from Vietnam shortly before the fall of Saigon. The incident is discussed in greater detail in *Schneider* v. *Lockheed Aircraft Corp.*, 212 U. S. App. D. C. 87, 90–91, 658 F. 2d 835, 838–839 (1981) *(per curiam)*, cert. denied, 455 U. S. 994 (1982).

He sought damages for Bottorff's wrongful death and for the injuries she suffered prior to her death. Lockheed, asserting a right to indemnification under the Federal Tort Claims Act, 28 U. S. C. §§ 1346(b), 2671–2680, impleaded the United States as a third-party defendant.[2]

Lockheed settled the administrator's claim and moved for summary judgment in the third-party action. The Government did not dispute that it was primarily responsible for the fatal crash, nor did it challenge the terms of the settlement. Rather the Government moved to dismiss the third-party claim on the ground that it was barred by 5 U. S. C. § 8116(c), FECA's exclusive-liability provision:

> "The liability of the United States . . . under [FECA] with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States . . . to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States . . . because of the injury or death . . . ."

The District Court, concluding that § 8116(c) did not bar the indemnity claim, granted summary judgment for Lockheed.

On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed. *Thomas* v. *Lockheed Aircraft Corp.*, 215 U. S. App. D. C. 27, 665 F. 2d 1330 (1981). It concluded that § 8116(c) barred Lockheed's third-party claim against the United States. In reaching this conclusion, the Court of Appeals relied primarily on several decisions by other Courts of Appeals. See, *e. g.*, *Kudelka* v. *American Hoist & Derrick Co.*, 541 F. 2d 651, 658–660 (CA7 1976); *Galimi* v. *Jetco, Inc.*, 514 F. 2d 949 (CA2 1975). The court recognized, however, that its holding was contrary to that reached in *Wallenius Bremen G. m. b. H.* v. *United*

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[2] Lockheed also asserted other claims against the United States that are not currently before the Court.

States, 409 F. 2d 994 (CA4 1969), cert. denied, 398 U. S. 958 (1970).[3]

We granted certiorari to resolve the conflict. 456 U. S. 913 (1982). We now reverse.

II

Section 8116(c) is specific and detailed. It prohibits actions against the United States by an "employee, his legal representative, spouse, dependents, next of kin, [or] any other person otherwise entitled to recover damages from the United States . . . because of the [employee's] injury or death." Lockheed is not within any of the specified categories. If § 8116(c) applies, therefore, it can only be because Lockheed is an "other person otherwise entitled to recover damages from the United States." The Government argues that the language is broad enough to include Lockheed. We must decide if Congress intended that result.

A

FECA's exclusive-liability provision was enacted in substantially its present form in 1949. FECA Amendments of 1949, § 201, 63 Stat. 861 (enacting FECA § 7(b)) (currently codified at 5 U. S. C. § 8116(c)). It was designed to protect the Government from suits under statutes, such as the Fed-

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[3] In *United Air Lines, Inc.* v. *Wiener*, 335 F. 2d 379, 402–404 (CA9), cert. dism'd *sub nom. United Air Lines, Inc.* v. *United States*, 379 U. S. 951 (1964), the court concluded that FECA's exclusive-liability provision does not bar a third-party indemnification action against the United States. The court held, however, that the Government nevertheless was not liable to the third party. Since there was no underlying tort liability on the Government's part toward the employee, there was no basis for indemnification.

We note that the decision whether or not to allow third-party indemnity actions is a problem common to all workers' compensation systems. Professor Larson has described this issue as "[p]erhaps the most evenly-balanced controversy in all of workers' compensation law." Larson, Third-Party Action Over Against Workers' Compensation Employer, 1982 Duke L. J. 483, 484.

eral Tort Claims Act, that had been enacted to waive the Government's sovereign immunity. In enacting this provision, Congress adopted the principal compromise—the "*quid pro quo*"—commonly found in workers' compensation legislation: employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return they lose the right to sue the Government. See H. R. Rep. No. 729, 81st Cong., 1st Sess., 14–15 (1949); S. Rep. No. 836, 81st Cong., 1st Sess., 23 (1949). This compromise is essentially the same as that found, for example, in the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).[4] See 33 U. S. C. § 905(a).

In *Weyerhaeuser S.S. Co.* v. *United States*, 372 U. S. 597 (1963), the Court considered FECA's exclusive-liability provision and carefully reviewed its legislative history. That case arose out of the collision between an Army dredge and a vessel owned by Weyerhaeuser. A federal employee injured in the collision recovered FECA compensation from the Government and tort damages from Weyerhaeuser. Weyerhaeuser brought suit against the United States under the Public Vessels Act, 43 Stat. 1112, 46 U. S. C. § 781 *et seq.*, seeking the damages that it could have recovered from another private shipowner. Included in its claim, under the admiralty divided damages rule, was the Government's share of the employee's tort recovery.

The Government challenged the inclusion of any part of the tort damages paid to the employee on the ground that FECA's exclusive-liability provision protected the United States from such claims. In particular, the Government ar-

[4] The FECA exclusive-liability provision was modeled on the analogous provisions of LHWCA and the New York Workmen's Compensation Law. By 1949 the New York courts already had construed the New York law to permit third-party indemnity actions against the employer. See, *e. g.*, *Westchester Lighting Co.* v. *Westchester County Small Estates Corp.*, 278 N. Y. 175, 15 N. E. 2d 567 (1938); *Gorham* v. *Arons*, 76 N. Y. S. 2d 850 (Sup. Ct. N. Y. Cty. 1947); *Clements* v. *Rockefeller*, 189 Misc. 885, 70 N. Y. S. 2d 146 (Sup. Ct. N. Y. Cty. 1947).

gued—much as it does in this case—that third parties plainly were included within the general phrase "anyone otherwise entitled to recover damages." Brief for United States in *Weyerhaeuser S.S. Co.* v. *United States*, O. T. 1962, No. 65, pp. 5, 8–11. See 372 U. S., at 600. The Court, however, rejected this argument. It first pointed out that the statute was ambiguous. "[T]he general language upon which the Government relies follows explicit enumeration of specific categories: employees, their representatives, and their dependents. Under the traditional rule of statutory construction which counsels against giving to general words a meaning totally unrelated to the more specific terms of a statute, we think the meaning of the statutory language is far from 'plain.'" *Id.*, at 600–601. The Court then reviewed the legislative history of the exclusive-liability provision, and concluded that it had been intended to govern only the relationship "between the Government on the one hand and its employees and their representatives or dependents on the other." *Id.*, at 601. The Court summarized its review of the legislative history as follows: "There is no evidence whatever that Congress was concerned with the rights of unrelated third parties, much less of any purpose to disturb settled doctrines of admiralty law affecting the mutual rights and liabilities of private shipowners in collision cases." *Ibid.* (footnote omitted).[5]

The *Weyerhaeuser* Court reinforced its conclusion with a discussion of the "nearly identical" LHWCA provision. *Id.*, at 602. The Court observed that under *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124 (1956), a ship-

[5] Contrary to suggestions in the dissent, *post*, at 199, 200, 201, there is no indication that the *Weyerhaeuser* Court balanced FECA's exclusive-liability provision against the divided damages rule. On the contrary, the holding in *Weyerhaeuser* relates simply to congressional intent. Whatever Congress might have done, it did not intend FECA's exclusive-liability provision to override the rights of unrelated third parties—including rights asserted under the Public Vessels Act on the basis of the divided damages rule.

owner was entitled to obtain indemnification from an injured longshoreman's employer for damages that were recovered against the shipowner but were based on the employer's negligence. Although *Ryan* relied on the existence of a contractual relationship between the shipowner and the employer, the same result was reached in a series of later cases where "the contractual relationship was considerably more attenuated." 372 U. S., at 603. In *Weyerhaeuser* there was no contractual relationship, but there was a well-established admiralty rule that had "governed with at least equal clarity the correlative rights and duties" at issue in the case. *Ibid.*

B

The Court's reasoning in *Weyerhaeuser* applies with equal force in the present case.[6] The Government advances the same arguments before us now that it unsuccessfully advanced in *Weyerhaeuser*. To paraphrase the *Weyerhaeuser* Court's conclusion, "[t]here is no evidence whatever that Congress was concerned with the rights of unrelated third parties, much less of any purpose to disturb settled doctrines of [tort] law affecting the mutual rights and liabilities of private [parties] in [indemnity] cases." *Id.*, at 601. Section 8116(c) was intended to govern only the rights of employees, their relatives, and people claiming through or on behalf of them.[7] These are the only categories of parties who benefit from the "*quid pro quo*" compromise that FECA adopts. See *Wallenius Bremen*, 409 F. 2d, at 995.

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[6] We reject the Government's suggestion that *Weyerhaeuser* was wrongly decided. See Brief for United States 22. We note that in the 20 years since *Weyerhaeuser* was decided, Congress has not modified FECA's exclusive-liability provision to include third parties. This is particularly significant in view of the 1966 codification of FECA, which included amendments to the new § 8116(c). See Pub. L. 89–554, 80 Stat. 542.

[7] As counsel for Lockheed suggested at oral argument, a guardian ad litem for an employee's minor dependent could be an "other person" under § 8116(c). Tr. of Oral Arg. 7–8.

The Government seeks to distinguish *Weyerhaeuser*, but the present situation is nearly identical. Here, as in *Weyerhaeuser*, a third party has been forced to pay tort damages for the death or injury of a federal employee covered by FECA, and the third party seeks to recover a portion of its payment. Here the basis for the suit against the United States is the Federal Tort Claims Act rather than the Public Vessels Act, but that difference is irrelevant. Congress intended § 8116(c) to apply to suits under both Acts without distinction. See H. R. Rep. No. 729, 81st Cong., 1st Sess., 14 (1949); S. Rep. No. 836, 81st Cong., 1st Sess., 23 (1949). Here Lockheed relies on substantive indemnity law,[8] while the private shipowner in *Weyerhaeuser* relied on the admiralty divided damages rule, but this is the same irrelevant

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[8] The validity of Lockheed's underlying substantive claim is not before us. The District Court ruled that, as a matter of substantive law, indemnity is available to Lockheed against the United States. The Court of Appeals did not find it necessary to rule on this issue.

Since the validity of the substantive indemnity claim is not before us, the LHWCA cases on which the dissent relies, *post*, at 200–202, are entirely irrelevant. In *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282 (1952), decided 4 years before *Ryan* and 11 years before *Weyerhaeuser*, the Court merely held that a substantive right of contribution did not exist in the circumstances of that case. The Court explicitly left open the issue whether such a right to contribution, if it were to exist, would be subject to LHWCA's exclusive-liability provision. 342 U. S., at 286, and n. 12. *Atlantic Coast Line R. Co.* v. *Erie Lackawanna R. Co.*, 406 U. S. 340 (1972) *(per curiam)*, is nothing more than a three-sentence reaffirmation of *Halcyon*.

Stencel Aero Engineering Corp. v. *United States*, 431 U. S. 666 (1977), which the dissent finds "similar," *post*, at 202, also offers no support to the Government's position on this point. The issue in *Stencel*, again relating to the underlying substantive claim, was whether the Government's waiver of sovereign immunity in the Federal Tort Claims Act applied to an indemnity action based on an injury to a serviceman. Relying primarily on the military nature of the action, we held that the doctrine of *Feres* v. *United States*, 340 U. S. 135 (1950), precluded the substantive claim without regard to any exclusive-liability provision. It is clear that the Government has waived its sovereign immunity here.

distinction. The Federal Tort Claims Act permits an indemnity action against the United States "in the same manner and to the same extent" that the action would lie against "a private individual under like circumstances." 28 U. S. C. § 2674; see *Stencel Aero Engineering Corp.* v. *United States*, 431 U. S. 666, 669–670 (1977) (citing *United States* v. *Yellow Cab Co.*, 340 U. S. 543 (1951)). The Public Vessels Act permits an action to recover collision damages on essentially the same terms. To the extent that the basis for the underlying cause of action could make any difference, the indemnity theories on which Lockheed relies are as well established as the divided damages rule was in *Weyerhaeuser*.

C

The most relevant changes since *Weyerhaeuser* have been in the LHWCA Amendments of 1972, 86 Stat. 1251. While these changes are illuminating, they do not help the Government's position. Under the amended LHWCA, an injured longshoreman's employer is no longer liable to a shipowner for tort damages that the shipowner has paid the employee. See 33 U. S. C. § 905(b). Congress thus overruled the result in *Ryan*, *supra*, and abolished the shipowner's indemnity action. But in so doing, Congress *also* abolished the injured employee's seaworthiness remedy against the shipowner—a strict-liability action that the Court had recognized in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946). In other words, Congress abolished the third-party indemnity action only in conjunction with a "*quid pro quo*" to benefit the third parties. Here there has been no FECA amendment to abolish the third-party indemnity action recognized in *Weyerhaeuser*. The Government nevertheless invites us to abolish the action without the benefit of an amendment. We are requested to do this even though Congress has provided no "*quid pro quo*" as it thought appropriate in the LHWCA context. We decline the invitation.

III

The District Court held that Lockheed had a right to indemnity under the governing substantive law, but the Court of Appeals did not rule on that question. Accordingly, we do not consider it. We adhere to the decision in *Weyerhaeuser*, and hold only that FECA's exclusive-liability provision, 5 U. S. C. § 8116(c), does not directly bar a third-party indemnity action against the United States. We reverse the judgment of the Court of Appeals and remand the case for further consideration consistent with this opinion.

It is so ordered.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court's opinion, and especially its unquestioning application of *Weyerhaeuser S.S. Co.* v. *United States*, 372 U. S. 597 (1963), do not show why this case presents "'the most evenly-balanced controversy in all of workers' compensation law.'" *Ante*, at 193, n. 3. Because I believe the balance tips in the opposite direction, I respectfully dissent.

In *Weyerhaeuser*, the Court found that the plaintiff's right to recover outweighed the limitation of liability provision of the statute. This is not surprising, since the plaintiff's right to recover was based on the ancient admiralty rule of divided damages.[1] The divided-damages rule is basic to admiralty and to the relationships of vessels at sea. Under this rule, Weyerhaeuser had a direct right of action against the United States for the injuries it sustained in the collision. Thus the only issue was whether one item of damage, the recovery of the federal employee against Weyerhaeuser, could be included in Weyerhaeuser's action against the Govern-

[1] "In *The North Star*, 106 U. S. 17 (1882), Mr. Justice Bradley traced the doctrine back to the Laws of Oléron which date from the 12th century, and its roots no doubt go much deeper." *Cooper Stevedoring Co.* v. *Kopke, Inc.*, 417 U. S. 106, 110 (1974).

ment. The Court stated that it had long since "held that the full scope of the divided damages rule must prevail over a statutory provision which . . . limited the liability of one of the shipowners with respect to an element of damages incurred by the other in a mutual fault collision. *The Chattahoochee*, 173 U. S. 540." 372 U. S., at 603. We thought that Congress, in enacting § 8116(c), did not show "any purpose to disturb settled doctrines of admiralty law affecting the mutual rights and liabilities of private shipowners in collision cases." *Id.*, at 601 (footnote omitted).

It is true that the *Weyerhaeuser* opinion states that § 8116(c) does not bear on "the rights of unrelated third parties." *Ibid.* This view is not controlling. The Court's finding on the primacy of the divided-damages rule shows that that rule was adequate to overcome § 8116(c) and that the comments on congressional intent were dictum. *Weyerhaeuser holds* that the divided-damages rule is more important than the limitation of liability provision of the statute, and that therefore the latter must yield.

In other cases involving a "'nearly identical,'" *ante*, at 195, quoting *Weyerhaeuser*, *supra*, at 602, statute, the Court has found that the limitation of liability aspects of a workers' compensation scheme outweigh an unrelated third party's right to recover. In *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282 (1952), and *Atlantic Coast Line R. Co.* v. *Erie Lackawanna R. Co.*, 406 U. S. 340 (1972) *(per curiam)*, we refused to allow unrelated third-party tortfeasors to obtain contribution from employers who were covered by the limitation of liability provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §§ 901–950. In each case we thought there was no competing principle as strong as the divided-damages rule that would overcome the limitation of liability aspect of the statute.[2]

[2] In *Kopke*, *supra*, we reaffirmed *Halcyon* and *Atlantic*. We permitted contribution in *Kopke* because the limitation of liability provision did not

There can be no doubt that a principal purpose of § 8116(c) was to limit the amount that the Government would have to pay on account of injuries to its employees. See S. Rep. No. 836, 81st Cong., 1st Sess., 23, 30 (1949) (Section 8116(c) will lead to "savings to the United States, both in the damages recovered and in the expense of handling the lawsuits"). As the Court pointed out in *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, 159 (1932), any workers' compensation statute exists in part to provide "for employers a liability which is limited and determinate." The balance that must be drawn, then, is between the doctrine that gives Lockheed a right to recover and the limitation on liability provided in § 8116(c). We know that in *Weyerhaeuser* the *right* was found to be more important and that in *Halcyon* and *Atlantic* the *limitation* was found to be more important.

In this case we are presented with a tort indemnity claim presented pursuant to the Federal Tort Claims Act, particularly 28 U. S. C. § 2674. The Court states, without explanation, that this claim is "as well established as the divided damages rule." *Ante*, at 198. However well established Lockheed's claim may be,[3] it is not the same kind of claim that we approved in *Weyerhaeuser* and *Ryan*. Those cases turned on the special relationship between the third party and the employer created by ancient maritime law or by voluntary agreement. The only relationship Lockheed can

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apply to the defendant, so the injured plaintiff could have sued him directly. In another LHWCA case, however, we upheld the third party's right to recover. *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124 (1956), "relied on the existence of a contractual relationship between the [third-party] shipowner and the employer." *Ante*, at 196. The holding of *Ryan* is that a contract that provides for employer liability, like the divided-damages rule, is a sufficiently compelling basis of liability to overcome the limitation of liability principle.

[3] The parties seek to show the status of indemnity actions in 1949, when the statute was enacted. What is important is not whether indemnity actions existed, but whether permitting such actions would be consistent with the limitation of liability principle Congress has enacted.

claim in this case comes from the Government's breach of a duty of care owed to Bottorff. In this respect, Lockheed's claim is like the claims for contribution the Court rejected in *Halcyon* and *Atlantic;* it is an indirect sharing of responsibility among wrongdoers and not a breach of a direct duty to Lockheed.

We considered a similar indemnity claim in *Stencel Aero Engineering Corp.* v. *United States*, 431 U. S. 666 (1977). The underlying injury in *Stencel* was caused when the ejection seat of a jet fighter malfunctioned during a midair emergency, and the Air National Guard pilot was permanently injured. The pilot sued Stencel, the manufacturer of the ejection system, for negligence. Stencel cross-claimed against the United States for indemnity. Its claim, like Lockheed's claim in this case, was that it was at most passively negligent, while the Government's active negligence caused the injuries. Both claims were brought under the Federal Tort Claims Act. The pilot, like Bottorff, was entitled to statutory payments, in that case under the Veterans' Benefits Act.

We affirmed the dismissal of Stencel's cross-claim, even though no limitation of liability statute applied to the case, because we found that the limitation of liability principle of *Feres* v. *United States*, 340 U. S. 135 (1950), precluded Stencel's indemnity claim. We did not consider whether the result would be different if Stencel had relied upon a more direct theory of liability, but *Stencel* does stand for the proposition that an indemnity claim of this kind is not sufficient to overcome a limitation on the liability of the United States.[4]

[4] The Court is mistaken when it states that *Stencel* was decided "without regard to any exclusive-liability provision." *Ante*, at 197, n. 8. *Stencel* pointed out that a factor in *Feres* was the compensation paid to servicemen without regard to the Government's negligence. 431 U. S., at 671. It then characterized *Feres* as establishing that the veterans' benefits statute "provides an upper limit of liability for the Government as to service-connected injuries," *id.*, at 673, thus establishing a limitation of liability principle similar to that enacted in § 8116(c). The Court in *Stencel* balanced this

The Court's opinion today does more than permit a new and, in my view, inappropriate kind of claim to defeat the limitation of liability principle. It also greatly expands the liability to which the Government may be subjected on account of injuries to its employees. Both the divided-damages rule and contribution require joint tortfeasors to share liability. An indemnitor, however, is required to pay the full amount of the judgment against the indemnitee.[5] W. Prosser, Law of Torts § 51, p. 310 (4th ed. 1971). This increased liability weighs on the side of refusing to permit recovery in this case.

For these reasons, I am convinced that we should retain the balance our earlier decisions would require. Where a third party has a direct action against the Government that fits into the same category as the claims we have allowed in the past, it may include a claim for damages it has paid to a Government employee. But where the third party's claim is an indirect action based on contribution or indemnity, Congress' clear intent to limit the liability of the United States should prevail. I would affirm the judgment of the Court of Appeals.

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principle against Stencel's right to recover, 431 U. S., at 672–673, just as a limitation of liability provision is balanced against a third party's right to recover when this question is faced under any other workers' compensation scheme.

[5] In this case, the parties have agreed that the Government will pay only a part of Lockheed's settlement with Bottorff. See App. 105–106; Brief for United States 4, and n. 4. The agreement establishing the proportion the Government will pay was filed under seal in the District Court. Under the Federal Tort Claims Act, however, the Government's liability is determined under state law. There is no reason to believe that future claimants will make similar agreements, and no way for the Court to oblige them to do so.

WHITE, MAYOR OF BOSTON, ET AL. *v.* MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC., ET AL.

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 81–1003. Argued November 1, 1982—Decided February 28, 1983

Petitioner Mayor of Boston, Mass., issued an executive order requiring all construction projects funded in whole or in part by city funds or funds that the city had authority to administer to be performed by a work force at least half of which are bona fide residents of the city. The Massachusetts Supreme Judicial Court held the order unconstitutional under the Commerce Clause.

Held: The Commerce Clause does not prevent the city from giving effect to the Mayor's executive order. Pp. 206–215.

(a) When a state or local government enters the market as a participant, it is not subject to the restraints of the Commerce Clause. *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794; *Reeves, Inc.* v. *Stake*, 447 U. S. 429. In a case like the instant one, the only inquiry is whether the challenged program constituted direct state or local participation in the market. Pp. 206–208.

(b) Insofar as the city expended only its own funds in entering into construction contracts for public projects, it was a market participant and entitled to be treated as such under the rule of *Alexandria Scrap Corp.* Even if implementation of the Mayor's order might have a significant impact on specialized construction firms employing out-of-state residents, this is not relevant to the inquiry of whether the city is participating in the marketplace when it provides funds for construction. Impact on out-of-state residents figures in the equation only after it is decided that the city is regulating the market rather than participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause. And, even if the Mayor's order is characterized as sweeping too broadly, such characterization is relevant only if the Commerce Clause imposes restraints on the city's activity and is no help in deciding whether those restraints apply. Pp. 209–211.

(c) Insofar as the Mayor's order was applied to projects funded in part with funds obtained from certain federal programs, the order was affirmatively sanctioned by the pertinent regulations of those programs.

Where the restrictions imposed by the city on construction projects financed in part by federal funds are directed by Congress, then no dormant Commerce Clause issue is presented. Pp. 212–213.

384 Mass. 466, 425 N. E. 2d 346, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, POWELL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which WHITE, J., joined, *post*, p. 215.

Laurence H. Tribe argued the cause for petitioners. With him on the briefs were *Kurt M. Pressman*, *Mark D. Stern*, and *Harold J. Carroll*.

Paul J. Kingston argued the cause and filed a brief for respondents.*

JUSTICE REHNQUIST delivered the opinion of the Court.

In 1979 the Mayor of Boston, Mass., issued an executive order[1] which required that all construction projects funded

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**Arthur Kinoy* filed a brief for the Affirmative Action Coordinating Center et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *J. Albert Woll*, *Laurence J. Cohen*, *Laurence Gold*, and *George Kaufmann* for the American Federation of Labor and Congress of Industrial Organizations et al.; and by *Stephen A. Bokat* for the Chamber of Commerce of the United States.

Wayne S. Henderson and *Robert E. Dickinson* filed a brief for the New England Legal Foundation et al. as *amici curiae*.

[1] The executive order provides:

"On any construction project funded in whole or in part by City funds, or funds which, in accordance with a federal grant or otherwise, the City expends or administers, and to which the City is a signatory to the construction contract, the worker hours on a craft-by-craft basis shall be performed, in accordance with the contract documents established herewith, as follows:

"a. at least 50% by bona fide Boston residents;

"b. at least 25% by minorities;

"c. at least 10% by women."

Only the residency requirement is being challenged.

in whole or in part by city funds, or funds which the city had the authority to administer, should be performed by a work force consisting of at least half bona fide residents of Boston.[2] The Supreme Judicial Court of Massachusetts decided that the order was unconstitutional, observing that the Commerce Clause "presents a clear obstacle to the city's order." 384 Mass. 466, 479, 425 N. E. 2d 346, 354 (1981). We granted certiorari to decide whether the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, prevents the city from giving effect to the Mayor's order. 455 U. S. 919 (1982). We now conclude that it does not and reverse.

I

We were first asked in *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976), to decide whether state and local governments are restrained by the Commerce Clause when they seek to effect commercial transactions not as "regulators" but as "market participants." In that case, the Maryland Legislature, in an attempt to encourage the recycling of abandoned automobiles, offered a bounty for every Maryland-titled automobile converted into scrap if the scrap processor supplied documentation of ownership. An amendment to the Maryland statute imposed more exacting documentation requirements on out-of-state than in-state processors, and out-of-state processors in turn demanded more exacting documentation from those who sold the junked automobiles for scrap. As a result, it became easier for those in possession of the automobiles to sell to in-state processors. "The practical effect was substantially the same as if Maryland had withdrawn altogether the availability of bounties on hulks delivered by unlicensed suppliers to licensed non-Maryland processors." *Id.*, at 803, n. 13. In upholding the Maryland

[2] In 1980, of approximately $483 million expended on construction in the city of Boston, some $54 million, or 11%, was spent on projects to which the executive order applied. Of this latter amount, approximately $34 million represented projects being funded in part through federal Urban Development Action Grants (UDAG's).

statute in the face of a Commerce Clause challenge, we said that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.*, at 810 (footnotes omitted). Because Maryland was participating in the market, rather than acting as a market regulator, we concluded that the Commerce Clause was not "intended to require independent justification," *id.*, at 809, for the statutory bounty.

We faced the question again in *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980), when confronted with a South Dakota policy to confine the sale of cement by a state-operated cement plant to residents of South Dakota. We underscored the holding of *Hughes* v. *Alexandria Scrap Corp.*, saying:

> "The basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law. As that case explains, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. [Citation omitted.] There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." 447 U. S., at 436–437.[3]

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[3] We also noted the policy in support of this limitation on the Commerce Clause:

"Restraint in this area is also counseled by considerations of state sovereignty, the role of each State '"as guardian and trustee for its people,"' *Heim* v. *McCall*, 239 U. S. 175, 191 (1915), quoting *Atkin* v. *Kansas*, 191 U. S. 207, 222–223 (1903), and 'the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.' *United States* v. *Colgate & Co.*, 250 U. S. 300, 307 (1919). Moreover, state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, States should similarly share existing

We concluded that South Dakota, "as a seller of cement, unquestionably fits the 'market participant' label" and applied the "general rule of *Alexandria Scrap*." *Id.*, at 440.

Alexandria Scrap and *Reeves*, therefore, stand for the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause. As we said in *Reeves*, in this kind of case there is "a single inquiry: whether the challenged 'program constituted direct state participation in the market.'" 447 U. S., at 436, n. 7. We reaffirm that principle now.

The Supreme Judicial Court of Massachusetts concluded that the city of Boston is not participating in the market in the sense described in *Alexandria Scrap Corp.* and *Reeves* because the order applies where the city is acting in a nonproprietary capacity, has a significant impact on interstate commerce, is more sweeping than necessary to achieve its objectives, and applies to funds the city receives from federal grants. 384 Mass., at 479–480, 425 N. E. 2d, at 354–355. For the same reasons the court found that the city is not a market participant, it concluded that the executive order violated the substantive restraints of the Commerce Clause.[4] *Ibid.*

II

Petitioners and respondents both, to a greater or lesser extent, seek to have us decide questions not presented by the record in this case. In support of the Massachusetts court's finding that the city is acting in a nonproprietary capacity, respondents urge that much of the construction subject to the Mayor's order involved nonpublic projects that were financed largely through private funds. While the Mayor's order by

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freedoms from federal constraints, including the inherent limits of the Commerce Clause." 447 U. S., at 438–439 (footnotes omitted).

[4] Respondents made several other challenges to the order, none of which are before us. Respondents also directed challenges to resident preferences contained in other state and local laws. None of these provisions is before us.

its terms would appear to apply to such construction, there is simply nothing in the record before us to support the conclusion that city funds were used for these types of construction projects. Respondents, had they wished to raise this question, were obligated to offer some evidence that city funds and private funds were used jointly to finance construction of some of the projects which were in fact subjected to the provisions of the Mayor's order; nothing in the record supports such a conclusion.[5] The only issues before us, then, are the propriety of applying the Mayor's executive order to projects funded wholly with city funds and projects funded in part with federal funds. We address first the application of the order to city-funded projects.

The Supreme Judicial Court of Massachusetts expressed reservations as to the application of the "market participation" principle to the city here, reasoning that "the implementation of the mayor's order will have a significant impact on those firms which engage in specialized areas of construction and employ permanent works crews composed of out-of-State residents." 384 Mass., at 479, 425 N. E. 2d, at 354. Even if this conclusion is factually correct,[6] it is not relevant

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[5] The case was submitted below on an agreed statement of facts. The only reference in that statement to the funds affected by the order provides:

"The approximate dollar value of construction, both private and public, within the City of Boston in 1980 was $482,886,000; of that amount approximately [$]54,421,040 represented construction projects 'funded in whole or in part by City funds, or funds which, in accordance with a federal grant or otherwise, the City expends or administers, and to which the City is a signatory to the construction contract' to which the Executive Order, by its terms, was applicable. Of that $54,421,040 approximately $34,000,000 represented projects involving Urban Development Action Grants." Agreed Statement of Facts, at A42.

[6] The record does not readily support a finding of "significant impact" on firms employing out-of-state residents. The parties stipulated that a "*small number* of plaintiff contractors are out-of-state contractors who have regular and permanent work crews comprised entirely of out-of-state residents. These contractors for the most part are those who perform

to the inquiry of whether the city is participating in the marketplace when it provides city funds for building construction. If the city is a market participant, then the Commerce Clause establishes no barrier to conditions such as these which the city demands for its participation. Impact on out-of-state residents figures in the equation only after it is decided that the city is regulating the market rather than participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause.

The same may be said of the Massachusetts court's finding that the executive order sweeps too broadly, creating more burden than is necessary to accomplish its stated objectives. *Id.*, at 480, 425 N. E. 2d, at 355. While relevant if the Commerce Clause imposes restraints on the city's activity, this characterization is of no help in deciding whether those restraints apply. The Massachusetts court relied in part on our decision in *Hicklin* v. *Orbeck*, 437 U. S. 518 (1978), saying that "as in *Hicklin*, *supra*, there is a broadly drawn statute which sweeps far wider than merely favoring unemployed or underemployed local residents." 384 Mass., at 480, 425 N. E. 2d, at 355.

In *Hicklin* we considered an Alaska statute which required employment in all work connected with oil and gas leases to which the State was a party to be offered first to "qualified" Alaska residents in preference to nonresidents. The State sought to justify the "Alaska Hire" law on the ground that

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specialty work. . . ." *Id.*, at A41 (emphasis added). Although the parties also stipulated that some out-of-state workers who would otherwise have been employed on the projects would be unemployed and that some out-of-state contractors would be discouraged from bidding on public construction work, *id.*, at A37, the record does not reveal that any significant number of out-of-state workers or contractors has withdrawn from the construction market because of the order. Furthermore, the record does not show that the increased employment of city residents in publicly funded construction projects has been accompanied by a decline in the percentage of out-of-state residents. See *id.*, at A48.

the underlying oil and gas were owned by the State itself. Analyzing the case under the Privileges and Immunities Clause of Art. IV, § 2, we held that mere ownership of a natural resource did not in all circumstances render a state regulation such as the "Alaska Hire" law immune from attack under that Clause. We summarized our view of the Alaska statute in these words:

> "In sum, the Act is an attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents." 437 U. S., at 531.

Even though respondents no longer press the Privileges and Immunities Clause holding of *Hicklin* in support of their Commerce Clause argument, we note that on the record before us the application of the Mayor's executive order to contracts involving only city funds does not represent the sort of "attempt to force virtually all businesses that benefit in some way from the economic ripple effect" of the city's decision to enter into contracts for construction projects "to bias their employment practices in favor of the [city's] residents."[7]

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[7] JUSTICE BLACKMUN's opinion dissenting in part, *post*, p. 215, argues that the Mayor's order goes beyond market participation because it regulates employment contracts between public contractors and their employees. We agree with JUSTICE BLACKMUN that there are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business. Cf. *Hicklin* v. *Orbeck*, 437 U. S. 518, 529–531 (1978). We find it unnecessary in this case to define those limits with precision, except to say that we think the Commerce Clause does not require the city to stop at the boundary of formal privity of contract. In this case, the Mayor's executive order covers a discrete, identifiable class of economic activity in which the city is a major participant. Everyone affected by the order is, in a substantial if informal sense, "working for the city." Wherever the limits of the market participation exception may lie, we conclude that the executive order in this case falls well within the scope of *Alexandria Scrap* and *Reeves*.

The Supreme Judicial Court of Massachusetts also observed that "a significant percentage of the funds affected by the order are received from Federal sources." 384 Mass., at 479, 425 N. E. 2d, at 354. The record does indicate that of approximately $54 million expended on projects affected by the Mayor's executive order, some $34 million represented projects being funded in part through UDAG's.[8] While the record assigns specific dollar amounts only for UDAG's, the parties also have stipulated that the executive order applies to Community Development Block Grants (CDBG's) and Economic Development Administration Grants (EDAG's).[9]

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[8] Not all UDAG projects in Boston have been subjected to the executive order. Department of Housing and Urban Development (HUD) publications indicate that in 1980 Boston received $28,600,000 through UDAG's and that this money was to be spent on projects costing a total of $397 million. U. S. Dept. of HUD, UDAG Project Approval List, Region I, p. 1 (Boston, Mass., Feb. 9, 1982). While we do not know what percentage of the $34 million spent on projects affected by the executive order was in fact UDAG money, we do know that overall UDAG funds constituted 7% of the total costs of projects they were expended on.

[9] UDAG's are administered by HUD pursuant to the Housing and Community Development Act of 1977, 42 U. S. C. § 5318 (1976 ed., Supp. V). The HUD regulations governing the program are found at 24 CFR pt. 570, subpart G (1982). CDBG's are administered by HUD pursuant to the Housing and Community Development Act of 1974, 42 U. S. C. § 5301 *et seq.* (1976 ed. and Supp. V), and the implementing regulations at 24 CFR pt. 570 (1982). EDAG's are administered by the Department of Commerce in accordance with the Public Works and Economic Development Act of 1965, 42 U. S. C. § 3131 *et seq.* (1976 ed. and Supp. V), and the implementing regulations at 13 CFR pt. 305 (1982).

Respondents have asserted in this Court that the executive order also applies to funds the city receives from the Department of Transportation. In the agreed statement of facts the parties stipulated that a resident preference in a state statute challenged below applied to DOT funds. Agreed Statement of Facts, at A45. There is, however, nothing in the record to indicate that DOT funds are affected by the order. In fact, the parties stipulate that the affected federal funds come from UDAG's, CDBG's, and EDAG's. *Id.*, at A43–A44. Without support in the record for a contrary conclusion, we decide this case as though DOT funds are not in-

But all of this proves too much. The Commerce Clause is a grant of authority to Congress, and not a restriction on the authority of that body. See *American Power & Light Co.* v. *SEC*, 329 U. S. 90 (1946); *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824). Congress, unlike a state legislature authorizing similar expenditures, is not limited by any negative implications of the Commerce Clause in the exercise of its spending power. Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce. *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 769 (1945). Thus, if the restrictions imposed by the city on construction projects financed in part by federal funds are directed by Congress then no dormant Commerce Clause issue is presented.

An examination of the applicable statutes reveals that these federal programs were intended to encourage economic revitalization, including improved opportunities for the poor, minorities, and unemployed.[10] Examination of the regulations set forth in the margin indicates that the Mayor's executive order sounds a harmonious note; the federal regulations for each program affirmatively permit the type of parochial favoritism expressed in the order.[11]

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volved. See *Ramsey* v. *Mine Workers*, 401 U. S. 302, 312 (1971); *Tyrrell* v. *District of Columbia*, 243 U. S. 1, 4–6 (1917).

[10] See 42 U. S. C. § 5318 (1976 ed., Supp. V) (UDAG's); § 5301 (1976 ed. and Supp. V) (CDBG's); § 3131 (EDAG's).

[11] In issuing implementing regulations to carry out its authority under the UDAG program, HUD requires that a city certify that its project would not be undertaken by the private sector without public funds and that the project will alleviate economic distress by helping the poor, minorities, and unemployed. 24 CFR § 570.458(c) (1982). The regulations further provide that the city must "comply with . . . Section 3 of the Housing and Urban Development Act of 1968, as amended, and implementing regulations at 24 CFR Part 135." 24 CFR § 570.458(c)(14)(ix)(D) (1982). The regulations implementing that Act provide that "to the greatest extent feasible opportunities for training and employment arising in connection with the planning and carrying out of any project assisted under any such pro-

III

We hold that on the record before us the application of the Mayor's executive order to the contracts in question did not violate the Commerce Clause of the United States Constitution.[12] Insofar as the city expended only its own funds in en-

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gram be given to lower income persons *residing in the area of such project.* . . ." 24 CFR § 135.1(a)(2)(i) (1982) (emphasis added).

Similarly, CDBG regulations provide that a recipient of funds must "comply with section 3 of the Housing and Urban Development Act of 1968, as amended, requiring that to the greatest extent feasible *opportunities for training and employment be given to lower-income residents of the project area* and contracts for work in connection with the project be awarded to eligible business concerns which are located in, or owned in substantial part by, persons residing in the area of the project." 24 CFR § 570.307(m) (1982) (emphasis added).

EDAG regulations provide:

"The maximum feasible employment of local labor shall be made in the construction of public works and development facility projects receiving direct grants and loans. Accordingly, every contractor and subcontractor undertaking to do work on any such project which is or reasonably may be done as on-site work, shall be required to employ in carrying out such contract work, qualified *persons who regularly reside in the designated area where such project is to be located,* or in the case of economic development centers, qualified persons who regularly reside in the center or in the adjacent or nearby redevelopment areas within the economic development district. . . ." 13 CFR § 305.54(a) (1982) (emphasis added).

[12] Respondents ask us to decide whether the executive order offends the Privileges and Immunities Clause of Art. IV, § 2, which provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." In addressing this issue, the Massachusetts court said:

"The preference is for inhabitants of the city, and its 'negative' effect is felt in significant part by other citizens of the Commonwealth, as well as by residents of other States. In such circumstances it may be more difficult to find a violation of the privileges and immunites clause because the discrimination adversely affects citizens of the Commonwealth as well." 384 Mass. 466, 478, 425 N. E. 2d 346, 354 (1981).

Because of its disposition under the Commerce Clause, however, the court did not resolve this issue.

tering into construction contracts for public projects, it was a market participant and entitled to be treated as such under the rule of *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976). Insofar as the Mayor's executive order was applied to projects funded in part with funds obtained from the federal programs described above, the order was affirmatively sanctioned by the pertinent regulations of those programs. The judgment of the Supreme Judicial Court of Massachusetts is therefore reversed, and the case is remanded to that court for proceedings not inconsistent with this opinion.

It is so ordered.

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

I agree with the Court that this case presents two issues: (1) the validity of the Mayor's executive order as applied to projects funded entirely by the city of Boston with its own revenues, and (2) the validity of the order as applied to projects funded in part with federal revenues pursuant to certain congressionally created grant programs.

I

Respecting the second issue, I am in agreement with the Court's conclusion that Congress, in creating the grant programs in question, specifically authorized "the type of parochial favoritism expressed in the order." *Ante*, at 213. As the Court holds, Congress unquestionably has the power to authorize state or local discrimination against interstate commerce that otherwise would violate the dormant aspect of the Commerce Clause. *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 418–427 (1946).[1]

This question has not been, to any great extent, briefed or argued in this Court. We did not grant certiorari on the issue and remand without passing on its merits. See *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 177–178 (1938).

[1] Because the Court does not pass on the possible invalidity of the executive order under the Privileges and Immunities Clause, U. S. Const.,

II

I do not agree, however, with the Court's holding that the executive order is immune from Commerce Clause scrutiny insofar as it applies to city activities undertaken *without* specific congressional authorization.

The Court rejects certain arguments advanced by the Supreme Judicial Court of Massachusetts as relevant only if the order were "regulation of," rather than "participation in," the market. *Ante*, at 210–211. The Court holds that the order is the latter rather than the former because, in the Court's view, it "falls well within the scope," *ante*, at 211, n. 7, of the Court's decisions in *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976), and *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980). With due respect, this plainly is not so.

In *Alexandria Scrap*, the effect of the Maryland statute was to offer a subsidy only to scrap processors located within the State. See 426 U. S., at 803, n. 13. The Court held that a State, free from Commerce Clause scrutiny, may enter "the market as a purchaser, in effect, of a potential article of interstate commerce" and "restric[t] its trade to its own citizens or businesses within the State." *Id.*, at 808. *Alexandria Scrap* thus permits a State to prefer its residents as direct recipients of certain subsidies. See *Reeves*, 447 U. S., at 440, n. 14 (discussing *Alexandria Scrap*).

In *Reeves*, South Dakota refused to sell cement to out-of-state consumers until the orders of all in-state customers were filled. The Court held that the Commerce Clause is not implicated when a State prefers its own residents as direct purchasers of state-produced goods. Neither *Reeves*

Art. IV, § 2, cl. 1, it has no occasion to determine whether Congress may authorize, through affirmative legislation, what otherwise would be a violation of that Clause. This question may present considerations different from those presented by the dormant Commerce Clause. See L. Tribe, American Constitutional Law § 6–31, p. 403, n. 18 (1978). For the reasons given by the Court, *ante*, at 214–215, n. 12, I also decline to reach this issue.

nor *Alexandria Scrap*, however, went beyond ensuring that the States enjoy "'the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'" *Reeves*, 447 U. S., at 438–439, quoting *United States* v. *Colgate & Co.*, 250 U. S. 300, 307 (1919).

Boston's executive order goes much further. The city has not attempted merely to choose the "parties with whom [it] will deal."[2] Instead, it has imposed as a condition of obtaining a public construction contract the requirement that *private firms* hire only Boston residents for 50% of specified jobs.[3] Thus, the order directly restricts the ability of private employers to hire nonresidents, and thereby curtails nonresidents' access to jobs with private employers. I had thought it well established that, under the Commerce Clause, States and localities cannot impose restrictions granting their own residents either the exclusive right, or a priority, to private sector economic opportunities. See *H. P. Hood & Sons* v. *Du Mond*, 336 U. S. 525 (1949); *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923); cf. *Hicklin* v. *Orbeck*, 437 U. S. 518 (1978) (decided under the Privileges and Immunities Clause).

Such restrictions are not immune from attack under the Commerce Clause solely because the city has imposed them as conditions to its contracts with private employers. In *Reeves*, the Court, I thought, carefully explored reasons the policy there at issue might not have been entitled to the market participant exemption, notwithstanding the policy's essentially proprietary nature. 447 U. S., at 440–447. The

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[2] Had the city decided to limit its *own* hiring to Boston residents, its decision would almost certainly have been permissible under *McCarthy* v. *Philadelphia Civil Service Comm'n*, 424 U. S. 645 (1976), as well as *Reeves* and *Alexandria Scrap*.

[3] That the order limits the preference to 50% of the covered jobs is, of course, not relevant to the applicability of the market participant exemption. If such preferences do not implicate the dormant Commerce Clause, they are immune even if they apply to 100% of a contractor's jobs.

Court also observed that the line between "market participant" and "market regulator" is not always bright: "South Dakota, as a seller of cement, unquestionably fits the 'market participant' label more comfortably than a State acting to subsidize local scrap processors." *Id.*, at 440. See *id.*, at 440, n. 14 ("We have no occasion here to inquire whether subsidy programs unlike that involved in *Alexandria Scrap* warrant characterization as proprietary, rather than regulatory, activity").

The line between regulation and market participation, for purposes of the Commerce Clause, should be drawn with reference to the constitutional values giving rise to the market participant exemption itself. As the Court recognized in *Reeves*, the most important of these is that historically the "Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace"; it was not designed "to limit the ability of the States themselves to operate freely in the free market." *Reeves*, 447 U. S., at 437. The Court also observed that the distinction between participation and regulation rests on core notions of state sovereignty, coupled with the traditional right of private traders to determine the identities of their bargaining partners free from governmental interference. *Id.*, at 438–439. The legitimacy of a claim to the market participant exemption thus should turn primarily on whether a particular state action more closely resembles an attempt to impede trade among private parties, or an attempt, analogous to the accustomed right of merchants in the private sector, to govern the State's own economic conduct and to determine the parties with whom it will deal.

The simple unilateral refusals to deal that the Court encountered in *Reeves* and *Alexandria Scrap* were relatively pure examples of a seller's or purchaser's simply choosing its bargaining partners, "long recognized" as the right of traders in our free enterprise system. The executive order in this case, in notable contrast, by its terms is a direct attempt to

govern private economic relationships. The power to dictate to another those with whom *he* may deal is viewed with suspicion and closely limited in the context of purely private economic relations.[4] When exercised by government, such a power is the essence of regulation.

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[4] Compare *United States* v. *Colgate & Co.*, 250 U. S. 300, 307 (1919) (unquestioned right of trader unilaterally to refuse to deal with those retailers who do not adhere to retail price schedule), relied upon in *Reeves*, 447 U. S., at 439, with *United States* v. *Parke, Davis & Co.*, 362 U. S. 29, 45–46 (1960) (trader violates Sherman Act by inducing wholesalers to refuse to deal with retailers who will not adhere to price schedule), *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 382 (1967) ("Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred" violates the Sherman Act), and *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 49 (1977) (overruling *Schwinn* in part; nonprice vertical market restrictions are not *per se* unlawful, but should be judged individually under the "rule of reason" to determine whether they "should be prohibited as imposing an unreasonable restraint on competition").

Conditioning a willingness to deal with potential bargaining partners on their derivative refusals to deal with others is particularly suspect where those whom the trader attempts to isolate are its competitors. See *Lorain Journal Co.* v. *United States*, 342 U. S. 143, 154–155 (1951). Here, the citizens of Boston, through their Mayor, have sought to do just this by requiring those wishing to deal with their city government to refuse to hire nonresidents competing with citizens for jobs. This anticompetitive and suspect goal will be present whenever a unit of state or local government requires recipients of public contracts or government subsidies to deal only with that government's constituents.

Congress, in § 8(e) of the National Labor Relations Act, has expressly prohibited labor organizations from requiring employers to agree "to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person," and has declared any such agreement to be void. 29 U. S. C. § 158(e). On the other hand, permitting labor unions to refuse to deal with the primary employer is the staple of federal labor policy, and nothing prevents an employer from refusing unilaterally to deal with others for any lawful reason. To be sure, in the construction industry, at issue in the executive order, collective-bargaining agreements are expressly exempted from this proscription of "hot cargo" clauses. *Ibid.*; see

Attempts directly to constrict private economic choices through contractual conditions are particularly akin to regulation because, unlike simple refusals to deal but like conventional market regulation, they threaten to extend their regulatory impact well beyond the transaction in which the State has an interest. A requirement that firms wishing to deal with the State hire a certain percentage of their work force from among state residents in practice may constrict the opportunities of nonresidents to work on projects with no connection whatever with the governmental entity imposing the condition. A firm that relies to any significant degree on a permanent work force will be compelled to favor local residents for these positions. An analogous requirement that such firms purchase only from in-state suppliers the goods used in state projects also might constrict interstate trade wholly unrelated to government business. If economic considerations counsel in favor of stable relationships with suppliers, a firm wishing to deal with the State will be compelled to favor local firms across the board. The effect of such "conditions" on the ability of nonresidents to deal with affected firms would be virtually identical to the effect of a conventional market regulation requiring such practices.

In *Reeves*, the Court cited "considerations of state sovereignty" as another factor counseling restraint in applying the Commerce Clause to "proprietary" activity. The States have a sovereign interest in some freedom from federal interference when hiring state employees. It might be argued that because the city could have chosen to build the projects covered by the order itself and, free from dormant Com-

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Woelke & Romero Framing, Inc. v. *NLRB*, 456 U. S. 645 (1982). That Congress has chosen, however, for reasons peculiar to labor policy and the history and nature of collective bargaining in the construction industry, to exclude collective agreements in that industry from this restriction does not detract from my basic point: there is a world of difference between the kind of "proprietary" activity at issue here and the kind exempted from dormant Commerce Clause scrutiny in *Reeves* and *Alexandria Scrap*.

merce Clause restraint, could have hired local residents, the city may contract to have the work done by private firms on the condition that the firms hire local residents.[5] But the Court never has suggested that the State's special sovereign interest in determining whom it will hire, and in setting the terms and conditions of public employment, extends to dictating whom private parties with which it contracts will hire, or the terms and conditions of private employment. In my view, the State's interest in managing its relations with its employees is fully safeguarded by its power to do the work itself if it so chooses, with such immunity from the Commerce Clause as attaches in that situation. The Court's observation in *Reeves*, 447 U. S., at 438–439, tying concerns for state sovereignty to a merchant's customary power to exercise his independent discretion as to the parties with whom he will deal, is fully consistent with this view. But when a State attempts to arrogate unto itself the "independent discretion" of others to deal with whom they please, it exercises regulatory power that must be consistent with the requirements of the Commerce Clause. See generally Varat, State "Citizenship" and Interstate Equality, 48 U. Chi. L. Rev. 487, 560–564 (1981).

This approach fully safeguards the power of the State to limit to state residents the direct benefits of subsidy programs supported with state funds. It permits a State to prefer local businesses as providers of the goods it purchases in the marketplace, and to prefer local residents as direct purchasers or recipients of state-created bounty. But it does not permit a State to impose clear market regulations as a condition of a contract or of a subsidy, using the tremendous power of the state treasury directly to impede the free flow of private trade in interstate commerce, or, what may be worse, to discriminate against such commerce. South Dakota should not be immune from the Commerce Clause if, for

[5] Indeed, the Court appears to rely on this argument. See *ante*, at 211, n. 7.

example, it imposes as a condition on the sale of state-owned cement that purchasers employ only South Dakota residents, or resell the cement only to South Dakota customers. Cf. *Reeves*, 447 U. S., at 444, n. 17 ("Nor has South Dakota cut off access to its own cement altogether, for the policy does not bar resale of South Dakota cement to out-of-state purchasers"). Similarly, Maryland should not be free of Commerce Clause scrutiny if it imposes as a condition of receiving a bounty, like that at issue in *Alexandria Scrap*, that scrap processors employ only Maryland residents, or resell the processed scrap only in-state. In my view such conditions, like the condition at issue here, directly intrude upon the historic Commerce Clause concern with "measures impeding free private trade in the national marketplace." *Reeves*, 447 U. S., at 437.

I do not intend to suggest that the Court necessarily would decide these variations of *Alexandria Scrap* and *Reeves* as it has decided this case; evidently, the Court acknowledges that "restrictions that reach beyond the immediate parties with which the government transacts business" pose Commerce Clause questions more profound than did the restrictions at issue in *Alexandria Scrap* and *Reeves*. *Ante*, at 211, n. 7. The Court indicates that it upholds the executive order on the understanding that, with the exception of the federal grant programs, it is applied solely to construction projects funded entirely by the city. *Ante*, at 208–209. Because many construction contractors hire a substantially different work crew for each project they undertake, applied to such projects the Mayor's order is arguably limited, as the Court says, to a "discrete, identifiable class of economic activity in which the city is a major participant." *Ante*, at 211, n. 7.[6]

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[6] See S. Rep. No. 187, 86th Cong., 1st Sess., 27 (1959) ("The occasional nature of the employment relationship makes [the construction] industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon

This unique aspect of employment in the construction industry—and of public works construction projects—must also underlie the Court's related justification that "[e]veryone affected by the order is, in a substantial if informal sense, 'working for the city.'" *Ibid.*

I am not persuaded, however, that even the comparatively limited terms of the executive order constitute "market participation" rather than "market regulation." The "sense" in which those affected by the Mayor's order "work for the city" is so "informal," in my view, as to lack substance altogether. The city does not hire them, fire them, negotiate with them or their representative about the terms of their employment, or pay their wages. In the case of the employees of subcontractors regulated by the order, the city does not even pay, or contract directly with, their employers. In short, the economic choices the city restricts in favor of its residents are the choices of private entities engaged in interstate commerce. Thus, the executive order directly impedes "free private trade in the national marketplace," and for that reason I would not hold it immune from Commerce Clause scrutiny. I therefore reach the question whether the order imposes an impermissible burden on interstate commerce.

III

As the Court recognizes, the order constitutes "parochial favoritism" of Boston residents over nonresidents of Boston and Massachusetts for access to private sector jobs. *Ante*, at 213. Thus, the order is a "protectionist measure" subject to the rule of virtually *per se* invalidity established by many of this Court's cases. See, *e. g.*, *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978).[7]

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various stages of construction"). It is noteworthy, however, that in this case the parties have stipulated that the order affects some "contractors who have regular and permanent work crews." Agreed Statement of Facts, App. to Pet. for Cert. A41.

[7] I reject the suggestion that the record does not establish a cognizable burden on interstate commerce. See *ante*, at 209–210, and n. 6. The city

That the order burdens Massachusetts residents living outside Boston to the same extent as residents of other States does not save the order from this rule. First, the order derives in part from a state statute encouraging *all* Massachusetts communities to institute similar measures. Mass. Gen. Laws Ann., ch. 149, § 26 (West 1982).[8] That statute is clearly designed to benefit all Massachusetts residents at the expense of all residents of other States. In carrying out this statutory mandate, Boston, a creature of the Commonwealth, is tainted by participation in the Commonwealth's larger and clearly discriminatory scheme.

Second, and more significant, the order would be improper under *Dean Milk Co.* v. *Madison*, 340 U. S. 349 (1951), even absent the state statute. In *Dean Milk*, this Court held that a Madison, Wis., city ordinance "plainly discriminate[d] against interstate commerce," even though "Wisconsin milk from outside the Madison area [was] subjected to the same proscription as that moving in interstate commerce." *Id.*, at 354, and n. 4. This was so because the ordinance "erect[ed] an economic barrier protecting a major local industry against competition from without the State." *Id.*, at 354. The

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has stipulated that, as a result of this order, some construction workers who are nonresidents of Massachusetts will be unemployed; contractors from outside Massachusetts will be discouraged from bidding on affected projects; and the costs of construction on affected projects will increase. Agreed Statement of Facts, App. to Pet. for Cert. A37.

[8] The Mayor's executive order itself states that one of its purposes is to satisfy the city's "statutory obligation to give preference to its residents in hiring for public[ly] funded construction projects pursuant to [Massachusetts] G. L. c. 149, § 26." App. to Pet. for Cert. A19. The statute to which the order refers provided: "Each county, town or district in the construction of public works, or persons contracting or subcontracting for such works, shall give preference [in hiring] to veterans and citizens who are residents of such county, town or district." Mass. Gen. Laws Ann., ch. 149, § 26 (West 1982). In its decision holding the city order unconstitutional, the Supreme Judicial Court of Massachusetts also struck down this statute. 384 Mass. 466, 476–478, 425 N. E. 2d 346, 352–353 (1981). The Commonwealth has not appealed that ruling.

Court held that the ordinance was invalid because "reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, [were] available." *Ibid.*

Boston has at its disposal reasonable alternatives to accomplish its central goal—the alleviation of unemployment among Boston residents. It can create training programs for its unemployed residents or establish aggressive referral practices aimed at promoting employment for its residents at *all* construction projects in the city without implicating Commerce Clause concerns. It also can undertake some of the construction projects itself, and hire Boston residents to work on them, without imposing discriminatory restraints on the private market.

Moreover, as in *Hicklin* v. *Orbeck*, 437 U. S. 518 (1978), the order is ill-suited to eliminating unemployment because it applies the preference to all Boston residents, not just the underemployed or undertrained. See *id.*, at 527–528. Finally, since *Dean Milk*, the Court has indicated that a discrimination against interstate commerce is unjustified unless there is a legitimate reason, apart from their out-of-state origin, to treat differently articles of commerce or individuals engaging in commerce originating outside the State. *Philadelphia* v. *New Jersey*, 437 U. S., at 626–627. No such reason has been shown in this case.

Insofar as the Massachusetts court held Boston's executive order violative of the Commerce Clause as applied outside the context of federal grant programs, I would affirm its judgment. To this extent, therefore, I respectfully dissent.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* WYOMING ET AL.

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

No. 81–554. Argued October 5, 1982—Decided March 2, 1983

The Age Discrimination in Employment Act of 1967 makes it unlawful for an employer to discriminate against any employee or potential employee between the ages of 40 and 70 on the basis of age, except "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." In 1974, the definition of "employer" under § 11(b) of the Act was extended to include state and local governments. After a supervisor for the Wyoming Game and Fish Department was involuntarily retired at age 55 pursuant to a Wyoming statute, he filed a complaint with the Equal Employment Opportunity Commission, alleging violation of the Act. The Commission ultimately filed suit in Federal District Court against appellees, the State and various state officials, seeking relief on behalf of the supervisor and others similarly situated. The District Court dismissed the suit, holding that insofar as the Act regulated Wyoming's employment relationship with its game wardens and other law enforcement officials, it violated the doctrine of Tenth Amendment immunity articulated in *National League of Cities* v. *Usery*, 426 U. S. 833, which struck down Congress' attempt to extend the wage and hour provisions of the Fair Labor Standards Act to state and local governments.

Held: The extension of the Age Discrimination in Employment Act to cover state and local governments is a valid exercise of Congress' powers under the Commerce Clause, both on its face and as applied in this case, and is not precluded by virtue of external constraints imposed on Congress' commerce powers by the Tenth Amendment. Pp. 235–244.

(a) The purpose of the doctrine of Tenth Amendment immunity articulated in *National League of Cities*, *supra*, is to protect States from federal intrusions that might threaten their "separate and independent existence." A claim that congressional commerce power legislation is invalid can succeed only if (1) the challenged statute regulates the States as States, (2) the federal regulation addresses matters that are indisputably attributes of state sovereignty, and (3) the States' compliance with the federal law would "directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'" *Hodel* v. *Virginia Surface Mining & Reclamation Assn.*, 452 U. S. 264, 287–288.

The first requirement is met in this case, but even assuming, *arguendo*, that the second requirement is met, the Act does not "directly impair" the State's ability to "structure integral operations in areas of traditional governmental functions." Pp. 236–239.

(b) In this case, the degree of federal intrusion on the States' ability to structure their integral operations is not sufficient to override Congress' choice to extend its regulatory authority to the States. Appellees claim no substantial stake in their retirement policy other than assuring the physical preparedness of Wyoming game wardens to perform their duties. The Act does not require the State to abandon those goals, or the public policy decisions underlying them. Under the Act, the State may assess the fitness of its game wardens on an individualized basis and may dismiss those wardens whom it reasonably finds to be unfit. Moreover, appellees remain free under the Act to continue to do precisely what they are doing now, if they can demonstrate that age is a "bona fide occupational qualification" for the job of game warden. And nothing in the nature of the Act suggests that it will have substantial and unintended consequential effects on state decisionmaking in other areas, such as the allocation of state financial resources or the pursuit of broad social and economic policies. *National League of Cities*, *supra*, distinguished. Pp. 239–242.

514 F. Supp. 595, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 244. BURGER, C. J., filed a dissenting opinion, in which POWELL, REHNQUIST, and O'CONNOR, JJ., joined, *post*, p. 251. POWELL, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 265.

Solicitor General Lee argued the cause for appellant. With him on the briefs were *Deputy Solicitor General Wallace*, *George W. Jones*, *Michael J. Connolly*, *Philip B. Sklover*, and *Vella M. Fink*.

Bruce A. Salzburg, Senior Assistant Attorney General of Wyoming, argued the cause for appellees. With him on the briefs was *Steven F. Freudenthal*, Attorney General.*

**Steven J. Cole* and *Richard Kirschner* filed a brief for the American Federation of State, County and Municipal Employees, AFL–CIO, as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *Charles A. Graddick*, Attorney General of Alabama, and

JUSTICE BRENNAN delivered the opinion of the Court.

Under the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.* (1976 ed. and Supp. V) (ADEA or Act), it is unlawful for an employer

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Algert S. Agricola, Jr., Assistant Attorney General, *Robert K. Corbin*, Attorney General of Arizona, and *Anthony B. Ching*, Solicitor General, *Michael J. Bowers*, Attorney General of Georgia, and *Gary R. Hurst*, Assistant Attorney General, *Tany S. Hong*, Attorney General of Hawaii, *Tyrone C. Fahner*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, and *James F. Schmidt*, Deputy Attorney General, *William J. Guste, Jr.*, Attorney General of Louisiana, and *Kendall L. Vick*, Assistant Attorney General, *Frank J. Kelly*, Attorney General of Michigan, and *Susan Peck Iannotti*, Assistant Attorney General, *John Ashcroft*, Attorney General of Missouri, *Louis J. Caruso*, Solicitor General, and *Preston Dean*, Assistant Attorney General, *Michael J. Greely*, Attorney General of Montana, and *F. Woodside Wright*, Special Assistant Attorney General, *Paul L. Douglas*, Attorney General of Nebraska, and *Bernard L. Packett*, Assistant Attorney General, *William J. Brown*, Attorney General of Ohio, and *James R. Rishel*, *Rufus L. Edmisten*, Attorney General of North Carolina, and *Douglas A. Johnston*, Assistant Attorney General, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, and *Debra K. Wallet*, Deputy Attorney General, *William M. Leech, Jr.*, Attorney General of Tennessee, and *Michael E. Terry*, Deputy Attorney General, *Mark White*, Attorney General of Texas, and *William O. Goodman*, Assistant Attorney General, *David L. Wilkinson*, Attorney General of Utah, and *Stephen G. Schwendiman*, Assistant Attorney General, *John J. Easton, Jr.*, Attorney General of Vermont, and *Denise Johnson*, Assistant Attorney General, and *Jack Avery*, Attorney General of Guam; for the State of California et al. by *George Deukmejian*, Attorney General of California, *Willard A. Shank*, Chief Assistant Attorney General, *Richard D. Martland*, Assistant Attorney General, and *Mary C. Michel*, Deputy Attorney General, and *Charles A. Graddick*, Attorney General of Alabama, and *Algert S. Agricola, Jr.*, Assistant Attorney General; for the County of Marathon, Wisconsin, et al. by *Charles C. Mulcahy*, *Michael R. Wherry*, and *William J. Mulligan;* for the City of Baltimore by *Benjamin L. Brown* and *Ambrose T. Hartman;* and for the National Institute of Municipal Law Officers by *James B. Brennan*, *Henry W. Underhill, Jr.*, *Benjamin L. Brown*, *J. Lamar Shelley*, *Roy D. Bates*, *Roger F. Cutler*, *Alan J. Davis*, *John Dekker*, *Lee E. Holt*, *George F. Knox, Jr.*, *Walter M. Powell*, *William H. Taube*, *John W. Witt*, *Max P. Zall*, *Conard B. Mattox, Jr.*, and *Charles S. Rhyne.*

to discriminate against any employee or potential employee on the basis of age, except "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age."[1] The question presented in this case is whether Congress acted constitutionally when, in 1974, it extended the definition of "employer" under § 11(b) of the Act to include state and local governments. The United States District Court for the District of Wyoming, in an enforcement action brought by the Equal Employment Opportunity Commission (EEOC or Commission), held that, at least as applied to certain classes of state workers, the extension was unconstitutional. 514 F. Supp. 595 (1981). The Commission filed a direct appeal under 28 U. S. C. § 1252, and we noted probable jurisdiction. 454 U. S. 1140 (1982). We now reverse.

I

Efforts in Congress to prohibit arbitrary age discrimination date back at least to the 1950's.[2] During floor debate over what was to become Title VII of the Civil Rights Act of 1964, amendments were offered in both the House and the Senate to ban discrimination on the basis of age as well as race, color, religion, sex, and national origin. These amendments were opposed at least in part on the basis that Congress did not yet have enough information to make a considered judgment about the nature of age discrimination, and each was ultimately defeated. 110 Cong. Rec. 2596–2599, 9911–9913, 13490–13492 (1964); EEOC, Legislative History of the Age Discrimination in Employment Act 5–14 (1981) (hereinafter Legislative History). Title VII did, however,

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[1] See *infra*, at 231–233.

[2] See Age Discrimination in Employment: Hearings on S. 830 and S. 788 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., 23 (1967) (statement of Sen. Javits); Note, 47 S. Cal. L. Rev. 1311, 1325 (1974).

include a provision, § 715, 78 Stat. 265 (since superseded by § 10 of the Equal Employment Opportunity Act of 1972, 86 Stat. 111), which directed the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected," and to report the results of that study to Congress. That report was transmitted approximately one year later. Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment (1965), Legislative History 16–41.

In 1966, Congress directed the Secretary of Labor to submit specific legislative proposals for prohibiting age discrimination. Fair Labor Standards Amendments of 1966, § 606, 80 Stat. 845. The Secretary transmitted a draft bill in early 1967, see 113 Cong. Rec. 1377 (1967), and the President, in a message to Congress on older Americans, recommended its enactment and expressed serious concern about the problem of age discrimination, see Special Message to the Congress Proposing Programs for Older Americans, 1 Public Papers of the Presidents, Lyndon B. Johnson, 1967, pp. 32, 37 (1968). Congress undertook further study of its own, and Committees in both the House and the Senate conducted detailed hearings on the proposed legislation. See Age Discrimination in Employment: Hearings on S. 830 and S. 788 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. (1967); Age Discrimination in Employment: Hearings on H. R. 3651 et al. before the General Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong., 1st Sess. (1967); see also Retirement and the Individual: Hearings before the Subcommittee on Retirement and the Individual of the Senate Special Committee on Aging, 90th Cong., 1st Sess. (1967).

The report of the Secretary of Labor, whose findings were confirmed throughout the extensive factfinding undertaken

by the Executive Branch and Congress, came to the following basic conclusions: (1) Many employers adopted specific age limitations in those States that had not prohibited them by their own antidiscrimination laws, although many other employers were able to operate successfully without them. (2) In the aggregate, these age limitations had a marked effect upon the employment of older workers. (3) Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact, and was often defended on grounds different from its actual causes. (4) Moreover, the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers. (5) Finally, arbitrary age discrimination was profoundly harmful in at least two ways. First, it deprived the national economy of the productive labor of millions of individuals and imposed on the governmental treasury substantially increased costs in unemployment insurance and federal Social Security benefits. Second, it inflicted on individual workers the economic and psychological injury accompanying the loss of the opportunity to engage in productive and satisfying occupations.

The product of the process of factfinding and deliberation formally begun in 1964 was the Age Discrimination in Employment Act of 1967. The preamble to the Act emphasized both the individual and social costs of age discrimination.[3]

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[3] "(a) The Congress hereby finds and declares that—

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

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

The provisions of the Act as relevant here prohibited various forms of age discrimination in employment, including the discharge of workers on the basis of their age. § 4(a), 29 U. S. C. § 623(a).[4] The protection of the Act was limited, however, to workers between the ages of 40 and 65, § 12(a), 29 U. S. C. § 631, raised to age 70 in 1978, Age Discrimination in Employment Act Amendments of 1978, § 3(a), 92 Stat. 189. Moreover, in order to insure that employers were per-

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

"(4) the existence in industries affecting commerce of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

"(b) It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." § 2, 29 U. S. C. § 621.

[4] Section 4(a) of the Act, 29 U. S. C. § 623(a), provides:

"It shall be unlawful for an employer —

"(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

"(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

"(3) to reduce the wage rate of any employee in order to comply with this Act."

The Act has roughly parallel provisions covering employment agencies and labor organizations. §§ 4(b), (c), 29 U. S. C. §§ 623(b), (c). In addition, it prohibits employers, employment agencies, and labor organizations from retaliating against persons who seek to enforce the Act, § 4(d), 29 U. S. C. § 623(d), and from publishing certain types of discriminatory employment notices, § 4(e), 29 U. S. C. § 623(e).

mitted to use neutral criteria not directly dependant on age, and in recognition of the fact that even criteria that are based on age are occasionally justified, the Act provided that certain otherwise prohibited employment practices would not be unlawful "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." § 4(f)(1), 29 U. S. C. § 623(f)(1).

The ADEA, as originally passed in 1967, did not apply to the Federal Government, to the States or their political subdivisions, or to employers with fewer than 25 employees. In a Report issued in 1973, a Senate Committee found this gap in coverage to be serious, and commented that "[t]here is . . . evidence that, like the corporate world, government managers also create an environment where young is somehow better than old." Senate Special Committee on Aging, Improving the Age Discrimination Law, 93d Cong., 1st Sess., 14 (Comm. Print 1973), Legislative History 231. In 1974, Congress extended the substantive prohibitions of the Act to employers having at least 20 workers, and to the Federal and State Governments.[5]

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[5] Congress extended the Act to cover state and local governments by amending the definition of "employer" under § 11(b) of the Act, 29 U. S. C. § 630(b). (At the same time, Congress amended the definition of "employee" under § 11(f) of the Act, 29 U. S. C. § 630(f), to *exclude* state and local elected officials and certain non-civil-service appointed officials.) It extended the Act to cover federal workers by enacting a separate provision, § 15, 29 U. S. C. § 633a (1976 ed. and Supp. V), which created an independent enforcement mechanism under the jurisdiction of the Equal Employment Opportunity Commission. In 1978, at the same time that Congress raised the upper bound of the Act's protection for state, local, and private employees from age 65 to age 70, it removed the cap entirely for federal workers. Age Discrimination in Employment Act Amendments of 1978, § 3(a), 92 Stat. 189, 29 U. S. C. § 631(b) (1976 ed. and Supp. V).

II

Prior to the District Court decision in this case, every federal court that considered the question upheld the constitutionality of the 1974 extension of the Age Discrimination in Employment Act to state and local workers as an exercise of Congress' power under either the Commerce Clause or § 5 of the Fourteenth Amendment.[6]

This case arose out of the involuntary retirement at age 55 of Bill Crump, a District Game Division supervisor for the Wyoming Game and Fish Department. Crump's dismissal was based on a Wyoming statute that conditions further employment for Game and Fish Wardens who reach the age of 55 on "the approval of [their] employer."[7] Crump filed a

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[6] *E. g.*, *Arritt* v. *Grisell*, 567 F. 2d 1267, 1269–1270 (CA4 1977); *Carpenter* v. *Pennsylvania Liquor Control Bd.*, 508 F. Supp. 148 (ED Pa. 1981); *EEOC* v. *Pennsylvania Liquor Control Bd.*, 503 F. Supp. 1051, 1052–1053 (MD Pa. 1980); *Marshall* v. *Delaware River & Bay Auth.*, 471 F. Supp. 886, 891–892 (Del. 1979); *EEOC* v. *Florissant Valley Fire Protection Dist.*, 21 FEP Cases 973, 21 EPD ¶ 30,520 (ED Mo. 1979); *Remmick* v. *Barnes County*, 435 F. Supp. 914 (ND 1977); *Aaron* v. *Davis*, 424 F. Supp. 1238, 1239–1241 (ED Ark. 1976); *Usery* v. *Board of Education of Salt Lake City*, 421 F. Supp. 718 (Utah 1976).

Since the District Court decision in this case, two other District Court opinions have followed its lead, *Campbell* v. *Connelie*, 542 F. Supp. 275, 280 (NDNY 1982); *Taylor* v. *Montana Department of Fish & Game*, 523 F. Supp. 514, 515 (Mont. 1981), but at least two Court of Appeals and eight District Court opinions have declined to do so, see *EEOC* v. *County of Calumet*, 686 F. 2d 1249, 1251–1253 (CA7 1982); *EEOC* v. *Elrod*, 674 F. 2d 601, 603–612 (CA7 1982); *McCroan* v. *Bailey*, 543 F. Supp. 1201, 1205–1207 (SD Ga. 1982); *Kenny* v. *Valley County School District*, 543 F. Supp. 1194, 1196–1199 (Mont. 1982); *EEOC* v. *Minneapolis*, 537 F. Supp. 750, 756 (Minn. 1982); *Bleakley* v. *Jekyll Island—State Park Auth.*, 536 F. Supp. 236, 240 (SD Ga. 1982); *EEOC* v. *County of Los Angeles*, 531 F. Supp. 122, 124 (CD Cal. 1982); *EEOC* v. *County of Los Angeles*, 526 F. Supp. 1135, 1137–1138 (CD Cal. 1981); *Adams* v. *James*, 526 F. Supp. 80, 84 (MD Ala. 1981); *Johnson* v. *Mayor of Baltimore*, 515 F. Supp. 1287, 1292 (Md. 1981).

[7] Section 31–3–107 of the Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, Wyo. Stat. § 31–3–107 (1977), provides that

complaint with the EEOC, alleging that the Game and Fish Department had violated the Age Discrimination in Employment Act. After conciliation efforts between the Commission and the Game and Fish Department failed, the Commission filed suit in the District Court for the District of Wyoming against the State and various of its officials seeking declaratory and injunctive relief, backpay, and liquidated damages on behalf of Mr. Crump and others similarly situated.

The District Court, upon a motion by the defendants, dismissed the suit. It held that the Age Discrimination in Employment Act violated the doctrine of Tenth Amendment immunity articulated in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), at least insofar as it regulated Wyoming's employment relationship with its game wardens and other law enforcement officials. 514 F. Supp., at 600. The District Court also held, citing *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981), that the application of the ADEA to the States could not be justified as an exercise of Congress' power under § 5 of the Fourteenth Amendment because Congress did not explicitly state that it invoked that power in passing the 1974 amendments. 514 F. Supp., at 600.

III

The appellees have not claimed either in the District Court or in this Court that Congress exceeded the scope of its affirmative grant of power under the Commerce Clause[8] in enacting the ADEA. See generally *National League of Cities* v. *Usery*, *supra*, at 840–841; *Heart of Atlanta Motel, Inc.* v.

"[a]n employee may continue in service on a year-to-year basis after age . . . fifty-five (55), with the approval of the employer and under conditions as the employer may prescribe." The provision also provides for the mandatory retirement of covered employees who reach the age of 65.

[8] "The Congress shall have power . . . [t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3.

United States, 379 U. S. 241, 243–244 (1964). Rather, the District Court held and appellees argue that, at least with respect to state game wardens, application of the ADEA to the States is precluded by virtue of external constraints imposed on Congress' commerce powers by the Tenth Amendment.

A

National League of Cities v. *Usery* struck down Congress' attempt to extend the wage and hour provisions of the Fair Labor Standards Act to state and local governments. *National League of Cities* was grounded on a concern that the imposition of certain federal regulations on state governments might, if left unchecked, "allow 'the National Government [to] devour the essentials of state sovereignty,'" 426 U. S., at 855 (quoting *Maryland* v. *Wirtz*, 392 U. S. 183, 205 (1968) (Douglas, J., dissenting)). It therefore drew from the Tenth Amendment an "affirmative limitation on the exercise of [congressional power under the Commerce Clause] akin to other commerce power affirmative limitations contained in the Constitution." 426 U. S., at 841. The principle of immunity articulated in *National League of Cities* is a functional doctrine, however, whose ultimate purpose is not to create a sacred province of state autonomy, but to ensure that the unique benefits of a federal system in which the States enjoy a "'separate and independent existence,'" *id.*, at 845 (quoting *Lane County* v. *Oregon*, 7 Wall. 71, 76 (1869)), not be lost through undue federal interference in certain core state functions. See *FERC* v. *Mississippi*, 456 U. S. 742, 765–766 (1982); *United Transportation Union* v. *Long Island R. Co.*, 455 U. S. 678, 686–687 (1982); *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 286–288 (1981).[9]

Hodel v. *Virginia Surface Mining & Reclamation Assn., Inc.*, *supra*, summarized the hurdles that confront any claim

[9] Cf. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 489–490 (1939) (Frankfurter, J., concurring).

that a state or local governmental unit should be immune from an otherwise legitimate exercise of the federal power to regulate commerce:

> "[I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the 'States as States.' Second, the federal regulation must address matters that are indisputably 'attribute[s] of state sovereignty.' And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'" 452 U. S., at 287–288 (citations omitted; emphasis in original).

Moreover,

> "Demonstrating that these three requirements are met does not . . . guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies state submission." *Id.*, at 288, n. 29 (citations omitted).

See also *United Transportation Union* v. *Long Island R. Co.*, *supra*, at 684, and n. 9. The first requirement—that the challenged federal statute regulate the "States as States"—is plainly met in this case.[10] The second requirement—that

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[10] It is worth emphasizing, however, that it is precisely this prong of the *National League of Cities* test that marks it as a specialized immunity doctrine rather than a broad limitation on federal authority. As we made clear in *Hodel:*

"A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating *private* activity affecting interstate commerce when these laws conflict with federal law. . . . Although such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider im-

the federal statute address an "undoubted attribute of state sovereignty"—poses significantly more difficulties.[11] We need not definitively resolve this issue, however, nor do we have any occasion to reach the final balancing step of the inquiry described in *Hodel*,[12] for we are convinced that, even if Wyoming's decision to impose forced retirement on

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portant, the Supremacy Clause permits no other result." 452 U. S., at 290 (emphasis added; citations omitted).

See also *FERC* v. *Mississippi*, 456 U. S. 742, 759 (1982).

[11] *National League of Cities* held that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress" and that "[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where those employees may be called upon to work overtime." 426 U. S., at 845. Precisely what it meant by an "undoubted attribute of state sovereignty" is somewhat unclear, however, and our subsequent cases applying the *National League of Cities* test have had little occasion to amplify on our understanding of the concept.

A State's employment relationship with its workers can, under certain circumstances, be one vehicle for the exercise of its core sovereign functions. In *National League of Cities*, for example, the power to determine the wages of government workers was tied, among other things, to the exercise of the States' public welfare interest in providing jobs to persons who would otherwise be unemployed, *id.*, at 848. Moreover, some employment decisions are so clearly connected to the execution of underlying sovereign choices that they must be assimilated into them for purposes of the Tenth Amendment. See *id.*, at 850 (relating power to determine hours of government workers to unimpeded exercise of State's role as provider of emergency services). See generally *id.*, at 851 (stressing importance of state autonomy as to "*those* fundamental employment decisions *upon which their systems for performance of* [their dual functions of administering the public law and furnishing public services] *must rest*") (emphasis added). But we are not to be understood to suggest that every state employment decision aimed simply at advancing a generalized interest in efficient management—even the efficient management of traditional state functions—should be considered to be an exercise of an "undoubted attribute of state sovereignty."

[12] See n. 17, *infra*.

its game wardens does involve the exercise of an attribute of state sovereignty, the Age Discrimination in Employment Act does not "directly impair" the State's ability to "structure integral operations in areas of traditional governmental functions."

B

The management of state parks is clearly a traditional state function. *National League of Cities*, 426 U. S., at 851. As we have already emphasized, however, the purpose of the doctrine of immunity articulated in *National League of Cities* was to protect States from federal intrusions that might threaten their "separate and independent existence." *Ibid.* Our decision as to whether the federal law at issue here directly impairs the States' ability to structure their integral operations must therefore depend, as it did in *National League of Cities* itself, on considerations of degree. See *id.*, at 845, 852; *FERC* v. *Mississippi*, 456 U. S., at 769–770. We conclude that the degree of federal intrusion in this case is sufficiently less serious than it was in *National League of Cities* so as to make it unnecessary for us to override Congress' express choice to extend its regulatory authority to the States.

In this case, appellees claim no substantial stake in their retirement policy other than "assur[ing] the physical preparedness of Wyoming game wardens to perform their duties." Brief for Appellees 18.[13] Under the ADEA, however, the State may still, at the very least, assess the fitness of its game wardens and dismiss those wardens whom it reasonably finds to be unfit. Put another way, the Act requires the State to achieve its goals in a more individualized and careful manner than would otherwise be the case, but it does not require the State to abandon those goals, or to abandon the public policy decisions underlying them. *FERC* v. *Mississippi*, *supra*, at 771; cf. n. 11, *supra*.

[13] The only other interest alluded to by appellees is in maintaining the integrity of the state pension system. See n. 15, *infra*.

Perhaps more important, appellees remain free under the ADEA to continue to do *precisely what they are doing now*, if they can demonstrate that age is a "bona fide occupational qualification" for the job of game warden. See *supra*, at 232–233. Thus, in distinct contrast to the situation in *National League of Cities*, *supra*, at 848, even the State's discretion to achieve its goals *in the way it thinks best* is not being overridden entirely, but is merely being tested against a reasonable federal standard.

Finally, the Court's concern in *National League of Cities* was not only with the effect of the federal regulatory scheme on the particular decisions it was purporting to regulate, but also with the potential impact of that scheme on the States' ability to structure operations and set priorities over a wide range of decisions. 426 U. S., at 849–850.[14] Indeed, *National League of Cities* spelled out in some detail how application of the federal wage and hour statute to the States threatened a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking. *Id.*, at 846–852. Nothing in this case, however, portends anything like the same wide-ranging and profound threat to the structure of state governance.

The most tangible consequential effect identified in *National League of Cities* was financial: forcing the States to pay their workers a minimum wage and an overtime rate would leave them with less money for other vital state programs. The test of such financial effect as drawn in *National League of Cities* does not depend, however, on "particularized assessments of actual impact," which may vary from State to State and time to time, but on a more generalized inquiry, essentially legal rather than factual, into the direct and obvious effect of the federal legislation on the ability of the States to allocate their resources. *Id.*, at 851–852; see

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[14] We do not mean to suggest that such consequential effects could be enough, by themselves, to invalidate a federal statute. See *FERC* v. *Mississippi*, *supra*, at 770, n. 33; *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 292, n. 33 (1981).

Hodel, 452 U. S., at 292, n. 33. In this case, we cannot conclude from the nature of the ADEA that it will have either a direct or an obvious negative effect on state finances. Older workers with seniority may tend to get paid more than younger workers without seniority, and may by their continued employment accrue increased benefits when they do retire. But these increased costs, even if they were not largely speculative in their own right, might very well be outweighed by a number of other factors: Those same older workers, as long as they remain employed, will not have to be paid any pension benefits at all, and will continue to contribute to the pension fund. And, when they do retire, they will likely, as an actuarial matter, receive benefits for fewer years than workers who retire early.[15] Admittedly, as some of the *amici* point out, the costs of certain state health and other benefit plans would increase if they were automatically extended to older workers now forced to retire at an early age. But Congress, in passing the ADEA, included a provision specifically disclaiming a construction of the Act which would require that the health and similar benefits received by older work-

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[15] Appellees argue that prohibiting involuntary retirement at age 55 will somehow interfere with the State's ability to "enable those law enforcement officers who, due to the rigors of their occupations, cannot work beyond 55 to retire with a maximum [pension] benefit." Brief for Appellees 12, n. 5. They do not, of course, suggest that anything in the Age Discrimination in Employment Act forbids the State to continue to provide maximum pension benefits to game wardens who retire at age 55. Rather, they claim that eliminating mandatory retirement will require the State to "balance [its pension] fund periodically based upon the number of employees who remained in service beyond 55," and that this would require "the complete restructuring of the benefit program." Frankly, we do not see how the State's financial ability to provide maximum benefits to game wardens who retire at age 55 would be anything but helped by eliminating the involuntary retirement of workers eligible to receive those maximum benefits. Cf. *National League of Cities* v. *Usery*, 426 U. S., at 853 (distinguishing Economic Stabilization Act from Fair Labor Standards Act on basis that former "operated to reduce the pressures upon state budgets rather than increase them").

ers be in all respects identical to those received by younger workers. ADEA § 4(f)(2), 29 U. S. C. § 623(f)(2) (1976 ed. and Supp. V).[16]

The second consequential effect identified in *National League of Cities* was on the States' ability to use their employment relationship with their citizens as a tool for pursuing social and economic policies beyond their immediate managerial goals. See, *e. g.*, 426 U. S., at 848 (offering jobs at below the minimum wage to persons who do not possess "minimum employment requirements"). Appellees, however, have claimed no such purposes for Wyoming's involuntary retirement statute. Moreover, whatever broader social or economic purposes could be imagined for this particular Wyoming statute would not, we are convinced, bring with them either the breadth or the importance of the state policies identified in *National League of Cities*.[17]

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[16] The present version of § 4(f)(2) provides that

"[i]t shall not be unlawful for an employer . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [the] Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual [between the ages of 40 and 70] because of the age of such individual." (The last clause, relating to involuntary retirement, was added by the Age Discrimination in Employment Act Amendments of 1978, § 2(a), 92 Stat. 189.)

As Senator Jacob Javits explained in 1967, the meaning of this provision is that an employer is not compelled "to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers." 113 Cong. Rec. 31255 (1967), Legislative History 146. See H. R. Rep. No. 805, 90th Cong., 1st Sess., 4 (1967), Legislative History 77; 123 Cong. Rec. 34295 (1977) (remarks of Sen. Williams), Legislative History 482; 124 Cong. Rec. 8218–8219 (1978) (remarks of Sen. Javits), Legislative History 539–540.

[17] Even if the minimal character of the federal intrusion in this case did not lead us to hold that the ADEA survives the third prong of the *Hodel* inquiry, it might still, when measured against the well-defined federal in-

IV

The extension of the ADEA to cover state and local governments, both on its face and as applied in this case, was a valid exercise of Congress' powers under the Commerce Clause. We need not decide whether it could also be upheld as an exercise of Congress' powers under § 5 of the Fourteenth Amendment.[18] The judgment of the District Court is

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terest in the legislation, require us to find that the nature of that interest "justifies state submission." We note, incidentally, that the strength of the federal interest underlying the Act is not negated by the fact that the Federal Government happens to impose mandatory retirement on a small class of its own workers. See Brief for Appellees 19. But cf. n. 5, *supra* (no upper age limit on Act's protection of federal employees). Once Congress has asserted a federal interest, and once it has asserted the strength of that interest, we have no warrant for reading into the ebbs and flows of political decisionmaking a conclusion that Congress was insincere in that declaration, and must from that point on evaluate the sufficiency of the federal interest as a matter of law rather than of psychological analysis.

[18] We do reaffirm that when properly exercising its power under § 5, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers. *City of Rome* v. *United States*, 446 U. S. 156, 179 (1980). We also note that, whatever else may be said about the § 5 question in this case, the District Court erred in reading *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981), as holding that congressional action could not be upheld on the basis of § 5 unless Congress "expressly articulated its intent to legislate under § 5," and in disposing of the § 5 argument on the sole basis that "nothing in the 1974 . . . Amendments [to the ADEA] or their legislative history . . . suggest[s] that Congress acted pursuant to any other power than the Commerce Clause," 514 F. Supp. 595, 600 (1981).

It is in the nature of our review of congressional legislation defended on the basis of Congress' powers under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words "section 5" or "Fourteenth Amendment" or "equal protection," see, *e. g.*, *Fullilove* v. *Klutznick*, 448 U. S. 448, 476–478 (1980) (BURGER, C. J.), for "[t]he . . . constitutionality of action taken by Congress does not depend on recitals of the power which

reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE STEVENS, concurring.

While I join the Court's opinion, a complete explanation of my appraisal of the case requires these additional comments about the larger perspective in which I view the underlying issues.

I

In final analysis, we are construing the scope of the power granted to Congress by the Commerce Clause of the Constitution. It is important to remember that this Clause was the Framers' response to the central problem that gave rise to the Constitution itself. As I have previously noted, Justice Rutledge described the origins and purpose of the Commerce Clause in these words:

> "If any liberties may be held more basic than others, they are the great and indispensable democratic freedoms secured by the First Amendment. But it was not

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it undertakes to exercise." *Woods* v. *Cloyd W. Miller Co.*, 333 U. S. 138, 144 (1948).

Our task in *Pennhurst State School and Hospital* v. *Halderman*, *supra*, was to construe a statute, 451 U. S., at 15, not to adjudge its constitutional validity, see *id.*, at 16, n. 12. The Court characterized the question before it as whether "Congress intend[ed a certain statute] to create enforceable rights and obligations." *Id.*, at 15. It then made the unremarkable statement, relied on by the District Court, that "we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Id.*, at 16. The rule of statutory construction invoked in *Pennhurst* was, like all rules of statutory construction, a tool with which to divine the meaning of otherwise ambiguous statutory intent. Here, there is no doubt what the intent of Congress was: to extend the application of the ADEA to the States. The observations in *Pennhurst* therefore simply have no relevance to the question of whether, in this case, Congress acted pursuant to its powers under § 5.

to assure them that the Constitution was framed and adopted. Only later were they added, by popular demand. It was rather to secure freedom of trade, to break down the barriers to its free flow, that the Annapolis Convention was called, only to adjourn with a view to Philadelphia. Thus the generating source of the Constitution lay in the rising volume of restraints upon commerce which the Confederation could not check. These were the proximate cause of our national existence down to today.

"As evils are wont to do, they dictated the character and scope of their own remedy. This lay specifically in the commerce clause. No prohibition of trade barriers as among the states could have been effective of its own force or by trade agreements. It had become apparent that such treaties were too difficult to negotiate and the process of securing them was too complex for this method to give the needed relief. Power adequate to make and enforce the prohibition was required. Hence, the necessity for creating an entirely new scheme of government.

". . . So by a stroke as bold as it proved successful, they founded a nation, although they had set out only to find a way to reduce trade restrictions. So also they solved the particular problem causative of their historic action, by introducing the commerce clause in the new structure of power." W. Rutledge, A Declaration of Legal Faith 25–26 (1947), quoted in *United States* v. *Stasczuk*, 517 F. 2d 53, 58 (CA7) (en banc), cert. denied, 423 U. S. 837 (1975).[1]

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[1]Justice Rutledge's view of our Nation's history has been widely shared. For example, in 1934 in an article in the Harvard Law Review, Robert L. Stern wrote:

"The Constitutional Convention was called because the Articles of Confederation had not given the Federal Government any power to regulate commerce. This defect proved to be so serious that the Virginia General Assembly appointed commissioners to meet with commissioners of other

There have been occasions when the Court has given a miserly construction to the Commerce Clause.[2] But as the needs of a dynamic and constantly expanding national economy have changed, this Court has construed the Commerce Clause to reflect the intent of the Framers of the Constitution—to confer a power on the National Government ade-

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states to 'take into consideration the trade of the United States; to examine the relative situation and trade of the said states; to consider how far the uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several states such an act relative to this great object. . . .' Representatives of but five states met at Annapolis in September, 1786. They determined that they could do nothing by themselves, and that the adequate protection of commerce required a complete revision of the structure of government. Accordingly, they recommended that a convention be called for the purpose of revising the Articles of Confederation, and Congress thereupon asked the various states to send delegates to Philadelphia in May, 1787.

. . . . . .

". . . In view of the fact that the need for centralized commercial regulation was universally recognized as the primary reason for preparing a new constitution, the Convention would not have been likely to have meant the commerce clause to have a narrow or restrictive meaning." Stern, That Commerce Which Concerns More States Than One, 47 Harv. L. Rev. 1335, 1337, 1340–1341 (1934) (footnotes omitted).

See also 1 A. Beveridge, The Life of John Marshall 310–312 (1916); G. Gunther, Constitutional Law 127 (9th ed. 1975) ("The poor condition of American commerce and the proliferating trade rivalries between the states were the immediate provocations for the calling of the Constitutional Convention"); C. Swisher, American Constitutional Development 25–27 (2d ed. 1954); *Gibbons* v. *Ogden*, 9 Wheat. 1, 224 (1824) (opinion of Johnson, J.) (the "conflict of commercial regulations, destructive to the harmony of the States . . . was the immediate cause, that led to the forming of a convention").

[2] See, *e. g.*, *Kidd* v. *Pearson*, 128 U. S. 1, 20–21 (1888) (manufacturing is not subject to the commerce power of Congress); *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12–16 (1895) (monopoly in manufacturing is not subject to the commerce power); *Adair* v. *United States*, 208 U. S. 161, 178–179 (1908) (connection between interstate commerce and membership in a labor union insufficient to authorize Congress to make it a crime for an interstate carrier to discharge an employee because of union membership); *Hammer* v. *Dagenhart*, 247 U. S. 251, 276 (1918) (Congress has no power

quate to discharge its central mission. In this process the Court has repeatedly repudiated cases that had narrowly construed the Clause.[3] The development of judicial doctrine has accommodated the transition from a purely local, to a regional, and ultimately to a national economy.[4] Today, of course, our economy is merely a part of an international mechanism no single nation could possibly regulate.

In the statutes challenged in this case and in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), Congress exercised its power to regulate the American labor market. There was a time when this Court would have denied that Congress had any such power,[5] but that chapter in our judi-

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to prohibit interstate transportation of goods produced with child labor); *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 308–310 (1936) (commerce power does not extend to regulation of wages, hours, and working conditions of coal miners).

[3] Compare *Stafford* v. *Wallace*, 258 U. S. 495, 524–525 (1922), with *Hopkins* v. *United States*, 171 U. S. 578, 592–598 (1898); *Virginian R. Co.* v. *Railway Employees*, 300 U. S. 515, 557 (1937), with *Employers' Liability Cases*, 207 U. S. 463, 498 (1908); *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 393–394 (1940), with *Carter* v. *Carter Coal Co.*, *supra*, at 297–310; *United States* v. *Darby*, 312 U. S. 100, 115–117 (1941), with *Hammer* v. *Dagenhart*, *supra*, at 269–277; *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 542–553 (1944), with *New York Life Insurance Co.* v. *Deer Lodge County*, 231 U. S. 495, 502–512 (1913); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 229–235 (1948), with *United States* v. *E. C. Knight Co.*, *supra*, at 12–16.

[4] See, *e. g.*, *Wickard* v. *Filburn*, 317 U. S. 111, 118–125 (1942) (Congress may constitutionally apply wheat marketing quota to wheat grown wholly for consumption on the farm, because of interdependence of national market); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, *supra*, at 229–235 (Congress has power under Commerce Clause to prohibit price fixing by purchasers of beet sugar from growers in same State); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 249–262 (1964) (Congress may prohibit racial discrimination in places of public accommodation affecting commerce); *Perez* v. *United States*, 402 U. S. 146, 154–155 (1971) (Commerce Clause gives Congress power to regulate local loan sharking because it is in a class of activities that has an impact on interstate commerce).

[5] See, *e. g.*, *Employers' Liability Cases*, *supra*, at 496–499; *Adair* v. *United States*, *supra*, at 176–180; *Hammer* v. *Dagenhart*, *supra*, at 271–275; *Carter* v. *Carter Coal Co.*, *supra*, at 303–304.

cial history has long been closed.[6] Today, there should be universal agreement on the proposition that Congress has ample power to regulate the terms and conditions of employment throughout the economy. Because of the interdependence of the segments of the economy and the importance and magnitude of government employment, a comprehensive congressional policy to regulate the labor market may require coverage of both public and private sectors to be effective.

Congress may not, of course, transcend specific limitations on its exercise of the commerce power that are imposed by other provisions of the Constitution. But there is no limitation in the text of the Constitution that is even arguably applicable to this case. The only basis for questioning the federal statute at issue here is the pure judicial fiat found in this Court's opinion in *National League of Cities* v. *Usery*. Neither the Tenth Amendment,[7] nor any other provision of the Constitution, affords any support for that judicially constructed limitation on the scope of the federal power granted to Congress by the Commerce Clause.[8] In my opinion, that

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[6] See *United States* v. *Darby*, *supra*, at 113–124.

[7] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. Const., Amdt. 10.

As Chief Justice Stone wrote in *United States* v. *Darby*, *supra*, at 124: "The amendment states but a truism that all is retained which has not been surrendered. . . . From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end."

[8] This, of course, is not an original observation. See Chief Justice Marshall's opinion for the Court in *Gibbons* v. *Ogden*, *supra*, at 196–197:

"It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign na-

decision must be placed in the same category as *United States* v. *E. C. Knight Co.*, 156 U. S. 1 (1895), *Hammer* v. *Dagenhart*, 247 U. S. 251 (1918), and *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936)—cases whose subsequent rejection is now universally regarded as proper. I think it so plain that *National League of Cities* not only was incorrectly decided, but also is inconsistent with the central purpose of the Constitution itself, that it is not entitled to the deference that

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tions, and among the several States, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, . . . the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

These words carry special weight in view of the fact that, more than 35 years earlier, Chief Justice Marshall had been a delegate at the Virginia ratifying convention and had participated in the crucial debates regarding the proposed Constitution. He was thus fully conscious of the dramatic contrast between the Articles of Confederation, which had declared explicitly that "[e]ach State retains its sovereignty, freedom, and independence," Art. 2, and the new Constitution, which contained not a word respecting the sovereignty, freedom, and independence of the States, but rather conveyed an unequivocal message in the Supremacy Clause, Art. VI, cl. 2. The role of the States in the Confederation was repeatedly contrasted with their role in the proposed Constitution, both by supporters and by opponents of ratification. See 3 J. Elliot, Debates on the Federal Constitution 129 (1891 ed.) (James Madison, speaking in support: "A government which relies on thirteen independent sovereignties for the means of its existence, is a solecism in theory and a mere nullity in practice. . . . The effect, sir, cannot be changed without a removal of the cause"); *id.*, at 22 (Patrick Henry, speaking in opposition: "Who authorized them to speak the language of, *We, the people*, instead of, *We, the states?* States are the characteristics and the soul of a confederation. If the states be not the agents of this compact, it must be one great, consolidated, national government, of the people of all the states"). The question of authority, of course, was resolved by the ratification.

the doctrine of *stare decisis* ordinarily commands for this Court's precedents. Notwithstanding my respect for that doctrine, I believe that the law would be well served by a prompt rejection of *National League of Cities*' modern embodiment of the spirit of the Articles of Confederation.

II

My conviction that Congress had ample power to enact this statute, as well as the statute at issue in *National League of Cities*, is unrelated to my views about the merits of either piece of legislation. As I intimated in my dissent in that case, I believe that federal regulation that enhances the minimum price of labor inevitably reduces the number of jobs available to people who are ready, willing, and able to engage in productive work—and thereby aggravates rather than ameliorates our unemployment problems. I also believe, contrary to the popular view, that the burdens imposed on the national economy by legislative prohibitions against mandatory retirement on account of age exceed the potential benefits. My personal views on such matters are, however, totally irrelevant to the judicial task I am obligated to perform. There is nothing novel about this point—it has been made repeatedly by more learned and more experienced judges.[9] But it is important to emphasize this obvious limit on the proper exercise of judicial power, one that is sometimes overlooked by those who criticize our work product.

The question in this case is purely one of constitutional power. In exercising its power to regulate the national market for the services of individuals—either by prescribing the minimum price for such services or by prohibiting employment discrimination on account of age—may Congress regulate both the public sector and the private sector of that mar-

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[9] See, *e. g.*, *Spencer* v. *Texas*, 385 U. S. 554, 569 (1967) (Stewart, J., concurring); *Adair* v. *United States*, 208 U. S., at 191–192 (Holmes, J., dissenting); *Lochner* v. *New York*, 198 U. S. 45, 75 (1905) (Holmes, J., dissenting).

ket, or must it confine its regulation to the private sector? If the power is to be adequate to enable the National Government to perform its central mission, that question can have only one answer.

CHIEF JUSTICE BURGER, with whom JUSTICE POWELL, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

The Court decides today that Congress may dictate to the states, and their political subdivisions, detailed standards governing the selection of state employees, including those charged with protecting people and homes from crimes and fires. Although the opinion reads the Constitution to allow Congress to usurp this fundamental state function, I have reexamined that document and I fail to see where it grants to the National Government the power to impose such strictures on the states either expressly or by implication. Those strictures are not required by any holding of this Court, and it is not wholly without significance that Congress has not placed similar limits on itself in the exercise of its own sovereign powers. Accordingly, I would hold the Age Discrimination in Employment Act (Age Act) unconstitutional as applied to the states, and affirm the judgment of the District Court.

I

I begin by analyzing the Commerce Clause rationale, for it was upon this power that Congress expressly relied when it originally enacted the Age Act in 1967, see 29 U. S. C. § 621, and when it extended its protections to state and local government employees, see H. R. Rep. No. 93–913, pp. 1–2 (1974).[1]

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[1] The Age Act was extended to the states along with the Fair Labor Standards Act. Pub. L. 93–259, § 28, 88 Stat. 74. Extension of the FLSA was declared unconstitutional in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976).

We have had several occasions in recent years to investigate the scope of congressional authority to legislate under the Commerce Clause, see, *e. g.*, *National League of Cities* v. *Usery*, 426 U. S. 833 (1976); *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264 (1981); *United Transportation Union* v. *Long Island R. Co.*, 455 U. S. 678 (1982). The wisdom to be drawn from these cases is that Congress' authority under the Commerce Clause is restricted by the protections afforded the states by the Tenth Amendment. To decide whether a particular enactment has improperly intruded into Tenth Amendment rights, we have adopted a three-prong test:

> "First, there must be a showing that the challenged statute regulates the 'States as States.' [*National League of Cities*, 426 U. S.], at 854. Second, the federal regulation must address matters that are indisputably 'attribute[s] of state sovereignty.' *Id.*, at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.' *Id.*, at 852." *Hodel*, 452 U. S., at 287–288.

For statutes that meet each prong of this test, a final inquiry must be made to decide whether "the federal interest advanced [is] such that it justifies state submission." *Id.*, at 288, n. 29, citing *Fry* v. *United States*, 421 U. S. 542 (1975); *National League of Cities*, *supra*, at 856 (BLACKMUN, J., concurring).

We need not pause on the first prong of this test, for the legislation is indisputably aimed at regulating the states in their capacity as states, 29 U. S. C. § 630(b). The Commission argues, however, that the legislation does not run counter to the other two prongs of the test. Turning then to prong two, whether the Age Act addresses matters that are "attributes of state sovereignty," we may assume that in enacting the Wyoming State Highway Patrol and Game and

Fish Warden Retirement Act, Wyo. Stat. § 31–3–101 *et seq.* (1977 and Supp. 1982), Wyoming sought to assure the physical preparedness of its game wardens and others who enforce its laws. Tr. of Oral Arg. 5. This goal is surely an attribute of sovereignty, for parks and recreation services were identified in *National League of Cities*, *supra*, at 851, as traditional state activities protected by the Tenth Amendment. Even more important, it is the essence of state power to choose—subject only to *constitutional* limits—who is to be part of the state government. Cf. *Oregon* v. *Mitchell*, 400 U. S. 112, 123 (1970) (Black, J.). If poachers destroy the fish and game reserves of Wyoming, it is not to the Congress that people are going to complain, but to state and local authorities who will have to justify their actions in selecting wardens. Since it is the State that bears the responsibility for delivering the services, it is clearly an attribute of state sovereignty to choose who will perform these duties.

To decide whether a challenged activity is an attribute of sovereignty, it is instructive to inquire whether other government entities have attempted to enact similar legislation. A finding that other governmental units have passed mandatory retirement laws, although not conclusive, is persuasive evidence that such laws are traditional methods for insuring an efficient work force for certain governmental functions. My research indicates that more than one-half the states have retirement laws that, like the Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, violate the Age Act.[2] More important, Congress, while mandating

[2] See, *e. g.*, Ala. Code § 36–27–16(a)(1)(e) (Supp. 1982) (police; age 60); Ark. Stat. Ann. § 42–455 (1977) (police; 65); Cal. Gov't Code Ann. § 20980 (West 1980) (highway patrol; 60); Del. Code Ann., Tit. 11, § 8323 (1979) (police; 55); Idaho Code § 50–1514(a) (Supp. 1981) (police; 65); Ill. Rev. Stat., ch. 24, ¶ 10–2.1–17 (1979) (police and firemen; 65); Ind. Code § 36–8–3.5–20 (1981) (police and firemen; 65); Iowa Code § 97B.46(3) (Supp. 1982–1983) (peace officers and firefighters; 65); Kan. Stat. Ann. § 74–4975(b) (1980) (patrolmen; 60); La. Rev. Stat. Ann. § 42–691 (West Supp. 1983) (law enforcement personnel and firefighters; 65); Md. Ann. Code,

compliance in the states, carefully preserved its own freedom to select employees on any basis it chooses. Although the Age Act was expressly made to apply to the National Government, 29 U. S. C. § 633a (1976 ed. and Supp. V), exceptions were built into the enactment. Certain categories of federal employment—such as law enforcement officers—were *explicitly* excluded, and in addition, the statute provides that "[r]easonable exemptions to the provisions of this section may be established by the [Civil Service] Commission."[3] 29 U. S. C. § 633a(b). I conclude that defining the qualifications of employees is an essential of sovereignty.

Art. 88B, § 53(1)(c) (1979) (police; 60); Mass. Gen. Laws Ann., ch. 32, § 69(d) (West 1966) and § 83A(d) (Supp. 1982–1983) (police; 65); Mich. Comp. Laws Ann. § 38.556(1)(c) (Supp. 1982) (police and firemen; 65); Minn. Stat. § 423.075(1) (Supp. 1983) (police and firemen; 65); Miss. Code Ann. § 25–13–11 (Supp. 1982) (highway patrol; 55) and § 21–29–245 (Supp. 1982) (police and firemen; 60); Mo. Ann. Stat. § 104.010 and § 104.080 (Vernon Supp. 1983) (highway patrol; 60); Mont. Code Ann. § 19–6–504 (1981) (highway patrol; 60) and § 19–9–801 (1981) (police; 65); Neb. Rev. Stat. § 81–2025(2) (1981) (patrolmen; 60); N. Y. Retire. & Soc. Sec. Law § 381–b(e) (McKinney Supp. 1982–1983) (police; 65); N. D. Cent. Code § 39–03.1–18 (1980) (highway patrol; 60); Ohio Rev. Code Ann. § 5505.16 (Supp. 1982) (highway patrol; 55); Okla. Stat., Tit. 47, § 2–305A (Supp. 1982–1983) (police; 60); Ore. Rev. Stat. § 237.129(1) (1981) (police and firemen; 60); Pa. Stat. Ann., Tit. 71, § 65(d) (Purdon Supp. 1982–1983) (police; 60); R. I. Gen. Laws § 45–21.2–5 (1980) (police and firemen; 65); S. C. Code § 9–1–1535 (Supp. 1982) (conservation officers; 65); Tenn. Code Ann. § 8–36–205(1) (1980) (police; 60 or 65); Tex. Rev. Civ. Stat. Ann., Art. 6423g–1, § 11(d) (Vernon Supp. 1982–1983) (police; 65); Vt. Stat. Ann., Tit. 3, § 459(a)(2) (Supp. 1982) (police; 55); Wash. Rev. Code § 43.43.250(1) (1981) (state patrol; 60); W. Va. Code § 8–22–25(d) (Supp. 1982) (police and firemen; 65); Wis. Stat. § 41.02(23) (1979–1980) (police and firemen; 55); Wyo. Stat. § 15–5–307(a) (Supp. 1982) (police; 60). See also App. to Brief for National Institute of Municipal Law Enforcement Officers as *Amicus Curiae* 1a–7a, citing 160 municipalities that have laws violating the Age Act.

[3] This function was later transferred to the Equal Employment Opportunity Commission, see § 2 of the Reorg. Plan No. 1 of 1978, 3 CFR 321 (1979), 92 Stat. 3781, 5 U. S. C. App. 426 (1976 ed., Supp. V).

The third prong of the *National League of Cities* test is that the federal intrusion must impair the ability of the state to structure integral operations. Wyoming cites several ways in which the Age Act interferes with its ability to structure state services, and several *amici* inform us of additional difficulties, some economic, some not, that are engendered by the Act.

It is beyond dispute that the statute can give rise to increased employment costs caused by forced employment of older individuals. Since these employees tend to be at the upper end of the pay scale, the cost of their wages while they are still in the work force is greater. And since most pension plans calculate retirement benefits on the basis of maximum salary or number of years of service, pension costs are greater when an older employee retires.[4] The employer is also forced to pay more for insuring the health of older employees because, as a group, they inevitably carry a higher-than-average risk of illness. See, *e. g.*, Pollock, Gettman, & Meyer, Analysis of Physical Fitness and Coronary Heart Disease Risk of Dallas Area Police Officers, 20 J. Occup. Med. 393 (1978); N. Shock, Cardiac Performance and Age, in Cardiovascular Problems, Perspectives and Progress 3–24 (H. Russek ed. 1976); J. Hall & J. Zwemer, Prospective Medicine (2d ed. 1979). Since they are—especially in law enforce-

[4] This problem is exacerbated by the special retirement schemes often used in connection with mandatory early retirement laws. In Wyoming, for example, state employees who are not subject to early retirement contribute less per month towards retirement than those in occupations where early retirement is required. So long as the early retirement laws are in effect, this system is actuarily sound because the employees who will spend less years at work pay into the system more rapidly. Simple invalidation of the early retirement system would work an inequity by requiring these workers to contribute more towards retirement than other state employees. Brief for Appellees 12, n. 5. Of course, Wyoming could revamp its pension system to correct this problem. Forcing the State to do so is another example of the adverse impact wrought by the Age Act.

ment—also more prone to on-the-job injuries, it is reasonable to conclude that the employer's disability costs are increased. See generally, D. Gregg & V. Lucas, Life and Health Insurance Handbook (3d ed. 1973); S. Huebner & K. Black, Life Insurance (10th ed. 1982).

Noneconomic hardships are equally severe. Employers are prevented from hiring those physically best able to do the job. Since older workers occupy a disproportionate share of the upper-level and supervisory positions, a bar on mandatory retirement also impedes promotion opportunities. Lack of such opportunities tends to undermine younger employees' incentive to strive for excellence, and impedes the state from fulfilling affirmative-action objectives.

The Federal Government can hardly claim that the objectives of decreasing costs and increasing promotional opportunities are impermissible: many of the same goals are cited repeatedly to justify the "enclaves" of federal exceptions to the Age Act. For example, mandatory retirement is still the rule in the Armed Services, 10 U. S. C. § 1251 (1976 ed., Supp. V), and the Foreign Service, 22 U. S. C. § 4052 (1976 ed., Supp. V), despite passage of the Age Act. The House Committee on Armed Services continues, apparently, to think it essential to have a mechanism to assure that officers from positions of command are vigorous and free from infirmities generally associated with age. H. R. Rep. No. 96–1462, p. 8 (1980). Similarly, the House Committee on Post Office and Civil Service, while acknowledging the "unfairness of a mandatory retirement age," H. R. Rep. No. 96–992, pt. 2, p. 30 (1980), concluded that it remains necessary in the Foreign Service "for the maintenance of predictable career patterns," *ibid.*, to prevent "unavailability for worldwide assignment," *ibid.*, and to "restore the 'flow' [*i. e.*, promotional opportunities] to the system," *id.*, at 15. See also 5 U. S. C. § 335. It is difficult to grasp just how Congress reconciles that view with its legislation forcing the states to comply with rigid standards.

The Commission answers the State's contentions by arguing that even under the Age Act, it is possible to effectuate some of the State's goals. According to appellant, adverse economic impact is mitigated by 29 U. S. C. § 623(f)(2) (1976 ed., Supp. V), which provides that an employer may "observe the terms of a bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter . . . ."

I reject the notion that this exception ameliorates the State's problem to any significant extent. The reality is that, for Wyoming to benefit from this exception, it will have to enact new laws and develop new regulations to reduce its insurance coverage on older employees. Drafting and enacting these new laws is a burden Congress has no power to impose on the states. Second, it is doubtful that Wyoming could, as a practical matter, lower the health and disability insurance coverage on employees who fall under mandatory retirement laws. It is these employees who are, for the most part, in the most physically hazardous occupations, and thus most need protection. Stated another way, perhaps Crump would not want to keep his job if the State were unwilling to bear the economic risks of his injuries. Section 623(f)(2) is thus a shallow alternative to mandatory retirement.

Section 623(f)(1), the Commission's answer to the problem of protecting the State's ability to deliver its services effectively, provides no solution either. That section provides that mandatory early retirement is permissible "where age is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business . . . ." Although superficially, this section appears to offer the states a means for lessening the administrative burden of retiring unfit employees on a case-by-case basis, the exception does not work in practice. In the absence of statutory guidelines, the courts that have faced the question have—in response to this appellant's urgings—established a

high standard of what constitutes a bona fide occupational qualification. Typical seems to be the approach taken in *Arritt* v. *Grisell*, 567 F. 2d 1267, 1271 (CA4 1977), requiring the employer to prove

> "(1) that the bfoq which it invokes is reasonably necessary to the essence of its business . . . , and (2) that the employer has reasonable cause, i. e., a factual basis for believing that all or substantially all persons within the class . . . would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis."

See also *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d 224 (CA5 1976). Given the state of modern medicine, it is virtually impossible to prove that *all* persons within a class are unable to perform a particular job or that it is impossible to test employees on an individual basis, see, *e. g.*, *Johnson* v. *Mayor of Baltimore*, 515 F. Supp. 1287, 1299 (Md. 1981), cert. denied, 455 U. S. 944 (1982).

In the face of this track record, I find it impossible to say that § 623(f)(1) provides an adequate method for avoiding significant impairment to the state's ability to structure its integral governmental operations.[5]

Since I am satisfied that the Age Act runs afoul of the three prongs of the *National League of Cities* test, I turn to the balancing test alluded to in JUSTICE BLACKMUN's concurring opinion in *National League of Cities*, and in *Hodel*. The Commission argues that the federal interest in preventing unnecessary demands on the social security system and other maintenance programs, in protecting employees from arbitrary discrimination, and in eliminating unnecessary burdens on the free flow of commerce "is more than sufficient in the

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[5] In addition, states that choose to invoke the BFOQ exception expose themselves to lawsuits requiring them to defend their choices. Defense of lawsuits is a costly and time-consuming endeavor that is, in itself, a burden impermissible for Congress to impose on the states.

face of . . . Wyoming's bald assertion of a prerogative to be arbitrary." Brief for Appellant 19.

It is simply not accurate to state that Wyoming is resting its challenge to the Age Act on a "sovereign" right to discriminate; as I read it, Wyoming is asserting a right to set standards to meet local needs. Nor do I believe that these largely theoretical benefits to the Federal Government outweigh the very real danger that a fire may burn out of control because the firefighters are not physically able to cope; or that a criminal may escape because a law enforcement officer's reflexes are too slow to react swiftly enough to apprehend an offender; or that an officer may be injured or killed for want of capacity to defend himself. These factors may not be real to Congress but it is not Congress' responsibility to prevent them; they are nonetheless real to the states. I would hold that Commerce Clause powers are wholly insufficient to bar the states from dealing with or preventing these dangers in a rational manner. Wyoming's solution is plainly a rational means.

II

Since it was ratified after the Tenth Amendment, the Fourteenth Amendment is not subject to the constraints discussed earlier in connection with the Commerce Clause. Indeed, it is well established that Congress may, under the powers bestowed by § 5, enact legislation affecting the states, *Ex parte Virginia*, 100 U. S. 339, 345 (1880); *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976). But this does not mean that Congress has been given a "blank check" to intrude into details of states' governments at will. The Tenth Amendment was not, after all, repealed when the Fourteenth Amendment was ratified: it was merely limited. The question then becomes whether the Fourteenth Amendment operates to transfer from the states to the Federal Government the essentially local governmental function of deciding who will protect citizens from lawbreakers.

The outer reaches of congressional power under the Civil War Amendments have always been uncertain. One factor

is, however, clear: Congress may act only where a violation lurks. The flaw in the Commission's analysis is that in this instance, no one—not the Court, not the Congress[6]—has determined that mandatory retirement plans violate any rights protected by these Amendments. We cannot say that the Judiciary made this determination, for we have considered the constitutionality of mandatory retirement schemes twice, in *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307 (1976), for state police, and *Vance* v. *Bradley*, 440 U. S. 93 (1979), for Foreign Service officers; we rejected both equal protection challenges. In both instances, we arrived at our conclusion by examining, *arguendo*, the retirement schemes under the rational-basis standard. It was not necessary that we be convinced that equal protection guarantees extend to classes defined by age because governmental employment is not a fundamental right and those who are mandatorily retired are not a suspect class.

In *Murgia*, we found that early retirement of policemen was justified by the states' objective of "protect[ing] the public by assuring physical preparedness of its uniformed police," 427 U. S., at 314; in *Bradley*, we held that early retirement of Foreign Service personnel was justified by Congress' perception of a need to assure "opportunities for promotion would be available" and "the high quality of those occupying positions critical to the conduct of our foreign relations," and in order to "minimiz[e] the risk of less than superior performance by reason of poor health or loss of vitality," 440 U. S., at 101 and 103–104. Congress was simply using a rational means for solving a practical governmental problem within its constitutional jurisdiction.

Were we asked to review the constitutionality of the Wyoming State Highway Patrol and Game and Fish Warden Re-

[6] The ability of Congress to define independently protected classes is an issue that need not be resolved here because I think that the Age Act is unconstitutional even if it is assumed that Congress has this power.

tirement Act, we would reach a result consistent with *Bradley* and *Murgia*. Like Congress dealing with military personnel, FBI agents, and Foreign Service officers, the State of Wyoming has an interest in the physical ability of its highway patrol and game and fish wardens. It is within Wyoming's authority to motivate personnel to high performance by assuring opportunities for advancement; Wyoming reasonably considers safety conditions on its highways and game preserves critical to the well-being of its citizenry. In short, it cannot be said that in applying the Age Act to the states Congress has acted to enforce equal protection guarantees as they have been defined by this Court.

Nor can appellant claim that Congress has used the powers we recognized in *City of Rome* v. *United States*, 446 U. S. 156, 176–177 (1980); *Oregon* v. *Mitchell*, 400 U. S. 112 (1970); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 437–444 (1968); *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966); and *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966), to enact legislation that prohibits conduct not in itself unconstitutional because it considered the prohibition necessary to guard against encroachment of guaranteed rights or to rectify past discrimination. There has been no finding, as there was in *South Carolina* v. *Katzenbach*, *supra*, at 309, that the abrogated state law infringed on rights identified by this Court.[7]

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[7] At oral argument, the Solicitor General argued that in applying the rational-basis test in *Murgia* and *Bradley*, the Court *sub silentio* agreed that age discrimination is protected by the Equal Protection Clause, and that Congress has merely altered the burden needed to prove compliance with its guarantees. Tr. of Oral Arg. 17–18. I do not read these decisions to support this notion. *Murgia* and *Bradley* presented us with no occasion to determine the scope of the equal protection guarantee because we found the legislation challenged there sustainable even if we assumed the class was protected.

This is not to say definitively that age discrimination is not protected by the Fourteenth Amendment because this case does not squarely raise that issue. Rather, I am pointing out that since this Court has not decided the

Nor did Congress use, as it did in *Katzenbach* v. *Morgan*, *supra*, at 656, its "specially informed legislative competence" to decide that the state law it invalidated was too intrusive on federal rights to be an appropriate means to achieve the ends sought by the state. Instead, the Age Act can be sustained only if we assume first, that Congress can define rights wholly independently of our case law, and second, that Congress has done so here. I agree with neither proposition.

Allowing Congress to protect constitutional rights statutorily that it has independently defined fundamentally alters our scheme of government. Although the *South Carolina* v. *Katzenbach* line of cases may be read to allow Congress a degree of flexibility in deciding what the Fourteenth Amendment safeguards, I have always read *Oregon* v. *Mitchell* as finally imposing a limitation on the extent to which Congress may substitute its own judgment for that of the states and assume this Court's "role of final arbiter," *Mitchell*, *supra*, at 205 (Harlan, J., concurring in part and dissenting in part). *Mitchell*, after all, involved legislation in the area of suffrage, where Congress had special competence and special reasons to limit the powers of the states. It is significant, however, that while we there sustained the portions of the Voting Rights Act Amendments of 1970 lowering the minimum age of voters from 21 to 18 in federal elections, barring literacy tests in state and federal elections, and prohibiting states from disqualifying voters in Presidential elections for failure to meet state residency requirements, a majority of the *Mitchell* Court did not agree to allow Congress to alter voting requirements in *state* elections. We struck that portion of the Voting Rights Act because we thought it a "plain fact of history" that Congress lacked this power, see 400 U. S., at 125 and 294 (Black and Stewart, JJ.); *id.*, at 154–215 (Harlan, J.); and because we thought that the Fourteenth Amendment

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question, the Government cannot support this enactment on the ground that Congress was attempting to establish further safeguards for a class we have found to be constitutionally protected.

was not a license to "overstep the letter or spirit of any constitutional restriction," *id.*, at 287 (Stewart, J.).

For me, this same reasoning leads inevitably to the conclusion that Congress lacked power to apply the Age Act to the states. There is no hint in the body of the Constitution ratified in 1789 or in the relevant Amendments that every classification based on age is outlawed. Yet there is much in the Constitution and the relevant Amendments to indicate that states retain sovereign powers not expressly surrendered, and these surely include the power to choose the employees they feel are best able to serve and protect their citizens.[8]

And even were we to assume, *arguendo*, that Congress could redefine the Fourteenth Amendment, I would still reject the power of Congress to impose the Age Act on the states when Congress, in the same year that the Age Act was extended to the states, passed mandatory retirement legislation of its own, Pub. L. 93–350, 88 Stat. 356, codified at 5 U. S. C. § 8335, for law enforcement officers and firefighters. Over eight years have elapsed since the Age Act was extended to the states, yet early retirement is still required of federal air traffic controllers, 5 U. S. C. § 8335(a) (1976 ed., Supp. V), federal law enforcement officers, § 8335(b), federal firefighters, *ibid.*, employees of the Panama Canal Commission and the Alaska Railroad, § 8335(c), members of the Foreign Service, 22 U. S. C. § 4052 (1976 ed., Supp. V), and members of the Armed Services, 10 U. S. C. § 1251 (1976 ed., Supp. V).

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[8] It has been suggested that where a congressional resolution of a policy question hinges on legislative facts, the Court should defer to Congress' judgment because Congress is in a better position than the Court to find the relevant facts. Cox, The Role of Congress in Constitutional Determinations, 40 U. Cin. L. Rev. 187, 229–230 (1971). While this theory may have some importance in matters of strictly federal concern, it has no place in deciding between the legislative judgments of Congress and that of the Wyoming Legislature. Congress is simply not as well equipped as state legislators to make decisions involving purely local needs.

III

I believe I have demonstrated that neither the Constitution nor any of its Amendments have transferred from the states to the Federal Government the essentially local function of establishing standards for choosing state employees. The Framers did not give Congress the power to decide local employment standards because they wisely realized that as a body, Congress lacked the means to analyze the factors that bear on this decision, such as the diversity of occupational risks, climate, geography, and demography. Since local conditions generally determine how a job should be performed, and who should perform it, the authority and responsibility for making employment decisions must be in the hands of local governments, subject only to those restrictions unmistakably contemplated by the Fourteenth Amendment. Intrusion by Congress into this area can lead only to ill-informed decisionmaking.

And even if Congress had infinite factfinding means at its disposal, conditions in various parts of the country are too diverse to be susceptible to a uniformly applicable solution. Wyoming is a State with large sparsely populated areas, where law enforcement often requires substantial physical stamina; the same conditions are not always encountered by law enforcement officers in Rhode Island, which has far less land area, no mountains, and no wilderness. Problems confronting law enforcement officers in Alaska or Maine may be unlike those encountered in Hawaii and Florida. Barring states from making employment decisions tailored to meet specific local needs undermines the flexibility that has long allowed industrial states to live under the same flag as rural states, and small, densely populated states to coexist with large, sparsely populated ones.

The reserved powers of the states and Justice Brandeis' classic conception of the states as laboratories, *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting), are turned on their heads when national rather than state governments assert the authority to make decisions on

the age standard of state law enforcement officers. Flexibility for experimentation not only permits each state to find the best solutions to its own problems, it is the means by which each state may profit from the experiences and activities of all the rest. Nothing in the Constitution permits Congress to force the states into a Procrustean national mold that takes no account of local needs and conditions. That is the antithesis of what the authors of the Constitution contemplated for our federal system.

JUSTICE POWELL, with whom JUSTICE O'CONNOR joins, dissenting.

I join THE CHIEF JUSTICE's dissenting opinion, but write separately to record a personal dissent from JUSTICE STEVENS' novel view of our Nation's history.

I

JUSTICE STEVENS begins his concurring opinion with the startling observation that the Commerce Clause "was the Framers' response to the *central problem* that gave rise to the Constitution itself." *Ante*, at 244 (emphasis added). At a subsequent point in his opinion, he observes that "this Court has construed the Commerce Clause to reflect the *intent of the Framers* . . . to confer a power on the National Government adequate to discharge its *central mission*." *Ante*, at 246–247 (emphasis added).[1] JUSTICE STEVENS further states that "*National League of Cities* not only was incorrectly decided, but also is inconsistent with the *central purpose* of the Constitution itself . . . ." *Ante*, at 249 (emphasis added).

No one would deny that removing trade barriers between the States was *one* of the Constitution's purposes. I sug-

[1] The authority on which JUSTICE STEVENS primarily relies is an extrajudicial lecture delivered by Justice Rutledge in 1946. *Ante*, at 244–245. Justice Rutledge declared that the "proximate cause of our national existence" was not the desire to assure the great "democratic freedoms"; rather it was the need "to secure freedom of trade" within the former Colonies. W. Rutledge, A Declaration of Legal Faith 25 (1947).

gest, however, that there were other purposes of equal or greater importance motivating the statesmen who assembled in Philadelphia and the delegates who debated the ratification issue in the state conventions. No doubt there were differences of opinion as to the principal shortcomings of the Articles of Confederation. But one can be reasonably sure that few of the Founding Fathers thought that trade barriers among the States were "the central problem," or that their elimination was the "central mission" of the Constitutional Convention. Creating a National Government within a federal system was far more central than any 18th-century concern for interstate commerce.

It is true, of course, that this Court properly has construed the Commerce Clause, and extended its reach, to accommodate the unanticipated and unimaginable changes, particularly in transportation and communication, that have occurred in our country since the Constitution was ratified. If JUSTICE STEVENS had written that the Founders' intent in adopting the Commerce Clause nearly two centuries ago is of little relevance to the world in which we live today, I would not have disagreed. But his concurring opinion purports to rely on their intent. *Ante*, at 246. I therefore write—briefly, in view of the scope of the subject—to place the Commerce Clause in proper historical perspective, and further to suggest that even today federalism is not, as JUSTICE STEVENS appears to believe, utterly subservient to that Clause.

II

The Constitution's central purpose was, as the name implies, to constitute a government. The most important provisions, therefore, are those in the first three Articles relating to the establishment of that government. The system of checks and balances, for example, is far more central to the larger perspective than any single power conferred on any branch. Indeed, the Virginia Plan, the initial proposal from which the entire Convention began its work, focuses on the

framework of the National Government without even mentioning the power to regulate commerce.[2]

Apart from the framework of government itself, the Founders stated their motivating purposes in the Preamble to the Constitution:

> "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty . . . ."

These purposes differ little from the concerns motivating the States in the Articles of Confederation: "their common defence, the security of their liberties, and their mutual and general welfare." Art. III. Although the "general Welfare" recognized by the Constitution could embrace the free flow of trade among States (despite the fact that the same language in the Articles of Confederation did not), it is clear that security "against foreign invasion [and] against dissen-

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[2] Whatever may have sparked the Annapolis Convention, see *ante*, at 245, and 245–246, n. 1, it is clear that the focus of attention at the Constitutional Convention in Philadelphia was the formation of a new government. Madison's report of the proceedings begins: "Monday May 14th 1787 was the day fixed for the meeting of the deputies in Convention for revising the federal system of Government." 1 M. Farrand, The Records of the Federal Convention of 1787, p. 3 (rev. ed. 1937) (footnote omitted). After dealing with several preliminary matters, see *id.*, at 1–17, the "main business," *id.*, at 18 (J. Madison), opened on May 29 with Edmund Randolph's speech proposing the Virginia Plan. Almost all of the Plan's resolutions dealt with the appropriate structure for the new government. Only the sixth resolution dealt with legislative powers at all. And far from stressing any power to regulate interstate commerce, it simply declared, in relevant part, that "the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation . . . ." *Id.*, at 21. While this language was, no doubt, broad enough to include the power to regulate interstate commerce, there was certainly no emphasis on that particular power.

tions between members of the Union" was of at least equal importance. See Speech by Edmund Randolph (May 29, 1787), reprinted in 1 M. Farrand, The Records of the Federal Convention of 1787, p. 18 (rev. ed. 1937) (J. Madison).[3]

The power to achieve the purposes identified in the Preamble was not delegated solely to Congress. If, however, one looks at the powers that were so delegated, the position of the Commerce Clause hardly suggests that it was the "central" concern of the patriots who formed our Union. The enumeration of powers in Art. I, § 8, begins with the "Power To lay and collect Taxes."[4] This is followed by the power "to pay the Debts" of the United States. Then, consistent with the Preamble, comes the power to "provide for the common Defence and general Welfare." See n. 3, *supra*. The power to regulate interstate commerce is only one among nearly a score of other powers that followed. It is evident that the authority to tax and to "provide for the common Defence" loomed larger among the concerns of the Founders than other powers granted Congress. The Commerce Clause was given no place of particular prominence. So much for what the Constitution's language and structure teach about the Framers' intent.

III

One would never know from the concurring opinion that the Constitution formed a federal system, comprising a Na-

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[3] No one in the ratification debate doubted that the power to defend the country was essential, and must be given to the central government. See The Federalist No. 41, pp. 269–276 (J. Cooke ed. 1961) (J. Madison). Even under the Articles of Confederation, it was considered necessary to give Congress "the sole and exclusive right and power of determining on peace and war." Art. IX.

[4] A major weakness of the system created by the Articles of Confederation was the central government's inability to collect taxes directly. See 1 Farrand, *supra* n. 2, at 284 (remarks of A. Hamilton). Remedying this defect was thus one of the most important purposes of the Constitutional Convention. See R. Paul, Taxation in the United States 4–5 (1954); The Federalist No. 30 (A. Hamilton).

tional Government with delegated powers and state governments that retained a significant measure of sovereign authority. This is clear from the Constitution itself, from the debates surrounding its adoption and ratification, from the early history of our constitutional development, and from the decisions of this Court. It is impossible to believe that the Constitution would have been recommended by the Convention, much less ratified, if it had been understood that the Commerce Clause embodied the National Government's "central mission," a mission to be accomplished even at the expense of regulating the personnel practices of state and local governments.[5]

A

The Bill of Rights imposes express limitations on national powers. The Tenth Amendment, in particular, explicitly recognizes the retained power of the States: "The powers not delegated to the United States by the Constitution, nor pro-

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[5] JUSTICE STEVENS' citation of *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), in support of his position, see *ante*, at 248–249, n. 8, is essentially irrelevant, for Chief Justice Marshall was not concerned with a State's sovereign power. Gibbons carried passengers between New Jersey and New York on two steamboats licensed under an Act of Congress, while Ogden claimed the benefit of a New York law granting an exclusive right to navigate steamboats on New York waters. The power to grant such a monopoly clearly is not one of a State's traditional sovereign powers. On the contrary, it is part of the power to regulate interstate navigation that lies within the very core of the Commerce Clause. I certainly do not suggest that principles of federalism should prevent Congress from regulating navigation. The present case, however, concerns the power to determine the terms and conditions of employment for the officers and employees who constitute a State's government. This is as sovereign a power as any that a State possesses, and it is far removed from the original concerns of the Commerce Clause. Indeed, this case illustrates how far the Federal Government, with the Court's approval, has departed from the principles upon which our federal union was formed. The "commerce" at issue, incredible as it would have seemed even a few years ago, let alone in Chief Justice Marshall's day, is the effect on trade among the States of Wyoming's requirement that its game wardens retire at age 65 rather than 70.

hibited by it to the States, are reserved to the States respectively, or to the people." This limitation was, of course, implicit in the Constitution as originally ratified. Even those who opposed the adoption of a Bill of Rights did not dispute the propriety of such a limitation. Rather, they argued that it was unnecessary, for the Constitution delegated certain powers to the central government, and those not delegated were necessarily retained by the States or the people.[6] Furthermore, the inherent federal nature of the system is clear from the structure of the National Government itself. Members of Congress and Presidential electors are chosen by States. Representation in the Senate is apportioned by States, regardless of population. The Full Faith and Credit Clause gives particular recognition to the States' "public Acts, Records, and judicial Proceedings." Article IV, § 4, requires a republican form of government in each State. The initial ratification of the Constitution was accomplished on a state-by-state basis, and subsequent Amendments require approval by three-fourths of the States.

It was also clear from the contemporary debates that the Founding Fathers intended the Constitution to establish a federal system. As James Madison, "the Father of the Constitution," explained to the people of New York:

> "The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised

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[6] Alexander Hamilton, for example, made this argument in The Federalist No. 84, pp. 578–579 (J. Cooke ed. 1961). See also *United States* v. *Darby*, 312 U. S. 100, 124 (1941) (Tenth Amendment "declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment"); *United States* v. *Sprague*, 282 U. S. 716, 733 (1931) ("The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified . . .").

> principally on external objects, as war, peace, negociation, and foreign commerce . . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." The Federalist No. 45, p. 313 (J. Cooke ed. 1961).

There can be no doubt that Madison's contemporaries shared this view. See, *e. g.*, Letter of Roger Sherman and Oliver Ellsworth to the Governor of Connecticut (Sept. 26, 1787), reprinted in 3 Farrand, *supra* n. 2, at 99 (description of proposed Constitution) (The "powers [vested in Congress] extend only to matters respecting the common interests of the union, and are specially defined, so that the particular states retain their sovereignty in all other matters").

During the earliest years of our constitutional development, principles of federalism were not only well recognized, they formed the basis for virtually every State in the Union to assert its rights as a State against the Federal Government. In 1798, for example, Thomas Jefferson drafted the Kentucky Resolutions,[7] which were passed by the Kentucky Legislature to protest the unpopular Alien and Sedition Acts, Act of June 18, 1798, 1 Stat. 566; Act of June 25, 1798, 1 Stat. 570; Act of July 6, 1798, 1 Stat. 577; Act of July 14, 1798, ch. 74, 1 Stat. 596. At the same time, Madison drafted similar Virginia Resolutions, which were adopted by the Virginia

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[7] In the first Resolution, Jefferson explained

"[t]hat the several states composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force." Kentucky Resolution of 1798, reprinted in 4 J. Elliot, Debates on the Federal Constitution 540 (2d ed. 1863).

General Assembly. See 4 J. Elliot, Debates on the Federal Constitution 528–529 (2d ed. 1863). In both cases it was clear that the powers reserved to the States were treated as a substantive limitation on the authority of Congress. It was asserted that these powers enabled a State to interpose its will against *any* action by the National Government. Thirty years later, Jefferson and Madison's views were expanded by John C. Calhoun in his nullification doctrine—the extreme view that eventually led to the War Between the States.[8] See 6 The Works of John C. Calhoun 1–57 (R. Cralle ed. 1859) (original draft of South Carolina Exposition of 1828).

The view that the reserved powers of the States limited the delegated powers of the National Government was not confined to the South. The New England States, for example, vehemently opposed the Embargo Act of Dec. 22, 1807, ch. 5, 2 Stat. 451, and they turned to their rights as States in defense. In 1809, the Governor of Connecticut, with the support of the legislature, refused to comply with the Act of Jan. 9, 1809, 2 Stat. 506, which Congress passed to enforce the embargo.[9] In Massachusetts the story was similar: The

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[8] In referring to this early and interesting history, I do not suggest that either the doctrine of interposition or that of nullification was constitutionally sound. In any event, they were laid to rest in one of history's bloodiest fratricides, ending at Appomattox in 1865. The views of these great figures in our history are, however, directly pertinent to the question whether there was ever any *intention* that the Commerce Clause would empower the Federal Government to intrude expansively upon the sovereign powers reserved to the States. See n. 5, *supra*.

[9] The Governor explained to a special session of the state legislature that "[w]henever our national legislature is led to overleap the prescribed bounds of their *[sic]* constitutional powers, on the State Legislatures, in great emergencies, devolves the arduous task—it is their right—it becomes their duty, to interpose their protecting shield between the right and liberty of the people, and the assumed power of the General Government." Speech of Governor Jonathan Trumbull (Feb. 23, 1809), reprinted in H. Ames, State Documents on Federal Relations 40 (1906). The Assembly promptly passed resolutions supporting the Governor's position

legislature denounced the enforcement Act as "unjust, oppressive and unconstitutional, and not legally binding on the citizens of this state." Resolutions of the Massachusetts Legislature (Feb. 15, 1809), reprinted in H. Ames, State Documents on Federal Relations 35 (1906). When Congress enacted the Embargo Act of Dec. 17, 1813, 3 Stat. 88, the Massachusetts Legislature declared it "a manifest . . . abuse of power" that infringed the "sovereignty reserved to the States"[10] and justified the legislature in "interpos[ing] its power" to protect its citizens from "oppression," Resolutions of the Massachusetts Legislature (Feb. 22, 1814), reprinted in Ames, *supra*, at 71–72. Even Daniel Webster, famous for his defense of the rights of the National Government, recognized that principles of federalism limit the power of Congress.[11]

B

It is clear beyond question that state sovereignty always has been a basic assumption of American political theory. Although its contours have changed over two centuries, state sovereignty remains a fundamental component of our system that this Court has recognized time and time again. Even to

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and concluding that the embargo legislation was "incompatible with the constitution of the United States, and encroach[ed] upon the immunites of [the] State." Resolutions of the General Assembly (Feb. 23, 1809), reprinted in Ames, *supra*, at 41. In view of its duty to support the Constitution, the legislature declined "to assist, or concur in giving effect to the aforesaid unconstitutional act, passed, to enforce the Embargo." *Ibid.*

[10] The legislature explained that the State's sovereignty was reserved, in part, to protect its citizens from excessive federal power. Resolutions of the Massachusetts Legislature (Feb. 22, 1814), reprinted in Ames, *supra*, at 71.

[11] During a debate in Congress on a conscription bill and a bill for the enlistment of minors, Webster declared that if these measures were enacted it would be "the solemn duty of the State Governments" to interpose their authority to prevent enforcement. In his view, this was "among the objects for which the State Governments exist." Speech on the Conscription Bill (Dec. 9, 1814), reprinted in 14 The Writings and Speeches of Daniel Webster 55, 68 (1903).

refer to the highlights would go far beyond the scope of this dissent. I therefore mention only a few of the decisions from last Term alone in which the Court expressly noted that States retain significant sovereign powers.[12] In *Community Communications Co.* v. *City of Boulder*, 455 U. S. 40 (1982), we considered the state-action exemption from the antitrust laws. Since "'under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority,'" *id.*, at 49 (quoting *Parker* v. *Brown*, 317 U. S. 341, 351 (1943)), we had previously recognized an antitrust exemption for States acting "in the exercise of [their] sovereign powers," 455 U. S., at 48. We held that this exemption does not extend to cities, but in so doing we repeatedly stressed the sovereign nature of States. See *id.*, at 48–54. In *United Transportation Union* v. *Long Island R. Co.*, 455 U. S. 678 (1982), we unanimously upheld the application of the Railway Labor Act to a state-owned railroad. We reached this conclusion, however, only by finding that operation of the railroad was not one of the State's "constitutionally preserved sovereign function[s]." *Id.*, at 683. And in *FERC* v. *Mississippi*, 456 U. S. 742 (1982), we considered whether parts of the Public Utility Regulatory Poli-

[12] See, *e. g.*, *Rodriguez* v. *Popular Democratic Party*, 457 U. S. 1, 8 (1982) ("Puerto Rico, like a state, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution'") (quoting *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 673 (1974)); *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 703, n. 10 (1982) (States are "'coequal sovereigns in a federal system'") (quoting *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 292 (1980)); *Engle* v. *Isaac*, 456 U. S. 107, 128 (1982) (discussing "the States' sovereign power to punish offenders"); *Underwriters National Assurance Co.* v. *North Carolina Life & Accident & Health Ins. Guaranty Assn.*, 455 U. S. 691, 704 (1982) (recognizing "the structure of our Nation as a union of States, each possessing equal sovereign powers"); *Cabell* v. *Chavez-Salido*, 454 U. S. 432, 444–447 (1982) (relying on State's "sovereign" police powers); *Fair Assessment in Real Estate Assn.* v. *McNary*, 454 U. S. 100, 108 (1981) (state courts are those "'of a different, though paramount sovereignty'") (quoting *Matthews* v. *Rodgers*, 284 U. S. 521, 525 (1932)).

cies Act "constituted an invasion of state sovereignty in violation of the Tenth Amendment," *id.*, at 752. Although the Court upheld the statute, it was clear that state sovereignty was an essential element to be considered in reaching that conclusion. See *id.*, at 758–771.

In sum, all of the evidence reminds us of the importance of the principles of federalism in our constitutional system. The Founding Fathers, and those who participated in the earliest phases of constitutional development, understood the States' reserved powers to be a limitation on the power of Congress—including its power under the Commerce Clause. And the Court has recognized and accepted this fact for almost 200 years.[13]

IV

JUSTICE STEVENS' concurring opinion recognizes no limitation on the ability of Congress to override state sovereignty in exercising its powers under the Commerce Clause. His opinion does not mention explicitly either federalism or state sovereignty. Instead it declares that "[t]he *only* basis for questioning the federal statute at issue here is the pure judicial fiat found in this Court's opinion in *National League of Cities* v. *Usery*." *Ante*, at 248 (emphasis added). Under this view it is not easy to think of any state function—however sovereign—that could not be pre-empted.

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[13] Of course I do not denigrate the importance of the Commerce Clause. It is essential to the functioning of our National Government. It is, however, only one provision of a Constitution that embodies strong principles of federalism.

UNITED STATES *v.* KNOTTS

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

No. 81–1802. Argued December 6 1982—Decided March 2, 1983

Having reason to believe that one Armstrong was purchasing chloroform to be used in the manufacture of illicit drugs, Minnesota law enforcement officers arranged with the seller to place a beeper (a radio transmitter) inside a chloroform container that was sold to Armstrong. Officers then followed the car in which the chloroform was placed, maintaining contact by using both visual surveillance and a monitor which received the beeper signals, and ultimately tracing the chloroform, by beeper monitoring alone, to respondent's secluded cabin in Wisconsin. Following three days of intermittent visual surveillance of the cabin, officers secured a search warrant and discovered the chloroform container, and a drug laboratory in the cabin, including chemicals and formulas for producing amphetamine. After his motion to suppress evidence based on the warrantless monitoring of the beeper was denied, respondent was convicted in Federal District Court for conspiring to manufacture controlled substances in violation of 21 U. S. C. § 846. The Court of Appeals reversed, holding that the monitoring of the beeper was prohibited by the Fourth Amendment.

Held: Monitoring the beeper signals did not invade any legitimate expectation of privacy on respondent's part, and thus there was neither a "search" nor a "seizure" within the contemplation of the Fourth Amendment. The beeper surveillance amounted principally to following an automobile on public streets and highways. A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements. While respondent had the traditional expectation of privacy within a dwelling place insofar as his cabin was concerned, such expectation of privacy would not have extended to the visual observation from public places of the automobile arriving on his premises after leaving a public highway, or to movements of objects such as the chloroform container outside the cabin. The fact that the officers relied not only on visual surveillance, but also on the use of the beeper, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting their sensory faculties with such enhancement as science and technology afforded them in this case. There is no indication that the beeper was used in any way to reveal information as to the movement of the chloroform container within the cabin, or in any

way that would not have been visible to the naked eye from outside the cabin. Pp. 280–285.

662 F. 2d 515, 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 an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 285. BLACKMUN, J., filed an opinion concurring in the judgment, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 287. STEVENS, J., filed an opinion concurring in the judgment, in which BRENNAN, and MARSHALL, JJ., joined, *post*, p. 288.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Jensen*, *Elliott Schulder*, and *Gloria C. Phares*.

Mark W. Peterson argued the cause and filed a brief for respondent.

JUSTICE REHNQUIST delivered the opinion of the Court.

A beeper is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver. In this case, a beeper was placed in a five-gallon drum containing chloroform purchased by one of respondent's codefendants. By monitoring the progress of a car carrying the chloroform Minnesota law enforcement agents were able to trace the can of chloroform from its place of purchase in Minneapolis, Minn., to respondent's secluded cabin near Shell Lake, Wis. The issue presented by the case is whether such use of a beeper violated respondent's rights secured by the Fourth Amendment to the United States Constitution.

I

Respondent and two codefendants were charged in the United States District Court for the District of Minnesota with conspiracy to manufacture controlled substances, including but not limited to methamphetamine, in violation of 21 U. S. C. § 846. One of the codefendants, Darryl Petschen,

was tried jointly with respondent; the other codefendant, Tristan Armstrong, pleaded guilty and testified for the Government at trial.

Suspicion attached to this trio when the 3M Co., which manufactures chemicals in St. Paul, notified a narcotics investigator for the Minnesota Bureau of Criminal Apprehension that Armstrong, a former 3M employee, had been stealing chemicals which could be used in manufacturing illicit drugs. Visual surveillance of Armstrong revealed that after leaving the employ of 3M Co., he had been purchasing similar chemicals from the Hawkins Chemical Co. in Minneapolis. The Minnesota narcotics officers observed that after Armstrong had made a purchase, he would deliver the chemicals to codefendant Petschen.

With the consent of the Hawkins Chemical Co., officers installed a beeper inside a five-gallon container of chloroform, one of the so-called "precursor" chemicals used to manufacture illicit drugs. Hawkins agreed that when Armstrong next purchased chloroform, the chloroform would be placed in this particular container. When Armstrong made the purchase, officers followed the car in which the chloroform had been placed, maintaining contact by using both visual surveillance and a monitor which received the signals sent from the beeper.

Armstrong proceeded to Petschen's house, where the container was transferred to Petschen's automobile. Officers then followed that vehicle eastward towards the state line, across the St. Croix River, and into Wisconsin. During the latter part of this journey, Petschen began making evasive maneuvers, and the pursuing agents ended their visual surveillance. At about the same time officers lost the signal from the beeper, but with the assistance of a monitoring device located in a helicopter the approximate location of the signal was picked up again about one hour later. The signal now was stationary and the location identified was a cabin occupied by respondent near Shell Lake, Wis. The record before us does not reveal that the beeper was used after the

location in the area of the cabin had been initially determined.

Relying on the location of the chloroform derived through the use of the beeper and additional information obtained during three days of intermittent visual surveillance of respondent's cabin, officers secured a search warrant. During execution of the warrant, officers discovered a fully operable, clandestine drug laboratory in the cabin. In the laboratory area officers found formulas for amphetamine and methamphetamine, over $10,000 worth of laboratory equipment, and chemicals in quantities sufficient to produce 14 pounds of pure amphetamine. Under a barrel outside the cabin, officers located the five-gallon container of chloroform.

After his motion to suppress evidence based on the warrantless monitoring of the beeper was denied, respondent was convicted for conspiring to manufacture controlled substances in violation of 21 U. S. C. § 846. He was sentenced to five years' imprisonment. A divided panel of the United States Court of Appeals for the Eighth Circuit reversed the conviction, finding that the monitoring of the beeper was prohibited by the Fourth Amendment because its use had violated respondent's reasonable expectation of privacy, and that all information derived after the location of the cabin was a fruit of the illegal beeper monitoring.* 662 F. 2d 515

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*Respondent does not challenge the warrantless installation of the beeper in the chloroform container, suggesting in oral argument that he did not believe he had standing to make such a challenge. We note that while several Courts of Appeals have approved warrantless installations, see *United States* v. *Bernard*, 625 F. 2d 854 (CA9 1980); *United States* v. *Lewis*, 621 F. 2d 1382 (CA5 1980), cert. denied, 450 U. S. 935 (1981); *United States* v. *Bruneau*, 594 F. 2d 1190 (CA8), cert. denied, 444 U. S. 847 (1979); *United States* v. *Miroyan*, 577 F. 2d 489 (CA9), cert. denied, 439 U. S. 896 (1978); *United States* v. *Cheshire*, 569 F. 2d 887 (CA5), cert. denied, 437 U. S. 907 (1978); *United States* v. *Curtis*, 562 F. 2d 1153 (CA9 1977), cert. denied, 439 U. S. 910 (1978); *United States* v. *Abel*, 548 F. 2d 591 (CA5), cert. denied, 431 U. S. 956 (1977); *United States* v. *Hufford*, 539 F. 2d 32 (CA9), cert. denied, 429 U. S. 1002 (1976), we have not before and do not now pass on the issue.

(1981). We granted certiorari, 457 U. S. 1131 (1982), and we now reverse the judgment of the Court of Appeals.

II

In *Olmstead* v. *United States*, 277 U. S. 438 (1928), this Court held that the wiretapping of a defendant's private telephone line did not violate the Fourth Amendment because the wiretapping had been effectuated without a physical trespass by the Government. Justice Brandeis, joined by Justice Stone, dissented from that decision, believing that the actions of the Government in that case constituted an "unjustifiable intrusion . . . upon the privacy of the individual," and therefore a violation of the Fourth Amendment. *Id.*, at 478. Nearly 40 years later, in *Katz* v. *United States*, 389 U. S. 347 (1967), the Court overruled *Olmstead* saying that the Fourth Amendment's reach "cannot turn upon the presence or absence of a physical intrusion into any given enclosure." 389 U. S., at 353. The Court said:

> "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance." *Ibid.*

In *Smith* v. *Maryland*, 442 U. S. 735 (1979), we elaborated on the principles stated in *Katz:*

> "Consistently with *Katz*, this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action. [Citations omitted.] This inquiry, as Mr. Justice Harlan aptly noted in his *Katz* concurrence, normally embraces

> two discrete questions. The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy,' 389 U. S., at 361—whether, in the words of the *Katz* majority, the individual has shown that 'he seeks to preserve [something] as private.' *Id.*, at 351. The second question is whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as "reasonable,"' *id.*, at 361—whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is 'justifiable' under the circumstances. *Id.*, at 353. *See Rakas* v. *Illinois*, 439 U. S., at 143–144, n. 12; *id.*, at 151 (concurring opinion); *United States* v. *White*, 401 U. S., at 752 (plurality opinion)." 442 U. S., at 740–741 (footnote omitted).

The governmental surveillance conducted by means of the beeper in this case amounted principally to the following of an automobile on public streets and highways. We have commented more than once on the diminished expectation of privacy in an automobile:

> "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view." *Cardwell* v. *Lewis*, 417 U. S. 583, 590 (1974) (plurality opinion).

See also *Rakas* v. *Illinois*, 439 U. S. 128, 153–154, and n. 2 (1978) (POWELL, J., concurring); *South Dakota* v. *Opperman*, 428 U. S. 364, 368 (1976).

A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When Petschen traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over par-

ticular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.

Respondent Knotts, as the owner of the cabin and surrounding premises to which Petschen drove, undoubtedly had the traditional expectation of privacy within a dwelling place insofar as the cabin was concerned:

> "Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also of grave concern, not only to the individual, but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Johnson* v. *United States*, 333 U. S. 10, 14 (1948), quoted with approval in *Payton* v. *New York*, 445 U. S. 573, 586 (1980).

But no such expectation of privacy extended to the visual observation of Petschen's automobile arriving on his premises after leaving a public highway, nor to movements of objects such as the drum of chloroform outside the cabin in the "open fields." *Hester* v. *United States*, 265 U. S. 57 (1924).

Visual surveillance from public places along Petschen's route or adjoining Knotts' premises would have sufficed to reveal all of these facts to the police. The fact that the officers in this case relied not only on visual surveillance, but also on the use of the beeper to signal the presence of Petschen's automobile to the police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case. In *United States* v. *Lee*, 274 U. S. 559 (1927), the Court said:

"But no search on the high seas is shown. The testimony of the boatswain shows that he used a searchlight. It is not shown that there was any exploration below decks or under hatches. For aught that appears, the cases of liquor were on deck and, like the defendants, were discovered before the motor boat was boarded. Such use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution." *Id.*, at 563.

We have recently had occasion to deal with another claim which was to some extent a factual counterpart of respondent's assertions here. In *Smith* v. *Maryland*, we said:

"This analysis dictates that [Smith] can claim no legitimate expectation of privacy here. When he used his phone, [Smith] voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business. In so doing, [Smith] assumed the risk that the company would reveal to police the numbers he dialed. The switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber. [Smith] concedes that if he had placed his calls through an operator, he could claim no legitimate expectation of privacy. [Citation omitted.] We are not inclined to hold that a different constitutional result is required because the telephone company has decided to automate." 442 U. S., at 744–745.

Respondent does not actually quarrel with this analysis, though he expresses the generalized view that the result of the holding sought by the Government would be that "twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision." Brief for Respondent 9 (footnote omitted). But the fact is that the "reality hardly suggests abuse," *Zurcher* v. *Stanford*

Daily, 436 U. S. 547, 566 (1978); if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable. *Ibid.* Insofar as respondent's complaint appears to be simply that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality, and we decline to do so now.

Respondent specifically attacks the use of the beeper insofar as it was used to determine that the can of chloroform had come to rest on his property at Shell Lake, Wis. He repeatedly challenges the "use of the beeper to determine the location of the chemical drum at Respondent's premises," Brief for Respondent 26; he states that "[t]he government thus overlooks the fact that this case involves the sanctity of Respondent's residence, which is accorded the greatest protection available under the Fourth Amendment." *Ibid.* The Court of Appeals appears to have rested its decision on this ground:

> "As noted above, a principal rationale for allowing warrantless tracking of beepers, particularly beepers in or on an auto, is that beepers are merely a more effective means of observing what is already public. But people pass daily from public to private spheres. When police agents track bugged personal property without first obtaining a warrant, they must do so at the risk that this enhanced surveillance, intrusive at best, might push fortuitously and unreasonably into the private sphere protected by the Fourth Amendment." 662 F. 2d, at 518.

We think that respondent's contentions, and the above-quoted language from the opinion of the Court of Appeals, to some extent lose sight of the limited use which the government made of the signals from this particular beeper. As we have noted, nothing in this record indicates that the beeper

signal was received or relied upon after it had indicated that the drum containing the chloroform had ended its automotive journey at rest on respondent's premises in rural Wisconsin. Admittedly, because of the failure of the visual surveillance, the beeper enabled the law enforcement officials in this case to ascertain the ultimate resting place of the chloroform when they would not have been able to do so had they relied solely on their naked eyes. But scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise. A police car following Petschen at a distance throughout his journey could have observed him leaving the public highway and arriving at the cabin owned by respondent, with the drum of chloroform still in the car. This fact, along with others, was used by the government in obtaining a search warrant which led to the discovery of the clandestine drug laboratory. But there is no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin, or in any way that would not have been visible to the naked eye from outside the cabin. Just as notions of physical trespass based on the law of real property were not dispositive in *Katz* v. *United States*, 389 U. S. 347 (1967), neither were they dispositive in *Hester* v. *United States*, 265 U. S. 57 (1924).

We thus return to the question posed at the beginning of our inquiry in discussing *Katz*, *supra;* did monitoring the beeper signals complained of by respondent invade any legitimate expectation of privacy on his part? For the reasons previously stated, we hold it did not. Since it did not, there was neither a "search" nor a "seizure" within the contemplation of the Fourth Amendment. The judgment of the Court of Appeals is therefore

Reversed.

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

I join JUSTICE BLACKMUN's and JUSTICE STEVENS' opinions concurring in the judgment. I should add, however,

that I think this would have been a much more difficult case if respondent had challenged, not merely certain aspects of the monitoring of the beeper installed in the chloroform container purchased by respondent's compatriot, but also its original installation. See *ante*, at 279, n. *Katz* v. *United States*, 389 U. S. 347 (1967), made quite clear that the Fourth Amendment protects against governmental invasions of a person's reasonable "expectation[s] of privacy," even when those invasions are not accompanied by physical intrusions. Cases such as *Silverman* v. *United States*, 365 U. S. 505, 509–512 (1961), however, hold that, when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment even if the same information could have been obtained by other means. I do not believe that *Katz*, or its progeny, have eroded that principle. Cf. The Supreme Court, 1979 Term, 94 Harv. L. Rev. 75, 203–204 (1980).

I am also entirely unconvinced by the Court of Appeals' footnote disposing of the installation issue with the statement: "we hold that the consent of the owner [of the chloroform drum] at the time of installation meets the requirements of the Fourth Amendment, even if the consenting owner intends to soon sell the 'bugged' property to an unsuspecting buyer. *Caveat emptor.*" 662 F. 2d 515, 517, n. 2 (1981) (citation omitted). The Government is not here defending against a claim for damages in an action for breach of a warranty; it is attempting to justify the legality of a search conducted in the course of a criminal investigation. I am not at all sure that, for purposes of the Fourth Amendment, there is a constitutionally significant difference between planting a beeper in an object in the possession of a criminal suspect and purposefully arranging that he be sold an object that, unknown to him, already has a beeper installed inside it. Cf. *Gouled* v. *United States*, 255 U. S. 298, 305–306 (1921); *Lewis* v. *United States*, 385 U. S. 206, 211 (1966).

Respondent claimed at oral argument that, under this Court's cases, he would not have standing to challenge the original installation of the beeper in the chloroform drum because the drum was sold, not to him, but to one of his compatriots. See *ante*, at 279, n. If respondent is correct, that would only confirm for me the formalism and confusion in this Court's recent attempts to redefine Fourth Amendment standing. See *Rawlings* v. *Kentucky*, 448 U. S. 98, 114 (1980) (MARSHALL, J., dissenting); *Rakas* v. *Illinois*, 439 U. S. 128, 156 (1978) (WHITE, J., dissenting).

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

The Court's opinion gratuitously refers to the "open fields" doctrine and twice cites *Hester* v. *United States*, 265 U. S. 57 (1924). *Ante*, at 282 and 285. For me, the present case does not concern the open fields doctrine, and I regard these references and citations as unnecessary for the Court's decision. Furthermore, and most important, cases concerning the open fields doctrine have been accepted by the Court for argument and plenary consideration. *State* v. *Brady*, 406 So. 2d 1093 (Fla.), cert. granted, 456 U. S. 988 (1982); *United States* v. *Oliver*, 686 F. 2d 356 (CA6 1982), cert. granted, 459 U. S. 1168 (1983). See also *United States* v. *Dunn*, 674 F. 2d 1093 (CA5 1982), cert. pending, No. 82–508.

It would be unfortunate to provide either side in these granted cases with support, directly or by implication, for its position, and I surely do not wish to decide those cases in this one. Although the Court does not indicate its view on how such cases should be decided, I would defer all comments about open fields to a case that concerns that subject and in which we have the benefit of briefs and oral argument.

I therefore do not join the Court's opinion. I concur only in the result it reaches.

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

Since the respondent in this case has never questioned the installation of the radio transmitter in the chloroform drum, see *ante*, at 279, n., I agree that it was entirely reasonable for the police officers to make use of the information received over the airwaves when they were trying to ascertain the ultimate destination of the chloroform. I do not join the Court's opinion, however, because it contains two unnecessarily broad dicta: one distorts the record in this case, and both may prove confusing to courts that must apply this decision in the future.

First, the Court implies that the chloroform drum was parading in "open fields" outside of the cabin, in a manner tantamount to its public display on the highways. See *ante*, at 282. The record does not support that implication. As JUSTICE BLACKMUN points out, this case does not pose any "open fields" issue.

Second, the Court suggests that the Fourth Amendment does not inhibit "the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them." *Ibid.* But the Court held to the contrary in *Katz* v. *United States*, 389 U. S. 347 (1967). Although the augmentation in this case was unobjectionable, it by no means follows that the use of electronic detection techniques does not implicate especially sensitive concerns.

Accordingly, I concur in the judgment.

BLOCK, SECRETARY OF AGRICULTURE, ET AL. *v.* NEAL

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

No. 81–1494. Argued January 19, 1983—Decided March 7, 1983

In her complaint in the later-described action, respondent asserted the following facts. She obtained a loan from the Farmers Home Administration (FmHA) under the Housing Act of 1949 for the construction of a prefabricated house. She then contracted with a builder to construct the house. The contract required the work to conform to plans approved by FmHA and granted FmHA the right to inspect and test all materials and workmanship and reject any that were defective. During and at the completion of construction of the house, an FmHA official inspected the site and reported that the construction accorded with FmHA-approved drawings and specifications. After respondent moved into the house, she discovered, and FmHA officials identified, a number of defects. The builder refused to comply with FmHA's request to cure the defects in accordance with the builder's warranty, and FmHA declined to pay for certain defects. Respondent then brought an action in Federal District Court under the Federal Tort Claims Act (FTCA), alleging that the defects were partly attributable to FmHA's employees' failure properly to inspect and supervise construction of the house. The District Court dismissed the complaint for failure to state a claim on which relief could be granted. The Court of Appeals reversed, holding that the complaint stated a claim for negligence and that the action was not barred by 28 U. S. C. § 2680(h), which precludes recovery under the FTCA for "[a]ny claim arising out of . . . misrepresentation."

Held: Respondent's claim did not "aris[e] out of . . . misrepresentation" within the meaning of § 2680(h) and thus is not barred by that provision because respondent did not seek to recover on the basis of misstatements made by FmHA officials. *United States* v. *Neustadt*, 366 U. S. 696, distinguished. Although FmHA may have undertaken both to supervise construction of respondent's house and to provide her with information regarding the progress of construction, her action is based solely on the former conduct. The essence of an action for misrepresentation is the communication of misinformation on which the recipient relies. Here, the FmHA's duty to use due care to ensure that the builder adhered to the approved plans and cured all defects before completing construction was distinct from any duty to use due care in communicating information to respondent. Pp. 294–299.

646 F. 2d 1178, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BURGER, C. J., concurred in the judgment.

Carter G. Phillips argued the cause for petitioners. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General McGrath*, *Deputy Solicitor General Geller*, *Anthony J. Steinmeyer*, and *Margaret E. Clark*.

Lenny L. Croce argued the cause for respondent. With him on the brief were *Neil G. McBride* and *Dean Hill Rivkin*.*

JUSTICE MARSHALL delivered the opinion of the Court.

The Secretary of Agriculture is authorized by Title V of the Housing Act of 1949, 63 Stat. 432, as amended, 42 U. S. C. § 1471 *et seq.* (1976 ed., and Supp. V), to extend financial and technical assistance through the Farmers Home Administation (FmHA) to low-income rural residents who seek to obtain housing. Respondent Onilea Neal, the recipient of an FmHA loan for the construction of a prefabricated house, brought this action under the Federal Tort Claims Act, 28 U. S. C. §§ 1346(b), 2671–2680. She alleged that defects discovered after she set up residence were partly attributable to the failure of FmHA employees properly to inspect and supervise construction of her house. This case presents the question whether respondent's action is barred by 28 U. S. C. § 2680(h), which precludes recovery under the Tort Claims Act for "[a]ny claim arising out of . . . misrepresentation."

I

A

The facts described in respondent's complaint may be summarized as follows. Unable to obtain credit from other

**David M. Madway* filed a brief for the National Housing Law Project as *amicus curiae* urging affirmance.

Jan Perkins filed a brief for Oregon Legal Services Corp. as *amicus curiae*.

sources, Neal applied for a Rural Housing Loan from FmHA pursuant to § 502(a) of the Housing Act of 1949, 42 U. S. C. § 1472(a). FmHA approved her application in June 1977. During the summer of that year, Neal received advice from S. Lain Parkison, the FmHA Supervisor for Roane County, Tenn.

On August 8, 1977, Neal contracted with Home Marketing Associates, Inc. (Home Marketing), for the construction of a prefabricated house.[1] The contract required that Home Marketing's work conform to plans approved by FmHA. It also granted FmHA the right to inspect and test all materials and workmanship and reject any that were defective. At the same time, Neal entered into a deed of trust with FmHA and signed a promissory note providing for repayment of the principal sum of $21,170, plus interest of 8% per annum on the unpaid principal.

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[1] Regulations then in effect allowed the recipient of an FmHA loan under § 502 of the Housing Act of 1949, 42 U. S. C. § 1472, to obtain new housing in one of three ways. The method undertaken by respondent, known as the "contract method" of financing new construction, involved the performance of work by a builder in accordance with a signed contract approved by FmHA. See 7 CFR § 1804.4(d) (1977). Although the FmHA "will not become a party to a construction contract nor incur any liability thereunder," *ibid.*, its officials were significantly involved in all phases of the construction of respondent's house. For example, the FmHA County Supervisor was authorized to assist the borrower in selecting a contractor based on the bids or proposals and the contractor's qualifications. § 1804.4(d)(6). He reviewed all plans and specifications, § 1804.4(a), and was required to give prior approval of any changes in the plans, § 1804.4(d), or in the contract. § 1804.4(d)(8). He was responsible for making periodic and final inspections. § 1804.4(d)(6)(i)(*j*). See also §§ 1803.2, 1803.5, 1804.4(g). He also had a responsibility to see that partial payments made to the contractor were properly applied against his bills for material and labor, § 1804.4(d)(7)(iv), and to determine that work was performed in compliance with all the terms and conditions of the contract before making final payment. § 1804.4(d)(7)(vii). Finally, he assisted the borrower with respect to claims arising under the builder's warranty. § 1804.4(g)(5).

Home Marketing commenced work on Neal's house in August 1977 and finished the following month. An FmHA official, Mary Wells, inspected the site on three occasions: soon after construction began, shortly before it was concluded, and after the house was completed. Her inspection reports contained no adverse comments on the construction work. After her third inspection, Wells issued a final report, signed by Neal, which indicated that the construction accorded with the drawings and specifications approved by FmHA. Home Marketing issued a one-year builder's warranty covering workmanship, materials, and equipment.

Neal moved into the house in 1977. During the winter, she discovered that the heat pump in the house was not working properly. She notified FmHA and Home Marketing. An inspection by Parkison, the County FmHA Supervisor, revealed that the heat pump unit was either defective or undersized. On March 22, 1978, FmHA's State Director and other FmHA officials conducted a complete inspection and identified 13 additional defects in the construction of the house. These included deviations from plans approved by FmHA and from applicable Minimum Property Standards. The inadequacies in materials and workmanship included defects in caulking, bridging, sealing, and plumbing, and extended to all areas of the house, such as the porch, the rear door, the floor, the roof, the exterior paint, and the interior wall finish. Home Marketing refused to comply with FmHA's request to cure these defects in accordance with the builder's warranty.

In November 1978 respondent asked FmHA to pay for the correction of the heating system and other structural defects. It declined to do so.

B

The United States District Court for the Eastern District of Tennessee dismissed Neal's complaint for failure to state a claim on which relief can be granted. *Neal* v. *Bergland*, 489 F. Supp. 512 (1980). It found that no contractual duty to su-

pervise the construction of respondent's home was created either by the Federal Housing Act of 1949 and the regulations promulgated thereunder or by the various agreements between respondent and FmHA. The court concluded that regulations requiring FmHA officials to ensure that the builder adhere to the terms of its construction contract were intended solely to protect the Government's security interest, and were not intended to make FmHA warrant the quality of construction for the benefit of those receiving rural assistance loans. *Id.*, at 514–515. The District Court also concluded that respondent failed to state a claim against FmHA under applicable tort law. *Id.*, at 515.

The Court of Appeals reversed. *Neal* v. *Bergland*, 646 F. 2d 1178 (CA6 1981). It agreed with the District Court that FmHA had no contractual obligation to provide Neal with technical assistance or to inspect and supervise construction of her house. *Id.*, at 1181. However, the Court of Appeals found that respondent's complaint stated a claim for negligence under the principle "that one who undertakes to act, even though gratuitously, is required to act carefully and with the exercise of due care and will be liable for injuries proximately caused by failure to use such care." *Id.*, at 1181–1182, citing Restatement (Second) of Torts § 323 (1965). It noted that, subject to express exceptions, the Tort Claims Act, 28 U. S. C. § 2674, authorizes suit against the Government for the negligence of a federal agency in performing a voluntary undertaking. *Ibid.*[2]

The Court of Appeals then considered the question now before us: whether respondent's claim "aris[es] out of . . . misrepresentation," 28 U. S. C. § 2680(h), and is therefore ex-

[2] The court cited, *inter alia*, *Indian Towing Co.* v. *United States*, 350 U. S. 61 (1955) (Coast Guard's failure to maintain the beacon light in a lighthouse); *Seaboard Coast Line R. Co.* v. *United States*, 473 F. 2d 714 (CA5 1973) (negligent design and construction of a drainage ditch); and *Barron* v. *United States*, 473 F. Supp. 1077 (Haw. 1979) (failure to require a subcontractor to comply with a contract's safety requirements).

cluded from coverage by the Tort Claims Act. Distinguishing this case from others including *United States* v. *Neustadt*, 366 U. S. 696 (1961), the court concluded that respondent's negligence claim did not fall within this exception to the waiver of sovereign immunity. The Secretary of Agriculture and other Government officials petitioned for certiorari and suggested summary reversal on the ground that the decision below cannot be reconciled with this Court's decision in *Neustadt*. We granted the writ, 456 U. S. 988 (1982), and we now affirm.

II

The question before us is a narrow one. Petitioners argue only that respondent's claim is a claim of "misrepresentation" within the meaning of § 2680(h). They do not seek review of the threshold determination that respondent's complaint states a claim for negligence under the Good Samaritan doctrine that is otherwise actionable under 28 U. S. C. § 2674. Thus, we need not decide precisely what Neal must prove in order to prevail on her negligence claim, nor even whether such a claim lies.[3] Nor are we called on to consider whether recovery is barred by any other provision of the Tort Claims Act, including the exception for any action "based upon the exercise or performance or the failure to exercise or perform a discretionary function." § 2680(a). Finally, we are not asked to determine whether the administrative remedy created by the Housing Act of 1949, 42 U. S. C. § 1479(c) (1976

[3] The Court of Appeals found that respondent stated a claim against the United States under the common-law Good Samaritan doctrine which is described in § 323 of the Restatement (Second) of Torts (1965). However, the court did not expressly find that Tennessee law recognizes this doctrine, see 28 U. S. C. § 1346(b), and would apply it to a private person responsible for similar negligence. See 28 U. S. C. § 2674; *Rayonier, Inc.* v. *United States*, 352 U. S. 315, 319 (1957); *Indian Towing Co.* v. *United States*, *supra*. Nor did the court describe in any significant detail what respondent must show in order to prevail on her negligence claim.

ed., Supp. V), provides the exclusive remedy against the Government for damages attributable to the negligence of FmHA officials.[4]

The scope of the "misrepresentation" exception to the Tort Claims Act was the focus of this Court's decision in *United States* v. *Neustadt*, *supra*. Neustadt purchased a house in reliance on an appraisal undertaken by the Federal Housing Administration (FHA) for mortgage insurance purposes. After he took up residence, cracks appeared in the ceilings and walls of his house. The cracks were caused by structural defects that had not been noticed by the FHA appraiser during the course of his inspection. Neustadt sued the Government under the Tort Claims Act to recover the difference between the fair market value of the property and the purchase price. He alleged that the FHA had negligently inspected and appraised the property, and that he had justifiably relied on the appraisal in paying a higher price for the house than he would otherwise have paid.

This Court held that the claim in *Neustadt* arose out of "misrepresentation" under § 2680(h). We determined initially that § 2680(h) applies to claims arising out of negligent, as well as intentional, misrepresentation. 366 U. S., at

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[4] Compare, *e. g.*, *Johansen* v. *United States*, 343 U. S. 427 (1952) (Federal Employees' Compensation Act provides exclusive remedy for civilian employees), with *United States* v. *Muniz*, 374 U. S. 150, 160 (1963) (provision allowing compensation of certain prison inmates for work-related injuries was not exclusive remedy for inmate), and *United States* v. *Brown*, 348 U. S. 110, 111 (1954) (receipt of disability payments under the Veterans Act does not bar recovery under the Tort Claims Act).

Petitioners do argue at length, however, that neither the Housing Act of 1949 nor subsequent amendments were intended to expand liability beyond that established under the Tort Claims Act. Brief for Petitioners 22–32. Because we find that respondent's claim under the Good Samaritan doctrine is not barred by the "misrepresentation" exception to the Tort Claims Act, we do not consider whether the Housing Act provides an alternative basis for respondent's claim.

703–706. This Court found that Neustadt's claim that the Government had breached its "duty to use due care in obtaining and communicating information upon which [the plaintiff] may reasonably be expected to rely in the conduct of his economic affairs," merely restated the traditional legal definition of "negligent misrepresentation" as would have been understood by Congress when the Tort Claims Act was enacted. *Id.*, at 706–707.[5] Finally, we examined the National Housing Act of 1934, as amended, under which the FHA had conducted its appraisal, and found nothing to indicate "that Congress intended, in a case such as this, to limit or suspend the application of the 'misrepresentation' exception of the Tort Claims Act." *Id.*, at 708–710.

We cannot agree with petitioners that this case is controlled by *Neustadt*. As we recognized in that decision, the essence of an action for misrepresentation, whether negligent or intentional, is the communication of misinformation on which the recipient relies. The gravamen of the action against the Government in *Neustadt* was that the plaintiff was misled by a "Statement of FHA Appraisal" prepared by the Government. Neustadt alleged no injury that he would have suffered independently of his reliance on the erroneous appraisal. Because the alleged conduct that was the basis of

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[5] The Court distinguished negligent misrepresentation from the "many familiar forms of negligent misconduct [which] may be said to involve an element of 'misrepresentation,' [only] in the generic sense of that word." 366 U. S., at 711, n. 26. The "misrepresentation" exception applies only when the action itself falls within the commonly understood definition of a misrepresentation claim, which " 'has been identified with the common law action of deceit,' and has been confined 'very largely to the invasion of interests of a financial or commercial character, in the course of business dealings.' " *Ibid.*, quoting W. Prosser, Law of Torts § 85, pp. 702–703 (1941 ed.). Thus, the claim in *Indian Towing Co.* v. *United States*, 350 U. S. 61 (1955), for damages to a vessel which ran aground due to the Coast Guard's alleged negligence in maintaining a lighthouse, did not "aris[e] out of . . . misrepresentation" within the meaning of § 2680(h).

his negligence claim was in essence a negligent misrepresentation, Neustadt's action was barred under the "misrepresentation" exception.

Section 2680(h) thus relieves the Government of tort liability for pecuniary injuries which are wholly attributable to reliance on the Government's negligent misstatements. As a result, the statutory exception undoubtedly preserves sovereign immunity with respect to a broad range of Government actions.[6] But it does not bar negligence actions which focus not on the Government's failure to use due care in communicating information, but rather on the Government's breach of a different duty.

In this case, unlike *Neustadt*, the Government's misstatements are not essential to plaintiff's negligence claim. The Court of Appeals found that to prevail under the Good Samaritan doctrine, Neal must show that FmHA officials voluntarily undertook to supervise construction of her house; that the officials failed to use due care in carrying out their supervisory activity; and that she suffered some pecuniary injury proximately caused by FmHA's failure to use due care.[7] FmHA's duty to use due care to ensure that the builder adhere to previously approved plans and cure all defects before completing construction is distinct from any duty to use due care in communicating information to respondent. And it certainly does not "appea[r] beyond doubt" that the only damages alleged in the complaint to be caused by FmHA's conduct were those attributable to Neal's reliance on FmHA inspection reports. *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957). Neal's factual allegations would be consistent with proof at trial that Home Marketing would never have turned

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[6] See Restatement (Second) of Torts § 552(3) (1977).

[7] Although this negligence claim may include an element of reliance on FmHA's voluntary undertaking to supervise construction in a competent manner, this element of the claim would constitute "misrepresentation" only in the generic sense of the word. See n. 5, *supra*.

the house over to Neal in its defective condition if FmHA officials had pointed out defects to the builder while construction was still underway, rejected defective materials and workmanship, or withheld final payment until the builder corrected all defects.

Of course, in the absence of the "misrepresentation" exception to the Tort Claims Act, respondent could also have brought a claim for negligent misrepresentation to recover for any injury caused by her misplaced reliance on advice provided by FmHA officials and on the FmHA inspection reports. Common to both the misrepresentation and the negligence claim would be certain factual and legal questions, such as whether FmHA officials used due care in inspecting Neal's home while it was under construction. But the partial overlap between these two tort actions does not support the conclusion that if one is excepted under the Tort Claims Act, the other must be as well. Neither the language nor history of the Act suggests that when one aspect of the Government's conduct is not actionable under the "misrepresentation" exception, a claimant is barred from pursuing a distinct claim arising out of other aspects of the Government's conduct. "'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'" *United States* v. *Aetna Surety Co.*, 338 U. S. 366, 383 (1949), quoting *Anderson* v. *Hayes Constr. Co.*, 243 N. Y. 140, 147, 153 N. E. 28, 29–30 (1926) (Cardozo, J.). Any other interpretation would encourage the Government to shield itself completely from tort liability by adding misrepresentations to whatever otherwise actionable torts it commits.

We therefore hold that respondent's claim against the Government for negligence by FmHA officials in supervising construction of her house does not "aris[e] out of . . . misrepresentation" within the meaning of 28 U. S. C. § 2680(h). The Court of Appeals properly concluded that Neal's claim is

not barred by this provision of the Tort Claims Act because Neal does not seek to recover on the basis of misstatements made by FmHA officials. Although FmHA in this case may have undertaken both to supervise construction of Neal's house and to provide Neal information regarding the progress of construction, Neal's action is based solely on the former conduct. Accordingly, the judgment of the Court of Appeals is

Affirmed.

THE CHIEF JUSTICE concurs in the judgment.

NORTH DAKOTA *v.* UNITED STATES

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

No. 81–773. Argued November 2, 1982—Decided March 7, 1983

The federal Migratory Bird Hunting Stamp Act authorizes the Secretary of the Interior to acquire easements over wetland areas suitable for migratory waterfowl breeding and nesting grounds. Section 3 of the Wetlands Act of 1961 (Loan Act) provides that no land suitable for waterfowl habitats can be acquired with money from the fund established for such acquisitions unless the acquisition "has been approved" by the Governor or an appropriate agency of the State in which the land is located. Between 1961 and 1977, successive Governors of North Dakota consented to the acquisition of easements covering approximately 1.5 million acres of wetlands in that State. By 1977, the United States had obtained easements covering about half of this acreage. In the 1970's, however, cooperation between North Dakota and the United States began to break down, and in 1977 North Dakota enacted statutes restricting the United States' ability to acquire easements over wetlands. These statutes set out certain conditions that must be met "prior to final approval" of the acquisition of the easements, permitted a landowner to drain any after-expanded wetland in excess of the legal description in the easement, and limited all easements to a maximum term of 99 years. The United States brought suit in Federal District Court, seeking a declaratory judgment that, *inter alia*, the 1977 North Dakota statutes were hostile to federal law and could not be applied and any easement acquired in violation of such statutes would nevertheless be valid. The District Court granted summary judgment for the United States, and the Court of Appeals affirmed.

Held:

1. The consent required by § 3 of the Loan Act cannot be revoked at the will of an incumbent Governor. To hold otherwise would be inconsistent with the Loan Act's purpose of facilitating the acquisition of wetlands. Here, the acquisition in question clearly "has been approved" by North Dakota's Governors as § 3's language provides. Nothing in the statute authorizes the withdrawal of approval previously given. Nor does § 3's legislative history suggest that Congress intended to permit Governors to revoke their consent. Pp. 312–316.

2. Since § 3 of the Loan Act does not permit North Dakota to revoke its consent outright, the State may not revoke its consent based on non-

compliance with the conditions set forth in the 1977 legislation. And to the extent that such legislation authorizes landowners to drain after-expanded wetlands contrary to the terms of their easement agreements, it is hostile to federal interests and may not be applied. For the same reason, the statute limiting easements to a maximum term of 99 years may not be applied to wetlands acquired by the United States pursuant to previously given consents. Pp. 316–320.

650 F. 2d 911, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, and STEVENS, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, J., joined, *post*, p. 321.

Robert O. Wefald, Attorney General of North Dakota, argued the cause for appellant. With him on the briefs were *Murray G. Sagsveen*, Special Assistant Attorney General, and *David E. Engdahl*.

Barbara E. Etkind argued the cause for the United States. With her on the brief were *Solicitor General Lee*, *Assistant Attorney General Dinkins*, *Deputy Solicitor General Claiborne*, *Edward J. Schawaker*, and *Robert L. Klarquist*.*

JUSTICE BLACKMUN delivered the opinion of the Court.

Under the federal Migratory Bird Hunting Stamp Act, the Secretary of the Interior is authorized to acquire easements over small wetland areas suitable for migratory waterfowl breeding and nesting grounds. Although the State of North Dakota initially consented to the Secretary's acquisition of easements over certain wetlands, the State now seeks to withdraw its consent and to impose conditions on any future acquisitions. This has led to the present litigation, for the State's present posture raises the question whether the Secretary may proceed to acquire easements pursuant to North Dakota's prior consent.

**Richard J. Himelfarb* filed a brief for the National Wildlife Federation et al. as *amici curiae* urging affirmance.

I

A

In 1929, the Migratory Bird Conservation Act (Conservation Act), 45 Stat. 1222, ch. 257, 16 U. S. C. § 715 *et seq.*, became law. By § 5 of that Act, 45 Stat. 1223, the Secretary of the Interior was authorized to acquire land "for use as inviolate sanctuaries for migratory birds."[1] Land acquisitions under the Conservation Act are subject to certain conditions: they must be approved in advance by the Migratory Bird Conservation Commission, §§ 2 and 5, 16 U. S. C. §§ 715a and 715d, and the State in which the land is located must "have consented by law to the acquisition," § 7, 16 U. S. C. § 715f.

In 1934, in order to provide funding for land acquisitions under the Conservation Act, the Migratory Bird Hunting Stamp Act (Stamp Act), 48 Stat. 451, 16 U. S. C. § 718 *et seq.*, was enacted. Section 1 of the Stamp Act, 16 U. S. C. § 718a, required waterfowl hunters to purchase migratory bird hunting stamps, commonly known as duck stamps. By § 4, 16 U. S. C. § 718d, the proceeds from the sale of the stamps were to form a special "migratory bird conservation fund" (conservation fund) to be used primarily to pay for "the location, ascertainment, acquisition, administration, maintenance, and development" of bird sanctuaries pursuant to the Conservation Act.

To hasten the acquisition of land suitable for waterfowl habitats, Congress amended the Stamp Act in 1958. The price of a duck stamp was increased, and, most important for our present purposes, the Secretary of the Interior was authorized to expend money from the conservation fund for a new type of property: "small wetland and pothole areas, interests therein, and rights-of-way to provide access thereto,"

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[1] Section 5 was amended by § 5(a) of the Fish and Wildlife Improvements Act of 1978, Pub. L. 95–616, 92 Stat. 3113, with minor changes from the language quoted in the text. The sense of that language, however, was not altered. See 16 U. S. C. § 715d (1976 ed., Supp. V).

the small areas "to be designated as 'Waterfowl Production Areas.'" Pub. L. 85–585, § 3, 72 Stat. 487, 16 U. S. C. § 718d(c). Such waterfowl production areas could be "acquired without regard to the limitations and requirements of the Migratory Bird Conservation Act." *Ibid.* Because these waterfowl production areas did not have to be maintained as sanctuaries, there was no need for them to be purchased outright; the Secretary was authorized to acquire easements prohibiting fee owners from draining their wetlands or otherwise destroying the wetlands' suitability as breeding grounds.

Despite the 1958 amendments, however, the proceeds from duck stamp sales proved insufficient to acquire land at the rate Congress deemed necessary. Accordingly, a new source of income was provided through the Wetlands Act of 1961 (Loan Act), Pub. L. 87–383, 75 Stat. 813. Section 1 of this new Act originally authorized sums for appropriation not to exceed $105 million for a 7-year period.[2] These sums were to be added to the conservation fund in the form of interest-free loans that were to be repaid out of duck stamp proceeds. In addition, § 3 of the Loan Act provided that no land could be acquired with money from the conservation fund unless consent had been obtained from the Governor or an appropriate agency of the State in which the land was located.[3]

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[2] The authorization loan limit was increased to $200 million by § 2(a) of the Wetlands Loan Extension Act of 1976, 90 Stat. 189, 16 U. S. C. § 715k–3.

[3] Section 3 reads in relevant part:

"*Provided further*, That no land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency." 75 Stat. 813, 16 U. S. C. § 715k–5.

This proviso is in addition to the Conservation Act's requirement, in its § 7, that the State "shall have consented by law" to the acquisition of land for inviolate bird sanctuaries. 45 Stat. 1223, 16 U. S. C. § 715f. The latter requires consent by the legislature; the former requires consent by the Governor or the "appropriate State agency."

B

The principal waterfowl breeding grounds in the continental United States are located in four States of the northern Great Plains—North Dakota, South Dakota, Minnesota, and Montana.[4] North Dakota, in particular, is rich in wetlands suitable for waterfowl breeding, and the Government's acquisition of North Dakota land has been given high priority. See, *e. g.*, H. R. Rep. No. 95–1518, p. 5 (1978); S. Rep. No. 94–594, p. 3 (1976).

For the most part, North Dakota has cooperated with federal efforts to preserve waterfowl habitats. Two years after the Conservation Act went into effect, the State, pursuant to § 7 of that Act, 45 Stat. 1223, 16 U. S. C. § 715f, gave its consent to the "acquisition by the United States . . . of such areas of land or water, or of land and water, in the State of North Dakota, as the United States may deem necessary for

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[4] When the glaciers retreated from the northern Great Plains at the end of the last ice age, they left in their wake thousands of shallow depressions. These depressions, known as prairie potholes, provide excellent breeding grounds for migratory ducks. In *United States* v. *Albrecht*, 496 F. 2d 906 (CA8 1974), the Court of Appeals described the characteristics of a prairie pothole region and its advantages for breeding ducks:

"Each square mile of such land is dotted by approximately 70 to 80 potholes of three to four feet deep. . . . [On certain types of land] the potholes usually retain water through July or August, and therefore, provide an excellent environment for the production of aquatic invertebrates and aquatic plants, the basic foods for breeding adult ducks and their offspring. Essential to the maintenance of the land as a waterfowl production area is the availability of shallow water in these numerous potholes during the usually drier summer months. On the other hand, too much water, as a lake area with its deeper waters, does not provide the proper habitat for many species of duck to rear their young. Also, for the protection of their young, many species of duck prefer to be isolated in a small pothole, rather than to share a large lake." *Id.*, at 908–909.

See generally Kantrud & Stewart, Use of Natural Basin Wetlands By Breeding Waterfowl in North Dakota, 41 J. Wildlife Management 243 (1977); Prairie Potholes: Draining the Duck Hatchery, National Wildlife (Oct.–Nov. 1981) p. 6.

the establishment of migratory bird reservations." 1931 N. D. Laws, ch. 207, p. 360. By 1958, the United States had acquired more than 276,000 acres of North Dakota land for use as migratory bird refuges. Hearings on S. 2447 et al. before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., 79–81 (1958).

When the Loan Act was passed in 1961, the United States, through its Fish and Wildlife Service, promptly sought the necessary gubernatorial consent from Governor Guy of North Dakota. Between 1961 and 1977, Governor Guy and his successor, Governor Link, consented to the acquisition of easements covering approximately 1.5 million acres of wetlands. The consents specified the maximum acreage to be acquired within each county in the State, but did not list particular parcels.[5] By 1977, the Fish and Wildlife Service had obtained easements covering about half of the total wetlands acreage authorized by the consents.[6]

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[5] The consents were in written form prepared by the Fish and Wildlife Service. Each covered a separate county, and read substantially as follows:

"I, ————, Governor of the State of North Dakota, in accordance with the provisions of the Act of October 4, 1961, 75 Stat. 813, hereby grant approval to the acquisition of easements by the United States of America of any lands within the county of ————, State of North Dakota, for Waterfowl Production Area purposes not to exceed ———— — acres of wetlands." App. 3, 55.

Some of the forms were signed by the North Dakota Game and Fish Commissioner as the authorized representative of the Governor. *Id.*, at 4–5, 47.

[6] The typical easement agreement contained a legal description of a parcel of land, and imposed restrictions on all wetland areas within the parcel "now existing or subject to recurrence through natural or man-made causes," including "any enlargements of said wetland areas resulting from normal or abnormal increased water." The easements prohibit the owner from draining, filling, leveling or burning the wetlands, but permit farming and other activities whenever the wetlands "are dry of natural causes." *Id.*, at 14–16; see App. to Juris. Statement 6a–7a.

In the mid-1970's cooperation between North Dakota and the United States began to break down. The sources of the dispute are not altogether clear; the State accuses the United States of misleading landowners from whom it purchased easements, and of reneging on some unrelated agreements relating to flood-control projects. See Record 19–20, 40; Brief for Appellant 30–33. In any event, North Dakota enacted legislation in 1977 restricting the United States' ability to acquire easements over wetlands. 1977 N. D. Laws, ch. 204, p. 461, and ch. 426, p. 923.

The 1977 legislation affects the acquisition of wetlands easements in three major ways. First, § 2 of ch. 204, codified as N. D. Cent. Code § 20.1–02–18.1 (Supp. 1981), as amended by 1979 N. D. Laws, ch. 553, § 11, p. 1412,[7] re-

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[7] North Dakota Cent. Code § 20.1–02–18.1, as amended (Supp. 1981), provides:

"Federal wildlife area acquisitions—Submission to county commissioners, opportunity for public comment, and impact analysis required. The governor, the game and fish commissioner, or their designees, responsible under federal law for final approval of land, wetland, and water acquisitions by the United States department of the interior, its bureaus or agencies, for waterfowl production areas, wildlife refuges or other wildlife or waterfowl purposes, shall submit the proposed acquisitions to the board of county commissioners of the county or counties in which the land, wetland, and water areas are located for the board's recommendations. An affirmative recommendation by the board must be obtained prior to final approval of all such proposed acquisitions, whether by transfer of title, lease, easement, or servitude.

"The board of county commissioners of the county affected, or a designee or designees of the board, shall, within twenty-one days of receipt of an acquisition proposal, physically inspect the proposed acquisition areas. The board shall give public notice of the date, hour, and place where the public may comment on the proposed acquisitions. The notice shall be published once each week for two successive weeks in the official newspaper of the county or counties in which the land and water areas are located. The notice shall set forth the substance of the proposed action, and shall include a legal description of the proposed acquisitions. The board of

quires the Governor to submit proposed wetlands acquisitions for approval by the board of county commissioners of the county in which the land is located. The "federal agency involved"—here, the United States Fish and Wildlife Service—must provide the county with a "detailed impact analysis," and the county, as well, is directed to prepare an impact analysis at federal expense. If the county does not recommend the acquisition, the Governor may not approve it. Next, § 3 of ch. 204, codified as § 20.1–02–18.2, as amended by 1981 N. D. Laws, ch. 258, p. 654,[8] authorizes the landowner

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county commissioners shall make its recommendations within sixty days after receipt of an acquisition proposal.

"A detailed impact analysis from the federal agency involved shall be included with the acquisition proposal for board of county commissioner consideration in making recommendations. Such analysis shall include, but shall not be limited to, the recreational and wildlife impacts. In addition, the county agent of the affected county or counties shall prepare an impact analysis for board of county commissioner consideration which shall include the fiscal, social, and agricultural impacts of the proposed acquisitions. The department of the interior shall reimburse the county or counties for any expenses incurred by the county agent in preparing the analysis. The analyses shall also be forwarded to the state federal aid coordinator office which shall furnish copies to all interested state agencies and political subdivisions, which agencies and political subdivisions shall have thirty days to review the analyses and return their comments to the state federal aid coordinator office. Upon expiration of the thirty-day period, all comments received by the state federal aid coordinator office shall be forwarded to the federal agency involved and to the state official or agency responsible for final acquisition approval. The federal agency may, after consideration of such comments, file a final impact analysis with the governor, the board of county commissioners, and any other state official or agency responsible for final acquisition approval."

[8] North Dakota Cent. Code § 20.1–02–18.2, as amended (Supp. 1981), provides:

"Negotiation of leases, easements, and servitudes for wildlife production purposes. A landowner may negotiate the terms of a lease, easement, or servitude for land, wetland, or water areas sought to be acquired by the United States department of the interior, its bureaus or agencies, with moneys from the migratory bird conservation fund [16 U. S. C. 718d] for

to negotiate the terms and time period of the easement acquired by the United States, to restrict the easement "by legal description to the land, wetland, or water areas being sought," and to "drain any after-expanded wetland or water area in excess of the legal description." Finally, § 1 of ch. 426, codified as N. D. Cent. Code § 47–05–02.1 (1978),[9] restricts all easements to a maximum duration of 99 years. Because these restrictions have cast doubt upon the sufficiency of its title, the United States has acquired no easement over North Dakota wetlands since 1977.[10]

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use as waterfowl production areas, wildlife refuges, or for other wildlife purposes. A landowner may:

"1. Negotiate the time period of the lease, easement, or servitude being sought.

"2. Restrict a lease, easement, or servitude by legal description to the land, wetland, or water areas being sought, and may drain any after-expanded wetland or water area in excess of the legal description in the lease, easement, or servitude.

"Failure by the department of the interior, its bureaus or agencies, to agree to and comply with the above provisions shall nullify North Dakota's consent to the federal Act under section 20.1–02–18."

As originally enacted, § 20.1–02–18.2 also provided that any easement would terminate upon death of the landowner or a change in ownership. 1977 N. D. Laws, ch. 204, § 3, p. 463. This provision was repealed by 1981 N. D. Laws, ch. 258, § 1, p. 654.

[9] Section 47–05–02.1 provides in relevant part:

"Regulations governing easements, servitudes, or nonappurtenant restrictions on the use of real property.—Real property easements, servitudes, or any nonappurtenant restrictions on the use of real property, which become binding after July 1, 1977, shall be subject to the regulations contained in this section. These regulations shall be deemed a part of any agreement for such interests in real property whether or not printed in a document of agreement.

. . . . .

"2. The duration of the easement, servitude, or nonappurtenant restriction on the use of real property shall be specifically set out, and in no case shall the duration of any interest in real property regulated by this section exceed ninety-nine years."

[10] In 1981, while this case was pending in the Court of Appeals, North Dakota added a further provision forbidding any new federal acquisition

In 1979, the United States brought suit in the United States District Court for the District of North Dakota, seeking a declaratory judgment that the 1977 state statutes were hostile to federal law in certain respects and could not be applied; that any easement acquired in violation of the 1977 statutes would nevertheless be valid; and that the legislative-consent provision of the Conservation Act, § 7, 45 Stat. 1223, 16 U. S. C. § 715f, did not apply to the acquisition of waterfowl production areas under the Stamp Act. The District Court granted summary judgment for the United States, App. to Juris. Statement 16a, and the United States Court of Appeals for the Eighth Circuit affirmed. 650 F. 2d 911 (1981).[11] We noted probable jurisdiction over North Dakota's appeal. 455 U. S. 987 (1982).

II

The protection of migratory birds has long been recognized as "a national interest of very nearly the first magnitude." *Missouri* v. *Holland*, 252 U. S. 416, 435 (1920). Since the turn of the century, the Secretaries of Agriculture and of the Interior successively have been charged with responsibility for "the preservation, distribution, introduction, and restoration of game birds and other wild birds." Act of May 25, 1900, 31 Stat. 187, 16 U. S. C. § 701. A series of treaties dating back to 1916 obligates the United States to preserve and protect migratory birds through the regulation of hunt-

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of land for a migratory bird reservation, and suspending the Governor's authority to consent to any acquisition from the conservation fund. 1981 N. D. Laws, ch. 258, § 2, p. 654, codified as N. D. Cent. Code § 20.1–02–18.3 (Supp. 1981).

[11] The Court of Appeals held that neither legislative nor gubernatorial consent was required prior to the acquisition of waterfowl production areas, and that even if gubernatorial consent were required, it had been given here and could not be revoked. 650 F. 2d, at 916. The Court of Appeals also concluded that the challenged North Dakota statutes were void "[t]o the extent they encumber the federal statutes which provide for the acquisition of waterfowl habitat." *Id.*, at 918.

ing, the establishment of refuges, and the protection of bird habitats.[12] By providing for the acquisition of sanctuaries and waterfowl production areas, the Conservation Act and the Stamp Act play a central role in assuring that our Nation's migratory birds will continue to flourish.

In the absence of federal legislation to the contrary, the United States unquestionably has the power to acquire wetlands for waterfowl production areas, by purchase or condemnation, without state consent. *Paul* v. *United States*, 371 U. S. 245, 264 (1963); *Kohl* v. *United States*, 91 U. S. 367, 371–372 (1876). Here, however, Congress has conditioned any such acquisition upon the United States' obtaining the consent of the Governor of the State in which the land is located.[13] North Dakota concedes that its Governors, at var-

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[12] Convention for the Protection of Migratory Birds, United States-Great Britain, 39 Stat. 1702, T. S. No. 628 (1916); Convention for the Protection of Migratory Birds and Game Mammals, United States-Mexico, 50 Stat. 1311, T. S. No. 912 (1936); Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, United States-Japan, [1974] 25 U. S. T. 3331, T. I. A. S. No. 7990 (1972); Convention Concerning the Conservation of Migratory Birds and Their Environment, United States-Union of Soviet Socialist Republics, [1976–1977] 29 U. S. T. 4647, T. I. A. S. No. 9073 (1976). Habitat protection is specifically mandated by the treaties with the Soviet Union, Art. IV, 29 U. S. T., at 4653–4654, and Japan, Art. VI, 25 U. S. T., at 3335.

[13] Despite some confusion on this issue in the District Court and the Court of Appeals, see App. to Juris. Statement 11a; 650 F. 2d, at 916, the parties now agree that gubernatorial consent *is* required. See Brief for United States 16, and n. 11. Section 4 of the Stamp Act, as amended in 1958, permits the acquisition of waterfowl production areas "without regard to the limitations and requirements of the Migratory Bird Conservation Act." Pub. L. 85–585, § 3, 72 Stat. 487, 16 U. S. C. § 718d(c). The Conservation Act, ch. 257, 45 Stat. 1222, is codified at 16 U. S. C. §§ 715–715k and 715n–715r. The District Court and the Court of Appeals read the gubernatorial-consent requirement—codified at § 715k–5—as part of the Conservation Act, and concluded that it did not apply to the acquisition of waterfowl production areas. This reading of the statute, we have concluded, is incorrect. The gubernatorial-consent provision was enacted in 1961 as § 3 of the Loan Act. 75 Stat. 813. It has never been a part of

ious times since 1961, have consented to the acquisition of easements over 1.5 million acres of North Dakota wetlands. The issue before us is whether North Dakota may revoke its consent to the acquisition of further easements in the State, and whether North Dakota by statute may impose conditions and restrictions on the United States' power to acquire easements.[14]

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the Conservation Act. Although the codifiers of the United States Code chose to place the gubernatorial-consent provision in the midst of the Conservation Act's provisions, that choice, "made by a codifier without the approval of Congress . . . should be given no weight." *United States* v. *Welden*, 377 U. S. 95, 99, n. 4 (1964). Because the gubernatorial-consent provision is not one of the "requirements of the Migratory Bird Conservation Act," 16 U. S. C. § 718d(c), it does apply whenever waterfowl production areas are acquired with duck stamp funds.

[14] North Dakota advances two preliminary arguments which we find unpersuasive. The State first asserts that the gubernatorial consents given between 1961 and 1977 are invalid, because they do not specify the particular parcels to be acquired. The language of § 715k–5 does not suggest that parcel-by-parcel consent is necessary, and the legislative history tells us only that § 715k–5 requires consent "as to the nature of the lands and the acreage involved." 107 Cong. Rec. 17171 (1961) (remarks of Sen. Magnuson). The county-by-county consents given by Governors Guy and Link satisfied this standard. They specified both the "nature of the lands . . . involved," *i. e.*, wetlands, and the maximum acreage to be acquired in each county.

North Dakota next argues that the gubernatorial consents, if valid, have already been exhausted by acquisitions prior to 1977. This argument stems from the practice of including within each easement agreement the legal description of the entire parcel on which the wetlands are located, rather than merely the wetlands areas to which the easement restrictions apply. If the entire parcels are counted toward the acreage permitted by the gubernatorial consents, the United States already has acquired nearly 4.8 million acres, far more than the 1.5 million acres authorized. The United States has conceded as much in its answers to North Dakota's interrogatories. App. 49 ("The total acreage described in the permanent easements . . . is 4,788,300 acres . . ."). As the easement agreements make clear, however, the restrictions apply only to wetlands areas and not to the entire parcels. The consents obtained by the United States authorize it to acquire up to 1.5 million "acres of wetlands." See n. 5, *supra*. The fact that the easement agreements include legal descriptions of much

A

North Dakota's central argument is that the gubernatorial consent required by 16 U. S. C. § 715k–5, once given, may be revoked by the State at will. North Dakota reads § 715k–5 to require not only that the Governor have consented to the acquisition of land for waterfowl production areas, but also that the Governor (and his successors in office) must continue to consent until the moment the land is actually acquired. Thus, although the United States has acquired easements over only half the acreage authorized by Governors Guy and Link, North Dakota asserts that it can terminate the United States' power to acquire the remainder.[15] The United States takes the position that § 715k–5 does not permit a State to revoke its consent at will; once consent has been given, "the role assigned to the state by Congress has been exhausted." Brief for United States 24.

As with any case involving statutory interpretation, "we state once again the obvious when we note that, in determining the scope of a statute, one is to look first at its language." *Dickerson* v. *New Banner Institute, Inc.*, *ante*, at 110. See *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 19 (1979). "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). The language of § 715k–5 is uncomplicated; it provides that money from the conservation fund shall not be used to acquire land "unless the acquisition thereof has been approved" by the Governor or the appropriate state agency. In this case, the

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larger parcels does not change the acreage of the wetlands over which easements have been acquired.

[15] In the District Court and the Court of Appeals, North Dakota took the position that its prior consents had been revoked. See App. 72. At oral argument, North Dakota informed us that although the present Governor has not formally revoked the consents, he intends to engage in that formality if this Court holds that revocation is authorized. Tr. of Oral Arg. 28.

acquisition of approximately 1.5 million acres of wetlands clearly "has been approved" by North Dakota's Governors. Nothing in the statute authorizes the withdrawal of approval previously given.[16]

Nor does the legislative history of § 715k–5 suggest that Congress intended to permit Governors to revoke their consent. Before 1961, neither legislative nor gubernatorial consent was required prior to the acquisition of wetlands for waterfowl production areas. State legislative consent was a prerequisite to the acquisition of bird sanctuaries, § 715f, but waterfowl production areas were expressly exempted from this requirement, § 718d(c). Nonetheless, the United States followed an informal practice of obtaining agreement from the Governor or appropriate state agency before acquisition. The gubernatorial-consent provision was intended simply to incorporate this practice. 107 Cong. Rec. 17171 (1961) (remarks of Sen. Magnuson); *id.*, at 17172 (remarks of Sen. Hruska). There is no indication in the legislative history or elsewhere that under this prior practice a Governor could withdraw consent already given.[17]

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[16] Cf. *United States* v. *Unzeuta*, 281 U. S. 138, 142–143 (1930) (State may not revoke its consent to exercise of jurisdiction by the United States).

[17] Although the question of revocability did not arise during the Senate debates, the Senate's brief discussion of the gubernatorial-consent provision suggests that consent, once obtained, was expected to remain effective for as long as necessary. Senator Magnuson commented that he could not "conceive of any acreage of wetlands that it is intended to purchase in the next 3 or 4 years that has not already had the joint approval of all the States and everyone else involved." 107 Cong. Rec. 17172 (1961). Senator Hruska, a member of the Migratory Bird Conservation Commission, confirmed that when the Commission met to approve land acquisitions, "[t]here has already been processed before that time the area of agreement between the Federal agencies and the State agencies which makes the approval possible." *Ibid.* Senators Magnuson and Hruska each envisioned precisely the sequence of events that has occurred here: the United States would develop a general plan for the acquisition of wetlands, the plan would be submitted to the Governor or appropriate state agency for ap-

In the absence of any evidence to the contrary, we must conclude that the consent required by § 715k–5 cannot be revoked at the will of an incumbent Governor. To hold otherwise would be inconsistent with the very purpose behind the Loan Act of which § 715k–5 is a part. The Loan Act was expressly intended to facilitate the acquisition of wetlands by making available an additional source of funds. The legislative history is replete with references to the need to preserve the Nation's wetlands by bringing four to five million additional acres under federal control. See Hearings on S. 2187 et al. before the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Commerce, 87th Cong., 1st Sess., 14–19, 23–24, 28–31, 33–39 (1961); S. Rep. No. 705, 87th Cong., 1st Sess., 2 (1961); H. R. Rep. No. 545, 87th Cong., 1st Sess., 1–2 (1961). Obviously, this acquisition could not take place overnight; careful planning over many years was anticipated. See S. Rep. No. 705, *supra*, at 2. If consent under § 715k–5 were revocable, the United States' ability to engage in such planning would be severely hampered. A detailed federal program involving the estimate of needs, setting of priorities, allocation of funds, and negotiations with landowners could be negated in an instant by a Governor's decision that the politics of the moment made further federal acquisitions undesirable.

Our conclusion in this regard is strengthened by the fact that, at the time of its enactment, the gubernatorial-consent provision was not at all controversial. It was added by the Senate Committee on Commerce without explanation, see S. Rep. No. 705, *supra*, at 3, and was accepted by the House of Representatives without explanation or discussion, see H. R. Conf. Rep. No. 1184, 87th Cong., 1st Sess., 1 (1961); 107 Cong. Rec. 21184 (1961). The only discussion of the pro-

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proval, and, if approval was given, the United States would proceed to acquire wetlands pursuant to that approval—over the course of years, if need be.

vision came on the Senate floor, when that body was assured that it did no more than formalize the existing practice of gaining state approval prior to acquiring land. We are unwilling to assume that Congress, while expressing its firm belief in the need to preserve additional wetlands, so casually would have undercut the United States' ability to plan for their preservation. Clearly, Congress intended the States to play an important role in the planning process. But once plans have been made and the Governor's approval has been freely given, the role of the State indeed is at an end. It is then up to the United States to choose how best to use its resources in putting its acquisition plans into effect.

Although it has been intimated that a Governor's consent might become revocable if the United States were to delay unreasonably its land acquisitions pursuant to the consent, see Brief for United States 26; Tr. of Oral Arg. 35, we need not reach that issue here. In this case, there has been no unreasonable delay. Until North Dakota's legislation interfered in 1977, the United States had pursued diligently its program of acquiring wetlands easements in North Dakota. The acreage fluctuated somewhat from year to year, but the acquisitions each year were substantial.[18] In 1958, when Congress first authorized the Secretary of the Interior to acquire waterfowl production areas, it was generally anticipated that the United States' acquisition program would take a minimum of 20 to 25 years to complete.[19] The acquisition

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[18] See United States Dept. of the Interior, Annual Report of Lands Under Control of the U. S. Fish and Wildlife Service (1974–1977) (Table 4, Waterfowl Production Areas); United States Dept. of the Interior, Annual Report of Lands Under Control of the Bureau of Sport Fisheries and Wildlife (1961–1973) (Table 4, Waterfowl Production Areas).

[19] See, *e. g.*, H. R. Rep. No. 2182, 85th Cong., 2d Sess., 2 (1958); Hearings on H. R. 12006 before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, 85th Cong., 2d Sess., 5 (1958) (statement of Rep. Reuss); *id.*, at 26 (testimony of Ross Leffler, Assistant Secretary for Fish and Wildlife, Dept. of

program had been underway for only 16 years in 1977, a time-span well within the limits contemplated by Congress.

B

We next consider North Dakota's 1977 legislation, which purports to impose conditions on the United States' power to acquire further wetlands easements. Because the statutes at issue raise somewhat different concerns, we discuss each in turn.

1. *N. D. Cent. Code § 20.1–02–18.1 (Supp. 1981).* This statute sets out certain conditions that must be met "prior to final approval" of the acquisition of wetlands easements. The only sanction provided in § 20.1–02–18.1 for failure to comply with its conditions is that consent for the acquisitions will be refused. North Dakota explains that this represents the State's decision "to qualify or condition any consent to future acquisitions." Brief for Appellant 33; see *id.*, at 35.

We thus need not consider in this case whether the gubernatorial-consent provision, 16 U. S. C. § 715k–5, permits North Dakota to impose these conditions on any consent it chooses to give in the future.[20] At issue here is the status of

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the Interior); *id.*, at 37 (statement of Daniel H. Janzen, Director of Bureau of Sport Fisheries and Wildlife, Dept. of the Interior); *id.*, at 47 (statement of Rep. Metcalf); Hearings on S. 2447 et al. before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., 85 (1958) (comments of Sen. Magnuson).

JUSTICE O'CONNOR finds this legislative history unpersuasive, primarily because the gubernatorial-consent provision was not added until 1961, three years after initial authorization of the acquisition of land for waterfowl production areas. *Post*, at 322. But as we have explained *supra*, at 313, the gubernatorial-consent provision was intended merely to formalize the prior practice of obtaining consent prior to the acquisition of any land under the Stamp Act.

[20] Compare *United States* v. *Williams*, 302 U. S. 46, 50 (1937) (federal statute, requiring parental consent prior to minor's enlistment, does not confer right to impose conditions on consent), with, *e. g.*, *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 146–147 (1937) (Article I, § 8, cl. 17, of

acquisitions authorized by consents already given. We do not understand the State to argue that § 20.1–02–18.1 imposes retroactive conditions on these prior consents. By its terms, the statute has no application to the acquisition of easements for which consent previously has been given, because nothing in the statute purports to limit the United States' power to acquire land once "final approval" has been obtained. Moreover, any attempt to impose retroactive conditions clearly would be unavailing. We have ruled above that once the requisite gubernatorial consent has been obtained, it may not be revoked. Since 16 U. S. C. § 715k–5 does not permit North Dakota to revoke its consent outright, North Dakota may not revoke its consent based on noncompliance with the conditions set forth in N. D. Cent. Code § 20.1–02–18.1 (Supp. 1981).

2. *N. D. Cent. Code § 20.1–02–18.2 (Supp. 1981).* The United States does not challenge those portions of § 20.1–02–18.2 that permit a landowner to negotiate the conditions of an easement and restrict the scope of the easement to a particular legal description. The United States does object, however, to that part of § 20.1–02–18.2(2) that permits a landowner to "drain any after-expanded wetland or water area in excess of the legal description in the . . . easement . . . ." The United States' standard easement agreement contains a clause prohibiting the draining of after-expanded wetlands, see n. 6, *supra*, and § 20.1–02–18.2(2) might be read to void such clauses even when agreed to by the landowner.

This Court addressed a similar situation in *United States* v. *Little Lake Misere Land Co.*, 412 U. S. 580 (1973). In that case, the United States had exercised its authority under the Conservation Act to acquire land in Louisiana for use as a wildlife refuge. Mineral rights were reserved to the prior

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Constitution, requiring state consent prior to assumption of federal jurisdiction over land, does confer right to impose conditions on consent).

landowners for a period of 10 years, subject to extensions under certain conditions. A Louisiana statute barred the reversion of the mineral rights to the United States, and thus in effect extended the prior landowners' mineral rights indefinitely.

Applying *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943), this Court concluded that because the United States' acquisition of land under the Conservation Act "is one arising from and bearing heavily upon a federal regulatory program . . . , the choice-of-law task is a federal task for federal courts." 412 U. S., at 592. The key factors in *Little Lake Misere* were that "[w]e deal[t] with the interpretation of a land acquisition agreement (a) explicitly authorized, though not precisely governed, by the Migratory Bird Conservation Act and (b) to which the United States itself [was] a party." *Id.*, at 594. Although the present case involves acquisitions under the Stamp Act rather than the Conservation Act, the federal interests at stake are the same. Thus, the choice of applicable law presents a federal question. Although state law may be borrowed if appropriate, "specific aberrant or hostile state rules do not provide appropriate standards for federal law." *Id.*, at 596.

Because the Louisiana statute at issue in *Little Lake Misere* was "plainly hostile to the interests of the United States," *id.*, at 597, the Court refused to apply it. In language equally applicable to the present case, the Court said:

> "To permit state abrogation of the explicit terms of a federal land acquisition would deal a serious blow to the congressional scheme contemplated by the Migratory Bird Conservation Act and indeed all other federal land acquisition programs. These programs are national in scope. They anticipate acute and active bargaining by officials of the United States charged with making the best possible use of limited federal conservation appropriations. Certainty and finality are indispensable in

any land transaction, but they are especially critical when, as here, the federal officials carrying out the mandate of Congress irrevocably commit scarce funds." *Ibid.*

To the extent that § 20.1–02–18.2(2) authorizes landowners to drain after-expanded wetlands contrary to the terms of their easement agreements, we must conclude that it is equally hostile to federal interests and may not be applied to easements acquired under previously given consents.[21] The United States is authorized to incorporate into easement agreements such rules and regulations as the Secretary of the Interior deems necessary for the protection of wildlife, 16 U. S. C. § 715e, and these rules and regulations may include restrictions on land outside the legal description of the easement. See *Kleppe* v. *New Mexico*, 426 U. S. 529, 546 (1976); *Camfield* v. *United States*, 167 U. S. 518, 525–526 (1897). To respond to the inherently fluctuating nature of wetlands, the Secretary has chosen to negotiate easement agreements imposing restrictions on after-expanded wetlands as well as those described in the easement itself. As long as North Dakota landowners are willing to negotiate such agreements, the agreements may not be abrogated by state law.[22]

3. *N. D. Cent. Code § 47–05–02.1 (1978).* Much the same analysis persuades us that this statute, which limits nonap-

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[21] Because this case concerns only the acquisition of easements under consents already given, we need not decide whether § 20.1–02–18.2(2) could be applied to easements acquired under consents North Dakota may choose to give in the future. See n. 20, *supra.*

[22] *United States* v. *Burnison*, 339 U. S. 87 (1950), on which North Dakota relies, is not to the contrary. In *Burnison*, the Court held that a State's traditional power to control the testamentary transfer of property included the power to prohibit testamentary gifts to the United States. The Court stated specifically that its holding did not "affect the right of the United States to acquire property by purchase or eminent domain in the face of a prohibitory statute of the state." *Id.*, at 93, n. 14; see *United States* v. *Fox*, 94 U. S. 315, 320 (1877).

purtenant easements to a maximum term of 99 years, may not be applied to wetlands easements acquired by the United States under consents previously given pursuant to the Stamp Act.[23] The United States' commitment to the protection of migratory birds will not cease after 99 years have passed. This commitment has been incorporated into law for over 80 years and has been expressed in treaties since 1916, and the need to preserve migratory bird habitats is now no less than before.

To ensure that essential habitats will remain protected, the United States has adopted the practice of acquiring permanent easements whenever possible. Permanent easements are authorized by the gubernatorial consents given from 1961 to 1977,[24] and the United States apparently has had no difficulty in negotiating permanent easements with North Dakota landowners. The automatic termination of federal wetlands easements after 99 years would make impossible the "[c]ertainty and finality" that we have regarded as "critical when . . . federal officials carrying out the mandate of Congress irrevocably commit scarce funds." *United States* v. *Little Lake Misere Land Co.*, 412 U. S., at 597. We conclude that § 47–05–02.1 is hostile to federal interests and may not be applied. See 412 U. S., at 596; *United States* v. *Albrecht*, 496 F. 2d 906, 911 (CA8 1974).

III

The District Court and the Court of Appeals held that gubernatorial consent was not required prior to federal acqui-

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[23] Although N. D. Cent. Code § 47–05–02.1 (1978) applies to all nonappurtenant easements, it was apparently enacted in response to dissatisfaction with the United States' acquisition of permanent easements over wetlands. See Report of the Committee on Agriculture submitted to the North Dakota Legislative Council (Nov. 1976), reprinted at Record 22, 26; App. 39.

[24] We need not decide whether future consents could be limited so as to authorize the acquisition of 99-year easements only, or whether § 47–05–02.1 could be applied to easements acquired under consents given in the future. See nn. 20 and 21, *supra*.

sition of wetlands easements, and that North Dakota's 1977 legislation could not be applied to any easements acquired under the Stamp Act. We conclude that although gubernatorial consent is required, it has been given here and cannot be revoked. We also conclude that North Dakota's 1977 legislation cannot restrict the United States' ability to acquire easements pursuant to consent previously given. To this extent, we affirm the judgment below.

It is so ordered.

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

I agree with the Court that gubernatorial consent is required for the acquisition of wetlands easements, that the required consent was given in this case, and that North Dakota may not simply revoke its consent at will. I disagree with the Court, however, in its holding that the United States acquired its easements pursuant to the consents within a reasonable time as a matter of law. I would remand this case in order to allow the lower courts an opportunity to determine whether the Federal Government delayed unreasonably in making its acquisitions. Because I would remand, and because I believe that the Court decides another issue that is not properly before the Court, I dissent in part.

First, in its brief, the Government concedes that "Congress must have assumed that the Secretary would be able to rely on the continued effectiveness—*at least for a reasonable period of time*—of gubernatorial consents." Brief for United States 26 (emphasis added).[1] The Government's concession on this point reflects the position, correct in my view, that Congress did not intend that gubernatorial consents, once given, could never be withdrawn even if the United States failed to acquire its easements within a reasonable time. Although there is virtually no legislative history concerning the consent provision in 16 U. S. C. § 715k–5, the provision rep-

[1] See also Brief for United States 14, 27; Tr. of Oral Arg. 35, 41.

resents an attempt to give to the States a meaningful right to control to some extent federal acquisition of easements in light of the unquestioned federal authority to take the land through condemnation procedures.[2] See *Paul* v. *United States*, 371 U. S. 245, 264 (1963). Congress surely did not intend to bind the States forever by their consents if the Federal Government failed to act on them. Permanent irrevocable consents would frustrate legitimate state land use planning just as consents revocable at will would frustrate federal protection of migratory wildfowl. Therefore, I agree with the position taken by the United States that the State's consent is irrevocable for a reasonable time after the consent is given.

The Court finds it unnecessary to decide whether the consent is revocable after the lapse of a reasonable time because it concludes that a reasonable time has not elapsed in this case. The Court bases this factual judgment primarily on statements in the legislative history indicating that Congress anticipated that the wetlands "acquisition program would take a minimum of 20 to 25 years to complete." *Ante*, at 315 (footnote omitted). Although the Court correctly points out that such statements appear in the House Report and various hearings concerning the 1958 amendment to the Stamp Act, those statements cannot be used to show that, in adding the gubernatorial-consent provision *in 1961*, Congress intended consent to be irrevocable for the period necessary to complete all previously described acquisition objectives regardless of its duration. The Court merely assumes that the estimated time period for completing the acquisition program generally is a "reasonable time" for purposes of determining whether the Government has acted reasonably in exercising

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[2] The only explicit reference to the consent provision is made by Senator Magnuson, who stated that there could be no acquisition "unless the Federal Government and the State involved had a complete agreement . . . as to the nature of the lands and the acreage involved." 107 Cong. Rec. 17171 (1961).

its consents in this particular case. There is nothing in the legislative history of either the 1958 amendment to the Stamp Act, or the 1961 addition of the consent provision, to support the Court's conclusion on this point.

The Court acknowledges that the acquisition program involved in this case had been underway for 16 years by the time the Government ceased its acquisitions as a result of the state legislation that is in issue. This time period is not, in my view, "reasonable" *as a matter of law*, and I would remand the issue in order to give the courts below an opportunity to decide whether the Federal Government acted reasonably in this case.

Second, for the first time in this Court, North Dakota argues that even if it may not revoke its consent to easement acquisition, the United States has already acquired easements over acreage in excess of the consents that were given. The Court resolves this dispute by holding that North Dakota's argument fails because "the easement agreements make clear . . . [that] the restrictions apply only to wetlands areas not to the entire parcels. . . . The fact that the easement agreements include legal descriptions of much larger parcels does not change the acreage of the wetlands over which easements have been acquired." *Ante*, at 311–312, n. 14.

This issue clearly was not raised below. In its complaint filed in the District Court for North Dakota, the United States stated that its total easement acreage to date in North Dakota was 764,522 acres. App. 31. This claim was repeated in answers to North Dakota's interrogatories. *Id.*, at 49. North Dakota never challenged that claim, and stipulated that the District Court had been provided with all evidentiary material necessary to resolve the cross-motions for summary judgment concerning the necessity for, and revocability of, gubernatorial consent. *Id.*, at 71–73. Indeed, North Dakota stipulated that its position was that the consent had been revoked, and that the particular guberna-

torial consents were themselves legally inadequate for easement acquisition. *Id.*, at 71–72. Therefore, the issue concerning exhaustion of consent was not raised below, and is not properly before the Court in this case.

Because I would remand to enable the lower courts to determine whether the United States acted reasonably in obtaining its wetlands easements, and because the Court decides an issue that is not, in my view, properly before the Court, I am unable to join the Court's opinion in its entirety.

Syllabus

BRISCOE ET AL. *v.* LAHUE ET AL.

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

No. 81–1404. Argued November 9, 1982—Decided March 7, 1983

Held: Title 42 U. S. C. § 1983 (1976 ed., Supp. V) does not authorize a convicted state defendant to assert a claim for damages against a police officer for giving perjured testimony at the defendant's criminal trial. Pp. 329–346.

(a) The common law provided absolute immunity from subsequent damages liability for all persons—governmental or otherwise—who were integral parts of the judicial process. Section 1983 does not authorize a damages claim against private witnesses. Similarly, judges, *Pierson* v. *Ray*, 386 U. S. 547, and prosecutors, *Imbler* v. *Pachtman*, 424 U. S. 409, may not be held liable for damages under § 1983 for the performance of their respective duties in judicial proceedings. When a police officer appears as a witness, he may reasonably be viewed as acting like any witness sworn to tell the truth, in which event he can make a strong claim to witness immunity. Alternatively, he may be regarded as an official performing a critical role in the judicial process, in which event he may seek the benefit afforded to other governmental participants in the same proceeding. Nothing in § 1983's language suggests that a police officer witness belongs in a narrow, special category lacking protection against damages suits. Pp. 329–336.

(b) Nor does anything in the legislative history of the statute indicate that Congress intended to abrogate common-law witness immunity in order to provide a damages remedy under § 1983 against police officers or any other witnesses. Pp. 336–341.

(c) There is some force to the contentions that the reasons supporting common-law witness immunity—the need to avoid intimidation and self-censorship—apply with diminished force to police officers and that police officers' perjured testimony is likely to be more damaging to constitutional rights than such testimony by ordinary citizens. But immunity analysis rests on functional categories, not on the defendant's status. A police officer witness performs the same functions as any other witness. Moreover, to the extent that traditional reasons for witness immunity are less applicable to governmental witnesses, other considerations of public policy support absolute immunity for such witnesses more emphatically than for ordinary witnesses. Subjecting government officials, such as police officers, to damages liability under § 1983 for their testimony might undermine not only their contribution to the judicial

process but also the effective performance of their other public duties. Pp. 341–346.

663 F. 2d 713, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, *post*, p. 346. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN, J., joined except as to Part I, *post*, p. 346. BLACKMUN, J., filed a dissenting opinion, *post*, p. 369.

Edmund B. Moran, Jr., argued the cause for petitioners. With him on the briefs was *Robert A. Creamer*.

Harriet Lipkin argued the cause for respondents. With her on the brief was *William T. Enslen*.

JUSTICE STEVENS delivered the opinion of the Court.

This case presents a question of statutory construction: whether 42 U. S. C. § 1983 (1976 ed., Supp. V) authorizes a convicted person to assert a claim for damages against a police officer for giving perjured testimony at his criminal trial. The Court of Appeals for the Seventh Circuit held that witnesses are absolutely immune from damages liability based on their testimony, and rejected the petitioners' contention that government officials who testify about the performance of their official duties may be held liable under § 1983 even if other witnesses may not. We agree with that conclusion.

The Court of Appeals heard argument in three separate cases raising the absolute immunity issue and decided them in a single opinion. Two of these cases are before us on a writ of certiorari. Petitioner Briscoe was convicted in state court of burglarizing a house trailer. He then filed a § 1983 complaint against respondent LaHue, a member of the Bloomington, Indiana, police force, alleging that LaHue had violated his constitutional right to due process by committing perjury in the criminal proceedings leading to his conviction.[1]

[1] The Court has held that the prosecutor's knowing use of perjured testimony violates due process, but has not held that the false testimony of a police officer in itself violates constitutional rights. See *United States* v. *Agurs*, 427 U. S. 97, 103, and nn. 8, 9 (1976) (citing cases).

LaHue had testified that in his opinion Briscoe was one of no more than 50 to 100 people in Bloomington whose prints would match a partial thumbprint on a piece of glass found at the scene of the crime. According to Briscoe, the testimony was false because the Federal Bureau of Investigation and the state police considered the partial print too incomplete to be of value, and without the print there was no evidence identifying him as the burglar. He sought $100,000 in damages. The District Court granted LaHue's motion for summary judgment on four separate grounds: (1) the facts alleged in the complaint did not suggest that LaHue had testified falsely; (2) allegations of perjury alone are insufficient to state a constitutional claim; (3) LaHue had not testified "under color of law"; and (4) Briscoe's claim was collaterally estopped by his criminal conviction.

Petitioners Vickers and Ballard were jointly tried and convicted of sexual assault in state court. They subsequently brought a civil action under § 1983 against respondent Hunley, a member of the Cedar Lake, Indiana, police force, alleging that he had deprived them of their constitutional rights to due process and a fair trial. They alleged that, by giving false testimony suggesting that they had been able to harmonize their stories before making exculpatory statements to police, he had prejudicially diminished the credibility of those statements. Each plaintiff sought $150,000 in compensatory and $50,000 in punitive damages. The Federal Magistrate granted a motion to dismiss the complaint on alternative grounds: (1) Hunley had not testified "under color of law"; (2) he was entitled to absolute witness immunity; and (3) petitioners had failed to state a claim under § 1983 because they did not allege that the prosecutor had knowingly used false testimony. The District Court affirmed the dismissal on the first ground. Both cases were appealed to the United States Court of Appeals for the Seventh Circuit.[2]

[2] At the time of the Court of Appeals' decision, petitioner Briscoe's conviction had been set aside by the Indiana Court of Appeals on the ground that the evidence was insufficient to prove Briscoe's guilt beyond a reason-

Although other issues were argued in the Court of Appeals, its holding in both cases was predicated squarely on the ground that, in litigation brought under 42 U. S. C. § 1983 (1976 ed., Supp. V), all witnesses—police officers as well as lay witnesses—are absolutely immune from civil liability based on their testimony in judicial proceedings. 663 F. 2d 713 (1981).[3] Because of the importance of the immunity question, which has given rise to divergent conclusions in the Courts of Appeals,[4] we granted certiorari. 455 U. S. 1016 (1982).[5]

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able doubt. The opinion did not question the veracity of LaHue's testimony, but found that the State's evidence, including testimony that Briscoe was one of 50 to 100 persons who might have robbed the trailer, did not meet the State's burden of proof. *Briscoe* v. *State*, 180 Ind. App. 450, 460, 388 N. E. 2d 638, 644 (1979). Petitioners Vickers and Ballard were still serving their sentences when the Court of Appeals affirmed the dismissal of their complaint.

[3] On review of pretrial orders dismissing petitioners' complaints, the Court of Appeals assumed that the complaints' factual allegations of perjury were true. It also assumed that petitioners had alleged a constitutional violation—that they had been deprived of their liberty without due process of law by respondents' perjury in the judicial proceedings that resulted in their convictions. Because we granted certiorari to review the Court of Appeals' holding, we make the same assumptions for purposes of deciding this case, without implying that they are valid. In light of its resolution of the immunity question the Court of Appeals did not determine whether the respondents had acted "under color of law," though it suggested that it might have answered in the affirmative. 663 F. 2d, at 721, n. 4.

[4] A rule of absolute witness immunity has been adopted by the majority of Courts of Appeals. *Brawer* v. *Horowitz*, 535 F. 2d 830, 836–837 (CA3 1976) (lay witness in federal court; *Bivens* action); *Burke* v. *Miller*, 580 F. 2d 108 (CA4 1978) (state medical examiner; § 1983 action), cert. denied, 440 U. S. 930 (1979); *Charles* v. *Wade*, 665 F. 2d 661 (CA5 1982) (police officer victim; § 1983 suit), cert. pending, No. 81–1881; *Myers* v. *Bull*, 599 F. 2d 863, 866 (CA8) (police officer witness; § 1983 suit), cert. denied, 444 U. S. 901 (1979); *Blevins* v. *Ford*, 572 F. 2d 1336 (CA9 1978) (private witnesses and former Assistant U. S. Attorney; action under § 1983 and the Fifth Amendment). But see *Briggs* v. *Goodwin*, 186 U. S. App. D. C. 179, 569 F. 2d 10 (1977) (dicta rejecting absolute immunity for government

[Footnote 5 is on p. 329]

Before confronting the precise question that this case presents—whether § 1983 creates a damages remedy against police officers for their testimony as witnesses—we begin by considering the potential liability of lay witnesses on the one hand, and of judges and prosecutors who perform integral functions in judicial proceedings on the other hand. The unavailability of a damages remedy against both of these categories sheds considerable light on petitioners' claim that Congress intended police officer witnesses to be treated differently.

I

There are two reasons why § 1983 does not allow recovery of damages against a private party for testimony in a judicial proceeding. First, § 1983 does not create a remedy for all conduct that may result in violation of "rights, privileges, or immunities secured by the Constitution and laws." Its reach is limited to actions taken "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . ."[6] It is beyond question that, when a private

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official witness; *Bivens* action), cert. denied, 437 U. S. 904 (1978); *Hilliard* v. *Williams*, 516 F. 2d 1344, 1350 (CA6 1975) (rejecting absolute immunity for agent of state bureau of investigation; § 1983 action), cert. denied *sub nom. Clark* v. *Hilliard*, 423 U. S. 1066 (1976).

[5] The petition for writ of certiorari presents the following question: "Whether a police officer who commits perjury during a state court criminal trial should be granted absolute immunity from civil liability under 42 U. S. C. § 1983." Pet. for Cert. i. The petition does not raise the question of immunity for testimony at pretrial proceedings such as probable-cause hearings, nor does petitioners' brief discuss whether the same immunity considerations that apply to trial testimony also apply to testimony at probable-cause hearings. We therefore do not decide whether respondent LaHue is entitled to absolute immunity for allegedly false testimony at two probable-cause hearings regarding petitioner Briscoe.

[6] Thus, even though the defective performance of defense counsel may cause the trial process to deprive an accused person of his liberty in an unconstitutional manner, *Cuyler* v. *Sullivan*, 446 U. S. 335, 342–345 (1980), the lawyer who may be responsible for the unconstitutional state action

party gives testimony in open court in a criminal trial, that act is not performed "under color of law."[7]

Second, since 1951, when this Court decided *Tenney* v. *Brandhove*, 341 U. S. 367, it has been settled that the all-encompassing language of § 1983, referring to "[e]very person" who, under color of law, deprives another of federal constitutional or statutory rights, is not to be taken literally.[8]

> "It is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum. . . . One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *City of Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 258 (1981).

See *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967).

The immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings[9]

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does not himself act under color of state law within the meaning of § 1983. *Polk County* v. *Dodson*, 454 U. S. 312 (1981). This conclusion is compelled by the character of the office performed by defense counsel. See *id.*, at 317–319; *Ferri* v. *Ackerman*, 444 U. S. 193, 204 (1979). It is equally clear that the office of the lay witness who merely discharges his duty to testify truthfully is not performed under color of law within the meaning of § 1983.

[7] It is conceivable, however, that nongovernmental witnesses could act "under color of law" by conspiring with the prosecutor or other state officials. See *Dennis* v. *Sparks*, 449 U. S. 24, 27–29 (1980); *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 152 (1970). It is therefore necessary to go beyond the "color of law" analysis to consider whether private witnesses may ever be held liable for damages under § 1983.

[8] Nor is this the only piece of 19th-century legislation in which the word "every" may not be given a literal reading. See *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 687–688 (1978).

[9] The availability of a common-law action for false accusations of crime, see *post*, at 350–351, is inapposite because petitioners present only the

was well established in English common law. *Cutler* v. *Dixon*, 4 Co. Rep. 14b, 76 Eng. Rep. 886 (Q. B. 1585); *Anfield* v. *Feverhill*, 2 Bulst. 269, 80 Eng. Rep. 1113 (K. B. 1614); *Henderson* v. *Broomhead*, 4 H. & N. 569, 578, 157 Eng. Rep. 964, 968 (Ex. 1859);[10] see *Dawkins* v. *Lord Rokeby*, 4 F. & F. 806, 833–834, 176 Eng. Rep. 800, 812 (C. P. 1866). Some American decisions required a showing that the witness' allegedly defamatory statements were relevant to the judicial proceeding, but once this threshold showing had been made, the witness had an absolute privilege.[11] The

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question of § 1983 liability for false testimony during a state-court criminal trial. See n. 5, *supra*.

[10] "We have therefore a large collection of cases where from time to time parties have attempted to get damages in cases like the present, but in no one instance has the action ever been held to be maintainable. If for centuries many persons have attempted to get a remedy for injuries like the present, and there is an entire absence of authority that such remedy exists, it shews the unanimous opinion of those who have held the place which we do now, that such an action is not maintainable." *Henderson* v. *Broomhead*, 4 H. & N., at 578, 157 Eng. Rep., at 968.

[11] See generally M. Newell, Law of Defamation, Libel and Slander 425, 450–459 (1890); J. Townshend, A Treatise on the Wrongs Called Slander and Libel 353–354 (2d ed. 1872). See, *e. g.*, *Lawson* v. *Hicks*, 38 Ala. 279, 285–288 (1862); *Myers* v. *Hodges*, 53 Fla. 197, 208–210, 44 So. 357, 361 (1907); *Smith* v. *Howard*, 28 Iowa 51, 56–57 (1869); *Gardemal* v. *McWilliams*, 43 La. Ann. 454, 457–458, 9 So. 106, 108 (1891); *Burke* v. *Ryan*, 36 La. Ann. 951, 951–952 (1884); *McLaughlin* v. *Cowley*, 127 Mass. 316, 319–320 (1879); *Barnes* v. *McCrate*, 32 Me. 442, 446–447 (1851); *Cooper* v. *Phipps*, 24 Ore. 357, 363–364, 33 P. 985, 986–987 (1893); *Shadden* v. *McElwee*, 86 Tenn. 146, 149–154, 5 S. W. 602, 603–605 (1887); *Cooley* v. *Galyon*, 109 Tenn. 1, 13–14, 70 S. W. 607, 610 (1902); cf. *Hoar* v. *Wood*, 44 Mass. 193, 197–198 (1841) (statements by counsel); *Marsh* v. *Ellsworth*, 50 N. Y. 309, 312–313 (1872) (same). Other courts appear to have taken a position closer to the English rule, which did not require any showing of pertinency or materiality. See, *e. g.*, *Chambliss* v. *Blau*, 127 Ala. 86, 89–90, 28 So. 602, 603 (1899); cf. *Calkins* v. *Sumner*, 13 Wis. 193, 197–198 (1860) (in absence of objection and ruling by court, lack of pertinency of responses to questions does not remove immunity, because witnesses are not in a position to know what statements are pertinent to the case).

Although some cases used the words "good faith," see, *e. g.*, *White* v. *Carroll*, 42 N. Y. 161, 166 (1870); *Shadden* v. *McElwee*, *supra*, at 149–150,

plaintiff could not recover even if the witness knew the statements were false and made them with malice.[12]

In the words of one 19th-century court, in damages suits against witnesses, "the claims of the individual must yield to

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5 S. W., at 603, good faith was established as a matter of law if the statements were pertinent and material to the judicial proceeding and given in response to questions. Indeed, even if the testimony was not pertinent, the plaintiff had the burden of proving bad faith. The testimony by respondents in this case would have received absolute protection at common law, because it was directly relevant to the criminal charges against petitioners. If the testimony had not been relevant, it is unlikely that petitioners would have stated a claim that their constitutional rights had been violated. Therefore, for purposes of § 1983 analysis, there is no material difference between the English rule and the American rule.

[12] JUSTICE MARSHALL's dissent relies heavily on an opinion rendered by this Court, *White* v. *Nicholls*, 3 How. 266, 286–288 (1845). The Court's discussion of privileged statements in judicial proceedings was purely dictum. The plaintiff sought damages for defendants' allegedly defamatory assertions in a petition to the President of the United States requesting the plaintiff's removal from office as a customs collector, a statement entitled at most to a qualified privilege. *White* v. *Nicholls* cannot be considered authoritative. In 1909 a leading commentator stated:

"[T]he demands of public policy on which the rule [of absolute immunity] is based are so controlling that there is only one considered case in the English or American reports in which the existence of the general doctrine of absolute immunity under the common law has ever been questioned. Strangely enough this isolated instance was a decision of the Supreme Court of the United States, in the course of which Mr. Justice Daniel, speaking for the court, denied both the rule and its policy; but this expression of opinion was *obiter*, since the case in issue was one of qualified immunity." Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Colum. L. Rev. 463, 465–466 (footnotes omitted).

In 1860, a New York court asserted that "the reasoning of Judge Daniel's opinion, and the propositions which he deduces where he goes beyond the case in hand, are clearly unsustained by principle or authority." *Perkins* v. *Mitchell*, 31 Barb. 461, 468 (N. Y. Sup. Ct.). In 1878, the West Virginia Supreme Court severely criticized *White* v. *Nicholls*, stating: "We have reviewed all the authorities, cited by Justice Daniel, and have seen, that none of them are in conflict with the position, that express malice may be shielded by its being expressed in judicial proceedings in certain forms. . . . And the review of the American authorities will show, that the overwhelming weight of authority is opposed to Justice Daniel's idea, that

the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." *Calkins* v. *Sumner*, 13 Wis. 193, 197 (1860). A witness' apprehension of subsequent damages liability might induce two forms of self-censorship. First, witnesses might be reluctant to come forward to testify. See *Henderson* v. *Broomhead*, *supra*, at 578–579, 157 Eng. Rep., at 968. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability. See *Barnes* v. *McCrate*, 32 Me. 442, 446–447 (1851). Even within the constraints of the witness' oath there may be various ways to give an account or to state an opinion. These alternatives may be more or less detailed and may differ in emphasis and certainty. A witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence. See Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Colum. L. Rev. 463, 470 (1909).[13] But the truthfinding process is better

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there is no case, in which an action of slander or libel will not lie for libelous matter, spoken or written in the course of regular judicial proceedings. . . . The authorities, both English and American, fully establish the position, that there is a class of absolutely privileged communications . . . ." *Johnson* v. *Brown*, 13 W. Va. 71, 128–129. See also *McGehee* v. *Insurance Co. of North America*, 112 F. 853 (CA5 1902) (declining to follow *White* v. *Nicholls*); *Shelfer* v. *Gooding*, 47 N. C. 175, 181–182 (1855) (suggesting that Justice Daniel miscited *Hodgson* v. *Scarlett*, 1 Barn. & Ald. 232, 106 Eng. Rep. 86 (K. B. 1818)). In short, *White* v. *Nicholls* was not even a reliable statement of the common law; still less was it "the most salient feature in the landscape of the common law at the time Congress acted" in 1871.

[13] In addition, some courts expressed concern that, in the absence of a privilege, honest witnesses might erroneously be subjected to liability because they would have difficulty proving the truth of their statements. This result seemed inappropriate in light of the witness' duty to testify. *E. g.*, *Calkins* v. *Sumner*, 13 Wis., at 198; *Barnes* v. *McCrate*, 32 Me., at 446–447; *Chambliss* v. *Blau*, 127 Ala., at 89, 28 So., at 603.

served if the witness' testimony is submitted to "the crucible of the judicial process so that the factfinder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies." *Imbler* v. *Pachtman*, 424 U. S. 409, 440 (1976) (WHITE, J., concurring in judgment).[14]

At least with respect to private witnesses, it is clear that § 1983 did not abrogate the absolute immunity existing at common law, and petitioners do not contend otherwise. Like the immunity for legislators at issue in *Tenney* v. *Brandhove*, the common law's protection for witnesses is "a tradition so well grounded in history and reason" that we cannot believe that Congress impinged on it "by covert inclusion in the general language before us." 341 U. S., at 376.

II

The Court has already addressed the question whether § 1983 permits damages recoveries from judges, prosecutors, and other persons acting "under color of law" who perform official functions in the judicial process. Again, we have found that, in light of common-law immunity principles, § 1983 did not impose liability on these officials. We have held that state judges are absolutely immune from liability for their judicial acts, *Pierson* v. *Ray*, 386 U. S. 547 (1967); *Stump* v. *Sparkman*, 435 U. S. 349 (1978), and that state prosecutors have absolute immunity from liability for their actions in initiating prosecutions, *Imbler* v. *Pachtman*, *supra*.

The central focus of our analysis has been the nature of the judicial proceeding itself. Thus, in his opinion concurring in the judgment in *Imbler* v. *Pachtman*, *supra*, JUSTICE WHITE explained that the absolute immunity of public prosecutors was "based on the policy of protecting the judicial process."

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[14] Cf. *Marsh* v. *Ellsworth*, 50 N. Y., at 312 (importance of placing all relevant evidence before court and jury "to enable them to arrive at the truth"); *Hoar* v. *Wood*, 44 Mass., at 197 (stressing impartiality of judge as sufficient antidote to inaccuracies and exaggerations by adversaries).

424 U. S., at 439. He explained that this protection extended equally to other participants, including counsel and witnesses.

> "The reasons for this rule are also substantial. It is precisely the function of a judicial proceeding to determine where the truth lies. The ability of courts, under carefully developed procedures, to separate truth from falsity, and the importance of accurately resolving factual disputes in criminal (and civil) cases are such that those involved in judicial proceedings should be 'given every encouragement to make a full disclosure of all pertinent information within their knowledge.'" *Ibid.*

The common law's protection for judges and prosecutors formed part of a "cluster of immunities protecting the various participants in judge-supervised trials," which stemmed "from the characteristics of the judicial process." *Butz* v. *Economou*, 438 U. S. 478, 512 (1978); cf. *King* v. *Skinner*, Lofft 54, 56, 98 Eng. Rep. 529 (K. B. 1772) ("[N]either party, witness, counsel, jury, or judge can be put to answer, civilly or criminally, for words spoken in office"). The common law recognized that

> "controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another . . . . Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation." *Butz*, *supra*, at 512.

In short, the common law provided absolute immunity from subsequent damages liability for all persons—governmental or otherwise—who were integral parts of the judicial process. It is equally clear that § 1983 does not authorize a damages claim against private witnesses on the one hand, or against judges or prosecutors in the performance of their respective duties on the other. When a police officer appears as a witness, he may reasonably be viewed as acting like any

other witness sworn to tell the truth—in which event he can make a strong claim to witness immunity;[15] alternatively, he may be regarded as an official performing a critical role in the judicial process, in which event he may seek the benefit afforded to other governmental participants in the same proceeding. Nothing in the language of the statute suggests that such a witness belongs in a narrow, special category lacking protection against damages suits. We must ask, however, whether anything in the legislative history of § 1983 points to a different conclusion.

III

Petitioners point to a number of references throughout the debates on the 1871 Act to widespread perjury by Ku Klux Klan witnesses in state criminal trials.[16] They urge that, because perjury was one of the specific evils with which Congress was concerned, recognizing an absolute immunity for witnesses would conflict with congressional intent. We find this argument unpersuasive. The Act consisted of several sections establishing different remedies for disorder and violence in the Southern States.[17] The legislative history and statutory language indicate that Congress intended perjury

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[15] The common-law immunity that protected witnesses as well as other participants in the judicial process drew no distinction between public officials and private citizens. See Veeder, *supra* n. 12, at 468–469. The general purposes underlying witness immunity at common law applied equally to official and private witnesses. Both types of witness took the stand and testified under oath in response to the questions of counsel. Both might be deterred by the prospect of subsequent, vexatious litigation.

[16] Brief for Petitioners 19–20, citing 1 B. Schwartz, Statutory History of the United States: Civil Rights 599–606, 625 (1970).

[17] In addition to § 1, codified as § 1983, and § 2, discussed in text *infra*, the Act permitted the President to use armed force in response to insurrection and domestic violence (§ 3), authorized the suspension of habeas corpus if the President deemed it necessary (§ 4), required grand and petit jurors to take a test oath (§ 5), and provided a civil penalty against persons who knew of and failed to prevent § 2 violations. 17 Stat. 13.

leading to unjust acquittals of Klan conspirators to be prohibited by § 2, the civil and criminal conspiracy section of the statute, now codified in relevant part at 42 U. S. C. § 1985(3) (1976 ed., Supp. V) and 18 U. S. C. § 241. But the language of § 1—now codified as § 1983—differs from that of § 2 in essential respects, and we find no evidence that Congress intended to abrogate the traditional common-law witness immunity in § 1983 actions.

The Ku Klux Act, 17 Stat. 13, was enacted on April 20, 1871, less than a month after President Grant sent a dramatic message to Congress describing the breakdown of law and order in the Southern States. Cong. Globe, 42d Cong., 1st Sess., 236, 244 (1871). During the debates, supporters of the bill repeatedly described the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern States. Hours of oratory were devoted to the details of Klan outrages—arson, robbery, whippings, shootings, murders, and other forms of violence and intimidation—often committed in disguise and under cover of night. These acts of lawlessness went unpunished, legislators asserted, because Klan members and sympathizers controlled or influenced the administration of state criminal justice. In particular, it was alleged that Klan members were obligated, by virtue of membership in the organization, to protect fellow members who were charged with criminal activity. They had a duty to offer themselves for service on grand and petit juries, and to violate their jurors' oaths by refusing to indict or to convict regardless of the strength of the evidence. They also were bound to appear as witnesses, and again to violate their oaths by committing perjury, if necessary, to exculpate their Klan colleagues.[18] Perjury was thus one of the

[18] Supporters of the bill repeatedly quoted the testimony before an investigating committee of two former Klan members, who described a Klan oath binding its members to commit perjury. Cong. Globe, 42d Cong., 1st Sess., 152, 158, 173, 201, 320–321, 322, 340, 437, 439, 443–444, 457, 458, 503, 516, 518, 653, 654, 687 (1871).

means by which the Klan prevented state courts from gaining convictions of Klan members for crimes against blacks and Republicans.

It is clear from the legislative debates that, in the view of the Act's sponsors, the victims of Klan outrages were deprived of "equal protection of the laws" if the perpetrators systematically went unpunished.[19] Proponents of the measure repeatedly argued that, given the ineffectiveness of state law enforcement and the individual's federal right to "equal protection of the laws," an independent federal remedy was necessary and Congress had the power to provide it.[20] See *Monroe* v. *Pape*, 365 U. S. 167, 174 (1961).

Section 2 was designed specifically to provide criminal and civil remedies in federal court for the conspiratorial activities of the Klan. Indeed the provision singles out those who "go in disguise upon the public highway." Earlier versions of the section enumerated precisely the activities that had been attributed to the Klan—murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of of-

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[19] See *id.*, at 322 (remarks of Rep. Stoughton); 334 (remarks of Rep. Hoar); 375 (remarks of Rep. Lowe); 428 (remarks of Rep. Beatty); 458, 459 (remarks of Rep. Coburn); 481–482 (remarks of Rep. Wilson); 486 (remarks of Rep. Cook); 501 (remarks of Sen. Frelinghuysen); 506 (remarks of Sen. Pratt); 608 (remarks of Sen. Pool); 697 (remarks of Sen. Edmunds).

[20] As Representative Coburn stated:

"The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices and bad passions or terror more easily. The marshal, clothed with more power than the sheriff, can make arrests with certainty, and, with the aid of the General Government, can seize offenders in spite of any banded and combined resistance such as may be expected." *Id.*, at 460.

See *id.*, at 334 (remarks of Rep. Hoar); 374 (remarks of Rep. Lowe); 428 (remarks of Rep. Beatty); 459–460 (remarks of Rep. Coburn); 486 (remarks of Rep. Cook); 501 (remarks of Sen. Frelinghuysen); 514 (remarks of Rep. Poland).

ficers in discharge of official duty, arson, or larceny. Cong. Globe, *supra*, at 317. The more general language in the final version of § 2 was also intended to apply to the abuses that had been described repeatedly in congressional debate.[21] Part of the provision is particularly well tailored to reach conspiracies to commit perjury in order to prevent punishment of fellow Klansmen. It provides penalties whenever two or more persons shall

> "conspire together . . . for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws . . . ."[22]

This evidence does not, however, tend to show that Congress intended to abrogate witness immunity in civil actions under § 1, which applied to wrongs committed "under color of . . . law." The bill's proponents were exclusively concerned with perjury resulting in unjust *acquittals*—perjury likely to be committed by private parties acting in furtherance of a conspiracy—and not with perjury committed "under color of

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[21] Compare *id.*, at 317 (original version introduced by Rep. Shellabarger) with *id.*, at 477–478 (more general language in amended version); see *id.*, at 567, 702 (Senate amendment adding language punishing conspiracy for obstructing the due course of justice).

[22] It is noteworthy that the imposition of criminal liability on persons for conspiracy to give false evidence was not in derogation of the common law as it existed in 1871. Witnesses were traditionally subject to a prosecution for perjury committed in the course of their evidence, "or for conspiracy in case of a combination of two or more to give false evidence." Newell, *supra* n. 11, at 450, § 44. The offense of perjury had been shaped in English law during the 16th and 17th centuries by Parliament, the Court of Star Chamber, and common-law judges. 4 W. Holdsworth, A History of English Law 515–519 (1924); S. Milsom, Historical Foundations of the Common Law 418 (2d ed. 1981).

law" that might lead to unjust *convictions*. In hundreds of pages of debate there is no reference to the type of alleged constitutional deprivation at issue in this case: perjury by a *government official* leading to an unjust conviction. Indeed, the legislative history is virtually silent even with regard to perjury by *private* persons leading to convictions of innocent defendants.[23] There is a simple enough reason for this lacuna: the Klan had other, more direct, means of dealing with its victims. A "reign of terrorism and bloodshed" did not require the formal processes of law; at most, drumhead tribunals were convened at dead of night.[24] Even when the organization's intended victims had been taken into custody and charged with crimes, the evidence before Congress suggested that the Klan resorted to vigilante justice rather than courtroom perjury.[25]

In summary, the legislative history supports criminal punishment under § 2 for a witness who conspired to give perjured testimony favorable to a defendant, with the effect of preventing effective enforcement of the laws, and liability in a civil suit against the perjured witness by the defendant's victim. But these are not the issues before us today. We are asked to extrapolate from pro-defendant perjury to pro-prosecution perjury, and if willing to make that step, we are further invited to apply legislative history relating to § 2—a section specifically directed toward private conspiracies—to § 1—a section designed to provide remedies for abuses under

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[23] In several hundred pages of small triple-columned print, only one Senator—not a member of the Committee that reported the bill—referred to the possibility that perjury was being used to convict the innocent. See Cong. Globe, 42d Cong., 1st Sess., 653 (1871) (remarks of Sen. Osborn). His comments were made in connection with a proposal to retain a test oath for grand and petit jurors.

[24] The debates describe nocturnal Klan meetings passing decrees condemning political enemies. See *id.*, at 157, 209, 320, 321, 504.

[25] For references to lynch mobs attacking suspects held in custody, see *id.*, at 156, 157, 166, 200, 321, 444, 446, 447.

color of law. We decline the invitation. The debates of the 42d Congress do not support petitioners' contention that Congress intended to provide a § 1 damages remedy against police officers or any other witnesses.[26]

IV

Petitioners, finally, urge that we should carve out an exception to the general rule of immunity in cases of alleged perjury by police officer witnesses.[27] They assert that the reasons supporting common-law immunity—the need to

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[26] The legislative history of the Civil Rights Act of 1866, discussed at length by JUSTICE MARSHALL's dissent, simply does not speak to the question whether Congress intended witnesses—private parties or public officials—to be civilly liable for false testimony resulting in an unjust criminal conviction. It makes clear that judges and other "state officials integral to the judicial process" are subject to *criminal* liability for violating the constitutional rights of individuals. But we have never questioned that proposition, and we do not do so now. Moreover, witnesses enjoyed no common-law immunity from criminal prosecution for perjury. See n. 22, *supra*. Therefore the *criminal* provisions of the 1866 Act and its successors apply to official witnesses. See n. 32, *infra*. But the 1866 legislative history, to the extent that it sheds any light on the meaning of the 1871 Act, does not support *civil* liability for such witnesses, because it does not show the requisite congressional intent to override the clearly established common-law immunity of witnesses from civil liability. With respect to witnesses, the legislative history of the 1866 Act is simply silent, and we are unwilling to assume that, whenever legislators referred to "state judicial officials" or to "the judicial power of the State," they were describing witnesses as well as judges, sheriffs, and marshals.

Moreover, our decisions recognizing absolute immunity for judges and prosecutors from civil liability under the 1871 Act implicitly reject the position that the legislative history of the 1866 Act defines the scope of immunity for purposes of the 1871 Act. See *Pierson* v. *Ray*, 386 U. S. 547 (1967); *Imbler* v. *Pachtman*, 424 U. S. 409 (1976).

[27] The contours of the proposed exception are not clear. Similar considerations would presumably apply to other government officials and experts, including coroners, medical examiners, psychiatric experts, and social workers.

avoid intimidation and self-censorship—apply with diminished force to police officers. Policemen often have a duty to testify about the products of their investigations, and they have a professional interest in obtaining convictions which would assertedly counterbalance any tendency to shade testimony in favor of potentially vindictive defendants. In addition, they are subject to § 1983 lawsuits for the performance of their other duties, as to which they have only qualified immunity, and their defense is generally undertaken by their governmental employers. Further, petitioners urge that perjured testimony by police officers is likely to be more damaging to constitutional rights than such testimony by ordinary citizens, because the policeman in uniform carries special credibility in the eyes of jurors. And, in the case of police officers, who cooperate regularly with prosecutors in the enforcement of criminal law, prosecution for perjury is alleged to be so unlikely that it is not an effective substitute for civil damages.

These contentions have some force. But our cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant.[28] A police officer on the witness stand performs the same functions as any other witness; he is subject to compulsory process, takes an oath, responds to questions on direct examination and cross-examination, and may be prosecuted subsequently for perjury.

Moreover, to the extent that traditional reasons for witness immunity are less applicable to governmental witnesses,

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[28] See *Butz* v. *Economou*, 438 U. S. 478, 513–514 (1978) (administrative law judges enjoy absolute judicial immunity even though they are in the Executive Branch); *Imbler* v. *Pachtman*, *supra*, at 430–431 (reserving the question whether a prosecutor, who is absolutely immune for decisions to initiate a prosecution or put witnesses on the stand, has similar immunity for administrative or investigative tasks); cf. *Hampton* v. *City of Chicago*, 484 F. 2d 602, 608 (CA7 1973) (prosecutor's immunity ceases when he acts in a capacity other than his quasi-judicial role), cert. denied, 415 U. S. 917 (1974).

other considerations of public policy support absolute immunity more emphatically for such persons than for ordinary witnesses. Subjecting government officials, such as police officers, to damages liability under § 1983 for their testimony might undermine not only their contribution to the judicial process but also the effective performance of their other public duties.

Section 1983 lawsuits against police officer witnesses, like lawsuits against prosecutors, "could be expected with some frequency." Cf. *Imbler* v. *Pachtman*, 424 U. S., at 425. Police officers testify in scores of cases every year, and defendants often will transform resentment at being convicted into allegations of perjury by the State's official witnesses. As the files in this case show, even the processing of a complaint that is dismissed before trial consumes a considerable amount of time and resources.[29]

This category of § 1983 litigation might well impose significant burdens on the judicial system and on law enforcement resources. As this Court noted when it recognized absolute immunity for prosecutors in *Imbler*, if the defendant official "could be made to answer in court each time [a disgruntled defendant] charged him with wrongdoing, his energy and at-

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[29] Moreover, lawsuits alleging perjury on the stand in violation of the defendant's due process rights often raise material questions of fact, inappropriate for disposition at the summary judgment stage. The plaintiff's complaint puts in issue the falsity and materiality of the allegedly perjured statements, and the defendant witness' knowledge and state of mind at the time he testified. Sometimes collateral-estoppel principles will permit dismissal at the pretrial stage. But if the truth of the allegedly perjured statement was not necessarily decided in the previous criminal verdict, if there is newly discovered evidence of falsity, or if the defendant concedes that the testimony was inaccurate, the central issue will be the defendant's state of mind. Summary judgment is usually not feasible under these circumstances. C. Wright, Law of Federal Courts 493 (3d ed. 1976). If summary judgment is denied, the case must proceed to trial and must traverse much of the same ground as the original criminal trial.

tention would be diverted from the pressing duty of enforcing the criminal law." 424 U. S., at 425. To some degree the individual's burden might be alleviated by the government's provision of counsel, but a case that goes to trial always imposes significant emotional and other costs on every party litigant.

It is not sufficient to assert that the burdens on defendants and the courts could be alleviated by limiting the cause of action to those former criminal defendants who have already vindicated themselves in another forum, either on appeal or by collateral attack. We rejected a similar contention in *Imbler*. Petitioner contended that "his suit should be allowed, even if others would not be, because the District Court's issuance of the writ of habeas corpus shows that his suit has substance." *Id.*, at 428, n. 27. We declined to carve out such an exception to prosecutorial immunity, noting that petitioner's success in a collateral proceeding did not necessarily establish the merits of his civil rights action. Moreover, we noted that "using the habeas proceeding as a 'door-opener' for a subsequent civil rights action would create the risk of injecting extraneous concerns into that proceeding." *Ibid.* We emphasized that, in determining whether to grant postconviction relief, the tribunal should focus solely on whether there was a fair trial under law. "This focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment." *Id.*, at 427. The same danger exists in the case of potential liability for police officer witnesses.[30]

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[30] We are not writing on a clean slate, and it is not for us to craft a new rule designed to enable trial judges to dismiss meritless claims before trial but to allow recovery in cases of demonstrated injustice, when an innocent plaintiff has already obtained postconviction relief. The States remain free to grant relief in such cases and, of course, Congress has the power to fashion an appropriate remedy if it perceives the need for one.

There is, of course, the possibility that, despite the truth-finding safeguards of the judicial process, some defendants might indeed be unjustly convicted on the basis of knowingly false testimony by police officers.[31] The absolute immunity for prosecutors recognized in *Imbler* bars one possible avenue of redress for such defendants. Similarly, in this case, the absolute witness immunity bars another possible path to recovery for these defendants. But we have recognized, again and again, that in some situations, the alternative of limiting the official's immunity would disserve the broader public interest. As Judge Learned Hand wrote years ago:

> "As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert. denied, 339 U. S. 949 (1950).[32]

In short, the rationale of our prior absolute immunity cases governs the disposition of this case. In 1871, common-law immunity for witnesses was well settled. The principles set forth in *Pierson* v. *Ray* to protect judges and in *Imbler* v. *Pachtman* to protect prosecutors also apply to witnesses, who perform a somewhat different function in the trial process but whose participation in bringing the litigation to a

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[31] There is no reason to believe, however, that this risk is any greater than, or indeed as great as, the risk of an unjust conviction resulting from a misidentification or other unintentional mistake. There is no federal damages remedy for such innocent persons, or for those who are acquitted after undergoing the burdens of a criminal trial.

[32] Finally, in those cases in which the judicial process fails, the public is not powerless to punish misconduct. Like prosecutors and judges, official witnesses may be punished criminally for willful deprivations of constitutional rights under 18 U. S. C. § 242.

just—or possibly unjust—conclusion is equally indispensable.

The decision of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE BRENNAN, dissenting.

JUSTICE MARSHALL's dissenting opinion, *post*, presents an eloquent argument that Congress, in enacting § 1983, did not intend to create any absolute immunity from civil liability for "government officials involved in the judicial process . . . ." *Post*, at this page and 347. Whatever the correctness of his historical argument, I fear that the Court has already crossed that bridge in *Pierson* v. *Ray*, 386 U. S. 547 (1967), and *Imbler* v. *Pachtman*, 424 U. S. 409 (1976).

I entirely agree with JUSTICE MARSHALL, however, that the policies of § 1983 and of common-law witness immunity, as they apply to witnesses who are police officers, do not justify any absolute immunity for perjurious testimony. I therefore dissent for the reasons stated in Part IV of JUSTICE MARSHALL's opinion.

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN joins, except as to Part I, dissenting.

I cannot agree that police officers are absolutely immune from civil liability under 42 U. S. C. § 1983 (1976 ed., Supp. V) for testimony given in criminal proceedings. The extension of absolute immunity conflicts fundamentally with the language and purpose of the statute. I would therefore be reluctant in any case to conclude that § 1983 incorporates common-law tort immunities that may have existed when Congress enacted the statute in 1871. But in this case the conclusion is especially unjustified. First, absolute immunity for witnesses was by no means a settled legal proposition in 1871. Most notably, in 1845 this Court had cast serious doubt on the existence of absolute immunity for testimony given in judicial proceedings. Second, the origins and history of § 1983 strongly suggest that Congress meant to abrogate any absolute immunity for government officials involved

in the judicial process, including police officers. Finally, considerations of public policy deemed necessary to justify absolute immunity in our past cases do not support an absolute immunity for officer-witnesses.

I

The majority opinion correctly states that this case presents a question of statutory construction. *Ante*, at 326. Yet it departs from generally accepted principles for interpreting laws.

In all other matters of statutory construction, this Court begins by focusing on the language of the statute itself.[1] "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). The language of § 1983 provides unambiguous guidance in this case. A witness is most assuredly a "person," the word Congress employed to describe those whose conduct § 1983 encompasses.[2] The ma-

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[1] *E. g., Jackson Transit Authority* v. *Transit Union*, 457 U. S. 15, 23 (1982); *Bread Political Action Comm.* v. *FEC*, 455 U. S. 577, 580 (1982); *Universities Research Assn.* v. *Coutu*, 450 U. S. 754, 771 (1981); *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U. S. 176, 187 (1980).

[2] The majority criticizes a literal reading of the statute and refers to *National Society of Professional Engineers* v. *United States*, 435 U. S. 679 (1978). *Ante*, at 330, and n. 8. In *National Society*, the Court noted that the language of § 1 of the Sherman Act "cannot mean what it says." 435 U. S., at 687. But there is no logical reason why the word "person" in § 1983 should be read to exclude a witness. Moreover, on a number of occasions, this Court has relied on the plain language of § 1983. See, *e. g.*, *Maine* v. *Thiboutot*, 448 U. S. 1, 4 (1980) ("The question before us is whether the phrase 'and laws' as used in § 1983 means what it says, or whether it should be limited to some subset of laws. Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents' claim . . ."); *Parratt* v. *Taylor*, 451 U. S. 527, 534 (1981) (relying in part on text of § 1983 to reject limitation of statute to intentional deprivations); *Owen* v. *City of Independence*, 445 U. S. 622, 635 (1980) (relying on the "absolute and unqualified" language of § 1983 to reject a qualified immunity for municipalities); *Monell* v. *New York City*

> "Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force." *Ibid.*

Such "insubstantial findings" were not present in *Meadowmoor*. But in this case, the Mississippi Supreme Court has relied on isolated acts of violence during a limited period to uphold respondents' recovery of *all* business losses sustained over a 7-year span. No losses are attributed to the voluntary participation of individuals determined to secure "justice and equal opportunity."[66] The court's judgment "screens reality" and cannot stand.[67]

Respondents' supplemental brief also demonstrates that on the present record no judgment may be sustained against most of the petitioners. Regular attendance and participation at the Tuesday meetings of the Claiborne County Branch of the NAACP is an insufficient predicate on which to impose liability. The chancellor's findings do not suggest that any illegal conduct was authorized, ratified, or even discussed at any of the meetings. The Sheriff testified that he was kept

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dor system were held with guns and severely beaten about the head while being told 'to join the union'; carloads of men followed vendors' trucks, threatening the drivers, and in one instance shot at the truck and driver." 312 U. S., at 291–292.

[66] See n. 62, *supra*.

[67] For the same reasons, the permanent injunction entered by the chancellor must be dissolved. Since the boycott apparently has ended, the Mississippi Supreme Court may wish to vacate the entire injunction on the ground that it is no longer necessary; alternatively, the injunction must be modified to restrain only unlawful conduct and the persons responsible for conduct of that character.

> interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871).[4]

It might be appropriate to import common-law defenses and immunities into the statute if, in enacting § 1983, Congress had merely sought to federalize state tort law. But Congress "intended to give a broad remedy for violations of *federally* protected civil rights." *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 685 (1978) (emphasis added). Different considerations surely apply when a suit is based on a federally guaranteed right—in this case, the constitutional right to due process of law—rather than the common law.[5] The Congress that enacted § 1983 had concluded that "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though

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[4] See also Cong. Globe, 42d Cong., 1st Sess., App. 217 (1871) (Sen. Thurman in opposition) ("[T]here is no limitation whatsoever upon the terms that are employed [in § 1983], and they are as comprehensive as can be used"); *id.*, at 800 (Rep. Perry) ("Now, by our action on this bill we have asserted as fully as we can assert the mischief intended to be remedied"); *id.*, at 476 (Rep. Dawes) (The person who "invades, trenches upon, or impairs one iota or tittle of the least of [constitutional rights], to that extent trenches upon the Constitution and laws of the United States, and this Constitution authorizes us to bring him before the courts to answer therefor").

[5] See Note, 68 Harv. L. Rev. 1229, 1232 (1955) ("When a suit is based on deprivation of a federally guaranteed right, the need to enforce federal limitations on state action constitutes a consideration in favor of recovery which is not present in suits under state law"); P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 336 (2d ed. 1973) ("[W]here constitutional rights are at stake the courts are properly astute, in construing statutes, to avoid the conclusion that Congress intended to use the privilege of immunity . . . in order to defeat them").

the same act may constitute both a state tort and the deprivation of a constitutional right." *Monroe* v. *Pape*, 365 U. S. 167, 196 (1961) (Harlan, J., concurring). Therefore, immunities that arose in the context of tort actions against private parties provide little guidance for actions against state officials for constitutional violations. "It would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection." *Id.*, at 196, n. 5.

Given the language and purpose of § 1983, I have serious doubts about any further extension of absolute immunity to state officials in actions under § 1983. At a minimum, I do not believe the Court should extend absolute immunity to state officials "in the absence of the most convincing showing that the immunity is necessary." *Imbler* v. *Pachtman*, *supra*, at 434 (WHITE, J., concurring in judgment). For the reasons elaborated below, I believe that the case for absolute witness immunity is far from convincing.

II

The majority's decision is predicated on its conclusion that "[i]n 1871, common-law immunity for witnesses was well settled." *Ante*, at 345. I disagree with this view of the law as it stood when Congress enacted § 1983.

To begin with, some of petitioners' allegations would clearly not have been barred by doctrines of immunity at common law. The majority discusses only the immunities associated with actions for defamation at common law. *Ante*, at 330–331, n. 9. However, petitioner Briscoe did not allege solely that Officer LaHue had testified falsely at his trial, a claim resembling one for defamation. He also alleged that Officer LaHue had made knowingly false charges at two probable-cause hearings, one of which resulted in Briscoe's arrest.[6] At common law, such an allegation would have

[6] See Memorandum in Support of Complaint, App. 9–11.

formed the basis of an action on the case for malicious prosecution,[7] or the related action known by its Latin name, *crimen feloniae imposuit* (imputing the crime of felony).[8] Both English and American courts routinely permitted plaintiffs to bring actions alleging that the defendant had made a false and malicious accusation of a felony to a magistrate or other judicial officer.[9] No immunity barred these suits. Indeed, an absolute immunity would have been illogical, for it would have allowed a defendant to avoid the related common-law action for false imprisonment by the simple expedient of proffering false charges before a magistrate and thereby securing an arrest warrant.[10]

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[7] The action for malicious prosecution grew out of the related action for conspiracy. As early as 1293, various statutes were enacted to aid persons who had been falsely and maliciously indicted or accused of crimes by conspiracy among the defendants. In such cases a writ of conspiracy was employed in seeking redress. By the 16th century, this action was replaced by an action on the case in the nature of a conspiracy, but the allegation of a conspiracy was soon treated as surplusage. The result was an action on the case. See M. Bigelow, Leading Cases on the Law of Torts 190–191 (1875); 1 T. Street, The Foundations of Legal Liability 328–329 (1906); 2 W. Holdsworth, A History of English Law 366 (4th ed. 1936).

[8] See, *e. g.*, *Blizard* v. *Kelly*, 2 Barn. & Cress. 283, 284, 107 Eng. Rep. 389 (K. B. 1823) ("The legal sense and meaning of those words is, that the party made the charge of felony before a magistrate"); *Davis* v. *Noak*, 1 Stark. 377, 382, 171 Eng. Rep. 502, 504 (N. P. 1816).

[9] See, *e. g.*, *Fuller* v. *Cook*, 3 Leo. 100, 74 Eng. Rep. 567 (K. B. 1584); *Knight* v. *Jermin*, Cro. Eliz. 134, 78 Eng. Rep. 391 (K. B. 1589); *Clarke* v. *Postan*, 6 Car. & P. 423, 172 Eng. Rep. 1304 (N. P. 1834); *Wheeler* v. *Nesbitt*, 24 How. 544, 546 (1861); *Bunton* v. *Worley*, 4 Ky. 38 (1815); *Maddox* v. *Jackson*, 4 Munf. 462 (Va. 1815); *Hill* v. *Miles*, 9 N. H. 9, 13 (1837) (permitting an action for "maliciously and without reasonable or probable cause, charging a party with felony before a magistrate"); *Briggs* v. *Byrd*, 34 N. C. 377, 380 (1851); *Center* v. *Spring*, 2 Iowa 393 (1856); *Wilkinson* v. *Arnold*, 11 Ind. 45 (1858); *Rockwell* v. *Brown*, 36 N. Y. 207, 209 (1867).

[10] I reject the majority's conclusion that the issue of immunity for testimony by a police officer at a probable-cause hearing is not before this Court. The majority emphasizes that the question presented in the petition for certiorari only mentions testimony by a police officer during a crim-

Even with respect to the common-law action for defamation which the majority discusses, I cannot agree that an absolute immunity for witnesses was well-settled law in 1871. In 1845, this Court had rejected both the rule of absolute im-

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inal trial. *Ante*, at 329, n. 5. This literal reading of the question presented is contrary to our Rules, which provide that "[t]he statement of a question presented will be deemed to comprise every subsidiary question fairly included therein." This Court's Rule 21.1(a). See also *Peters* v. *Kiff*, 407 U. S. 493, 495 (1972) (MARSHALL, J, announcing the judgment of the Court and an opinion in which Douglas and Stewart, JJ., joined) (a challenge to the composition of a grand jury in the questions presented encompassed a challenge to the composition of the petit jury even though the question presented did not mention petit juries).

I believe that the question of witness immunity in one state-court criminal proceeding, the trial, fairly includes the issue of witness immunity in a related state-court criminal proceeding, the probable-cause hearing. The petition for certiorari in this case specifically referred to Officer LaHue's testimony at "several judicial proceedings relating to the state criminal prosecution," Pet. for Cert. 7, and it spoke in general terms about absolute witness immunity, *e. g.*, *id.*, at 14, 16–18, 20. Both petitioners and respondents obviously thought the issue was before us since they quoted lengthy excerpts from Officer LaHue's testimony at the probable-cause hearings in their briefs before this Court. See Brief for Petitioners 3–5; Brief for Respondents 2–4. Petitioner Briscoe has asserted respondent LaHue's liability for testimony at the probable-cause hearing throughout this proceeding. *E. g.*, App. 9–11, 17–22. Indeed, the District Court appeared to believe that the *only* issue raised by Briscoe's complaint involved testimony at a probable-cause hearing. See *Briscoe* v. *LaHue*, No. S 78–139 (ND Ind., Oct. 3, 1978), App. to Pet. for Cert. A–47. The Court of Appeals discussed the probable-cause hearing testimony, 663 F. 2d 713, 715, and its holding was framed in general terms regarding testimony at judicial proceedings, see *ante*, at 328, which would certainly include probable-cause hearings.

The majority nonetheless clearly leaves open the issue of immunity for testimony at a probable-cause hearing. *Ante*, at 329, n. 5. The absence of any immunity in such cases at common law should alone undermine any claim to absolute immunity under § 1983. In addition, the policy considerations applicable to testimony at a probable-cause hearing differ substantially from those relevant to testimony at a trial. For instance, the absence of cross-examination at probable-cause hearings increases the risk that false testimony will go undetected.

munity and its logical underpinnings, proposing instead that a plaintiff allege and prove malice in the case of privileged communications.

In *White* v. *Nicholls*, 3 How. 266 (1845), Justice Daniel wrote for a unanimous Court in dicta a veritable treatise on the law of defamation and privileged communications.[11] The Court began by noting the existence of various exceptions "which, in the elementary treatises, and in the decisions upon libel and slander, have been denominated privileged communications or publications." *Id.*, at 286. One of these "exceptions" was for "[w]ords used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used." *Id.*, at 287. The Court then stated:

> "But the term 'exceptions,' as applied to cases like those just enumerated, could *never* be interpreted to mean that there is a class of actors or transactions placed above the cognisance of the law, absolved from the commands of justice. It is difficult to conceive how, in society where rights and duties are relative and mutual, there can be tolerated those who are privileged to do injury *legibus soluti;* and still more difficult to imagine, how such a privilege could be instituted or tolerated upon the principles of social good. The privilege spoken of in the books should, in our opinion, be taken with strong and well-defined qualifications. It properly signifies this, and nothing more. That the excepted instances shall so far change the ordinary rule with respect to slanderous or libellous matter, as to remove the regular and usual presumption of malice, and to make it incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by the facts and circumstances connected with that matter, or with the situation of the parties, adequate to authorize the conclusion." *Ibid.* (emphasis added).

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[11] The Court itself noted that its examination of the law was "extended" because of the "importance of [the] subject." 3 How., at 291.

The Court invoked these principles in discussing the specific exception for words used in a judicial proceeding, relying on the views of one English judge who had rejected absolute immunity.[12]

> "With respect to words used in a course of judicial proceeding, it has been ruled that they are protected by the occasion, and cannot form the foundation of an action of slander *without proof of express malice;* . . . in the case of Hodgson *v.* Scarlett, 1 Barn. & Ald. 247, it is said by Holroyd, J., speaking of the words of counsel in the argument of a cause, 'If they be fair comments upon the evidence, and relevant to the matter in issue, then *unless malice be shown*, the occasion justifies them. If, however, it be proved that they were not spoken *bona fide*, or express malice be shown, then they may be actionable.'" *Id.*, at 288 (emphasis added).[13]

If Congress in 1871 actually examined the subject of common-law witness immunity, it could hardly have overlooked *White* v. *Nicholls* since that case was the sole pronouncement on the subject from the highest Court in the land. Congress might well have concluded—as did the Tennessee Supreme Court in 1871—that the principles enunciated in *White* were "settled law." *Saunders* v. *Baxter*, 53 Tenn. 369, 383. In an age when federal common law prevailed, see *Swift* v. *Tyson*, 16 Pet. 1 (1842), a Supreme Court decision would have been the natural focus for a Congress establishing a federal remedy which was accompanied by a new grant of federal jurisdiction.[14] In short, the most salient feature in the

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[12] *Hodgson* v. *Scarlett*, 1 Barn. & Ald. 232, 246–247, 106 Eng. Rep. 86, 91 (K. B. 1818) (Holroyd, J.). See also *Kendillon* v. *Maltby*, Car. & M. 402, 409, 174 Eng. Rep. 562, 566 (N. P. 1842) (Lord Denman, C. J.); *Thomas* v. *Churton*, 2 B. & S. 475, 477, 121 Eng. Rep. 1150, 1151 (Q. B. 1862) (Cockburn, C. J.) (reserving the question).

[13] The Court explained that "falsehood and the absence of probable cause will amount to proof of malice." 3 How., at 291.

[14] This jurisdictional grant was contained in the Act of Apr. 20, 1871, § 1, 17 Stat. 13, and was the forerunner of 28 U. S. C. § 1343(3).

landscape of the common law at the time Congress acted was an opinion rebuffing absolute immunity in favor of a qualified immunity based on the absence of malice.[15]

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[15] The views of the Supreme Court obviously conflicted with those expressed by some state-court judges. That is precisely the point: federal common law diverged from state common law as to witness immunity. The majority reasons as if state common law controlled the matter. See *ante*, at 331–333, and nn. 11, 12. Because federal common law prevailed when Congress enacted § 1983, and because the federal remedy provided in the Act was accompanied by a new grant of federal jurisdiction, I believe *White* v. *Nicholls* would have been the natural focus of attention for the 42d Congress. The majority does not explain why it thinks that the 42d Congress would instead have focused on state common law.

In any event, the majority's analysis of state-court decisions is sorely deficient. The proper inquiry in this case as defined by the majority itself is on common-law principles as understood by the Members of the 42d Congress. See *ante*, at 330. The 42d Congress enacted § 1983 in 1871. Yet the majority inexplicably relies on 11 cases decided *after* 1871. These cases are plainly irrelevant to the question of the 42d Congress' intent. Unless it was clairvoyant, the 42d Congress could not possibly have had access to most of the decisions relied on by the majority. By the same token, Congress certainly would not have had the benefit of the views of Van Vechter Veeder, *ante*, at 332, n. 12, who wrote his article in 1909.

The only arguably relevant support that the majority cites for the view that Congress extended absolute immunity to police officers who give perjurious testimony consists of eight state-court cases decided before 1871. *None* of these cases involved testimony by an official of the State, let alone a police officer, and the only support the majority can muster for the notion that the common-law witness immunity drew no distinction between public officials and private citizens is the 1909 article by Van Vechter Veeder. See *ante*, at 336, n. 15. In three of the pre-1871 cases, plaintiffs suing for defamation prevailed completely. In *Smith* v. *Howard*, 28 Iowa 51 (1869), and *White* v. *Carroll*, 42 N. Y. 161 (1870), the State Supreme Courts *affirmed* an award of damages recovered against a defendant who had slandered the plaintiff from the witness stand. Similarly, in *Perkins* v. *Mitchell*, 31 Barb. 461 (N. Y. 1860), the state court affirmed a trial court order rejecting a defendant's demurrer to a complaint. It held that a plaintiff *could* sue for defamatory statements made by a physician to a Justice of the Peace that resulted in the plaintiff's commitment as a lunatic. Whatever might have been said about immunity in these cases was, to use the majority's language, *ante*, at 332, n. 12, "purely dictum." Two other cases, *Hoar* v. *Wood*, 44 Mass. 193 (1841), and *Shelfer* v. *Gooding*, 47 N. C. 175

III

The majority's decision is also predicated on its conclusion that there is "no evidence that Congress intended to abrogate the traditional common-law witness immunity in § 1983 actions." *Ante*, at 337. In fact, there is considerable evidence in the legislative history that Congress did intend to abrogate the immunity of participants in state judicial proceedings.

A

At petitioners' urging,[16] the Court has extensively examined the legislative history of § 2 of the 1871 Ku Klux Klan Act, 17 Stat. 13, now codified as 42 U. S. C. § 1985(3) (1976 ed., Supp. V). However, the forerunner of § 1983 was § 1 of the 1871 Act, not § 2. As the majority points out, *ante*, at 337, 340–341, the two sections differ significantly in their language and purpose. It is thus hardly surprising that the debates over § 2 shed little light on § 1. In my view the inquiry should focus on the history of § 1. Only by examining the

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(1855), involved statements by *counsel* and not statements by a witness. This leaves three pre-1871 state cases upholding witness immunity, and these only as to private witnesses.

As between a smattering of state-court opinions and the extended and well-reasoned analysis of a unanimous Supreme Court, I think the latter would have commanded the attention of the Members of the 42d Congress. In fact, while Members of the 42d Congress displayed little interest in or familiarity with state-court decisions, they often focused on cases from the United States Supreme Court in their deliberations on the 1871 Act. See, *e. g.*, Cong. Globe, 42d Cong., 1st Sess., 375 (1871) (Cong. Globe) (Rep. Lowe) (citing *Prigg* v. *Pennsylvania*, 16 Pet. 539 (1842)); Cong. Globe, at 459 (Rep. Coburn) (citing *Cohens* v. *Virginia*, 6 Wheat. 264 (1821)); Cong. Globe, at App. 84 (Rep. Bingham) (citing *Barron* v. *Mayor of Baltimore*, 7 Pet. 243 (1833), and *Moore* v. *Illinois*, 14 How. 13 (1852)); Cong. Globe, at App. 188 (Rep. Willard) (citing the majority and dissenting opinions in the *Dred Scott* case, *Dred Scott* v. *Sandford*, 19 How. 393 (1857)); Cong. Globe, at 242 (Sen. Bayard) (citing *Withers* v. *Buckley*, 20 How. 84 (1858)); Cong. Globe, at App. 311 (Rep. Shellabarger) (citing *Jones* v. *Van Zandt*, 5 How. 215 (1847)).

[16] Brief for Petitioners 19–20.

genesis of that provision can it be determined whether Congress intended to abrogate certain common-law immunities.

The origin of § 1 is not open to serious question. The language and concept of the provision were derived in large part from § 2 of the Civil Rights Act of 1866, 14 Stat. 27.[17] The author of § 1 clearly stated the relationship between the two Acts in introducing the 1871 measure:

> "My first inquiry is as to the warrant which we have for enacting such a section as this [§ 1 of the 1871 Act]. The model for it will be found in the second section of the act of April 9, 1866, known as the 'civil rights act.' *That section provides a criminal proceeding in identically the same case as this one provides a civil remedy for*, except that the deprivation under color of State law must, under the civil rights act, have been on account of race, color, or former slavery. This section of the bill, *on the same state of facts*, not only provides a civil remedy for

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[17] As enacted, § 1 of the 1871 Act read in pertinent part:

"That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . ." Act of Apr. 20, 1871, § 1, 17 Stat. 13.

Section 2 of the 1866 Civil Rights Act read in pertinent part:

"That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court."

> persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871) (emphasis added).

Because the two provisions are so intimately connected, a full examination of the history of § 1 of the 1871 Act must begin with § 2 of the 1866 Act.

B

The Civil Rights Act of 1866 was the first federal statute to provide broad protection in the field of civil rights. Its primary purpose was to guarantee the newly emancipated Negro equality with whites before the law. Section 2 of the Act provided criminal liability for any person who, acting under color of law, deprived another of his rights because of race. This provision was extensively debated. Controversy centered in large part over its intended application to state officials integral to the judicial process.

The liability of state judicial officials and all official participants in state judicial proceedings under § 2 was explicitly and repeatedly affirmed.[18] The notion of immunity for such officials was thoroughly discredited. The Senate sponsor of

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[18] See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., 475–476 (1866) (exchange between Sen. Trumbull, the Senate sponsor of the bill, and Sen. Cowan); *id.*, at 1155 (exchange between Rep. Thayer and Rep. Eldridge); *id.*, at 1267 (Rep. Raymond) ("[I]f a judge or sheriff or any other officer of a State court should take part in enforcing any State law making distinctions among the citizens of the State on account of race or color, he shall be deemed guilty of a misdemeanor and punished with fine and imprisonment under this bill); *id.*, at 500 (Sen. Cowan in opposition) (noting that "the judge, the constable, the sheriff, the marshal, and everybody" was liable under § 2); *id.*, at 598 (Sen. Davis in opposition) ("All the parties" who participate in the unjust conviction of a Negro would be liable, including "the grand jury, the petit jury, the judge, and the officer of the law" who executes the judgment).

the Act deemed the idea "akin to the maxim of the English law that the King can do no wrong. It places officials above the law. It is the very doctrine out of which the rebellion [the Civil War] was hatched." Cong. Globe, 39th Cong., 1st Sess., 1758 (1866) (Sen. Trumbull). Thus, § 2 was "aimed directly at the State judiciary." *Id.*, at 1155 (Rep. Eldridge). See also *id.*, at 1778 (Sen. Johnson, member of the Senate Judiciary Committee) (§ 2 of the 1866 Act "strikes at the judicial department of the governments of the States").

Two unsuccessful efforts were made to amend § 2. First, Representative Miller introduced an amendment to exempt state judges from criminal liability. *Id.*, at 1156. Second, and of particular significance, Representative Bingham introduced an amendment to substitute a civil action for the criminal sanctions contained in the proposal. *Id.*, at 1266, 1271–1272. The sponsor of the 1866 Act, Representative Wilson, opposed the amendment largely on the ground that it would place the financial burden of protecting civil rights on poor individuals instead of on the government. *Id.*, at 1295. At the same time he stressed that there was "no difference in the principle involved" between a civil remedy and a criminal sanction. *Ibid.*

After the 1866 bill passed the Senate and House, President Andrew Johnson vetoed it. His opposition was based in part on the fact that § 2 of the bill "invades the judicial power of the State." Veto Message, in *id.*, at 1680. The President warned that "judges of the State courts . . . [and] marshals and sheriffs, who should, as ministerial officers, execute processes, sanctioned by State laws and issued by State judges, in execution of their judgments, could be brought before other tribunals and there subjected to fine and imprisonment for the performance of the duties which such state laws might impose." *Ibid.* Within two weeks, both the Senate and the House overrode the veto. Various Congressmen responded to the President's criticisms and freely admitted that § 2 of the legislation was aimed at state judicial systems. As a member of the House Judiciary Committee, Representative

Lawrence, declared: "I answer it is better to invade the judicial power of the State than permit it to invade, strike down, and destroy the civil rights of citizens. A judicial power perverted to such uses should be speedily invaded. The grievance would be insignificant." *Id.*, at 1837. See also *id.*, at 1758 (response of Sen. Trumbull to President's veto message); *id.*, at 1838 (statement of Rep. Clarke). The bill became law on April 9, 1866.

C

This Court has from time to time read § 1983 against the "background" of common-law tort liability.[19] Far more pertinent to this case, however, is the background provided by the 1866 Civil Rights Act. Representative Bingham, who had introduced the amendment to substitute civil liability for criminal liability in the 1866 Act, had become chairman of the House Judiciary Committee by the time of the 42d Congress. Senator Trumbull, the Senate sponsor of the 1866 Act, was chairman of the Senate Judiciary Committee in 1871. Representative Shellabarger, who had participated in the debates on the 1866 legislation,[20] drafted the 1871 Act.

Congress was well aware that the "model" for § 1 of the 1871 law could be found in the 1866 Civil Rights Act. Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871) (Rep. Shellabarger). The manager of the bill in the Senate, George Edmunds, stressed that § 1 was merely "carrying out the principles of the civil rights bill" that had been passed in 1866. *Id.*, at 568. Representative Coburn stated that § 1 "gives a civil remedy parallel to the penal provision" in the Civil Rights Act. "If this penal section is valid, and no one dares controvert it, the civil remedy is legal and unquestionable." *Id.*, at 461. See also *id.*, at 429 (Rep. McHenry in opposi-

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[19] *E. g.*, *Pierson* v. *Ray*, 386 U. S. 547, 556–557 (1967); *Monroe* v. *Pape*, 365 U. S. 167, 187 (1961). See *Carey* v. *Piphus*, 435 U. S. 247, 255 (1978); Nahmod, Section 1983 and the "Background" of Tort Liability, 50 Ind. L. J. 5 (1974).

[20] See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., 1293–1295 (1866).

tion) ("The first section of the bill is intended as an amendment of the civil rights act"); *id.*, at 365 (Rep. Arthur in opposition) (§ 1 is "cumulative, as far as it goes, with certain provisions in the civil rights bill").

The fact that § 2 of the Civil Rights Act was the model for § 1 of the 1871 Act explains why the debates in the 42d Congress on § 1 were so perfunctory.[21] Of all the measures in the Ku Klux Klan Act, § 1 generated the least controversy since it merely provided a civil counterpart to the far more controversial criminal provision in the 1866 Act. See *id.*, at 568 (Sen. Edmunds) ("The first section is one that I believe nobody objects to"); *id.*, at App. 313 (Rep. Burchard) ("To the first section, giving an injured party redress by suit at law in the United States courts in the cases enumerated, I can see no objections"); *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 665 (debate on § 1 was limited and the section passed without amendment); Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1155 (1977).

Opponents of § 1 of the 1871 Act repeated the same arguments that had been made against § 2 of the 1866 Act. They warned of the liability for judicial officers that would result from enactment of § 1.[22] Indeed, in portraying the inevitable consequences of the 1871 Act, Senator Thurman pointed to criminal prosecutions of state judicial officers that had already taken place under the 1866 Act.[23] These statements can hardly be dismissed as exaggerated rhetoric from opponents of the 1871 Act. Instead, they simply reflect the fact that the battle over liability for those integral to the judicial process had already been fought in 1866 when Congress

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[21] Because discussion of § 1 of the 1871 Act was so limited, it is simply unrealistic to demand overwhelming evidence that the 42d Congress meant to override a common-law witness immunity. Surely the majority does not mean to define an inquiry that is inherently futile.

[22] See, *e. g.*, Cong. Globe, 42d Cong., 1st Sess., 365, 366, (1871) (statements of Rep. Arthur); *id.*, at 385 (statement of Rep. Lewis).

[23] *Id.*, at App. 217.

adopted the far more serious criminal sanction aimed at state judicial systems. Section 1, in contrast, provided for "the mild remedy of a civil action." Cong. Globe, 42d Cong., 1st Sess., 482 (1871) (Rep. Wilson, member of the House Judiciary Committee). So it was not surprising that the arguments of the opponents to the 1871 Act would fall on deaf ears. It is also noteworthy that Representative Shellabarger, who was hardly reluctant to interrupt speakers who were misconstruing his proposal,[24] never disputed the opponents' characterizations with regard to the liability of state judicial officers.[25]

To assume that Congress, which had enacted a criminal sanction directed against state judicial officials,[26] intended *sub silentio* to exempt those same officials from the civil counterpart approaches the incredible.[27] Sheriffs and marshals, while performing a quintessentially judicial function such as serving process, were clearly liable under the 1866 Act, notwithstanding President Johnson's objections. Be-

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[24] *E. g.*, *id.*, at 382, App. 46.

[25] On at least one of the occasions when such remarks were made, Representative Shellabarger was present. See Note, Liability of Judicial Officers Under Section 1983, 79 Yale L. J. 322, 328, n. 40 (1969).

[26] The majority does concede that witnesses can be punished criminally for violations of 18 U. S. C. § 242, the modern successor of § 2 of the 1866 Act. See *ante*, at 345, n. 32. It cannot go without mention that the classic English formulation of absolute witness immunity by Lord Mansfield, which even the majority quotes, *ante*, at 335, precluded civil or criminal liability. *King* v. *Skinner*, Lofft 54, 56, 98 Eng. Rep. 529 (K. B. 1772) ("[N]either party, witness, counsel, jury, or judge can be put to answer, civilly, *or criminally*, for words spoken in office") (emphasis added). Under early common law, perjury was not a punishable offense. Jurors were merely a body of witnesses whose verdict was based on their own personal knowledge and not on the evidence of others testifying before them. The only method of punishment was by a writ of attaint. See generally 4 W. Holdsworth, A History of English Law 515–519 (3d ed. 1924); *Damport* v. *Sympson*, Cro. Eliz. 520, 78 Eng. Rep. 769 (Q. B. 1596).

[27] See Kates, Immunity of State Judges under the Federal Civil Rights Acts, 65 Nw. U. L. Rev. 615, 622–623 (1970).

cause, as Representative Shellabarger stated, § 1 of the 1871 Act provided a civil remedy "in identically the same case" or "on the same state of facts" as § 2 of the 1866 Act, it obviously overrode whatever immunity may have existed at common law for these participants in the judicial process in 1871.

D

The lack of historical support for witness immunity sharply contrasts with the substantial historical support for legislative immunity which this Court recognized in *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), a case on which the majority relies. *Ante*, at 330, 334. Legislative immunity enjoyed a unique historical position since it had been conceived in the Parliamentary struggles of the 17th century and enshrined in the Speech and Debate Clause of the Constitution. The vast majority of States had adopted constitutional provisions providing a parallel protection against civil and criminal liability. See 341 U. S., at 372–375.

Moreover, the history of § 1 supports incorporation of legislative immunity. For example, when the specter of holding state legislators liable under § 2 of the 1866 Act was raised by President Johnson's veto message,[28] the Senate sponsor of the Act was quick to disavow any such intention. Senator Trumbull argued at some length that legislators did not fall within the scope of the Act because they "enact" laws rather than act "under color of" state law.[29] Whatever the validity of this distinction, it no doubt reflected the reluctance of Congress to impinge on the immunity of state legislators. But while the Radical Republican Congress was a "staunch advocate of legislative freedom," 341 U. S., at 376, it displayed no solicitude for state courts.[30] The debates over the 1871 Act are replete with hostile comments directed at state judicial

[28] See Cong. Globe, 39th Cong., 1st Sess., 1680 (1866).

[29] *Id.*, at 1758.

[30] See Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1150–1152 (1977).

systems.[31] It is entirely reasonable to conclude that Congress intended to make state legislators immune from civil liability under § 1 of the 1871 Act. No similar evidence exists to support an immunity for police officers testifying as witnesses.[32]

IV

The majority also bases its decision on considerations of public policy, which purportedly mandate absolute immunity for police officers sued under § 1983 for their testimony as witnesses. *Ante*, at 341–345. This Court has recognized absolute immunity only in "exceptional situations" where public policy makes it "essential." *Butz* v. *Economou*, 438 U. S. 478, 507 (1978).[33] In my view, the case for official-witness immunity falls far short of this standard.

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[31] See, *e. g.*, Cong. Globe, 42d Cong., 1st Sess., App. 78 (Rep. Perry) ("Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices"); *id.*, at 394 (Rep. Rainey) ("[T]he courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity"); *id.*, at App. 186 (Rep. Platt) (judges exercise their "almost despotic powers . . . against Republicans without regard to law or justice"); *id.*, at App. 277 (Rep. Porter) ("The outrages committed upon loyal men there are under the forms of law. It can be summed up in one word: loyal men cannot obtain justice in the courts . . ."); *id.*, at 429 (referring to "prejudiced juries and bribed judges").

[32] The history of § 1 of the 1871 Act casts some doubt on the correctness of *Pierson* v. *Ray*, 386 U. S. 547 (1967), and *Imbler* v. *Pachtman*, 424 U. S. 409 (1976). *Pierson* and *Imbler* are distinguishable, however, on the ground that the policy considerations in those cases are far more powerful. Most significantly, judges and prosecutors must exercise a substantial amount of discretion in performing their official functions, while witnesses sworn to tell the truth do not. See n. 39, *infra*. In addition, we have only extended qualified immunity to police officers for the performance of many of their other duties. See *Pierson*, *supra*, at 557.

[33] *Butz* involved an action under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). In my view, we should be even more reluctant to import absolute immunities into § 1983 suits than into *Bivens* ac-

Police officers and other government officials differ significantly from private citizens, around whom common-law doctrines of witness immunity developed. A police officer comes to the witness stand clothed with the authority of the State. His official status gives him credibility and creates a far greater potential for harm than exists when the average citizen testifies.[34] The situation is aggravated when the official draws on special expertise. A policeman testifying about a fingerprint identification or a medical examiner testifying as to the cause of a death can have a critical impact on a defendant's trial.[35] At the same time, the threat of a criminal perjury prosecution, which serves as an important constraint on the average witness' testimony, is virtually nonexistent in the police-witness context. Despite the apparent prevalence of police perjury,[36] prosecutors exhibit extreme

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tions. First, with § 1983 we deal with explicit statutory language indicating the broad scope of the action, whereas *Bivens* actions have been implied by the federal courts. Second, the need to restrain state action implicit in the Fourteenth Amendment is implicated by § 1983 suits, while that Amendment has no relevance to suits against federal officials.

[34] See *Nugent* v. *Sheppard*, 318 F. Supp. 314, 317 (ND Ind. 1970). Cf. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, *supra*, at 392 (agent acting in the name of the United States possesses "far greater capacity for harm" than individual trespasser acting on his own).

[35] Checks and balances built into the trial process may well have limitations and strategic costs. For instance, lengthy cross-examination of an official witness may expose weaknesses in his testimony only at the cost of emphasizing the evidence in the mind of the jury.

[36] See *United States* v. *Marshall*, 488 F. 2d 1169, 1171 (CA9 1973); *Veney* v. *United States*, 120 U. S. App. D. C. 157, 157–158, 344 F. 2d 542, 542–543 (1965) (Wright, J., concurring in judgment); *People* v. *Berrios*, 28 N. Y. 2d 361, 370, 270 N. E. 2d 709, 714 (1971) (Fuld, C. J., dissenting); *People* v. *Dickerson*, 273 Cal. App. 2d 645, 650, n. 4, 78 Cal. Rptr. 400, 403, n. 4 (1969); B. Tarlow, Search Warrants 31–77 (1973); New York City Commission to Investigate Alleged Police Corruption, Knapp Commission Report on Police Corruption (1972); Sevilla, The Exclusionary Rule and Police Perjury, 11 San Diego L. Rev. 839 (1974); Grano, A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of

reluctance in charging police officials with criminal conduct because of their need to maintain close working relationships with law enforcement agencies.[37] The majority thus forecloses a civil sanction in precisely those situations where the need is most pressing.

Moreover, the danger that official witnesses would be inhibited in testifying by the fear of a damages action is much more remote than would be the case with private witnesses. Policemen normally have a duty to testify about matters involving their official conduct. The notion that officials with a professional interest in securing criminal convictions would shade their testimony in favor of a defendant to avoid the risk of a civil suit can only be viewed with skepticism. In addition, police officials are usually insulated from any economic hardship associated with lawsuits based on conduct within the scope of their authority.[38] In any event, if the Court truly desires to give police officers "'every encouragement to make a full disclosure of all pertinent information within their knowledge,'" *ante*, at 335 (quoting *Imbler* v. *Pachtman*, 424 U. S., at 439 (WHITE, J., concurring in judgment)), then at the very least it should permit § 1983 suits which allege that officials withheld key information while testifying.[39]

Police Perjury, 1971 U. Ill. Law Forum 405, 408–409; Younger, The Perjury Routine, 204 The Nation 596 (1967); Comment, 60 Geo. L. J. 507 (1971); Note, 4 Colum. J. Law & Soc. Probs. 87, 96, n. 40 (1968).

[37] See Newman, Suing the Law Breakers, 87 Yale L. J. 447, 449–450 (1977).

[38] Police officers are generally provided free counsel and are indemnified for conduct within the scope of their authority. See *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 713 (POWELL, J., concurring); Project, 88 Yale L. J. 781, 810 (1979). This is certainly the state of the law with respect to respondents. See Ind. Code Ann. §§ 34–4–16.5–5(b) and 34–4–16.5–18 (Burns Supp. 1982).

[39] Despite the differences between official witnesses and private witnesses, the majority contends that "immunity analysis rests on functional categories, not on the status of the defendant." *Ante*, at 342. However, the cases cited for this proposition, *ante*, at 342, n. 28, all involve various types of *official* conduct. The fact that individuals within the govern-

The majority's primary concern appears to be that § 1983 suits against police witnesses would impose "significant burdens on the judicial system and on law enforcement resources." *Ante*, at 343. As an empirical matter, this contention is unfounded. Both the Sixth Circuit and the District of Columbia Circuit have permitted such suits for over five years, see *ante*, at 328–329, n. 4, but there is no perceptible drain on legal resources in those Circuits compared to other Circuits that bar such lawsuits. Moreover, a comprehensive study of § 1983 suits filed in the Central District of California, which includes Los Angeles, indicates that only about 30 actions for false arrest were filed annually in that District.[40] Police officers arrest much more frequently than they testify, and an arrest will undoubtedly make many individuals disgruntled. Yet, lawsuits based on such allegations constituted only 0.5% of all cases filed in the Central District,[41] or an average of only one for every 243 full-time police

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ment should be treated the same because of the functions they perform does *not* necessarily mean that individuals within the government should be treated the same as private parties.

While relying on functional categories, the majority ignores the classic distinction embodied in immunity cases between acts involving discretion and those that do not. See *Kendall* v. *Stokes* 3 How. 87, 98 (1845); *McCray* v. *Maryland*, 456 F. 2d 1, 3–4 (CA4 1972) ("Where an official is not called upon to exercise judicial or quasi-judicial discretion, courts have properly refused to extend to him the protection of absolute judicial immunity, regardless of any apparent relationship of his role to the judicial system"). Here, as the lower court noted, 663 F. 2d 713, 719, a witness normally exercises no discretion in the performance of his duty to answer fully and truthfully all questions put to him. As a result, "the need for absolute immunity seems correspondingly less compelling." *Id.*, at 720.

[40] See Eisenberg, Section 1983: Doctrinal Foundations and An Empirical Study, 67 Cornell L. Rev. 482, 550–551, 555 (1982). The statistics are for 1975–1976. The estimate given in the text is approximate because Professor Eisenberg has grouped statistics for prisoner § 1983 actions involving false arrest, assault, and search and seizure. See, *id.*, at 555, Table VI.

[41] A total of 5,810 cases were filed in the Central District of California in 1976. See Annual Report of the Director of the Administrative Office of the United States Courts 177, Table 18, 350, Table D–3 (1976).

officers in the city of Los Angeles.[42] This does not appear to be a "significant burden."[43] The simple fact is that practical obstacles alone are enough to deter most individuals from suing the police for official misconduct.[44]

In considering the competing interests at stake in this area, the majority strikes a very one-sided balance. It eschews any qualified immunity in favor of an absolute one. Thus, the mere inquiry into good faith is deemed so undesirable that we must simply acquiesce in the possibility that government officials will maliciously deprive citizens of their rights.[45] For my part, I cannot conceive in this case how patent violations of individual rights can be tolerated in the name of the public good. "The very essence of civil liberty certainly consists in the right of every individual to claim the protections of the laws, whenever he receives an injury." *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803).

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[42] There were 7,294 full-time police officers employed by the city of Los Angeles in 1976. See generally U. S. Dept. of Commerce, Bureau of the Census, City Employment in 1976, p. 8, Table 4 (1977) (data for all police department employees).

[43] Data from another State indicate that the California experience may overstate the burden of false arrest cases. Over more than seven years, a *total* of only 32 § 1983 suits for false arrest were brought in Federal District Court for all or part of Connecticut. See Project, 88 Yale L. J., *supra*, at 786, n. 23, 793.

[44] Former criminal defendants may well wish to avoid further entanglements with the legal system and are unlikely to have the resources needed to pursue such suits. Lawyers will probably have little incentive to become involved in actions against the police, and those that do face an uphill struggle. See Amsterdam, The Supreme Court and the Rights of Suspects in Criminal Cases, 45 N. Y. U. L. Rev. 785, 787 (1970) (civil actions against the police are "very rare, and until recently were so rare as to be insignificant, because the obstacles to their maintenance are formidable").

[45] Cf. 2 F. Harper & F. James, Law of Torts 1645 (1956) ("[I]t is stretching the argument pretty far to say that the mere inquiry into malice would have worse consequences than the possibility of actual malice . . . . Since the danger that official power will be abused is greatest where motives are improper, the balance here may well swing the other way") (emphasis deleted).

V

For all of the above reasons, I believe that the majority has failed to sustain the heavy burden required to justify an immunity so plainly at odds with the language and purpose of § 1983. I therefore respectfully dissent.

JUSTICE BLACKMUN, dissenting.

I join all of JUSTICE MARSHALL's dissenting opinion except Part I. I cannot join its Part I, for I adhere to the views I expressed for the Court in *City of Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 258–259 (1981), regarding the role played by history and policy in determining whether § 1983 incorporates a particular common-law immunity. It is proper to assume—indeed, the Court in the past has assumed—"that members of the 42d Congress were familiar with common-law principles . . . and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *Id.*, at 258. If an immunity was well established in the common law in 1871, careful analysis of the policies supporting it, and those supporting § 1983, governs the determination whether that immunity was retained.

In my view, JUSTICE MARSHALL's dissent convincingly demonstrates that the Court finds little support for its decision in the present case either in the language of the statute, the history of the common law, the relevant legislative history, or policy considerations.

I therefore dissent.

HILLSBORO NATIONAL BANK *v.* COMMISSIONER OF INTERNAL REVENUE

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

No. 81–485. Argued November 1, 1982—Decided March 7, 1983*

Until 1970, Illinois imposed a property tax on shares of stock held in incorporated banks, but in 1970 the Illinois Constitution was amended to prohibit such taxes. The Illinois courts thereafter held that the amendment violated the Federal Constitution, but, pending disposition of the case in this Court, Illinois enacted a statute providing for collection of the disputed taxes and placement of the receipts in escrow. Petitioner Bank in No. 81–485 paid the taxes for its shareholders in 1972, taking the deduction for the amount of the taxes pursuant to § 164(e) of the Internal Revenue Code of 1954 (IRC), which grants a corporation a deduction for taxes imposed on its shareholders but paid by the corporation and denies the shareholders any deduction for the tax. The authorities placed the receipts in escrow. After this Court upheld the constitutional amendment, the amounts in escrow were refunded to the shareholders. When petitioner, on its federal income tax return for 1973, recognized no income from this sequence of events, the Commissioner of Internal Revenue assessed a deficiency against petitioner, requiring it to include as income the amount paid its shareholders from the escrow. Petitioner then sought a redetermination in the Tax Court, which held that the refund of the taxes was includible in petitioner's income. The Court of Appeals affirmed. In No. 81–930, respondent corporation, which operated a dairy, in the taxable year ending June 30, 1973, deducted the full cost of the cattle feed purchased for use in its operations as permitted by § 162 of the IRC, but a substantial portion of the feed was still on hand at the end of the taxable year. Two days into the next taxable year, respondent adopted a plan of liquidation and distributed its assets, including the cattle feed, to its shareholders. Relying on § 336 of the IRC, which shields a corporation from the recognition of gain on the distribution of property to its shareholders on liquidation, respondent reported no income on the transaction. The Commissioner challenged respondent's treatment of

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*Together with No. 81–930, *United States* v. *Bliss Dairy, Inc.*, on certiorari to the United States Court of Appeals for the Ninth Circuit.

the transaction, asserting that it should have included as income the value of the feed distributed to the shareholders, and therefore increased respondent's income by $60,000. Respondent paid the resulting assessment and sued for a refund in Federal District Court, which rendered a judgment in respondent's favor. The Court of Appeals affirmed.

Held:

1. Unless a nonrecognition provision of the IRC prevents it, the tax benefit rule ordinarily applies to require the inclusion of income when events occur that are fundamentally inconsistent with an earlier deduction. Pp. 377–391.

2. In No. 81–485, the tax benefit rule does not require petitioner to recognize income with respect to the tax refund. The purpose of § 164(e) was to provide relief for corporations making payments for taxes imposed on their shareholders, the focus being on the act of payment rather than on the ultimate use of the funds by the State. As long as the payment itself was not negated by a refund to the corporation, the change in character of the funds in the hands of the State does not require the corporation to recognize income. Pp. 391–395.

3. In No. 81–930, however, the tax benefit rule requires respondent to recognize income with respect to the distribution of the cattle feed to its shareholders on liquidation. The distribution of expensed assets to shareholders is inconsistent with the earlier deduction of the cost as a business expense. Section 336, which clearly does not shield the taxpayer from recognition of all income on distribution of assets, does not prevent application of the tax benefit rule in this case. Section 336's legislative history, the application of other general rules of tax law, and the construction of identical language in § 337, which governs sales of assets followed by distribution of the proceeds in liquidation and shields a corporation from the recognition of gain on the sale of the assets, all indicate that § 336 does not permit a liquidating corporation to avoid the tax benefit rule. Pp. 395–402.

No. 81–485, 641 F. 2d 529, reversed; No. 81–930, 645 F. 2d 19, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined, and in Parts I, II, and IV of which BRENNAN, J., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, *post*, p. 403. STEVENS, J., filed an opinion concurring in the judgment in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 403. BLACKMUN, J., filed a dissenting opinion, *post*, p. 422.

Harvey B. Stephens argued the cause for petitioner in No. 81–485. With him on the briefs were *Mark H. Ferguson* and *Robert A. Stuart.*

James Silhasek argued the cause and filed a brief for respondent in No. 81–930.

Solicitor General Lee argued the cause for the United States in No. 81–930 and respondent in No. 81–485. With him on the briefs were *Assistant Attorney General Archer, Stuart A. Smith, Gary R. Allen, Jay W. Miller,* and *David I. Pincus.*†

JUSTICE O'CONNOR delivered the opinion of the Court.

These consolidated cases present the question of the applicability of the tax benefit rule to two corporate tax situations: the repayment to the shareholders of taxes for which they were liable but that were originally paid by the corporation; and the distribution of expensed assets in a corporate liquidation. We conclude that, unless a nonrecognition provision of the Internal Revenue Code prevents it, the tax benefit rule ordinarily applies to require the inclusion of income when events occur that are fundamentally inconsistent with an earlier deduction. Our examination of the provisions granting the deductions and governing the liquidation in these cases leads us to hold that the rule requires the recognition of income in the case of the liquidation but not in the case of the tax refund.

I

In No. 81–485, *Hillsboro National Bank* v. *Commissioner,* the petitioner, Hillsboro National Bank, is an incorporated bank doing business in Illinois. Until 1970, Illinois imposed a property tax on shares held in incorporated banks. Ill. Rev. Stat., ch. 120, § 557 (1971). Banks, required to retain earnings sufficient to cover the taxes, § 558, customarily paid

†Briefs of *amici curiae* urging affirmance in No. 81–930 were filed by *Jack R. White* and *Steven W. Bacon* for Ameron, Inc.; and by *Arthur A. Armstrong, pro se.*

the taxes for the shareholders. Under § 164(e) of the Internal Revenue Code of 1954, 26 U. S. C. § 164(e),[1] the bank was allowed a deduction for the amount of the tax, but the shareholders were not. In 1970, Illinois amended its Constitution to prohibit ad valorem taxation of personal property owned by individuals, and the amendment was challenged as a violation of the Equal Protection Clause of the Federal Constitution. The Illinois courts held the amendment unconstitutional in *Lake Shore Auto Parts Co.* v. *Korzen*, 49 Ill. 2d 137, 273 N. E. 2d 592 (1971). We granted certiorari, 405 U. S. 1039 (1972), and, pending disposition of the case here, Illinois enacted a statute providing for the collection of the disputed taxes and the placement of the receipts in escrow. Ill. Rev. Stat., ch. 120, ¶ 676.01 (1979). Hillsboro paid the taxes for its shareholders in 1972, taking the deduction permitted by § 164(e), and the authorities placed the receipts in escrow. This Court upheld the state constitutional amendment in *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356 (1973). Accordingly, in 1973 the County Treasurer refunded the amounts in escrow that were attributable to shares held by individuals, along with accrued interest. The Illinois courts held that the refunds belonged to the shareholders rather than to the banks. See *Bank & Trust Co. of Arlington Heights* v. *Cullerton*, 25 Ill. App. 3d 721, 726, 324 N. E.

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[1] Section 164(e) provides:

"Where a corporation pays a tax imposed on a shareholder on his interest as a shareholder, and where the shareholder does not reimburse the corporation, then—

"(1) the deduction allowed by subsection (a) shall be allowed to the corporation; and

"(2) no deduction shall be allowed the shareholder for such tax."

Subsection (a) provides, in part:

"Except as otherwise provided in this section, the following taxes shall be allowed as a deduction for the taxable year within which paid or accrued:

. . . . .

"(2) State and local personal property taxes."

2d 29, 32 (1975) (alternative holding); *Lincoln National Bank* v. *Cullerton*, 18 Ill. App. 3d 953, 310 N. E. 2d 845 (1974). Without consulting Hillsboro, the Treasurer refunded the amounts directly to the individual shareholders. On its return for 1973, Hillsboro recognized no income from this sequence of events.[2] The Commissioner assessed a deficiency against Hillsboro, requiring it to include as income the amount paid its shareholders from the escrow. Hillsboro sought a redetermination in the Tax Court, which held that the refund of the taxes, but not the payment of accrued interest, was includible in Hillsboro's income. On appeal, relying on its earlier decision in *First Trust and Savings Bank of Taylorville* v. *United States*, 614 F. 2d 1142 (1980), the Court of Appeals for the Seventh Circuit affirmed. 641 F. 2d 529, 531 (1981).

In No. 81–930, *United States* v. *Bliss Dairy, Inc.*, the respondent, Bliss Dairy, Inc., was a closely held corporation engaged in the business of operating a dairy. As a cash basis taxpayer, in the taxable year ending June 30, 1973, it deducted upon purchase the full cost of the cattle feed purchased for use in its operations, as permitted by § 162 of the Internal Revenue Code, 26 U. S. C. § 162.[3] A substantial portion of the feed was still on hand at the end of the taxable year. On July 2, 1973, two days into the next taxable year, Bliss adopted a plan of liquidation, and, during the month of July, it distributed its assets, including the remaining cattle feed, to the shareholders. Relying on § 336, which shields the corporation from the recognition of gain on the distribu-

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[2] Although the returns of the shareholders of the bank are not before us, the Commissioner explained that they were required to recognize the refund as income. See 641 F. 2d 529, 533, and n. 4 (CA7 1981) (Pell, J., dissenting).

[3] Section 162(a) provides in relevant part:

"There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ."

tion of property to its shareholders on liquidation,[4] Bliss reported no income on the transaction. The shareholders continued to operate the dairy business in noncorporate form. They filed an election under § 333 to limit the gain recognized by them on the liquidation,[5] and they therefore calculated their basis in the assets received in the distribution as pro-

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[4] Section 336 provides:

"Except as provided in subsection (b) of this section and in section 453B (relating to disposition of installment obligations), no gain or loss shall be recognized to a corporation on the distribution of property in partial or complete liquidation." 26 U. S. C. § 336 (1976 ed., Supp. V).

[5] Section 333 provides, in relevant part:

"(a) In the case of property distributed in complete liquidation of a domestic corporation . . . , if—

"(1) the liquidation is made in pursuance of a plan of liquidation adopted, and

"(2) the distribution is in complete cancellation or redemption of all the stock, and the transfer of all the property under the liquidation occurs within some one calendar month,

"then in the case of each qualified electing shareholder . . . gain on the shares owned by him at the time of the adoption of the plan of liquidation shall be recognized only to the extent provided in subsections (e) and (f).

. . . . . .

"(e) In the case of a qualified electing shareholder other than a corporation—

"(1) there shall be recognized, and treated as a dividend, so much of the gain as is not in excess of his ratable share of the earnings and profits of the corporation accumulated after February 28, 1913, such earnings and profits to be determined as of the close of the month in which the transfer in liquidation occurred under subsection (a)(2), but without diminution by reason of distributions made during such month; but by including in the computation thereof all amounts accrued up to the date on which the transfer of all the property under the liquidation is completed; and

"(2) there shall be recognized, and treated as short-term or long-term capital gain, as the case may be, so much of the remainder of the gain as is not in excess of the amount by which the value of that portion of the assets received by him which consists of money, or of stock or securities acquired by the corporation after December 31, 1953, exceeds his ratable share of such earnings and profits."

vided in § 334(c).[6] Under that provision, their basis in the assets was their basis in their stock in the liquidated corporation, decreased by the amount of money received, and increased by the amount of gain recognized on the transaction. They then allocated that total basis over the assets, as provided in the regulations, Treas. Reg. § 1.334–2, 26 CFR § 1.334–2 (1982), presumably taking a basis greater than zero in the feed, although the amount of the shareholders' basis is not in the record. They in turn deducted their basis in the feed as an expense of doing business under § 162. On audit, the Commissioner challenged the corporation's treatment of the transaction, asserting that Bliss should have taken into income the value of the grain distributed to the shareholders. He therefore increased Bliss' income by $60,000. Bliss paid the resulting assessment and sued for a refund in the District Court for the District of Arizona, where it was stipulated that the grain had a value of $56,565, see Pretrial Order, at 3. Relying on *Commissioner* v. *South Lake Farms, Inc.*, 324 F. 2d 837 (CA9 1963), the District Court rendered a judgment in favor of Bliss. While recognizing authority to the contrary, *Tennessee-Carolina Transportation, Inc.* v. *Commissioner*, 582 F. 2d 378 (CA6 1978), cert. denied, 440 U. S. 909 (1979), the Court of Appeals saw *South Lake Farms* as controlling and affirmed. 645 F. 2d 19 (CA9 1981) *(per curiam)*.

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[6] Section 334(c) provides:

"If—

"(1) property was acquired by a shareholder in the liquidation of a corporation in cancellation or redemption of stock, and

"(2) with respect to such acquisition—

"(A) gain was realized, but

"(B) as the result of an election made by the shareholder under section 333, the extent to which gain was recognized was determined under section 333,

"then the basis shall be the same as the basis of such stock cancelled or redeemed in the liquidation, decreased in the amount of any money received by the shareholder, and increased in the amount of gain recognized to him."

II

The Government[7] in each case relies solely on the tax benefit rule—a judicially developed principle[8] that allays some of the inflexibilities of the annual accounting system. An annual accounting system is a practical necessity if the federal income tax is to produce revenue ascertainable and payable at regular intervals. *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359, 365 (1931). Nevertheless, strict adherence to an annual accounting system would create transactional inequities. Often an apparently completed transaction will reopen unexpectedly in a subsequent tax year, rendering the initial reporting improper. For instance, if a taxpayer held a note that became apparently uncollectible early in the taxable year, but the debtor made an unexpected financial recovery before the close of the year and paid the debt, the transaction would have no tax consequences for the taxpayer, for the repayment of the principal would be recovery of capital. If, however, the debtor's financial recovery and the resulting repayment took place after the close of the taxable year, the taxpayer would have a deduction for the apparently bad debt in the first year under § 166(a) of the Code, 26 U. S. C. § 166(a). Without the tax benefit rule, the repayment in the second year, representing a return of capital, would not be taxable. The second transaction, then, although economically identical to the first, could, because of the differences in accounting, yield drastically different tax consequences. The Government, by allowing a deduction that it could not have known to be improper at the time, would be foreclosed[9]

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[7] In No. 81–485, the Solicitor General represents the Commissioner of Internal Revenue, while in No. 81–930, he represents the United States. We refer to the Commissioner and the United States collectively as "the Government."

[8] Although the rule originated in the courts, it has the implicit approval of Congress, which enacted 26 U. S. C. § 111 as a limitation on the rule. See n. 12, *infra*.

[9] A rule analogous to the tax benefit rule protects the taxpayer who is required to report income received in one year under claim of right that he

from recouping any of the tax saved because of the improper deduction.[10] Recognizing and seeking to avoid the possible distortions of income,[11] the courts have long required the

later ends up repaying. Under that rule, he is allowed a deduction in the subsequent year. See generally 26 U. S. C. § 1341; 1 B. Bittker, Federal Taxation of Income, Estates and Gifts ¶ 6.3 (1981).

[10] When the event proving the deduction improper occurs after the close of the taxable year, even if the statute of limitations has not run, the Commissioner's proper remedy is to invoke the tax benefit rule and require inclusion in the later year rather than to reopen the earlier year. See *Lexmont Corp.* v. *Commissioner*, 20 T. C. 185 (1953); *South Dakota Concrete Products Co.* v. *Commissioner*, 26 B. T. A. 1429, 1432 (1932); 1 J. Mertens, Law of Federal Income Taxation § 7.34 (J. Doheny rev. ed. 1981); Bittker & Kanner, The Tax Benefit Rule, 26 UCLA L. Rev. 265, 266 (1978) (hereinafter Bittker & Kanner).

Much of JUSTICE BLACKMUN's dissent takes issue with this well-settled rule. The inclusion of the income in the year of the deductions by amending the returns for that year is not before us in these cases, for none of the parties has suggested such a result, no doubt because the rule is so settled. It is not at all clear what would happen on the remand that JUSTICE BLACKMUN desires. Neither taxpayer has ever sought to file an amended return. The statute of limitations has now run on the years to which the dissent would attribute the income, § 6501(a), and we have no indication in the record that the Government has held those years open for any other reason.

Even if the question were before us, we could not accept the view of JUSTICE BLACKMUN's dissent. It is, of course, true that the tax benefit rule is not a precise way of dealing with the transactional inequities that occur as a result of the annual accounting system, *post*, at 423, 426. See n. 12, *infra*. JUSTICE BLACKMUN's approach, however, does not eliminate the problem; it only multiplies the number of rules. If the statute of limitations has run on the earlier year, the dissent recognizes that the rule that we now apply must apply. *Post*, at 425. Thus, under the proposed scheme, the only difference is that, if the inconsistent event fortuitously occurs between the end of the year of the deduction and the running of the statute of limitations, the Commissioner must reopen the earlier year or permit an amended return even though it is settled that the acceptance of such a return after the date for filing a return is not covered by statute but within the discretion of the Commissioner. See, *e. g.*, *Koch* v. *Alexander*, 561 F. 2d 1115 (CA4 1977) *(per curiam)*; *Miskovsky* v. *United States*, 414

[Footnote 11 is on p. 380]

taxpayer to recognize the repayment in the second year as income. See, *e. g.*, *Estate of Block* v. *Commissioner*, 39 B. T. A. 338 (1939), aff'd *sub nom. Union Trust Co.* v. *Commissioner*, 111 F. 2d 60 (CA7), cert. denied, 311 U. S. 658 (1940); *South Dakota Concrete Products Co.* v. *Commis-*

F. 2d 954 (CA3 1969). In any other situation, the income must be recognized in the later year. Surely a single rule covering all situations would be preferable to several rules that do not alleviate any of the disadvantages of the single rule.

A second flaw in JUSTICE BLACKMUN's approach lies in his assertion that the practice he proposes is like any correction made after audit. Changes on audit reflect the proper tax treatment of items under the facts as they were known at the end of the taxable year. The tax benefit rule is addressed to a different problem—that of events that occur *after* the close of the taxable year.

In any event, whatever the merits of amending the return of the year of the improper deduction might originally have been, we think it too late in the day to change the rule. Neither the judicial origins of the rule nor the subsequent codification permits the approach suggested by JUSTICE BLACKMUN.

The dissent suggests that the reason that the early cases expounding the tax benefit rule required inclusion in the later year was that the statute of limitations barred adjustment in the earlier year. *Post*, at 423–424, n. That suggestion simply does not reflect the cases cited. In *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359 (1931), the judgment of the Court of Appeals reflected JUSTICE BLACKMUN's approach, holding that the amount recovered in the later year was not income in that year but that the taxpayer had to amend its returns for the years of the deductions. *Id.*, at 362. This Court reversed, stating: "That the recovery made by respondent in 1920 was gross income *for that year* . . . cannot, we think, be doubted." *Id.*, at 363. (Emphasis added.) Neither does *Healy* v. *Commissioner*, 345 U. S. 278 (1953), a case dealing with income received under claim of right, provide any support for this novel theory. On the contrary, the Court's discussion of the statute of limitations, cited by the dissent, in context, is as follows:

"A rule which required that the adjustment be made in the earlier year of receipt instead of the later year of repayment would generally be unfavorable to taxpayers, for the statute of limitations would frequently bar any adjustment of the tax liability for the earlier year. Congress has enacted an annual accounting system under which income is counted up at the

sioner, 26 B. T. A. 1429 (1932); Plumb, The Tax Benefit Rule Today, 57 Harv. L. Rev., 129, 176, 178, and n. 172 (1943) (hereinafter Plumb).[12]

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end of each year. It would be disruptive of an orderly collection of the revenue to rule that the accounting must be done over again to reflect events occurring after the year for which the accounting is made, and would violate the spirit of the annual accounting system." *Id.*, at 284–285 (footnote omitted).

Even the earliest cases, then, reflect the currently accepted view of the tax benefit rule.

Further, § 111, the partial codification of the tax benefit rule, see n. 8, *supra*, contradicts JUSTICE BLACKMUN's view. It provides that gross income for a year does not include a specified portion of a recovery of amounts earlier deducted, implying that the remainder of the recovery *is* to be included in gross income for that year. See, *e. g.*, S. Rep. No. 830, 88th Cong., 2d Sess., 100 (1964); S. Rep. No. 1631, 77th Cong., 2d Sess., 79 (1942). Even if the judicial origins of the rule supported JUSTICE BLACKMUN, we would still be obliged to bow to the will of Congress.

[11] As the rule developed, a number of theories supported taxation in the later year. One explained that the taxpayer who had taken the deduction "consented" to "return" it if events proved him not entitled to it, *e. g.*, *Philadelphia National Bank* v. *Rothensies*, 43 F. Supp. 923, 925 (ED Pa. 1942), while another explained that the deduction offset income in the earlier year, which became "latent" income that might be recaptured, *e. g.*, *National Bank of Commerce* v. *Commissioner*, 115 F. 2d 875, 876–877 (CA9 1940); Lassen, The Tax Benefit Rule and Related Problems, 20 Taxes 473, 476 (1942). Still a third view maintained that the later recognition of income was a balancing entry. *E. g.*, *South Dakota Concrete Products Co.* v. *Commissioner*, 26 B. T. A. 1429, 1431 (1932). All these views reflected that the initial accounting for the item must be corrected to present a true picture of income. While annual accounting precludes reopening the earlier year, it does not prevent a less precise correction—far superior to none—in the current year, analogous to the practice of financial accountants. See W. Meigs, A. Mosich, C. Johnson, & T. Keller, Intermediate Accounting 109 (3d ed. 1974). This concern with more accurate measurement of income underlies the tax benefit rule and always has.

[12] Even this rule did not create complete transactional equivalence. In the second version of the transaction discussed in the text, the taxpayer might have realized no benefit from the deduction, if, for instance, he had no taxable income for that year. Application of the tax benefit rule as originally developed would require the taxpayer to recognize income on the repayment, so that the net result of the collection of the principal amount

The taxpayers and the Government in these cases propose different formulations of the tax benefit rule. The taxpayers contend that the rule requires the inclusion of amounts *recovered* in later years, and they do not view the events in these cases as "recoveries." The Government, on the other hand, urges that the tax benefit rule requires the inclusion of amounts previously deducted if later events are inconsistent with the deductions; it insists that no "recovery" is necessary to the application of the rule. Further, it asserts that the events in these cases are inconsistent with the deductions taken by the taxpayers. We are not in complete agreement with either view.

An examination of the purpose and accepted applications of the tax benefit rule reveals that a "recovery" will not always be necessary to invoke the tax benefit rule. The purpose of the rule is not simply to tax "recoveries." On the contrary, it is to approximate the results produced by a tax system based on transactional rather than annual accounting. See generally Bittker & Kanner 270; Byrne, The Tax Benefit Rule as Applied to Corporate Liquidations and Contributions to Capital: Recent Developments, 56 Notre Dame Law. 215, 221, 232, (1980); Tye, The Tax Benefit Doctrine Reexamined, 3 Tax L. Rev. 329 (1948) (hereinafter Tye). It has long been accepted that a taxpayer using accrual accounting who accrues and deducts an expense in a tax year before it becomes payable and who for some reason eventually does not have to

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of the debt would be recognition of income. Similarly, the tax rates might change between the two years, so that a deduction and an inclusion, though equal in amount, would not produce exactly offsetting tax consequences. Congress enacted § 111 to deal with part of this problem. Although a change in the rates may still lead to differences in taxes due, see *Alice Phelan Sullivan Corp.* v. *United States*, 180 Ct. Cl. 659, 381 F. 2d 399 (1967), § 111 provides that the taxpayer can exclude from income the amount that did not give rise to some tax benefit. See *Dobson* v. *Commissioner*, 320 U. S. 489, 505–506 (1943). This exclusionary rule and the inclusionary rule described in the text are generally known together as the tax benefit rule. It is the inclusionary aspect of the rule with which we are currently concerned.

pay the liability must then take into income the amount of the expense earlier deducted. See, *e. g.*, *Mayfair Minerals, Inc.* v. *Commissioner*, 456 F. 2d 622 (CA5 1972) *(per curiam); Bear Manufacturing Co.* v. *United States*, 430 F. 2d 152 (CA7 1970), cert. denied, 400 U. S. 1021 (1971); *Haynsworth* v. *Commissioner*, 68 T. C. 703 (1977), affirmance order, 609 F. 2d 1007 (CA5 1979); *G. M. Standifer Construction Corp.* v. *Commissioner*, 30 B. T. A. 184, 186–187 (1934), petition for review dism'd, 78 F. 2d 285 (CA9 1935). The bookkeeping entry canceling the liability, though it increases the balance sheet net worth of the taxpayer, does not fit within any ordinary definition of "recovery."[13] Thus, the taxpayers' formulation of the rule neither serves the purposes of the rule nor accurately reflects the cases that establish the rule. Further, the taxpayers' proposal would introduce an undesirable formalism into the application of the tax benefit rule. Lower courts have been able to stretch the definition of "recovery" to include a great variety of events. For instance, in cases of corporate liquidations, courts have viewed the corporation's receipt of its own stock as a "recovery," reasoning that, even though the instant that the corporation receives the stock it becomes worthless, the stock has value as it is turned over to the corporation, and that ephemeral value represents a recovery for the corporation.

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[13] See, *e. g.*, Bittker & Kanner 267; cf. Zysman, Income Derived from the Recovery of Deductions, 19 Taxes 29, 30 (1941) (We are "not concerned with a theoretical or pure economic concept of income, but with gross income within the meaning of the statute").

Although JUSTICE STEVENS insists that this situation falls within the standard meaning of "recovery," it does so only in the sense that an increase in balance sheet net worth is to be considered a recovery. *Post*, at 416–417, n. 26. But in *Bliss*, JUSTICE STEVENS asserts that there is no recovery. There, the corporation's balance sheet shows zero as the historic cost of the grain on hand, because the corporation expensed the asset upon acquisition. At the date of liquidation, the historic cost of the grain on hand was in fact greater than zero, and an accurate balance sheet would have reflected an asset account balance greater than zero. The necessary adjustment thus reflects an increase in balance sheet net worth.

See, *e. g.*, *Tennessee-Carolina Transportation, Inc.* v. *Commissioner*, 582 F. 2d, at 382 (alternative holding). Or, payment to another party may be imputed to the taxpayer, giving rise to a recovery. See *First Trust and Savings Bank of Taylorville* v. *United States*, 614 F. 2d, at 1146 (alternative holding). Imposition of a requirement that there be a recovery would, in many cases, simply require the Government to cast its argument in different and unnatural terminology, without adding anything to the analysis.[14]

The basic purpose of the tax benefit rule is to achieve rough transactional parity in tax, see n. 12, *supra*, and to protect the Government and the taxpayer from the adverse effects of reporting a transaction on the basis of assumptions that an event in a subsequent year proves to have been erroneous. Such an event, unforeseen at the time of an earlier deduction, may in many cases require the application of the tax benefit rule. We do not, however, agree that this consequence invariably follows. Not every unforeseen event will require the taxpayer to report income in the amount of his earlier deduction. On the contrary, the tax benefit rule will "cancel out" an earlier deduction only when a careful examination shows that the later event is indeed fundamentally inconsistent with the premise on which the deduction was initially based.[15] That is, if that event had occurred within the

[14] Despite JUSTICE STEVENS' assertion that *Tennessee-Carolina* was wrong, *post*, at 417, n. 26, the case fits what seems to be his definition of a recovery—an enhancement of the taxpayer's wealth—for the corporation in *Tennessee-Carolina* received stock worth more than the balance sheet book value of its assets. See n. 13, *supra*. Thus we disagree with the assertion that the recovery rule is a bright-line rule easily applied.

[15] JUSTICE STEVENS accuses us of creating confusion at this point in the analysis by requiring the courts to distinguish "inconsistent events" from "fundamentally inconsistent events." *Post*, at 418. That line is not the line we draw; rather, we draw the line between merely unexpected events and inconsistent events.

This approach differs from that proposed by the Government in that the Government has not attempted to explain why two events are inconsistent. Apparently, in the Government's view, any unexpected event is inconsistent with an earlier deduction. That view we cannot accept.

same taxable year, it would have foreclosed the deduction.[16] In some cases, a subsequent recovery by the taxpayer will be the only event that would be fundamentally inconsistent with the provision granting the deduction. In such a case, only actual recovery by the taxpayer would justify application of the tax benefit rule. For example, if a calendar-year taxpayer made a rental payment on December 15 for a 30-day lease deductible in the current year under § 162(a)(3), see Treas. Reg. § 1.461–1(a)(1), 26 CFR § 1.461–1(a)(1) (1982); *e. g.*, *Zaninovich* v. *Commissioner*, 616 F. 2d 429 (CA9 1980),[17] the tax benefit rule would not require the recognition

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[16] JUSTICE STEVENS apparently disagrees with this rule, for, although he concurs in the result in *Hillsboro*, he asserts that the events there would have resulted in denial of the deduction had they all occurred in one year. *Post*, at 418. We find it difficult to believe that Congress placed such a premium on having a transaction straddle two tax years.

[17] JUSTICE STEVENS questions whether this amount was properly deductible under § 162(a)(3) and seems to suggest that if it was, Congress meant the deduction to be irrevocable. *Post*, at 415–416, n. 25. It is clear that § 162(a)(3) permits the deduction of prepaid expenses that will benefit the taxpayer for a short time into the next taxable year, as in our example, rather than benefiting the taxpayer substantially beyond the taxable year. See generally 1 B. Bittker, *supra* n. 9, ¶ 20.4.1.

The dissent's view that the preferable approach is to scrutinize the deduction more carefully in the year it is taken ignores two basic problems. First, reasons unrelated to the certainty that the taxpayer will eventually consume the asset as expected often enter into the decision when to allow the deduction. For instance, the desire to save taxpayers the burden of careful allocation of relatively small expenditures favors the allowance of the entire deduction in a single year of some business expenditures attributable to operations after the close of the taxable year. See generally *ibid.* Second, we simply cannot predict the future, no matter how carefully we scrutinize the deduction in the earlier year. For instance, in the case of the bad debt that is eventually repaid, we already require that the debt be apparently worthless in the year of deduction, see § 166(a)(1), but we often find that the future does not conform to earlier perceptions, and the taxpayer collects the debt. Then, "the deductions are practical necessities due to our inability to read the future, and the inclusion of the recovery in income is necessary to offset the deduction." *South Dakota Concrete Products Co.* v. *Commissioner*, 26 B. T. A., at 1432.

of income if the leased premises were destroyed by fire on January 10. The resulting inability of the taxpayer to occupy the building would be an event not fundamentally inconsistent with his prior deduction as an ordinary and necessary business expense under § 162(a). The loss is attributable to the business[18] and therefore is consistent with the deduction of the rental payment as an ordinary and necessary business expense. On the other hand, had the premises not burned and, in January, the taxpayer decided to use them to house his family rather than to continue the operation of his business, he would have converted the leasehold to personal use. This would be an event fundamentally inconsistent with the business use on which the deduction was based.[19] In the case of the fire, only if the lessor—by virtue of some provision in the lease—had refunded the rental payment would the taxpayer be required under the tax benefit rule to recognize income on the subsequent destruction of the building. In other words, the subsequent recovery of the previously deducted rental payment would be the only event inconsistent with the provision allowing the deduction. It therefore is evident that the tax benefit rule must be applied on a case-by-case basis. A court must consider the facts and circumstances of each case in the light of the purpose and function of the provisions granting the deductions.

When the later event takes place in the context of a nonrecognition provision of the Code, there will be an inherent tension between the tax benefit rule and the nonrecognition provision. See *Putoma Corp.* v. *Commissioner*, 601 F. 2d 734, 742 (CA5 1979); *id.*, at 751 (Rubin, J., dissenting); cf. *Helvering* v. *American Dental Co.*, 318 U. S. 322 (1943) (ten-

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[18] The loss is properly attributable to the business because the acceptance of the risk of loss is a reasonable business judgment that the courts ordinarily will not question. See *Welch* v. *Helvering*, 290 U. S. 111, 113 (1933); 1 B. Bittker, *supra* n. 9, ¶ 20.3.2.

[19] See 1 B. Bittker, *supra* n. 9, ¶ 20.2.2 ("[F]ood and shelter are quintessential nondeductible personal expenses"). See also *infra*, at 395–396.

sion between exclusion of gifts from income and treatment of cancellation of indebtedness as income). We cannot resolve that tension with a blanket rule that the tax benefit rule will always prevail. Instead, we must focus on the particular provisions of the Code at issue in any case.[20]

The formulation that we endorse today follows clearly from the long development of the tax benefit rule. JUSTICE STEVENS' assertion that there is no suggestion in the early cases or from the early commentators that the rule could ever be applied in any case that did not involve a physical recovery, *post*, at 406–408, is incorrect. The early cases frequently framed the rule in terms consistent with our view and irreconcilable with that of the dissent. See *Barnett* v. *Com-*

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[20] An unreserved endorsement of the Government's formulation might dictate the results in a broad range of cases not before us. See, *e. g.*, Brief for United States in No. 81–930 and for Respondent in No. 81–485, p. 20; Reply Brief for Petitioner in No. 81–485, p. 12; Tr. of Oral Arg. 33. For instance, the Government's position implies that an individual proprietor who makes a gift of an expensed asset must recognize the amount of the expense as income, but cf. *Campbell* v. *Prothro*, 209 F. 2d 331, 335 (CA5 1954). See generally 2A J. Rabkin & M. Johnson, Federal Income, Gift and Estate Taxation § 6.01(3) (1982) (discussing Commissioner's treatment of gifts of expensed assets). Similarly, the Government's view suggests the conclusion that one who dies and leaves an expensed asset to his heirs would, in his last return, recognize income in the amount of the earlier deduction. Our decision in the cases before us now, however, will not determine the outcome in these other situations; it will only demonstrate the proper analysis. Those cases will require consideration of the treatment of gifts and legacies as well as §§ 1245(b)(1), (2), and 1250(d)(1), (2), which are a partial codification of the tax benefit rule, see O'Hare, Statutory Nonrecognition of Income and the Overriding Principle of the Tax Benefit Rule in the Taxation of Corporations and Shareholders, 27 Tax L. Rev. 215, 216 (1972), and which exempt dispositions by gift and transfers at death from the operation of the general depreciation recapture rules. Although there may be an inconsistent event in the personal use of an expensed asset, that event occurs in the context of a nonrecognition rule, see, *e. g.*, *Campbell* v. *Prothro*, *supra*, at 336; 1 B. Bittker, *supra* n. 9, ¶ 5.21, and resolution of these cases would require a determination whether the nonrecognition rule or the tax benefit rule prevails.

missioner, 39 B. T. A. 864, 867 (1939) ("Finally, the present case is analogous to a number of others, where . . . [w]hen some event occurs which is *inconsistent* with a deduction taken in a prior year, adjustment may have to be made by reporting a balancing item in income for the year in which the change occurs") (emphasis added); *Estate of Block* v. *Commissioner*, 39 B. T. A., at 341 ("When recovery *or some other event which is inconsistent* with what has been done in the past occurs, adjustment must be made in reporting income for the year in which the change occurs") (emphasis added); *South Dakota Concrete Products Co.* v. *Commissioner*, 26 B. T. A., at 1432 ("[W]hen an *adjustment* occurs which is *inconsistent* with what has been done in the past in the determination of tax liability, the adjustment should be reflected in reporting income for the year in which it occurs") (emphasis added).[21] The reliance of the dissent on the early commentators is equally misplaced, for the articles cited in the dissent, like the early cases, often stated the rule in terms of inconsistent events.[22]

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[21] JUSTICE STEVENS' attempt to discount the explicit statement in *Estate of Block* that inconsistent events would trigger the recognition of income, *post*, at 408, n. 9, is singularly unpersuasive. The Board of Tax Appeals used the word "recovery" later in the opinion because it was faced with a recovery in that case, not because it meant to repudiate hastily its discussion in the same opinion of the general rule. Similarly, the mere assertion that the broad formulation in *Barnett* followed a discussion of a Treasury Regulation, *post*, at 408, n. 10, does not support the view of the dissent that the concept of inconsistent events represents a break with the early cases.

[22] "The rule requiring taxation of income from the recovery or *cancellation* of items previously deducted is a remedial expedient, designed to prevent the unjust enrichment of a taxpayer and to offset the benefit derived from a deduction to which, *in the light of subsequent events*, the taxpayer was not entitled." Plumb 176 (emphasis added). See also *id.*, at 131, 178.

"In a few words, the basic idea of the Tax Benefit Rule is this: If a taxpayer has derived a benefit from a deduction by reducing his taxable income in the year of deduction, he must declare as taxable income any recovery *or other change of his status* which—*ex nunc*—makes the original

Finally, JUSTICE STEVENS' dissent relies heavily on the codification in § 111 of the exclusionary aspect of the tax benefit rule, which requires the taxpayer to include in income only the amount of the deduction that gave rise to a tax benefit, see n. 12, *supra*. That provision does, as the dissent observes, speak of a "recovery." By its terms, it only applies to bad debts, taxes, and delinquency amounts. Yet this Court has held, *Dobson* v. *Commissioner*, 320 U. S. 489, 505–506 (1943), and it has always been accepted since,[23] that § 111 does not *limit* the application of the exclusionary aspect of the tax benefit rule. On the contrary, it lists a few applications and represents a general endorsement of the exclusionary aspect of the tax benefit rule to other situations within the inclusionary part of the rule. The failure to mention inconsistent events in § 111 no more suggests that they do not trigger the application of the tax benefit rule than the failure to mention the recovery of a capital loss suggests that it does not, see *Dobson*, *supra*.

JUSTICE STEVENS also suggests that we err in recognizing transactional equity as the reason for the tax benefit rule. It is difficult to understand why even the clearest recovery should be taxed if not for the concern with transactional equity, see *supra*, at 377. Nor does the concern with transactional equity entail a change in our approach to the annual accounting system. Although the tax system relies basically

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deduction seem unjustified." Lassen, The Tax Benefit Rule and Related Problems, 20 Taxes 473 (1942) (emphasis added).

One author saw his subject—the recovery of deductions—as an example of the broader rule: "Sometimes a *subsequent event* reveals the income or deductions as reported by the taxpayer to be erroneous. Thus the unexpected recovery of a portion of an amount lost and already deducted reduces the loss as originally determined. There are even cases in which items apparently finally and accurately determined have to be adjusted *on account of a subsequent event.*" Zysman, Income Derived from the Recovery of Deductions, 19 Taxes 29 (1941) (emphasis added).

[23] See, *e. g.*, Bittker & Kanner 266; Tye 330; Plumb 144–145.

on annual accounting, see *Burnet* v. *Sanford & Brooks Co.*, 282 U. S., at 365, the tax benefit rule eliminates some of the distortions that would otherwise arise from such a system. See, *e. g.*, Bittker & Kanner 268–270; Tye 350; Plumb 178, and n. 172. The limited nature of the rule and its effect on the annual accounting principle bears repetition: *only* if the occurrence of the event in the earlier year would have resulted in the disallowance of the deduction can the Commissioner require a compensating recognition of income when the event occurs in the later year.[24]

Our approach today is consistent with our decision in *Nash* v. *United States*, 398 U. S. 1 (1970). There, we rejected the Government's argument that the tax benefit rule required a taxpayer who incorporated a partnership under § 351 to include in income the amount of the bad debt reserve of the

[24] JUSTICE STEVENS seems to fear that our approach to the annual accounting system is inconsistent with *Sanford & Brooks* in a way that will vest new power in the tax collector to ignore the annual accounting system. The fear is unfounded. In *Sanford & Brooks*, a taxpayer who had incurred a net loss on a long-term contract managed to recoup the loss in a lawsuit in a later year. The earlier net losses on the contract contributed to net losses for the business in most of the tax years during the performance of the contract. The Court rejected the taxpayer's contention that it should be able to exclude the award on the theory that the award offset the earlier net losses. This adherence to the annual accounting system is perfectly consistent with the approach we follow in the cases now before us. In situations implicating the tax benefit rule or the analogous doctrine permitting the taxpayer to take a deduction when income recognized earlier under a claim of right must be repaid, see n. 9, *supra*, the problem is that the taxpayer has mischaracterized some event. Either he has recognized income that eventually turns out not to be income, or he has taken a deduction that eventually turns out not to be a deduction. Neither of these problems arose in *Sanford & Brooks*. Instead, the problem there was that the taxpayer had properly deducted expenditures and was properly recognizing income but thought that the two should have been matched in the same year. The tax benefit rule does not permit the Commissioner or the taxpayer to rematch properly recognized income with properly deducted expenses; it merely permits a balancing entry when an apparently proper expense turns out to be improper.

partnership. The Government's theory was that, although § 351 provides that there will be no gain or loss on the transfer of assets to a controlled corporation in such a situation, the partnership had taken bad debt deductions to create the reserve, see § 166(c), and when the partnership terminated, it no longer needed the bad debt reserve. We noted that the receivables were transferred to the corporation along with the bad debt reserve. *Id.*, at 5, and n. 5. Not only was there no "recovery," *id.*, at 4, but there was no inconsistent event of any kind. That the fair market value of the receivables was equal to the face amount less the bad debt reserve, *ibid.*, reflected that the reserve, and the deductions that constituted it, were still an accurate estimate of the debts that would ultimately prove uncollectible, and the deduction was therefore completely consistent with the later transfer of the receivables to the incorporated business. See *Citizens' Acceptance Corp.* v. *United States*, 320 F. Supp. 798 (Del. 1971), rev'd on other grounds, 462 F. 2d 751 (CA3 1972); Rev. Rul. 78–279, 1978–2 Cum. Bull. 135; Rev. Rul. 78–278, 1978–2 Cum. Bull. 134; see generally O'Hare, Statutory Nonrecognition of Income and the Overriding Principle of the Tax Benefit Rule in the Taxation of Corporations and Shareholders, 27 Tax L. Rev. 215, 219–221 (1972).[25]

In the cases currently before us, then, we must undertake an examination of the particular provisions of the Code that govern these transactions to determine whether the deduc-

[25] JUSTICE STEVENS attempts to read our prior cases as somehow inconsistent with our approach here. *Nash* is the only case in which we have dealt with the inclusionary aspect of the tax benefit rule, and, as we have established, there was neither a recovery nor an inconsistent event in that case. In *Dobson* v. *Commissioner*, 320 U. S. 489 (1943), we considered the exclusionary aspect of the rule. That case involved a recovery that was clearly inconsistent with the deduction, and the only question was whether the deduction had created a benefit. The references to "recovery" in the opinion describe the case before the Court. They do not in any way impose general requirements for inclusion, as the dissent seems to suggest.

tions taken by the taxpayers were actually inconsistent with later events and whether specific nonrecognition provisions prevail over the principle of the tax benefit rule.[26]

III

In *Hillsboro*, the key provision is § 164(e).[27] That section grants the corporation a deduction for taxes imposed on its shareholders but paid by the corporation. It also denies the shareholders any deduction for the tax. In this case, the Commissioner has argued that the refund of the taxes by the State to the shareholders is the equivalent of the payment of a dividend from Hillsboro to its shareholders. If Hillsboro does not recognize income in the amount of the earlier deduction, it will have deducted a dividend. Since the general structure of the corporate tax provisions does not permit deduction of dividends, the Commissioner concludes that the payment to the shareholders must be inconsistent with the original deduction and therefore requires the inclusion of the amount of the taxes as income under the tax benefit rule.

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[26] It is worth noting that a holding requiring no recognition of income is not, as JUSTICE BLACKMUN's dissent suggests, a conclusion that the tax benefit rule "has no application to the situation presented." *Post*, at 422. As a general principle of tax law, the rule of course applies; it simply does not require the recognition of income.

[27] The Commissioner asserts also that Hillsboro deducted the taxes as a contested liability under § 461(f), and that the legislative history of § 461(f) shows that Congress intended that the tax benefit rule apply if a taxpayer successfully contested a liability deducted under § 461(f). We do not view this argument as in any way separate from the Commissioner's argument under § 164(e). Section 461(f) does not grant deductions of its own force; the expenditure must qualify as deductible in character under some other section. See Treas. Reg. § 1.461–2(a)(1)(iv), 26 CFR § 1.461–2(a)(1)(iv) (1982). If the expenditure does qualify independently as deductible, but, because it is contested, it lacks the certainty otherwise required for deduction, § 461(f) grants the deduction, on the condition that the tax benefit rule will apply. But for the tax benefit rule to apply, there must be some event that is inconsistent with the provision granting the deduction. The question here then remains whether the deduction is appropriate under § 164(e) or whether later events are inconsistent with that deduction.

In evaluating this argument, it is instructive to consider what the tax consequences of the payment of a shareholder tax by the corporation would be without § 164(e) and compare them to the consequences under § 164(e). Without § 164(e), the corporation would not be entitled to a deduction, for the tax is not imposed on it. See Treas. Reg. § 1.164–1(a), 26 CFR § 1.164–1(a) (1982); *Wisconsin Gas & Electric Co.* v. *United States*, 322 U. S. 526, 527–530 (1944). If the corporation has earnings and profits, the shareholder would have to recognize income in the amount of the taxes, because a payment by a corporation for the benefit of its shareholders is a constructive dividend. See §§ 301(c), 316(a); *e. g.*, *Ireland* v. *United States*, 621 F. 2d 731, 735 (CA5 1980); B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders ¶ 7.05 (4th ed. 1979). The shareholder, however, would be entitled to a deduction since the constructive dividend is used to satisfy his tax liability. § 164(a)(2). Thus, for the shareholder, the transaction would be a wash: he would recognize the amount of the tax as income,[28] but he would have an offsetting deduction for the tax. For the corporation, there would be no tax consequences, for the payment of a dividend gives rise to neither income nor a deduction. 26 U. S. C. § 311(a) (1976 ed., Supp. V).

Under § 164(e), the economics of the transaction of course remain unchanged: the corporation is still satisfying a liability of the shareholder and is therefore paying a constructive dividend. The tax consequences are, however, significantly different, at least for the corporation. The transaction is still a wash for the shareholder; although § 164(e) denies him the de-

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[28] There would be an exception for a shareholder who had not yet earned $200 in interest and dividend income from his stock holdings in this and other corporations during the taxable year. He would be able to exclude up to $200 received in dividend and interest income for the year. See 26 U. S. C. §§ 116(a)(1), (b) (1976 ed., Supp. V). At the time of the Hillsboro transaction, the exclusion was $100. See 26 U. S. C. § 116(a).

duction to which he would otherwise be entitled, he need not recognize income on the constructive dividend, Treas. Reg. § 1.164–7, 26 CFR § 1.164–7 (1982). But the corporation is entitled to a deduction that would not otherwise be available. In other words, the only effect of § 164(e) is to permit the corporation to deduct a dividend. Thus, we cannot agree with the Commissioner that, simply because the events here give rise to a deductible dividend, they cannot be consistent with the deduction. In at least some circumstances, a deductible dividend is within the contemplation of the Code. The question we must answer is whether § 164(e) permits a deductible dividend in these circumstances—when the money, though initially paid into the state treasury, ultimately reaches the shareholder—or whether the deductible dividend is available, as the Commissioner urges, only when the money remains in the state treasury, as properly assessed and collected tax revenue.

Rephrased, our question now is whether Congress, in granting this special favor to corporations that paid dividends by satisfying the liability of their shareholders, was concerned with the *reason* the money was paid out by the corporation or with the *use* to which it was ultimately put. Since § 164(e) represents a break with the usual rules governing corporate distributions, the structure of the Code does not provide any guidance on the reach of the provision. This Court has described the provision as "prompted by the plight of various banking corporations which paid and voluntarily absorbed the burden of certain local taxes imposed upon their shareholders, but were not permitted to deduct those payments from gross income." *Wisconsin Gas & Electric Co.* v. *United States*, *supra*, at 531 (footnote omitted). The section, in substantially similar form, has been part of the Code since the Revenue Act of 1921, 42 Stat. 227. The provision was added by the Senate, but its Committee Report merely mentions the deduction without discussing it, see S. Rep. No. 275, 67th Cong., 1st Sess., 19 (1921). The only discussion of

the provision appears to be that between Dr. T. S. Adams and Senator Smoot at the Senate hearings. Dr. Adams' statement explains why the States imposed the property tax on the shareholders and collected it from the banks, but it does not cast much light on the reason for the deduction. Hearings on H. R. 8245 before the Committee on Finance, 67th Cong., 1st Sess., 250–251 (1921) (statement of Dr. T. S. Adams, tax advisor, Treasury Department). Senator Smoot's response, however, is more revealing:

> "I have been a director in a bank . . . for over 20 years. They have paid that tax ever since I have owned a share of stock in the bank. . . . I know nothing about it. I do not take 1 cent of credit for deductions, and the banks are entitled to it. *They pay it out.*" *Id.*, at 251 (emphasis added).

The *payment* by the corporations of a liability that Congress knew was not a tax imposed on them[29] gave rise to the entitlement to a deduction; Congress was unconcerned that the corporations took a deduction for amounts that did not satisfy their tax liability. It apparently perceived the shareholders and the corporations as independent of one another, each "know[ing] nothing about" the payments by the other. In those circumstances, it is difficult to conclude that Congress intended that the corporation have no deduction if the State turned the tax revenues over to these independent parties. We conclude that the purpose of § 164(e) was to provide relief for corporations making these payments, and the focus of Congress was on the act of payment rather than on the ultimate use of the funds by the State. As long as the payment itself was not negated by a refund to the corporation, the change in character of the funds in the hands of the

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[29] Dr. Adams testified repeatedly that the banks paid the tax "voluntarily." Hearings on H. R. 8245 before the Committee on Finance, 67th Cong., 1st Sess., 250 (1921).

State does not require the corporation to recognize income, and we reverse the judgment below.[30]

IV

The problem in *Bliss* is more complicated. Bliss took a deduction under § 162(a), so we must begin by examining that provision. Section 162(a) permits a deduction for the "ordinary and necessary expenses" of carrying on a trade or business. The deduction is predicated on the consumption of the asset in the trade or business. See Treas. Reg. § 1.162–3, 26 CFR § 1.162–3 (1982) ("Taxpayers . . . should include in expenses the charges for materials and supplies only in the amount that they are *actually consumed and used in operation* in the taxable year . . .") (emphasis added). If the taxpayer later sells the asset rather than consuming it in furtherance of his trade or business, it is quite clear that he would lose his deduction, for the basis of the asset would be zero, see, *e. g.*, *Spitalny* v. *United States*, 430 F. 2d 195 (CA9 1970), so he would recognize the full amount of the proceeds on sale as gain. See §§ 1001(a), (c). In general, if the taxpayer converts the expensed asset to some other, nonbusiness use, that action is inconsistent with his earlier deduction, and the tax benefit rule would require inclusion in income of the amount of the unwarranted deduction. That nonbusiness use is inconsistent with a deduction for an ordinary and necessary business expense is clear from an examination of the Code. While § 162(a) permits a deduction for ordinary and necessary business expenses, § 262 explicitly

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[30] Our examination of the legislative history thus leads us to reject JUSTICE BLACKMUN's unsupported suggestion that Congress focused on the payment of a tax. *Post*, at 422. The theory he suggests leads to the conclusion that, even if the State had not refunded the taxes, the bank would not have been entitled to the deduction, because it had not paid a "tax." It is difficult to believe that the Congress that acted to alleviate "the plight of various banking corporations which paid and voluntarily absorbed the burden," *Wisconsin Gas & Electric Co.* v. *United States*, 322 U. S. 526, 531 (1944), intended the result suggested by the dissent.

denies a deduction for personal expenses. In the 1916 Act, the two provisions were a single section. See § 5(a)(First), 39 Stat. 756. The provision has been uniformly interpreted as providing a deduction only for those expenses attributable to the business of the taxpayer. See, *e. g.*, *Kornhauser* v. *United States*, 276 U. S. 145 (1928); Hearings on Proposed Revision of Revenue Laws before the Subcommittee of the House Committee on Ways and Means, 75th Cong., 3d Sess., 54 (1938) ("a taxpayer should be granted a reasonable deduction for the direct expenses he has incurred *in connection with his income*") (emphasis added); see generally, 1 Bittker, *supra* n. 9, ¶ 20.2. Thus, if a corporation turns expensed assets to the analog of personal consumption, as Bliss did here—distribution to shareholders[31]—it would seem that it should take into income the amount of the earlier deduction.[32]

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[31] "Paying the dividend was the enjoyment of [the corporate] income. A body corporate can be said to enjoy its income in no other way." *Williamson* v. *United States*, 155 Ct. Cl. 279, 289, 292 F. 2d 524, 530 (1961).

[32] JUSTICE STEVENS' dissent takes issue with this conclusion, characterizing the situation as identical to that in *Nash* v. *United States*, 398 U. S. 1 (1970), which he explains as a case in which we held that, although "a business asset matching a prior deduction . . . would not be used up . . . until it had passed to a different taxpayer," the transfer did not require the recognition of income. *Post*, at 415. What is misleading in this description is its failure to recognize that in *Nash* the prior deduction was reflected in the asset transferred because of the contra-asset account: uncollectible accounts. That contra-asset diminished the asset, see generally W. Meigs, A. Mosich, C. Johnson, & T. Keller, Intermediate Accounting 140–141 (3d ed. 1974), and was inseparable from it. Therefore, the transfer of the notes did not establish that they were worth their face value, and there was no inconsistent event.

In *Bliss*, the taxpayers took a deduction for an expense and credited the asset account. Unlike the debit to the expense account in *Nash*, the debit to the expense account did not reflect any economic decrease in the value of the asset. When the taxpayers transferred the asset, it became clear that the economic decrease would not take place in the hands of Bliss—and possibly never would occur.

To see the difference more clearly, consider the views of a third party contemplating purchasing the asset on hand in *Nash* and one contemplating

That conclusion, however, does not resolve this case, for the distribution by Bliss to its shareholders is governed by a provision of the Code that specifically shields the taxpayer from recognition of gain—§ 336. We must therefore proceed to inquire whether this is the sort of gain that goes unrecognized under § 336. Our examination of the background of § 336 and its place within the framework of tax law convinces us that it does not prevent the application of the tax benefit rule.[33]

Section 336 was enacted as part of the 1954 Code. It codified the doctrine of *General Utilities Co.* v. *Helvering*, 296 U. S. 200, 206 (1935), that a corporation does not recognize gain on the distribution of appreciated property to its shareholders. Before the enactment of the statutory provision,

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purchasing the asset on hand in *Bliss*. In *Nash*, the purchaser would be willing to pay only the face amount of the receivables *less the amount in the contra-asset account*—the amount earlier deducted by the taxpayer—because that is all the purchaser could expect to realize on them. In other words, the deduction reflected a real decrease in the value of the asset. In *Bliss*, on the other hand, the purchaser would be happy to pay the value of the grain, *undiminished by the expense deducted by the taxpayer*. The deduction and the asset remain separable, and the taxpayer can transfer one without netting out the other.

[33] We are aware that Congress considered but failed to enact a bill amending §§ 1245 and 1250 to cover any deduction of the purchase price of property. H. R. 10936, 94th Cong., 1st Sess. (1975). That bill would have settled the question here, since it is clear that § 1245 overrides § 336. § 1245(a)(1); Treas. Reg. § 1.1245–6(b), 26 CFR § 1.1245–6(b) (1982). The failure to enact the bill does not suggest that Congress intended that deductions under § 162 not be subject to recapture. Both the House and Senate Committees reported favorably on the bill, S. Rep. No. 94–1346 (1976); H. R. Rep. No. 94–1350 (1976), the House passed it, and Congress adjourned without any action by the Senate. See Calendars of the United States House of Representatives and History of Legislation 174 (Final ed. 1977). The Reports suggest that Congress focused on disposition by sale and thought the income subject to recapture in any event, but possibly at capital gains rather than ordinary income rates. S. Rep. No. 94–1346, *supra*, at 2; H. R. Rep. No. 94–1350, *supra*, at 2. Given this background, we cannot draw any inference from the failure to enact the amendment.

the rule was expressed in the regulations, which provided that the corporation would not recognize gain or loss, "however [the assets] may have *appreciated or depreciated* in value since their acquisition." Treas. Regs. 118, § 39.22(a)–20 (1953) (emphasis added). The Senate Report recognized this regulation as the source of the new § 336, S. Rep. No. 1622, 83d Cong., 2d Sess., 258 (1954). The House Report explained its version of the provision: "Thus, the fact that the property distributed has *appreciated or depreciated* in value over its adjusted basis to the distributing corporation will in no way alter the application of subsection (a) [providing nonrecognition]." H. R. Rep. No. 1337, 83d Cong., 2d Sess., A90 (1954) (emphasis added). This background indicates that the real concern of the provision is to prevent recognition of market appreciation that has not been realized by an arm's-length transfer to an unrelated party rather than to shield all types of income that might arise from the disposition of an asset.

Despite the breadth of the nonrecognition language in § 336, the rule of nonrecognition clearly is not without exception. For instance, § 336 does not bar the recapture under § 1245 and § 1250 of excessive depreciation taken on distributed assets. §§ 1245(a), 1250(a); Treas. Reg. §§ 1.1245–6(b), 1.1250–1(c)(2), 26 CFR §§ 1.1245–6(b), 1.1250–1(c)(2) (1982). Even in the absence of countervailing statutory provisions, courts have never read the command of nonrecognition in § 336 as absolute. The "assignment of income" doctrine has always applied to distributions in liquidation. See, *e. g.*, *Siegel* v. *United States*, 464 F. 2d 891 (CA9 1972), cert. dism'd, 410 U. S. 918 (1973); *Williamson* v. *United States*, 155 Ct. Cl. 279, 292 F. 2d 524 (1961); see also *Idaho First National Bank* v. *United States*, 265 F. 2d 6 (CA9 1959) (decided before *General Utilities* codified in § 336). That judicial doctrine prevents taxpayers from avoiding taxation by shifting income from the person or entity that earns it to

someone who pays taxes at a lower rate.[34] Since income recognized by the corporation is subject to the corporate tax and is again taxed at the individual level upon distribution to the shareholder, shifting of income from a corporation to a shareholder can be particularly attractive: it eliminates one level of taxation. Responding to that incentive, corporations have attempted to distribute to shareholders fully performed contracts or accounts receivable and then to invoke § 336 to avoid taxation on the income. In spite of the language of nonrecognition, the courts have applied the assignment-of-income doctrine and required the corporation to recognize the income.[35] Section 336, then, clearly does not shield the taxpayer from recognition of *all* income on the distribution.

Next, we look to a companion provision—§ 337, which governs sales of assets followed by distribution of the proceeds in liquidation.[36] It uses essentially the same broad language to

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[34] For instance, a taxpayer cannot avoid recognizing the interest income on bonds that he owns by clipping the coupons and giving them to another party. See, *e. g.*, *Helvering* v. *Horst*, 311 U. S. 112 (1940); *Lucas* v. *Earl*, 281 U. S. 111 (1930).

[35] Indeed, the legislative history of § 336 compels such a result. Section 336 arose out of the same provision in the House bill as did § 311, which provides for nonrecognition of gain on nonliquidating distributions of appreciated property, and the Senate comment on § 311 explicitly provides for the application of the assignment-of-income doctrine. S. Rep. No. 1622, 83d Cong., 2d Sess., 247 (1954).

[36] In relevant part, § 337 provides:

"(a) If within the 12-month period beginning on the date on which a corporation adopts a plan of complete liquidation, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims, then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period.

"(b) (1) For purposes of subsection (a), the term 'property' does not include—

"(A) stock in trade of the corporation, or other property of a kind which would properly be included in the inventory of the corporation if on hand at the close of the taxable year, and property held by the corporation primarily for sale to customers in the ordinary course of its trade or business,

shield the corporation from the recognition of gain on the sale of the assets. The similarity in language alone would make the construction of § 337 relevant in interpreting § 336. In addition, the function of the two provisions reveals that they should be construed in tandem. Section 337 was enacted in response to the distinction created by *United States* v. *Cumberland Public Service Co.*, 338 U. S. 451 (1950), and *Commissioner* v. *Court Holding Co.*, 324 U. S. 331 (1945). Under those cases, a corporation that liquidated by distributing appreciated assets to its shareholders recognized no income, as now provided in § 336, even though its shareholders might sell the assets shortly after the distribution. See *Cumberland.* If the corporation sold the assets, though, it would recognize income on the sale, and a sale by the shareholders after distribution in kind might be attributed to the corporation. See *Court Holding.* To eliminate the necessarily formalistic distinctions and the uncertainties created by *Court Holding* and *Cumberland*, Congress enacted § 337, permitting the corporation to adopt a plan of liquidation, sell

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"(B) installment obligations acquired in respect of the sale or exchange (without regard to whether such sale or exchange occurred before, on, or after the date of the adoption of the plan referred to in subsection (a)) of stock in trade or other property described in subparagraph (A) of this paragraph, and

"(C) installment obligations acquired in respect of property (other than property described in subparagraph (A)) sold or exchanged before the date of the adoption of such plan of liquidation.

"(2) Notwithstanding paragraph (1) of this subsection, if substantially all of the property described in subparagraph (A) of such paragraph (1) which is attributable to a trade or business of the corporation is, in accordance with this section, sold or exchanged to one person in one transaction, then for purposes of subsection (a) the term 'property' includes—

"(A) such property so sold or exchanged, and

"(B) installment obligations acquired in respect of such sale or exchange.

"(c) (1) This section shall not apply to any sale or exchange—

"(A) made by a collapsible corporation (as defined in section 341(b)), or

"(B) following the adoption of a plan of complete liquidation, if section 333 applies with respect to such liquidation."

its assets without recognizing gain or loss at the corporate level, and distribute the proceeds to the shareholders. The very purpose of § 337 was to create the same consequences as § 336. See *Midland-Ross Corp.* v. *United States*, 485 F. 2d 110 (CA6 1973); S. Rep. No. 1622, *supra*, at 258.

There are some specific differences between the two provisions, largely aimed at governing the period during which the liquidating corporation sells its assets, a problem that does not arise when the corporation distributes its assets to its shareholders. For instance, § 337 does not shield the income produced by the sale of inventory in the ordinary course of business; that income will be taxed at the corporate level before distribution of the proceeds to the shareholders. See § 337(b). These differences indicate that Congress did not intend to allow corporations to escape taxation on business income earned while carrying on business in the corporate form; what it did intend to shield was market appreciation.

The question whether § 337 protects the corporation from recognizing income because of unwarranted deductions has arisen frequently, and the rule is now well established that the tax benefit rule overrides the nonrecognition provision. *Connery* v. *United States*, 460 F. 2d 1130 (CA3 1972); *Commissioner* v. *Anders*, 414 F. 2d 1283 (CA10), cert. denied, 396 U. S. 958 (1969); *Krajeck* v. *United States*, 75–1 USTC ¶9492 (ND 1975); *S. E. Evans, Inc.* v. *United States*, 317 F. Supp. 423 (Ark. 1970); *Anders* v. *United States*, 199 Ct. Cl. 1, 462 F. 2d 1147, cert. denied, 409 U. S. 1064 (1972); *Estate of Munter* v. *Commissioner*, 63 T. C. 663 (1975); Rev. Rul. 61–214, 1961–2 Cum. Bull. 60; Byrne, The Tax Benefit Rule as Applied to Corporate Liquidations: Recent Developments, 56 Notre Dame Law. 215, 221 (1980); Note, Tax Treatment of Previously Expensed Assets in Corporate Liquidations, 80 Mich. L. Rev. 1636, 1638–39 (1982); cf. *Spitalny* v. *United States*, 430 F. 2d 195 (CA9 1970) (when deduction and liquidation occur within a single year, though tax benefit rule does not apply, principle does). Congress has recently under-

taken major revisions of the Code, see Economic Recovery Tax Act of 1981, Pub. L. 97–34, 95 Stat. 172, and has made changes in the liquidation provisions, *e. g.*, Pub. L. 95–600, 92 Stat. 2904 (amending § 337); Pub. L. 95–628, 92 Stat. 3628 (same), but it did not act to change this longstanding, universally accepted rule. If the construction of the language in § 337 as permitting recognition in these circumstances has the acquiescence of Congress, *Lorillard* v. *Pons*, 434 U. S. 575, 580 (1978), we must conclude that Congress intended the same construction of the same language in the parallel provision in § 336.

Thus, the legislative history of § 336, the application of other general rules of tax law, and the construction of the identical language in § 337 all indicate that § 336 does not permit a liquidating corporation to avoid the tax benefit rule. Consequently, we reverse the judgment of the Court of Appeals and hold that, on liquidation, Bliss must include in income the amount of the unwarranted deduction.[37]

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[37] Some commentators have argued that the correct measure of the income that Bliss should include is the lesser of the amount it deducted or the basis that the shareholders will take in the asset. See Feld, The Tax Benefit of *Bliss*, 62 B. U. L. Rev. 443, 463–464 (1982); see also Rev. Rul. 74–396, 1974–2 Cum. Bull. 106. Since Bliss has not suggested that, if there is an amount taken into income, it should be less than the amount previously deducted, we need not address the point.

As JUSTICE STEVENS observes, *post*, at 419, n. 29, we do not resolve this question. His perception of ambiguities elsewhere in our discussion of the amount recognized as income is simply inaccurate. Our discussion of the tax consequences on the sale of an expensed asset, *supra*, at 395, does not suggest that the entire amount of proceeds on sale is attributable to the tax benefit rule. Instead, we illustrated that the basis rules automatically lead to inclusion of the amount attributable to the operation of the tax benefit rule. That is, the proceeds will equal the cost plus any appreciation (or less any decrease in value). The appreciation would be recognized as gain (or the decrease as loss) in the ordinary sale, regardless of whether the taxpayer had expensed the asset upon acquisition. The reduction of the basis to zero when the item is expensed ensures that if it is sold rather than consumed the unwarranted deduction will be included in income along with any appreciation, and it is this amount that the tax benefit rule requires to be recognized as income.

V

Bliss paid the assessment on an increase of $60,000 in its taxable income. In the District Court, the parties stipulated that the value of the grain was $56,565, but the record does not show what the original cost of the grain was or what portion of it remained at the time of liquidation. The proper increase in taxable income is the portion of the cost of the grain attributable to the amount on hand at the time of liquidation. In *Bliss*, then, we remand for a determination of that amount. In *Hillsboro*, the taxpayer sought a redetermination in the Tax Court rather than paying the tax, so no further proceedings are necessary, and the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE BRENNAN, concurring in No. 81–930 and dissenting in No. 81–485.

I join Parts I, II, and IV of the Court's opinion. For the reasons expressed in Part I of JUSTICE BLACKMUN's dissenting opinion, however, I believe that a proper application of the principles set out in Part II of the Court's opinion would require an affirmance rather than a reversal in No. 81–485.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, concurring in the judgment in No. 81–485 and dissenting in No. 81–930.

These two cases should be decided in the same way. The taxpayer in each case is a corporation. In 1972 each taxpayer made a deductible expenditure, and in 1973 its shareholders received an economic benefit. Neither corporate taxpayer ever recovered any part of its 1972 expenditure. In my opinion, the benefits received by the shareholders in 1973 are matters that should affect their returns; those benefits should not give rise to income on the 1973 return of the taxpayer in either case.

Both cases require us to apply the tax benefit rule. This rule has always had a limited, but important office: it deter-

mines whether certain events that enrich the taxpayer—recoveries of past expenditures—should be characterized as income.[1] It does not create income out of events that do not enhance the taxpayer's wealth.

Today the Court declares that the purpose of the tax benefit rule is "to approximate the results produced by a tax system based on transactional rather than annual accounting." *Ante*, at 381. Whereas the rule has previously been used to determine the character of a current wealth-enhancing event, when viewed in the light of past deductions, the Court now suggests that the rule requires a study of the propriety of earlier deductions, when viewed in the light of later events. The Court states that the rule operates to "cancel out" an earlier deduction if the premise on which it is based is "fundamentally inconsistent" with an event in a later year. *Ante*, at 383.[2]

The Court's reformulation of the tax benefit rule constitutes an extremely significant enlargement of the tax collector's powers. In order to identify the groundbreaking character of the decision, I shall review the history of the tax benefit rule. I shall then discuss the *Bliss Dairy* case in some detail, to demonstrate that it fits comfortably within

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[1] Cf. H. Simons, Personal Income Taxation 50 (1938) (defining income as net accumulation of property rights over the course of a year, plus consumption during that year).

[2] Notwithstanding this focus on the legitimacy of the 1972 deductions, scrutinized with the aid of hindsight after the completion of a multiyear transaction, the Court is careful not to require that "transactional inequities" be dealt with in the most "precise way" imaginable. *Ante*, at 378, n. 10. It rejects JUSTICE BLACKMUN's suggestion that the 1972 tax returns be reopened, quite properly noting our past observations that "'[i]t would be disruptive of an orderly collection of the revenue to rule that the accounting must be done over again to reflect events occurring after the year for which the accounting is made, and would violate the spirit of the annual accounting system.'" *Ante*, at 380, n. 10, quoting *Healy* v. *Commissioner*, 345 U. S. 278, 285 (1953). See also *ante*, at 380–381, n. 12.

the class of cases to which the tax benefit rule has not been applied in the past. Finally, I shall explain why the Court's adventure in lawmaking is not only misguided but does not even explain its inconsistent disposition of these two similar cases.

I

What is today called the "tax benefit rule" evolved in two stages, reflecting the rule's two components. The "inclusionary" component requires that the recovery within a taxable year of an item previously deducted be included in gross income. The "exclusionary component," which gives the rule its name, allows the inclusionary component to operate only to the extent that the prior deduction benefited the taxpayer.

The inclusionary component of the rule originated in the Bureau of Internal Revenue in the context of recoveries of debts that had previously been deducted as uncollectible. The Bureau sensed that it was inequitable to permit a taxpayer to characterize the recovery of such a debt as "return of capital" when in a prior year he had been allowed to reduce his taxable income to compensate for the loss of that capital. As one commentator described it, "the allowance of a deduction results in a portion of gross income not being taxed; when the deducted item is recouped, the recovery stands in the place of the gross income which had not been taxed before and is therefore taxable."[3] This principle was quickly endorsed by the Board of Tax Appeals and the courts. See *Excelsior Printing Co.* v. *Commissioner*, 16 B. T. A. 886 (1929); *Putnam National Bank* v. *Commissioner*, 50 F. 2d 158 (CA5 1931).

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[3] Plumb, The Tax Benefit Rule Today, 57 Harv. L. Rev. 129, 131, n. 10 (1943). Accord, *Estate of Collins* v. *Commissioner*, 46 B. T. A. 765, 769 (1942), rev'd *sub nom. Harwick* v. *Commissioner*, 133 F. 2d 732 (CA8), rev'd *sub nom. Dobson* v. *Commissioner*, 320 U. S. 489 (1943).

The exclusionary component was not so readily accepted. The Bureau first incorporated it during the Great Depression as the natural equitable counterweight to the inclusionary component. G. C. M. 18525, 1937–1 Cum. Bull. 80. It soon retreated, however, insisting that a recovery could be treated as income even if the prior deduction had not benefited the taxpayer. G. C. M. 22163, 1940–2 Cum. Bull. 76. The Board of Tax Appeals protested, *e. g.*, *Corn Exchange National Bank & Trust Co.* v. *Commissioner*, 46 B. T. A. 1107 (1942), but the Circuit Courts of Appeals sided with the Bureau. *Helvering* v. *State-Planters Bank & Trust Co.*, 130 F. 2d 44 (CA4 1942); *Commissioner* v. *United States & International Securities Corp.*, 130 F. 2d 894 (CA3 1942). At that point, Congress intervened for the first and only time. It enacted the forerunner of § 111 of the present Code, ch. 619, Title I, § 116(a), Act of Oct. 21, 1942, 56 Stat. 812, using language that by implication acknowledges the propriety of the inclusionary component by explicitly mandating the exclusionary component.[4]

The most striking feature of the rule's history is that from its early formative years, through codification, until the 1960's, Congress,[5] the Internal Revenue Service,[6] courts,[7]

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[4] Section 111(a) provides:

"Gross income does not include income attributable to the *recovery* during the taxable year of a bad debt, prior tax, or delinquency amount, to the extent of the amount of the recovery exclusion with respect to such debt, tax, or amount" (emphasis added).

[5] *Ibid.* See also the detailed provisions of ch. 619, Title I, § 156(a) of the Act of Oct. 21, 1942, 56 Stat. 852, amended, Act of Aug. 16, 1954, ch. 736, 68A Stat. 343, repealed, Pub. L. 94–455, Title XIX, § 1901(a)(145)(A), Act of Oct. 4, 1976, 90 Stat. 1788, establishing a mechanism for including the recoveries of previously claimed war losses in current income to the extent of tax benefit.

[6] Consider the following passages from the regulations under § 111.

"*General.* Section 111 provides that income attributable to the *recovery during any taxable year* of bad debts, prior taxes, and delinquency amounts shall be excluded from gross income to the extent of the 'recov-

[Footnote 7 is on p. 407]

and commentators,[8] understood it in essentially the same way. They all saw it as a theory that appropriately characterized certain recoveries of capital as income. Although the rule undeniably helped to accommodate the annual accounting system to multiyear transactions, I have found no sugges-

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ery exclusion' with respect to such items. The rule of exclusion so prescribed by statute applies equally with respect to all other losses, expenditures and accruals made the basis of deductions from gross income for prior taxable years, including war losses . . . , but not including deductions with respect to depreciation, depletion, amortization, or amortizable bond premiums. . . .

. . . . . .

"*Definition of 'recovery'*. Recoveries result from the *receipt of amounts* in respect of the previously deducted or credited section 111 items, such as from the collection or sale of a bad debt, refund or credit of taxes paid, or cancellation of taxes accrued." Treas. Reg. § 1.111–1(a), 26 CFR § 1.111–1(a) (1982) (emphasis added).

Consider also:

"If the taxpayer deducted a loss in accordance with the provisions of this paragraph and in a subsequent taxable year receives reimbursement for such loss, he does not recompute the tax for the taxable year in which the deduction was taken but includes the amount of such reimbursement in his gross income for the taxable year in which received, subject to the provisions of section 111, relating to recovery of amounts previously deducted." Treas. Reg. § 1.165–1(d)(2)(iii), 26 CFR § 1.165–1(d)(2)(iii) (1982).

[7] *E. g.*, *National Bank of Commerce* v. *Commissioner*, 115 F. 2d 875 (CA9 1940); *South Dakota Concrete Products Co.* v. *Commissioner*, 26 B. T. A. 1429 (1932).

[8] See Costigan, Income Taxes on Recoveries from Civil Litigation, Proceedings of the U. S. C. Tax Inst. 559, 567–570 (1954); Atlas, Tax Free Recoveries: The Tax Benefit Rule, N. Y. U. 9th Inst. on Fed. Tax. 847 (1951); Tye, The Tax Benefit Doctrine Reexamined, 3 Tax L. Rev. 329 (1948); Plumb, The Tax Benefit Rule Today, 57 Harv. L. Rev. 129, 131, n. 10, 176 (1943); Lassen, The Tax Benefit Rule and Related Problems, 20 Taxes 473, 475 (1942) (statute of limitations not a problem because "all these cases have a new element, namely, a recovery or increment in value or decrease of liability in the year in which income was determined by the Commissioner to have been received); Note, 56 Harv. L. Rev. 434, 436 (1942); Zysman, Income Derived From the Recovery of Deductions, 19 Taxes 29 (1941); Ayers, Bad Debts—Deductions and Recoveries, 18 Taxes 549 (1940).

tion that it was regarded as a generalized method of approximating a transactional accounting system through the fabrication of income at the drop of a fundamentally inconsistent event.[9] An inconsistent event was always a necessary condition, but with the possible exception of the discussion of the Board of Tax Appeals in *Barnett* v. *Commissioner*, 39 B. T. A. 864, 867 (1939), inconsistency was never by itself a sufficient reason for applying the rule.[10] Significantly, the first case from this Court dealing with the tax benefit rule emphasized the role of a recovery.[11] And when litigants in

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[9] Except for *Barnett* v. *Commissioner*, 39 B. T. A. 864 (1939), all of the early cases cited by the Court, *ante*, at 386–387, involved a recovery. In *Estate of Block* v. *Commissioner*, 39 B. T. A. 338, 341 (1939), the Board of Tax Appeals made the following statement:

"When recovery or some other event which is inconsistent with what has been done in the past occurs, adjustment must be made in reporting income for the year in which the change occurs. No other system would be practical in view of the statute of limitations, the obvious administrative difficulties involved, and the lack of finality in income tax liability, which would result. The foregoing principles, which have been established by the following cases, require that the refund here be included in the income of this estate for the year of recovery."

Notwithstanding the general reference to an inconsistent event in the first quoted sentence, it is obvious from the two succeeding sentences that the Board was not intending to lay the groundwork for a new theory of the tax benefit rule. Rather, it was attempting to respond to the suggestion that the adjustment be made in the year of deduction rather than the year of recovery. This conclusion is confirmed by the fact that the third quoted sentence speaks of "the year of recovery," not "the year of inconsistent event," and by the fact that each of the 14 cases cited by the Board following the conclusion of the quoted passage, like *Estate of Block* itself and like *South Dakota Concrete Products Co.* v. *Commissioner*, *supra*, involved recoveries in the traditional sense.

[10] It should be noted that even in *Barnett*, the Board of Tax Appeals included its discussion of inconsistent events only after emphasizing that the inclusion in income of a prior oil depletion deduction was required by Treasury Regulations that had been ratified by Congress. 39 B. T. A., at 867.

[11] In *Dobson* v. *Commissioner*, 320 U. S. 489 (1943), the taxpayer had bought stock, sold it at a loss, and then claimed a deductible loss on his tax return. Eight years later, the taxpayer had sued for rescission of the stock purchase, claiming fraud; he settled the suit and received approxi-

this Court suggested that a transactional accounting system would be more equitable, we expressly declined to impose one, stressing the importance of finality and practicability in a tax system.[12]

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mately $30,000 for the stock on which he had sustained the loss. We upheld the Tax Court's determination that the $30,000 recovery did not need to be reported as income, since the earlier deductible losses had not reduced the taxpayer's taxes in the year he had claimed them. For present purposes, the holding in *Dobson* was less significant than the way it endorsed the Tax Court's analysis:

"The Tax Court has not attempted to revise liability for earlier years closed by the statute of limitation, nor used any expense, liability, or deficit of a prior year to reduce the income of a subsequent year. *It went to prior years only to determine the nature of the recovery, whether return of capital or income.*" *Id.*, at 493 (emphasis added).

The tax benefit question was not one of inconsistent events, but whether a recovery should be characterized as return of capital or as income.

[12] *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359 (1931), was a mirror image of this case. The taxpayer argued that a recovery of previously deducted funds should not be income because, seen from a transactional view, no net profits had been realized. The Court framed the issue as whether net profits are to be determined "on the basis of fixed accounting periods, or . . . on the basis of particular transactions of the taxpayer when they are brought to a conclusion." *Id.*, at 363. The answer was unanimous and unflinching:

"A taxpayer may be in receipt of net income in one year and not in another. The net result of the two years, if combined in a single taxable period, might still be a loss; but it has never been supposed that that fact would relieve him from a tax on the first, or that it affords any reason for postponing the assessment of the tax until the end of a lifetime, or for some other indefinite period, to ascertain more precisely whether the final outcome of the period, or of a given transaction, will be a gain or a loss.

"The Sixteenth Amendment was adopted to enable the government to raise revenue by taxation. It is the essence of any system of taxation that it should produce revenue ascertainable, and payable to the government, at regular intervals. Only by such a system is it practicable to produce a regular flow of income and apply methods of accounting, assessment, and collection capable of practical operation. It is not suggested that there has ever been any general scheme for taxing income on any other basis. . . . While, conceivably, a different system might be devised by which the tax could be assessed, wholly or in part, on the basis of the finally ascertained results of particular transactions, Congress is not required by the amend-

In the 1960's, the Commissioner, with the support of some commentators and the Tax Court, began to urge that the tax benefit rule be given a more ambitious office.[13] In *Nash* v. *United States*, 398 U. S. 1 (1970), the Commissioner argued that the rule should not be limited to cases in which the taxpayer had made an economic recovery, but rather should operate to cancel out an earlier deduction whenever later events demonstrate that the taxpayer is no longer entitled to it. The arguments advanced, and rejected, in that case were remarkably similar to those found in the Court's opinion today.[14]

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ment to adopt such a system in preference to the more familiar method, even if it were practicable." *Id.*, at 364–365.

Healy v. *Commissioner*, 345 U. S. 278 (1953), dealt with a more extreme effort to approximate a transactional accounting system—more closely analogous to JUSTICE BLACKMUN's approach than to the Court's today. In that case, a taxpayer received money under a claim of right in an early year and was forced to disgorge it in a later year. The Government was perfectly willing to allow the taxpayer to take a deduction in the year of disgorgement (presumably under a "tax detriment" theory, since repayments of loans are usually not deductible), but the taxpayer wanted to be able to go back and reopen the prior year, in which he had included the receipt in income. The Court refused to allow the reopening, extolling the virtues of an annual accounting system. *Id.*, at 284–285. See n. 2, *supra*.

[13] See Rev. Rul. 62–128, 1962–2 Cum. Bull. 139; Note, 21 Vand. L. Rev. 995 (1968); *Estate of Schmidt* v. *Commissioner*, 42 T. C. 1130 (1964), rev'd, 355 F. 2d 111 (CA9 1966).

[14] For example:

"The [tax benefit] rule rests on the notion that a taxpayer should not be permitted to retain the tax benefit of a deduction when later events demonstrate that he no longer is entitled to it. . . . To limit application of the rule to cases in which there has been an economic recovery would frustrate its purpose, which is to insure that a taxpayer not retain the benefit of a deduction to which he is no longer entitled. Fulfillment of that purpose requires application of the rule, whether the lack of need for a bad debt reserve arises from a sale or collection of accounts receivable, or merely by reason of the termination of the existence of the owner of the receivables. . . . The proper analysis of the transaction where accounts receivable are sold for their net value by a reserve method taxpayer is to restore

The *Nash* case arose out of the sale of a partnership business to a corporation. The partnership had taken deductions for ledger entries in a "bad debt reserve"—an account that reflected the firm's estimate of its future losses from accounts receivable that would *eventually* become uncollectible. When the partnership business was sold to a corporation, the Commissioner sought to apply the tax benefit rule, arguing that even though the partnership had made no recovery of the amount in the bad debt reserve, the deductibility of the presale additions to the taxpayer's reserve had been justified on the basis of an assumption that was no longer valid after the business was sold.[15]

This Court flatly rejected the Commissioner's position. Rather than scrutinizing the premises of the prior deduction in the light of subsequent events, the Court used the subsequent events themselves as its starting point. Since the transfer of the bad debt reserve did not enrich the taxpayer, there was no current realization event justifying the application of the tax benefit rule. "[A]lthough the 'need' for the reserve ended with the transfer, the end of that need did

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the reserve to his income and accord him a loss on the sale of property. That this loss (face value less amount realized) equals the amount of the restoration to income does not militate against the basic principle that the reserve must be restored to income when it is no longer needed, irrespective of whether there has been an economic recovery." Brief for United States in *Nash* v. *United States*, O. T. 1969, No. 678, pp. 8–14.

[15] The Commissioner argued that (a) an accrual basis taxpayer is normally only allowed to deduct accounts receivable that are uncollectible, (b) the taxpayer had been allowed to take a deduction because the taxpayer was being allowed to represent that it would eventually find some presently collectible accounts to be uncollectible, and (c) those accounts had *not* in fact become uncollectible at the time they left the taxpayer's hands. The Commissioner asserted that the earlier deduction had been allowed on the assumption that it fairly represented the taxpayer's continuing "need" for bad debt deductions across taxable years. He argued that once the accounts receivable left the taxpayer's hands, it had no further "need" for the bad debt reserve and that the premise for the prior deduction had become invalid. See *ibid.*

not mark a 'recovery' within the meaning of the tax benefit cases." *Id.*, at 5.[16]

Today, the Court again has before it a case in which the Commissioner, with the endorsement of some commentators and a closely divided Tax Court, is pushing for a more ambitious tax benefit rule.[17] This time, the Court accepts the invitation. Since there has been no legislation since *Nash* suggesting that our approach over the past half-century[18] has been wrong-headed, cf. n. 32, *infra*, the new doctrine that emerges from today's decision is of the Court's own making.

II

In the *Bliss Dairy* case, the Court today reaches a result contrary to that dictated by a recovery theory. One would not expect such a break with the past unless it were apparent that prior law would produce a palpable inequity—a clear windfall for the taxpayer. Yet that is not the case in *Bliss Dairy*. Indeed, the tax economics of the case are indistinguishable from those of the *Nash* case.

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[16] The taxpayer's receipts from the sale of the business was not a recovery because, to the extent the accounts receivable were offset by the bad debt reserve, the corporation had not paid the taxpayer a penny for them. It was this fact that distinguished *Nash* and *Schmidt* from earlier cases applying the tax benefit rule to bad debt reserves such as *Arcadia Savings & Loan Assn.* v. *Commissioner*, 300 F. 2d 247 (CA9 1962), *Citizens Federal Savings & Loan Assn.* v. *United States*, 154 Ct. Cl. 305, 290 F. 2d 932 (1961), *West Seattle National Bank* v. *Commissioner*, 288 F. 2d 47 (CA9 1961), and *S. Rossin & Sons, Inc.* v. *Commissioner*, 113 F. 2d 652 (CA2 1940).

[17] See Rev. Rul. 74–396, 1974–2 Cum. Bull. 106; Feld, The Tax Benefit of *Bliss*, 62 B. U. L. Rev. 443 (1982); *Tennessee-Carolina Transportation, Inc.* v. *Commissioner*, 65 T. C. 440 (1975), aff'd, 582 F. 2d 378 (CA6 1978), cert. denied, 440 U. S. 909 (1979). Contra, O'Hare, Application of Tax Benefit Rule in New Case Threatens Certain Liquidations, 44 J. Taxation 200 (1976); Broenen, The Tax Benefit Rule and Sections 332, 334(b)(2) and 336, 53 Taxes 231 (1975).

[18] *Nash* and *Dobson* are the only tax benefit rule cases ever decided in this Court. On one other occasion, the Court invoked the tax benefit rule by analogy. *United States* v. *Skelly Oil Co.*, 394 U. S. 678, 688, and n. 5 (1969).

Three statutory provisions, as interpreted by the Commissioner, interact in *Bliss Dairy*. First, pursuant to § 162(a),[19] the Commissioner allowed the corporation to deduct the entire cost of all grain purchased in 1972. That deduction left it with a basis of zero in that grain. Second, under the terms of § 336,[20] the corporation was not required to recognize any gain or loss when it went through a § 333 liquidation in 1973. And third, pursuant to the regulations implementing § 334,[21] the shareholders were allowed to assign some portion of their basis in the corporation's stock to the grain they received in the liquidation. Admittedly, this combination of provisions could in some cases cause a "step-up" in the grain's basis that is not reflected in the income of either the corporation or the shareholders. That possibility figured strongly in the decision of the Court of Appeals for the Sixth Circuit to endorse an inconsistent-event theory in a precursor of this case. See *Tennessee-Carolina Transportation, Inc.* v. *Commissioner*, 582 F. 2d 378, 382, and n. 14 (1978). And it is stressed by the Solicitor General in his argument in this case. Brief for United States in No. 81–930 and for Respondent in No. 81–485, pp. 39–42. Yet close analysis reveals that the potential untaxed step-up is not the sort of extraordinary and inequitable windfall that calls for extraordinary measures in *this* case.

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[19] In relevant part, 26 U. S. C. § 162(a) provides that "[t]here shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ."

[20] In relevant part, 26 U. S. C. § 336 provides that "no gain or loss shall be recognized to a corporation on the distribution of property in partial or complete liquidation."

[21] In relevant part, 26 U. S. C. § 334 provides that "[i]f . . . property was acquired by a shareholder in the liquidation of a corporation in cancellation or redemption of stock, and . . . the extent to which gain was recognized was determined under § 333, then the basis shall be the same as the basis of such stock cancelled or redeemed in the liquidation, decreased in the amount of any money received by the shareholder, and increased in the amount of gain recognized to him." The relevant implementing regulations are found at Treas. Reg. § 1.334–2, 26 CFR § 1.334–2 (1982).

As a factual matter, the record does not include the tax returns of Bliss Dairy's shareholders. We have no indication of how much, if any, step-up in basis actually occurred. And as a legal matter, a § 333 liquidation expressly contemplates steps-up in basis that are not reflected in income. Thus, even if the corporation had behaved as the Court believes it should have and had fed all the grain to the cows before liquidating, whatever shareholder stock basis was assigned to the grain in this case would have been used to step up the basis of some other asset that passed to the shareholders in the liquidation.

I suppose it might be argued that this sort of untaxed step-up is acceptable if it happens accidentally, but not if a taxpayer manipulates business transactions solely to take advantage of it. Yet here again we have too little information to conclude that there has been any such manipulation in the case of Bliss Dairy. To begin with, the Government has never questioned the propriety of the 1972 deduction, viewed in the light of 1972 events.[22] Moreover, the record before us on appeal does not tell us how much feed the Dairy's cattle consumed in 1972, whether 1972 consumption exceeded 1972 purchases, or how the volume purchased in 1972 compared with purchases in prior years. Indeed, it is quite possible that in 1971 the Dairy had made abnormally large purchases as a hedge against a possible rise in the market price, and that its 1972 consumption of grain actually exceeded its $150,000 in purchases during that year.

It is no doubt for these reasons that the Court never relies on the untaxed step-up argument in its opinion today.[23] Un-

[22] The Court's partial quotation of Treas. Reg. § 1.162–3, 26 CFR 1.162–3 (1982), *ante*, at 395, suggests that it may regard the deduction for unconsumed feed as improper because the feed was not "actually *consumed and used in operation* in the taxable year," *ibid.* Of course, if the Court really believed that such a deduction should not be allowed, the proper course of action would be to modify the rules authorizing the deduction, see n. 31, *infra*, rather than to modify the tax benefit rule.

[23] It should also be noted that the potential for an untaxed step-up, which may give rise to a second deduction in cases such as this, is analytically the

fortunately, the only argument the Court offers in its place is an *ipse dixit:* it seems wrong for a taxpayer not to realize income if it fails to use up an asset, when it was allowed to deduct the value of that asset in a prior year. We rejected that precise proposition in *Nash.* In both *Nash* and *Bliss Dairy*, the transfer of the business in a subsequent year revealed that a business asset matching a prior deduction (*i. e.*, grain matching the expense deduction, or the account receivable matching the bad debt deduction) would not be used up (*i. e.*, consumed or become uncollectible) until it had passed to a different taxpayer.[24] The only explanation for today's decision to detach the tax benefit rule from the recovery mooring appears to be the challenge to be found in an open sea of troublesome and inconclusive hypothetical cases.[25]

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same as the potential for a double deduction that was present in *Nash.* See Brief for United States in *Nash* v. *United States*, O. T. 1969, No. 678, pp. 20–31.

[24] The Solicitor General made this timing point explicit in *Nash.* "Since a reserve for bad debts represents losses that are estimated will be sustained in subsequent taxable years, . . . any unabsorbed amounts in such a reserve must be restored to income when . . . it becomes clear that the taxpayer will not suffer some or all of the estimated losses as a result of the uncollectibility of accounts receivable." *Id.*, at 8–9.

[25] The flaws in the Court's approach are exemplified by its discussion, *ante*, at 384–385, of a hypothetical situation involving a tenant who has paid the entire cost of a 30-day lease that straddles two taxable years on December 15 of the first year.

The Court first invites consideration of what tax consequences would result if the premises burn down in January of the second year. I would think it obvious that a taxpayer does not realize income under such circumstances, and the Court manages to accommodate this result to its theory. Even though the original explanation for the deduction (the business would make use of the premises) is no longer valid, the Court finds no fundamental inconsistency because "the loss is attributable to the business."

The Court goes through this exercise in order to reach the next hypothetical, wherein the taxpayer *voluntarily* stops using the leasehold for a business purpose during the second year. Having assumed that the entire cost of the lease was deductible during the first year, the Court now de-

III

Because tax considerations play such an important role in decisions relating to the investment of capital, the transfer of operating businesses, and the management of going concerns, there is a special interest in the orderly, certain, and consistent interpretation of the Internal Revenue Code. Today's decision seriously compromises that interest. It will engender uncertainty, it will enlarge the tax gatherer's discretionary power to reexamine past transactions, and it will produce controversy and litigation.

Any inconsistent-event theory of the tax benefit rule would make the tax system more complicated than it has been under the recovery theory.[26] Inconsistent-event analysis

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clares that the tax benefit rule must be invoked to prevent a tax inequity. The Court's methodology in this regard is quite revealing. It has presumed the validity of the deduction in the first year, citing *Zaninovich* v. *Commissioner*, 616 F. 2d 429 (CA9 1980). Yet *Zaninovich* is still being debated in the lower courts, in part because of hypothetical cases such as this one, and has not been endorsed by either the Commissioner or the Tax Court. See *Keller* v. *Commissioner*, 79 T. C. 7, 40, n. 24 (1982); *Dunn* v. *United States*, 468 F. Supp. 991, 994, and n. 17 (SDNY 1979) (Weinfeld, J.). See also *Van Raden* v. *Commissioner*, 71 T. C. 1083, 1107 (1979) (suggesting a distinction between "period" costs and "product" costs), aff'd, 650 F. 2d 1046 (CA9 1981). Thus, the Court creates its own problem by blithely allowing a deduction in the initial period, with the intention of continuously second-guessing that decision in subsequent years. I do not see the advantage of this approach over JUSTICE BLACKMUN's suggestion, which is criticized by the Court *ante*, at 378–380, n. 10. Instead, I would prefer to think carefully about whether or not the deduction should be allowed in the first place (taking into account such factors as the ease with which a lease can be prorated, the likelihood of nonbusiness uses, and the bright-line recovery rule) and, if that results in a decision to grant the deduction, to abide by whatever consequences follow from the application of traditionally accepted tax principles.

[26] The Court suggests, *ante*, at 381–383, that a recovery requirement is both too narrow and too broad to give certain guidance. The Court suggests it is too narrow because the Court believes that the cancellations of indebtedness found in *Mayfair Minerals, Inc.* v. *Commissioner*, 456 F. 2d 622 (CA5 1972), *Bear Manufacturing Co.* v. *United States*, 430 F. 2d

forces a deviation from the traditional pattern of calculating income during a given year: identify the transactions in which the taxpayer was made wealthier, determine from the history of those transactions which apparent sources of enrichment should be characterized as income, and then determine how much of that income must be recognized. Of course, in several specific contexts, Congress has already mandated deviations from that traditional pattern,[27] and the additional complications are often deemed an appropriate price for enhanced tax equity. But to my knowledge Congress has never even considered so sweeping a deviation as a general inconsistent-event theory.

Nonetheless, a general inconsistent-event theory would surely give more guidance than the vague hybrid established by the Court today. The dimensions of the Court's newly fashioned "fundamentally inconsistent event" version of the

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152 (CA7 1970), *Haynsworth* v. *Commissioner*, 68 T. C. 703 (1977), and *G. M. Standifer Construction Corp.* v. *Commissioner*, 30 B. T. A. 184 (1934), "[do] not fit within any ordinary definition of 'recovery.'" *Ante*, at 382. I disagree. As the Court concedes, *ibid.*, cancellation of a legally enforceable liability quite obviously increases the taxpayer's net worth. The Code therefore explicitly requires a discharge of indebtedness to be included in income. § 61(a)(12). Cf. § 108. It does no damage to the English language to say that a taxpayer who has previously incurred an expense by assuming a liability recovers that expense when the liability is canceled.

The Court suggests that the term "recovery" is too broad because two courts have claimed to find a recovery in situations the Court finds surprising. *Tennessee-Carolina Transportation, Inc.* v. *Commissioner*, 582 F. 2d 378 (CA6 1978) (alternative holding); *First Trust and Savings Bank of Taylorville* v. *United States*, 614 F. 2d 1142 (CA7 1980). Since I believe both cases were wrongly decided (*Tennessee-Carolina* applied the tax benefit rule to a case closely analogous to *Bliss Dairy*, and *First Trust* applied the rule to a case closely analogous to *Hillsboro Bank*), I do not find the Court's criticism any more persuasive than I would find a suggestion that someone might incorrectly think there was a "recovery" in the cases before us today.

[27] *E. g.*, §§ 1245, 1250 (mere dispositions of certain depreciable property and certain depreciable realty may give rise to income).

tax benefit rule are by no means clear. It obviously differs from both the Government's "inconsistent event" theory and the familiar "recovery" theory, either of which would require these two cases to be decided in the same way. I do not understand, however, precisely why the Court's theory distinguishes between these cases, or how it is to be applied in computing the 1973 taxes of Bliss Dairy, Inc.

The Government describes its test as whether "subsequent events eliminate the factual premise on which the deduction was originally claimed." Brief for United States in No. 81–930 and for Respondent in No. 81–485, p. 18. The Court describes its test as whether "the later event is indeed fundamentally inconsistent with the premise on which the deduction was initially based." *Ante*, at 383. One might infer that the difference between these tests is a difference between "inconsistent events" and "fundamentally inconsistent events." The Court attempts to place the line more precisely "between merely unexpected events and inconsistent events." *Ante*, at 383, n. 15. I am afraid the attempt fails because, however it is described, the line does not cleanly and predictably separate the Court's position from the Government's.

The Court presents its test as whether "the occurrence of the [later year's] event in the earlier year would have resulted in the disallowance of the deduction." *Ante*, at 389. But in *Hillsboro*, the Court rejects the Government's claim. The Court holds that if this Court had decided *Lehnhausen* v. *Lakeshore Auto Parts Co.*, 410 U. S. 356 (1973), in 1972, the Bank would still have been entitled to deduct a dividend that was not used for the payment of taxes. It attempts to read the legislative history of § 164(e) as establishing that Congress did not care about the use to which the dividend payment was put, but only about the Bank's reason for the dividend. I would simply note that I find JUSTICE BLACKMUN's interpretation of § 164(e) far more plausible.

The Court's analysis of *Bliss Dairy* is equally unsatisfying. Without any mention of a same-year principle, the Court re-

solves the case in a single sentence: a § 336 liquidation is assimilated to a dividend distribution, which is deemed "the analog of personal consumption," and therefore "it would seem that it should take into income the amount of the earlier deduction." *Ante*, at 396, and n. 31.[28] It is not obvious to me why the change in ownership of a going concern is more "the analog of personal consumption" than the gift of an asset.

The new rule will create even more confusion than that which will accompany efforts to reconcile the Court's disposition of these two cases. Given that *Nash* is still considered good law by the Court, it is not clear which prior expenses of Bliss Dairy, Inc., will give rise to income in 1973. Presumably, all expenses for the purchase of tangible supplies will be treated like the cattle feed. Thus, all corporate paper towels, paper clips, and pencils that remain on hand will become income as a result of the liquidation. It is not clear, however, how the Court would react to other expenses that provide an enduring benefit. I find no limiting principle in the Court's opinion that distinguishes cattle feed and pencils from prepaid rent, prepaid insurance, accruals of employee vacation time, advertising, management training, or any other expense that will have made the going concern more valuable when it is owned directly by its shareholders.

The Court's opinion also leaves unclear the amount of income that is realized in the year in which the fundamentally inconsistent event occurs. In most of its opinion, the Court indicates that the taxpayer is deemed to realize "the amount of his earlier deduction," *ante*, at 383, but from time to time the Court equivocates,[29] and at least once suggests that when

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[28] It is noteworthy that the Court cites no authority for the assumption—critical under its interpretation of the tax benefit rule—that if the liquidation of Bliss Dairy, Inc., had occurred in 1972, the deduction for purchased but unconsumed cattle feed would have been disallowed.

[29] In a footnote, *ante*, at 402, n. 37, the Court suggests that it is not addressing the issue of whether some figure less than the amount previously deducted might be appropriate. Two possibilities have been sug-

an expensed asset is sold, only the "amount of the proceeds on sale," *ante*, at 395, is income.[30] Even in *Bliss Dairy*, which involves a revolving inventory of a fungible commodity, I am not sure how the Court requires the "cost" of the grain, *ante*, at 403, to be computed. If the corporation's 1972 consumption matched its 1972 purchases, one might think that the relevant cost was that in the prior years when the surplus was built up. I cannot tell whether or why the fundamentally inconsistent-event theory prefers LIFO accounting over FIFO.

IV

Neither history nor sound tax policy supports the Court's abandonment of its interpretation of the tax benefit rule as a tool for characterizing certain recoveries as income. If Congress were dissatisfied with the tax treatment that I believe *Bliss Dairy* should be accorded under current law, it could respond by changing any of the three provisions that bear on this case. See *supra*, at 413. It could modify the manner in which deductions are authorized under § 162.[31] It could

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gested: lesser-of-prior-deduction-and-current-fair-market-value, see *Tennessee Carolina Transportation, Inc.* v. *Commissioner*, 65 T. C. 440, 448 (1975), and lesser-of-prior-deduction-and-shareholder's-basis, see Feld, The Tax Benefit of *Bliss*, 62 B. U. L. Rev. 443 (1982). Given the uniform tenor of the Court's theory that the tax benefit rule serves to "'cancel out' an earlier deduction," *ante*, at 383, I think it unlikely that it would endorse either possibility.

[30] This view, of course, conforms to what a recovery theory would dictate. See *Rosen* v. *Commissioner*, 611 F. 2d 942 (CA1 1980) (taxpayer realizes the value of recovered asset, determined at time of recovery).

[31] If it were so inclined, it could modify § 162(a) to provide that no deduction would be allowed for the purchase of materials and supplies; instead, a deduction would be allowed only at the time of consumption. Such a sentiment clearly underlies the Court's statement, *ante*, at 395, that "[t]he deduction is predicated on the consumption of the asset in the trade or business."

Alternatively, it could provide that a purchase of materials and supplies not be considered an "ordinary and necessary expense" to the extent it includes items that will probably not be consumed during the taxable year. As the Solicitor General notes in his brief before this Court, "income might

legislate another statutory exception to the annual accounting system, much as it did when it made the depreciation recapture provisions, §§ 1245, 1250, apply to § 336 liquidations.[32] Or it could modify the manner in which basis is allocated under § 334.[33] But in the absence of legislative action, I cannot join in the Court's attempt to achieve similar results by distorting the tax benefit rule.[34]

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be more accurately reflected through the use of inventory accounting for such supplies," Brief for United States in No. 81–930 and for Respondent in No. 81–485, pp. 37–38. It bears mention that the Commissioner presently takes the position that an expenditure for feed that will be consumed in a subsequent year will not be allowed unless three tests are satisfied: it must be a payment (not a refundable deposit), it must be made for a business purpose and not merely for tax avoidance, and the deduction must not result in a material distortion of income. Rev. Rul. 79–229, 1979–2 Cum. Bull. 210. Cf. Treas. Reg. 1.162–12, 26 CFR § 1.162–12 (1982). The courts have divided over whether the Commissioner's position is consistent with the present § 162(a). Compare *Clement* v. *United States*, 217 Ct. Cl. 495, 580 F. 2d 422 (1978), cert. denied, 440 U. S. 907 (1979); *Dunn* v. *United States*, 468 F. Supp. 991 (SDNY 1979) (Weinfeld, J.) (supporting the Commissioner), with *Frysinger* v. *Commissioner*, 645 F. 2d 523 (CA5 1981); *Commissioner* v. *Van Raden*, 650 F. 2d 1046 (CA9 1981) (supporting the taxpayer).

[32] In 1975, Congress had before it, but was unable to pass, such legislation. H. R. 10936, 94th Cong., 1st Sess. (1975).

[33] In particular, it could prohibit the allocation of any shareholder basis to an expensed asset, thereby completely eliminating the possibility of the step-up discussed *supra*, at 413. Indeed, the Internal Revenue Service could do so consistently with the present text of § 334 by modifying Treas. Reg. § 1.334–2, 26 CFR § 1.334–2 (1982).

[34] Because I disagree with the Court's conclusion that Bliss Dairy, Inc., realized income upon liquidation, I obviously do not reach the issue of how § 336, the nonrecognition provision, should be construed. I would observe, however, that in order to justify its conclusion, the Court is forced to override the plain language of § 336. See *ante*, at 397–402; n. 20, *supra*. The Court justifies this course of action by invoking the lower court decisions that have held the nonrecognition language of § 337 superseded by the tax benefit rule in the context of recoveries. *E. g.*, *Commissioner* v. *Anders*, 414 F. 2d 1283 (CA10), cert. denied, 396 U. S. 958 (1969); *Anders* v. *United States*, 199 Ct. Cl. 1, 462 F. 2d 1147, cert. denied, 409 U. S. 1064 (1972). Those cases are relevant because when Congress enacted § 337, it hoped to allow taxpayers to enjoy some of the tax benefits of § 336 even when they do not precisely satisfy the formal prerequisites for applying

Accordingly, I concur in the Court's judgment in No. 81–485 and respectfully dissent in No. 81–930.

JUSTICE BLACKMUN, dissenting.

These consolidated cases present issues concerning the so-called "tax benefit rule" that has been developed in federal income tax law. In No. 81–485, the Court concludes that the rule has no application to the situation presented. In No. 81–930, it concludes that the rule operates to the detriment of the taxpayer with respect to its *later* tax year. I disagree with both conclusions.

I

In No. 81–485, the Court interprets § 164(e) of the Internal Revenue Code of 1954, 26 U. S. C. § 164(e). See *ante*, at 392–395. It seems to me that the propriety of a 1972 deduction by the Bank under § 164(e) depended upon the payment by the Bank of a state tax on its shares. This Court's decision in *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356 (1973), rendered any such tax nonexistent and any deduction therefore unavailable. I sense no "focus of Congress . . . on the act of payment rather than on the ultimate use of the funds by the State." *Ante*, at 394. The focus, instead, is on the payment of a *tax*. Events proved that there was no tax. The situation, thus, is one for the application, not the nonapplication, of some tax benefit rule.

I therefore turn to the question of the application of a proper rule in each of these cases.

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that section. But assuming that the *Anders* construction of § 337 is correct (a point this Court has never decided), I would think the tail wags the dog if one construes § 336 in light of § 337, rather than vice versa. Cf. *Tennessee-Carolina Transportation, Inc.* v. *Commissioner*, *supra*, at 453 (Tannenwald, J., dissenting) ("Section 337 was designed to be a shield for taxpayers and not a sword to be used against them in applying other sections of the Code").

II

The usual rule, as applied to a deduction, appears to be this: Whenever a deduction is claimed, with tax benefit, in a taxpayer's federal return for a particular tax year, but factual developments in a later tax year prove the deduction to have been asserted mistakenly in whole or in part, the deduction, or that part of it which the emerging facts demonstrate as excessive, is to be regarded as income to the taxpayer in the later tax year. With that general concept (despite occasionally expressed theoretical differences between "transactional parity" or "transactional inconsistency," on the one hand, and, on the other, a need for a "recovery") I have no basic disagreement.

Regardless of the presence of § 111 in the Internal Revenue Code of 1954, 26 U. S. C. § 111 (1976 ed. and Supp. V), it is acknowledged that the tax benefit rule is judge-made. See, *e. g.*, 1 J. Mertens, Law of Federal Income Taxation § 7.34, p. 114 (J. Doheny rev. ed. 1981); Bittker & Kanner, The Tax Benefit Rule, 26 UCLA L. Rev. 265, 266 (1978). It came into being, apparently, because of two concerns: (1) a natural reaction against an undeserved and otherwise unrecoverable (by the Government) tax benefit, and (2) a perceived need, because income taxes are payable at regular intervals, to promote the integrity of the annual tax return. Under this approach, if a deduction is claimed, with some justification, in an earlier tax year, it is to be allowed in that year, even though developments in a later year show that the deduction in the earlier year was undeserved in whole or in part. This impropriety is then counterbalanced (concededly in an imprecise manner, see *ante*, at 378, n. 10, and 380–381, n. 12) by the inclusion of a reparative item in gross income in the later year. See *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359 (1931); *Healy* v. *Commissioner*, 345 U. S. 278 (1953).* In

*In *Sanford & Brooks*, the earlier tax years were 1913–1916 and the later year was 1920. In *Healy*, the earlier year was 1945 and the later

Nash v. *United States*, 398 U. S. 1, 3 (1970), the Court succinctly phrased it this way: "[A] recovery of an item that has produced an income tax benefit in a prior year is to be added to income in the year of recovery."

I have no problem with the rule with respect to its first underlying concern (the rectification of an undeserved tax benefit). When a taxpayer has received an income tax benefit by claiming a deduction that later proves to be incorrect or, in other words, when the *premise* for the deduction is destroyed, it is only right that the situation be corrected so far as is reasonably possible, and that the taxpayer not profit by the improper deduction. I am troubled, however, by the tendency to carry out the second concern (the integrity of the annual return) to unnecessary and undesirable limits. The rule is not that sacrosanct.

In No. 81–485, Hillsboro National Bank, in its 1972 return, took as a deduction the amount of assessed state property taxes the Bank paid that year on its stock held by its shareholders; this deduction, were there such a tax, was authorized by the unusual, but nevertheless specific, provisions of § 164(e) of the Code, 26 U. S. C. § 164(e). The Bank received a benefit by the deduction, for its net income and federal income tax were reduced accordingly. Similarly, in No. 81–930, Bliss Dairy, Inc., which kept its books and filed its returns on the cash receipts and disbursements method, took a deduction in its return for its fiscal year ended June 30, 1973, for cattle feed it had purchased that year. That deduction was claimed as a business expense under § 162(a) of the Code, 26 U. S. C. § 162(a). The Dairy received a tax benefit, for its net income and federal income tax for fiscal 1973 were reduced by the deduction. Thus far, everything is clear and there is no problem.

In the Bank's case, however, a subsequent development, namely, the final determination by this Court in 1973 in

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years were 1947 and 1948. In *Healy*, the Court specifically noted the probable complicating factor of a statute of limitations barrier. 345 U. S., at 284.

Lehnhausen, *supra*, that the 1970 amendment of the Illinois Constitution, prohibiting the imposition of the state property taxes in question, was valid, eliminated any factual justification for the 1972 deduction. And, in the Dairy's case, a postfiscal year 1973 development, namely, the liquidation of the corporation and the distribution of such feed as was unconsumed on June 30, 1973, to its shareholders, with their consequent ability to deduct, when the feed thereafter was consumed, the amount of their adjusted basis in that feed, similarly demonstrated the impropriety of the Dairy's full-cost deduction in fiscal 1973.

I have no difficulty in favoring some kind of "tax benefit" adjustment in favor of the Government for each of these situations. An adjustment should be made, for in each case the beneficial deduction turned out to be improper and undeserved because its factual premise proved to be incorrect. Each taxpayer thus was not entitled to the claimed deduction, or a portion of it, and this nonentitlement should be reflected among its tax obligations.

This takes me, however, to the difficulty I encounter with the second concern, that is, the unraveling or rectification of the situation. The Commissioner and the United States in these respective cases insist that the Bank and the Dairy should be regarded as receiving income in the very next tax year when the factual premise for the prior year's deduction proved to be incorrect. I could understand that position, if, in the interim, the bar of a statute of limitations had become effective or if there were some other valid reason why the preceding year's return could not be corrected and additional tax collected. But it seems to me that the better resolution of these two particular cases and others like them—and a resolution that should produce little complaint from the taxpayer—is to make the necessary adjustment, whenever it can be made, in the tax year for which the deduction was originally claimed. This makes the correction where the correction is due and it makes the amount of net income for each year a true amount and one that accords with the facts, not

one that is structured, imprecise, and fictional. This normally would be accomplished either by the taxpayer's filing an amended return for the earlier year, with payment of the resulting additional tax, or by the Commissioner's assertion of a deficiency followed by collection. This actually is the kind of thing that is done all the time, for when a taxpayer's return is audited and a deficiency is asserted due to an overstated deduction, the process equates with the filing of an amended return.

The Dairy's case is particularly acute. On July 2, 1973, on the second day after the end of its fiscal year, the Dairy adopted a plan of liquidation pursuant to § 333 of the Code, 26 U. S. C. § 333. That section requires the adoption of a plan of liquidation; the making and filing, within 30 days, of written elections by the qualified electing shareholders; and the effectuation of the distribution in liquidation within a calendar month. §§ 333(a), (c), and (d). It seems obvious that the Dairy, its management, and its shareholders, by the end of the Dairy's 1973 fiscal year on June 30, and certainly well before the filing of its tax return for that fiscal year, all had conceived and developed the July 2, 1973, plan of liquidation and were resolved to carry out that plan with the benefits that they felt would be afforded by it. Under these circumstances, we carry the tax benefit rule too far and apply it too strictly when we utilize the unconsumed feed to create income for the Dairy for fiscal 1974 (the month of July 1973), instead of decreasing the deduction for the same feed in fiscal 1973. Any concern for the integrity of annual tax reporting should not demand that much. I thus would have the Dairy's returns adjusted in a realistic and factually true manner, rather than in accord with an inflexibly administered tax benefit rule.

Much the same is to be said about the Bank's case. The decisive event, this Court's decision in *Lehnhausen*, occurred on February 22, 1973, within the second month of the Bank's 1973 tax year. Indeed, it took place before the Bank's calendar year 1972 return would be overdue. Here again, an ac-

curate return for 1972 should be preferred over inaccurate returns for both 1972 and 1973.

This, in my view, is the way these two particular tax controversies should be resolved. I see no need for anything more complex in their resolution than what I have outlined. Of course, if a statute of limitations problem existed, or if the facts in some other way prevented reparation to the Government, the cases and their resolution might well be different.

I realize that my position is simplistic, but I doubt if the judge-made tax benefit rule really was intended, at its origin, to be regarded as applicable in simple situations of the kind presented in these successive-tax-year cases. So often a judge-made rule, understandably conceived, ultimately is used to carry us further than it should.

I would vacate the judgment in each of these cases and remand each case for further proceedings consistent with this analysis.

FALLS CITY INDUSTRIES, INC. *v.* VANCO BEVERAGE, INC.

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

No. 81–1271. Argued October 13, 1982—Decided March 22, 1983

During a certain period from 1972 through 1978, petitioner sold its beer to respondent, the sole wholesale distributor for petitioner's beer in Vanderburgh County, Ind., at a higher price than petitioner charged its only wholesale distributor in Henderson County, Ky., the two counties forming a single metropolitan area across the state line. Under Indiana law, brewers were required to sell to all Indiana wholesalers at a single price, Indiana wholesalers were prohibited from selling to out-of-state retailers, and Indiana retailers were not permitted to purchase beer from out-of-state wholesalers. Respondent filed suit in Federal District Court, alleging that petitioner's price discrimination violated § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. After trial, the court held that respondent had established a prima facie case of price discrimination, finding that although respondent and petitioner's Kentucky wholesaler did not sell to the same retailers, they competed for sale of petitioner's beer to consumers of beer from retailers in the market area; that petitioner's pricing policy resulted in lower retail prices for its beer in Kentucky than in Indiana; that many customers living in the Indiana portion of the market ignored Indiana law to purchase petitioner's beer more cheaply from Kentucky retailers; and that petitioner's pricing policy thus prevented respondent from competing effectively with petitioner's Kentucky wholesaler and caused respondent to sell less beer to Indiana retailers. The court rejected petitioner's "meeting-competition" defense under § 2(b) of the Clayton Act, which provides that a defendant may rebut a prima facie showing of illegal price discrimination by establishing that its lower price to any purchaser or purchasers "was made in good faith to meet an equally low price of a competitor." The court reasoned that instead of reducing its prices to meet those of a competitor, petitioner had created the price disparity by raising its prices to Indiana wholesalers more than it had raised its Kentucky prices; that instead of adjusting prices on a customer-to-customer basis to meet competition from other brewers, petitioner charged a single price throughout each State; and that the higher Indiana price was not set in good faith but instead was raised solely to allow petitioner to follow other brewers to enhance its profits. The Court of Appeals affirmed.

Held:

1. The District Court's findings, supported by direct evidence of diverted sales, more than established the "competitive injury" (the reasonable possibility that a price difference may harm competition) required to establish a prima facie violation of § 2(a). For § 2(a)'s purposes, injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time, although the inference of competitive injury may be overcome by evidence breaking the causal connection between the price differential and lost sales or profits. This rule is not limited to cases where the favored competitor is extraordinarily large. Nor is the competitive injury component of a Robinson-Patman Act violation limited to the injury to competition between the favored and the disfavored purchaser; it also encompasses the injury to competition between their customers. Pp. 434–438.

2. Petitioner's meeting-competition defense under § 2(b) is not defeated on the theory that the price difference resulted from price increases in Indiana rather than price decreases in Kentucky, and that the higher Indiana price resulted from petitioner's policy of following the Indiana prices of its larger competitors in order to enhance its profits. *FTC* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, distinguished. Pp. 438–447.

(a) The meeting-competition defense at least requires the seller to show the existence of facts that would lead a reasonable and prudent person to believe that the seller's lower price to the favored purchaser or purchasers would meet the equally low price of a competitor. The defense also requires the seller to demonstrate that its lower price was actually a good-faith response to that competing low price. Pp. 439–441.

(b) The standard governing the requirement of a "good-faith response" is the standard of a prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity. Here, the District Court did not address the crucial question whether petitioner's Kentucky prices remained lower than its Indiana prices in response to competitors' prices in Kentucky. If petitioner set its *lower* price in good faith to meet an equally low price of a competitor, it did not violate the Robinson-Patman Act. Moreover, the existence of industry-wide price discrimination within the geographic retail market did not itself establish collusion inconsistent with a good-faith response, particularly since the interstate price difference could well have been attributable not to petitioner, but to Indiana's extensive regulation of the sale of beer. Pp. 441–444.

(c) Nothing in § 2(b) requires a seller to *lower* its prices in order to meet competition. On the contrary, § 2(b) requires the defendant to show only that its lower price was made in good faith to meet a competi-

tor's equally low price. A price discrimination created by selective smaller price increases can result from a good-faith effort to meet a competitor's low price. Nor is the good faith with which the lower price is offered impugned if the prices raised, like those kept lower, respond to competitors' prices and are set with the goal of increasing the seller's profits. Pp. 444–446.

(d) The meeting-competition defense is not limited to price discrimination for the purpose of retaining a customer. A seller's price discrimination must be a defensive response to competition, in the sense that the lower price must be calculated and offered in good faith to "meet not beat" the competitor's low price, but § 2(b) does not distinguish between meeting a competitor's lower price to retain an old customer and meeting a competitor's lower price in an attempt to gain new customers. Pp. 446–447.

3. Petitioner's meeting-competition defense is not defeated on the theory that § 2(b) applies only where the defendant sets its lower price on a customer-by-customer basis rather than, as here, by the defendant's use of areawide pricing. Congress did not intend to limit the availability of § 2(b) to customer-specific responses, but also intended to allow reasonable pricing responses on an area-specific basis where competitive circumstances warrant them. A seller choosing to price on a territorial basis must show that the decision was a genuine, reasonable response to prevailing competitive circumstances. Pp. 447–451.

4. In the absence of further findings, petitioner has not established its meeting-competition defense as a matter of law. While there is evidence in the record that might support an inference that petitioner's decision to set a lower statewide price in Kentucky was a good-faith, well-tailored response to the competitive circumstances prevailing there, the question whether to draw such inference is for the trier of fact, not this Court. Pp. 451–452.

654 F. 2d 1224, vacated and remanded.

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

Howard Adler, Jr., argued the cause for petitioner. With him on the briefs was *Lionel Kestenbaum*.

Deputy Solicitor General Shapiro argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Baxter*, *John H. Garvey*, *Barry Grossman*, and *Nancy C. Garrison*.

John T. Cusack argued the cause for respondent. With him on the briefs was *Gordon B. Nash.*

JUSTICE BLACKMUN delivered the opinion of the Court.

Section 2(b) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13(b), provides that a defendant may rebut a prima facie showing of illegal price discrimination by establishing that its lower price to any purchaser or purchasers "was made in good faith to meet an equally low price of a competitor."[1] The United States Court of Appeals for the Seventh Circuit has concluded that the "meeting-competition" defense of § 2(b) is available only if the defendant sets its lower price on a customer-by-customer basis and creates the price discrimination by lowering rather than by raising prices. We conclude that § 2(b) is not so inflexible.

I

From July 1, 1972, through November 30, 1978, petitioner Falls City Industries, Inc., sold beer f.o.b. its Louisville, Ky., brewery to wholesalers throughout Indiana, Kentucky, and 11 other States. Respondent Vanco Beverage, Inc., was the sole wholesale distributor of Falls City beer in Vanderburgh County, Ind. That county includes the city of Evansville. Directly across the state line from Vanderburgh County is Henderson County, Ky., where Falls City's only wholesale distributor was Dawson Springs, Inc. The city of Henderson, Ky., located in Henderson County, is less than 10 miles from Evansville. The two cities are connected by a four-lane interstate highway. The two counties generally are considered to be a single metropolitan area. App. 124.

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[1] Section 2(b)'s "meeting-competition" proviso reads:

"[N]othing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Vanco and Dawson Springs each purchased beer from Falls City and other brewers and resold it to retailers in Vanderburgh County and Henderson County, respectively. The two distributors did not compete for sales to the same retailers. This was because Indiana wholesalers were prohibited by state law from selling to out-of-state retailers, Ind. Code § 7.1–3–3–5 (1982), and Indiana retailers were not permitted to purchase beer from out-of-state wholesalers. See § 7.1–3–4–6. Indiana law also affected beer sales in two other ways relevant to this case. First, Indiana required brewers to sell to all Indiana wholesalers at a single price. § 7.1–5–5–7. Second, although it was ignored and virtually unenforced, see Tr. 122–123, 135–136, state law prohibited consumers from importing alcoholic beverages without a permit. § 7.1–5–11–1.

In December 1976, Vanco sued Falls City in the United States District Court for the Southern District of Indiana, alleging, among other things, that Falls City had discriminated in price against Vanco, in violation of § 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13(a),[2] by charging Vanco a higher price than it charged Dawson Springs. Vanco also claimed that Falls City had violated §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, by conspiring with other brewers and unnamed wholesalers to maintain higher prices in Indiana than in Kentucky.

After trial, the District Court dismissed Vanco's Sherman Act claims, finding no evidence to support the allegations of

[2] That section provides in relevant part:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."

conspiracy or monopolization. 1980–2 Trade Cases ¶63,357, pp. 75,809, 75,820. The court held, however, that Vanco had made out a prima facie case of price discrimination under the Robinson-Patman Act. The District Court found that Vanco competed in a geographic market that spanned the state border and included Vanderburgh and Henderson Counties. *Id.*, at 75,813–75,814. Although Vanco and Dawson Springs did not sell to the same retailers, they "competed for sale of [Falls City's] beer to . . . consumers of beer from retailers situated in [that] market area." *Id.*, at 75,814. Falls City charged a higher price for beer sold to Indiana distributors than it charged for the same beer sold to distributors in other States, including Kentucky. *Ibid.*[3] This pricing policy resulted in lower retail prices for Falls City beer in Kentucky than in Indiana, because Kentucky distributors passed on their savings to retailers who in turn passed them on to consumers. Finding that many customers living in the Indiana portion of the geographic market ignored state law to purchase cheaper Falls City beer from Henderson County retailers, the court concluded that Falls City's pricing policies prevented Vanco from competing effectively with Dawson Springs, *id.*, at 75,815–75,816, and caused it to sell less beer to Indiana retailers. *Id.*, at 75,814–75,817, 75,818.[4]

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[3] Falls City charged Vanco and other Indiana distributors 10–30% more than it charged Dawson Springs and other Kentucky distributors. The District Court concluded that this price differential was not explained by differing costs. Falls City's distributors—wherever located—picked up the beer at Falls City's Louisville brewery. 1980–2 Trade Cases, at 75,814.

[4] The District Court acknowledged that during the period at issue, sales of Falls City beer dropped precipitously throughout Indiana and Kentucky. *Id.*, at 75,815. This decline paralleled a significant nationwide trend that favored national brands of beer and harmed or eliminated many regional brewers like Falls City. See generally, FTC, Staff Report of Bureau of Economics, The Brewing Industry 13–28 (1978). But Vanco's sales of Falls City beer declined more rapidly than did Falls City's sales in Indiana

The District Court rejected Falls City's § 2(b) meeting-competition defense. The court reasoned that, instead of reducing its prices to meet those of a competitor, Falls City had created the price disparity by raising its prices to Indiana wholesalers more than it had raised its Kentucky prices. Instead of "adjusting prices on a customer to customer basis to meet competition from other brewers," *id.*, at 75,822, Falls City charged a single price throughout each State in which it sold beer. The court concluded that Falls City's higher Indiana price was not set in good faith; instead, it was raised "for the sole reason that it followed the other brewers . . . for its profit." *Ibid.*

The United States Court of Appeals for the Seventh Circuit, by a divided vote, affirmed the finding of liability. 654 F. 2d 1224 (1981).[5] The court held that Vanco had established a prima facie case of illegal price discrimination and that Falls City had not demonstrated that the discrimination "was a good faith effort to defend against competitors." *Id.*, at 1230. We granted certiorari to review the Court of Appeals' holdings respecting injury to competition and the "meeting-competition" defense. 455 U. S. 988 (1982).

II

To establish a prima facie violation of § 2(a), one of the elements a plaintiff must show is a reasonable possibility that a

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as a whole, or in Henderson County. Moreover, Falls City's rate of decline in Henderson County was less than that in Kentucky as a whole. The District Court found that the difference between Vanco's rate of decline and the rate of decline elsewhere was caused by Falls City's price discrimination. 1980–2 Trade Cases, at 75,815.

[5] The Court of Appeals remanded the case to the District Court for a redetermination of damages because, contrary to our decision in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U. S. 557 (1981), the District Court had found, 1980–2 Trade Cases, at 75,823, that the aggregate overcharges to Vanco—$575,293.79—were "automatic damage[s]," and had entered judgment for treble that amount. 654 F. 2d, at 1231. The damages issue is not before this Court.

price difference may harm competition. *Corn Products Refining Co.* v. *FTC*, 324 U. S. 726, 742 (1945). In keeping with the Robinson-Patman Act's prophylactic purpose, § 2(a) "does not 'require that the discriminations must in fact have harmed competition.'" *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U. S. 557, 562 (1981), quoting *Corn Products*, 324 U. S., at 742. This reasonable possibility of harm is often referred to as competitive injury. Unless rebutted by one of the Robinson-Patman Act's affirmative defenses, a showing of competitive injury as part of a prima facie case is sufficient to support injunctive relief, and to authorize further inquiry by the courts into whether the plaintiff is entitled to treble damages under § 4 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 15 (1976 ed., Supp. V). *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U. S., at 562.[6]

Falls City contends that the Court of Appeals erred in relying on *FTC* v. *Morton Salt Co.*, 334 U. S. 37 (1948), to uphold the District Court's finding of competitive injury. In *Morton Salt* this Court held that, for the purposes of § 2(a), injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time. 334 U. S., at 46, 50–51; see *id.*, at 60 (Jackson, J., dissenting in part). In the absence of direct evidence of displaced sales, this inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits. F. Rowe, Price Discrimination Under the Robinson-Patman Act 182 (1962) (Rowe); see *Chrysler Credit Corp.* v. *J. Truett Payne Co.*, 670 F. 2d 575, 581 (CA5 1982).

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[6] Section 4 of the Clayton Act requires "some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U. S., at 562. In this case, the Court of Appeals affirmed the District Court's finding of antitrust injury, 654 F. 2d, at 1230, and that issue is not before us.

According to Falls City, the *Morton Salt* rule should be applied only in cases involving "large buyer preference or seller predation." Brief for Petitioner 31. Falls City does not, however, suggest any economic reason why *Morton Salt*'s "self-evident" inference, 334 U. S., at 50, should not apply when the favored competitor is not extraordinarily large. Although concerns about the excessive market power of large purchasers were primarily responsible for passage of the Robinson-Patman Act, see generally Rowe, at 3–23; U. S. Dept. of Justice, Report on the Robinson-Patman Act 101–139 (1977) (1977 Report), the Act "is of general applicability and prohibits discriminations generally," *FTC* v. *Sun Oil Co.*, 371 U. S. 505, 522 (1963). The determination whether to alter the scope of the Act must be made by Congress, not this Court, as is recognized by the commentators on which Falls City relies. See 1977 Report, at 221–228 and 290–291; ABA Antitrust Section, Monograph No. 4, The Robinson-Patman Act: Policy and Law, Vol. I, 102–103 (1980).

The *Morton Salt* rule was not misapplied in this case. In a strictly literal sense, this case differs from *Morton Salt* because Vanco and Dawson Springs did not compete with each other at the wholesale level; Vanco sold only to Indiana retailers and Dawson Springs sold only to Kentucky retailers. But the competitive injury component of a Robinson-Patman Act violation is not limited to the injury to competition between the favored and the disfavored purchaser; it also encompasses the injury to competition between their customers—in this case the competition between Kentucky retailers and Indiana retailers who, under a District Court finding not challenged in this Court, were selling in a single, interstate retail market.[7]

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[7] The Court of Appeals upheld the District Court's findings that the sale of Falls City beer to Vanco was in interstate commerce and that Henderson County and Vanderburgh County constituted a unified retail market for beer. *Id.*, at 1227–1229. These holdings are not before us. Falls City does not argue, and never has argued, that "Indiana's consumer-level non-

After observing that Falls City had maintained a substantial price difference between Vanco and Dawson Springs over a significant period of time, the Court of Appeals, like the District Court, considered the evidence that Vanco's loss of Falls City beer sales was attributable to factors other than the price difference, particularly the marketwide decline of Falls City beer. Both courts found it likely that this overall decline accounted for some—or even most—of Vanco's lost sales. Nevertheless, if some of Vanco's injury was attributable to the price discrimination, Falls City is responsible to that extent. See *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 144 (1968) (WHITE, J., concurring).

The Court of Appeals agreed with the District Court's findings that "the major reason for the higher Indiana retail beer prices was the higher prices charged Indiana distributors," and "the lower retail prices in Henderson County attracted Indiana customers away from Indiana retailers, thereby causing the retailers to curtail purchases from Vanco." 654 F. 2d, at 1229. These findings were supported by direct evidence of diverted sales,[8] and more than established the com-

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importation law *compels* a finding that Evansville and Henderson are separate retail beer markets." Reply Brief for Petitioner to Supplemental Brief after Oral Argument 3. Indeed, Falls City's counsel affirmatively waived this argument in a letter written to the District Court before trial, App. to Supplemental Brief for Respondent after Oral Argument. Nor is the broader question whether Indiana and Kentucky constitute separate markets fairly included within the scope of the questions presented in Falls City's petition for certiorari. Counsel for Falls City made this very clear at oral argument, stating that "I'm not asking this Court to delve into the record to second guess that determination by the lower courts." Tr. of Oral Arg. 5–6.

[8] Falls City's own sales agent reported that the different prices charged in the two States accounted—at least in part—for the substantial difference in Vanco's and Dawson Spring's sales performances. App. 97–98, 157, 166. The local press reported substantial purchases of beer in Kentucky by Indiana residents. Tr. 114–122, 128. Kentucky retailers located just south of the Indiana state line on the four-lane highway between

petitive injury required for a prima facie case under § 2(a). See *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U. S., at 561–562; *Morton Salt*, 334 U. S., at 50–51. We therefore turn to Falls City's "meeting-competition" defense.

III

When proved, the meeting-competition defense of § 2(b) exonerates a seller from Robinson-Patman Act liability. *Standard Oil Co.* v. *FTC*, 340 U. S. 231, 246–247 (1951). This Court consistently has held that the meeting-competition defense "'at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.'" *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 451 (1978), quoting *FTC* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, 759–760 (1945); see *Great A&P Tea Co.* v. *FTC*, 440 U. S. 69, 82 (1979). The seller must show that under the circumstances it was reasonable to believe that the quoted price or a lower one was available to the favored purchaser or purchasers from the seller's competitors. See *United States Gypsum Co.*, 438 U. S., at 451. Neither the District Court nor the Court of Appeals addressed the question whether Falls City had shown information that would have led a reasonable and prudent person to believe that its lower Kentucky price would meet competitors' equally low prices there; indeed, no findings whatever were made regarding competitors' Kentucky prices, or

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Evansville and Henderson advertised their low prices extensively in the Evansville media and utilized "drive-in windows" at which customers could purchase beer without leaving their cars. *E. g.*, *id.*, at 336. Witnesses testified that they observed cars with Indiana license plates parked at Henderson County carryout retailers, to which drivers would return carrying cases of beer. *Id.*, at 86–112, 629–632. One Indiana resident testified that he purchased beer in Kentucky because of lower prices there. *Id.*, at 121–122, 218–222, 229. The District Court also relied on the differing rates of decline. See n. 4, *supra*.

the information available to Falls City about its competitors' Kentucky prices.

Instead, the Court of Appeals reasoned that Falls City had otherwise failed to show that its pricing "was a good faith effort" to meet competition. 654 F. 2d, at 1230. The Court of Appeals considered it sufficient to defeat the defense that the price difference "resulted from price increases in Indiana, not price decreases in Kentucky," *ibid.*, and that the higher Indiana price was the result of Falls City's policy of following the Indiana prices of its larger competitors in order to enhance its profits. The Court of Appeals also suggested that Falls City's defense failed because it adopted a "general system of competition," rather than responding to "individual situations." *Ibid.* The court believed that *FTC* v. *A. E. Staley Mfg. Co.*, *supra*, supported this holding. 654 F. 2d, at 1230.

A

On its face, § 2(b) requires more than a showing of facts that would have led a reasonable person to believe that a lower price was available to the favored purchaser from a competitor. The showing required is that the "lower price . . . *was made* in good faith *to meet*" the competitor's low price. 15 U. S. C. § 13(b) (emphasis added). Thus, the defense requires that the seller offer the lower price in good faith *for the purpose* of meeting the competitor's price, that is, the lower price must actually have been a good-faith response to that competing low price. See Rowe, at 234–235. See generally Kuenzel & Schiffres, Making Sense of Robinson-Patman: The Need to Revitalize Its Affirmative Defenses, 62 Va. L. Rev. 1211, 1237–1255 (1976). In most situations, a showing of facts giving rise to a reasonable belief that equally low prices were available to the favored purchaser from a competitor will be sufficient to establish that the seller's lower price was offered in good faith to meet that price. In others, however, despite the availability from other sellers of a low price, it may be apparent that the defendant's low offer was not a good-faith response.

In *Staley*, this Court applied that principle. The Federal Trade Commission (FTC) had proceeded against Staley and six competing manufacturers of glucose, all of whom adhered to the same Chicago basing-point pricing system. See C. Edwards, Price Discrimination Law 372–379 (1959). See generally FTC Policy Toward Geographic Pricing Practices, 1 CCH Trade Reg. Rep. ¶¶3601.27, 3601.40–3601.42, pp. 5346, 5351–5352 (10th ed. 1959). Like its competitors, Staley, whose plant was located in Decatur, Ill., sold glucose to candy and syrup manufacturers at a delivered price that included the freight rate from Chicago to the point of delivery. Purchasers nearer Decatur thus were charged an element of "phantom" freight, while Staley "absorbed" an element of freight in sales to buyers nearer Chicago. 324 U. S., at 749. Customers located near Staley's Decatur plant were harmed because, despite being located closer to the plant, they were forced to pay more for glucose than did their Chicago area competitors. *Id.*, at 756.

The FTC eventually charged all seven manufacturers individually with price discrimination and jointly under the Federal Trade Commission Act with price fixing. See *Corn Products Refining Co.*, 47 F. T. C. 587 (1950). At the time of the *Staley* decision, both the FTC and this Court had determined that use of the pricing system by Staley's competitors was illegal under §2(a). See *Corn Products Refining Co.* v. *FTC*, 324 U. S., at 732, 737–739. And, although neither the FTC nor this Court directly relied on the fact in finding price discrimination, Staley itself had been found to be a party to an interseller conspiracy aimed at maintaining "oppressive and uniform net delivered prices" throughout the country. See *A. E. Staley Mfg. Co.* v. *FTC*, 4 F. T. C. Stat. & Dec. 795, 805 (1943).

The Court observed that §2(b) could exonerate Staley only if that section permitted a seller to establish "an otherwise unlawful system of discriminatory prices" in order to benefit from "a like unlawful system maintained by his competitors."

324 U. S., at 753. Staley could not claim that its low Chicago prices were set for the purpose of meeting the equally low prices of competitors there; the Chicago prices could be seen only as part of a collusive pricing system designed to exact artificially high prices throughout the country. Since the low prices were set "in order to establish elsewhere the artificially high prices whose discriminatory effect permeates respondents' entire pricing system," *id.*, at 756, the Court sustained the FTC's finding "that respondents' price discriminations were not made to meet a 'lower' price and consequently were not in good faith," *id.*, at 758.

Thus, even had Staley been able to show that its prices throughout the country did not undercut those of its competitors, its lower price in the Chicago area was not a good-faith response to the lower prices there. Staley had not priced in response to competitors' discrete pricing decisions, but from the outset had followed an industrywide practice of setting its prices according to a single, arbitrary scheme that by its nature *precluded* independent pricing in response to normal competitive forces.

B

Almost 20 years ago, the FTC set forth the standard that governs the requirement of a "good-faith response":

> "At the heart of Section 2(b) is the concept of 'good faith'. This is a flexible and pragmatic, not a technical or doctrinaire, concept. The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity." *Continental Baking Co.*, 63 F. T. C. 2071, 2163 (1963).

Whether this standard is met depends on "'the facts and circumstances of the particular case, not abstract theories or remote conjectures.'" *United States* v. *United States Gypsum Co.*, 438 U. S., at 454, quoting *Continental Baking Co.*, 63 F. T. C., at 2163.

The "facts and circumstances" present in *Staley* differ markedly from those present here. Although the District Court characterized the Indiana prices charged by Falls City and its competitors as "artificially high," there is no evidence that Falls City's lower prices in Kentucky were set as part of a plan to obtain artificially high profits in Indiana rather than in response to competitive conditions in Kentucky. Falls City did not adopt an illegal system of prices maintained by its competitors.[9] The District Court found that Falls City's prices rose in Indiana in response to competitors' price increases there; it did not address the crucial question whether Falls City's Kentucky prices remained lower in response to competitors' prices in that State.

Vanco attempts to liken this case to *Staley* by arguing that the existence of industrywide price discrimination within the single geographic retail market itself indicates "tacit or explicit collusion, or . . . market power" inconsistent with a good-faith response. Brief for Respondent 39. By its terms, however, the meeting-competition defense requires a seller to justify only its *lower* price. See *Staley*, 324 U. S., at 753. Thus, although the Sherman Act would provide a remedy if Falls City's higher Indiana price were set collusively, collusion is relevant to Vanco's Robinson-Patman Act claim only if it affected Falls City's lower Kentucky price. If Falls City set its lower price in good faith to meet an equally low price of a competitor, it did not violate the Robinson-Patman Act.

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[9] Except through its rejected Sherman Act claim, Vanco has never attempted to prove that the competing prices Falls City claims to have met were themselves illegal, or that Falls City met those prices knowing them to be unlawful. The plaintiff bears the burden of proving that the prices met were actually illegal. *Cadigan* v. *Texaco, Inc.*, 492 F. 2d 383, 387 (CA9 1974); *National Dairy Products Corp.* v. *FTC*, 395 F. 2d 517, 524 (CA7), cert. denied, 393 U. S. 977 (1968); see *Standard Oil Co.* v. *Brown*, 238 F. 2d 54, 58, and n. 7 (CA5 1956).

Moreover, the collusion argument founders on a complete lack of proof. Persistent, industrywide price discrimination within a geographic market should certainly alert a court to a substantial possibility of collusion.[10] See Posner, Oligopoly and the Antitrust Laws: A Suggested Approach, 21 Stan. L. Rev. 1562, 1578–1579 (1969). Here, however, the persistent interstate price difference could well have been attributable, not to Falls City, but to extensive state regulation of the sale of beer. Indiana required each brewer to charge a single price for its beer throughout the State, and barred direct competition between Indiana and Kentucky distributors for sales to retailers. In these unusual circumstances, the prices charged to Vanco and other wholesalers in Vanderburgh County may have been influenced more by market conditions in distant Gary and Fort Wayne than by conditions in nearby Henderson County, Ky. Moreover, wholesalers in Henderson County competed directly, and attempted to price competitively, with wholesalers in neighboring Kentucky counties. App. 52–53. A separate pricing structure might well have evolved in the two States without collusion, not-

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[10] Indeed, in some circumstances there may be no other plausible explanation for persistent "economic" price discrimination. Cf. *FTC* v. *Cement Institute*, 333 U. S. 683, 715 (1948) ("the multiple basing point system of delivered prices as employed by respondents contravened accepted economic principles and could only have been maintained through collusion"); *Staley*, 324 U. S., at 756 (it "seems inescapable" that basing point system was adopted not to meet equally low prices of competitors, but to establish artificially high prices elsewhere).

"Economic" price discrimination consists in selling a product to different customers at prices that bear different ratios to the marginal costs of sales to those customers, for example, charging the same price to two customers despite the fact that the seller incurs higher costs to serve one than the other, or charging different prices to two customers despite the fact that the seller's costs of service are the same. Price discrimination under the Robinson-Patman Act, however, "is merely a price difference." *FTC* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 549 (1960).

withstanding the existence of a common retail market along the border. Thus, the sustained price discrimination does not itself demonstrate that Falls City's Kentucky prices were not a good-faith response to competitors' prices there.

C

The Court of Appeals explicitly relied on two other factors in rejecting Falls City's meeting-competition defense: the price discrimination was created by raising rather than lowering prices, and Falls City raised its prices in order to increase its profits. Neither of these factors is controlling. Nothing in § 2(b) requires a seller to *lower* its price in order to meet competition. On the contrary, § 2(b) requires the defendant to show only that its "lower price . . . was made in good faith to meet an equally low price of a competitor." A seller is required to justify a price difference by showing that it reasonably believed that an equally low price was available to the purchaser and that it offered the lower price for that reason; the seller is not required to show that the difference resulted from subtraction rather than addition.

A different rule would not only be contrary to the language of the statute, but also might stifle the only kind of legitimate price competition reasonably available in particular industries. In a period of generally rising prices, vigorous price competition for a particular customer or customers may take the form of smaller price increases rather than price cuts. Thus, a price discrimination created by selective price increases can result from a good-faith effort to meet a competitor's low price.

Nor is the good faith with which the lower price is offered impugned if the prices raised, like those kept lower, respond to competitors' prices and are set with the goal of increasing the seller's profits. A seller need not choose between "ruinously cutting its prices to all its customers to match the price offered to one, [and] refusing to meet the competition and

then ruinously raising its prices to its remaining customers to cover increased unit costs." *Standard Oil Co.* v. *FTC*, 340 U. S., at 250. Nor need a seller choose between keeping all its prices ruinously low to meet the price offered to one, and ruinously raising its prices to all customers to a level significantly above that charged by its competitors. A seller is permitted "to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its other customers." *Ibid.* The plain language of § 2(b) also permits a seller to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily freezing his price to his other customers.

Section 2(b) does not require a seller, meeting in good faith a competitor's lower price to certain customers, to forgo the profits that otherwise would be available in sales to its remaining customers. The very purpose of the defense is to permit a seller to treat different competitive situations differently. The prudent businessman responding fairly to what he believes in good faith is a situation of competitive necessity might well raise his prices to some customers to increase his profits, while meeting competitors' prices by keeping his prices to other customers low.

The Court in *Staley* said that the meeting-competition defense "presupposes that the person charged with violating the Act would, by his normal, non-discriminatory pricing methods, have reached a price so high that he could reduce it in order to meet the competitor's equally low price." 324 U. S., at 754. In that case, however, the Court was not dealing with a seller whose "normal, non-discriminatory pricing methods" called for a price increase but who wished to exempt certain customers from the increase in order to meet prices, lower than the increased price, available to those customers from competitors. Of course, a seller could accomplish the same result within the guidelines the Court of Ap-

peals would impose by instituting across-the-board price increases followed by selective reductions. But far from being flexible and pragmatic, a rule requiring such costly behavior would be nonsensical.[11]

D

Vanco also contends that Falls City did not satisfy § 2(b) because its price discrimination "was not a *defensive* response to competition." Brief for Respondent 47 (emphasis supplied). According to Vanco, the Robinson-Patman Act permits price discrimination only if its purpose is to retain a customer. *Id.*, at 32–33. We agree that a seller's response must be defensive, in the sense that the lower price must be calculated and offered in good faith to "meet not beat" the competitor's low price. See *United States Gypsum Co.*, 438 U. S., at 454. Section 2(b), however, does not distinguish between one who meets a competitor's lower price to retain an old customer and one who meets a competitor's lower price in an attempt to gain new customers.[12] See Stevens, Defense of Meeting the Lower Price of a Competitor, in Summer Institute on International and Comparative Law, University of Michigan Law School, Lectures on Federal Antitrust Laws 129, 135–136 (1953). Such a distinction would be

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[11] "Section 2(b) should not require proof that the seller departed from a previously uniform price schedule. Such *previous* pricing is not relevant to evaluation of genuine responses to a *current* competitive situation." Report of the Attorney General's National Committee to Study the Antitrust Laws 182 (1955) (1955 Report) (emphasis in original).

[12] At least three Courts of Appeals have held that the defense is not limited to attempts to retain customers. *Cadigan* v. *Texaco, Inc.*, 492 F. 2d, at 387, and n. 3; *Hanson* v. *Pittsburgh Plate Glass Industries, Inc.*, 482 F. 2d 220, 226–227 (CA5 1973), cert. denied, 414 U. S. 1136 (1974); *Sunshine Biscuits, Inc.* v. *FTC*, 306 F. 2d 48, 51–52 (CA7 1962). But see *Standard Motor Products, Inc.* v. *FTC*, 265 F. 2d 674, 677 (CA2) (defense available only if lower price responds to individual competitive demand), cert. denied, 361 U. S. 826 (1959).

inconsistent with that section's language and logic, see *Sunshine Biscuits, Inc.* v. *FTC*, 306 F. 2d 48, 51–52 (CA7 1962), "would not be in keeping with elementary principles of competition, and would in fact foster tight and rigid commercial relationships by insulating them from market forces." 1955 Report, at 184; see 1977 Report, at 26, 265.[13]

IV

The Court of Appeals also relied on *Staley* for the proposition that the meeting-competition defense "'places emphasis on individual [competitive] situations, rather than upon a general system of competition,'" 654 F. 2d, at 1230 (quoting *Staley*, 324 U. S., at 753), and "does not justify the maintenance of discriminatory pricing among classes of customers that results merely from the adoption of a competitor's discriminatory pricing structure," 654 F. 2d, at 1230. The Court of Appeals was apparently invoking the District Court's findings that Falls City set prices statewide rather than on a "customer to customer basis," and the District Court's conclusion that this practice disqualified Falls City from asserting the meeting-competition defense. 1980–2 Trade Cases, at 75,817. At least two other Courts of Appeals have read *Staley* to hold that the defense is unavailable to sellers pricing on other than a customer-by-customer basis, while two Courts of Appeals have held that a customer-by-customer response is not required.[14]

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[13] *Standard Oil Co.* v. *FTC*, 340 U. S. 231 (1951), is not to the contrary. The Court there referred to the defense's being available to a seller seeking to "retain" customers, *id.*, at 242, 249, 250, simply because the petitioner had so framed its defense in that particular case. *Id.*, at 234, 236; see 1955 Report, at 184; Kuenzel & Schiffres, Making Sense of Robinson-Patman: The Need to Revitalize its Affirmative Defenses, 62 Va. L. Rev. 1211, 1253–1254 (1976).

[14] Compare *Exquisite Form Brassiere, Inc.* v. *FTC*, 123 U. S. App. D. C. 358, 359, 360 F. 2d 492, 493 (1965) (customer-by-customer response required), cert. denied, 384 U. S. 959 (1966), and *Standard Motor Products*,

There is no evidence that Congress intended to limit the availability of § 2(b) to customer-specific responses. Section 2(b)'s predecessor, § 2 of the original Clayton Act, stated that "nothing herein contained shall prevent . . . discrimination in price in the same or different communities made in good faith to meet competition." 38 Stat. 730. The Judiciary Committee of the House of Representatives, which drafted the clause that became the current § 2(b), see *Standard Oil Co.* v. *FTC*, 340 U. S., at 247–248, n. 14, explained the new section's anticipated function: "It should be noted that while the seller is permitted to meet *local* competition, [§ 2(b)] does not permit him to cut *local* prices until his competitor has first offered lower prices, and then he can go no further than to meet those prices." H. R. Rep. No. 2287, 74th Cong., 2d Sess., 16 (1936) (emphasis supplied). Congress intended to allow reasonable pricing responses on an area-specific basis where competitive circumstances warrant them. The purpose of the amendment was to "restric[t] the proviso to price differentials occurring in actual competition." *Standard Oil Co.* v. *FTC*, 340 U. S., at 242. We conclude that Congress did not intend to bar territorial price differences that are in fact responses to competitive conditions.

Section 2(b) specifically allows a "lower price . . . to any purchaser or purchasers" made in good faith to meet a competitor's equally low price. A single low price surely may be extended to numerous purchasers if the seller has a reasonable basis for believing that the competitor's lower price is available to them.[15] Beyond the requirement that the lower

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Inc. v. *FTC*, 265 F. 2d, at 677 (same), with *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F. 2d 1014, 1046 (CA9 1981) (customer-by-customer response not necessarily required), cert. denied, 459 U. S. 825 (1982), *Callaway Mills Co.* v. *FTC*, 362 F. 2d 435, 442 (CA5 1966) (same), and *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356, 366 (CA9 1955) (same), cert. denied, 350 U. S. 991 (1956).

[15] See also *Standard Oil Co.* v. *FTC*, 340 U. S., at 247, n. 13, quoting statement of Herbert A. Bergson, Assistant Attorney General, at Hear-

price be reasonably calculated to "meet not beat" the competition, Congress intended to leave it a "question of fact . . . whether the way in which the competition was met lies within the latitude allowed." 80 Cong. Rec. 9418 (1936) (remarks of Rep. Utterback). Once again, this inquiry is guided by the standard of the prudent businessman responding fairly to what he reasonably believes are the competitive necessities.

A seller may have good reason to believe that a competitor or competitors are charging lower prices throughout a particular region. See *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F. 2d 1014, 1046 (CA9 1981), cert. denied, 459 U. S. 825 (1982); *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356, 366 (CA9 1955), cert. denied, 350 U. S. 991 (1956); Rowe, at 235–236. In such circumstances, customer-by-customer negotiations would be unlikely to result in prices different from those set according to information relating to competitors' territorial prices. A customer-by-customer requirement might also make meaningful price competition unrealistically expensive for smaller firms such as Falls City, which was attempting to compete with larger national breweries in 13 separate States. Cf. *Callaway Mills Co.* v. *FTC*, 362 F. 2d 435, 442 (CA5 1966) (in some circumstances, requirement of customer-by-customer pricing "would be burdensome, unreasonable, and practically unfeasible").

In *Staley*, 324 U. S., at 753, as in each of the later cases in which this Court has contrasted a "general system of competition" with "individual competitive situations," see, *e. g.*, *FTC* v. *National Lead Co.*, 352 U. S. 419, 431 (1957); *FTC* v. *Cement Institute*, 333 U. S. 683, 708 (1948), the seller's lower

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ings on S. 236 before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 81st Cong., 1st Sess., 77 (1949) ("'The section presently permits sellers to justify otherwise forbidden price discriminations on the ground that the lower prices to one set of buyers were made in good faith to meet the equally low prices of a competitor'").

price was quoted not "*because* of lower prices by a competitor," but "*because* of a preconceived pricing scale which [was] operative regardless of variations in competitor's prices." Rowe, at 234 (emphasis in original). In those cases, the contested lower prices were not truly "*responsive* to rivals' competitive prices," *ibid.* (emphasis in original), and therefore were not genuinely made to meet competitors' lower prices. Territorial pricing, however, can be a perfectly reasonable method—sometimes the most reasonable method—of responding to rivals' low prices.[16] We choose not to read into § 2(b) a restriction that would deny the meeting-competition defense to one whose areawide price is a well-tailored response to competitors' low prices.

Of course, a seller must limit its lower price to that group of customers reasonably believed to have the lower price available to it from competitors. A response that is not reasonably tailored to the competitive situation as known to the seller, or one that is based on inadequate verification, would not meet the standard of good faith. Similarly, the response may continue only as long as the competitive circumstances justifying it, as reasonably known by the seller, persist.[17] One choosing to price on a territorial basis, rather than on a

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[16] See Rowe, at 240 ("a seller's area-wide and blanket lower price, if made in good faith to meet competitors' lower prices, may be justified . . . as responsive to an 'individual competitive situation' "). Cf. *Maryland Baking Co.* v. *FTC*, 243 F. 2d 716, 719 (CA4 1957) (FTC permits competitive area price variations to avert placing "prices in a straightjacket throughout the country"); *Anheuser-Busch, Inc.*, 54 F. T. C. 277, 301 (1957) (suggesting that offer of lower price throughout particular area might be responsive to "individual competitive situation"); *C. E. Niehoff & Co.*, 51 F. T. C. 1114, 1130, 1146 (1955) (rejecting position that "showing that the seller's discriminations were temporary and localized in area is an indispensable prerequisite" to defense).

[17] See Klein, Meeting Competition by Price Systems Under § 2(b) of the Robinson-Patman Act: Problems and Prospects, 16 Antitrust Bull. 213, 233–234, 238 (1971); Kuenzel & Schiffres, 62 Va. L. Rev., at 1244–1249.

customer-by-customer basis, must show that this decision was a genuine, reasonable response to prevailing competitive circumstances. See *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F. 2d 714, 725–726 (CA5 1975), cert. denied, 424 U. S. 943 (1976); *Callaway Mills Co.* v. *FTC*, 362 F. 2d, at 441–442. See generally 1977 Report, at 265. Unless the circumstances call into question the seller's good faith, this burden will be discharged by showing that a reasonable and prudent businessman would believe that the lower price he charged was generally available from his competitors throughout the territory and throughout the period in which he made the lower price available. See *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F. 2d, at 1045–1046.

V

In summary, the meeting-competition defense requires the seller at least to show the existence of facts that would lead a reasonable and prudent person to believe that the seller's lower price would meet the equally low price of a competitor; it also requires the seller to demonstrate that its lower price was a good-faith response to a competitor's lower price.

Falls City contends that it has established its meeting-competition defense as a matter of law. In the absence of further findings, we do not agree. The District Court and the Court of Appeals did not decide whether Falls City had shown facts that would have led a reasonable and prudent person to conclude that its lower price would meet the equally low price of its competitors in Kentucky throughout the period at issue in this suit. Nor did they apply the proper standards to the question whether Falls City's decision to set a single statewide price in Kentucky was a good-faith, well-tailored response to the competitive circumstances prevailing there. The absence of allegations to the contrary is not controlling; the statute places the burden of establishing the defense on Falls City, not Vanco. There is evidence

in the record that might support an inference that these requirements were met,[18] but whether to draw that inference is a question for the trier of fact, not this Court.

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

It is so ordered.

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[18] Were the courts below to find that Falls City reasonably believed that low prices were available to Dawson Springs and other Kentucky wholesalers from Falls City's competitors, a factfinding that we decline to address on this record, Falls City could not easily have eliminated price discrimination between Dawson Springs and Vanco. In such circumstances, had Falls City raised prices in Kentucky in lockstep with price increases in Indiana, it would have lost sales in Kentucky because its competitors would have been offering far lower prices. Raising its Kentucky prices only in Henderson County would not only have cost Falls City sales there, but also might have exposed Falls City to new Robinson-Patman Act claims, since Dawson Springs competed for sales with wholesalers in neighboring Kentucky counties. Nor, in such circumstances, could Falls City reasonably be required to charge Vanco the lower Kentucky price. Indiana law prohibited Falls City from doing so without simultaneously offering the same price to all other Indiana wholesalers. This approach might well have harmed Falls City's economic interests, since most of Falls City's Indiana sales were in areas far removed from lower Kentucky prices and competition.

Syllabus

UNITED STATES *v.* GENERIX DRUG CORP. ET AL.

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

No. 81–1222. Argued November 3, 1982—Decided March 22, 1983

The Federal Food, Drug, and Cosmetic Act (Act) prohibits the marketing of a "new drug" without the prior approval of the Food and Drug Administration (FDA). Section 201(p) of the Act defines a "new drug" as "any drug . . . [which] is not generally recognized . . . as safe and effective . . . or . . . which has not, otherwise than in [safety and effectiveness] investigations, been used to a material extent or for a material time." Section 201(g)(1) defines the term "drug" as, *inter alia*, "articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or in other animals." The Government brought an action in Federal District Court to enjoin respondent Generix Drug Corp. (respondent) from distributing a number of generic drug products containing specified active ingredients, alleging that the FDA had never approved "new drug" applications with respect to such products. Holding that a generic drug product containing the same active ingredients as a previously approved pioneer drug marketed under a brand name is a "new drug" if there is a reasonable possibility that the differences in inactive "excipients" between the generic product and the pioneer drug will make the generic product less safe and effective, and finding that the Government had established a reasonable possibility that the safety and effectiveness of respondent's generic drug products might be affected by differences between their inactive "excipients" and those found in approved products, the court enjoined respondent from distributing the products in question. The Court of Appeals vacated the injunction and remanded with instructions to dismiss the complaint, holding that the statutory prohibition against the sale of a "new drug" without prior FDA approval does not apply to a drug product having the same active ingredients as a previously approved drug product, regardless of any differences in "excipients."

Held: A generic product is a "drug" within the meaning of the indicated definition in § 201(g)(1). That definition is broad enough to encompass entire drug products, complete with their active and inactive ingredients. Accordingly, a generic drug product is a "new drug," subject to prior FDA approval, until the product (and not merely its active ingredients) no longer falls within the terms of § 201(p). Pp. 457–461.

654 F. 2d 1114, reversed.

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

Jerrold J. Ganzfried argued the cause for the United States. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Baxter, Deputy Solicitor General Claiborne, John J. Powers III, Nancy C. Garrison,* and *Jeffrey B. Springer.*

Robyn Greene argued the cause and filed a brief for respondents.*

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether the statutory prohibition against the marketing of a "new drug" without the prior approval of the Food and Drug Administration (FDA) requires respondent Generix Drug Corp. to have approved new drug applications (NDA's) before it may market its generic drug products. In statutory terms, we are required to determine whether the term "drug" as used in the relevant sections of the Federal Food, Drug, and Cosmetic Act (Act), as amended, 21 U. S. C. § 301 *et seq.* (1976 ed. and Supp V), refers only to the active ingredient in a drug product or to the entire product. We hold that Congress intended the word to have the broader meaning.

I

The active ingredients in most prescription drugs constitute less than 10% of the product; inactive "excipients" (such as coatings, binders, and capsules) constitute the rest. The term "generic drug" is used to describe a product that contains the same active ingredients but not necessarily the same excipients as a so-called "pioneer drug" that is mar-

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*Briefs of *amici curiae* urging reversal were filed by *Joel E. Hoffman* and *Robert M. Lichtman* for the Pharmaceutical Manufacturers Association; by *Richard Ayres Givens* for the Generic Pharmaceutical Industry Association; and by *Michael R. Sonnenreich, Michael X. Morrell,* and *William H. Kenety* for Medicine in the Public Interest.

Clark M. Clifford, Robert A. Altman, and *Daniel F. O'Keefe, Jr.*, filed a brief for the Proprietary Association as *amicus curiae.*

keted under a brand name.[1] Respondent Generix is a distributor of generic drugs manufactured by other firms.

The Government initiated this action to enjoin Generix from distributing in interstate commerce a number of generic drug products that contain eight specified active ingredients.[2] It alleged that the FDA had never approved new drug applications with respect to any of those products.[3]

The District Court held that a generic drug product containing the same active ingredients as a previously approved pioneer drug is a "new drug," requiring an NDA, only if there is a reasonable possibility that the differences in excipients between the generic product and the pioneer will make the generic product less safe and effective. 498 F. Supp. 288, 292. The court found clear evidence in support of the general proposition that differences in excipients may affect the safety and effectiveness of drug products. Excipients may affect the rate at which the active ingredient is delivered to a diseased organ. If delivery is too fast, the patient may be harmed just as if he received an overdose; if delivery is too slow, the treatment of the disease may be ineffective. *Id.*, at 291.

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[1] Generic drugs, also called "copycat" or "me-too" drugs, are usually marketed at relatively low prices because their manufacturers do not incur the research, development, and promotional costs normally associated with the creation and marketing of an original product.

[2] The eight ingredients were: allopurinol, spironolactone with hydrochlorothiazide, furosemide, diethylpropion hydrochloride, chlorothiazide with reserpine, amitriptyline with perphenazine, prochlorperazine maleate, and chlorthalidone. The District Court explained the use of each of these ingredients, noting that furosemide is one of the most widely used drugs in the United States, it being used to treat hypertension and edema. 498 F. Supp. 288, 289–290.

[3] Section 505(a) of the Act, 52 Stat. 1052, as amended, 76 Stat. 784, 21 U. S. C. § 355(a), provides:

"(a) Necessity of effective approval of application

"No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an approval of an application filed pursuant to subsection (b) of this section is effective with respect to such drug."

In this case, the District Court found that the Government had established a reasonable possibility that the safety and effectiveness of six of respondent's generic drug products might be affected by differences between their excipients and those found in approved products.[4] Accordingly, it enjoined the defendants from further distribution of products containing the designated active ingredients.

The Court of Appeals for the Fifth Circuit, now the Eleventh Circuit, vacated the District Court's injunction and remanded with instructions to dismiss the complaint. 654 F. 2d 1114. It held that the statutory prohibition against the sale of a "new drug" without prior approval does not apply to a drug product having the same active ingredients as a previously approved drug product, regardless of any differences in excipients. It based that conclusion on its view that the statutory requirement of evaluating the safety and effectiveness of new drugs must normally relate to active ingredients, because the precise technique of formulating the finished drug is not part of the information generally known to the medical or scientific community. Moreover, it believed that the legislative history suggested that Congress had not intended to create a product-by-product licensing system. Since the active ingredients at issue had all received the necessary approval, the Court of Appeals concluded that the Government was entitled to no relief at all.

Because the question is obviously important and because it has been decided differently in other Circuits,[5] we granted certiorari. 455 U. S. 988.[6]

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[4] Since no evidence concerning the safety and effectiveness of formulations containing prochlorperazine maleate or chlorthalidone was presented at the hearing, no relief was granted with respect to products containing those ingredients. 498 F. Supp., at 294.

[5] *Premo Pharmaceutical Laboratories, Inc.* v. *United States*, 629 F. 2d 795 (CA2 1980).

[6] Respondent Generix has argued that the case is moot because almost its entire store of products containing the disputed active ingredients is no longer salable, and in the future it intends only to sell generic drugs that

II

In resolving the narrow issue presented, the Court of Appeals misread the statutory text.

Section 201(p) of the Act defines a "new drug" to be "any drug . . . [which] is not generally recognized . . . as safe and effective . . . or . . . which has not, otherwise than in [safety and effectiveness] investigations, been used to a material extent or for a material time . . . ."[7] The Court of Appeals did not rest its decision on a finding that Generix's products are generally recognized as safe and effective; rather, its conclusion rested on the proposition that the statutory phrase "any drug" does not include a complete drug product, but only an active ingredient. That proposition is simply untenable.

The original Federal Food and Drugs Act of June 30, 1906, 34 Stat. 768, prohibited the sale of adulterated or misbranded

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have FDA approval. The possibility that respondent may change its mind in the future is sufficient to preclude a finding of mootness. See *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U. S. 283, 288–289 (1982); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953).

[7] The full text of § 201(p), 52 Stat. 1041–1042, as amended, 76 Stat. 781, 21 U. S. C. § 321(p), reads as follows:

"The term 'new drug' means—

"(1) Any drug (except a new animal drug or an animal feed bearing or containing a new animal drug) the composition of which is such that such drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling thereof, except that such a drug not so recognized shall not be deemed to be a 'new drug' if at any time prior to June 25, 1938, it was subject to the Food and Drugs Act of June 30, 1906, as amended, and if at such time its labeling contained the same representations concerning the conditions of its use; or

"(2) Any drug (except a new animal drug or an animal feed bearing or containing a new animal drug) the composition of which is such that such drug, as a result of investigations to determine its safety and effectiveness for use under such conditions, has become so recognized, but which has not, otherwise than in such investigations, been used to a material extent or for a material time under such conditions."

foods or drugs. The definition of the term "drug" in that statute was plainly broad enough to describe a completed drug product. It provided:

> "That the term 'drug,' as used in this Act, shall include all medicines and preparations recognized in the United States Pharmacopoeia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals." 34 Stat. 769.

In 1938, Congress passed the new statute, which requires that an application be submitted to the FDA before any "new drug" may be introduced into interstate commerce. Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, 21 U. S. C. § 301 *et seq.* (1976 ed. and Supp. V). The new Act's definition of the term "drug" is even broader than the old one:

> "[201](g)(1) The term 'drug' means (A) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a component of any article specified in clauses (A), (B), or (C) of this paragraph; but does not include devices or their components, parts, or accessories." 52 Stat. 1041, as amended, and as set forth in 21 U. S. C. § 321(g)(1).

In examining this statutory definition, the Court of Appeals was persuaded that only active ingredients come within the terms of subsection (A). 654 F. 2d, at 1116.[8] Unfortu-

[8] But cf. The United States Pharmacopeia 2 (20th rev. ed. 1980) ("article" is an item for which a monograph exists; monographs may exist for the

nately, the court did not analyze the entire definition. If it had done so, it would have noted both that the terms of subsections (A), (B), and (C) are plainly broad enough to include more than just active ingredients, and that they *must* do so unless subsection (D) is to be superfluous. Because the definition is disjunctive, generic drug products are quite plainly drugs within the meaning of the Act.

The natural reading of this definition is corroborated by other sections of the Act. Section 501(a) provides that a "drug" is deemed adulterated "if [it is a drug which] bears or contains, for purposes of coloring only, a color additive which is unsafe." 52 Stat. 1049, as amended, 21 U. S. C. § 351(a)(4). Section 502(e) provides that a "drug . . . fabricated from two or more ingredients" shall be deemed to be misbranded unless its label includes, "whether active or not, the established name and quantity or proportion of any bromides, ether, chloroform, [etc.]." 52 Stat. 1050–1051, as amended, 21 U. S. C. § 352(e)(1). And § 505(b) requires that an application for new drug approval contain "a full list of the articles used as components of such drug [and] a full statement of the composition of such drug." 52 Stat. 1052, 21 U. S. C. § 355(b). The term "drug" is plainly intended throughout the Act to include entire drug products, complete with active and inactive ingredients.[9]

Neither the Court of Appeals nor respondents have pointed to anything in the text of the Act that is inconsistent

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"finished, or partially finished . . . preparation or product of one or more official substances [active ingredients or excipients] formulated for use on or for the patient").

[9] At oral argument, respondents suggested that it would be nonsensical to understand the word "drug" in § 502(i) of the Act, 52 Stat. 1051, 21 U. S. C. § 352(i), to mean "drug product," because any generic drug is "an imitation of another drug." Tr. of Oral Arg. 41–42. But § 502(i) is intended to prohibit a company from passing an imitation off as the original; if "imitation" is understood with that in mind, it becomes apparent that the word "drug" can and should mean "drug product" in § 502(i), as well.

with our reading of its plain language.[10] The respondents make a number of arguments based upon legislative history and administrative practice regarding the marketing of generic prescription and over-the-counter drugs that lend support to the proposition that two products need not have precisely the same molecular structure in order to be the same "drug."[11] None of those arguments, however, warrants the conclusion that the term "drug" means only the active ingredient in a product.

In this case we are not required to determine what types of differences between drugs would be significant or insignificant under the statute. Respondent Generix argues only

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[10] Both the respondents and the Court of Appeals have suggested that if the term "new drug" referred to complete drug products, as opposed to active ingredients, then § 201(p)(2) of the Act would be superfluous. See 654 F. 2d, at 1116–1117. That section (set forth in n. 7, *supra*) establishes that before a drug may drop out of regulation, it must—in addition to being generally recognized among experts as safe and effective for the prescribed use—have been used to a material extent or for a material time other than in scientific investigations. The argument appears to rest on the premise that the only regulatory burden associated with being a new drug is the need to file a new drug application. Since an application must be filed *before* a drug can receive general public use, the argument is that nothing would be gained by deregulation because the only regulatory burden would have been sustained before one could be exempted from that burden. But the premise is flawed. Significant recordkeeping and reporting burdens are lifted when the "new drug" status terminates. See § 505(j) of the Act, 76 Stat. 782–783, 21 U. S. C. § 355(j). See also 21 CFR §§ 310.300–310.303 (1982).

[11] They argue (1) that legislative history suggests that the 1938 Congress rejected a product-by-product licensing system, (2) that in 1938 many pharmacists compounded their own pills with excipients of their choice and were not expected to file NDA's for each pill or every time they used a new excipient, (3) that between 1938 and 1968 the FDA advised drug manufacturers that certain generic products were not "new drugs" and therefore did not require NDA's to be marketed, (4) that the 1962 amendments reveal a congressional interest in promoting the availability of generic drugs in order to reduce the price of prescription drugs for consumers, (5) that in applying the 1962 amendments, the FDA took the position that, for some purposes, generic drug products were covered by NDA's of the pioneer

that its products are not new drugs under the theory that "drug" means "active ingredient"; it does not argue that its complete products—active ingredients and excipients together—are the same as previously approved products. The latter argument would, of course, have been unavailing on the facts before us; for the respondent has not questioned the District Court's finding of a reasonable possibility that its products are not bioequivalent to any previously approved products.[12] We thus do not reach the issue of whether two demonstrably bioequivalent products, containing the same active ingredients but different excipients, might under some circumstances be the same "drug."

In summary, a generic drug product is a "drug" within the meaning of § 201(g)(1) of the Act. Such a product is therefore a "new drug," subject to the requirements of § 505, until the product (and not merely its active ingredient) no longer falls within the terms of § 201(p). The judgment of the Court of Appeals is accordingly

Reversed.

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drugs that they copied, and (6) that since 1972 the FDA has used a "monograph" system to permit the marketing of over-the-counter drugs that meet prescribed standards and contain "suitable" excipients.

[12] Because the Government did not cross-appeal from the District Court's refusal to grant relief as to products containing prochlorperazine maleate and chlorthalidone, see n. 4, *supra*, we have no occasion to pass on the District Court's conclusion that the FDA has the burden of showing a "reasonable possibility" that a drug product is not bioequivalent to an approved product in order to enjoin distribution.

DISTRICT OF COLUMBIA COURT OF APPEALS ET AL. *v.* FELDMAN ET AL.

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

No. 81–1335. Argued December 8, 1982—Decided March 23, 1983

Respondents filed petitions in the District of Columbia Court of Appeals asking for waivers of that court's District of Columbia Bar admission rule that requires applicants to have graduated from a law school approved by the American Bar Association. The court issued *per curiam* orders denying the petitions. Respondents then filed complaints in the United States District Court for the District of Columbia, challenging the District of Columbia Court of Appeals' denials of their waiver petitions and also challenging the constitutionality of the bar admission rule. The District Court dismissed the complaints on the ground that it lacked subject-matter jurisdiction. The United States Court of Appeals for the District of Columbia Circuit reversed and remanded.

Held:

1. The proceedings before the District of Columbia Court of Appeals were judicial in nature. They involved a "judicial inquiry" in which the court was called upon to investigate, declare, and enforce "liabilities as they [stood] on present or past facts and under laws supposed already to exist." *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226. With respect to both respondents, the court adjudicated claims of a present right to admission to the Bar. Pp. 476–482.

2. United States district courts have no jurisdiction over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. Review of those decisions may be had only in this Court. Thus, to the extent that respondents sought review in the District Court of the District of Columbia Court of Appeals' denials of their petitions for waiver, the District Court lacked subject-matter jurisdiction over their complaints. But United States district courts do have subject-matter jurisidiction over general challenges to state bar rules promulgated by state courts in nonjudicial proceedings, which do not require review of a final state-court judgment in a particular case. Accordingly, here the District Court has jurisdiction over the elements of respondents' complaints involving a general attack on the constitutionality of the District of Columbia Bar admission rule. Pp. 482–488.

213 U. S. App. D. C. 119, 661 F. 2d 1295, vacated and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 488.

Daniel A. Rezneck argued the cause for petitioners. With him on the briefs was *Charles H. Cochran.*

Robert M. Sussman argued the cause for respondent Feldman. With him on the brief was *William P. Skinner. Michael F. Healy* argued the cause and filed a brief for respondent Hickey.*

JUSTICE BRENNAN delivered the opinion of the Court.

We must decide in this case what authority the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit have to review decisions of the District of Columbia Court of Appeals in bar admission matters. The United States Court of Appeals for the District of Columbia Circuit, reversing the United States District Court, held that the District Court had jurisdiction to review the District of Columbia Court of Appeals' denials of the respondents' requests for waivers of a bar admission rule that requires applicants to have graduated from an approved law school. We vacate the decision of the United States Court of Appeals for the District of Columbia Circuit and remand the case for proceedings consistent with this opinion.

I

We have discussed in detail in earlier opinions the changes in the structure of the District of Columbia court system effected by the District of Columbia Court Reform and Criminal Procedure Act of 1970. Pub. L. 91–358, 84 Stat. 473. See *Key* v. *Doyle*, 434 U. S. 59 (1977); *Palmore* v. *United States*, 411 U. S. 389 (1973). For purposes of this case,

**Allen R. Snyder* and *Elliot M. Mincberg* filed a brief for the Conference of Chief Justices as *amicus curiae* urging reversal.

three provisions of that legislation are crucial. One provision made "[f]inal judgments and decrees of the District of Columbia Court of Appeals . . . reviewable by the Supreme Court of the United States in accordance with section 1257 of title 28, United States Code." § 111, 84 Stat. 475 (codified at D. C. Code § 11–102 (1981)). Another provision amended 28 U. S. C. § 1257 to specify that the term "highest court of a State" as used in § 1257 includes the District of Columbia Court of Appeals. § 172(a)(1), 84 Stat. 590. These provisions make the judgments of the District of Columbia Court of Appeals, like the judgments of state courts, directly reviewable in this Court. Cases no longer have to proceed from the local courts to the United States Court of Appeals and then to this Court under 28 U. S. C. § 1254. See *Key* v. *Doyle*, *supra*, at 64. The third provision authorized the District of Columbia Court of Appeals to "make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion." § 111, 84 Stat. 521 (codified at D. C. Code § 11–2501(a) (1981)). This provision divested the United States District Court of its former authority to supervise admission to the District of Columbia Bar.

Pursuant to its new rulemaking authority, the District of Columbia Court of Appeals adopted, as part of its general rules, Rule 46I (1973), which governs admission to the bar. Rule 46I(b)(3) states:

> "(3) Proof of Legal Education. An applicant who has graduated from a law school that at the time of graduation was approved by the American Bar Association or who shall be eligible to be graduated from an approved law school within 60 days of the date of the examination will be permitted to take the bar examination. Under no circumstances shall an applicant be admitted to the bar without having first submitted to the Secretary to

> the Committee [on Admissions] a certificate verifying that he has graduated from an approved law school."[1]

Neither of the respondents graduated from an approved law school. Their efforts to avoid the operation of Rule 46I(b)(3) form the foundation of this case.

A

Respondent Feldman did not attend law school. Instead, he pursued an alternative path to a legal career provided by the State of Virginia involving a highly structured program of study in the office of a practicing attorney. See Va. Code § 54–62 (1982). In addition to his work and study at a law firm in Charlottesville, Va., Feldman formally audited classes at the University of Virginia School of Law. For the final six months of his alternative course of study, Feldman served as a law clerk to a United States District Judge.

Having passed the Virginia bar examination, Feldman was admitted to that State's Bar in April 1976. In March of that year he had begun working as a staff attorney for the Baltimore, Md., Legal Aid Bureau. He continued in that job until January 1977. Like the District of Columbia, Maryland has a rule limiting access to the bar examination to graduates of ABA-approved law schools, but the Maryland Board of Law Examiners waived the rule for Feldman. Feldman passed the Maryland examination and later was admitted to that State's Bar.

In November 1976, Feldman applied to the Committee on Admissions of the District of Columbia Bar for admission to the District Bar under a rule which, prior to its recent amendment, allowed a member of a bar in another jurisdiction to seek membership in the District Bar without examina-

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[1] Under Rule 46I(b)(4), a graduate of an unaccredited law school "may be permitted admission to an examination only after receiving credit for 24 semester hours of study in a law school that at the time of study was approved by the American Bar Association and with Committee approval."

tion. In January 1977, the Committee denied Feldman's application on the ground that he had not graduated from an approved law school. Initially, the Committee stated that waivers of Rule 46I(b)(3), or exceptions to it, were not authorized. Following further contact with the Committee, however, Feldman was granted an informal hearing. After the hearing, the Committee reaffirmed its denial of Feldman's application and stated that only the District of Columbia Court of Appeals could waive the requirement of graduation from an approved law school.

In June 1977, Feldman submitted to the District of Columbia Court of Appeals a petition for admission to the bar without examination. App. 1a. Alternatively, Feldman requested that he be allowed to sit for the bar examination. *Id.*, at 5a. In his petition, Feldman described his legal training, work experience, and other qualifications. He suggested that his professional training and education were "equal to that received by those who have attended an A. B. A. approved law school." *Id.*, at 4a. In view of his training, experience, and success in passing the bar examinations in other jurisdictions, Feldman stated that "the objectives of the District of Columbia's procedures and requirements for admission to the Bar will not be frustrated by granting this petition." *Ibid.*

The District of Columbia Court of Appeals did not act on Feldman's petition for several months. In March 1978, Feldman's counsel wrote to the Chief Judge of the District of Columbia Court of Appeals to urge favorable action on Feldman's petition. The letter stated that Feldman had "abundantly demonstrated his fitness to practice law" and suggested that "it would be a gross injustice to exclude him from the Bar without even considering his individual qualifications." *Id.*, at 6a. The letter went on to state that "[i]n the unique circumstances of his case, barring Mr. Feldman from the practice of law merely because he has not graduated from an accredited law school would raise important questions

under the United States Constitution and the federal antitrust laws—questions that Mr. Feldman is prepared to pursue in the United States District Court if necessary." *Id.*, at 6a–7a. In support of Feldman's position, the letter again stressed the strength of his training and the breadth of his experience. While acknowledging that a strict reading of Rule 46I(b)(3) prevented Feldman from taking the bar examination, Feldman's counsel suggested that the court was not precluded from considering "Mr. Feldman's application on its merits." *Id.*, at 9a. The court has plenary power to regulate the licensing of attorneys, which, in the view of Feldman's counsel, includes the discretion to waive the requirements of Rule 46I in a deserving case. In view of Feldman's "unusually high qualifications for admission" his case provided "an ideal occasion for the exercise of such discretion." *Ibid.*

Feldman's counsel also pointed out that the court had granted waivers of the rule in the past and suggested that a "failure to consider Mr. Feldman's application would be highly arbitrary and would raise serious questions about the fairness and even-handedness of the Court's policies regarding bar admissions." *Id.*, at 10a. He went on to state that "serious questions under the United States Constitution are raised by any bar admissions procedure which automatically rejects applicants who have not graduated from an A. B. A. accredited law school, without any opportunity to show that their experience and education provide equivalent evidence of their fitness to practice law." *Id.*, at 10a–11a. Feldman's counsel cited case authority in support of his position. Finally, Feldman's counsel stated that "[t]he federal antitrust laws provide an alternative basis for questioning the legality of a bar admissions procedure which presumes applicants to be unqualified if they lack a law degree and denies them any opportunity to show that their individual training and experience still qualify them to practice law." *Id.*, at 12a. Feldman's counsel also cited cases in support of this position.

In late March 1978, the Chief Judge of the District of Columbia Court of Appeals responded to the letter from Feldman's counsel. *Id.*, at 16a. The Chief Judge stated that while the Committee on Admissions had recognized Mr. Feldman's "exceptional opportunity for training" and his fine personal qualities, the purpose of the rule at issue was "to prevent the Committee and the Court from assuming the practicably impossible task of making separate subjective evaluations of each applicant's training and education; hence, an objective and reasonable standard as prescribed by the rule must be utilized." *Ibid.* In this light, the court decided not to waive the rule and upheld the Committee's denial of Feldman's application.

On March 30, 1978, the District of Columbia Court of Appeals issued a *per curiam* order denying Feldman's petition. *Id.*, at 18a. The order stated simply that "[o]n consideration of the petition of Marc Feldman to waive the provisions of Rule 46 of the General Rules of this Court, it is ORDERED that applicant's petition is denied." *Ibid.*

In May 1978, Feldman filed a complaint in the United States District Court for the District of Columbia challenging the District of Columbia Court of Appeals' refusal to waive Rule 46I(b)(3) on his behalf. *Id.*, at 35a.[2] The complaint stated that the "[d]efendants' refusal to consider plaintiff's individual qualifications to practice law is unlawful in view of his demonstrated fitness and competence, as well as the prior admission to the D. C. bar of several other individuals who did not attend an accredited law school." *Id.*, at 36a. Feldman sought "a declaration that defendants' actions have violated the Fifth Amendment to the Constitution and the Sherman Act, and . . . an injunction requiring defendants either

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[2] The complaint named as defendants the District of Columbia Court of Appeals, the Chief Judge of the District of Columbia Court of Appeals in his official capacity, the Committee on Admissions, and the Chairman and Secretary of that Committee. App. 37a–38a.

to grant plaintiff immediate admission to the District of Columbia bar or to permit him to sit for the bar examination as soon as possible." *Ibid.*[3]

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[3] In his complaint, Feldman specifically alleged that the District of Columbia Court of Appeals' refusal to admit him to the bar violated the Fifth Amendment in five respects. First, Feldman alleged that Rule 46I(b)(3), by limiting bar membership to graduates of accredited law schools, creates an irrebuttable presumption that only graduates of such schools are fit to practice law in the District of Columbia and thereby deprives persons who have pursued alternative methods of legal training of their liberty and property without due process of law. App. 42a. Second, Feldman alleged that the rule impermissibly and irrationally discriminates against persons who have obtained equivalent legal training by other means and therefore denies such persons the equal protection of the laws. *Ibid.* Third, Feldman alleged that by conclusively presuming that only graduates of accredited law schools are fit to practice law in the District of Columbia, the rule impermissibly delegates to the American Bar Association the District of Columbia Court of Appeals' power to regulate the practice of law and therefore deprives persons with alternative legal training of their property and liberty without due process of law. *Ibid.* Fourth, Feldman alleged that by refusing to consider whether his individual qualifications and training were equivalent to graduation from an accredited law school and for that reason justified a waiver of the rule, the District of Columbia Court of Appeals acted arbitrarily and capriciously and deprived him of his liberty and property without due process of law. *Ibid.* Finally, Feldman alleged that because the District of Columbia Court of Appeals had repeatedly waived the rule in the past to permit admission to the bar of persons who had not graduated from approved law schools, the court acted unreasonably and discriminatorily in refusing to consider his individual qualifications and both denied him the equal protection of the laws and deprived him of his liberty and property without due process of law. *Id.*, at 43a.

The complaint also included an allegation that by limiting membership in the District of Columbia Bar to graduates of approved law schools, the defendants had entered into a combination in restraint of trade and had attempted to monopolize, and in fact had monopolized, the practice of law in the District of Columbia. *Ibid.*

In his prayer for relief, Feldman asked for a declaration that Rule 46I, "either on its face or as applied to plaintiff," *ibid.*, violates the Fifth Amendment; that the defendants' refusal to consider his individual qualifications and training violated his rights under the Fifth Amendment; and that the defendants' rejection of his application because he did not graduate

The District Court granted the defendants' motion to dismiss on the ground that it lacked subject-matter jurisdiction over the action. *Id.*, at 78a, 79a.[4] The court found that the District of Columbia Court of Appeals' order denying Feldman's petition was a judicial act "which fully encompassed the constitutional and statutory issues raised." *Id.*, at 82a. The court stated that if it were "to assume jurisdiction over the subject matter of this lawsuit, it would find itself in the unsupportable position of reviewing an order of a jurisdiction's highest court." *Ibid.*

B

Respondent Hickey began the study of law in March 1975 at the Potomac School of Law, Washington, D. C., after concluding a distinguished 20-year career as a pilot in the United States Navy. At the time he entered Potomac, Hickey was aware that it had not been accredited by the ABA, but he thought that he could transfer at some later date to an ABA-approved school. Shortly after Hickey started his studies, the District of Columbia Court of Appeals granted waivers of Rule 46I(b)(3) to graduates of the International School of Law, a new and unapproved school in the area. The court granted waivers to members of the 1975, 1976, and 1977 graduating classes of International. This practice encouraged Hickey to believe that he also would be able to obtain a waiver of the rule. In November 1977, however, the Court of Appeals denied Potomac's petition for a temporary waiver of the rule and announced that it would no longer grant waivers to future International graduates.

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from an approved law school violated the federal antitrust laws. *Id.*, at 43a–44a. Feldman requested an order requiring the defendants to admit him to the bar without examination or to allow him to sit for the bar examination at the earliest possible date or to determine whether his training and qualifications had provided him with the same competence to practice law as graduates of approved law schools. *Id.*, at 44a.

[4] The defendants also asserted res judicata as a ground for their motion to dismiss. *Id.*, at 80a.

In April 1978, Hickey submitted to the District of Columbia Court of Appeals a petition for waiver of Rule 46I(b)(3) so that he could sit for the bar examination. *Id.*, at 19a. In his petition, Hickey described his career in the Navy and his law school record. He also submitted affidavits from four law professors attesting to his competence in his legal studies. Hickey went on to suggest that it would be unfair to deny him, or other students currently enrolled at Potomac, a waiver after they had pursued three years of legal education in reliance on the court's previous policy of granting waivers to International graduates.[5] Hickey pointed out that denying his petition for waiver would impose an especially severe burden on him in view of his age and his status as a husband and father.

Hickey also suggested that it would be burdensome for him to attempt to comply with Rule 46I(b)(4), which permits graduates of unapproved law schools to sit for the bar examination after completing 24 credit hours at an approved law school.[6] Furthermore, Hickey contended that he would be unable to comply with the rule because the ABA had instructed approved law schools in the District of Columbia to deny admission to nondegree candidates for completion of the 24-credit-hour requirement.

Finally, Hickey stated that his 20 years of military service had demonstrated "far beyond that of the average bar exam

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[5] Hickey also suggested that the court's former policy of granting waivers to the members of the first three graduating classes of a new law school should be continued in view of the difficulty of meeting "the strict standards for ABA approval in the mere three years between the inception of a new law school and its first graduation." *Id.*, at 23a.

[6] Hickey also asserted that it was unnecessary for him to take 24 more credit hours at an approved law school in view of the breadth of the legal education he already had received. He stated that he had completed 87 credit hours covering all of the subjects included in the bar examination. To take 24 more credit hours he would have to enroll in elective courses not even tested by the bar examination. *Id.*, at 23a–24a.

candidate, that he possesses the qualities essential to a good lawyer, including: judgment, maturity, courage in the face of adversity, concern for his fellow man, commitment to our society and attention to detail." App. 24a. He suggested that "[f]ar more than most, [he had] earned the right to sit for the bar examination." *Ibid.*

On June 12, 1978, the court issued a *per curiam* order denying Hickey's petition for a waiver. *Id.*, at 49a. The order stated that the court had considered the petition and Hickey's contention that the ABA had instructed approved law schools in the District of Columbia to deny admission to nondegree candidates for completion of the 24-credit-hour requirement. The court stated: "The American Bar Association Standards and Rules of Procedure, as amended—1977, permit enrollment of persons in petitioner's category under Standard 506(ii) if they can satisfy the requirement for admission set forth in Standard 502." *Ibid.*[7]

In July 1978, Hickey filed a complaint in the United States District Court for the District of Columbia challenging the District of Columbia Court of Appeals' denial of his waiver petition. *Id.*, at 60a.[8] Hickey alleged that the denial of his petition violated the Fifth Amendment and the federal antitrust laws. *Id.*, at 64a–65a. The allegations and prayer for relief in Hickey's complaint were virtually identical to the

[7] At the direction of the court, the Clerk of the District of Columbia Court of Appeals had written to the ABA to determine whether it had "'instructed, as a matter of policy, the approved law schools in the District of Columbia to deny admission to non-degree candidates, as Potomac graduates will be, for completion of the 24 credit hour requirement.'" *Id.*, at 138a. The ABA responded by citing Standard 506, which permits, among other things, "the enrollment in a limited number of courses of non-degree candidates who are students enrolled in other colleges, members of the bar, graduates of other approved law schools, or other persons who have successfully completed at least three years toward a bachelor's degree at a regionally accredited college or university." *Id.*, at 140a.

[8] The complaint named as defendants the District of Columbia Court of Appeals and its individual judges in their official capacities. *Id.*, at 61a.

allegations and prayer for relief in Feldman's complaint, see n. 3, *supra*, except that Hickey simply sought an order requiring the defendants to allow him to sit for the bar examination at the earliest possible date. App. 66a.

The District Court granted the defendants' motion to dismiss Hickey's complaint for lack of subject-matter jurisdiction. *Id.*, at 142a. In this regard, the court stated that "[i]t is well settled that the admission and exclusion of attorneys by the members of the highest court of a state is the exercise of a judicial function which may be reviewed only by the United States Supreme Court." *Id.*, at 143a. In the District Court's view, Hickey was seeking review of the defendants' denial of his petition for admission to the bar examination. The court suggested that "[t]he constitutional challenge to that denial is wholly and directly intertwined with plaintiff's efforts to secure an exemption from Rule 46, and the allegations of the complaint and the relief requested concern essentially the application of the Rule to his own particular case." *Ibid.* In this light the court concluded that "there is no basis for the extraordinary attempt to invoke the jurisdiction of this Court on a matter entrusted by the Congress to the D. C. Court of Appeals." *Ibid.*[9]

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[9] The District Court pointed out that if the issues concerning the validity of the rule had been raised in the District of Columbia Court of Appeals that "court could and would have entertained and determined them." *Id.*, at 143a. The court stated that if that course had been followed "this Court would have been precluded in any event from thereafter entertaining those same issues." *Id.*, at 144a. The court also noted that it had been advised by counsel for the defendants that the District of Columbia Court of Appeals was still willing to consider those matters. The court suggested that it "would be a violation of the principles of comity and judicial economy in these circumstances for this Court to exercise jurisdiction even if such jurisdiction exists." *Ibid.* Finally, the court dismissed the antitrust claims on the ground that the antitrust laws "do not apply to the kind of action being challenged." *Ibid.*

C

Both Hickey and Feldman appealed the dismissals of their complaints to the United States Court of Appeals for the District of Columbia Circuit.[10] The District of Columbia Circuit affirmed the dismissals of Hickey's and Feldman's antitrust claims on the ground that they were insubstantial. *Feldman* v. *Gardner*, 213 U. S. App. D. C. 119, 122, 661 F. 2d 1295, 1298 (1981).[11] The court, however, concluded that the waiver proceedings in the District of Columbia Court of Appeals "were not judicial in the federal sense, and thus did not foreclose litigation of the constitutional contentions in the District Court." *Ibid.* The court therefore reversed the dismissals of the constitutional claims and remanded them for consideration on the merits. *Ibid.*

Although the District of Columbia Circuit acknowledged that "review of a final judgment of the highest judicial tribunal of a state is vested solely in the Supreme Court of the United States," *id.*, at 134, 661 F. 2d, at 1310 (footnote omitted), and that the United States District Court therefore is without authority to review determinations by the District of Columbia Court of Appeals in judicial proceedings, the court found that the District Court has jurisdiction over these cases because the proceedings in the District of Columbia Court of Appeals "were not judicial . . . ." *Ibid.* The court based this conclusion on a finding that neither Feldman nor Hickey asserted in their waiver petitions "any sort of *right* to be admitted to the District of Columbia bar, or even to take the examination therefor." *Id.*, at 139, 661 F. 2d, at 1315

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[10] Although the cases were not consolidated, the District of Columbia Circuit dealt with them in a single opinion because they raised nearly identical legal issues and were argued on the same day. *Feldman* v. *Gardner*, 213 U. S. App. D. C. 119, 122, n. 3, 661 F. 2d 1295, 1298, n. 3 (1981).

[11] We denied respondents' cross-petitions for certiorari from the disposition of the antitrust claims. *Feldman* v. *District of Columbia Court of Appeals*, 458 U. S. 1106 (1982); *Hickey* v. *District of Columbia Court of Appeals*, 458 U. S. 1106 (1982). Those claims, therefore, are not before us.

(emphasis in original). Feldman and Hickey simply sought an exemption from the rule. In particular, Hickey did not present any legal arguments nor did "he demand admission to the examination as a matter of legal entitlement." *Ibid.* He "merely asked the court to exercise its administrative discretion to permit him to take the test." *Ibid.* This amounted to a request that the court "make a policy decision equating his personal qualities with accredited legal education, not an adjudication requiring resort to legal principles." *Ibid.* (footnote omitted).

The District of Columbia Circuit found Feldman's case more difficult, *id.*, at 140, 661 F. 2d, at 1316, but still concluded that the proceedings on his waiver petition were not judicial in nature because the "claim-of-right element" was lacking. *Ibid.* Feldman's petition did not "claim that a refusal of his waiver request would deny him any right at all." *Ibid.* Instead, the petition "invoked the administrative discretion of [the court], simply asking that it temper its rule in his favor, for personal and not legal reasons." *Ibid.* The District of Columbia Circuit rejected the argument that the letter from Feldman's counsel, which raised certain legal arguments, changed the nature of the proceedings. *Id.*, at 140–141, 661 F. 2d, at 1316–1317. The District of Columbia Circuit stated: "We are unable to discern in the letter any desire that the court consider Feldman's legal criticisms of the rule on their merits, or hand down a decision dealing with them. The letter made unmistakably clear that these criticisms would be litigated, if at all, in the District Court . . . ." *Ibid.* (footnotes omitted).[12]

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[12] The District of Columbia Circuit rejected the petitioners' alternative argument that consideration of the legal issues Feldman sought to raise in the District Court was barred by principles of res judicata. *Feldman* v. *Gardner*, *supra*, at 144, 661 F. 2d, at 1320. The court did so on the ground that the proceedings in the District of Columbia Court of Appeals were nonjudicial in nature. *Ibid.*

In an opinion concurring in part and dissenting in part, *id.*, at 145, 661 F. 2d, at 1321, Judge Robb expressed the view that the District Court had no

II

The District of Columbia Circuit properly acknowledged that the United States District Court is without authority to review final determinations of the District of Columbia Court of Appeals in judicial proceedings. Review of such determinations can be obtained only in this Court. See 28 U. S. C. § 1257. See also *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, 296 (1970); *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, 415, 416 (1923). A crucial question in this case, therefore, is whether the proceedings before the District of Columbia Court of Appeals were judicial in nature.[13]

A

This Court has considered the distinction between judicial and administrative or ministerial proceedings on several occasions. In *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210 (1908), railroads challenged in federal court the constitutionality of rail passenger rates set by the State Corporation Commission. The question presented by the case was whether the federal court was free to enjoin implementation of the rate order. *Id.*, at 223. In considering this question, we assumed that the State Corporation Commission was, at

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jurisdiction to review the orders of the District of Columbia Court of Appeals. *Ibid.* He noted that the District of Columbia Court of Appeals has the status of a state supreme court and stated:

"The adverse decisions in the appellants' cases were reviewable in the Supreme Court of the United States. Although the appellants cast their petitions to the Court of Appeals in terms of requests for waivers, the petitions in essence were demands that the court declare the petitioners qualified to sit for the bar examination. Those demands were denied by *en banc* orders of the Court of Appeals. The denials were judicial acts and as such were reviewable on writ of certiorari to the Supreme Court. They were not reviewable in the District Court." *Ibid.*

[13] As the District of Columbia Circuit recognized, it is a question of federal law whether "a particular proceeding before another tribunal was truly judicial" for purposes of ascertaining the jurisdiction of a federal court. *Feldman* v. *Gardner*, *supra*, at 134, 661 F. 2d, at 1310. See *In re Summers*, 325 U. S. 561, 566 (1945).

least for some purposes, a court. *Id.*, at 224. We held, however, that the federal court could enjoin implementation of the rate order because the Commission had acted in a legislative as opposed to a judicial capacity in setting the rates. *Id.*, at 226. In reaching this conclusion, we stated:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind . . . ." *Ibid.*

We went on to suggest that the nature of a proceeding "depends not upon the character of the body but upon the character of the proceedings." *Ibid.* See generally *Roudebush* v. *Hartke*, 405 U. S. 15, 20–22 (1972); *Lathrop* v. *Donohue*, 367 U. S. 820, 827 (1961); *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 259 (1933); *Public Service Co.* v. *Corboy*, 250 U. S. 153, 161–162 (1919).

In *In re Summers*, 325 U. S. 561 (1945), we considered the petitioner's challenge to the constitutionality of a State Supreme Court's refusal to admit him to the practice of law. At the outset, we noted that the record was not in the "customary form" because the state court had not treated the proceeding as "judicial." *Id.*, at 563. In fact, the state court contested our certiorari jurisdiction on the ground that the state-court proceedings had not been judicial in nature and that no case or controversy therefore existed in this Court under Art. III of the Federal Constitution. *Id.*, at 564–565. In considering this contention, we conceded that the state-court proceedings might not have been judicial under state law and that the denial of the petitioner's application for admission to the bar was treated "as a ministerial act which is performed by virtue of the judicial power, such as the ap-

pointment of a clerk or bailiff or the specification of the requirements of eligibility or the course of study for applicants for admission to the bar, rather than a judicial proceeding." *Id.*, at 566. We stated, however, that in determining the nature of the proceedings "we must for ourselves appraise the circumstances of the refusal." *Ibid.*

In conducting this appraisal, we first stated:

> "A case arises, within the meaning of the Constitution, when any question respecting the Constitution, treaties or laws of the United States has assumed 'such a form that the judicial power is capable of acting on it.' . . . A declaration on rights as they stand must be sought, not on rights which may arise in the future, and there must be an actual controversy over an issue, not a desire for an abstract declaration of the law. The form of the proceeding is not significant. It is the nature and effect which is controlling." *Id.*, at 566–567, quoting *Osborn* v. *Bank of United States*, 9 Wheat. 738, 819 (1824) (citations omitted).

Applying this standard, we noted that the state court had concluded that the report of the Committee on Character and Fitness, which refused to issue a favorable certificate, should be sustained. The state court, therefore, considered the petitioner's petition "on its merits." 325 U. S., at 567. Although "no entry was placed by the Clerk in the file, on a docket, or in a judgment roll," *ibid.*, we found that the state court had taken "cognizance of the petition and passed an order which [was] validated by the signature of the presiding officer." *Ibid.* (footnote omitted). We stated:

> "Where relief is thus sought in a state court against the action of a committee, appointed to advise the court, and the court takes cognizance of the complaint without requiring the appearance of the committee or its members, we think the consideration of the petition by the Su-

preme Court, the body which has authority itself by its own act to give the relief sought, makes the proceeding adversary in the sense of a true case or controversy.

"A claim of a present right to admission to the bar of a state and a denial of that right is a controversy. When the claim is made in a state court and a denial of the right is made by judicial order, it is a case which may be reviewed under Article III of the Constitution when federal questions are raised and proper steps taken to that end, in this Court." *Id.*, at 567–569 (footnote omitted).

B

These precedents clearly establish that the proceedings in the District of Columbia Court of Appeals surrounding Feldman's and Hickey's petitions for waiver were judicial in nature. The proceedings were not legislative, ministerial, or administrative. The District of Columbia Court of Appeals did not "loo[k] to the future and chang[e] existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S., at 226. Nor did it engage in rulemaking or specify "the requirements of eligibility or the course of study for applicants for admission to the bar . . . ." *In re Summers*, *supra*, at 566. Nor did the District of Columbia Court of Appeals simply engage in ministerial action. Instead, the proceedings before the District of Columbia Court of Appeals involved a "judicial inquiry" in which the court was called upon to investigate, declare, and enforce "liabilities as they [stood] on present or past facts and under laws supposed already to exist." *Prentis* v. *Atlantic Coast Line Co.*, *supra*, at 226.

In his petition to the District of Columbia Court of Appeals, discussed in detail, *supra*, at 466–468, Feldman contended that he possessed "the requisite fitness and good moral character necessary to practice law in this jurisdiction." App. 1a. In support of his position, he described in detail his legal

training and experience. He asserted that his professional education and training were "equal to that received by those who have attended an A. B. A. approved law school." *Id.*, at 4a. He further argued that granting his petition would not frustrate the objectives of the District of Columbia's procedures and requirements for admission to the bar. In his later letter, see *supra*, at 466–467, Feldman pointed out that the court's former practice of granting waivers to graduates of unaccredited law schools raised questions about the fairness of denying his petition. He also made explicit legal arguments against the rule based both on the Constitution and on the federal antitrust laws.[14] All of this was done against the background of an existing rule.

In essence, Feldman argued on policy grounds that the rule should not be applied to him because he had fulfilled the spirit, if not the letter, of Rule 46I(b)(3). Alternatively, he argued in his letter that the rule was invalid. In short, he was seeking "a declaration on rights as they [stood] . . . not on rights which [might] arise in the future . . . ." *In re Summers*, 325 U. S., at 567. This required the District of Columbia Court of Appeals to determine in light of existing law and in light of Feldman's qualifications and arguments whether Feldman's petition should be granted. The court also had before it legal arguments against the validity of the rule. When it issued a *per curiam* order denying Feldman's petition, it determined as a legal matter that Feldman was

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[14] The fact that Feldman's counsel stated in the letter that he was prepared to pursue constitutional and antitrust challenges to the rule in federal district court if Feldman's petition was denied is irrelevant to a consideration of whether these issues were before the District of Columbia Court of Appeals. This case is not like *England* v. *Louisiana Board of Medical Examiners*, 375 U. S. 411 (1964), which arose in the abstention context, and discussed a litigant's right to reserve his federal claims for consideration by a federal court even though he might be required to inform the state court of the nature of his federal claims so that a state statute could be construed in light of those claims.

not entitled to be admitted to the bar without examination or to sit for the bar examination. The court had adjudicated Feldman's "claim of a present right to admission to the bar," *id.*, at 568, and rejected it. This is the essence of a judicial proceeding.

The same conclusion obtains with respect to the proceedings on Hickey's petition for waiver. In his petition, see *supra*, at 471–472, Hickey asserted that he was substantively qualified to sit for the bar examination. In support of his position, he submitted affidavits supporting his competence and described in detail his military service and legal education. He also argued that he had relied on the court's former policy of granting waivers to graduates of unaccredited law schools in developing a reasonable expectation that he would be granted a waiver as well. Moreover, he suggested that ABA policy made it impossible for him to pursue the alternative route under the rules to being permitted to sit for the bar examination. Finally, he argued, based on equitable considerations such as his age, military service, and status as a father and husband, that he should be granted a waiver. He stated that "[f]ar more than most," he had "earned the right to sit for the bar examination." App. 24a.

As in Feldman's case, Hickey's petition called upon the District of Columbia Court of Appeals to consider policy and equitable arguments in deciding whether to waive the rule. The fact that Hickey did not cite case authority in support of his arguments or make any explicitly legal contentions does not render the proceedings nonjudicial. The court still was required to determine if Hickey's qualifications and background fulfilled the basic purposes of the rule sufficiently to justify a waiver and, if not, whether equitable considerations compelled a waiver. These are essentially judicial inquiries. They resulted in a *per curiam* order that denied Hickey's petition and explicitly rejected his contention that ABA policy prevented him from acquiring 24 credit hours from an accredited law school.

Admittedly, the proceedings in both Feldman's case and Hickey's case did not assume the form commonly associated with judicial proceedings. As we said in *In re Summers*, *supra*, however, "[t]he form of the proceeding is not significant. It is the nature and effect which is controlling." *Id.*, at 567.[15]

III

A

A determination that the proceedings on Feldman's and Hickey's petitions were judicial does not finally dispose of this case. As we have noted, *supra*, at 476, a United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in this Court. Therefore, to the extent that Hickey and Feldman sought review in the District Court of the District of Columbia Court of Appeals' denial of their petitions for waiver, the District Court lacked subject-matter jurisdiction over their complaints. Hickey and Feldman should have sought review of the District of Columbia Court of Appeals' judgments in this Court.[16] To the ex-

[15] Our conclusion that the proceedings before the District of Columbia Court of Appeals were judicial in nature is consistent with our grants of certiorari to review state-court decisions on bar-related matters in such cases as *Schware* v. *New Mexico Board of Bar Examiners*, 353 U. S. 232 (1957), *Konigsberg* v. *State Bar of California*, 353 U. S. 252 (1957), *Konigsberg* v. *State Bar of California*, 366 U. S. 36 (1961), *In re Anastaplo*, 366 U. S. 82 (1961), *Willner* v. *Committee on Character*, 373 U. S. 96 (1963), *Baird* v. *State Bar of Arizona*, 401 U. S. 1 (1971), and *In re Stolar*, 401 U. S. 23 (1971). Last Term we again recognized the judicial nature of state bar disciplinary proceedings in *Middlesex County Ethics Committee* v. *Garden State Bar Assn.*, 457 U. S. 423 (1982).

[16] It is possible that review of a state-court decision by this Court could be barred by a petitioner's failure to raise his constitutional claims in the state courts. In *Cardinale* v. *Louisiana*, 394 U. S. 437 (1969), we stated that "[i]t was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Id.*, at 438. See also *Tacon* v. *Arizona*, 410 U. S. 351, 352 (1973); *Hill* v. *California*, 401 U. S. 797, 805 (1971); *Street* v. *New York*, 394 U. S. 576, 582 (1969). Cf. *Raley* v. *Ohio*, 360 U. S. 423, 436–437

tent that Hickey and Feldman mounted a general challenge to the constitutionality of Rule 46I(b)(3), however, the District Court did have subject-matter jurisdiction over their complaints.

The difference between seeking review in a federal district court of a state court's final judgment in a bar admission mat-

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(1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it. . . . We think this sufficient here to satisfy the statutory requirement that the federal right sought to be vindicated in this Court be one claimed below. 28 U. S. C. § 1257(3)" (footnote omitted)); *Boykin* v. *Alabama*, 395 U. S. 238, 242 (1969); *Coleman* v. *Alabama*, 377 U. S. 129, 133 (1964). The United States Court of Appeals for the Fifth Circuit has relied on this limit on our certiorari jurisdiction to hold that a federal district court has jurisdiction over constitutional claims asserted by a plaintiff who has been denied admission to a state bar in a state-court judicial proceeding if he failed to raise his constitutional claims in the state court. In *Dasher* v. *Supreme Court of Texas*, 658 F. 2d 1045 (1981), the Court of Appeals stated:

"The record gives no indication that [the plaintiff] asserted the federal constitutional claims which are the basis of her § 1983 action—that the denial of her application for admission to the bar examination deprived her of a constitutionally protected liberty and property interest in pursuing the practice of law in Texas, constituted a violation of equal protection and infringed upon her constitutionally protected right to travel—in the Texas Supreme Court. Since 28 U. S. C. § 1257(3) authorizes the Supreme Court to review only judgments in state court cases in which a federal issue was raised and adjudicated, . . . it is apparent that [the plaintiff's] case could not have been reviewed on a writ of certiorari from the United States Supreme Court following the Texas Supreme Court's denial of her motion. Since [the plaintiff's] § 1983 complaint states claims for relief grounded in federal constitutional rights, claims which were not presented to the Texas Supreme Court, her § 1983 suit does not constitute an impermissible effort to seek review of a state court judgment in a lower federal court." *Id.*, at 1051 (footnote omitted).

The Court of Appeals' reasoning in *Dasher* is flawed. As we noted in *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281 (1970), "lower federal courts possess no power whatever to sit in direct review of state court decisions." *Id.*, at 296. If the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the district court is in essence

ter and challenging the validity of a state bar admission rule has been recognized in the lower courts and, at least implicitly, in the opinions of this Court.

In *Doe* v. *Pringle*, 550 F. 2d 596 (CA10 1976), the plaintiff challenged in United States District Court the constitutionality of a state-court decision denying his application for admission to the bar. In concluding that the District Court lacked

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being called upon to review the state-court decision. This the district court may not do.

Moreover, the fact that we may not have jurisdiction to review a final state-court judgment because of a petitioner's failure to raise his constitutional claims in state court does not mean that a United States district court should have jurisdiction over the claims. By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state-court decision in any federal court. This result is eminently defensible on policy grounds. We have noted the competence of state courts to adjudicate federal constitutional claims. See, *e. g.*, *Sumner* v. *Mata*, 449 U. S. 539, 549 (1981); *Allen* v. *McCurry*, 449 U. S. 90, 105 (1980); *Swain* v. *Pressley*, 430 U. S. 372, 383 (1977). We also noted in *Cardinale* that one of the policies underlying the requirement that constitutional claims be raised in state court as a predicate to our certiorari jurisdiction is the desirability of giving the state court the first opportunity to consider a state statute or rule in light of federal constitutional arguments. A state court may give the statute a saving construction in response to those arguments. 394 U. S., at 439.

Finally, it is important to note in the context of this case the strength of the state interest in regulating the state bar. As we stated in *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Id.*, at 792. See also *Middlesex County Ethics Committee* v. *Garden State Bar Assn.*, *supra*, at 434–435; *Leis* v. *Flynt*, 439 U. S. 438, 442 (1979). In *MacKay* v. *Nesbett*, 412 F. 2d 846 (CA9 1969), the court stated:

"[O]rders of a state court relating to the admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court, and not by means of an original action in a lower federal court. The rule serves substantial policy interests arising from the historic relationship between state judicial systems and the members of their respective bars, and between the state and federal judicial systems." *Ibid.*

subject-matter jurisdiction over the action, the Court of Appeals stated: "We concur in the district court's finding that it is without subject matter jurisdiction to review a final order of the [State] Supreme Court denying *a particular application for admission* to the [state bar]. This rule applies even though, as here, the challenge is anchored to alleged deprivations of federally protected due process and equal protection rights." *Id.*, at 599 (emphasis in original). During the course of its opinion, the Court of Appeals stated:

> "The United States District Court, in denying [the plaintiff] relief, declared that there is a subtle but fundamental distinction between two types of claims which a frustrated bar applicant might bring to federal court: The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim, based on constitutional or other grounds, that the state has unlawfully denied a particular applicant admission. The Court held that while federal courts do exercise jurisdiction over many constitutional claims which attack the state's power to license attorneys involving challenges to either the rule-making authority or the administration of the rules, . . . *such is not true where review of a state court's adjudication of a particular application is sought.* The Court ruled that the latter claim may be heard, if at all, exclusively by the Supreme Court of the United States." *Id.*, at 597 (emphasis in original).[17]

The Court of Appeals for the Tenth Circuit in *Doe* v. *Pringle*, *supra*, properly emphasized the distinction between general challenges to state bar admission rules and claims that a state court has unlawfully denied a particular applicant admission. We have recognized that state supreme courts may act in a nonjudicial capacity in promulgating rules regulating the bar. See, *e. g.*, *Supreme Court of Virginia* v. *Consumers Union*, 446 U. S. 719, 731 (1980); *Lathrop* v.

[17] See also *Brown* v. *Board of Bar Examiners*, 623 F. 2d 605 (CA9 1980).

Donohue, 367 U. S., at 827 (plurality opinion); *In re Summers*, 325 U. S., at 566. Challenges to the constitutionality of state bar rules, therefore, do not necessarily require a United States district court to review a final state-court judgment in a judicial proceeding. Instead, the district court may simply be asked to assess the validity of a rule promulgated in a nonjudicial proceeding. If this is the case, the district court is not reviewing a state-court judicial decision. In this regard, 28 U. S. C. § 1257 does not act as a bar to the district court's consideration of the case and because the proceedings giving rise to the rule are nonjudicial the policies prohibiting United States district court review of final state-court judgments are not implicated. United States district courts, therefore, have subject-matter jurisdiction over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state-court judgment in a particular case. They do not have jurisdiction, however, over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. Review of those decisions may be had only in this Court. 28 U. S. C. § 1257.

B

Applying this standard to the respondents' complaints, it is clear that their allegations that the District of Columbia Court of Appeals acted arbitrarily and capriciously in denying their petitions for waiver and that the court acted unreasonably and discriminatorily in denying their petitions in view of its former policy of granting waivers to graduates of unaccredited law schools, see n. 3, *supra*, required the District Court to review a final judicial decision of the highest court of a jurisdiction in a particular case. These allegations are inextricably intertwined with the District of Columbia

Court of Appeals' decisions, in judicial proceedings, to deny the respondents' petitions. The District Court, therefore, does not have jurisdiction over these elements of the respondents' complaints.

The remaining allegations in the complaints, however, involve a general attack on the constitutionality of Rule 46I (b)(3). See n. 3, *supra*. The respondents' claims that the rule is unconstitutional because it creates an irrebuttable presumption that only graduates of accredited law schools are fit to practice law, discriminates against those who have obtained equivalent legal training by other means, and impermissibly delegates the District of Columbia Court of Appeals' power to regulate the bar to the American Bar Association, do not require review of a judicial decision in a particular case. The District Court, therefore, has subject-matter jurisdiction over these elements of the respondents' complaints.[18]

In deciding that the District Court has jurisdiction over those elements of the respondents' complaints that involve a general challenge to the constitutionality of Rule 46I(b)(3), we expressly do not reach the question of whether the doctrine of res judicata forecloses litigation on these elements of

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[18] In reaching these conclusions regarding the District Court's jurisdiction over particular elements of the respondents' complaints, we necessarily refuse to accept in their entirety either the petitioners' argument that "the sum and substance of respondents' federal court actions were to obtain review of the prior adverse decisions of the D. C. Court of Appeals in their individual cases," Brief for Petitioners 23, n. 9; Reply Brief for Petitioners 4–7, or the respondents' argument that their complaints involved general challenges to the constitutionality of Rule 46I(b)(3) without seeking review of particularized decisions of the District of Columbia Court of Appeals adjudicating their right to practice law. See Brief for Respondent Hickey 11; Brief for Respondent Feldman 41. As discussed above, a close reading of the complaints discloses that the respondents mounted a general challenge to the constitutionality of the rule *and* sought review of the District of Columbia Court of Appeals' decisions in their particular cases.

the complaints. We leave that question to the District Court on remand.[19]

IV

The judgment of the District of Columbia Circuit is vacated, and the case is remanded to the District Court for further proceedings consistent with this opinion.

So ordered.

JUSTICE STEVENS, dissenting.

There are many crafts in which the State performs a licensing function. That function is important, not only to those seeking access to a gainful occupation but to the members of the public served by the profession as well. State-created rules governing the grant or denial of licenses must comply with constitutional standards and must be administered in accordance with due process of law. Given these acknowledged constitutional limitations on action by the State, it should be beyond question that a federal district court has subject-matter jurisdiction over an individual's lawsuit raising federal constitutional challenges either to licensing rules themselves or to their application in his own case.[1] Curiously, however, the Court today ignores basic jurisdictional principles when it decides a jurisdictional issue affecting the licensing of members of the legal profession.

The Court holds that respondents may make a general constitutional attack on the rules governing the admission of lawyers to practice in the District of Columbia. I agree. But the Court also concludes that a United States district

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[19] The District Court did not reach the question of whether the doctrine of res judicata barred further litigation on the respondents' claims in either Feldman's case, App. 79a, or Hickey's, *id.*, at 142a.

[1] Title 28 U. S. C. § 1331 (1976 ed., Supp. V) provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

court has no subject-matter jurisdiction over a claim that those rules have been administered in an unconstitutional manner. According to the Court's opinion, respondents' contentions that bar admission rules have been unconstitutionally applied to them by the District of Columbia Court of Appeals somehow constitute impermissible attempts to secure appellate review of final judgments of that court. See *ante*, at 482, 483–484, n. 16. There are two basic flaws in the Court's analysis.

First, neither Feldman nor Hickey requested the District of Columbia Court of Appeals to pass on the validity of Rule 46I(b)(3) or to grant them admission to the bar or the bar examination as a matter of right. Rather, each of them asked the court to waive the requirements of the rule for a variety of reasons. I would not characterize the court's refusal to grant a requested waiver as an adjudication. Unlike the decision of the Supreme Court of Illinois reviewed in *In re Summers*, 325 U. S. 561 (1945), the order of the District of Columbia Court of Appeals did not determine a claim of right, nor did it even apply standard equitable principles to a prayer for relief. Rather, that court performed no more and no less than the administrative function of a licensing board. As the United States Court of Appeals wrote, Hickey asked the court "to make a policy decision equating his personal qualities with accredited legal education, not an adjudication requiring resort to legal principles," *Feldman* v. *Gardner*, 213 U. S. App. D. C. 119, 139, 661 F. 2d 1295, 1315 (1981) (footnote omitted), and Feldman "invoked the administrative discretion of that body, simply asking that it temper its rule in his favor, for personal and not legal reasons," *id.*, at 140, 661 F. 2d, at 1316. Rejection of those petitions was not "adjudicative" and was therefore not susceptible to certiorari review in this Court.

Second, even if the refusal to grant a waiver were an adjudication, the federal statute that confers jurisdiction upon

the United States District Court to entertain a constitutional challenge to the rules themselves also authorizes that court to entertain a collateral attack upon the unconstitutional application of those rules. The Court's opinion fails to distinguish between two concepts: appellate review and collateral attack. If a challenge to a state court's decision is brought in United States district court and alleges violations of the United States Constitution, then by definition it does not seek appellate review. It is plainly within the federal-question jurisdiction of the federal court. 28 U. S. C. § 1331 (1976 ed., Supp. V). There may be other reasons for denying relief to the plaintiff—such as failure to state a cause of action, claim or issue preclusion, or failure to prove a violation of constitutional rights.[2] But it does violence to jurisdictional concepts for this Court to hold, as it does, that the federal district court has no *jurisdiction* to conduct independent review of a specific claim that a licensing body's action did not comply with federal constitutional standards. The fact that the licensing function in the legal profession is controlled by the judiciary is not a sufficient reason to immunize allegedly unconstitutional conduct from review in the federal courts.

I therefore respectfully dissent.

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[2] Constitutional challenges to specific licensing actions may, of course, fail on the merits. But in my view, if plaintiffs challenging a bar admissions decision by a state court prove facts comparable to the allegations made by the plaintiff in error and appellant in *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), they would clearly be entitled to relief in the United States district court. If they were seeking admission to any other craft regulated by the State, they would unquestionably have such a right.

FLORIDA *v.* ROYER

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD APPELLATE DISTRICT

No. 80–2146. Argued October 12, 1982—Decided March 23, 1983

After purchasing a one-way airline ticket to New York City at Miami International Airport under an assumed name and checking his two suitcases bearing identification tags with the same assumed name, respondent went to the concourse leading to the airline boarding area, where he was approached by two detectives, who previously had observed him and believed that his characteristics fit the so-called "drug courier profile." Upon request, but without oral consent, respondent produced his airline ticket and driver's license, which carried his correct name. When the detectives asked about the discrepancy in names, respondent explained that a friend had made the ticket reservation in the assumed name. The detectives then informed respondent that they were narcotics investigators and that they had reason to suspect him of transporting narcotics, and, without returning his airline ticket or driver's license, asked him to accompany them to a small room adjacent to the concourse. Without respondent's consent, one of the detectives retrieved respondent's luggage from the airline and brought it to the room. While he did not respond to the detectives' request that he consent to a search of the luggage, respondent produced a key and unlocked one of the suitcases in which marihuana was found. When respondent said he did not know the combination to the lock on the second suitcase but did not object to its being opened, the officers pried it open and found more marihuana. Respondent was then told he was under arrest. Following the Florida trial court's denial of his pretrial motion to suppress the evidence obtained in the search of the suitcases, respondent was convicted of felony possession of marihuana. The Florida District Court of Appeal reversed, holding that respondent had been involuntarily confined within the small room without probable cause, that at the time his consent to search was obtained, the involuntary detention had exceeded the limited restraint permitted by *Terry* v. *Ohio*, 392 U. S. 1, and that such consent was therefore invalid because tainted by the unlawful confinement.

Held: The judgment is affirmed.

389 So. 2d 1007, affirmed.

JUSTICE WHITE, joined by JUSTICE MARSHALL, JUSTICE POWELL, and JUSTICE STEVENS, concluded that respondent was being illegally detained when he consented to the search of his luggage and that such con-

sent was tainted by the illegality and hence was ineffective to justify the search. Pp. 497–508.

(a) When the detectives identified themselves as narcotics agents, told respondent he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his airline ticket and driver's license and without indicating in any way that he was free to depart, respondent was effectively seized for purposes of the Fourth Amendment. At the time respondent produced the key to his suitcase, the detention to which he was then subjected was a more serious intrusion on his personal liberty than is allowable on mere suspicion of criminal activity. What had begun as a consensual inquiry in a public place escalated into an investigatory procedure in a police interrogation room, and respondent, as a practical matter, was under arrest at that time. Moreover, the detectives' conduct was more intrusive than necessary to effectuate an investigative detention otherwise authorized by the *Terry* line of cases. Pp. 501–507.

(b) Probable cause to arrest respondent did not exist at the time he consented to the search of his luggage. P. 507.

JUSTICE BRENNAN, concurring in the result, agreed that at some point after the initial stop the officers' seizure of the respondent matured into an arrest unsupported by probable cause. The respondent's consent to the search of his suitcases, therefore, was tainted by the illegal arrest. P. 509.

WHITE, J., announced the judgment of the Court and delivered an opinion, in which MARSHALL, POWELL, and STEVENS, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 508. BRENNAN, J., filed an opinion concurring in the result, *post*, p. 509. BLACKMUN, J., filed a dissenting opinion, *post*, p. 513. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and O'CONNOR, J., joined, *post* p. 519.

Calvin L. Fox, Assistant Attorney General of Florida, argued the cause for petitioner. With him on the briefs was *Jim Smith*, Attorney General.

Deputy Solicitor General Frey argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Jensen*, *Joshua I. Schwartz*, and *Deborah Watson*.

Theodore Klein argued the cause for respondent. With him on the brief was *Irwin J. Block*.*

**Fred E. Inbau*, *Wayne W. Schmidt*, *James P. Manak*, *Robert K. Corbin*, Attorney General of Arizona, and *Steven J. Twist*, Chief Assistant

JUSTICE WHITE announced the judgment of the Court and delivered an opinion, in which JUSTICE MARSHALL, JUSTICE POWELL, and JUSTICE STEVENS joined.

We are required in this case to determine whether the Court of Appeal of Florida, Third District, properly applied the precepts of the Fourth Amendment in holding that respondent Royer was being illegally detained at the time of his purported consent to a search of his luggage.

I

On January 3, 1978, Royer was observed at Miami International Airport by two plainclothes detectives of the Dade County, Fla., Public Safety Department assigned to the county's Organized Crime Bureau, Narcotics Investigation Section.[1] Detectives Johnson and Magdalena believed that Royer's appearance, mannerisms, luggage, and actions fit the so-called "drug courier profile."[2] Royer, apparently unaware of the attention he had attracted, purchased a one-way ticket to New York City and checked his two suitcases, placing on each suitcase an identification tag bearing the name "Holt" and the destination "La Guardia." As Royer made

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Attorney General, filed a brief for Americans for Effective Law Enforcement, Inc., et al., as *amici curiae* urging reversal.

[1] The facts set forth in this opinion are taken from the en banc decision of the Florida District Court of Appeal, Third District, 389 So. 2d 1007, 1015–1018 (1980), and from the transcript of the hearing on the motion to suppress contained in the joint appendix. App. 11A–116A.

[2] The "drug courier profile" is an abstract of characteristics found to be typical of persons transporting illegal drugs. In Royer's case, the detectives attention was attracted by the following facts which were considered to be within the profile: (a) Royer was carrying American Tourister luggage, which appeared to be heavy, (b) he was young, apparently between 25–35, (c) he was casually dressed, (d) he appeared pale and nervous, looking around at other people, (e) he paid for his ticket in cash with a large number of bills, and (f) rather than completing the airline identification tag to be attached to checked baggage, which had space for a name, address, and telephone number, he wrote only a name and the destination. 389 So. 2d, at 1016; App. 27A–40A.

his way to the concourse which led to the airline boarding area, the two detectives approached him, identified themselves as policemen working out of the sheriff's office, and asked if Royer had a "moment" to speak with them; Royer said "Yes."

Upon request, but without oral consent, Royer produced for the detectives his airline ticket and his driver's license. The airline ticket, like the baggage identification tags, bore the name "Holt," while the driver's license carried respondent's correct name, "Royer." When the detectives asked about the discrepancy, Royer explained that a friend had made the reservation in the name of "Holt." Royer became noticeably more nervous during this conversation, whereupon the detectives informed Royer that they were in fact narcotics investigators and that they had reason to suspect him of transporting narcotics.

The detectives did not return his airline ticket and identification but asked Royer to accompany them to a room, approximately 40 feet away, adjacent to the concourse. Royer said nothing in response but went with the officers as he had been asked to do. The room was later described by Detective Johnson as a "large storage closet," located in the stewardesses' lounge and containing a small desk and two chairs. Without Royer's consent or agreement, Detective Johnson, using Royer's baggage check stubs, retrieved the "Holt" luggage from the airline and brought it to the room where respondent and Detective Magdalena were waiting. Royer was asked if he would consent to a search of the suitcases. Without orally responding to this request, Royer produced a key and unlocked one of the suitcases, which one detective then opened without seeking further assent from Royer. Marihuana was found in that suitcase. According to Detective Johnson, Royer stated that he did not know the combination to the lock on the second suitcase. When asked if he objected to the detective opening the second suitcase, Royer said "[n]o, go ahead," and did not object when the de-

tective explained that the suitcase might have to be broken open. The suitcase was pried open by the officers and more marihuana was found. Royer was then told that he was under arrest. Approximately 15 minutes had elapsed from the time the detectives initially approached respondent until his arrest upon the discovery of the contraband.

Prior to his trial for felony possession of marihuana,[3] Royer made a motion to suppress the evidence obtained in the search of the suitcases. The trial court found that Royer's consent to the search was "freely and voluntarily given," and that, regardless of the consent, the warrantless search was reasonable because "the officer doesn't have the time to run out and get a search warrant because the plane is going to take off."[4] Following the denial of the motion to suppress, Royer changed his plea from "not guilty" to "*nolo contendere*," specifically reserving the right to appeal the denial of the motion to suppress.[5] Royer was convicted.

The District Court of Appeal, sitting en banc, reversed Royer's conviction.[6] The court held that Royer had been involuntarily confined within the small room without probable cause; that the involuntary detention had exceeded the limited restraint permitted by *Terry* v. *Ohio*, 392 U. S. 1 (1968), at the time his consent to the search was obtained; and that the consent to search was therefore invalid because tainted by the unlawful confinement.[7]

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[3] Fla. Stat. § 893.13(1)(a)(2) (1975).

[4] App. 114A–116A.

[5] Under Florida law, a plea of *nolo contendere* is equivalent to a plea of guilty.

[6] On appeal, a panel of the District Court of Appeal of Florida found that viewing the totality of the circumstances, the finding of consent by the trial court was supported by clear and convincing evidence. 389 So. 2d 1007 (1979). The panel decision was vacated and rehearing en banc granted. *Id.*, at 1015 (1980). It is the decision of the en banc court that is reviewed here.

[7] The Florida court was also of the opinion that "a mere similarity with the contents of the drug courier profile is insufficient even to constitute the

Several factors led the court to conclude that respondent's confinement was tantamount to arrest. Royer had "found himself in a small enclosed area being confronted by two police officers—a situation which presents an almost classic definition of imprisonment." 389 So. 2d 1007, 1018 (1980). The detectives' statement to Royer that he was suspected of transporting narcotics also bolstered the finding that Royer was "in custody" at the time the consent to search was given. *Ibid.* In addition, the detectives' possession of Royer's airline ticket and their retrieval and possession of his luggage made it clear, in the District Court of Appeal's view, that Royer was not free to leave. *Ibid.*

At the suppression hearing Royer testified that he was under the impression that he was not free to leave the officers' presence. The Florida District Court of Appeal found that this apprehension "was much more than a well-justified subjective belief," for the State had conceded at oral argument before that court that "the officers would not have permitted Royer to leave the room even if he had erroneously thought he could." *Ibid.* The nomenclature used to describe Royer's confinement, the court found, was unimportant because under *Dunaway* v. *New York*, 442 U. S. 200 (1979), "a police confinement which . . . goes beyond the limited restraint of a *Terry* investigatory stop may be constitutionally justified only by probable cause." 389 So. 2d, at 1019 (footnote omitted). Detective Johnson, who conducted the search, had specifically stated at the suppression hearing that he did not have probable cause to arrest Royer until the suitcases were opened and their contents revealed.

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articulable suspicion required to justify" the stop authorized by *Terry* v. *Ohio*. It went on to hold that even if it followed a contrary rule, or even if articulable suspicion occurred at some point prior to Royer's consent to search, the facts did not amount to probable cause that would justify the restraint imposed on Royer. 389 So. 2d, at 1019. As will become clear, we disagree on the reasonable-suspicion issue but do concur that probable cause to arrest was lacking.

Ibid. In the absence of probable cause, the court concluded, Royer's consent to search, given only after he had been unlawfully confined, was ineffective to justify the search. *Ibid.* Because there was no proof at all that a "break in the chain of illegality" had occurred, the court found that Royer's consent was invalid as a matter of law. *Id.*, at 1020. We granted the State's petition for certiorari, 454 U. S. 1079 (1981), and now affirm.

II

Some preliminary observations are in order. First, it is unquestioned that without a warrant to search Royer's luggage and in the absence of probable cause and exigent circumstances, the validity of the search depended on Royer's purported consent. Neither is it disputed that where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority. *Lo-Ji Sales, Inc.* v. *New York*, 442 U. S. 319, 329 (1979); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 233–234 (1973); *Bumper* v. *North Carolina*, 391 U. S. 543, 548–549 (1968); *Johnson* v. *United States*, 333 U. S. 10, 13 (1948); *Amos* v. *United States*, 255 U. S. 313, 317 (1921).

Second, law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. See *Dunaway* v. *New York*, *supra*, at 210, n. 12; *Terry* v. *Ohio*, 392 U. S., at 31, 32–33 (Harlan, J., concurring); *id.*, at 34 (WHITE, J., concurring). Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. *United States* v. *Mendenhall*, 446 U. S. 544, 555 (1980) (opinion of Stewart, J.). The person

approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. *Terry* v. *Ohio*, 392 U. S., at 32–33 (Harlan, J., concurring); *id.*, at 34 (WHITE, J., concurring). He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. *United States* v. *Mendenhall*, *supra*, at 556 (opinion of Stewart, J.). If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.

Third, it is also clear that not all seizures of the person must be justified by probable cause to arrest for a crime. Prior to *Terry* v. *Ohio*, *supra*, any restraint on the person amounting to a seizure for the purposes of the Fourth Amendment was invalid unless justified by probable cause. *Dunaway* v. *New York*, *supra*, at 207–209. *Terry* created a limited exception to this general rule: certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime. In that case, a stop and a frisk for weapons were found unexceptionable. *Adams* v. *Williams*, 407 U. S. 143 (1972), applied the same approach in the context of an informant's report that an unnamed individual in a nearby vehicle was carrying narcotics and a gun. Although not expressly authorized in *Terry*, *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 881–882 (1975), was unequivocal in saying that reasonable suspicion of criminal activity warrants a temporary seizure for the purpose of questioning limited to the purpose of the stop. In *Brignoni-Ponce*, that purpose was to verify or dispel the suspicion that the immigration laws were being violated, a governmental interest that was sufficient to warrant temporary detention for limited questioning. Royer does not suggest, nor do we, that a similar rationale would not warrant temporary detention for questioning on less than probable cause where the public interest

involved is the suppression of illegal transactions in drugs or of any other serious crime.

Michigan v. *Summers*, 452 U. S. 692 (1981), involved another circumstance in which a temporary detention on less than probable cause satisfied the ultimate test of reasonableness under the Fourth Amendment. There the occupant of a house was detained while a search warrant for the house was being executed. We held that the warrant made the occupant sufficiently suspect to justify his temporary seizure. The "limited intrusio[n] on the personal security" of the person detained was justified "by such substantial law enforcement interests" that the seizure could be made on articulable suspicion not amounting to probable cause. *Id.*, at 699.

Fourth, *Terry* and its progeny nevertheless created only limited exceptions to the general rule that seizures of the person require probable cause to arrest. Detentions may be "investigative" yet violative of the Fourth Amendment absent probable cause. In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects. Nor may the police seek to verify their suspicions by means that approach the conditions of arrest. *Dunaway* v. *New York*, *supra*, made this clear. There, the suspect was taken to the police station from his home and, without being formally arrested, interrogated for an hour. The resulting incriminating statements were held inadmissible: reasonable suspicion of crime is insufficient to justify custodial interrogation even though the interrogation is investigative. *Id.*, at 211–212. *Brown* v. *Illinois*, 422 U. S. 590 (1975), and *Davis* v. *Mississippi*, 394 U. S. 721 (1969), are to the same effect.

The Fourth Amendment's prohibition against unreasonable searches and seizures has always been interpreted to prevent a search that is not limited to the particularly described "place to be searched, and the persons or things to be seized," U. S. Const., Amdt. 4, even if the search is made pursuant to

a warrant and based upon probable cause. The Amendment's protection is not diluted in those situations where it has been determined that legitimate law enforcement interests justify a warrantless search: the search must be limited in scope to that which is justifed by the particular purposes served by the exception. For example, a warrantless search is permissible incident to a lawful arrest because of legitimate concerns for the safety of the officer and to prevent the destruction of evidence by the arrestee. *E. g.*, *Chimel* v. *California*, 395 U. S. 752, 763 (1969). Nevertheless, such a search is limited to the person of the arrestee and the area immediately within his control. *Id.*, at 762. *Terry* v. *Ohio*, *supra*, also embodies this principle: "The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." 392 U. S., at 19, quoting *Warden* v. *Hayden*, 387 U. S. 294, 310 (1967) (Fortas, J., concurring). The reasonableness requirement of the Fourth Amendment requires no less when the police action is a seizure permitted on less than probable cause because of legitimate law enforcement interests. The scope of the detention must be carefully tailored to its underlying justification.

The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. See, *e. g.*, *United States* v. *Brignoni-Ponce*, *supra*, at 881–882; *Adams* v. *Williams*, *supra*, at 146. It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.

Fifth, *Dunaway* and *Brown* hold that statements given during a period of illegal detention are inadmissible even though voluntarily given if they are the product of the illegal detention and not the result of an independent act of free will. *Dunaway* v. *New York*, 442 U. S., at 218–219; *Brown* v. *Illinois*, *supra*, at 601–602. In this respect those cases reiterated one of the principal holdings of *Wong Sun* v. *United States*, 371 U. S. 471 (1963).

Sixth, if the events in this case amounted to no more than a permissible police encounter in a public place or a justifiable *Terry*-type detention, Royer's consent, if voluntary, would have been effective to legalize the search of his two suitcases. Cf. *United States* v. *Watson*, 423 U. S. 411, 424–425 (1976). The Florida District Court of Appeal in the case before us, however, concluded not only that Royer had been seized when he gave his consent to search his luggage but also that the bounds of an investigative stop had been exceeded. In its view the "confinement" in this case went beyond the limited restraint of a *Terry* investigative stop, and Royer's consent was thus tainted by the illegality, a conclusion that required reversal in the absence of probable cause to arrest. The question before us is whether the record warrants that conclusion. We think that it does.

III

The State proffers three reasons for holding that when Royer consented to the search of his luggage, he was not being illegally detained. First, it is submitted that the entire encounter was consensual and hence Royer was not being held against his will at all. We find this submission untenable. Asking for and examining Royer's ticket and his driver's license were no doubt permissible in themselves, but when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment.

These circumstances surely amount to a show of official authority such that "a reasonable person would have believed that he was not free to leave." *United States* v. *Mendenhall*, 446 U. S., at 554 (opinion of Stewart, J.) (footnote omitted).

Second, the State submits that if Royer was seized, there existed reasonable, articulable suspicion to justify a temporary detention and that the limits of a *Terry*-type stop were never exceeded. We agree with the State that when the officers discovered that Royer was traveling under an assumed name, this fact, and the facts already known to the officers—paying cash for a one-way ticket, the mode of checking the two bags, and Royer's appearance and conduct in general—were adequate grounds for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage while they attempted to verify or dispel their suspicions in a manner that did not exceed the limits of an investigative detention. We also agree that had Royer voluntarily consented to the search of his luggage while he was justifiably being detained on reasonable suspicion, the products of the search would be admissible against him. We have concluded, however, that at the time Royer produced the key to his suitcase, the detention to which he was then subjected was a more serious intrusion on his personal liberty than is allowable on mere suspicion of criminal activity.

By the time Royer was informed that the officers wished to examine his luggage, he had identified himself when approached by the officers and had attempted to explain the discrepancy between the name shown on his identification and the name under which he had purchased his ticket and identified his luggage. The officers were not satisfied, for they informed him they were narcotics agents and had reason to believe that he was carrying illegal drugs. They requested him to accompany them to the police room. Royer went with them. He found himself in a small room—a large closet—equipped with a desk and two chairs. He was alone with two police officers who again told him that they thought

he was carrying narcotics. He also found that the officers, without his consent, had retrieved his checked luggage from the airline. What had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a police interrogation room, where the police, unsatisfied with previous explanations, sought to confirm their suspicions. The officers had Royer's ticket, they had his identification, and they had seized his luggage. Royer was never informed that he was free to board his plane if he so chose, and he reasonably believed that he was being detained. At least as of that moment, any consensual aspects of the encounter had evaporated, and we cannot fault the Florida District Court of Appeal for concluding that *Terry* v. *Ohio* and the cases following it did not justify the restraint to which Royer was then subjected. As a practical matter, Royer was under arrest. Consistent with this conclusion, the State conceded in the Florida courts that Royer would not have been free to leave the interrogation room had he asked to do so.[8] Furthermore, the State's brief in this Court interprets the testimony of the officers at the suppression hearing as indicating that had Royer refused to consent to a search of his luggage, the officers would have held the luggage and sought a warrant to authorize the search. Brief for Petitioner 6.[9]

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[8] In its brief and at oral argument before this Court, the State contests whether this concession was ever made. We have no basis to question the statement of the Florida court.

[9] Our decision here is consistent with the Court's judgment in *United States* v. *Mendenhall*, 446 U. S. 544 (1980). In *Mendenhall*, the respondent was walking along an airport concourse when she was approached by two federal Drug Enforcement Agency (DEA) officers. As in the present case, the officers asked for Mendenhall's airline ticket and some identification; the names on the ticket and identification did not match. When one of the agents specifically identified himself as attached to the DEA, Mendenhall became visibly shaken and nervous. *Id.*, at 548.

After returning the ticket and identification, one officer asked Mendenhall if she would accompany him to the DEA airport office, 50 feet away, for further questions. Once in the office, Mendenhall was asked to consent

We also think that the officers' conduct was more intrusive than necessary to effectuate an investigative detention otherwise authorized by the *Terry* line of cases. First, by returning his ticket and driver's license, and informing him that he was free to go if he so desired, the officers might have obviated any claim that the encounter was anything but a consensual matter from start to finish. Second, there are undoubtedly reasons of safety and security that would justify moving a suspect from one location to another during an investigatory detention, such as from an airport concourse to a more

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to a search of her person and her handbag; she was advised of her right to decline. *Ibid.* In a private room following further assurance from Mendenhall that she consented to the search, a policewoman began the search of Mendenhall's person by requesting that Mendenhall disrobe. As she began to undress, Mendenhall removed two concealed packages that appeared to contain heroin and handed them to the policewoman. *Id.*, at 549. The Court of Appeals determined that the initial "stop" of Mendenhall was unlawful because not based upon a reasonable suspicion of criminal activity. In the alternative, the court found that even if the initial stop was permissible, the officer's request that Mendenhall accompany him to the DEA office constituted an arrest without probable cause.

This Court reversed. Two Justices were of the view that the entire encounter was consensual and that no seizure had taken place. Three other Justices assumed that there had been a seizure but would have held that there was reasonable suspicion to warrant it; hence a voluntary consent to search was a valid basis for the search. Thus, the five Justices voting to reverse appeared to agree that Mendenhall was not being illegally detained when she consented to be searched. The four dissenting Justices also assumed that there had been a detention but were of the view that reasonable grounds for suspecting Mendenhall did not exist and concluded that Mendenhall was thus being illegally detained at the time of her consent.

The case before us differs in important respects. Here, Royer's ticket and identification remained in the possession of the officers throughout the encounter; the officers also seized and had possession of his luggage. As a practical matter, Royer could not leave the airport without them. In *Mendenhall*, no luggage was involved, the ticket and identification were immediately returned, and the officers were careful to advise that the suspect could decline to be searched. Here, the officers had seized Royer's luggage and made no effort to advise him that he need not consent to the search.

private area. Cf. *Pennsylvania* v. *Mimms*, 434 U. S. 106, 109–111 (1977) *(per curiam)*. There is no indication in this case that such reasons prompted the officers to transfer the site of the encounter from the concourse to the interrogation room. It appears, rather, that the primary interest of the officers was not in having an extended conversation with Royer but in the contents of his luggage, a matter which the officers did not pursue orally with Royer until after the encounter was relocated to the police room. The record does not reflect any facts which would support a finding that the legitimate law enforcement purposes which justified the detention in the first instance were furthered by removing Royer to the police room prior to the officers' attempt to gain his consent to a search of his luggage. As we have noted, had Royer consented to a search on the spot, the search could have been conducted with Royer present in the area where the bags were retrieved by Detective Johnson and any evidence recovered would have been admissible against him. If the search proved negative, Royer would have been free to go much earlier and with less likelihood of missing his flight, which in itself can be a very serious matter in a variety of circumstances.

Third, the State has not touched on the question whether it would have been feasible to investigate the contents of Royer's bags in a more expeditious way. The courts are not strangers to the use of trained dogs to detect the presence of controlled substances in luggage.[10] There is no indication

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[10] Courts of Appeals are in disagreement as to whether using a dog to detect drugs in luggage is a search, but no Court of Appeals has held that more than an articulable suspicion is necessary to justify this kind of a warrantless search if indeed it is a search. See, *e. g.*, *United States* v. *Sullivan*, 625 F. 2d 9, 13 (CA4 1980) (no search), cert. denied, 450 U. S. 923 (1981); *United States* v. *Burns*, 624 F. 2d 95, 101 (CA10 1980) (same); *United States* v. *Beale*, 674 F. 2d 1327, 1335 (CA9 1982) (sniff is an intrusion requiring reasonable suspicion), cert. pending, No. 82–674. Furthermore, the law of the Circuit from which this case comes was and is that "use of [drug-detecting canines] constitute[s] neither a search nor a seizure

here that this means was not feasible and available. If it had been used, Royer and his luggage could have been momentarily detained while this investigative procedure was carried out. Indeed, it may be that no detention at all would have been necessary. A negative result would have freed Royer in short order; a positive result would have resulted in his justifiable arrest on probable cause.

We do not suggest that there is a litmus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigative stop. Even in the discrete category of airport encounters, there will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will

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under the Fourth Amendment." *United States* v. *Goldstein*, 635 F. 2d 356, 361 (CA5), cert. denied, 452 U. S. 962 (1981). See *United States* v. *Viera*, 644 F. 2d 509, 510 (CA5), cert. denied, 454 U. S. 867 (1981). Decisions of the United States Court of Appeals for the Fifth Circuit rendered prior to September 30, 1981, are binding precedent on the United States Court of Appeals for the Eleventh Circuit. *Bonner* v. *City of Prichard*, 661 F. 2d 1206, 1207 (CA11 1981).

In any event, we hold here that the officers had reasonable suspicion to believe that Royer's luggage contained drugs, and we assume that the use of dogs in the investigation would not have entailed any prolonged detention of either Royer or his luggage which may involve other Fourth Amendment concerns. In *United States* v. *Beale*, *supra*, for example, after briefly questioning two suspects who had checked baggage for a flight from the Fort Lauderdale, Fla., airport, the officers proceeded to the baggage area where a trained dog alerted to one of the checked bags. Meanwhile, the suspects had boarded their plane for California, where their bags were again sniffed by a trained dog and they were arrested. The Court of Appeals for the Ninth Circuit vacated a judgment convicting the suspects on the ground that articulable suspicion was necessary to justify the use of a trained dog to sniff luggage and that the existence or not of that requirement should have been determined in the District Court. 674 F. 2d, at 1335. In the case before us, the officers, with founded suspicion, could have detained Royer for the brief period during which Florida authorities at busy airports seem able to carry out the dog-sniffing procedure.

provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment. Nevertheless, we must render judgment, and we think that the Florida District Court of Appeal cannot be faulted in concluding that the limits of a *Terry*-stop had been exceeded.

IV

The State's third and final argument is that Royer was not being illegally held when he gave his consent because there was probable cause to arrest him at that time. Detective Johnson testified at the suppression hearing and the Florida District Court of Appeal held that there was no probable cause to arrest until Royer's bags were opened, but the fact that the officers did not believe there was probable cause and proceeded on a consensual or *Terry*-stop rationale would not foreclose the State from justifying Royer's custody by proving probable cause and hence removing any barrier to relying on Royer's consent to search. *Peters* v. *New York*, decided with *Sibron* v. *New York*, 392 U. S. 40, 66–67 (1968). We agree with the Florida District Court of Appeal, however, that probable cause to arrest Royer did not exist at the time he consented to the search of his luggage. The facts are that a nervous young man with two American Tourister bags paid cash for an airline ticket to a "target city." These facts led to inquiry, which in turn revealed that the ticket had been bought under an assumed name. The proffered explanation did not satisfy the officers. We cannot agree with the State, if this is its position, that every nervous young man paying cash for a ticket to New York City under an assumed name and carrying two heavy American Tourister bags may be arrested and held to answer for a serious felony charge.

V

Because we affirm the Florida District Court of Appeal's conclusion that Royer was being illegally detained when he consented to the search of his luggage, we agree that the con-

sent was tainted by the illegality and was ineffective to justify the search. The judgment of the Florida District Court of Appeal is accordingly

Affirmed.

JUSTICE POWELL, concurring.

I join the plurality opinion. This is an airport "stop for questioning" case similar in its general setting to that before us in *United States* v. *Mendenhall*, 446 U. S. 544 (1980).[1] The plurality opinion today has discussed helpfully the principles applicable to investigative stops for questioning. Since I was the author of one of the opinions in *Mendenhall*, *id.*, at 560, I write briefly to repeat that the public has a compelling interest in identifying by all lawful means those who traffic in illicit drugs for personal profit. As the plurality opinion emphasizes, *ante*, at 506–507, the facts and circumstances of investigative stops necessarily vary. In view of the extent to which air transportation is used in the drug traffic, the fact that the stop at issue is made by trained officers in an airport warrants special consideration.[2]

This case, however, differs strikingly from *Mendenhall* in the circumstances following the lawful initial questioning and the request that the suspect accompany the officers to a more private place. Royer then found himself in a small, windowless room—described as a "large closet"—alone with two officers who, without his consent, already had obtained possession of his checked luggage. In addition, they had retained his driver's license and airline ticket. Neither the evidence

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[1] As the plurality notes, *ante*, at 504, n. 9, five Justices in *Mendenhall* were of the view that the respondent in that case had not been illegally detained, and therefore that she had consented to be searched.

[2] Since 1974 the Drug Enforcement Administration has assigned highly skilled agents to the major airports as part of a nationwide program to intercept drug couriers. These agents are guided in part by a "drug courier profile" that identifies characteristics that experience has shown to be relevant in identifying suspects. See *Mendenhall*, 446 U. S., at 562.

in this case nor common sense suggests that Royer was free to walk away. I agree with the plurality that as a practical matter he then was under arrest, and his surrender of the luggage key to the officers cannot be viewed as consensual.

JUSTICE BRENNAN, concurring in the result.

In this case the Florida District Court of Appeal's decision rested on its holding that at some point after the initial stop the officers' seizure of Royer matured into an arrest unsupported by probable cause. 389 So. 2d 1007, 1019 (1980) (en banc). Royer's consent to the search of his suitcases, therefore, was tainted by the illegal arrest. *Id.*, at 1019–1020. The District Court of Appeal's conclusion is amply supported by the record and by our decision in *Dunaway* v. *New York*, 442 U. S. 200 (1979). I therefore concur that the District Court of Appeal's judgment should be affirmed. But the plurality reaches certain issues that it clearly need not reach to support an affirmance.

To the extent that the plurality endorses the legality of the officers' initial stop of Royer, see *post*, at 523, n. 3 (REHNQUIST, J., dissenting), it was wholly unnecessary to reach that question. For even assuming the legality of the initial stop, the plurality correctly holds, and I agree, that the officers' subsequent actions clearly exceeded the permissible bounds of a *Terry* "investigative" stop. *Ante*, at 501, 507. "[A]ny 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." *Dunaway* v. *New York*, *supra*, at 213. Thus, most of the plurality's discussion of the permissible scope of *Terry* investigative stops is also unnecessary to the decision.

I emphasize that *Terry* v. *Ohio*, 392 U. S. 1 (1968), was a very limited decision that expressly declined to address the "constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or

interrogation." *Id.*, at 19, n. 16. *Terry* simply held that under certain carefully defined circumstances a police officer "is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing . . . in an attempt to discover weapons which might be used to assault him." *Id.*, at 30. *Adams* v. *Williams*, 407 U. S. 143 (1972), endorsed "brief" investigative stops based on reasonable suspicion, *id.*, at 145–146, but the search for weapons upheld in that case was very limited and was based on *Terry*'s safety rationale. 407 U. S., at 146. In *Adams*, we stated that the purpose of the "limited" weapons search was "not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . . ." *Ibid.* In *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975), we held that "when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion." *Id.*, at 881. We based this holding on the importance of the governmental interest in stemming the flow of illegal aliens, on the minimal intrusion of a brief stop, and on the absence of practical alternatives for policing the border. *Ibid.* We noted the limited holdings of *Terry* and *Adams* and while authorizing the police to "question the driver and passengers about their citizenship and immigration status, and . . . ask them to explain suspicious circumstances," we expressly stated that "any further detention or search must be based on consent or probable cause." 422 U. S., at 881–882. See also *Dunaway* v. *New York*, *supra*, at 208–212 (discussing the narrow scope of *Terry* and its progeny).

The scope of a *Terry*-type "investigative" stop and any attendant search must be extremely limited or the *Terry* exception would "swallow the general rule that Fourth Amendment seizures [and searches] are 'reasonable' only if based on probable cause." *Dunaway* v. *New York*, *supra*, at 213. In my view, any suggestion that the *Terry* reasonable-suspicion

standard justifies anything but the briefest of detentions or the most limited of searches finds no support in the *Terry* line of cases.*

In any event, I dissent from the plurality's view that the initial stop of Royer was legal. For plainly Royer was "seized" for purposes of the Fourth Amendment when the officers asked him to produce his driver's license and airline ticket. *Terry* stated that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." 392 U. S., at 16. Although I agree that "not all personal intercourse between policemen and citizens involves 'seizures' of persons," *id.*, at 19, n. 16, and that policemen may approach citizens on the street and ask them questions without "seizing" them for purposes of the Fourth Amendment, once an officer has identified himself and asked a traveler for identification and his airline ticket, the traveler has been "seized" within the meaning of the Fourth Amendment. By identifying themselves and asking for Royer's airline ticket and driver's license the officers, as a practical matter, engaged in a "show of authority" and "restrained

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*I interpret the plurality's requirement that the investigative methods employed pursuant to a *Terry* stop be "the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time," *ante*, at 500, to mean that the availability of a less intrusive means may make an otherwise reasonable stop unreasonable. I do not interpret it to mean that the absence of a less intrusive means can make an otherwise unreasonable stop reasonable.

In addition, contrary to the plurality's apparent suggestion, I am not at all certain that the use of trained narcotics dogs constitutes a less intrusive means of conducting a lawful *Terry* investigative stop. See *ante*, at 505. Such a suggestion finds no support in our cases and any question concerning the use of trained dogs to detect the presence of controlled substances in luggage is clearly not before us.

In any event, the relevance of a least intrusive means requirement within the context of a *Terry* investigative stop is not clear to me. As I have discussed, a lawful stop must be so strictly limited that it is difficult to conceive of a less intrusive means that would be effective to accomplish the purpose of the stop.

[Royer's] liberty." *Ibid.* It is simply wrong to suggest that a traveler feels free to walk away when he has been approached by individuals who have identified themselves as police officers and asked for, and received, his airline ticket and driver's license.

Before *Terry*, only "seizures" of persons based on probable cause were held to satisfy the Fourth Amendment. *Dunaway* v. *New York*, 442 U. S., at 208–209. As we stated in *United States* v. *Brignoni-Ponce*, *supra*, however, *Terry* and *Adams* "establish that in appropriate circumstances the Fourth Amendment allows a properly limited 'search' or 'seizure' on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime." 422 U. S., at 881. But to justify such a seizure an officer must have a reasonable suspicion of criminal activity based on "specific and articulable facts . . . [and] rational inferences from those facts . . . ." *Terry* v. *Ohio*, 392 U. S., at 21. See also *Brown* v. *Texas*, 443 U. S. 47, 51 (1979). In this case, the officers decided to approach Royer because he was carrying American Tourister luggage, which appeared to be heavy; he was young; he was casually dressed; he appeared to be pale and nervous and was looking around at other people; he paid for his airline ticket in cash with a large number of bills; and he did not completely fill out the identification tags for his luggage, which was checked to New York. See *ante*, at 493, n. 2. These facts clearly are not sufficient to provide the reasonable suspicion of criminal activity necessary to justify the officers' subsequent seizure of Royer. Indeed, considered individually or collectively, they are perfectly consistent with innocent behavior and cannot possibly give rise to any inference supporting a reasonable suspicion of criminal activity. The officers' seizure of Royer, therefore, was illegal.

Although I recognize that the traffic in illicit drugs is a matter of pressing national concern, that cannot excuse this Court from exercising its unflagging duty to strike down official activity that exceeds the confines of the Constitution.

In discussing the Fourth Amendment in *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971), Justice Stewart stated: "In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts." *Id.*, at 455 (plurality opinion). We must not allow our zeal for effective law enforcement to blind us to the peril to our free society that lies in this Court's disregard of the protections afforded by the Fourth Amendment.

JUSTICE BLACKMUN, dissenting.

JUSTICE POWELL, concurring in *United States* v. *Mendenhall*, 446 U. S. 544 (1980), observed:

> "The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs . . . may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement." *Id.*, at 561–562.

In my view, the police conduct in this case was minimally intrusive. Given the strength of society's interest in overcoming the extraordinary obstacles to the detection of drug traffickers, such conduct should not be subjected to a requirement of probable cause. Because the Court holds otherwise, I dissent.

I

The Florida District Court of Appeal, Third District, held that respondent Royer had been arrested without probable cause before he consented to the search of his luggage, and that his consent was therefore tainted by this illegal deten-

tion. I concur in the plurality's adoption of the Fourth Amendment "seizure" standard proposed by Justice Stewart in *Mendenhall:* Fourth Amendment protections apply when "official authority" is exercised "such that 'a reasonable person would have believed he was not free to leave.'" *Ante*, at 502, quoting 446 U. S., at 554. I do not quarrel with the plurality's conclusion that at some point in this encounter, that threshold was passed. I also agree that the information available prior to the opening of Royer's suitcases did not constitute probable cause to arrest; thus, if probable cause was required, the seizure was illegal and the resulting consent to search was invalid. *Dunaway* v. *New York*, 442 U. S. 200, 216–219 (1979); *Brown* v. *Illinois*, 422 U. S. 590, 601–604 (1975). The dispositive issue, however, is whether the officers needed probable cause to arrest before they could take the actions that led to Royer's consent and the subsequent discovery of the contraband. I conclude that they did not.

A

"'[T]he key principle of the Fourth Amendment is reasonableness—the balancing of competing interests.'" *Michigan* v. *Summers*, 452 U. S. 692, 700, n. 12 (1981), quoting *Dunaway* v. *New York*, 442 U. S., at 219 (WHITE, J., concurring). Previous cases suggest a two-step analysis to distinguish seizures requiring probable cause from those requiring reasonable suspicion. On the one hand, any formal arrest, and any seizure "having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause." *Michigan* v. *Summers*, 452 U. S., at 700. On the other hand, a more limited intrusion, if supported by a special law enforcement need for greater flexibility, may be justifiable under the lesser "reasonable suspicion" standard. These lesser seizures are "not confined to the momentary, on-the-street detention accompanied by a frisk for weapons." *Ibid.* In the case of a seizure less intrusive than a formal arrest, determining whether the less demanding reasonable-

suspicion standard will be applied requires balancing the amount of intrusion upon individual privacy against the special law enforcement interests that would be served by permitting such an intrusion on less than probable cause. See *Michigan* v. *Summers*, 452 U. S., at 699–701; *United States* v. *Mendenhall*, 446 U. S., at 561 (POWELL, J., concurring in part); *Dunaway* v. *New York*, 442 U. S., at 219–220 (WHITE, J., concurring); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 555 (1976); *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878–881 (1975).

B

At the suppression hearing in this case, Royer agreed that he was not formally arrested until after his suitcases were opened. App. 84A, 85A. In my view, it cannot fairly be said that, prior to the formal arrest, the functional equivalent of an arrest had taken place. The encounter had far more in common with automobile stops justifiable on reasonable suspicion, see *United States* v. *Brignoni-Ponce*, 422 U. S., at 880–882, than with the detention deemed the functional equivalent of a formal arrest in *Dunaway* v. *New York*, *supra*. In *Dunaway*, the suspect was taken from his neighbor's home and involuntarily transported to the police station in a squad car. At the precinct house, he was placed in an interrogation room and subjected to extended custodial interrogation. 442 U. S., at 203, 206–207, 212. Here, Royer was not taken from a private residence, where reasonable expectations of privacy perhaps are at their greatest. Instead, he was approached in a major international airport where, due in part to extensive antihijacking surveillance and equipment, reasonable privacy expectations are of significantly lesser magnitude, certainly no greater than the reasonable privacy expectations of travelers in automobiles. See *United States* v. *Martinez-Fuerte*, 428 U. S., at 561. As in the automobile stop cases, and indeed as in every case in which the Court has upheld seizures upon reasonable suspicion, Royer was questioned where he was found, and all

questions were directly related to the purpose of the stop. Thus, the officers asked about Royer's identity, the purposes of his travel, and the suspicious circumstances they had noted. As the plurality appears to concede, *ante*, at 502, probable cause was certainly not required at this point, and the officers' conduct was fully supported by reasonable suspicion.

What followed was within the scope of the lesser intrusions approved on less than probable cause in our prior cases, and was far removed from the circumstances of *Dunaway*. In the context of automobile stops, the Court has held that an officer "may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause." *United States* v. *Brignoni-Ponce*, 422 U. S., at 881–882, quoted with approval in *Dunaway*, 442 U. S., at 212. Here, Royer was not subjected to custodial interrogation, for which probable cause is required. *Dunaway*, 442 U. S., at 216. Instead, the officers first sought Royer's consent to move the detention 40 feet to the police room, and then sought his consent to search his luggage. The question is whether, as in *Dunaway*, the move was involuntary, in which case probable cause might have been required, or whether, as in *Mendenhall*, 446 U. S., at 557–558, Royer consented voluntarily to this change of locale. Like JUSTICE REHNQUIST, *post*, at 530–531, I do not understand the plurality to dispute that Royer consented to go to the police room. Because the detention up to this point was not unlawful, the voluntariness of Royer's consent is to be judged on the totality of the circumstances. *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 227 (1973). As in *Mendenhall*, 446 U. S., at 557, quoting *Sibron* v. *New York*, 392 U. S. 40, 63 (1968), Royer went "'voluntarily in a spirit of apparent cooperation.'"[1]

[1] The trial judge, App. 115A–116A, and the appellate panel, 389 So. 2d 1007, 1008–1010 (Fla. App. 1979), so found, and the Florida District Court

Had Royer initially refused to consent to the search of his suitcases, and had the officers continued the detention in the hope that he would change his mind, a situation much closer to *Dunaway* would have been presented. But once he was in the room,[2] Royer consented to the search immediately upon request. Neither the plurality nor the Florida Court of Appeal suggests that, judged on the totality of the circumstances, Royer's consent to the search was involuntary.

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of Appeal, which viewed the evidence in the light most favorable to the State, *id.*, at 1016, did not contradict this finding. This is not inconsistent with a possible finding that at the time the request was made, Royer reasonably believed that he was not free to leave the officers' presence. As the officers framed the request, Royer might have believed that his only choices, for the moment, were to accompany the officers to the police room or to continue the discussion in the public concourse. His consent to moving the discussion, therefore, was voluntary, even if the detention itself was not.

[2] The character of the police room did not transform the encounter into the functional equivalent of an arrest. See *post*, at 532, and n. 10 (REHNQUIST, J., dissenting). Indeed, the plurality does not rely on any differences between this room and the one in *Mendenhall* to distinguish this encounter from the encounter held in *Mendenhall* to require at most reasonable suspicion. *Ante*, at 503–504, n. 9. The plurality instead points to several other differences between this case and *Mendenhall:* the officers retained Royer's ticket and identification, momentarily took possession of Royer's luggage, and did not advise him that he could decline to be searched. *Ante*, at 504, n. 9. Like JUSTICE POWELL, I considered the question whether a threshold seizure had taken place in *Mendenhall* to be "extremely close." 446 U. S., at 560, n. 1 (POWELL, J., concurring in part). Thus, notwithstanding the facts that, unlike the suspect in *Mendenhall*, Royer was a well-educated, adult, Caucasian male, cf. *id.*, at 558 ("that the respondent, a female and a Negro, may have felt unusually threatened by the officers, who were white males," is "not irrelevant" to the degree of coercion), the differences noted by the plurality lead me to agree that a reasonable person in Royer's circumstances would not have felt free to walk away. But while these differences did transform this otherwise identical encounter from an arguably consensual one into a seizure clearly requiring *some* justification under the Fourth Amendment, they are not so significant as to require the conclusion that Royer had been subjected to the equivalent of a full-blown arrest.

Thus, the officers in this case followed the formula for "lesser intrusions" set forth in *Brignoni-Ponce* and approved in *Dunaway:* beyond the initial stop and properly limited questioning, further detention and search were based on Royer's consent. Certainly, the intrusion on Royer's privacy was not so extreme as to make the countervailing public interest in greater flexibility irrelevant to the question whether probable cause was required. Consequently, I do not understand why the plurality fails to balance the character of the detention and the degree to which it intruded upon Royer's privacy against its justification as measured by "both the law enforcement interest and the nature of the 'articulable facts' supporting the detention." *Michigan* v. *Summers*, 452 U. S., at 702. This balance should determine whether probable cause or reasonable suspicion was required to support the officers' conduct, and whether that conduct was lawful under the appropriate standard.

II

The officers in this case began their encounter with Royer with reasonable suspicion. They continued their questioning and requested further cooperation only as more facts, heightening their suspicion, came to their attention. Certainly, as any such detention continues or escalates, a greater degree of reasonable suspicion is necessary to sustain it, and at some point probable cause will be required. But here, the intrusion was short-lived and minimal. Only 15 minutes transpired from the initial approach to the opening of the suitcases. The officers were polite, and sought and immediately obtained Royer's consent at each significant step of the process.[3] Royer knew that if the search of the suitcases did not

[3] The officers acted reasonably in taking Royer's baggage stubs and bringing his luggage to the police room without his consent. Royer had already surrendered the suitcases to a third party, the airline. The officers brought the suitcases to him immediately, and their contents were not revealed until Royer gave his consent. Thus, Royer's privacy was not substantially invaded. At that time, moreover, Royer himself was validly

turn up contraband, he would be free to go on his way.[4] Thus, it seems clear to me that "'the police [were] diligently pursuing a means of investigation which [was] likely to resolve the matter one way or another very soon . . . .'" *Michigan* v. *Summers*, 452 U. S., at 701, n. 14, quoting 3 W. LaFave, Search and Seizure § 9.2, p. 40 (1978).[5]

The special need for flexibility in uncovering illicit drug couriers is hardly debatable. Surely the problem is as serious, and as intractable, as the problem of illegal immigration discussed in *United States* v. *Brignoni-Ponce*, 422 U. S., at 878–879, and in *United States* v. *Martinez-Fuerte*, 428 U. S., at 552. In light of the extraordinary and well-documented difficulty of identifying drug couriers, the minimal intrusion in this case, based on particularized suspicion, was eminently reasonable.

I dissent.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

The plurality's meandering opinion contains in it a little something for everyone, and although it affirms the reversal of a judgment of conviction, it can scarcely be said to bespeak

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detained, the object of the encounter had become the securing of Royer's consent to search his luggage, and the luggage would otherwise have been loaded onto the airplane.

[4] The fact that Royer knew the search was likely to turn up contraband is of course irrelevant; the potential intrusiveness of the officers' conduct must be judged from the viewpoint of an innocent person in Royer's position. See *United States* v. *Wylie*, 186 U. S. App. D. C. 231, 237, 569 F. 2d 62, 68 (1977), cert. denied, 435 U. S. 944 (1978).

[5] Like JUSTICE REHNQUIST, *post*, at 528, I cannot accept the "least intrusive" alternative analysis the plurality would impose on the law of the Fourth Amendment. See *ante*, at 500. Prior cases do establish that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Ibid.* The detention at issue fully met that standard. The cases relied upon by the plurality do not, however, support the further proposition for which it cites them.

a total indifference to the legitimate needs of law enforcement agents seeking to curb trafficking in dangerous drugs. Indeed, in both manner and tone, the opinion brings to mind the old nursery rhyme:

"The King of France
With forty thousand men
Marched up the hill
And then marched back again."

The opinion nonetheless, in my view, betrays a mind-set more useful to those who officiate at shuffleboard games, primarily concerned with which particular square the disc has landed on, than to those who are seeking to administer a system of justice whose twin purposes are the conviction of the guilty and the vindication of the innocent. The plurality loses sight of the very language of the Amendment which it purports to interpret:

> "The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated . . . ." (Emphasis added.)

Analyzed simply in terms of its "reasonableness" as that term is used in the Fourth Amendment, the conduct of the investigating officers toward Royer would pass muster with virtually all thoughtful, civilized persons not overly steeped in the mysteries of this Court's Fourth Amendment jurisprudence. Analyzed even in terms of the most meticulous regard for our often conflicting cases, it seems to me to pass muster equally well.

The facts of this case, which are doubtless typical of those facing narcotics officers in major airports throughout the country, may be usefully stated in a somewhat different manner than that followed in the opinion of the plurality. Officers Magdalena and Johnson, members of the "Smuggling Detail" of the Dade County Public Safety Department created in response to a growing drug problem at the Miami Air-

port, were on duty at that airport on January 3, 1978. Since this is one of the peak periods of the tourist season in south Florida and the Caribbean, we may presumably take judicial notice that the airport was in all probability very crowded and busy at that time.

The detectives first saw Royer walking through the airport concourse. He was a young man, casually dressed, carrying two heavily laden suitcases. The officers described him as nervous in appearance, and looking around in a manner which suggested that he was trying to detect and avoid police officers. Before they approached him, the officers followed Royer to a ticket counter. He there requested a ticket for New York City, and in paying for it produced a large roll of cash in small denomination bills from which he peeled off the necessary amount. He then affixed two baggage tags to his luggage and checked it. Rather than filling out his full name, address, and phone number in the spaces provided on the tags, Royer merely wrote the words "Holt" and "La Guardia" on each tag.

At this point, the officers approached Royer, identified themselves, and asked if he had a moment to talk. He answered affirmatively, and the detectives then asked to see his airline ticket and some identification.[1] Although his ticket was for the name "Holt," his driver's license was in the name of "Mark Royer." When asked to explain this discrepancy, he said that a friend named Holt had made the ticket reservation. This explanation, of course, did not account for his use of the name "Holt" on the baggage tags that he had just filled out.

By this time Royer had become all the more obviously nervous. The detectives told Royer that they suspected he was transporting narcotics, and asked if he would accompany

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[1] The plurality recites these facts by noting that while Royer "produced" the ticket and identification, he did so "without oral consent." *Ante*, at 494. See n. 2, *infra*.

them for further questioning to a room adjacent to the concourse "to get out of the general population of the Airport." 389 So. 2d 1007, 1017 (Fla. App. 1980) (en banc). Royer agreed to go. The room was no more than 40 feet from the place where the detectives first approached Royer; it was described in the testimony of one of the officers as a "large storage closet" off a stewardesses' lounge converted into a room used by the Smuggling Detail, *ibid.;* the room contained a desk and two chairs. At this time the detectives also, without Royer's consent, retrieved Royer's suitcases from the place where they had been checked through on the flight to New York and brought them to the room off the concourse.

Once inside, the detectives asked Royer if he would consent to a search of the luggage so that they could dispel or confirm their suspicion that he was smuggling narcotics. The plurality's opinion describes what then happened:

> "Without orally responding to this request, Royer produced a key and unlocked one of the suitcases, which the detective then opened without seeking further assent from Royer. Marihuana was found in that suitcase. According to Detective Johnson, Royer stated that he did not know the combination to the lock on the second suitcase. When asked if he objected to the detective opening the second suitcase, Royer said, 'no, go ahead,' and did not object when the detective explained that the suitcase might have to be broken open. The suitcase was pried open by the officers and more marihuana was found. Royer was then told that he was under arrest. Approximately 15 minutes had elapsed from the time the detectives initially approached respondent until his arrest upon the discovery of the contraband." *Ante*, at 494–495.[2]

[2] Why it should make the slightest difference that Royer did not "orally" consent to the opening of the first bag, when in response to the request by the officers that he consent to a search Royer produced a key and unlocked it, is one of the many opaque nuances of the plurality's opinion.

The plurality inferentially concedes, as of course it must, that at the time the suitcases were opened and 65 pounds of marihuana were disclosed, the officers had probable cause to arrest and detain Royer. But working backward through this very brief encounter, the plurality manages to sufficiently fault the officers' conduct so as to require that Royer's conviction for smuggling drugs be set aside. Analyzed in terms of the "reasonableness" which must attend any search and seizure under the requirements of the Fourth Amendment, I find it impossible to conclude that any step in the officers' efforts to apprehend Royer fails to meet that test.

The plurality concedes that after their initial conversation with Royer, the officers had "grounds for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage while they attempted to verify or dispel their suspicions . . . ." *Ante*, at 502. See also *Michigan* v. *Summers*, 452 U. S. 692, 697–700 (1981); *Adams* v. *Williams*, 407 U. S. 143, 146 (1972); *Terry* v. *Ohio*, 392 U. S. 1, 20–21 (1968). I agree that their information reached at least this level.[3] The detectives had learned, among other things, that (1) Royer was carrying two heavy suitcases; (2) he was visibly nervous, exhibiting the behavior of a person trying to iden-

[3] I also agree with the plurality's intimation that when the detectives first approached and questioned Royer, no seizure occurred and thus the constitutional safeguards of the Fourth Amendment were not invoked. *Ante*, at 497. "[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry* v. *Ohio*, 392 U. S., at 19, n. 16. See also *United States* v. *Mendenhall*, 446 U. S. 544, 551–557 (1980) (opinion of Stewart, J.); *id.*, at 560, n. 1 (POWELL, J., concurring in part); *United States* v. *Herbst*, 641 F. 2d 1161, 1166 (CA5), cert. denied, 454 U. S. 851 (1981); *United States* v. *Berd*, 634 F. 2d 979, 984–985 (CA5 1981); *United States* v. *Turner*, 628 F. 2d 461, 462–465 (CA5 1980), cert. denied, 451 U. S. 988 (1981); *United States* v. *Hill*, 626 F. 2d 429, 432–433, and n. 6 (CA5 1980); *United States* v. *Fry*, 622 F. 2d 1218, 1220–1221 (CA5 1980); *United States* v. *Elmore*, 595 F. 2d 1036, 1038–1042 (CA5 1979), cert. denied, 447 U. S. 910 (1980).

tify and evade police officers; (3) at a ticket counter in a major import center for illicit drugs, he had purchased a ticket for a city that is a major distribution center for such drugs; (4) he paid for his ticket from a large roll of small denomination bills, avoiding the need to show identification; (5) in filling out his baggage tags, Royer listed only a last name and the airport of destination, failing to give his full name, address, and phone number in the provided spaces, and (6) he was traveling under an assumed name.[4]

The Florida court felt that even these facts did not amount to articulable suspicion, reasoning that this behavior was "at least equally, and usually far more frequently, consistent with complete innocence."[5] 389 So. 2d, at 1016. This eval-

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[4] The facts of this case bear a strong resemblance to those we examined in *United States* v. *Mendenhall*, *supra*. In that case, DEA agents in the Detroit Metropolitan Airport observed Mendenhall as she was the last passenger to deplane from a flight originating in Los Angeles. Once inside the terminal, Mendenhall, who appeared very nervous, slowly scanned the populace of the concourse and then walked very slowly toward the baggage area. Rather than claim any baggage, however, Mendenhall asked for directions to the Eastern Airlines ticket counter. At the counter, which was located in another terminal, Mendenhall, who carried an American Airlines ticket for a flight from Detroit to Pittsburgh, asked for an Eastern Airlines ticket for the same trip. Before Mendenhall could board the Eastern Airlines flight, agents stopped her for questioning. Three Members of this Court concluded that, based on these observations alone, the agents had a reasonable suspicion which justified the stop. 446 U. S., at 560–565 (POWELL, J., joined by BURGER, C. J., and BLACKMUN, J., concurring in part). Two Members of the Court did not reach the question, finding instead that Mendenhall had never been "seized." *Id.*, at 546–557 (opinion of Stewart, J., joined by REHNQUIST, J.). To the extent that the present case differs from *Mendenhall*, the basis for a reasonable suspicion is stronger on the facts before us now.

[5] The Florida District Court of Appeal took specific exception to the officers' conclusion that Royer appeared to be nervously attempting to evade police contact. The lower court said that since police officers are not psychiatrists, this conclusion "must be completely disregarded." 389 So. 2d, at 1016, n. 4. This Court, however, has repeatedly emphasized that a trained police officer may draw inferences and make deductions that could elude any untrained person observing the same conduct. See, *e. g.*,

uation of the evidence seems to me singularly akin to observing that because a stranger who was loitering near a building shortly before an arsonist set fire to the building could not be detained against his will for questioning solely on the basis of that fact, the same conclusion would be reached even though the same stranger had been found loitering in the presence of four other buildings shortly before arsonists had likewise set them on fire. Any one of these factors relied upon by the Miami police may have been as consistent with innocence as with guilt; but the combination of several of these factors is the essence of both "articulable suspicion" and "probable cause."[6]

United States v. *Cortez*, 449 U. S. 411, 418 (1981). We have noted as an example the behavior of a suspect who appears to the officer to be evading police contact. See, *e. g.*, *United States* v. *Mendenhall*, *supra*, at 564 (opinion of Stewart, J.); *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 884–885 (1975).

[6] While the plurality does not address the use of "drug courier profiles" in narcotics investigations, it affirms a decision where the Florida District Court of Appeal took the liberty to fashion a bright-line rule with regard to the use of these profiles. The state court concluded that conformity with a "drug courier profile," "without more," is insufficient to establish even reasonable suspicion that criminal activity is afoot. 389 So. 2d, at 1017, n. 6 (emphasis deleted).

In 1974 the Department of Justice Drug Enforcement Administration instituted training programs for its narcotics officers wherein instruction was given on a "drug courier profile." A "profile" is, in effect, the collective or distilled experience of narcotics officers concerning characteristics repeatedly seen in drug smugglers. As one DEA agent explained:

"Basically, it's a number of characteristics which we attribute or which we believe can be used to pick out drug couriers. And these characteristics are basically things that normal travelers do not do . . . .

. . . . . .

"Essentially, when we started this detail at the airport, we didn't really know what we were looking for. The majority of our cases, when we first started, involved cases we made based on information from law enforcement agencies or from airline personnel. And as these cases were made, certain characteristics were noted among the defendants.

"At a later time we began to see a pattern in these characteristics and began using them to pick out individuals we suspected as narcotic couriers

The point at which I part company with the plurality's opinion is in the assessment of the reasonableness of the officers' conduct following their initial conversation with Royer.

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without any prior information." *United States* v. *McClain*, 452 F. Supp. 195, 199 (ED Mich. 1977).

Few statistics have been kept on the effectiveness of "profile" usage, but the data available suggest it has been a success. In the first few months of a "profile" program at the Detroit Metropolitan Airport, 141 persons were searched in 96 different encounters; drugs were discovered in 77 of the searches. See *United States* v. *Van Lewis*, 409 F. Supp. 535, 538 (ED Mich. 1976), aff'd, 556 F. 2d 385 (CA6 1977), cert. denied, 434 U. S. 1011 (1978). A DEA agent working at the La Guardia Airport in New York City estimated that some 60% percent of the persons identified as having "profile" characteristics are found to be carrying drugs. *United States* v. *Price*, 599 F. 2d 494, 501, n. 8 (CA2 1979).

Because of this success, state and local law enforcement agencies also have instructed narcotics officers according to "drug courier profiles." It was partly on the basis of "profile" characteristics that Detectives Johnson and Magdalena initially began surveillance of Royer. Certainly in this case the use of the "profile" proved effective.

Use of "drug courier profiles" has played an important part in a number of lower court decisions. See, *e. g.*, *United States* v. *Forero-Rincon*, 626 F. 2d 218 (CA2 1980); *United States* v. *Vasquez*, 612 F. 2d 1338 (CA2 1979), cert. denied, 447 U. S. 907 (1980); *United States* v. *Price*, 599 F. 2d 494 (CA2 1979); *United States* v. *Diaz*, 503 F. 2d 1025 (CA3 1974); *United States* v. *Sullivan*, 625 F. 2d 9 (CA4 1980), cert. denied, 450 U. S. 923 (1981); *United States* v. *Hill*, 626 F. 2d 429 (CA5 1980); *United States* v. *Ballard*, 573 F. 2d 913 (CA5 1978); *United States* v. *Smith*, 574 F. 2d 882 (CA6 1978); *United States* v. *Scott*, 545 F. 2d 38 (CA8 1976), cert. denied 429 U. S. 1066 (1977); *United States* v. *Beck*, 598 F. 2d 497 (CA9 1979). In fact, the function of the "profile" has been somewhat overplayed. Certainly, a law enforcement officer can rely on his own experience in detection and prevention of crime. Likewise, in training police officers, instruction focuses on what has been learned through the collective experience of law enforcers. The "drug courier profile" is an example of such instruction. It is not intended to provide a mathematical formula that automatically establishes grounds for a belief that criminal activity is afoot. By the same reasoning, however, simply because these characteristics are accumulated in a "profile," they are not to be given less weight in assessing whether a suspicion is well founded. While each case will turn on its own facts, sheer logic dictates that where certain characteristics repeatedly are found among drug smugglers, the existence of those characteristics in a

The plurality focuses on the transfer of the place of the interview from the main concourse of the airport to the room off the concourse and observes that Royer "found himself in a small room—a large closet—equipped with a desk and two chairs. He was alone with two police officers who again told him that they thought he was carrying narcotics. He also found that the officers, without his consent, had retrieved his checked luggage from the airline." *Ante*, at 502–503.

Obviously, this quoted language is intended to convey stern disapproval of the described conduct of the officers. To my mind, it merits no such disapproval and was eminently reasonable. Would it have been preferable for the officers to have detained Royer for further questioning, as they concededly had a right to do, without paying any attention to the fact that his luggage had already been checked on the flight to New York, and might be put aboard the flight even though Royer himself was not on the plane? Would it have been more "reasonable" to interrogate Royer about the contents of his suitcases, and to seek his permission to open the suitcases

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particular case is to be considered accordingly in determining whether there are grounds to believe that further investigation is appropriate. Cf. *United States* v. *Cortez*, 449 U. S. 411, 418 (1981).

The "drug courier profile" is not unfamiliar to this Court. We have held that conformity with certain aspects of the "profile" does not automatically create a particularized suspicion which will justify an investigatory stop. *Reid* v. *Georgia*, 448 U. S. 438 (1980) *(per curiam)*. Yet our decision in *United States* v. *Mendenhall*, 446 U. S. 544 (1980), made it clear that a police officer is entitled to assess the totality of the circumstances in the light of his own training and experience and that instruction on a "drug courier profile" would be a part of his accumulated knowledge. This process is not amenable to bright-line rules such as the Florida court tried to establish. We are not dealing "with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *United States* v. *Cortez*, *supra*, at 418. See also *Brown* v. *Texas*, 443 U. S. 47, 52, n. 2 (1979).

when they were retrieved, in the busy main concourse of the Miami Airport, rather than to find a room off the concourse where the confrontation would surely be less embarrassing to Royer? If the room had been large and spacious, rather than small, if it had possessed three chairs rather than two, would the officers' conduct have been made reasonable by these facts?

The plurality's answers to these questions, to the extent that it attempts any, are scarcely satisfying. It commences with the observation that "the officers' conduct was more intrusive than necessary to effectuate an investigative detention otherwise authorized by the *Terry* line of cases." *Ante*, at 504. Earlier in its opinion, the plurality set the stage for this standard when the familiar "least intrusive means" principle of First Amendment law is suddenly carried over into Fourth Amendment law by the citation of two cases, *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 881–882 (1975), and *Adams* v. *Williams*, 407 U. S., at 146, see *ante*, at 500, neither one of which lends any support to the principle as a part of Fourth Amendment law. The plurality goes on to say that had the officers returned Royer's ticket and driver's license, the encounter clearly would have been consensual. The plurality also states that while there were good reasons to justify moving Royer from one location to another, the officers' motives in seeking to examine his luggage render these reasons unavailing—a conclusion the reason for which wholly escapes me. Finally, the plurality suggests that the officers might have examined Royer's bags in a more expeditious way, such as the use of trained dogs.

All of this to my mind adds up to little more than saying that if my aunt were a man, she would be my uncle. The officers might have taken different steps than they did to investigate Royer, but the same may be said of virtually every investigative encounter that has more than one step to it. The question we must decide is what was *unreasonable* about the steps which *these officers* took with respect to *this* sus-

pect in the Miami Airport on this particular day. On this point, the plurality stutters, fudges, and hedges:

> "What had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a police interrogation room, where the police, unsatisfied with previous explanations, sought to confirm their suspicions." *Ante*, at 503.

But since even the plurality concedes that there was articulable suspicion warranting an investigatory detention, the fact that the inquiry had become an "investigatory procedure in a police interrogation room" would seem to have little bearing on the proper disposition of a claim that the officers violated the Fourth Amendment. The plurality goes on to say:

> "At least as of that moment, any consensual aspects of the encounter had evaporated, and we cannot fault the Florida District Court of Appeal in concluding that *Terry* v. *Ohio* and the cases following it did not justify the restraint to which Royer was then subjected. As a practical matter, Royer was under arrest." *Ibid.*

Does the plurality intimate that if the Florida District Court of Appeal had reached the opposite conclusion with respect to the holdings of *Terry* and the cases which follow it, it would affirm that holding?[7] Does it mean that the 15-minute duration of the total encounter, and the even lesser amount of elapsed time during which Royer was in the "interrogation room," was more than a *Terry* investigative stop can ever consume? These possible conclusions are adumbrated, but not stated; if the plurality's opinion were to be

[7] See also *ante*, at 501 ("The question before us is whether the record warrants that conclusion"); *ante*, at 507 ("[W]e think that the Florida District Court of Appeal cannot be faulted in concluding that the limits of a *Terry*-stop had been exceeded"). Certainly we owe no such deference to the Florida court's conclusion. See *Haynes* v. *Washington*, 373 U. S. 503, 515–516 (1963) (citing *Stein* v. *New York*, 346 U. S. 156, 181 (1953)); *Fiske* v. *Kansas*, 274 U. S. 380, 385–386 (1927).

judged by standards appropriate to Impressionist paintings, it would perhaps receive a high grade, but the same cannot be said if it is to be judged by the standards of a judicial opinion.

Since the plurality concedes the existence of "articulable suspicion" at least after the initial conversation with Royer, the only remaining question is whether the detention of Royer during that period of time was permissible under the rule enunciated in *Terry* v. *Ohio*, 392 U. S. 1 (1968). Although *Terry* itself involved only a protective patdown for weapons, subsequent cases have expanded the permissible scope of such a "seizure." In *Adams* v. *Williams*, *supra*, we upheld both a search and seizure of a pistol being carried by a suspect seated in a parked automobile. In *United States* v. *Martinez-Fuerte*, 428 U. S. 543 (1976), we allowed Government officials to stop, and divert for visual inspection and questioning, automobiles which were suspected of harboring illegal aliens. These stops, including waiting time, could clearly have approximated in length the time which Royer was detained, and yet *Martinez-Fuerte* allowed them to be made "in the absense of *any individualized suspicion* at reasonably located checkpoints." *Id.*, at 562 (emphasis supplied). Unless we are to say that commercial drug trafficking is somehow quantitatively less weighty on the Fourth Amendment scale than trafficking in illegal aliens, I think the articulable suspicion which concededly focused upon Royer justified the length and nature of his detention.[8]

The reasonableness of the officers' activity in this case did not depend on Royer's consent to the investigation. Nevertheless, the presence of consent further justifies the action taken. The plurality does not seem to dispute that Royer

[8] The detention of Royer would also pass muster under this Court's Fourth Amendment jurisprudence if the officers had "a reasonable ground for belief of guilt" prior to their adjournment to the room. *Brinegar* v. *United States*, 338 U. S. 160, 175 (1949). But since the officers clearly had an articulable suspicion to justify the detention under *Terry* v. *Ohio*, 392 U. S. 1 (1968), the probable-cause issue need not be decided in this case.

consented to go to the room in the first instance. Certainly that conclusion is warranted by the totality of the circumstances. *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 227 (1973). The facts are similar to those addressed in *United States* v. *Mendenhall*, 446 U. S. 544 (1980), where a majority of the Court determined that the consent to accompany police officers had been voluntary. Royer was not told that he had to go to the room, but was simply asked, after a brief period of questioning, if he would accompany the detectives to the room. Royer was informed as to why the officers wished to question him further. There were neither threats nor any show of force. Detectives Johnson and Magdelena were not in uniform and did not display weapons. The detectives did not touch Royer and made no demands. In fact, Royer admits that the detectives were quite polite.[9]

The plurality concludes that somewhere between the beginning of the 40-foot journey and the resumption of conversation in the room the investigation became so intrusive that Royer's consent "evaporated" leaving him "[a]s a practical matter . . . under arrest." *Ante*, at 503. But if Royer was legally approached in the first instance and consented to accompany the detectives to the room, it does not follow that his consent went up in smoke and he was "arrested" upon entering the room. As we made clear in *Mendenhall*, logical analysis would focus on whether the environment in the room rendered the subsequent consent to a search of the luggage involuntary.

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[9] Contrary to the Florida court's view, this phase of the encounter contrasts sharply with the circumstances we examined in *Dunaway* v. *New York*, 442 U. S. 200 (1979). In that case, police officers deliberately sought out the suspect at a neighbor's house and, with a show of force, brought the suspect to police headquarters in a police car, placed him in an interrogation room, and questioned him extensively after giving him a *Miranda* warning. Unlike in *Dunaway*, Royer, after brief questioning, was *asked to cooperate* by accompanying the officers to a room no more than 40 feet away, so that the questioning could proceed out of the view of the general public.

As we said in *Mendenhall*, "the fact that she was [in the room] is little or no evidence that she was in any way coerced." 446 U. S., at 559. Other than the size of the room, described as "a large storage closet,"[10] there is nothing in the record which would indicate that Royer's resistance was overborne by anything about the room. Royer, who was in his fourth year of study at Ithaca College at the time and has since graduated with a degree in *communications*, simply continued to cooperate with the detectives as he had from the beginning of the encounter. Absent any evidence of objective indicia of coercion, and even absent any claim of such indicia by Royer, the size of the room itself does not transform a voluntary consent to search into a coerced consent.

For any of these several reasons, I would reverse the judgment of the Florida District Court of Appeal.

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[10] The characterization of the room as a "closet" is quite misleading. The room contained one desk and two chairs. It was large enough to allow three persons to enter with two heavy suitcases. It also is relevant that it was the Florida court, not Royer, who focused on the size of the room. Royer appealed his conviction arguing that his consent to a search was invalid as a matter of law because he was not informed that he could refuse consent. A panel of the Florida court properly rejected this contention, relying on *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 234 (1973), where we said that "proof of knowledge of a right to refuse [is not] the *sine qua non* of an effective consent to a search." It was during rehearing by the court en banc that the conviction was reversed with the court finding that when Royer was taken into the private room he was in effect placed under arrest.

THURSTON MOTOR LINES, INC. *v.* JORDAN K. RAND, LTD.

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

No. 82–713. Decided March 28, 1983

Held: Federal-question jurisdiction under 28 U. S. C. § 1337 exists over petitioner common carrier's action in Federal District Court, where petitioner alleged that respondent failed to pay a specified amount in motor freight charges, as required by petitioner's tariffs on file with the Interstate Commerce Commission, and that the action arose under the Interstate Commerce Act. *Louisville & Nashville R. Co.* v. *Rice*, 247 U. S. 201, is controlling. Petitioner's suit cannot be characterized as a "simple contract-collection action." A carrier's claim is, of necessity, predicated on its tariffs regulated by the Interstate Commerce Act—not an understanding with the shipper.

Certiorari granted; 682 F. 2d 811, reversed and remanded.

PER CURIAM.

Petitioner is a common carrier authorized by the Interstate Commerce Commission to transport commodities. When respondent allegedly failed to pay $661.41 in motor freight charges, petitioner filed suit in United States District Court. Its complaint alleged that respondent failed to pay for transport services as required by petitioner's tariffs on file with the Commission. The complaint also alleged that the action arose under the Interstate Commerce Act, 49 U. S. C. § 10741(a) (1976 ed., Supp. V), and that the District Court had jurisdiction pursuant to 28 U. S. C. § 1337.

The District Court dismissed the matter for want of subject-matter jurisdiction and the Court of Appeals for the Ninth Circuit affirmed. 682 F. 2d 811 (1982). Characterizing the suit as a "simple contract-collection action," the court could not "discern any proposition of federal law that a court need confront in deciding what, if anything, can be recovered." *Id.*, at 812.

Under the Interstate Commerce Act, as construed by this Court, the Court of Appeals was in error. In *Louisville & Nashville R. Co.* v. *Rice*, 247 U. S. 201 (1918), this Court squarely held that federal-question jurisdiction existed over a suit to recover $145 allegedly due the carrier for an interstate shipment under tariffs regulated by the Interstate Commerce Act.

> "The Interstate Commerce Act requires carrier to collect and consignee to pay all lawful charges duly prescribed by the tariff in respect of every shipment. Their duty and obligation grow out of and depend upon that act." *Id.*, at 202.

Other federal courts have had no difficulty in following the clear import of *Rice*. See *Madler* v. *Artoe*, 494 F. 2d 323 (CA7 1974); *Bernstein Bros. Pipe & Machinery Co.* v. *Denver & R. G. W. R. Co.*, 193 F. 2d 441 (CA10 1951); *Maritime Service Corp.* v. *Sweet Brokerage De Puerto Rico, Inc.*, 537 F. 2d 560 (CA1 1976).

The Court of Appeals' attempt to distinguish this "most troublesome precedent" is wholly unconvincing. In its view, *Rice* turned upon the fact that the carrier billed the shipper for an additional amount that, while authorized by lawful tariffs, was contrary to the parties' understanding.* Unlike petitioner's complaint, the complaint in *Rice* could not have alleged that the shipper agreed to pay the amount sought; the carrier there had to rely exclusively on the Act to override the parties' understanding. There is no support for this novel interpretation in *Rice* or elsewhere. That the consignee attempted to avoid payment by invoking an estoppel

*In *Rice*, the parties had an understanding requiring the carrier to assess all charges immediately upon the delivery of livestock. This arrangement allowed the shipper to include the transportation costs in the price at which the livestock was sold. The dispute resulted from the carrier's billing the shipper after the delivery and sale of the livestock for an additional $145 to cover disinfecting the freight cars. This additional charge complied with lawful tariffs.

defense is an accurate enough portrayal of the facts, but does not obscure that the claim arose under federal law. "As to interstate shipments," the Court stated, "the parties are held to the responsibilities imposed by the federal law, to the exclusion of all other rules of obligation." 247 U. S., at 203. A carrier's claim is, of necessity, predicated on the tariff—not an understanding with the shipper. This was true in *Rice* and is equally true here. Under the Court of Appeals' approach, the question of federal jurisdiction would depend upon the defenses pleaded by the shipper—but we have long ago settled that it is the character of the action and not the defense which determines whether there is federal-question jurisdiction. *Public Service Comm'n of Utah* v. *Wycoff Co.*, 344 U. S. 237, 248 (1952); *Phillips Petroleum Co.* v. *Texaco Inc.*, 415 U. S. 125, 127 (1974). In short, the Court of Appeals has simply confused the factual contours of *Rice* for its unmistakable holding.

Perhaps unsure of its distinction of *Rice*, the Court of Appeals went on to "doubt that *Rice* is still good law." Needless to say, only this Court may overrule one of its precedents. Until that occurs, *Rice* is the law, and the decision below cannot be reconciled with it. The petition for certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

WASHINGTON ET AL. *v.* UNITED STATES

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

No. 81–969. Argued January 10, 1983—Decided March 29, 1983

Washington state statutes impose a sales tax on federal contractors with respect to the sale of materials to such contractors for work on federal projects, but with regard to nonfederal construction projects, the tax is imposed on the landowner, who pays tax on the full price of the project, including the contractor's labor costs and markup as well as the cost of tangible personal property sold to the contractor. The United States filed suit in Federal District Court, seeking declaratory and injunctive relief and an order requiring a refund of sales taxes for which the Federal Government had reimbursed its contractors. The District Court granted partial summary judgment for the United States, holding that the statutes discriminate against federal contractors in violation of the Supremacy Clause of the Federal Constitution, and the Court of Appeals affirmed.

Held: The Washington statutes are not invalid under the Supremacy Clause. Pp. 540–546.

(a) The Federal Government's constitutional immunity from state taxation may not be conferred on a third party simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy. Nor can immunity be conferred simply because the state tax falls on the earnings of a contractor providing services to the Government. *United States* v. *New Mexico*, 455 U. S. 720, 734. "So long as the tax is not directly laid on the Federal Government, it is valid if nondiscriminatory . . . or until Congress declares otherwise." *United States* v. *County of Fresno*, 429 U. S. 452, 460. P. 540.

(b) Washington's tax is not invalid on the asserted ground that the State has circumvented the Federal Government's tax immunity by identifying a federal activity for different tax treatment. Washington imposes a sales tax of the same rate on all purchases from nonfederal contractors. The only deviation from equality between the Federal Government and federal contractors on one hand, and every other taxpayer on the other hand, is that the former are taxed on a smaller proportion of the value of the project than the latter. Thus the Federal Government and its contractors are *better off* than other taxpayers, which is not the mistreatment of the Federal Government against which the Supremacy Clause

protects. A tax is not invalid simply because it treats those who deal with the Federal Government differently than it treats others. *Phillips Chemical Co.* v. *Dumas Independent School District*, 361 U. S. 376, distinguished. Cf. *United States* v. *County of Fresno*, *supra*; *United States* v. *City of Detroit*, 355 U. S. 466. Pp. 541–544.

(c) The important consideration is not whether the State differentiates in determining what entity shall bear the legal incidence of the tax, but whether the tax is discriminatory with regard to the economic burdens that result. The State does not discriminate against the Federal Government and those with whom it deals unless it treats someone else better than it treats them. Here, Washington has not singled out contractors who work for the United States for discriminatory treatment. It has merely accommodated for the fact that it may not impose a tax directly on the United States as the project owner. Pp. 544–546.

654 F. 2d 570, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, POWELL, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which WHITE, MARSHALL, and STEVENS, JJ., joined, *post*, p. 547.

Kenneth O. Eikenberry, Attorney General of Washington, argued the cause for appellants. With him on the briefs were *Leland T. Johnson* and *Timothy R. Malone*, Assistant Attorneys General.

Stuart A. Smith argued the cause for the United States. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Archer*, *David English Carmack*, and *John J. McCarthy*.*

JUSTICE REHNQUIST delivered the opinion of the Court.

The State of Washington's principal source of revenue is a sales and use tax imposed on the buyer or consumer in all retail sales and consumer uses of tangible personal property.[1]

**George Deukmejian*, Attorney General, filed a brief for the State of California as *amicus curiae* urging reversal.

[1] The sales tax is imposed by Chapters 82.04, 82.08, and 82.14 of the Revised Code of Washington (1981). The use tax is imposed by Chapters 82.12 and 82.14 (1981). The terms "buyer" and "consumer" are quite broadly defined in Wash. Rev. Code §§ 82.08.010, 82.04.190 (1981).

In this case the United States contends that one aspect of that tax statute—its application to building construction—is invalid under the Supremacy Clause of the United States Constitution. The statutory provisions are most easily understood in light of their history.

Before 1941, building contractors were treated as consumers for sales tax purposes. All sales of tangible personal property, such as construction materials, to contractors were subject to the sales tax. The legal incidence of this tax was on the contractor; the tax was collected by suppliers who sold to contractors, and remitted by them to the State.

In 1941, Washington changed the sales tax system it applied to contractors by defining the landowner who purchases construction work from the contractor, rather than the contractor, as the "consumer." The legal incidence of the tax was now on the landowner, who paid tax on the full price of the construction project. The net result was that contractors' labor costs and markups were added to the tax base, which had previously included only the cost of tangible personal property sold to contractors.

The post-1941 tax system could not, however, be applied to construction for the Federal Government because the Supremacy Clause prohibits States from taxing the United States directly. *United States* v. *New Mexico*, 455 U. S. 720 (1982). Thus, when the United States was the landowner, Washington did not collect any tax on the sale either of tangible personal property to the contractor or of the finished building to the Government.

In 1975, the Washington Legislature acted to eliminate the complete tax exemption for construction purchased by the United States.[2] It did so by reimposing the pre-1941 tax on

[2] The statute places public housing authorities in the same category as the Federal Government. No party has argued that this circumstance affects the analysis of this case, and public housing authorities will be disregarded throughout this opinion. The statute treats all branches of state or local government other than public housing authorities in the same way as private parties.

contractors that work for the Federal Government ("federal contractors").[3] Thus, Washington now taxes the sale of non-federal projects to the landowner, and taxes the sale of materials to federal contractors. The net result is that for federal projects the legal incidence of the tax falls on the

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[3] As the Court of Appeals explained, 654 F. 2d 570, 573, n. 6 (1981):

"The manner in which this was accomplished is somewhat complex. The change was effected by substitute House Bill No. 86, enacted into law as Chapter 90, Laws of 1975 (amending Wash. Rev. Code §§ 82.04.050 and 82.04.190); Section 5 of Substitute House Bill No. 2736, enacted into law as Section 5 of Chapter 291, Laws of 1975 (amending Wash. Rev. Code § 82.04.050) and House Bill No. 1229, enacted into law as Chapter 1, Laws of 1975–76 (amending Wash. Rev. Code §§ 82.12.010 and 82.12.020). These statutes added the following definition of 'consumer' to Wash. Rev. Code § 82.04.190:

"'"Consumer" means the following: . . .

"'(6) Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon or above real property of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation. Any such person shall be a consumer within the meaning of this subsection in respect to tangible personal property incorporated into, installed in, or attached to such building or other structure by such person.'

"These statutes further expressly excluded from the definition of 'consumer' 'the United States, instrumentalities thereof, and county and city housing authorities created pursuant to chapter 35.82 RCW in respect to labor and services rendered to their real property.' Wash. Rev. Code § 82.04.190(4). Wash. Rev. Code § 82.04.050 was also amended so as to redefine 'retail sale' and 'sale at retail' to *exclude* expressly from their scope contracts calling for the improvement, repair or construction of real property owned by the United States or any of its instrumentalities and to *include* sales of materials to prime contractors engaged in construction work on federally-owned property. As with the sales tax, the liability of federal prime construction contractors for the State's use tax arose basically from the inclusion of such contractors within the meaning of the term 'consumer,' and the use of that term in Wash. Rev. Code § 82.12.020, under which the use tax is levied."

contractor rather than the landowner, and the tax is measured by a lesser amount than the tax on nonfederal projects because the contractor's labor costs and markup are not included in the tax base.

Shortly after the new statute was enacted, the United States sued the State in the District Court for the Western District of Washington, seeking a declaratory judgment and a permanent injunction against the assessment and collection of the sales tax from federal contractors, and an order requiring the refund of sales taxes already so collected, for which the United States had reimbursed its contractors. The District Court granted the United States' motion for partial summary judgment, holding that the statutes discriminate against federal contractors in violation of the Supremacy Clause. On appeal, the Court of Appeals for the Ninth Circuit affirmed. 654 F. 2d 570 (1981). Washington appealed pursuant to 28 U. S. C. § 1254(2), and we noted probable jurisdiction. 456 U. S. 970 (1982).

In recent years this Court has examined in some detail the history of the Federal Government's constitutional immunity from state taxation. *United States* v. *New Mexico*, *supra*, at 730–738; *United States* v. *County of Fresno*, 429 U. S. 452, 457–464 (1977). There is no reason to repeat these discussions here; it suffices to restate our conclusions. In *New Mexico*, we explained that "immunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy. . . . Similarly, immunity cannot be conferred simply because the state tax falls on the earnings of a contractor providing services to the Government." 455 U. S., at 734. In *Fresno*, we stated the rule that, "[s]o long as the tax is not directly laid on the Federal Government, it is valid if nondiscriminatory . . . or until Congress declares otherwise." 429 U. S., at 460 (citing *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 150, 161 (1937)). Accord, *Memphis Bank & Trust Co.* v. *Garner*, 459 U. S. 392, 397 (1983).

The United States' principal argument is that the tax is invalid because Washington has circumvented the Federal Government's tax immunity by identifying a federal activity for different tax treatment. Brief for United States 10, 21–31; Tr. of Oral Arg. 29–33, 40–41. Because Washington does not impose a sales tax on contractors who do not work for the Federal Government, the argument goes, it discriminates against the Federal Government and those with whom it deals.

Washington does, however, impose a sales tax on all purchases from contractors who do not deal with the Federal Government. The tax is imposed on every construction transaction, and the tax rate is the same for everyone. The only deviation from equality between the Federal Government and federal contractors on one hand, and every other taxpayer on the other, is that the former are taxed on a smaller proportion of the value of the project than the latter.[4] Thus the Federal Government and federal contractors

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[4] The United States argues that it is inappropriate to consider the economic burden on the contractor and the owner together, and that we should focus solely on the tax the contractor is required to pay. When the case is viewed in this light, we are told, it is apparent that federal contractors pay more than other contractors. The Court of Appeals apparently accepted this argument. *Id.*, at 576.

This way of looking at the problem is unrealistic. The appropriate question is whether a contractor who is considering working for the Federal Government is faced with a cost he would not have to bear if he were to do the same work for a private party. If he works for the Federal Government, the contractor is required to pay a tax on the materials he buys. The contractor will count the tax among his costs in setting a price for the Government. Depending on his bargaining power, he may pass some or all of the tax on to the Federal Government when he sets his price. If he works for a private party, the contractor is required to collect the tax from the purchaser and remit it to the State. The purchaser will count the tax as part of the price of the building. Depending on his bargaining power, the contractor may reduce his price to make up for some or all of the tax the purchaser must pay. If the tax is the same, and the parties have the same bargaining power, the amounts the purchasers pay and the amounts the contractors receive will be identical in the two cases. Thus, it makes

are both *better off* than other taxpayers because they pay less tax than anyone else in the State. This hardly seems, on its face, to be the mistreatment of the Federal Government against which the Supremacy Clause protects.

The United States relies upon *Phillips Chemical Co.* v. *Dumas Independent School District*, 361 U. S. 376 (1960), in which Texas taxed the lessees of property owned by the State on the value of their leasehold interest, but taxed some lessees of property owned by the United States on the full value of the premises. However, the Court there *rejected* the United States' argument that the tax was invalid simply because it treats those who deal with the Federal Government differently than it treats others.[5] *Id.*, at 382. We plainly stated that a determination whether a tax is discriminatory "requires 'an examination of the whole tax structure of the state.'" *Id.*, at 383 (quoting *Tradesmens National Bank* v. *Oklahoma Tax Comm'n*, 309 U. S. 560, 568 (1940)).[6] The Texas tax was invalid *only* because it imposed "a heavier tax burden on lessees of federal property than is imposed on lessees of" state property.[7] 361 U. S., at 383, 387. See *Memphis Bank & Trust Co.* v. *Garner*, *supra*, at 398.

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no difference to the contractor (or to the purchasers) which of them is required to pay the tax to the State, as long as they have the opportunity to allocate the burden among themselves by adjusting the price.

[5] We acknowledged that *Macallen Co.* v. *Massachusetts*, 279 U. S. 620 (1929), supported the United States' argument, but explained that, "to the extent that it does, it no longer has precedential value." 361 U. S., at 382. See also *United States* v. *City of Detroit*, 355 U. S. 466, 472, n. 2 (1958).

[6] We noted that "nothing in *Miller* [v. *Milwaukee*, 272 U. S. 713 (1927), upon which the United States also seeks to rely], at least as it has been interpreted in later cases, should be read as indicating that less is required." 361 U. S., at 383.

[7] The United States also relies upon *Moses Lake Homes, Inc.* v. *Grant County*, 365 U. S. 744 (1961). In that case, like in *Phillips*, the State taxed lessees of property owned by the State on a lower valuation than lessees of property owned by the United States. We held, on the authority of *Phillips*, that the tax was invalid. 365 U. S., at 751. This holding does

In *United States* v. *County of Fresno*, *supra*, the county imposed a tax on the owners of real property. Of course, property owned by the United States was exempt from the tax. Rather than forgo all revenue from federally owned land, the county taxed private lessees' interests in real property rented from the Federal Government and other tax-exempt owners.[8] It did not tax the interests of any lessees of nonexempt property. We rejected the United States' contention that the tax system discriminated against lessees of federal property. Because the economic burden of a tax imposed on the owner of nonexempt property is ordinarily passed on to the lessee, we explained that those who leased property from the Federal Government were no worse off than their counterparts in the private sector. 429 U. S., at 464–465.

Similarly, in *United States* v. *City of Detroit*, 355 U. S. 466, 473–474 (1958), Michigan taxed private property owners, but not the United States or other exempt owners. Instead, the State taxed nonexempt parties' use of exempt property. It did not tax the use of nonexempt property. We upheld the tax because the State may "equate the tax burden imposed on private enterprise using exempt property with that carried by similar businesses using taxed property."[9] *Id.*, at 473. We explained that "[t]hose using ex-

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not support the United States' position any more than the holding in *Phillips*.

The Court of Appeals in *Moses Lake* had attempted to eliminate the discriminatory aspect of the tax by reducing the tax "to what it would have been if" it had been levied on a state lessee. 365 U. S., at 752. We held that the Court of Appeals did not have the power to revise the state tax to cure a constitutional defect. *Ibid.* This was nothing more than a ruling on severability and has no bearing on this case.

[8] Nothing in the case turned on the existence of other tax-exempt owners.

[9] This answers the United States' contention that the Washington tax is invalid simply because it is an attempt to circumvent the Federal Govern-

empt property are required to pay no greater tax than that placed on private owners or passed on by them to their business lessees." *Id.*, at 473–474.

In this case, federal contractors are required to pay no greater tax than that placed on private buyers of construction work or passed on by them to their contractors. The Court of Appeals sought to distinguish *Detroit* on the ground that the tax burden in this case is not *necessarily* shifted to the nonfederal contractors. 654 F. 2d, at 576. But there was no proof in either *Detroit* or *Fresno* that private owners would *necessarily* pass the tax on to their lessees; the *opportunity* for the parties to allocate the economic burden of the tax among themselves was sufficient. No more should be required here.

The important consideration, therefore, is not whether the State differentiates in determining what entity shall bear the legal incidence of the tax, but whether the tax is discriminatory with regard to the economic burdens that result. The only difference between this case and *Fresno* and *Detroit* is that the taxpayer here is a vendor of services to the United States, rather than one who receives an economic benefit from the Federal Government. To rest upon this distinction would be to elevate form over substance. The entire trend of our decisions since *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (1937), has been to avoid "wooden formalism." *United States* v. *New Mexico*, 455 U. S., at 737. See *Fresno*, 429 U. S., at 460–461, and n. 9. See generally Comment, Federal Immunity from State Taxation, 45 U. Chi. L. Rev. 695, 700–702 (1978). The State does not discriminate against the Federal Government and those with

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ment's tax immunity. The Washington statute is no different from any other taxing scheme that switches the incidence of the tax from one party to a transaction to another when the party that would ordinarily be taxed is immune. In this respect, this case is no different from *Fresno* or *Detroit*.

whom it deals unless it treats someone else better than it treats them.[10]

The Court of Appeals thought that the Washington statutes do not provide a "political check against abuse of the taxing power," *Fresno*, *supra*, at 463, because "there is no broad state constituency taxed as are the prime contractors who deal with the federal government." 654 F. 2d, at 577. A "political check" is provided when a state tax falls on a significant group of state citizens who can be counted upon to use their votes to keep the State from raising the tax excessively, and thus placing an unfair burden on the Federal Government. It has been thought necessary because the United States does not have a direct voice in the state legislatures. See generally *Fresno*, *supra*, at 458–459, and n. 6.

The Court of Appeals focused only on the taxes levied directly on contractors, and not on "'the whole tax structure of the state.'" *Phillips*, 361 U. S., at 383 (quoting *Tradesmens*, 309 U. S., at 568). The tax on federal contractors is part of the same structure, and imposed at the same rate, as the tax on the transactions of private landowners and contractors. Indeed, the tax on contractors is part of a single sales tax scheme that is imposed at the same rate on every retail transaction in Washington; virtually every citizen is af-

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[10] In this respect, this case is like *United States* v. *Department of Revenue of Illinois*, 371 U. S. 21 (1962), summarily aff'g 202 F. Supp. 757 (ND Ill.). Illinois imposed a retail sales tax on the retailer and a tax in an identical amount on the purchaser. The State permitted the retailer to keep the tax he collected from the purchaser. Although retailers could not, of course, collect the tax from the United States when it purchased goods from them, they were nonetheless required to pay the tax imposed on them. Retailers who dealt with the United States were economically burdened by this taxing scheme unless they could adjust their prices to pass their tax burden on to the Federal Government. Nevertheless, this Court summarily affirmed the District Court's conclusion, *id.*, at 760, that such disparate treatment of taxpayers resulting from the United States' immunity from state taxation is not forbidden by the Supremacy Clause.

fected by the tax in the same way. As long as the tax imposed on those who deal with the Federal Government is an integral part of a tax system that applies to the entire State, there is little chance that the State will take advantage of the Federal Government by increasing the tax.[11]

In short, Washington has not singled out contractors who work for the United States for discriminatory treatment. It has merely accommodated for the fact that it may not impose a tax directly on the United States as the project owner. This the State may do without running afoul of the Supremacy Clause. As the Court stated in *United States* v. *New Mexico*, *supra*, at 737–738:

> "If the immunity of federal contractors is to be expanded beyond its narrow constitutional limits, it is Congress that must take responsibility for the decision, by so expressly providing as respects contracts in a particular form, or contracts under particular programs. *James* v. *Dravo Contracting Co.*, 302 U. S., at 161; *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232, 234 (1952). And this allocation of responsibility is wholly appropriate, for the political process is 'uniquely adapted to accommodating the competing demands' in this area. *Massachusetts* v. *United States*, 435 U. S. 444, 456 (1978) . . . . But absent congressional action, we have emphasized that the States' power to tax can be denied only under 'the clearest constitutional mandate.' *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276, 293 (1976)."[12]

The judgment of the Court of Appeals is

Reversed.

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[11] A different situation would be presented if a State imposed a sales tax on contractors who work for the Federal Government, and an entirely differrent kind of tax, such as a head tax or a payroll tax, on every other business. That, however, is not this case.

[12] We note that when Congress has acted in this field, it has applied a nondiscrimination rule. See, *e. g.*, *Memphis Bank & Trust Co.* v. *Garner*, 459 U. S. 392 (1983) (construing 31 U. S. C. § 742). If some other test of

JUSTICE BLACKMUN, with whom JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

The Court by its ruling in this case continues its recent tendency[1] to be sympathetic with States in their urgent quest for new taxes. In my view, however, the Court now oversteps the important and significant boundary that separates appropriate state taxation, having only an incidental effect on federal operations, from inappropriate state taxation that is imposed directly or indirectly upon the United States and is therefore invalid under the Supremacy Clause, Art. VI, cl. 2, of the United States Constitution. The State of Washington has sought to circumvent the United States' absolute constitutional immunity from state taxation. The District Court and the Court of Appeals in this litigation upheld the Federal Government's protest against the incursion and granted the United States declaratory and injunctive relief. This Court, by reversing that considered judgment, upholds Washington's circumvention.

I

The Supremacy Clause, of course, is the foundation of *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), where the Court laid down the principle that the property, functions, and instrumentalities of the Federal Government are immune from taxation by its constituent parts. Since *McCulloch*, the Court "has never questioned the propriety of absolute federal immunity from state taxation." *United States* v. *New Mexico*, 455 U. S. 720, 733 (1982). And "a State may not, consistent with the Supremacy Clause . . . lay a tax 'directly upon the United States,' *Mayo* v. *United States*, 319 U. S. 441, 447 (1943)." *Ibid.* Federal immunity is "the un-

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the validity of a state tax was necessary to protect the Federal Government, it would be reasonable to expect that Congress would, for at least some situation, have devised one.

[1] See, *e. g.*, *United States* v. *County of Fresno*, 429 U. S. 452 (1977); *United States* v. *New Mexico*, 455 U. S. 720 (1982). But compare *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, *post*, p. 575.

avoidable consequence of that supremacy which the constitution has declared." *McCulloch* v. *Maryland*, 4 Wheat., at 436.

An established corollary of this basic principle is that "a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals." *United States* v. *City of Detroit*, 355 U. S. 466, 473 (1958). Accord, *Memphis Bank & Trust Co.* v. *Garner*, 459 U. S. 392 (1983). Specifically, it "remains true . . . that state taxes on contractors are constitutionally invalid if they discriminate against the Federal Government, or substantially interfere with its activities." *United States* v. *New Mexico*, 455 U. S., at 735, n. 11. To be sure, "the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the State." *United States* v. *County of Fresno*, 429 U. S. 452, 462 (1977).

But here, contractors for the Federal Government are *singled out* for a special tax that applies to no other contractor within the State of Washington. A contractor who deals with the Federal Government is subject to the tax. One who deals with the State or a private party is not subject to the tax. It is as simple as that. It necessarily follows that the tax violates the Supremacy Clause, just as if the tax were laid directly upon the United States. To hold otherwise, by measuring the perceived economic burden, demeans the principle of *McCulloch* v. *Maryland*.

II

I agree with the Court that Washington's statutory provisions are best understood "in light of their history." *Ante*, at 538. But that history reveals, it seems to me, the clear purpose of the Washington Legislature to "get at" the Federal Government and to overcome its tax immunity. In contrast with the usual silence of legislative history behind

state enactments, the history here is clear and the purpose is specific.

A. Washington's sales and use taxes came into being in 1935. 1935 Wash. Laws, ch. 180. Under that original legislation, all building contractors were treated in precisely the same manner. Sales of tangible personal property to the contractor were subject to the retail sales tax, and use of tangible personal property by the contractor was subjected to the use tax if it had not first been subjected to the sales tax. There were no exceptions to this pattern. It applied to contractors who dealt with the Federal and State Governments, with local governments, and with private parties.

B. In 1941, however, a major change was effected in the State's system as it applied to contractors. The taxable transaction no longer was the sale *to* the contractor; instead, the taxable transaction became the sale *by* the contractor to the property owner. 1941 Wash. Laws, ch. 178, § 2. See *Klickitat County* v. *Jenner*, 15 Wash. 2d 373, 130 P. 2d 880 (1942). The sale of building items *to* the contractor then became a nontaxable wholesale transaction. This change, for purposes of the present case, had two important consequences. The first was that the State's sales tax base was expanded. Before 1941, it had included only property sold to the contractor. Now it included the contractor's total charge to the owner. This charge, of course, included not only the costs of material, but labor costs and the contractor's profit as well. The second consequence of the 1941 statute related to construction for the Federal Government. Here the tax base was diminished. Most sales of property *to* the contractor were immune because they were at wholesale. But the transaction between the contractor and the Federal Government also was immune because of the Government's vendee status and its constitutional immunity from a direct tax.

Clearly, this 1941 change in the statute was a knowing one. Washington accepted Federal Government immunity in exchange, as it were, for the substantial expansion of the sales

tax base for all other construction. Thus, from 1941 through the first half of 1975, no sales or use taxes were levied on nonroad construction projects on real property owned by the Federal Government in the State of Washington. This was the result of a considered choice by the legislature generally to enlarge its tax base.

C. This happy situation for federal construction projects in the State became the subject of the Washington Legislature's concern and disapproval in 1975. In an attempt to collect sales and use taxes with respect to material incorporated in building construction projects owned by the United States, the legislature redefined the terms "retail sale" and "consumer" in the State's sales and use tax statutes.[2] It is conceded that the target was specific and the change purposefully made to catch the burgeoning federal construction in the State. Brief for Appellants 6–8; Tr. of Oral Arg. 7. As a result, prime contractors performing construction work on real property owned by the United States now were required to pay sales and use taxes on material and personal property incorporated into such construction projects. In stark contrast, however, the 1975 legislation did not amend the State's sales and use tax laws so as to impose like obligations on contractors performing construction work on real property owned by the State or by private persons. With respect to these, any such taxes imposed continued to be the obligation of the particular project's owner. The enlargement of the tax base that had been effectuated in 1941 was thus preserved.

The consequence of the 1975 change is that prime contractors performing construction work in the State of Washington were divided into two separate and distinct categories. The first consisted of those performing construction work for the United States; these contractors now were liable for sales and use taxes on material incorporated in their projects.

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[2] See 1975 Wash. Laws, 1st Ex. Sess., ch. 90, and ch. 291, § 5, and 1975 Wash. Laws, 2d Ex. Sess., ch. 1.

The second consisted of prime contractors performing construction work for the State or a private person; these contractors were not liable for sales and use taxes with respect to material incorporated therein. Since the 1975 statutory change, the State has required prime contractors on United States construction projects to pay state sales and use taxes as "consumers" of material. But similarly situated prime contractors for the State and for private persons are not so taxed.

III

It is easy and convenient to argue, as the Court does, *ante*, at 540–542, that Washington imposes a sales tax on all purchases from contractors who do not deal with the Federal Government, that the tax rate is the same for everyone, and that the Federal Government is really better off than others because the tax consequence to it is a lesser amount inasmuch as the contractor's labor costs and markup are not included in the tax base. The latter alleged fact, as I shall endeavor to point out, is a glib and, in my view, unwarranted assumption.

Three cases, in particular, decided by this Court demand affirmance of the judgment of the Court of Appeals. The first is *Miller* v. *Milwaukee*, 272 U. S. 713 (1927). There the Court struck down a Wisconsin income tax provision that, similarly, sought to circumvent the tax immunity of the United States. It held unconstitutional the State's attempt to single out the income from corporation-owned Government bonds and to tax a fraction of corporate dividends equal to the fraction of the corporation's income derived from Government bonds. It was the selection of such income for tax, to the exclusion of other income, that was the basis of the decision. Justice Holmes, in speaking for the Court, stated:

> "A system of taxation that applied to stockholders of all corporations equally might tax . . . the stockholders of a corporation that had invested all its property in United States bonds. But it would be a different matter if the state selected such corporations . . . and taxed their

> stockholders alone. It is a familiar principle that conduct which in usual situations the law protects may become unlawful when part of a scheme to reach a prohibited result." *Id.*, at 714–715.

Such discriminatory selectivity is forbidden by the Constitution. This analysis was reaffirmed by a unanimous Court in *Phillips Chemical Co.* v. *Dumas Independent School Dist.*, 361 U. S. 376, 383 (1960), when it pronounced that *Miller* v. *Milwaukee* stands for the proposition that "a State may not single out those who deal with the Government, in one capacity or another, for a tax burden not imposed on others similarly situated."[3]

Phillips is the second case. It demonstrates that discrimination against the Federal Government need not be explicit in a State's statute to be prohibited by the Supremacy Clause. There, Texas legislation provided for taxation of private users of Government realty but the tax was less for property held under a lease for three years or more. Because a federal lease was subject to termination in the event of sale, the lessee could not qualify for the preferential tax treatment. Accordingly, the Court held the Texas statute unconstitutional. It said:

> "Here, Phillips is taxed . . . on the full value of the real property which it leases from the Federal Government, while businesses with similar leases, using exempt property owned by the State and its political subdivisions, are not taxed on their leaseholds at all. The differences . . . seem too impalpable to warrant such a gross differentiation. It follows that [the statute], as applied in this case, discriminates unconstitutionally against the United States and its lessee." 361 U. S., at 387.

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[3] *Miller* v. *Milwaukee* is not to be explained away, as the Court attempts to do, *ante*, at 542, n. 6, by intimating that later cases have cut back the holding in *Miller*. The quotation from *Miller*, set forth in the Court's footnote, appears on the same page of the *Phillips* opinion as the Court's more positive and specific statement of law I have quoted in the text.

The continuing validity of *Phillips* was recognized by a unanimous Court just a few weeks ago. *Memphis Bank & Trust Co.* v. *Garner*, 459 U. S., at 398. As the Court acknowledges, *ante*, at 542, the Texas tax was said to be invalid "because it imposed 'a heavier tax burden on lessees of federal property than is imposed on lessees of' state property." The reference to the comparative weight of the tax was not one to the rate but to the quantity of the property interest taxed. So it is here, for what the State of Washington taxes with respect to a federal building contractor is different from what it taxes with respect to any other building contractor. The holding and principle of *Phillips* are not so easily to be explained away.

The third case is *Moses Lake Homes, Inc.* v. *Grant County*, 365 U. S. 744 (1961). There the county attempted to tax the full value of improvements on privately owned Wherry Act leaseholds of housing developments on a military base. It taxed other leaseholds, however, including privately owned leaseholds of tax-exempt state lands, at a lower valuation. A unanimous Court held the tax unconstitutional and void, and it reversed the lower court's judgment to the effect that the Constitution required only that the amount collectible be reduced to the level of taxes upon other leaseholds. The Court today would distinguish *Moses Lake Homes* by saying merely that it "does not support the United States' position any more than the holding in *Phillips*." *Ante*, at 542–543, n. 7.

It seems to me that *Miller*, *Phillips*, and *Moses Lake Homes* all require the conclusion that the Washington tax under submission here is invalid as applied to contractors for the Federal Government. A State cannot single out the Federal Government and those with whom it deals for special tax burdens. For more than 30 years the State of Washington apparently remained content with the choice it made in its 1941 restructuring of its sales and use taxes to gain enhanced revenue from other sources at the price of sacrificing revenue from Federal Government contractors. A substan-

tial expansion of construction activity on behalf of the United States brought to the attention of the state legislature a prized target for increased state taxation. A statute singling out those who serve the United States was the result and equated with a tax on the United States itself.

The State asserts, and the Court appears to agree, *ante*, at 541–542 and 543, that so long as the monetary burden on Government contractors is no greater than the burden on others, the discrimination is constitutionally acceptable. It asserts, in other words, that the United States has no ground for complaint unless it is placed at a competitive disadvantage in the marketplace.

This conclusion is misguided as a matter of law. The decision in *Moses Lake Homes* establishes that the Supremacy Clause guarantees more than that the United States will not be placed at a competitive disadvantage, for there this Court reversed a ruling that would have resulted in *equal* tax burdens on federal and nonfederal lessees. The Supremacy Clause does not merely guarantee equality; it absolutely immunizes the contractors and lessees of the United States from discriminatory state taxation.

The Court's economic burden argument is also questionable as a matter of fact. That the incidence of the tax as applied to federal contractors does not include labor and profit components does not necessarily mean that the total costs to the contractors and hence to the United States are less than the total costs to a nonfederal contractor. Only the federal contractor is required, under Washington's system, to put out additional tax money "up front," as the project progresses, to maintain special records, to hire personnel for such recordkeeping, and to prepare and file returns. This is not inexpensive activity, and its costs could exceed what would have been the tax increment on the labor and profit components. The record does not disclose the facts.[4] In

[4] Additionally, the Court's assumption, *ante*, at 541–542, n. 4, that a federal contractor will be able to pass the tax through to the Federal Gov-

any event, those facts are inconsequential, for it is discrimination, not the quality of the burden, that carries unconstitutional consequences. It is "absolute federal immunity from state taxation" that this Court "has never questioned." *United States* v. *New Mexico*, 455 U. S., at 733.

The Court's reliance upon *United States* v. *County of Fresno*, 429 U. S. 452 (1977), deserves passing mention. There a possessory use tax was imposed solely on private citizens who used tax-exempt land. The individual appellants in that case were United States Forest Service employees who lived in federally owned houses. The Court concluded, however, that there was no discrimination, for the tax did not discriminate against the Forest Service or other federal employees. Indeed, the United States expressly abandoned any claim that the tax treated federal employees differently from state employees who lived in state-owned houses. *Id.*, at 464, n. 13.

Finally, it is of interest to note the Court's obvious discomfort in evaluating the relative burdens of different methods of taxation by States of the Federal Government and of those with whom it does business. In *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, also decided today, *post*, at 589–590, n. 12, the Court struggles with the problem of the economic incidence of a tax on the Federal Government. There it says that a State remains free to impose the economic incidence of a tax on the United States so long as that tax is not discriminatory, and it explains the

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ernment is highly suspect. First, the assumption hardly can be applied to a contract made prior to the 1975 legislation. A contractor trapped with such a contract has the burden of the tax; a private contractor is not at the same risk. Second, the Court seems to believe that a federal contractor has the same amount of bargaining power with the Federal Government as his private counterpart has with his contractual partner. I suspect that in most circumstances this is not correct. Under Washington's tax, a private contractor charges his client the amount of the state tax on top of the contract price; it is far from clear that a federal contractor is able to pass the tax on in the same way to the Federal Government.

result in this Washington case as a mere accommodation. This, the Court says, may "force us, within limits, . . . to compare the burdens of two different taxes." For me, that is a new approach to state taxation of the Federal Government, and it flies in the face of the Court's simultaneously expressed view that "courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation." *Post*, at 589; see *post*, at 600 (REHNQUIST, J., dissenting). I had thought this measure of state taxation of the Federal Government absolutely improper as a constitutional matter. *United States* v. *New Mexico*, 455 U. S., at 733. Now the Court, in order to prevent abuse, will have to dissect and carefully measure every state system that imposes its tax burden upon the United States.

I respectfully dissent.

ILLINOIS *v.* ABBOTT & ASSOCIATES, INC., ET AL.

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

No. 81–1114. Argued November 29, 1982—Decided March 29, 1983

Section 4F(a) of the Clayton Act, enacted in 1976, provides that whenever the Attorney General of the United States has brought an action under the federal antitrust laws and has reason to believe that any state attorney general would be entitled to bring an action under the Act based on substantially the same alleged violation, he shall give written notification to that official. Under § 4F(b), in order to assist a state attorney general in evaluating this notice or in bringing an action, the United States Attorney General upon the state attorney general's request must make available to him, "to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action" under the Act. After the Justice Department had refused the State of Illinois' request for certain grand jury materials involved in an investigation of alleged violations of the federal antitrust laws, the Attorney General of Illinois filed a petition in Federal District Court asserting a right of access to such materials, and contending that § 4F(b) made it unnecessary for him to meet the "particularized need" standard required under Federal Rule of Criminal Procedure 6(e). The District Court denied the petition, and the Court of Appeals affirmed.

Held: Section 4F(b) does not give the state attorney general a special right of access to grand jury materials that is independent of or modifies the limitations imposed by Rule 6(e). Pp. 565–573.

(a) Rule 6(e) establishes a "General Rule of Secrecy" by providing that grand jury transcripts shall remain in the custody of the attorney for the Federal Government "unless otherwise ordered by the court in a particular case." One seeking disclosure under Rule 6(e) is normally required to make a showing of a "particularized need" in order to obtain access to grand jury materials. Under that Rule, a state attorney general cannot obtain access to federal grand jury proceedings without federal-court approval, and such approval cannot be obtained merely by alleging that the materials are relevant to an actual or potential civil antitrust action. Accordingly, it follows from the language of § 4F(b) mandating disclosure of investigative files and other materials only "to

the extent permitted by law," that the Illinois Attorney General is not entitled to the disclosure sought in this case. Pp. 565–568.

(b) Section 4F(b)'s legislative history supports the conclusion that Congress intended the section to recognize the "General Rule of Secrecy" and did not intend to change applicable law concerning grand jury materials. Pp. 568–571.

(c) The Act's general goals of enhancing federal-state cooperation and encouraging more state lawsuits against price fixers are not sufficient to show that Congress intended to change existing rules of law, absent an affirmative expression of intent to do so. Pp. 572–573.

659 F. 2d 800, affirmed.

STEVENS, J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring opinion, in which O'CONNOR, J., joined., *post*, p. 573.

Thomas M. Genovese, Assistant Attorney General of Illinois, argued the cause for petitioner. With him on the briefs were *Tyrone C. Fahner*, Attorney General, and *Thomas J. DeMay* and *Thomas S. Malciauskas*, Assistant Attorneys General. *Richard G. Wilkins* argued the cause *pro hac vice* for the United States, respondent under this Court's Rule 19.6, in support of petitioner. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Baxter*, *Deputy Solicitor General Wallace*, and *Robert B. Nicholson.*

Michael B. Nash argued the cause for respondents and filed a brief for respondents Climatemp, Inc., et al. *Jerold S. Solovy*, *Barry Sullivan*, and *Thomas E. Lindley* filed a brief for respondents Abbott & Associates, Inc., et al. *Mark Crane* and *Wm. Carlisle Herbert* filed a brief for respondents Inland Heating & Air Conditioning Co. et al. *Arthur C. Chapman* filed a brief for undisclosed respondents.*

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*A brief of *amici curiae* urging reversal was filed for the State of Alabama et al. by *Stephen H. Sachs*, Attorney General of Maryland, and *Charles O. Monk II* and *Robert W. Hesselbacher, Jr.*, Assistant Attorneys General; *Charles A. Graddick*, Attorney General of Alabama, and *Susan Beth Farmer*, Assistant Attorney General; *Wilson L. Condon*, Attorney General of Alaska, and *Louise E. Ma*, Assistant Attorney General; *Robert*

JUSTICE STEVENS delivered the opinion of the Court.

The Attorney General of Illinois asserts a statutory right of access to transcripts, documents, and other materials gath-

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K. Corbin, Attorney General of Arizona; *Steve Clark*, Attorney General of Arkansas, and *David L. Williams*, Deputy Attorney General; *George Deukmejian*, Attorney General of California, *Sanford N. Gruskin*, Assistant Attorney General, and *Linda L. Tedeschi*, Deputy Attorney General; *J. D. MacFarlane*, Attorney General of Colorado, and *Thomas P. McMahon*, Assistant Attorney General; *Carl R. Ajello*, Attorney General of Connecticut, and *Robert M. Langer* and *Steven M. Rutstein*, Assistant Attorneys General; *Richard S. Gebelein*, Attorney General of Delaware, and *Vincent M. Amberly*, Deputy Attorney General; *Judith Rogers*, Corporation Counsel of the District of Columbia, *Charles Reischel*, Deputy Corporation Counsel, and *Timothy J. Shearer*, Assistant Corporation Counsel; *Jim Smith*, Attorney General of Florida, and *Bill L. Bryant, Jr.*, Assistant Attorney General; *Tany S. Hong*, Attorney General of Hawaii, and *Sonia Faust*, Deputy Attorney General; *Linley E. Pearson*, Attorney General of Indiana, and *Frank A. Baldwin*, Assistant Attorney General; *Thomas J. Miller*, Attorney General of Iowa, and *John R. Perkins*, Assistant Attorney General; *Robert T. Stephan*, Attorney General of Kansas, and *Wayne E. Hundley*, Deputy Attorney General; *Steven L. Beshear*, Attorney General of Kentucky, and *James M. Ringo*, Assistant Attorney General; *William J. Guste, Jr.*, Attorney General of Louisiana, and *John R. Flowers, Jr.*, Assistant Attorney General; *James E. Tierney*, Attorney General of Maine, and *Cheryl Harrington*, Senior Assistant Attorney General; *Francis X. Bellotti*, Attorney General of Massachusetts, and *Alan L. Kovacs*, Assistant Attorney General; *Frank J. Kelley*, Attorney General of Michigan, and *Edwin M. Bladen*, Assistant Attorney General; *Warren Spannaus*, Attorney General of Minnesota, and *Stephen P. Kilgriff*, Special Assistant Attorney General; *Bill Allain*, Attorney General of Mississippi, and *Robert E. Sanders*, Special Assistant Attorney General; *John Ashcroft*, Attorney General of Missouri, and *William Newcomb*, Assistant Attorney General; *Mike Greely*, Attorney General of Montana, and *Jerome J. Cate; Paul L. Douglas*, Attorney General of Nebraska, and *Dale A. Comer*, Assistant Attorney General; *Richard H. Bryan*, Attorney General of Nevada, and *Don Christensen*, Deputy Attorney General; *Gregory H. Smith*, Attorney General of New Hampshire, and *Edward E. Lawson; James R. Zazzali*, Attorney General of New Jersey, *Charles D. Sapienza*, and *Laurel A. Price*, Deputy Attorney General; *Jeff Bingaman*, Attorney General of New Mexico, and *James J. Wechsler*, Assistant Attorney General; *Rufus L. Edmisten*, Attorney General of North Carolina,

ered or generated by two federal grand juries during their investigations of alleged violations of the federal antitrust laws. He contends that § 4F(b) of the Clayton Act, 90 Stat. 1395, 15 U. S. C. § 15f(b), enacted as part of Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Act), makes it unnecessary for him to meet the "particularized need" standard generally required under Rule 6(e) of the Federal Rules of Criminal Procedure in order to obtain access to grand jury materials. Disagreeing with two other

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H. A. Cole, Jr., Special Deputy Attorney General, and *Fred R. Gamin*, Assistant Attorney General; *Robert O. Wefald*, Attorney General of North Dakota, and *Gary Lee*, Assistant Attorney General; *William J. Brown*, Attorney General of Ohio, and *Eugene F. McShane; Jan Eric Cartwright*, Attorney General of Oklahoma, and *Gary Gardenhire*, Assistant Attorney General; *Dave Frohnmayer*, Attorney General of Oregon, and *William F. Gary*, Solicitor General; *Dennis J. Roberts II*, Attorney General of Rhode Island, and *Patrick J. Quinlan*, Assistant Attorney General; *Daniel R. McLeod*, Attorney General of South Carolina, and *John M. Cox*, Assistant Attorney General; *Mark V. Meierhenry*, Attorney General of South Dakota, and *Dennis R. Holmes*, Assistant Attorney General; *William M. Leech, Jr.*, Attorney General of Tennessee, and *William J. Haynes, Jr.*, Deputy Attorney General; *Mark White*, Attorney General of Texas, and *Katie Bond*, Assistant Attorney General; *David L. Wilkinson*, Attorney General of Utah, and *Mark K. Buchi*, Assistant Attorney General; *John J. Easton, Jr.*, Attorney General of Vermont, and *Glenn A. Jarrett*, Assistant Attorney General; *Gerald L. Baliles*, Attorney General of Virginia, *Elizabeth B. Lacy*, Deputy Attorney General, and *Bertram M. Long* and *Craig T. Merritt*, Assistant Attorneys General; *Kenneth O. Eikenberry*, Attorney General of Washington, and *John R. Ellis*, Senior Assistant Attorney General; *Chauncey H. Browning*, Attorney General of West Virginia, and *Charles G. Brown*, Deputy Attorney General; *Bronson C. La Follette*, Attorney General of Wisconsin, and *Michael L. Zaleski*, Assistant Attorney General; and *Steven F. Freudenthal*, Attorney General of Wyoming, and *Gay Vanderpoel*, Assistant Attorney General.

Arthur M. Handler filed a brief for Cuisinarts, Inc., as *amicus curiae* urging affirmance.

Dee J. Kelly, Reese Harrison, Robert Travis, Frank McCown, Stanley E. Neely, Wilson W. Herndon, Timothy R. McCormick, and *Michael P. Carnes* filed a brief for certain appellants in In re Grand Jury Proceedings as *amici curiae*.

Courts of Appeals,[1] the Seventh Circuit rejected this contention. We granted certiorari to resolve the conflict, 455 U. S. 1015 (1982), and now affirm.

I

On January 31, 1980, the State of Illinois filed a petition in the United States District Court for the Northern District of Illinois seeking disclosure of transcripts and documents generated during two federal grand jury investigations of alleged bid-rigging in the construction trades in Illinois. These investigations had resulted in the return of three separate indictments naming 59 defendants.[2] At the time the State filed its petition, most of the defendants had entered pleas of *nolo contendere* to the federal charges and one had been found guilty by a jury, but eight defendants were still awaiting trial.[3] The Justice Department had refused the State's request for the grand jury materials,[4] explaining that they

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[1] *United States* v. *Colonial Chevrolet Corp.*, 629 F. 2d 943 (CA4 1980) (placing the burden of justifying nondisclosure on the opposing party), cert. denied, 450 U. S. 913 (1981); and *United States* v. *B. F. Goodrich Co.*, 619 F. 2d 798 (CA9 1980) (allowing disclosure on a showing of "relevance"). Contra, *In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F. 2d 24 (CA2 1981) (§ 4F(b) did not change the standard of "particularized need" for state attorneys general), cert. pending, No. 81–1595.

[2] In June 1978, 18 corporations, 13 individuals, and a labor union were charged with conspiring to rig bids on public sheet metal projects in the Chicago area. *United States* v. *Climatemp, Inc.*, 78 CR 388 (ND Ill.) On January 31, 1979, 21 corporations and 6 individuals were indicted for conspiring to rig bids on piping construction projects in the same area. *United States* v. *Borg, Inc.*, 79 CR 67 (ND Ill.) (felony); *United States* v. *S. J. Reynolds Co., Inc.*, 79 CR 66 (ND Ill.) (misdemeanor).

[3] The State's memorandum in support of its petition, filed on January 31, 1980, advised the court that eight defendants were scheduled to begin trial on February 4, 1980. Four of these were subsequently acquitted. On request of the Justice Department, the State held its petition in abeyance pending completion of the trial.

[4] App. 4 (Justice Department notice to the Attorney General of Illinois that indictments had been returned); *id.*, at 5, 7 (state requests for investigative materials relating to the indictments). In response, the Justice Department furnished 19 pages of staff memoranda. It advised the State

could not be disclosed without a court order under Rule 6(e) of the Federal Rules of Criminal Procedure.[5]

The State advised the District Court that it had already initiated civil class actions against 86 defendants, charged in the indictments or identified as unindicted co-conspirators, to recover damages based on federal antitrust violations. The State's petition invoked § 4F(b)[6] and Rule 6(e) in support of

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that, with respect to other materials within the scope of the State's request, the Department would support the State's request for court-ordered disclosure. *Id.*, at 9–10.

[5] Rule 6(e) provides, in part:

"Rule 6. *The Grand Jury*

. . . . . .

"(e) Recording and Disclosure of Proceedings.

"(1) *Recording of proceedings.* . . . The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

"(2) *General rule of secrecy.* A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. . . . A knowing violation of Rule 6 may be punished as a contempt of court.

"(3) *Exceptions.*

. . . . . .

"(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

"(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

"(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

"If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct."

[6] Section 4F of the Clayton Act, as added, 90 Stat. 1395, 15 U. S. C. § 15f, provides:

"(a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any

disclosure. It further stated that "the materials requested are extremely relevant and material to Plaintiff's causes; their disclosure will insure and promote efficient and economical utilization of scarce judicial and taxpayers resources, and will also obviate the need for duplicative and redundant discovery . . . ." App. 13. The Department of Justice supported the State's petition.[7] Certain defendants in the civil suits and others who had testified before the grand juries intervened to oppose disclosure.

The District Court first considered the State's claim that it had a statutory right of access under § 4F(b) without making any showing of compelling or particularized need. The court concluded that, in response to a § 4F(b) request, the Justice Department was free to disclose documents that were independently acquired by the Executive Branch and voluntarily presented to the grand jury. But it held that transcripts of grand jury testimony and other materials acquired by the grand jury through the use of its subpoena power were not part of the "investigative files" of the Attorney General of the United States within the meaning of the Act. Moreover, the court found nothing in the legislative history of the Act to suggest that Congress intended either to authorize "unmon-

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State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.

"(b) To assist a State attorney general in evaluating the notice or in bringing any action under this Act, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under this Act."

[7] Similar petitions were filed on behalf of other parties, including local governmental entities and private persons, who had also filed treble-damages actions against the defendants. The Justice Department took no position with regard to these petitions. The District Court consolidated the various petitions for purposes of argument and decision.

itored disclosure of purely grand jury materials" without a court order under Rule 6(e), or to modify the standard traditionally applied under Rule 6(e) itself.

The District Court then explained why the record as then developed would not justify disclosure under Rule 6(e) without reference to § 4F(b). Noting the absence of any special showing of need for access to the grand jury materials, the scope of the material otherwise available to the plaintiffs, and the interests in grand jury secrecy that survived the termination of criminal proceedings,[8] the District Court denied all of the petitions for disclosure. The denial, however, was without prejudice to renewed requests under Rule 6(e) after discovery efforts created a basis for more narrowly focused requests showing "particularized needs."[9]

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[8] "Petitioners have simply requested the release to them of all of the grand jury material. In their quest for information grand juries often acquire reams of documents and hours of testimony later to be found irrelevant to the investigation or the final charge. Its wholesale disclosure could be embarrassing, if not destructive of third parties or of unindicted individuals and corporations concerned when witnesses are called upon to testify or furnish evidence which involves them. This is one of the principal reasons why grand jurors are sworn to secrecy. It is the duty of the court in following 6(e) to protect from public scrutiny and injury such individuals and corporations. Petitioners after having done little more than filing a suit, seek an all-encompassing, unparticularized general type of full disclosure which by the very nature of the request would defeat the spirit and rule of *Procter & Gamble* and *Douglas Oil* [*United States* v. *Procter & Gamble Co.*, 356 U. S. 677 (1958); *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U. S. 211 (1979)]. Their request offends the common-law concern for the traditional protection of the innocent that has been built into our grand jury system from its earliest conception." App. to Pet. for Cert. 37a–38a.

These comments carry special weight because they were made by the Chief Judge of a large metropolitan District, who had acquired a unique familiarity with the problems associated with the supervision of the conduct of grand juries.

[9] Because the District Court's order finally disposed of the State Attorney General's claim of a statutory right of access to grand jury materials without a showing of particularized need, we are satisfied that the order was appealable under 28 U. S. C. § 1291. The court's acknowledgment

The State of Illinois filed a timely appeal to the United States Court of Appeals for the Seventh Circuit. On appeal the State did not contend that its petition had satisfied the showing of particularized need normally required under Rule 6(e). Instead, it presented the issue that had been finally resolved by the District Court's order: whether § 4F(b) gives the state attorney general a special right of access to grand jury materials that is independent of or that modifies the limitations that were imposed by Rule 6(e) in 1976 when the Act became law. Noting that the plain language of the Act authorizes disclosure only "to the extent permitted by law," and that the legislative history affirmatively indicates Congress' intent to preserve then-existing limitations on access to grand jury materials, the Court of Appeals affirmed. *In re Illinois Petition to Inspect and Copy Grand Jury Materials*, 659 F. 2d 800 (1981).

II

Section 4F(a) of the Clayton Act, 15 U. S. C. § 15f(a), provides that, whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any state attorney general would be entitled to bring a federal action based substantially on the same alleged violation, he shall promptly give written notification to that official. Under § 4F(b), 15 U. S. C. § 15f(b), in order to assist a state attorney general in evaluating this

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that the State might subsequently seek disclosure of particular materials under a "particularized need" standard does not deprive the order of finality. The ruling at issue in this case was made by the Chief Judge of the Northern District of Illinois in a separately docketed proceeding, see App. to Pet. for Cert. 40a; the opinion contemplates that further disclosure requests would be filed with the District Judges presiding over the State's civil antitrust actions, *id.*, at 39a. See *Illinois* v. *Sarbaugh*, 552 F. 2d 768, 773–774 (CA7 1977); cf. *Douglas Oil Co.* v. *Petrol Stops Northwest*, *supra*, at 231–233 (REHNQUIST, J., concurring) (the District Court's order granting access to grand jury minutes "disposes of all of the contentions of the parties and terminates a separate proceeding pending before the grand jury court" and is therefore appealable as a "final decisio[n]" under 28 U. S. C. § 1291).

notice or in bringing an action, the Attorney General of the United States "shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under this Act."

The plain language of § 4F(b) requires us to evaluate the legal context in which Congress legislated in 1976. The statute expressly mandates disclosure of investigative files and other materials only "to the extent permitted by law." It is therefore appropriate to examine the extent to which, at the time the Act was passed, federal law permitted the Attorney General of the United States to disclose matters occurring before a federal grand jury to a state attorney general.[10]

Since 1946 the disclosure of grand jury minutes has been governed by Rule 6(e) of the Federal Rules of Criminal Procedure. In so many words, the Rule establishes a "General Rule of Secrecy," a knowing violation of which "may be punished as a contempt of court."[11] The Rule provides that

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[10] The parties have briefed and argued, as a separate question, whether grand jury files are included in the "investigative files or other materials" covered by § 4F(b). Respondents suggest that, because the section imposes upon the Attorney General an automatic and mandatory obligation to disclose the materials to which it does apply, it simply does not apply to grand jury materials—which can be disclosed only if authorized by a court. Given our reading of the statute's proviso that disclosure shall be made "to the extent permitted by law," we do not need to address this question separately.

[11] See Rule 6(e)(2), quoted in n. 5, *supra*. The General Rule of Secrecy codifies a longstanding rule of common law which we have recognized as "an integral part of our criminal justice system." *Douglas Oil Co.* v. *Petrol Stops Northwest*, *supra*, at 218, n. 9. Several distinct interests are served by safeguarding the confidentiality of grand jury proceedings. See 441 U. S., at 219, and n. 10. Even after the conclusion of a particular grand jury's investigation, continued secrecy protects the reputations of the innocent and safeguards witnesses from possible retaliation. In addition, stringent protection of the secrecy of completed grand jury investigations may be necessary to encourage persons to testify fully and freely before future grand juries. *Id.*, at 222. More generally, grand jury secrecy has

grand jury transcripts shall remain in the custody of the attorney for the Government "unless otherwise ordered by the court in a particular case."[12] There is only one exception to the general prohibition against disclosure without prior court approval, but that exception is limited to Federal Government personnel performing a specified federal law enforcement function.[13] Plainly Rule 6(e) does not permit the Attorney General of the United States to disclose any grand jury proceedings to a state attorney general unless he is directed to do so by a court.

The court, however, is authorized by Rule 6(e)(3)(C) to permit certain disclosures that are otherwise prohibited by the "General Rule of Secrecy." The scope of that authority has been delineated in a series of cases setting forth the standard of "particularized need."[14] We need not delineate the precise contours of that standard in this case, because the State made no attempt to make any such showing in the District Court, see n. 8, *supra*, and has consistently maintained that it need not shoulder that burden.[15]

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traditionally been invoked to justify the limited procedural safeguards available to witnesses and persons under investigation.

[12] Rule 6(e)(1).

[13] Rule 6(e)(3)(A)–(B).

[14] See *Douglas Oil Co.*, 441 U. S., at 221–224. "Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed." *Id.*, at 222 (footnote omitted); see also *United States* v. *Procter & Gamble Co.*, 356 U. S., at 682; *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395, 398–399 (1959); cf. *Dennis* v. *United States*, 384 U. S. 855 (1966).

[15] The State's petition sought *all* materials gathered or generated by the grand jury investigations. In this Court, the State concedes that the district court may properly exercise its discretion to determine whether to disclose the requested materials, but it proposes "a standard less restrictive than particularized need." See Brief for Petitioner 30–33, 42–43. Under this standard the district court would determine whether disclosure would undermine an ongoing or potential federal enforcement proceeding and whether countervailing interests require secrecy, and it could impose

Thus, under the law as it existed in 1976, two propositions were clear: (1) a state attorney general could not obtain access to federal grand jury proceedings without federal court approval; and (2) the State could not secure such approval merely by alleging that the materials were relevant to an actual or potential civil antitrust action.[16] At the time the Act was passed in 1976, a blanket disclosure request comparable to the one at issue in this case would have been denied because it was not permitted by law. The State does not suggest that there has been any change in the law since 1976 that affects its right to disclosure.[17] It therefore follows from the plain language of the Act that the State Attorney General is not entitled to the disclosure he seeks in this case.

III

If the text of § 4F(b) left any doubt concerning its recognition of the "General Rule of Secrecy" for grand jury materi-

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appropriate protective limitations upon disclosure. *Ibid.* The United States, as respondent under this Court's Rule 19.6, in support of petitioner proposes a similar test. See Brief for United States 24–28. However such a standard might be formulated, it differs from the "particularized need" standard, which is expressly preserved by § 4F(b). But in rejecting such a rule, we stress that under the particularized-need standard, the district court may weigh the public interest, if any, served by disclosure to a governmental body—along with the requisite particularized need—in determining whether "the need for disclosure is greater than the need for continued secrecy." *Douglas Oil Co., supra*, at 222.

[16] The State does not directly argue that, apart from § 4F(b), the law permits it to obtain grand jury materials without a showing of particularized need. At oral argument the Assistant Attorney General expressed uncertainty regarding the legal standard that would apply in the absence of § 4F(b). Tr. of Oral Arg. 10. Cf. Brief for United States 15, n. 10 (expressing no opinion on the standard applicable to State requests for grand jury materials in the absence of § 4F(b)).

[17] Although we examine the law in 1976 as an aid to interpreting the intent of the Congress that enacted § 4F(b), the terms of the Act would, of course, be satisfied if a requested disclosure is "permitted by law" at the time the request is made.

als, that doubt would be removed by its legislative history. First, Congress considered and rejected a proposed section that would have specifically granted civil antitrust plaintiffs a right of access to grand jury materials after completion of federal civil or criminal proceedings. As reported by the Senate Judiciary Committee, the provision eliminated the particularized-need requirement and permitted disclosure, subject to court-imposed conditions, upon payment of reasonable costs.[18] The proposed sweeping invasion of grand jury secrecy drew substantial criticism from a number of Senators.[19] A floor amendment limited the section's scope, and as amended it was adopted by the Senate,[20] but at the informal House-Senate conference the House conferees objected and the Senate's provision was dropped.[21] The net effect of these

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[18] See S. Rep. No. 94–803, pp. 4, 33–35, 128, 152 (1976) (§ 202(*l*) of S. 1284). The Senate Judiciary Committee bill also authorized the Attorney General to give the Federal Trade Commission access to these grand jury materials. *Id.*, at 31–32 (§ 202(k)).

[19] See, *e. g.*, *id.*, at 203–204 (minority views of five members of Judiciary Committee); 122 Cong. Rec. 15318 (1976) (Sen. Thurmond); *id.*, at 15835 (Sen. Allen); *id.*, at 17428–17431 (Sen. Tower). The proposal was also opposed by the administration. *Id.*, at 17038.

One of the leading opponents of § 212(*l*), Senator Allen, introduced a substitute amendment, defeated by the Senate, which was virtually identical in wording to the section in the House bill that was later enacted into law as § 4F(b). See *id.*, at 15852–15853, 16824–16825, 17194. Senator Allen's support of this provision, coupled with his strong opposition to § 212(*l*), indicates that § 4F(b) was not intended to abrogate traditional protections of grand jury secrecy.

[20] The amendment limited disclosure to cases in which a defendant had entered a plea of guilty or *nolo contendere*, and permitted only the disclosure of material provided by that defendant, not by third parties. *Id.*, at 15917–15918, 16922-16923. Amended § 202(*l*) was part of the bill adopted by the Senate on June 10, 1976. *Id.*, at 17572.

[21] *Id.*, at 29147. After the conference, Senator Abourezk, the Senate floor manager of the bill, prepared a chart comparing the Senate and House versions. The chart showed that S. 1284 gave private plaintiffs and the FTC access to grand jury materials, and that the House version had no

deliberations was to leave the law applicable to grand jury materials unchanged.

Second, a specific explanation of § 4F(b) by Senator Abourezk, the floor manager of the legislation, confirms the conclusion that Congress did not intend to change existing law concerning grand jury materials. The section was included in the compromise bill accepted by an informal House-Senate conference. After Senator Hruska expressed his concern that § 4F(b) might require the Department of Justice to act as "a massive document distribution center for the benefit of State officials,"[22] Senator Abourezk explained:

> "The section specifically limits the Attorney General's power to release documents to whatever his powers are under existing law. Under existing law, he cannot turn over materials given in response to a grand jury demand or to a civil investigative demand. Therefore, the section is limited by existing law to cases where materials were turned over voluntarily." 122 Cong. Rec. 29160 (1976).

Senator Abourezk's interpretation of this provision was not questioned.[23]

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comparable provisions. In another section it stated that the House bill provided that state attorneys general may obtain investigative files or other materials from the United States Attorney General "to the extent permitted by law," and noted that the Senate bill had no such provision. See *id.*, at 29151–29152. The chart's structure and wording strongly suggest that § 4F(b) did not contemplate disclosure of grand jury materials to state attorneys general.

[22] *Id.*, at 29144.

[23] This statement in floor debate is consistent with language in a House Committee Report on an earlier version of the statute, which explains that the Justice Department's investigative files "are to be made available except where specifically prohibited." H. R. Rep. No. 94–499, p. 17 (1975). This language merely paraphrases the plain language of the statute; Rule 6(e) quite specifically prohibits disclosure of grand jury documents save under specified conditions.

Third, the Act's treatment of material obtained by the Government in response to Civil Investigative Demands (CID's) supports our interpretation of § 4F(b). The Act increases the Attorney General's CID powers,[24] but mandates that materials obtained in this manner be kept strictly confidential. CID materials may not be disclosed to persons outside the Federal Government without the consent of the provider. 15 U. S. C. § 1313 (1976 ed. and Supp. V). This requirement was imposed to safeguard the rights of individuals under investigation and to protect witnesses from retaliation.[25] Since those reasons also underlie the traditional secrecy accorded to the grand jury, it would be anomalous for the same Congress that placed stringent limits on CID materials silently to have abrogated grand jury secrecy by permitting wholesale disclosure.[26]

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[24] Limited CID authority was conferred upon the Attorney General by the Antitrust Civil Process Act of 1962, Pub. L. 87–664, 76 Stat. 548. The Attorney General's powers were considerably expanded by Title I of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, codified at 15 U. S. C. § 1311 *et seq.* (1976 ed. and Supp. V).

[25] See H. R. Rep. No. 94–1343, pp. 3, 8, 18 (1976); S. Rep. No. 94–803, *supra* n. 18, at 30–31; 122 Cong. Rec. 29341 (1976) (explanation of House-Senate compromise bill by Sen. Hart).

[26] Indeed, the House Report explains the Justice Department's need for increased CID powers by canvassing the inadequacy of each alternative, including grand jury investigations, for civil enforcement purposes.

"The Division might try to empanel a grand jury, as it currently does in criminal antitrust investigations, and use the sweeping, compulsory powers of that investigative body to unearth evidence of civil violations. But the U. S. Supreme Court has virtually eliminated the Antitrust Division's power to utilize the grand jury as a civil investigative tool. In *United States* v. *Procter & Gamble*, 356 U. S. 677 (1958), Justice Douglas concluded that 'if the prosecution were using . . . criminal procedures to elicit evidence in a civil case, it would be flouting the policy of the law.' That is because such a use of the grand jury would subvert the Division's policy of proceeding criminally only against flagrant, willful offenses, and would debase the law 'by tarring respectable citizens with the brush of crime when their deeds involve no criminality.'" H. R. Rep. No. 94–1343, *supra*, at 5.

IV

Finally, the State argues that the Act implements a general policy of encouraging federal/state cooperation and giving state attorneys general an important role in the enforcement of the antitrust laws. According to the State, this broad legislative goal would be served by facilitating the State's access to grand jury materials. The State contends that virtually all of the Federal Government's investigations of core Sherman Act violations—such as price fixing and bid rigging—are conducted from the outset by means of grand juries.[27] Therefore, as in this case, a narrow reading of § 4F(b) would severely limit the amount of additional disclosure to state attorneys general. Further, the State asserts, a "particularized need" standard would be difficult to satisfy before a State has filed a civil action and attempted civil discovery—a stage when § 4F(b) is intended to provide assistance to the State.

However correct these assertions may be, they do not authorize us to add specific language that Congress did not include in a carefully considered statute. Congress, of course, has the power to modify the rule of secrecy by changing the showing of need required for particular categories of litigants.[28] But the rule is so important, and so deeply rooted in our traditions, that we will not infer that Congress has exer-

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[27] Brief for Petitioner 14–15.

Although the State cites passages from hearings to show that Congress was aware of the Justice Department's use of the grand jury, *id.*, at 16, n. 4, these passages stressed that grand jury investigations were of limited usefulness in civil enforcement and urged the adoption of strengthened CID powers.

[28] Congress has, on occasion, done precisely that. In 1966 it approved amendments to Rule 16 that gave defendants a right to obtain copies of their prior statements before grand juries; Fed. Rule Crim. Proc. 16(a)(1)(A). In 1977, it amended Rule 6(e) to permit disclosure of grand jury materials to personnel assisting United States Government attorneys in the enforcement of federal criminal law. Fed. Rule Crim. Proc. 6(e)(3)(A). See also 18 U. S. C. § 3500(e)(3) (Jencks Act).

cised such a power without affirmatively expressing its intent to do so. The general goals of enhancing federal-state cooperation in antitrust enforcement, and encouraging more state lawsuits against price fixers, are not sufficient.[29] The statute as enacted by Congress simply does not authorize the Attorney General to turn over the entire investigative record of a federal antitrust grand jury to a state attorney general who has not complied with the judicially developed standards implementing Rule 6(e). Because the disclosure requested by the State in this case is not permitted by Rule 6(e) on the basis of the showing it made to the District Court, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE O'CONNOR joins, concurring.

I join in the Court's opinion. I write separately to state my view that when a district court considers "the public interest, if any, served by disclosure to a governmental body," *ante*, at 568, n. 15, that consideration may properly include consideration of a specific statutory policy favoring disclosure in particular circumstances. In this case, the district court would have before it the specific provisions of § 4F(b) of the

[29] The 1976 legislation was designed to enhance the effectiveness of antitrust enforcement on behalf of small consumers. The availability of information to antitrust plaintiffs, however, was not at the forefront of legislative deliberations. Congress focused on the difficulty of achieving class certification of consumer actions under Rule 23 of the Federal Rules of Civil Procedure and the complexity of measuring and distributing damages in such cases. See generally H. R. Rep. No. 94–499, *supra* n. 23, at 3–8; S. Rep. No. 94–803, *supra* n. 18, at 6–7, 39–40. To remedy these problems, the 1976 statute permits state attorneys general the right to institute *parens patriae* suits on behalf of state residents, 15 U. S. C. § 15c; exempts such suits from the class-action requirements of Rule 23, § 15c(a); and allows damages in these suits to be computed through aggregation techniques, § 15d. Therefore the State exaggerates when it asserts that the 1976 Act's purposes would be frustrated if Rule 6(e) continued to be applied to state requests for access to grand jury materials.

Clayton Act. I agree with the Court that § 4F(b) does not relieve a State of the requirement that it show particularized need under Rule 6(e) and *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U. S. 211 (1979); but it does not follow that § 4F(b) is irrelevant to the *Douglas Oil* balancing test. When the district court has before it a statute clearly evincing Congress' intent to foster cooperation with and disclosure to state governments to aid them in enforcement of federal antitrust laws, that is surely material to the public interest served by disclosure to such governments.

MINNEAPOLIS STAR & TRIBUNE CO. *v.* MINNESOTA COMMISSIONER OF REVENUE

APPEAL FROM THE SUPREME COURT OF MINNESOTA

No. 81–1839. Argued January 12, 1983—Decided March 29, 1983

While exempting periodic publications from its general sales and use tax, Minnesota imposes a "use tax" on the cost of paper and ink products consumed in the production of such a publication, but exempts the first $100,000 worth of paper and ink consumed in any calendar year. Appellant newspaper publisher brought an action seeking a refund of the ink and paper use taxes it had paid during certain years, contending that the tax violates, *inter alia*, the guarantee of the freedom of the press in the First Amendment. The Minnesota Supreme Court upheld the tax.

Held: The tax in question violates the First Amendment. Pp. 579–593.

(a) There is no legislative history, and no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the Minnesota Legislature in enacting the tax. *Grosjean* v. *American Press Co.*, 297 U. S. 233, distinguished. Pp. 579–580.

(b) But by creating the special use tax, which is without parallel in the State's tax scheme, Minnesota has singled out the press for special treatment. When a State so singles out the press, the political constraints that prevent a legislature from imposing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, thus undercutting the basic assumption of our political system that the press will often serve as an important restraint on government. Moreover, differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such goal is presumptively unconstitutional. Differential treatment of the press, then, places such a burden on the interests protected by the First Amendment that such treatment cannot be countenanced unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation. Pp. 581–585.

(c) Minnesota has offered no adequate justification for the special treatment of newspapers. Its interest in raising revenue, standing alone, cannot justify such treatment, for the alternative means of taxing businesses generally is clearly available. And the State has offered no explanation of why it chose to use a substitute for the sales tax rather

than the sales tax itself. A rule that would automatically allow the State to single out the press for a different method of taxation as long as the effective burden is no different from that on other taxpayers or, as Minnesota asserts here, is lighter than that on other businesses, is to be avoided. The possibility of error inherent in such a rule poses too great a threat to concerns at the heart of the First Amendment. Pp. 586–590.

(d) Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers. The effect of the $100,000 exemption is that only a handful of publishers in the State pay any tax at all, and even fewer pay any significant amount of tax. To recognize a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme. Pp. 591–592.

314 N. W. 2d 201, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, POWELL, and STEVENS, JJ., joined, in Part V of which WHITE, J., joined, and in all but footnote 12 of which BLACKMUN, J., joined. WHITE, J., filed an opinion concurring in part and dissenting in part, *post*, p. 593. REHNQUIST, J., filed a dissenting opinion, *post*, p. 596.

Lawrence C. Brown argued the cause for appellant. With him on the briefs were *John D. French*, *John P. Borger*, and *Norton L. Armour*.

Paul R. Kempainen, Special Assistant Attorney General of Minnesota, argued the cause for appellee. With him on the brief was *Warren Spannaus*, Attorney General.*

JUSTICE O'CONNOR delivered the opinion of the Court.†

This case presents the question of a State's power to impose a special tax on the press and, by enacting exemptions, to limit its effect to only a few newspapers.

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*Briefs of *amici curiae* urging reversal were filed by *Peter W. Schroth* and *Charles S. Sims* for the American Civil Liberties Union et al.; and by *Philip A. Lacovara*, *W. Terry Maguire*, and *Pamela J. Riley* for Knight-Ridder Newspapers, Inc., et al.

†JUSTICE BLACKMUN joins this opinion except footnote 12.

I

Since 1967, Minnesota has imposed a sales tax on most sales of goods for a price in excess of a nominal sum.[1] Act of June 1, 1967, ch. 32, Art. XIII, § 2, 1967 Minn. Laws 2143, 2179, codified at Minn. Stat. § 297A.02 (1982). In general, the tax applies only to retail sales. *Ibid.* An exemption for industrial and agricultural users shields from the tax sales of components to be used in the production of goods that will themselves be sold at retail. § 297A.25(1)(h). As part of this general system of taxation and in support of the sales tax, see Minn. Code of Agency Rules, Tax S & U 300 (1979), Minnesota also enacted a tax on the "privilege of using, storing or consuming in Minnesota tangible personal property." This use tax applies to any nonexempt tangible personal property unless the sales tax was paid on the sales price. Minn. Stat. § 297A.14 (1982). Like the classic use tax, this use tax protects the State's sales tax by eliminating the residents' incentive to travel to States with lower sales taxes to buy goods rather than buying them in Minnesota. §§ 297A.14, 297A.24.

The appellant, Minneapolis Star & Tribune Co., "Star Tribune," is the publisher of a morning newspaper and an evening newspaper (until 1982) in Minneapolis. From 1967 until 1971, it enjoyed an exemption from the sales and use tax provided by Minnesota for periodic publications. 1967 Minn. Laws 2187, codified at Minn. Stat. § 297A.25(1)(i) (1982). In 1971, however, while leaving the exemption from the sales tax in place, the legislature amended the scheme to impose a "use tax" on the cost of paper and ink products consumed in the production of a publication. Act of Oct. 31, 1971, ch. 31, Art. I, § 5, 1971 Minn. Laws 2561, 2565, codified

[1] Currently, the tax applies to sales of items for more than 9¢. Minn. Stat. § 297A.03(2) (1982). When first enacted, the threshold amount was 16¢. Act of June 1, 1967, ch. 32, Art. XIII, § 3(2), 1967 Minn. Laws 2143, 2180.

with modifications at Minn. Stat. §§ 297A.14, 297A.25(1)(i) (1982). Ink and paper used in publications became the only items subject to the use tax that were components of goods to be sold at retail. In 1974, the legislature again amended the statute, this time to exempt the first $100,000 worth of ink and paper consumed by a publication in any calendar year, in effect giving each publication an annual tax credit of $4,000. Act of May 24, 1973, ch. 650, Art. XIII, § 1, 1973 Minn. Laws 1606, 1637, codified at Minn. Stat. § 297A.14 (1982).[2] Publications remained exempt from the sales tax, § 2, 1973 Minn. Laws 1639.

After the enactment of the $100,000 exemption, 11 publishers, producing 14 of the 388 paid circulation newspapers in the State, incurred a tax liability in 1974. Star Tribune was one of the 11, and, of the $893,355 collected, it paid $608,634, or roughly two-thirds of the total revenue raised by the tax.

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[2] After the 1974 amendment, the use tax provision read in full:

"For the privilege of using, storing or consuming in Minnesota tangible personal property, tickets or admissions to places of amusement and athletic events, electricity, gas, and local exchange telephone service purchased for use, storage or consumption in this state, there is hereby imposed on every person in this state a use tax at the rate of four percent of the sales price of sales at retail of any of the aforementioned items made to such person after October 31, 1971, unless the tax imposed by section 297A.02 [the sales tax] was paid on said sales price.

"Motor vehicles subject to tax under this section shall be taxed at the fair market value at the time of transport into Minnesota if such motor vehicles were acquired more than three months prior to its *[sic]* transport into this state.

"Notwithstanding any other provisions of section 297A.01 to 297A.44 to the contrary, the cost of paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication as defined in section 297A.25, subdivision 1, clause (i) is subject to the tax imposed by this section." 1973 Minn. Laws 1637, codified at Minn. Stat. § 297A.14 (1982).

The final paragraph was the only addition of the 1974 amendment. The provision has since been amended to increase the rate of the tax, Act of June 6, 1981, ch. 1, Art. IV, § 5, 1981 Minn. Laws 2396, but has not been changed in any way relevant to this litigation.

See 314 N. W. 2d 201, 203, and n. 4 (1981). In 1975, 13 publishers, producing 16 out of 374 paid circulation papers, paid a tax. That year, Star Tribune again bore roughly two-thirds of the total receipts from the use tax on ink and paper. *Id.*, at 204, and n. 5.

Star Tribune instituted this action to seek a refund of the use taxes it paid from January 1, 1974, to May 31, 1975. It challenged the imposition of the use tax on ink and paper used in publications as a violation of the guarantees of freedom of the press and equal protection in the First and Fourteenth Amendments. The Minnesota Supreme Court upheld the tax against the federal constitutional challenge. 314 N. W. 2d 201 (1981). We noted probable jurisdiction, 457 U. S. 1130 (1982), and we now reverse.

II

Star Tribune argues that we must strike this tax on the authority of *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936). Although there are similarities between the two cases, we agree with the State that *Grosjean* is not controlling.

In *Grosjean*, the State of Louisiana imposed a license tax of 2% of the gross receipts from the sale of advertising on all newspapers with a weekly circulation above 20,000. Out of at least 124 publishers in the State, only 13 were subject to the tax. After noting that the tax was "single in kind" and that keying the tax to circulation curtailed the flow of information, *id.*, at 250–251, this Court held the tax invalid as an abridgment of the freedom of the press. Both the brief and the argument of the publishers in this Court emphasized the events leading up to the tax and the contemporary political climate in Louisiana. See Argument for Appellees, *id.*, at 238; Brief for Appellees, O. T. 1936, No. 303, pp. 8–9, 30. All but one of the large papers subject to the tax had "ganged up" on Senator Huey Long, and a circular distributed by Long and the Governor to each member of the state legisla-

ture described "lying newspapers" as conducting "a vicious campaign" and the tax as "a tax on lying, 2c *[sic]* a lie." *Id.*, at 9. Although the Court's opinion did not describe this history, it stated "[the tax] is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information," 297 U. S., at 250, an explanation that suggests that the motivation of the legislature may have been significant.

Our subsequent cases have not been consistent in their reading of *Grosjean* on this point. Compare *United States* v. *O'Brien*, 391 U. S. 367, 384–385 (1968) (stating that legislative purpose was irrelevant in *Grosjean*), with *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 9–10 (1978) (plurality opinion) (suggesting that purpose was relevant in *Grosjean*); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 383 (1973) (same). Commentators have generally viewed *Grosjean* as dependent on the improper censorial goals of the legislature. See T. Emerson, The System of Freedom of Expression 419 (1970); L. Tribe, American Constitutional Law 592, n. 8, 724, n. 10 (1978). We think that the result in *Grosjean* may have been attributable in part to the perception on the part of the Court that the State imposed the tax with an intent to penalize a selected group of newspapers. In the case currently before us, however, there is no legislative history[3] and no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the legislature. We cannot resolve the case by simple citation to *Grosjean*. Instead, we must analyze the problem anew under the general principles of the First Amendment.

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[3] Although the Minnesota Legislature records some proceedings and preserves the recordings, it has specifically provided that those recordings are not to be considered as evidence of legislative intent. See Minnesota Legislative Manual, Rule 1.18, Rules of the Minn. House of Representatives; Rule 65, Permanent Rules of the Senate (1981–1982). There is no evidence of legislative intent on the record in this litigation.

III

Clearly, the First Amendment does not prohibit all regulation of the press. It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems. See, *e. g.*, *Citizen Publishing Co.* v. *United States*, 394 U. S. 131, 139 (1969) (antitrust laws); *Lorain Journal Co.* v. *United States*, 342 U. S. 143, 155–156 (1951) (same); *Breard* v. *Alexandria*, 341 U. S. 622 (1951) (prohibition of door-to-door solicitation); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 192–193 (1946) (Fair Labor Standards Act); *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178 (1946) (same); *Associated Press* v. *United States*, 326 U. S. 1, 6–7, 19–20 (1945) (antitrust laws); *Associated Press* v. *NLRB*, 301 U. S. 103, 132–133 (1937) (National Labor Relations Act); see also *Branzburg* v. *Hayes*, 408 U. S. 665 (1972) (enforcement of subpoenas). Minnesota, however, has not chosen to apply its general sales and use tax to newspapers. Instead, it has created a special tax that applies only to certain publications protected by the First Amendment. Although the State argues now that the tax on paper and ink is part of the general scheme of taxation, the use tax provision, quoted in n. 2, *supra*, is facially discriminatory, singling out publications for treatment that is, to our knowledge, unique in Minnesota tax law.

Minnesota's treatment of publications differs from that of other enterprises in at least two important respects:[4] it imposes a use tax that does not serve the function of protecting the sales tax, and it taxes an intermediate transaction rather than the ultimate retail sale. A use tax ordinarily serves to complement the sales tax by eliminating the incentive to make major purchases in States with lower sales taxes; it re-

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[4] A third difference is worth noting, though it may have little economic effect. The use tax is not visible to consumers, while the sales tax must, by law, be stated separately as an addition to the price. See Minn. Stat. § 297A.03(1) (1982).

quires the resident who shops out-of-state to pay a use tax equal to the sales tax savings. *E. g., National Geographic Society* v. *California Board of Equalization*, 430 U. S. 551, 555 (1977); P. Hartman, Federal Limitations on State and Local Taxation §§ 10:1, 10:5 (1981); Warren & Schlesinger, Sales and Use Taxes: Interstate Commerce Pays Its Way, 38 Colum. L. Rev. 49, 63 (1938). Minnesota designed its overall use tax scheme to serve this function. As the regulations state, "[t]he 'use tax' is a compensating or complementary tax." Minn. Code of Agency Rules, Tax S & U 300 (1979); see Minn. Stat. § 297A.24 (1982). Thus, in general, items exempt from the sales tax are not subject to the use tax, for, in the event of a sales tax exemption, there is no "complementary function" for a use tax to serve. See *DeLuxe Check Printers, Inc.* v. *Commissioner of Tax*, 295 Minn. 76, 203 N. W. 2d 341, 343 (1972). But the use tax on ink and paper serves no such complementary function; it applies to all uses, whether or not the taxpayer purchased the ink and paper in-state, and it applies to items exempt from the sales tax.

Further, the ordinary rule in Minnesota, as discussed above, is to tax only the ultimate, or retail, sale rather than the use of components like ink and paper. "The statutory scheme is to devise a unitary tax which exempts intermediate transactions and imposes it only on sales when the finished product is purchased by the ultimate user." *Standard Packaging Corp.* v. *Commissioner of Revenue*, 288 N. W. 2d 234, 239 (Minn. 1979). Publishers, however, are taxed on their purchase of components, even though they will eventually sell their publications at retail.

By creating this special use tax, which, to our knowledge, is without parallel in the State's tax scheme, Minnesota has singled out the press for special treatment. We then must determine whether the First Amendment permits such special taxation. A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest. See,

e. g., *United States* v. *Lee*, 455 U. S. 252 (1982). Any tax that the press must pay, of course, imposes some "burden." But, as we have observed, see *supra*, at 581, this Court has long upheld economic regulation of the press. The cases approving such economic regulation, however, emphasized the general applicability of the challenged regulation to all businesses, *e. g.*, *Oklahoma Press Publishing Co.* v. *Walling*, *supra*, at 194; *Mabee* v. *White Plains Publishing Co.*, *supra*, at 184; *Associated Press* v. *NLRB*, *supra*, at 132–133,[5] suggesting that a regulation that singled out the press might place a heavier burden of justification on the State, and we now conclude that the special problems created by differential treatment do indeed impose such a burden.

There is substantial evidence that differential taxation of the press would have troubled the Framers of the First Amendment.[6] The role of the press in mobilizing senti-

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[5] The Court recognized in *Oklahoma Press* that the FLSA excluded seamen and farmworkers. See 327 U. S., at 193. It rejected, however, the publisher's argument that the exclusion of these workers precluded application of the law to the employees of newspapers. The State here argues that *Oklahoma Press* establishes that the press cannot successfully challenge regulations on the basis of the exemption of other enterprises. We disagree. The exempt enterprises in *Oklahoma Press* were isolated exceptions and not the rule. Here, everything is exempt from the use tax on ink and paper, except the press.

[6] It is true that our opinions rarely speculate on precisely how the Framers would have analyzed a given regulation of expression. In general, though, we have only limited evidence of exactly how the Framers intended the First Amendment to apply. There are no recorded debates in the Senate or in the States, and the discussion in the House of Representatives was couched in general terms, perhaps in response to Madison's suggestion that the Representatives not stray from simple acknowledged principles. See Constitution of the United States: Analysis and Interpretation, S. Doc. No. 92–82, p. 936, and n. 5 (1973); see also Z. Chafee, Free Speech in the United States 16 (1941). Consequently, we ordinarily simply apply those general principles, requiring the government to justify any burdens on First Amendment rights by showing that they are necessary to achieve a legitimate overriding governmental interest, see n. 7,

ment in favor of independence was critical to the Revolution. When the Constitution was proposed without an explicit guarantee of freedom of the press, the Antifederalists objected. Proponents of the Constitution, relying on the principle of enumerated powers, responded that such a guarantee was unnecessary because the Constitution granted Congress no power to control the press. The remarks of Richard Henry Lee are typical of the rejoinders of the Antifederalists:

> "I confess I do not see in what cases the congress can, with any pretence of right, make a law to suppress the freedom of the press; though I am not clear, that congress is restrained from laying any duties whatever on printing, and from laying duties particularly heavy on certain pieces printed . . . ." R. Lee, Observation Leading to a Fair Examination of the System of Government, Letter IV, reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 466, 474 (1971).

See also A Review of the Constitution Proposed by the Late Convention by a Federal Republican, reprinted in 3 H. Storing, The Complete Anti-Federalist 65, 81–82 (1981); M. Smith, Address to the People of New York on the Necessity of Amendments to the Constitution, reprinted in 1 B. Schwartz, *supra*, at 566, 575–576; cf. The Federalist No. 84, p. 440, and n. 1 (A. Hamilton) (M. Beloff ed. 1948) (recognizing and attempting to refute the argument). The concerns voiced by the Antifederalists led to the adoption of the Bill of Rights. See 1 B. Schwartz, *supra*, at 527.

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infra. But when we do have evidence that a particular law would have offended the Framers, we have not hesitated to invalidate it on that ground alone. Prior restraints, for instance, clearly strike to the core of the Framers' concerns, leading this Court to treat them as particularly suspect. *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 713, 716–718 (1931); cf. *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936) (relying on the role of the "taxes on knowledge" in inspiring the First Amendment to strike down a contemporary tax on knowledge).

The fears of the Antifederalists were well founded. A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. See *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106, 112–113 (1949) (Jackson, J., concurring). When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government. See generally Stewart, "Or of the Press," 26 Hastings L. J. 631, 634 (1975). "[A]n untrammeled press [is] a vital source of public information," *Grosjean*, 297 U. S., at 250, and an informed public is the essence of working democracy.

Further, differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional. See, *e. g.*, *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 95–96 (1972); cf. *Brown* v. *Hartlage*, 456 U. S. 45 (1982) (First Amendment has its "fullest and most urgent" application in the case of regulation of the content of political speech). Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.[7]

[7] JUSTICE REHNQUIST's dissent analyzes this case solely as a problem of equal protection, applying the familiar tiers of scrutiny. *Post*, at 599–

IV

The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally,[8] avoiding the censorial threat implicit in a tax that singles out the press.

Addressing the concern with differential treatment, Minnesota invites us to look beyond the form of the tax to its substance. The tax is, according to the State, merely a substitute for the sales tax, which, as a generally applicable tax, would be constitutional as applied to the press.[9] There are

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600. We, however, view the problem as one arising directly under the First Amendment, for, as our discussion shows, the Framers perceived singling out the press for taxation as a means of abridging the freedom of the press, see n. 6, *supra*. The appropriate method of analysis thus is to balance the burden implicit in singling out the press against the interest asserted by the State. Under a long line of precedents, the regulation can survive only if the governmental interest outweighs the burden and cannot be achieved by means that do not infringe First Amendment rights as significantly. See, *e. g.*, *United States* v. *Lee*, 455 U. S. 252, 257–258, 259 (1982); *United States* v. *O'Brien*, 391 U. S. 367, 376–377; *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958).

[8] Cf. *United States* v. *Lee*, *supra* (generally applicable tax may be applied to those with religious objections).

[9] Star Tribune insists that the premise of the State's argument—that a generally applicable sales tax would be constitutional—is incorrect, citing *Follett* v. *McCormick*, 321 U. S. 573 (1944), *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943), and *Jones* v. *Opelika*, 319 U. S. 103 (1943). We think that *Breard* v. *Alexandria*, 341 U. S. 622 (1951), is more relevant and rebuts Star Tribune's argument. There, we upheld an ordinance prohibiting door-to-door solicitation, even though it applied to prevent the door-to-door sale of subscriptions to magazines, an activity covered by the First Amendment. Although *Martin* v. *Struthers*, 319 U. S. 141 (1943), had struck down a similar ordinance as applied to the distribution of free religious literature, the *Breard* Court explained that case as emphasizing

two fatal flaws in this reasoning. First, the State has offered no explanation of why it chose to use a substitute for the sales tax rather than the sales tax itself. The court below speculated that the State might have been concerned that collection of a tax on such small transactions would be impractical. 314 N. W. 2d, at 207. That suggestion is unpersuasive, for sales of other low-priced goods are not exempt, see n. 1, *supra*.[10] If the real goal of this tax is to dupli-

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that the information distributed was religious in nature and that the distribution was noncommercial. 341 U. S., at 642–643. As the dissent in *Breard* recognized, the majority opinion substantially undercut both *Martin* and the cases now relied upon by Star Tribune, in which the Court had invalidated ordinances imposing a flat license tax on the sale of religious literature. See 341 U. S., at 649–650 (Black, J., dissenting) ("Since this decision cannot be reconciled with the *Jones*, *Murdock* and *Martin* v. *Struthers* cases, it seems to me that good judicial practice calls for their forthright overruling"). Whatever the value of those cases as authority after *Breard*, we think them distinguishable from a generally applicable sales tax. In each of those cases, the local government imposed a flat tax, unrelated to the receipts or income of the speaker or to the expenses of administering a valid regulatory scheme, as a *condition* of the right to speak. By imposing the tax as a condition of engaging in protected activity, the defendants in those cases imposed a form of prior restraint on speech, rendering the tax highly susceptible to constitutional challenge. *Follett*, *supra*, at 576–578; *Murdock*, *supra*, at 112, 113–114; *Jones* v. *Opelika*, 316 U. S. 584, 609, 611 (1942) (Stone, C. J., dissenting), reasoning approved on rehearing in 319 U. S. 103 (1943); see *Grosjean* v. *American Press Co.*, 297 U. S., at 249; see generally *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931). In that regard, the cases cited by Star Tribune do not resemble a generally applicable sales tax. Indeed, our cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible, *Branzburg* v. *Hayes*, 408 U. S. 665, 683 (1972) (dictum); *Grosjean* v. *American Press Co.*, *supra*, at 250 (dictum); cf. *Follett*, *supra*, at 578 (preacher subject to taxes on income or property) (dictum); *Murdock*, *supra*, at 112 (same) (dictum).

[10] JUSTICE REHNQUIST's dissent explains that collecting sales taxes on newspapers entails special problems because of the unusual marketing practices for newspapers—sales from vending machines and at newsstands, for instance. *Post*, at 602. The dissent does not, however, explain why the State cannot resolve these problems by using the same methods

cate the sales tax, it is difficult to see why the State did not achieve that goal by the obvious and effective expedient of applying the sales tax.

Further, even assuming that the legislature did have valid reasons for substituting another tax for the sales tax, we are not persuaded that this tax does serve as a substitute. The State asserts that this scheme actually *favors* the press over other businesses, because the same rate of tax is applied, but, for the press, the rate applies to the cost of components rather than to the sales price. We would be hesitant to fashion a rule that automatically allowed the State to single out the press for a different method of taxation as long as the effective burden was no different from that on other taxpayers or the burden on the press was lighter than that on other businesses. One reason for this reluctance is that the very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but also with the possibility of subsequent differentially *more burdensome* treatment. Thus, even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for "[t]he threat of sanctions may deter [the] exercise [of First Amendment rights] almost as potently as the actual application of sanctions." *NAACP* v. *Button*, 371 U. S. 415, 433 (1963).[11]

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used for items like chewing gum and candy, marketed in these same unusual ways and subject to the sales tax, see Minn. Stat. §§ 297A.01 (3)(c)(vi), (viii) (1982) (defining the sale of food from vending machines as a sale); see also § 297A.04 (dealing with vending machine operators).

Further, JUSTICE REHNQUIST fears that the imposition of a sales tax will mean that vending machine prices will be 26¢ instead of 25¢; or prices will be 30¢, with publishers retaining an extra 4¢ per paper; or the price will be 25¢, with publishers absorbing the tax. *Post*, at 602. It is difficult to see how the use tax rectifies this problem, for it increases publishers' costs. If the increase is a penny, the use taxes forces publishers to choose to pass the exact increment along to consumers by raising the price of the finished product to 26¢; or to increase the price by a nickel and retain an extra 4¢ per paper; or to leave the price at 25¢ and absorb the tax.

[Footnote 11 is on p. 589]

A second reason to avoid the proposed rule is that courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation.[12] The

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[11] JUSTICE REHNQUIST's dissent deprecates this concern, asserting that there is no threat, because this Court will invalidate any differentially more burdensome tax. *Post*, at 601. That assertion would provide more security if we could be certain that courts will always prove able to identify differentially more burdensome taxes, a question we explore further, *infra*.

[12] We have not always avoided evaluating the relative burdens of different methods of taxation in certain cases involving state taxation of the Federal Government and those with whom it does business. See *Washington* v. *United States*, *ante*, p. 536; *United States* v. *County of Fresno*, 429 U. S. 452 (1977). Since *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), the Supremacy Clause has prohibited not only state taxation that discriminates against the Federal Government but also any direct taxation of the Federal Government. See generally *United States* v. *New Mexico*, 455 U. S. 720, 730–734 (1982). In spite of the rule against direct taxation of the Federal Government, States remain free to impose the *economic* incidence of a tax on the Federal Government, as long as that tax is not discriminatory. *E. g.*, *id.*, at 734–735, and n. 11; *United States* v. *County of Fresno*, *supra*, at 460. In that situation, then, the valid state interest in requiring federal enterprises to bear their share of the tax burden will often justify the use of differential methods of taxation. As we explained in *Washington* v. *United States*, "[Washington] has merely accommodated for the fact that it may not impose a tax directly on the United States . . . ." *Ante*, at 546. The special rule prohibiting direct taxation of the Federal Government but permitting the imposition of an equivalent economic burden on the Government may not only justify the State's use of different methods of taxation, but may also force us, within limits, see *Washington*, *ante*, at 546, n. 11, to compare the burdens of two different taxes. Nothing, however, prevents the State from taxing the press in the same manner that it taxes other enterprises. It can achieve its interest in requiring the press to bear its share of the burden by taxing the press as it taxes others, so differential taxation is not necessary to achieve its goals.

JUSTICE WHITE insists that the Court regularly inquires into the economic effect of taxes, relying on a number of cases arising under the Due Process Clause and the Commerce Clause. In the cases cited, the Court has struck down state taxes only when "[t]he inequality of the . . . tax burden between in-state and out-of-state manufacturer-users [was] admitted," *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U. S. 64, 70 (1963), and when the Court was able to see that the tax produced a "*grossly* distorted

complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes. In sum, the possibility of error inherent in the proposed rule poses too great a threat to concerns at the heart of the First Amendment, and we cannot tolerate that possibility.[13] Minnesota, therefore, has offered no adequate justification for the special treatment of newspapers.[14]

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result," *Norfolk & Western R. Co.* v. *Missouri State Tax Comm'n*, 390 U. S. 317, 326 (1968) (emphasis added). In these cases, the Court required the taxpayer to show "gross overreaching," recognizing "the vastness of the State's taxing power and the latitude that the exercise of that power must be given before it encounters constitutional restraints." *Ibid.*; see *Alaska* v. *Arctic Maid*, 366 U. S. 199, 205 (1961). When delicate and cherished First Amendment rights are at stake, however, the constitutional tolerance for error diminishes drastically, and the risk increases that courts will prove unable to apply accurately the more finely tuned standards.

[13] If a State employed the same *method* of taxation but applied a lower *rate* to the press, so that there could be no doubt that the legislature was not singling out the press to bear a more burdensome tax, we would, of course, be in a position to evaluate the relative burdens. And, given the clarity of the relative burdens, as well as the rule that differential methods of taxation are not automatically permissible if less burdensome, a lower tax rate for the press would not raise the threat that the legislature might later impose an extra burden that would escape detection by the courts, see *supra*, at 588, and n. 11. Thus, our decision does not, as the dissent suggests, require Minnesota to impose a greater tax burden on publications.

[14] Disparaging our concern with the complexities of economic proof, JUSTICE REHNQUIST's dissent undertakes to calculate a hypothetical sales tax liability for Star Tribune for the years 1974 and 1975. *Post*, at 597–598. That undertaking, we think, illustrates some of the problems that inhere in any such inquiry, see generally R. Musgrave & P. Musgrave, Public Finance in Theory and Practice 461 (2d ed. 1976) (detailing some of the complexities of calculating the burden of a tax); cf. *id.*, at 475 (in evaluating excess burden of taxes, "quantitative evidence is sketchy and underlying procedures are necessarily crude"). First, the calculation for 1974 and 1975 for this newspaper tells us nothing about the relative impact of the tax on other newspapers or in other years. Since newspapers receive a substantial portion of their revenues from advertising, see generally Newsprint Information

V

Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers. The effect of the $100,000 exemption enacted in 1974 is that only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax.[15] The State explains this exemption as part of a policy favoring an "equitable" tax system, although there are no comparable exemptions for small enterprises outside the press. Again, there is no legislative history supporting the State's view of the purpose of the amendment. Whatever the motive of the legislature in this

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Committee, Newspaper and Newsprint Facts at a Glance 12 (24th ed. 1982), it is not necessarily true even for profitable newspapers that the price of the finished product will exceed the cost of inputs. Consequently, it is not necessary that a tax imposed on components is less burdensome than a tax at the same rate imposed on the price of the product. Although the relationship of Star Tribune's revenues from circulation and its revenues from advertising may result in a lower tax burden under the use tax in 1974 and 1975, that relationship need not hold for all newspapers or for all time.

Second, if, as the dissent assumes elsewhere, *post*, at 602, the sales tax increases the price, that price increase presumably will cause a decrease in demand. The decrease in demand may lead to lower total revenues and, therefore, to a lower total sales tax burden than that calculated by the dissent. See generally P. Samuelson, Economics 381–383, 389–390 (10th ed. 1976); R. Musgrave & P. Musgrave, Public Finance in Theory and Practice 21 (3d ed. 1980) ("[I]t is necessary, in designing fiscal policies, to allow for how the private sector will respond"). The dissent's calculations, then, can only be characterized as hypothetical. Taking the chance that these calculations or others like them are erroneous is a risk that the First Amendment forbids.

[15] In 1974, 11 publishers paid the tax. Three paid less than $1,000, and another three paid less than $8,000. Star Tribune, one of only two publishers paying more than $100,000, paid $608,634. In 1975, 13 publishers paid the tax. Again, three paid less than $1,000, and four more paid less than $3,000. For that year, Star Tribune paid $636,113 and was again one of only two publishers incurring a liability greater than $100,000. See 314 N. W. 2d, at 203–204, and nn. 4, 5.

case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme. It has asserted no interest other than its desire to have an "equitable" tax system. The current system, it explains, promotes equity because it places the burden on large publications that impose more social costs than do smaller publications and that are more likely to be able to bear the burden of the tax. Even if we were willing to accept the premise that large businesses are more profitable and therefore better able to bear the burden of the tax, the State's commitment to this "equity" is questionable, for the concern has not led the State to grant benefits to small businesses in general.[16] And when the exemption selects such a narrowly defined group to bear the full burden of the tax, the tax begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises.

VI

We need not and do not impugn the motives of the Minnesota Legislature in passing the ink and paper tax. Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment. See *NAACP* v. *Button*, 371 U. S., at 439; *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 461 (1958); *Lovell* v. *Griffin*, 303 U. S. 444, 451 (1938). We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment. *E. g.*, *Schneider* v. *State*, 308 U. S. 147 (1939). A tax that singles out the press, or that targets individual publications within the press, places a

[16] Cf. *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178, 183, 184 (1946) (upholding exemption from Fair Labor Standards Act of small weekly and semiweekly newspapers where the purpose of the exemption was "to put those papers more on a parity with other small town enterprises").

heavy burden on the State to justify its action. Since Minnesota has offered no satisfactory justification for its tax on the use of ink and paper, the tax violates the First Amendment,[17] and the judgment below is

Reversed.

JUSTICE WHITE, concurring in part and dissenting in part.

This case is not difficult. The exemption for the first $100,000 of paper and ink limits the burden of the Minnesota tax to only a few papers. This feature alone is sufficient reason to invalidate the Minnesota tax and reverse the judgment of the Minnesota Supreme Court. The Court recognizes that Minnesota's tax violates the First Amendment for this reason, and I subscribe to Part V of the Court's opinion and concur in the judgment.

Having found fully sufficient grounds for decision, the Court need go no further. The question whether Minnesota or another State may impose a use tax on paper and ink that is not targeted on a small group of newspapers could be left for another day.

The Court, however, undertakes the task today. The crux of the issue is whether Minnesota has justified imposing a use tax on paper and ink in lieu of applying its general sales tax to publications. The Court concludes that the State has offered no satisfactory explanation for selecting a substitute for a sales tax. *Ante*, at 587. If this is so, that could be the end of the matter, and the Minnesota tax would be invalid for a second reason.

The Court nevertheless moves on to opine that the State could not impose such a tax even if "the effective burden was no different from that on other taxpayers or the burden on the press was lighter than that on other businesses."

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[17] This conclusion renders it unnecessary to address Star Tribune's arguments that the $100,000 exemption violates the principles of *Buckley* v. *Valeo*, 424 U. S. 1 (1976), and *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550 (1935).

Ante, at 588. The fear is that the government might use the tax as a threatened sanction to achieve a censorial purpose. As JUSTICE REHNQUIST demonstrates, *post*, at 601–602, the proposition that the government threatens the First Amendment by favoring the press is most questionable, but for the sake of argument, I let it pass.

Despite having struck down the tax for three separate reasons, the Court is still not finished. "A second reason" to eschew inquiry into the relative burden of taxation is presented. The Court submits that "courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation," *ante*, at 589, except, it seems, in cases involving the sovereign immunity of the United States. Why this is so is not made clear, and I do not agree that the courts are so incompetent to evaluate the burdens of taxation that we must decline the task in this case.

The Court acknowledges that in cases involving state taxation of the Federal Government and those with whom it does business, the Court has compared the burden of two different taxes. *Ante*, at 589, n. 12. See, *e. g.*, *United States* v. *County of Fresno*, 429 U. S. 452 (1977); *United States* v. *City of Detroit*, 355 U. S. 466 (1958). It is not apparent to me why we are able to determine whether a State has imposed the economic incidence of a tax in a discriminatory fashion upon the Federal Government, but incompetent to determine whether a tax imposes discriminatory treatment upon the press. The Court's rationale that these are a unique set of cases which nevertheless "force us" to assume a duty we are incompetent to perform is wholly unsatisfactory. If convinced of its inherent incapacity for tax analysis, the Court could have taken the path chosen today and simply prohibited the States from imposing a compensatory "equivalent" economic burden on those who deal with the Federal Government. It has not done so.

Moreover, the Court frequently has examined—without complaint—the actual effect of a tax in determining whether the State has imposed an impermissible burden on interstate

commerce or run afoul of the Due Process Clause.[1] In a number of cases concerning railroad taxes, for example, the Court considered the tax burden to decide whether it was the equivalent of a property tax or an invalid tax on interstate commerce.[2] The Court has compared the burden of use taxes on competing products from sister States with that of sales taxes on products sold in-state to decide whether the former constituted discrimination against interstate commerce. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937).[3] We have also measured tax burdens in our cases considering whether state tax formulas are so out of propor-

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[1] See, *e. g.*, *Alaska* v. *Arctic Maid*, 366 U. S. 199 (1961) (Alaska occupational tax collected from freezer ships at rate of 4% of value of salmon not discriminatory because Alaskan canneries pay a 6% tax on the value of salmon obtained for canning).

[2] See *Norfolk & Western R. Co.* v. *Missouri State Tax Comm'n*, 390 U. S. 317, 329 (1968) (holding property tax on rolling stock based on a mileage formula violated due process) ("[W]hen a taxpayer comes forward with strong evidence tending to prove that the mileage formula will yield a grossly distorted result in a particular case, the State is obliged to counter that evidence . . ."); *Great Northern R. Co.*v. *Minnesota*, 278 U. S. 503, 509 (1929) ("We find nothing in the record to indicate that the tax under consideration, plus that already collected, exceeds 'what would be legitimate as an ordinary tax on the property valued as part of a going concern, [or is] relatively higher than the taxes on other kinds of property.' *Pullman Co.* v. *Richardson*, 261 U. S. 330, 339"). See also *Pullman Co.* v. *Richardson*, 261 U. S. 330, 339 (1923); *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450, 453–455 (1918); *United States Express Co.* v. *Minnesota*, 223 U. S. 335 (1912); *Galveston, H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217 (1908).

[3] In *Henneford*, a 2% tax was imposed on the privilege of using products coming from other States. Excepted from the tax was any property, the sale or use of which had already been subjected to an equal or greater tax. The Court, speaking through Justice Cardozo, upheld the use tax, noting that "[w]hen the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates." 300 U. S., at 583–584. See also *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U. S. 64 (1963) (holding use tax burden went beyond sales tax and constituted invalid discriminatory burden on commerce); *Scripto* v. *Carson*, 362 U. S. 207 (1960) (upholding use tax as complement to sales tax).

tion to the amount of in-state business as to violate due process. See, *e. g.*, *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267 (1978); *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U. S. 123 (1931). In sum, the Court's professed inability to determine when a tax poses an *actual* threat to constitutional principles is a novel concept, and one belied by the lessons of our experience.

There may be cases, I recognize, where the Court cannot confidently ascertain whether a differential method of taxation imposes a greater burden upon the press than a generally applicable tax. In these circumstances, I too may be unwilling to entrust freedom of the press to uncertain economic proof. But, as JUSTICE REHNQUIST clearly shows, *post*, at 597–598, this is not such a case. Since it is plainly evident that Minneapolis Star is not disadvantaged and is almost certainly benefited by a use tax vis-à-vis a sales tax, I cannot agree that the First Amendment forbids a State to choose one method of taxation over another.

JUSTICE REHNQUIST, dissenting.

Today we learn from the Court that a State runs afoul of the First Amendment proscription of laws "abridging the freedom of speech, or of the press" where the State structures its taxing system to the advantage of newspapers. This seems very much akin to protecting something so overzealously that in the end it is smothered. While the Court purports to rely on the intent of the "Framers of the First Amendment," I believe it safe to assume that in 1791 "abridge" meant the same thing it means today: to diminish or curtail. Not until the Court's decision in this case, nearly two centuries after adoption of the First Amendment, has it been read to prohibit activities which in no way diminish or curtail the freedoms it protects.

I agree with the Court that the First Amendment does not *per se* prevent the State of Minnesota from regulating the press even though such regulation imposes an economic burden. It is evident from the numerous cases relied on by the

Court, which I need not repeat here, that this principle has been long settled. *Ante*, at 581. I further agree with the Court that application of general sales and use taxes to the press would be sanctioned under this line of cases. *Ante*, at 586–587, n. 9. Therefore, I also agree with the Court to the extent it holds that any constitutional attack on the Minnesota scheme must be aimed at the classifications used in that taxing scheme. *Ante*, at 583. But it is at this point that I part company with my colleagues.

The Court recognizes in several parts of its opinion that the State of Minnesota could avoid constitutional problems by imposing on newspapers the 4% sales tax that it imposes on other retailers. *Ante*, at 586–590, and nn. 9, 13. Rather than impose such a tax, however, the Minnesota Legislature decided to provide newspapers with an exemption from the sales tax and impose a 4% use tax on ink and paper; thus, while both taxes are part of one "system of sales and use taxes," 314 N. W. 2d 201, 203 (1981), newspapers are classified differently within that system.* The problem the Court finds too difficult to deal with is whether this difference in treatment results in a significant burden on newspapers.

The record reveals that in 1974 the Minneapolis Star & Tribune had an average daily circulation of 489,345 copies. *Id.*, at 203–204, nn. 4 and 5. Using the price we were informed of at argument of 25¢ per copy, see Tr. of Oral Arg. 46, gross sales revenue for the year would be $38,168,910. The Sunday circulation for 1974 was 640,756; even assuming that it did not sell for more than the daily paper, gross sales revenue for the year would be at least $8,329,828. Thus, total sales revenues in 1974 would be $46,498,738. Had a 4% sales tax

*The sales tax exemption and use tax liability are not, strictly speaking, for newspapers alone. The term of art used in the Minnesota taxing scheme is "publications." Publications is defined to include such materials as magazines, advertising supplements, shoppers guides, house organs, trade and professional journals, and serially issued comic books. See Minn. Stat. § 331.02 (1982); 13 Minn. Code of Agency Rules, Tax S & U 409(b) (1979).

been imposed, the Minneapolis Star & Tribune would have been liable for $1,859,950 in 1974. The same "complexities of factual economic proof" can be analyzed for 1975. Daily circulation was 481,789; at 25¢ per copy, gross sales revenue for the year would be $37,579,542. The Sunday circulation for 1975 was 619,154; at 25¢ per copy, gross sales revenue for the year would be $8,049,002. Total sales revenues in 1975 would be $45,628,544; at a 4% rate, the sales tax for 1975 would be $1,825,142. Therefore, had the sales tax been imposed, as the Court agrees would have been permissible, the Minneapolis Star & Tribune's liability for 1974 and 1975 would have been $3,685,092.

The record further indicates that the Minneapolis Star & Tribune paid $608,634 in use taxes in 1974 and $636,113 in 1975—a total liability of $1,244,747. See 314 N. W. 2d, at 203–204, nn. 4 and 5. We need no expert testimony from modern day Euclids or Einsteins to determine that the $1,224,747 paid in use taxes is significantly less burdensome than the $3,685,092 that could have been levied by a sales tax. *A fortiori*, the Minnesota taxing scheme which singles out newspapers for "differential treatment" has benefited, not burdened, the "freedom of speech, [and] of the press."

Ignoring these calculations, the Court concludes that "differential treatment" alone in Minnesota's sales and use tax scheme requires that the statutes be found "presumptively unconstitutional" and declared invalid "unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Ante*, at 585. The "differential treatment" standard that the Court has conjured up is unprecedented and unwarranted. To my knowledge this Court has never subjected governmental action to the most stringent constitutional review solely on the basis of "differential treatment" of particular groups. The case relied on by the Court, *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 95–96 (1972), certainly does not stand for this proposition. In *Mosley* all picketing except "peaceful picketing" was prohibited within a particular public area.

Thus, "differential treatment" was not the key to the Court's decision; rather the essential fact was that unless a person was considered a "peaceful picketer" his speech through this form of expression would be totally abridged within the area.

Of course, all governmentally created classifications must have some "rational basis." See *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955); *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106 (1949). The fact that they have been enacted by a presumptively rational legislature, however, arms them with a presumption of rationality. We have shown the greatest deference to state legislatures in devising their taxing schemes. As we said in *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522 (1959):

> "The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. . . . The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. [Citations omitted.] 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government . . . .'" *Id.*, at 526–527 (quoting *Ohio Oil Co.* v. *Conway*, 281 U. S. 146, 159 (1930)).

See also *Kahn* v. *Shevin*, 416 U. S. 351 (1974); *Independent Warehouses, Inc.* v. *Scheele*, 331 U. S. 70 (1947); *Madden* v. *Kentucky*, 309 U. S. 83 (1940); *Fox* v. *Standard Oil Co. of New Jersey*, 294 U. S. 87 (1935); *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573 (1938).

Where the State devises classifications that infringe on the fundamental guarantees protected by the Constitution the Court has demanded more of the State in justifying its action. But there is no *infringement*, and thus the Court has never required more, unless the State's classifications *significantly burden* these specially protected rights. As we said in *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 312 (1976) *(per curiam)* (emphasis added), "equal protection analysis requires strict scrutiny of a legislative classification only when the classification *impermissibly interferes* with the exercise of a fundamental right. . . ." See also *California Medical Assn.* v. *FEC*, 453 U. S. 182 (1981); *Maher* v. *Roe*, 432 U. S. 464 (1977); *Storer* v. *Brown*, 415 U. S. 724 (1974); *American Party of Texas* v. *White*, 415 U. S. 767 (1974); *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1 (1973). To state it in terms of the freedoms at issue here, no First Amendment issue is raised unless First Amendment rights have been infringed; for if there has been no infringement, then there has been no "abridgment" of those guarantees. See *Branzburg* v. *Hayes*, 408 U. S. 665 (1972).

Today the Court departs from this rule, refusing to look at the record and determine whether the classifications in the Minnesota use and sales tax statutes significantly burden the First Amendment rights of appellant and its fellow newspapers. The Court offers as an explanation for this failure the self-reproaching conclusion that

> "courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation. The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes. In sum, the possibility of error inherent in the proposed rule poses too great a threat to concerns at the heart of the First Amendment, and we cannot tolerate that possibility. Minne-

> sota, therefore, has offered no adequate justification for the special treatment of newspapers." *Ante*, at 589–590 (footnotes omitted).

Considering the complexity of issues this Court resolves each Term, this admonition as a general rule is difficult to understand. Considering the specifics of this case, this confession of inability is incomprehensible.

Wisely not relying solely on its inability to weigh the burdens of the Minnesota tax scheme, the Court also says that even if the resultant burden on the press is lighter than on others

> "the very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but also with the possibility of subsequent differentially *more burdensome* treatment. Thus, even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for '[t]he threat of sanctions may deter [the] exercise [of First Amendment rights] almost as potently as the actual application of sanctions.'" *Ante*, at 588.

Surely the Court does not mean what it seems to say. The Court should be well aware from its discussion of *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936), that this Court is quite capable of dealing with changes in state taxing laws which are intended to penalize newspapers. As Justice Holmes aptly put it: "[T]his Court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 223 (1928) (dissenting opinion). Furthermore, the Court itself intimates that if the State had employed "the same *method* of taxation but applied a lower *rate* to the press, so that there could be no doubt that the legislature was not singling out the press to bear a more burden-

some tax" the taxing scheme would be constitutionally permissible. *Ante*, at 590, n. 13. This obviously has the same potential for "the threat of sanctions," because the legislature could at any time raise the taxes to the higher rate. Likewise, the newspapers' absolute exemption from the sales tax, which the Court acknowledges is used by many other States, would be subject to the same attack; the exemption could be taken away.

The State is required to show that its taxing scheme is rational. But in this case that showing can be made easily. The Court states that "[t]he court below speculated that the State might have been concerned that collection of a [sales] tax on such small transactions would be impractical." *Ante*, at 587. But the Court finds this argument "unpersuasive," because "sales of other low-priced goods" are subject to the sales tax. *Ibid.* I disagree. There must be few such inexpensive items sold in Minnesota in the volume of newspaper sales. Minneapolis Star & Tribune alone, as noted above, sold approximately 489,345 papers every weekday in 1974 and sold another 640,756 papers every Sunday. In 1975 it had a daily circulation of 481,789 and a Sunday circulation of 619,154. Further, newspapers are commonly sold in a different way than other goods. The legislature could have concluded that paperboys, corner newsstands, and vending machines provide an unreliable and unsuitable means for collection of a sales tax. Must everyone buying a paper put 26¢ in the vending machine rather than 25¢; or should the price of a paper be raised to 30¢, giving the paper 4¢ more profit; or should the price be kept at 25¢ with the paper absorbing the tax? In summary, so long as the State can find another way to collect revenue from the newspapers, imposing a sales tax on newspapers would be to no one's advantage; not the newspaper and its distributors who would have to collect the tax, not the State who would have to enforce collection, and not the consumer who would have to pay for the paper in odd amounts. The reasonable alternative Minnesota chose was to impose the use tax on ink and paper. "There is no reason

to believe that this legislative choice is insufficiently tailored to achieve the goal of raising revenue or that it burdens the first amendment in any way whatsoever." 314 N. W. 2d, at 207. Cf. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456 (1981).

The Court finds in very summary fashion that the exemption newspapers receive for the first $100,000 of ink and paper used also violates the First Amendment because the result is that only a few of the newspapers actually pay a use tax. I cannot agree. As explained by the Minnesota Supreme Court, the exemption is in effect a $4,000 credit which benefits all newspapers. 314 N. W. 2d, at 203. Minneapolis Star & Tribune was benefited to the amount of $16,000 in the two years in question; $4,000 each year for its morning paper and $4,000 each year for its evening paper. *Ibid.* Absent any improper motive on the part of the Minnesota Legislature in drawing the limits of this exemption, it cannot be construed as violating the First Amendment. See *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 194 (1946). Cf. *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178 (1946). The Minnesota Supreme Court specifically found that the exemption was not a "deliberate and calculated device" designed with an illicit purpose. 314 N. W. 2d, at 208. There is nothing in the record which would cast doubt on this conclusion. The Minnesota court further explained:

> "[I]t is necessary for the legislature to construct economically sound taxes in order to raise revenue. In order to do so, the legislature must classify or grant exemptions to insure that the burden upon the taxpayer in paying the tax or upon the state in collecting the tax does not outweigh the benefit of the revenues to the state. 'Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden.' *Madden* v. *Kentucky*, 309 U. S. 83, 88 (1940)." *Id.*, at 209–210.

There is no reason to conclude that the State, in drafting the $4,000 credit, acted other than reasonably and rationally to fit its sales and use tax scheme to its own local needs and usages.

To collect from newspapers their fair share of taxes under the sales and use tax scheme and at the same time avoid abridging the freedoms of speech and press, the Court holds today that Minnesota must subject newspapers to millions of additional dollars in sales tax liability. Certainly this is a hollow victory for the newspapers, and I seriously doubt the Court's conclusion that this result would have been intended by the "Framers of the First Amendment."

For the reasons set forth above, I would affirm the judgment of the Minnesota Supreme Court.

ARIZONA *v.* CALIFORNIA ET AL.

ON EXCEPTIONS TO SPECIAL MASTER'S REPORT AND RECOMMENDED DECREE AND MOTIONS TO INTERVENE

No. 8, Orig. Argued December 8, 1982—Decided March 30, 1983

This extended litigation over rights to the waters of the Colorado River began in 1952 when Arizona brought an original action in this Court against California and several of its public agencies. Later, Nevada, New Mexico, Utah, and the United States became parties. Following the report of a Special Master, the major issue in the case—the apportionment of water among the lower basin States—was resolved in the Court's opinion, 373 U. S. 546, and 1964 decree, 376 U. S. 340. A supplemental decree identifying present perfected rights was entered in 1979. 439 U. S. 419. Pursuant to the Court's initial opinion and decree, the United States acquired water rights for the reservations of five Indian Tribes that are dependent upon the river for their water. The proper standard for measuring the water rights intended for the reservations was held to be "practicably irrigable acreage," and the Special Master's calculation of the amount of such acreage was approved. The United States, and the Tribes which ask to intervene in the action, now seek to have those water rights increased to account for (1) "omitted lands"—irrigable lands within recognized reservation boundaries for which water rights were not claimed in the earlier litigation; and (2) "boundary lands"—irrigable lands claimed to now have been finally determined to lie within the reservations. A Special Master appointed by the Court issued a preliminary finding allowing the Tribes to intervene and a final report concluding that the Tribes are entitled to the additional rights.

Held:

1. The Indian Tribes' motions to intervene are granted. Since the Tribes do not seek to bring new claims or issues against the States but only ask leave to participate in an adjudication of their water rights that was commenced by the United States, this Court's judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised. Moreover, the Tribes satisfy the standards for permissive intervention set forth in the Federal Rules of Civil Procedure, which serve as a guide in an original action in this Court. Pp. 613–615.

2. The States' exceptions to the Special Master's conclusion that the Tribes are entitled to increased water rights for omitted lands are sus-

tained. The prior determination of Indian water rights in the 1964 decree precludes relitigation of the irrigable acreage issue. Article IX of the 1964 decree—which provided that this Court would retain jurisdiction of the action "for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy"—must be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated. The principles of res judicata advise against reopening the calculation of the amount of practicably irrigable acreage to which the Tribes are entitled. To apply the law-of-the-case doctrine in this Court's original actions, as the Special Master would here, would weaken the finality of the decrees in such actions, particularly in a case such as this one which turns on statutory rather than Court-fashioned equitable criteria. Recalculating the amount of practicably irrigable acreage runs directly counter to the strong interests in finality in this litigation, a major purpose of which has been to provide the necessary assurance to the States and various private interests involved of the amount of water they can anticipate receiving from the Colorado River. Article IX did not contemplate a departure from these fundamental principles so as to permit retrial of factual or legal issues that were fully and fairly litigated 20 years ago. The absence of the Indian Tribes in the prior proceedings does not require relitigation of their reserved rights. Pp. 615–628.

3. The States' and state agencies' exceptions to the Special Master's finding that certain reservation boundaries extended by order of the Secretary of the Interior have been "finally determined" within the meaning of Article II(D)(5) of the 1964 decree—which provided that the quantities of water fixed in the provisions of the decree setting forth the reservations' water rights in the Colorado River shall be subject to appropriate adjustment by agreement or decree of this Court in the event "the boundaries of the respective reservations are finally determined"—are sustained. But with respect to the boundaries determined by judicial decree in certain quiet title actions, the exceptions are overruled, and the Special Master's conclusion that these boundaries were "finally determined" within the meaning of Article II(D)(5) is adopted. Accordingly, the 1979 supplemental decree in this case should be amended to provide to the respective reservations appropriate water rights to service the irrigable acreage the Special Master found to be contained within the tracts adjudicated by the specified quiet title judgments to be reservation land. Pp. 628–641.

Exceptions to the Special Master's Report sustained in part and overruled in part, and motions to intervene granted.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined, and in Part III of which BRENNAN, BLACKMUN, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 642. MARSHALL, J., took no part in the consideration or decision of the case.

Carl Boronkay and *Ralph E. Hunsaker* argued the cause for the State of Arizona et al. With Mr. Boronkay on the brief for the California Agencies were *Warren J. Abbott*, *Maurice C. Sherrill*, *Justin McCarthy*, *Ira Reiner*, *Gilbert W. Lee*, *John W. Witt*, *C. M. Fitzpatrick*, and *Joseph Kase, Jr.* With Messrs. Hunsaker and Boronkay on the briefs for the State of Arizona et al. were *George Deukmejian*, Attorney General of California, *R. H. Connett* and *N. Gregory Taylor*, Assistant Attorneys General, *Douglas B. Noble* and *Emil Stipanovich, Jr.*, Deputy Attorneys General, *Roy H. Mann*, Messrs. Reiner, Lee, Witt, Fitzpatrick, Sherrill, McCarthy, and Kase, *Richard Bryan*, Attorney General of Nevada, and *James LaVelle*, Chief Deputy Attorney General. Mr. Hunsaker filed a brief for the State of Arizona.

Lawrence A. Aschenbrenner argued the cause for the Chemehuevi Indian Tribe et al. With him on the briefs were *Arlinda F. Locklear*, *John J. Mullins, Jr.*, *Thomas W. Fredericks*, *Robert S. Pelcyger*, and *Raymond C. Simpson.* Mr. Simpson filed a brief for the Quechan Tribe.

Deputy Solicitor General Claiborne argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Dinkins*, *Myles E. Flint*, *Tom W. Echohawk*, and *Scott B. McElroy.**

JUSTICE WHITE delivered the opinion of the Court.

The problem of irrigating the arid lands of the Colorado River Basin has been confronted by the peoples of that region

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*Briefs of *amici curiae* were filed by *Michael R. Thorp* for the Pyramid Lake Tribe; and by *M. Byron Lewis* and *John B. Weldon, Jr.*, for the Salt River Project Agricultural Improvement and Power District et al.

for 2,000 years and by Congress and this Court for many decades. Today we conclude another chapter in this original action brought to determine rights to the waters of the Colorado River. In earlier proceedings in this case, the United States, an intervenor in the principal action, acquired water rights for five Indian reservations that are dependent upon the river for their water. The United States, and the Tribes which ask to intervene in the action, now seek to have those water rights increased.

I

The Colorado River Compact of 1922 divided the waters of the Colorado River between the Upper- and Lower-Basin States, but fell short of apportioning the respective shares among the individual States. Nor did the Boulder Canyon Project Act of 1928, 45 Stat. 1057, as amended, 43 U. S. C. § 617 *et seq.* (1976 ed. and Supp. V) (Project Act), a vast federal effort to harness and put to use the waters of the lower Colorado River, expressly effect such an apportionment. The principal dispute that became increasingly pressing over the years concerned the respective shares of the Lower-Basin States, particularly the shares of California and Arizona.

This litigation began in 1952 when Arizona, to settle this dispute, invoked our original jurisdiction, U. S. Const., Art. III, § 2, cl. 2, by filing a motion for leave to file a bill of complaint against California and seven public agencies of the State.[1] Arizona sought to confirm its title to water in the Colorado River system and to limit California's annual consumptive use of the river's waters. Nevada intervened, praying for determination of its water rights; Utah and New Mexico were joined as defendants; and the United States intervened, seeking water rights on behalf of various federal establishments, including the reservations of five Indian

[1] Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego.

Tribes—the Colorado River Indian Tribes, Fort Mojave Indian Tribe, Chemehuevi Indian Tribe, Cocopah Indian Tribe, and Fort Yuma (Quechan) Indian Tribe.

After lengthy proceedings, Special Master Simon Rifkind filed a report recommending a certain division of the Colorado River waters among California, Arizona, and Nevada. The parties' respective exceptions to the Master's report were extensively briefed and the case was twice argued. The Court for the most part agreed with the Special Master, 373 U. S. 546 (1963), and our views were carried forward in the decree found at 376 U. S. 340 (1964).

The long and rich story of the efforts on behalf of the States involved to arrive at a mutually satisfactory plan of apportionment is set forth in the Special Master's report and the Court's opinion and need not be repeated here. We agreed with the Special Master that the allocation of Colorado River water was to be governed by the standards set forth in the Project Act rather than by the principles of equitable apportionment which in the absence of statutory directive this Court has applied to disputes between States over entitlement to water from interstate streams. Nor was the local law of prior appropriation necessarily controlling. The Project Act itself was held to have created a comprehensive scheme for the apportionment among California, Nevada, and Arizona of the Lower Basin's share of the mainstream waters of the Colorado River, leaving each State its tributaries. Congress had decided that a fair division of the first 7.5 million acre-feet of such mainstream waters would give 4.4 million acre-feet to California, 2.8 million acre-feet to Arizona, and 300,000 acre-feet to Nevada. Arizona and California would share equally in any surplus. 373 U. S., at 565.

Over strong objection, we also agreed with the Special Master that the United States had reserved water rights for the Indian reservations, effective as of the time of their creation. *Id.*, at 598–600. See *Winters* v. *United States*, 207 U. S. 564 (1908). These water rights, having vested before

the Project Act became effective on June 25, 1929, were ranked with other "present perfected rights,"[2] and as such were entitled to priority under the Act. 373 U. S., at 600. Rejecting more restrictive standards for measuring the water rights intended to be reserved for the reservations, we agreed with the Master and the United States, speaking on behalf of the Tribes, that the "only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." *Id.*, at 601. We further sustained the Master's findings, arrived at after full, adversary proceedings, as to the various acreages of practicably irrigable land on the different reservations. *Ibid.* These findings were subsequently incorporated in our decree of March 9, 1964. Article II(D) of our decree specified each reservation's entitlement to diversions from the mainstream.

Not all aspects of the case were finally resolved in the 1964 decree. First, in the course of determining irrigable acreage on the reservations, the Master resolved a dispute between the United States and the States with respect to the boundaries of the Colorado River and Fort Mojave Indian Reservations, generally finding that the reservations were smaller than the United States claimed them to be. Although we based the water rights decreed to these two reservations on the irrigable acreage within the boundaries determined by the Special Master, we found that it had been "unnecessary" for the Special Master finally to have determined these

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[2] A "perfected right" is a "water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use." 376 U. S., at 341. "Present perfected rights" means perfected rights in existence as of June 25, 1929, the effective date of the Project Act. *Ibid.*

boundaries[3] and provided in Article II(D) that the quantities of water provided for the Fort Mojave Indian Reservation and the Colorado River Indian Reservation "shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." 376 U. S., at 345. See Part V, *infra*. Second, Article VI of the decree provided that the parties, within two years, should provide the Court with a list of the outstanding present perfected rights in the mainstream waters. Finally, in Article IX of the decree we retained jurisdiction over the case for the purpose of further modifications and orders that we deemed proper.

On January 9, 1979, we entered a supplemental decree identifying the present perfected rights to the use of the mainstream water in each State and their priority dates as agreed to by the parties. 439 U. S. 419. We also decreed that, in the event of shortage, the Secretary of the Interior shall, before providing for the satisfaction of these present perfected rights, first provide for the satisfaction in full of the Indian water rights set forth in the 1964 decree for the five reservations. We expressly noted that these quantities, fixed in paragraphs 1 through 5 of Article II(D) of the 1964 decree "shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." 439 U. S., at 421. The 1979 decree thus resolved outstanding issues in the litigation. But before that decree was entered new questions arose: The five Indian Tribes, ultimately joined by the United States, made claims for additional water rights to reservation lands.

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[3] "We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation. We hold that it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time." 373 U. S., at 601.

Because the United States had represented their interests, the Indian Tribes previously had no part in the litigation. In 1977, however, the Fort Mojave, Chemehuevi, and Quechan (Fort Yuma) Indian Tribes moved for leave to intervene as indispensable parties. By April 10, 1978, the Colorado River Indian Tribes and the Cocopah Indian Tribe had also filed petitions for intervention. Three of the Tribes sought intervention to oppose entry of the 1979 decree that was to set the priority order for water rights in the Colorado River. The Tribes also raised claims for additional water rights appurtenant to two types of land: (1) the so-called "omitted" lands—irrigable lands, within the recognized 1964 boundaries of the reservations, for which it was said that the United States failed to claim water rights in the earlier litigation; and (2) "boundary" lands—lands that were or should have been officially recognized as part of the reservations and that had assertedly been finally determined to lie within the reservations within the meaning of the 1964 decree.

Initially, both the state parties and the United States opposed intervention. Subsequently, the United States dropped its opposition to the Tribes' intervention. Still later, on December 22, 1978, the United States joined the Indians in moving for a supplemental decree to grant additional water rights to the reservations. In our 1979 decree, we denied the motion of the Fort Mojave, Chemehuevi, and Quechan Tribes to intervene insofar as they sought to oppose entry of the supplemental decree. Other matters raised by their motion, as well as that of the United States' and the other two Tribes, were not resolved. We appointed Senior Judge Elbert P. Tuttle Special Master and referred these motions to him. 439 U. S., at 436–437.

II

After conducting hearings, the Special Master issued a preliminary report on August 28, 1979, granting the Indian Tribes leave to intervene in subsequent hearings on the

merits. In addition, the Special Master concluded that certain boundaries of the reservations had now been finally determined within the meaning of Article II(D) of the 1964 decree, primarily because of administrative decisions taken by the Secretary of the Interior. These decisions purported considerably to enlarge the reservations affected and, with respect to the Colorado River and Mojave Reservations, were for the most part reassertions of the positions submitted by the United States to Special Master Rifkind, rejected by him, and left open by us to later final resolution. We refused to allow the States to file exceptions at that time, 444 U. S. 1009 (1980), and the Special Master held further hearings on the merits.

On February 22, 1982, the Special Master issued his final report. The Special Master's findings were almost entirely consistent with the position of the United States and the Indian Tribes. Rejecting the States' strong objections to reopening the question of whether more practicable irrigable acreage actually existed than the United States claimed, Special Master Rifkind found, and our 1963 opinion and 1964 decree specified, the Special Master concluded that each of the Tribes was entitled to additional water rights based on land that he determined to be irrigable over and beyond that previously found. Furthermore, based on his earlier boundary determination, the Master determined that there was additional practicably irrigable acreage for which the Indians were entitled to further water rights. The States have filed exceptions to both of these determinations, as well as to various factual findings concerning the amount of practicably irrigable acreage.

III

The States have also refiled their exceptions to the Special Master's preliminary findings allowing the Indian Tribes to intervene in the action. We consider this matter first.

We agree with the Special Master that the Indian Tribes' motions to intervene should be granted. The States oppose

the motions and insist that, without their consent, the Tribes' participation violates the Eleventh Amendment.[4] Assuming, *arguendo*, that a State may interpose its immunity to bar a suit brought against it by an Indian tribe, *United States* v. *Minnesota*, 270 U. S. 181, 193–195 (1926), the States involved no longer may assert that immunity with respect to the subject matter of this action. Water right claims for the Tribes were brought by the United States. Nothing in the Eleventh Amendment "has ever been seriously supposed to prevent a State's being sued by the United States." *United States* v. *Mississippi*, 380 U. S. 128, 140 (1965). See, *e. g.*, *United States* v. *Texas*, 143 U. S. 621, 646 (1892); *United States* v. *California*, 297 U. S. 175 (1936); *United States* v. *California*, 332 U. S. 19, 26–28 (1947). The Tribes do not seek to bring new claims or issues against the States, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore, our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised. See, *e. g.*, *Maryland* v. *Louisiana*, 451 U. S. 725, 745, n. 21 (1981).

The States also oppose intervention on grounds that the presence of the United States insures adequate representation of the Tribes' interests. The States maintain that the prerequisites for intervention as of right set forth in Rule 24 of the Federal Rules of Civil Procedure are not satisfied. Aside from the fact that our own Rules make clear that the Federal Rules are only a guide to procedures in an original action, see this Court's Rule 9.2; *Utah* v. *United States*, 394 U. S. 89, 95 (1969), it is obvious that the Indian Tribes, at a minimum, satisfy the standards for permissive intervention

[4] There are suggestions in the papers that the States' sovereign immunity is in some respect distinct from the immunity afforded by the Eleventh Amendment. Insofar as the question of intervention posed here is concerned, we appreciate no such difference.

set forth in the Federal Rules. The Tribes' interests in the water of the Colorado basin have been and will continue to be determined in this litigation since the United States' action as their representative will bind the Tribes to any judgment. *Heckman* v. *United States*, 224 U. S. 413, 444–445 (1912). Moreover, the Indians are entitled "'to take their place as independent qualified members of the modern body politic.'" *Poafpybitty* v. *Skelly Oil Co.*, 390 U. S. 365, 369 (1968), quoting *Board of County Comm'rs* v. *Seber*, 318 U. S. 705, 715 (1943). Accordingly, the Indians' participation in litigation critical to their welfare should not be discouraged.[5] The States have failed to present any persuasive reason why their interests would be prejudiced or this litigation unduly delayed by the Tribes' presence. The Tribes' motions to intervene are sufficiently timely with respect to this phase of the litigation. Of course, permission to intervene does not carry with it the right to relitigate matters already determined in the case, unless those matters would otherwise be subject to reconsideration. The motions to intervene are granted.

IV

We turn now to the first major question in the case: whether the determination of practicably irrigable acreage within recognized reservation boundaries should be reopened to consider claims for "omitted" lands for which water rights could have been sought in the litigation preceding the 1964 decree. The Special Master agreed with the United States and the Tribes that it is not too late in the day to modify the 1964 adjudication and decree, notwithstanding his own finding that "[t]he claim in the original case . . . embraced the totality of water rights for the Reservation lands." Tuttle Report, at 31. We disagree with the Special Master and sus-

[5] For this reason, the States' reliance on *New Jersey* v. *New York*, 345 U. S. 369 (1953) *(per curiam)*, where the Court denied the city of Philadelphia's request to intervene in that interstate water dispute on the grounds that its interests were adequately represented by the State of Pennsylvania, is misplaced.

tain the exceptions filed by the States and state agencies to his conclusion. In our opinion, the prior determination of Indian water rights in the 1964 decree precludes relitigation of the irrigable acreage issue.

Arizona v. *California*, unlike many other disputes over water rights that we have adjudicated, has been and continues to be governed mainly by statutory considerations. The primary issue in the case—the allocation of the waters of the Lower Colorado River Basin among the States—was resolved by the distribution of waters intended by Congress and written into the Project Act. The question of Indian water rights—an important but ancillary concern—was also decided by recourse to congressional policy rather than judicial equity. We held that the creation of the reservations by the Federal Government implied an allotment of water necessary to "make the reservation livable." 373 U. S., at 599–600. See *Winters* v. *United States*, 207 U. S. 564 (1908); *Cappaert* v. *United States*, 426 U. S. 128, 141 (1976). We rejected the argument, urged by the States, that equitable apportionment should govern the question. We were "not convinced by Arizona's argument that each reservation is so much like a State that its rights to water should be determined by the doctrine of equitable apportionment." 373 U. S., at 597. "Moreover, even were we to treat an Indian reservation like a State, equitable apportionment would still not control, since, under our view, the Indian claims here are governed by the statutes and Executive Orders creating the reservations." *Ibid.*

We went on to reject Arizona's further arguments that (1) the doctrine of *Pollard's Lessee* v. *Hagan*, 3 How. 212 (1845), and *Shively* v. *Bowlby*, 152 U. S. 1 (1894), prevented the Federal Government from reserving waters for federally reserved lands, 373 U. S., at 597; (2) water rights could not be reserved by Executive Order, *id.*, at 598; and (3) there was insufficient evidence that the United States intended to reserve water for the Tribes, *id.*, at 598–600.

The standard for quantifying the reserved water rights was also hotly contested by the States, who argued that the Master adopted a much too liberal measure. Our decision to rely upon the amount of practicably irrigable acreage contained within the reservation constituted a rejection of Arizona's proposal that the quantity of water reserved should be measured by the Indians' "reasonably foreseeable needs," *i. e.*, by the number of Indians. The practicably-irrigable-acreage standard was preferable because how many Indians there will be and what their future needs will be could "only be guessed," *id.*, at 601. By contrast, the irrigable-acreage standard allowed a present water allocation that would be appropriate for future water needs. *Id.*, at 600–601. Therefore, with respect to the question of reserved rights for the reservations, and the measurement of those rights, the Indians, as represented by the United States, won what can be described only as a complete victory. A victory, it should be stressed, that was in part attributable to the Court's interest in a *fixed* calculation of future water needs. Applying the irrigable-acreage standard, we found that the Master's determination as to the amount of practicably irrigable acreage, an issue also subject to adversary proceedings, was reasonable. Our subsequent decree reflected this judgment. 376 U. S. 340 (1964).

The Tribes and the United States now claim that certain practicably irrigable acreage was "omitted" from those calculations.[6] There is no question that if these claims were presented in a different proceeding, a court would be without power to reopen the matter due to the operation of res judicata. That would be true here were it not for Article IX of the 1964 decree which provides:[7]

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[6] The United States attributes the omission of irrigable acreage to the complexity of the case. The state parties maintain that the omission was in part a tactical decision made to portray the irrigable-acreage standard as a reasonable basis for calculating the reservations' water needs.

[7] The parties do not contend that absent Article IX the decree would not be final. Although this Court had not entered a decree on other present

> "Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy."

We agree with the United States and the Tribes that this provision grants us power to correct certain errors, to determine reserved questions, and, if necessary, to make modifications in the decree. We differ in our understanding of the circumstances which make exercise of this power appropriate.

The Special Master believed that the decision whether to exercise that discretion should be governed by "law of the case" principles. Unlike the more precise requirements of res judicata, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. See 1B J. Moore & T. Currier, Moore's Federal Practice ¶0.404 (1982) (hereinafter Moore).[8] Law of the case directs a court's discretion, it does not limit the tribunal's power. *Southern R. Co.* v. *Clift*, 260 U. S. 316, 319 (1922); *Messenger* v. *Anderson*, 225 U. S. 436, 444 (1912). In that sense, the doctrine might appear applicable here. But law of the case doctrine was understandably crafted with

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perfected rights, 439 U. S. 419 (1979), at the time the United States moved to reopen the irrigable-acreage question, the pendency of the former does not undermine the finality of our earlier determination of the latter. See Restatement (Second) of Judgments § 13, Comment *e* (1982) ("A judgment may be final in a res judicata sense as to a part of an action although the litigation continues as to the rest").

[8] Under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice. See, *e. g.*, *White* v. *Murtha*, 377 F. 2d 428, 431–432 (CA5 1967).

the course of ordinary litigation in mind. Such litigation proceeds through preliminary stages, generally matures at trial, and produces a judgment, to which, after appeal, the binding finality of res judicata and collateral estoppel will attach. To extrapolate wholesale law of the case into the situation of our original jurisdiction, where jurisdiction to accommodate changed circumstances is often retained,[9] would weaken to an intolerable extent the finality of our decrees in original actions, particularly in a case such as this turning on statutory rather than Court-fashioned equitable criteria.

For the following reasons, we hold that Article IX must be given a narrower reading and should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated.

First, while the the technical rules of preclusion are not strictly applicable, the principles upon which these rules are founded should inform our decision. It is clear that res judicata and collateral estoppel do not apply if a party moves the rendering court in the same proceeding to correct or modify its judgment. 1B Moore ¶0.407, pp. 931–935; R. Field, B. Kaplan, & K. Clermont, Materials on Civil Procedure 860 (4th ed. 1978). Nevertheless, a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive. *Montana* v. *United States*, 440 U. S. 147, 153 (1979); *Federated Department Stores, Inc.* v. *Moitie*, 452 U. S. 394, 398 (1981); *Cromwell* v. *County of Sac*, 94 U. S. 351, 352–353 (1877). "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana* v. *United States*, *supra*, at 153–154.

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[9] Of course, this case does not present the issue of the proper standard to be applied when a district court issues an equitable decree and retains jurisdiction.

In no context is this more true than with respect to rights in real property. Abraham Lincoln once described with scorn those who sat in the basements of courthouses combing property records to upset established titles.[10] Our reports are replete with reaffirmations that questions affecting titles to land, once decided, should no longer be considered open. *Minnesota Co.* v. *National Co.*, 3 Wall. 332, 334 (1866); *United States* v. *Title Ins. Co.*, 265 U. S. 472, 486 (1924). Certainty of rights is particularly important with respect to water rights in the Western United States. The development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the country. *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800, 804 (1976). The doctrine of prior appropriation, the prevailing law in the Western States, is itself largely a product of the compelling need for certainty in the holding and use of water rights.[11]

Recalculating the amount of practicably irrigable acreage runs directly counter to the strong interest in finality in this case. A major purpose of this litigation, from its inception to the present day, has been to provide the necessary assurance to States of the Southwest and to various private interests, of the amount of water they can anticipate to receive from the Colorado River system. "In the arid parts of the West . . . claims to water for use on federal reservations inescapably

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[10] See E. Kempf, Abraham Lincoln's Philosophy of Common Sense, Part 1, p. 346 (1965).

[11] Prior appropriation law serves western interests by encouraging the diversion of water for irrigating otherwise barren lands and for other productive uses, and by ensuring developers that they will continue to enjoy use of the water. "Appropriation law, developed in the arid West, is usually thought of as a system for water-short areas. Where there is not enough for everyone, the rule of priority insures that those who obtain rights will not have their water taken by others who start later." F. Trelease, Cases and Materials on Water Law 11 (3d ed. 1979).

vie with other public and private claims for the limited quantities to be found in the rivers and streams." *United States* v. *New Mexico*, 438 U. S. 696, 699 (1978). If there is no surplus of water in the Colorado River, an increase in federal reserved water rights will require a "gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." *Id.*, at 705. As Special Master Tuttle recognized, "[n]ot a great deal of evidence is really needed to convince anyone that western states would rely upon water adjudications." Tuttle Report, at 46. Not only did the Metropolitan Water District in California and the Central Arizona Project predicate their plans on the basis of the 1964 allocations, but, due to the high priority of Indian water claims, an enlargement of the Tribes' allocation cannot help but exacerbate potential water shortage problems for these projects and their States.[12]

Article IX did not contemplate a departure from these fundamental principles so as to permit retrial of factual or legal issues that were fully and fairly litigated 20 years ago. The Article does not explicate the conditions under which changes in the decree are appropriate. Very little discussion surrounded the Article, which was included in Master Rifkind's

[12] The United States and the dissenting Justices contend that the States did not enjoy certainty of the extent of their water rights until quantification of non-Indian present perfected rights was accomplished in 1979. Of course, not everything was settled in 1964, but most important things were and one of them was the extent of irrigable acreage within the uncontested boundaries of the reservations. The presence of other uncertainties did not render the 1964 decree an interlocutory judgment subject to relitigation in all respects. Moreover, under the United States' line of argument, echoed by the dissent, no aspect of our 1964 decision could safely be relied upon due to the incomplete determination of present perfected rights. As already noted, res judicata does not require all aspects of a case to be final before finality attaches. See n. 7, *supra*. We agree with the States that the uncertainties not resolved until 1979 were not of a nature and magnitude to deter the States from relying upon our 1964 decree with respect to the litigated issue of irrigable acreage on the reservations.

recommended decree as an agreed-upon provision.[13] This in itself suggests that the Article was mainly a safety net added to retain jurisdiction and to ensure that we had not, by virtue of res judicata, precluded ourselves from adjusting the decree in light of unforeseeable changes in circumstances.

This reading is supported by the proceedings before Master Rifkind. The record demonstrates that it was the understanding of the parties and Master Rifkind's intention that the calculation of practicably irrigable acreage be final.[14]

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[13] Rifkind Report, at 360. The Imperial Irrigation District was the only party expressly to address Article IX, noting that the Article would preserve the Court's power to correct determinations that are "erroneous or unworkable." Supplement and Amendment to Imperial Irrigation District's Form of Decree of Court 11 (Dec. 1963). The District's favoring the inclusion of Article IX may have been predicated on the States' more general argument for equitable apportionment, under which an open-ended decree could permit adjustments as increases in non-Indian water needs outstripped Indian water utilization. We do not read the District's submission as recommending the relitigation of settled issues nor do we attach particular weight to the source as an indicium of the Court's intent in including Article IX.

[14] Master Rifkind's intention that the calculation of irrigable acreage be final is most clearly evident in one exchange with United States counsel on the precise subject. Upon being informed that some mesa lands not included within the Government's submission might be irrigable if an additional pumping plant were constructed, Master Rifkind inquired whether the Government's maps "illustrate and define" the irrigable acreage. Mr. Warner, representing the United States, stated that he was probably not "authorized to give anything away that we ought to claim," but could offer assurance that "we do not propose to ask a decree allowing water . . . for use on the Indian reservations in excess of the proof we are now offering in this matter." Master Rifkind then inquired: "And although there may be other irrigable lands within those reservations, those you do not lay any claim for the service of water upon?" Mr. Warner replied: "That is correct," and Master Rifkind noted: "that is the way we are going to be bound. This is a statement that I will take seriously." Counsel then responded that if there was a mistake in the Indian water rights claims, the United States would "ask [for] leave to correct it." This suggestion was clearly rebuffed by the Master, who labeled the categories of irrigable lands indicated on the maps as constituting a "Bill of Particulars," sub-

That was our understanding as well, and was reflected in his and our choice of the practicably-irrigable-acreage standard as a measure which would allow a *fixed* present determination of future needs for water.[15] It is untenable that the parties, the Special Master, and this Court would have intended Article IX to undercut the prevailing understanding that the calculation of practicably irrigable acreage was to be final without so much as discussing the subject.

This interpretation of Article IX is consistent with our action in prior original cases. Our long history of resolving disputes over boundaries and water rights reveals a simple fact: This Court does not reopen an adjudication in an original action to reconsider whether initial factual determinations were

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ject to correction only for clerical error. Tr. of Arg. before Special Master Rifkind 14,154–14,157. The dissent, *post*, at 649, in seizing upon Mr. Warner's statement that he was not "authorized to give anything away," forgets that our interest in the exchange is that it reflects Master Rifkind's intent that the parties be bound by the submission on irrigable acreage.

Additional passages of similar import are collected in Appendix A to Brief for State Parties in Support of Exceptions (May 20, 1982). See also n. 15, *infra*.

[15] Master Rifkind's discussion of the disadvantages of an open-end decree make this clear:

"One possibility would be to adopt an open-end decree, simply stating that each Reservation may divert at any particular time all the water reasonably necessary for its agricultural and related uses as against those who appropriated water subsequent to its establishment. However, such a limitless claim would place all junior water rights in jeopardy of the uncertain and the unknowable. Financing of irrigation projects would be severely hampered if investors were faced with the possibility that expanding needs on an Indian Reservation might result in a reduction of the project's water supply." Rifkind Report, at 263–264.

For this reason, the Master concluded that "the most feasible decree" would be to establish a water right for each of the reservations in the amount necessary to irrigate all of the practicably irrigable acreage on the reservations and to satisfy related stock and domestic uses. This would "establish water rights of fixed magnitude and priority so as to provide certainty for both the United States and non-Indian users." *Id.*, at 265.

correctly made. In two original cases in which provisions virtually identical to Article IX were included, subsequent modifications were made in reaction to changed circumstances. *Wisconsin* v. *Illinois*, 278 U. S. 367 (1929), 281 U. S. 179, decree entered, 281 U. S. 696 (1930), temporarily modified, 352 U. S. 945 (1956), 352 U. S. 983 (1957), superseded, 388 U. S. 426 (1967); *New Jersey* v. *New York*, 283 U. S. 336, decree entered, 283 U. S. 805 (1931), modified, 347 U. S. 995 (1954).[16] The Court's purpose in retaining jurisdiction in those cases can be gleaned from the respective reports of the Special Masters, which note the need for flexibility in light of changed conditions and questions which could not be disposed of at the time of an initial decree.[17] This interpretation is also consistent with the role of a "court of equity to modify an injunction in adaptation to changed

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[16] *Wisconsin* v. *Illinois* was an action brought to prevent Illinois and the Sanitary District of Chicago from diverting water from Lake Michigan for the purpose of diluting and carrying away the sewage of Chicago. The Court's decree was temporarily modified in 1956 because of an "emergency in navigation caused by low water in the Mississippi River." 352 U. S. 945. In *New Jersey* v. *New York*, litigation concerning the diversion of water from the Delaware River system, the decree was amended with the consent of the parties to take account of changed conditions concerning the discharge of sewage.

In *Wyoming* v. *Colorado*, 259 U. S. 419 (1922), the Court corrected an inadvertent omission four months after the entry of a decree. 260 U. S. 1 (1922). See 2 R. Clark, Waters and Water Rights 338 (1967).

[17] See Report of Special Master on Re-Reference in *Wisconsin* v. *Illinois*, O. T. 1929, Nos. 7, 11, and 12, Orig., p. 145 ("It is recommended that the Court should retain jurisdiction as there are questions which it is impossible to dispose of at this time in full justice to the parties . . . and unforeseen contingencies may arise"); Report of Special Master in *New Jersey* v. *New York*, O. T. 1930, No. 16, Orig., p. 199 (recommending retention of jurisdiction because "the future is necessarily fraught with uncertainties"). See also Report of Special Master in *Nebraska* v. *Wyoming*, O. T. 1944, No. 6, Orig., p. 10 ("Recommendation is further made of retention by the Court of jurisdiction to amend the decree upon a showing of such change of conditions as might render the operation of the decree inequitable").

conditions." *Railway Employes* v. *Wright*, 364 U. S. 642, 647 (1961); *United States* v. *Swift & Co.*, 286 U. S. 106, 114 (1932).

We note that our cases with similar reservations of jurisdiction involved equitable apportionment where our latitude to correct inequitable allocations injustices is at its broadest. If even there our retention of jurisdiction was limited to the consideration of new issues and changed circumstances, rather than to permit the relitigation of factual determinations on which a decree has been based, *a fortiori* the reservation of jurisdiction in this case, not governed by equitable apportionment, is no broader.[18]

We also fear that the urge to relitigate, once loosed, will not be easily cabined. The States have already indicated, if the issue were reopened, that the irrigable-acreage standard itself should be reconsidered in light of our decisions in *United States* v. *New Mexico*, 438 U. S. 696 (1978), and *Washington* v. *Washington Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658 (1979), and we are not persuaded that a defensible line can be drawn between the reasons for reopening this litigation advanced by the Tribes and the United States on the one hand and the States on the other. It would be counter to the interests of all parties to this case to open what may become a Pandora's Box, upsetting the certainty of all aspects of the decree. These considerations, combined with the practice in our original cases and the

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[18] It is not seriously contended that the claim for omitted lands is predicated upon an unforeseeable change in circumstances. The only suggested pertinent development since the prior adjudication is the advent of more sophisticated irrigation technologies that would increase the amount of practicably irrigable acreage. Clearly, however, such technological improvements will continue indefinitely, and if a basis for recalculating the extent of irrigable acreage, the decree would have no finality at all. The United States concedes that "technological advances alone ought not to call for re-opening a complete decree," Reply Brief for United States 18. We agree.

strong res judicata interests involved, lead us to conclude that the irrigable-acreage question should not be relitigated.

Because we have determined that the principles of res judicata advise against reopening the calculation of the amount of practicably irrigable acreage, and that Article IX does not demand that we do so, it is unnecessary to resolve the bitterly contested question of the extent to which the States have detrimentally relied on the 1964 decree. Detrimental reliance is certainly relevant in a balancing of the equities when determining whether changed circumstances justify modification of a decree. We believe that a certain manner of reliance has occurred, *supra*, at 621, but even the absence of detrimental reliance cannot open an otherwise final determination of a fully litigated issue. Finality principles would become meaningless if an adversarially determined issue were final only if the equities were against revising it.[19]

Similarly, it is hardly determinative that the changes requested by the United States and the Indian Tribes do not involve reallocations of as much water as was involved in the initial litigation. Aside from the fact that the requested increases of between 15 and 22 percent in the amount of irrigable acreage determined in the initial decree hardly constitute "relatively minor adjustments," the magnitude of the adjustment requested is relevant only *after* it is established that the underlying legal issue is one which should be redetermined.

Finally, the absence of the Indian Tribes in the prior proceedings in this case does not dictate or authorize relitigation of their reserved rights. As a fiduciary, the United States had full authority to bring the *Winters* rights claims for the

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[19] We are not convinced of the dissent's assessment that "the balance of hardships in this case is decidedly in the Tribes' favor." *Post*, at 655. As the dissent recognizes, "the Tribes are not currently able to use all the rights allocated to them under the 1964 decree," *post*, at 653. When viewed against the serious water shortages faced by all people, including other Tribes, in the Lower-Basin States, this is hardly the mark of manifest injustice.

Indians and bind them in the litigation. *Heckman* v. *United States*, 224 U. S. 413 (1912).[20] We find no merit in the Tribes' contention that the United States' representation of their interests was inadequate whether because of a claimed conflict of interests arising from the Government's interest in securing water rights for other federal property, or otherwise. The United States often represents varied interests in litigation involving water rights, particularly given the large extent and variety of federal land holdings in the West. See, *e. g.*, *Colorado River Water Conservation District* v. *United States*, 424 U. S., at 805. The Government's representation of these varied interests does not deprive our decisions of finality. In this case, there is no demonstration that the United States, as a fiduciary, was involved in an actual conflict of interest. From the initiation of this case, the Government has taken seriously its responsibility to represent the Tribes' interests, and we have no indication that the Government's representation of the Tribes' interests with respect to the amount of practicably irrigable acreage was legally inadequate. Recognition of Indian water rights would not di-

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[20] Contrary to the dissent, *post*, at 650, *Heckman*'s square holding that the United States' representation of Indian claims is binding, 224 U. S., at 443–446, has not been undermined, let alone "repudiated," by subsequent cases. *Cramer* v. *United States*, 261 U. S. 219 (1923), was a suit brought by the United States to confirm the right of several individual Indians to possess certain lands patented to a third party. A bare citation, *id.*, at 232, is the extent of *Heckman*'s role in the case. *Shoshone Tribe* v. *United States*, 299 U. S. 476 (1937), and *United States* v. *Creek Nation*, 295 U. S. 103 (1935), the other cases relied upon by the dissent, involve suits brought in the Court of Claims by Indian Tribes seeking compensation from the United States for alleged takings of Indian lands. Neither of these cases even mentions, let alone qualifies, *Heckman*. Nor does either case involve the Government's binding of Indian interests in court. If these cases are at all relevant, it is to suggest that in an appropriate case the Tribes' remedy for inadequate representation by the Government may lie in the Court of Claims. We, of course, do not intimate any view now as to whether such remedy is available.

minish other federally reserved water rights.[21] Under the Project Act, there was no basis for the Government to believe that Indian water rights and water needs for other *federal* property were in direct competition. Our 1963 opinion bore this out: perfected rights for the use of federal establishments were charged against the States' apportionment, 373 U. S., at 601, and, in times of shortage, under the decree, the Secretary of the Interior retained broad power to ensure that perfected rights for the use of federal establishments are satisfied. *Id.*, at 593–594; 376 U. S., at 343–344. Indeed, the substantial water allocations awarded the Tribes reflect the competency of the United States' representation. We believe the issue of practicably irrigable acreage was fully and fairly litigated in 1963.

Accordingly, we sustain the States' exceptions to this aspect of the Special Master's report.

V

We now address the dispute over reservation boundaries, which first arose during the hearing before Special Master Rifkind.

A

In the course of the proof by the United States as to the extent of the irrigable acreage of the Colorado River and Fort Mojave Reservations, California disputed the location of

[21] A breach of the United States' duty to represent the Tribes' interests is not demonstrated merely by showing that the Government erred in its calculation of irrigable acreage, whether by oversight or, as viewed in retrospect, by an unnecessarily cautious litigation strategy. Certainly, a claim of inadequate representation is not found—at least not in a court of law—by sifting through testimony in Congress, Presidential speeches, and other commentary which discuss whether the Government has at other times in other circumstances been "slow to press Indian claims." The dissent's reliance on such sources, *post*, at 650–652, only highlights that a claim of inadequate representation cannot be supported on this record. Indeed, the dissent concedes that the United States has not violated ordinary standards of attorney care as to be liable for inadequate representation.

the boundaries of these reservations. On the theory that failure to adjudicate these controversies would leave non-Indian users in doubt as to the water available for their use, and would leave the Secretary in doubt as to how to operate Hoover Dam and the mainstream works below, the former Master deemed it necessary to resolve the boundary disputes, see Rifkind Report, at 256–257, and he held several days of hearings on these matters. Tr. 19,992 *et seq.* California objected to these proceedings. The State felt it lacked authority to represent the private individuals who claimed title to land the United States contended was part of the reservations. *Id.*, at 19,998–20,000. The Master nevertheless ruled on the boundary issues, for the most part in California's favor—that is, the Master concluded that the reservations covered a smaller area than the United States claimed and that the irrigable acreage and reserved water rights should be determined on this basis.

California maintained its position before this Court that the Master should not have determined the disputed boundary of the Colorado River Reservation. California contended that it would be unfair to prejudice any of the parties in future litigation over land titles or political jurisdiction by approving findings on a tangential issue never pleaded by the United States. The State also observed that postponing determination of the boundary dispute would not materially affect the priority of the water right to which the disputed land was entitled, since both the Indians and the Palo Verde Irrigation District, in which California would place the disputed land, had high priorities.[22] California did not specifically object to the Master's resolution of the Fort Mojave boundary dispute, no doubt because, on the merits of this issue, the Master entirely agreed with the State's position.

The United States responded that the Master acted properly by resolving the boundary disputes:

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[22] Opening Brief of California Defendants in Support of Their Exceptions 279–283 (May 22, 1961).

> "The determination of the boundary of each Reservation is an essential prerequisite to the determination of the quantum of the water rights for that Reservation. There is no question of the Court's jurisdiction to resolve boundary questions nor of the authority of California to act as *parens patriae* for its citizens in such matters."[23]

The United States did not file any exceptions to the boundary determinations of the Special Master.

We did not accept the Master's resolution of the boundary disputes:

> "We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation. We hold that it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time." 373 U. S., at 601.

The decree that we entered limited the water rights of the two reservations to those awarded by the Master, based on the irrigable acreage within the boundaries as he had found them, but with respect to the boundary disputes, as stipulated by the parties,[24] Article II(D)(5) of the decree provided:

> "[T]he quantities [of water] fixed in [the paragraphs setting the water rights of the Colorado River and Fort Mojave Reservations] shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." 376 U. S., at 345.

B

The disputes about the boundaries of the Colorado River and the Fort Mojave Reservations are still with us. And

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[23] Answering Brief of United States 95 (Aug. 16, 1961).

[24] Agreed Provisions for Final Decree 10 (Dec. 18, 1963).

since the time our original decree was entered in 1964, disputes about the boundaries of the other three reservations have emerged. It is thus necessary to decide whether any or all of these boundary disputes have been "finally determined" within the meaning of Article II(D)(5), and, if so, whether the Tribes are entitled to an upward adjustment of their water rights. We begin with a summary of each of the boundary issues.

We describe first the Colorado River Reservation boundary dispute. Master Rifkind agreed with California that the disputed portion of the western boundary of the reservation ran along the west bank of the Colorado River as it moved from time to time, subject to the ordinary rules of accretion, erosion, and avulsion. The Master rejected the United States' claim that the boundary was fixed at the point where the west bank of the river existed on May 15, 1876, the date of the relevant Executive Order revising the boundaries of the reservation. Because we found it unnecessary to resolve the question, this dispute remained open for later settlement.

On January 17, 1969, the Secretary of the Interior, relying on an opinion of the Department's Solicitor, issued an order directing that approximately the northerly two-thirds of the disputed boundary was to follow the meander lines of 1879 and 1874 and was not to follow the changing west bank of the Colorado River. This order, issued unilaterally and without a hearing, added some 4,400 acres to the reservation. Later, the United States, on behalf of the Tribes, obtained final judgment in title disputes with private parties quieting title in the Tribes to various parcels in the area added to the reservation. Also, in the course of establishing the western boundary, the Secretary corrected what he deemed to be an error in an old survey. He approved the corrected plat adding 450 acres to the reservation on December 18, 1978.

Second is the dispute as to the boundary of the Fort Mojave Reservation, specifically, the location of the westerly boundary of the so-called Hay and Wood Reserve portion of

the reservation. Special Master Rifkind found that the area had been officially surveyed in 1928 and that the survey, adopted by the General Land Office of the Interior Department in 1931, was binding on the United States. Water rights were accordingly awarded on this basis. On June 3, 1974, however, the Secretary of the Interior, by order, declared null and void the 1928 survey relied upon by the Special Master and directed that a new survey be made so as to reflect the total acreage recited in the description of the Hay and Wood Reserve when it was added to the reservation in 1890. A new survey was accordingly prepared, the final plat being approved on November 6, 1978. This plat added to the reservation some 3,500 acres not treated as part of the Fort Mojave Reservation when water allocations were decreed in 1964. In this litigation, the United States claims that this additional tract contains approximately 2,000 irrigable acres for which water should be provided on a priority basis.

Third, a post-1964 secretarial order substantially enlarging the Fort Yuma Reservation has engendered controversy. The question that arose was whether some 25,000 acres of land, which in earlier proceedings in this case were not claimed by the United States to be part of the Fort Yuma Reservation, should now be deemed part of the reservation, thereby entitling the Tribe to appropriate additional water rights. A 1936 Interior Department Solicitor's opinion, based on an 1893 agreement with the Fort Yuma Tribes, had ruled that these lands were not part of the reservation. 1 Op. Solicitor of Dept. of Interior Relating to Indian Affairs 1917–1974, p. 596. In 1968 and 1977, Interior Department Solicitors reaffirmed the 1936 opinion. But on December 20, 1978, with no prior notice to parties who had participated in proceedings leading to the 1977 opinion, the Solicitor of the Interior Department overruled the three earlier Solicitor opinions and concluded that the 1893 agreement was invalid. 86 I. D. 3 (1978). The Secretary acted on that opinion,

thereby adding 25,000 acres to the reservation. The next day, the United States filed a claim in this proceeding asserting that some 5,800 acres of this area were irrigable. The Tribes claimed that even more of this tract was irrigable.

The Chemeheuvi Indian Reservation boundaries have also been changed since 1964. Some 2,430 acres were "restored" to this reservation by secretarial order of August 15, 1974. This resulted from a secretarial determination that part of the land taken from the reservation for the construction of Parker Dam was not needed. However, neither the United States nor the Tribe claimed before the Special Master that there is any irrigable acreage within this addition.

There have been still other boundary developments in the years since our first decree in this case. In 1977, the Fort Mojave Tribe obtained a stipulated judgment in its favor against the assignees of a railroad patent grant. Nearly a section of land was thereby added to the reservation, 500 acres of which, it is claimed, are irrigable. Also, since 1964, there has been an accretion of some 883 acres along the west boundary of the Cocopah Indian Reservation, an accretion that the United States asserts has been confirmed as part of the reservation by a final court decree entered on May 12, 1975. Finally, in § 102(e) of the Colorado River Basin Salinity Control Act, Pub. L. 93–320 (June 24, 1974), 88 Stat. 269, Congress directed the Secretary to cede a tract of federal land to the Cocopah Indians as an addition to their reservation. This cession was intended to be considered full payment for a certain right-of-way across the Cocopah Reservation. See S. Rep. No. 93–906 (1974). Between the accretion and the congressional Act, the United States claims that 1,161 irrigable acres have been added to the Cocopah Reservation.

As we have recited, *supra*, at 630–632 and this page, all of the foregoing developments with respect to reservation boundaries took place long prior to the entry of our supplemental decree in 1979. We were apprised of them by the

motions of the Tribes to intervene and by the motion of the United States filed in 1978 to amend the decree by awarding additional water, based on what were alleged to be final determinations enlarging the reservation boundaries and the irrigable acreage therein. Our supplemental decree of 1979 did not rule on these motions or resolve these disputes. Rather, it not only expressly left unaffected Article II(D)(5) providing for possible adjustments with respect to the Colorado River and Fort Mojave Reservations, but it also left open the issues about the boundaries of the other reservations:

> "[T]he quantities [of water] fixed in [the 1964 decree sections setting forth the water rights of each of the five Tribes] shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." 439 U. S., at 421.

The motions of the United States and the Tribes were referred to the Special Master. *Id.*, at 436–437.

C

In its motion to amend the decree, the United States, with the support of the five Tribes, contended that the above-described events constituted "final determinations" of the boundaries within the meaning of our 1964 decree. The state parties and the California agencies objected that the secretarial orders and the quiet title judgments were not "final determinations" within the meaning of Article II(D)(5) of our decree, since they had not been given an opportunity to participate in any of these proceedings, and since the administrative orders were still susceptible to judicial review. They argued, however, that the boundary controversies were ripe for judicial review, and they urged the Special Master to receive evidence, hear legal arguments, and resolve each of the boundary disputes, but only for the limited purpose of establishing additional Indian water rights, if any.

Observing that we had rebuffed the former Master's attempt to resolve these disputes, Special Master Tuttle rejected the contention that he should make a *de novo* determination of the boundaries. While recognizing that the secretarial orders might be set aside in an appropriate judicial forum, and that the court judgments, although "accepted" by the Secretary, were not res judicata as to the state parties or the California agencies, the Master nevertheless found that these acts "provide[d] the sort of finality contemplated by the Court when it left the boundary disputes concerning the Reservations for later determination." Tuttle Report, at 64. He regarded the two boundary disputes before the Court in 1963 as involving "conflicting positions within the Interior Department or ambiguities in the description of boundaries." Had the recent "definitive" secretarial orders, which have "swe[pt] aside inconsistencies and ambiguities," existed at the time of the hearing before the prior Master, they "would have removed any choice that the prior Master may have had regarding the proper boundaries," because boundaries fixed by Interior Department surveys are "conclusive in collateral proceedings." *Id.*, at 67–69 (citing *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10, 16–17 (1935); *Stoneroad* v. *Stoneroad*, 158 U. S. 240, 250–252 (1895); *Knight* v. *United States Land Assn.*, 142 U. S. 161, 176–187 (1891); *Cragin* v. *Powell*, 128 U. S. 691, 698–699 (1888)).

The Master was unmoved by the state parties' argument that they did not receive their "day in court" before any administrative or judicial decisionmaker, since he was "aware of no claim to land in any of the disputed areas by any of the State Parties." Tuttle Report, at 74. Any remaining concerns could "be met by the inclusion in the final decree of the Court of a provision that would reduce the allotment now sought on behalf of the Tribes *pro tanto* for lands found to be practicably irrigable which subsequent litigation determines not to be Indian land." *Id.*, at 75. Accordingly, the Master

accepted almost all of the boundary changes set forth in the motion of the United States, and the States and the agencies filed their exceptions.

D

We cannot agree with the Special Master that the reservation boundaries extended by secretarial order have been "finally determined" within the meaning of Article II(D)(5) of our 1964 decree. With respect to these boundary lines, we sustain the exceptions and decline to increase the Tribes' water rights at this time.[25] However, with respect to the boundaries determined by judicial decree,[26] we overrule the exceptions and adopt the Master's conclusions.

In our 1963 opinion, when we set aside Master Rifkind's boundary determinations as unnecessary and referred to possible future final settlement, we in no way intended that *ex parte* secretarial determinations of the boundary issues would constitute "final determinations" that could adversely affect the States, their agencies, or private water users holding priority rights. In the first place, Article II(D)(5) was a stipulated provision; it is implausible to suggest that the

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[25] It follows *a fortiori* from this conclusion that we must overrule the United States' claim that administrative action subsequent to the date the Master filed his report has "finally determined" the boundaries of another disputed tract—the so-called "Checkerboard area"—alleged to be part of the Fort Mojave Reservation. See Tuttle Report, at 81–83.

[26] These include: (1) the boundary fixed by the 1977 judgment in favor of the Fort Mojave Tribe against the assignees of the railroad patent grant; and (2) the boundary determined by the court decree of May 12, 1975, which confirmed certain accreted land to be part of the Cocopah Reservation. See *supra*, at 633. The only other court judgments relevant to this case are those obtained by the United States on behalf of the Colorado River Tribes. These judgments quieted the Tribes' title to certain parcels of land *totally within* the area added to the reservation by the secretarial order of January 17, 1969. See *supra*, at 631. Accordingly, in view of our holding that the secretarial orders do not constitute "final determinations," the Colorado River Tribes will have to await the results of further litigation before they can receive an increase in their water allotment based on the land determined to be part of the reservation by these latter judgments.

States would have so meekly stipulated to *ex parte* secretarial determinations beyond the reach of judicial review. Furthermore, it was the United States that insisted that Master Rifkind should adjudicate the boundary disputes. The Special Master complied, and the United States filed no objections to his conclusions. Indeed, all of the parties treated the boundary matters as fully adjudicable issues of material fact or law. The United States wanted those matters to be adjudicated here; California apparently wanted them resolved elsewhere. But no one contended that they should not be judicially resolved at all. Present and former officials of the Department of the Interior testified and cooperated fully with the United States at the hearing before Master Rifkind. The Department's views appeared to be as definitive and final as they ever would be. No one suggested that future administrative determinations were being contemplated, or that any such future proceedings would purport conclusively to determine the issue then before the Court.

Of course, we now intimate nothing as to the Secretary's power or authority to take the actions that he did or as to the soundness of his determinations on the merits. It must be remembered that while we did not accept Master Rifkind's boundary decisions, water allocations to the Tribes under our decree were limited to the irrigable lands within the reservation boundaries as the Master had determined them to be. Thus, up to the present the States have had the benefit of their victory before Master Rifkind on the boundary issues; and even if there were something they might have done to set in motion some judicial proceeding to resolve the disputes left open by our decree, they obviously had no great incentive to do so. The United States, on the other hand, the intervenor with the burden of proving reserved rights, might have instituted appropriate judicial proceedings in the District Courts, in which event the issues tried by the Special Master would presumably have been relitigated. Instead, the Secretary

chose to bring matters to a head by a series of secretarial orders, culminating with the 1978 motion in this Court moving for a determination of the irrigable acreage within the boundary lands recognized by the Secretary, and for appropriate additional water allocations.

While the California agencies have filed suit to set aside the secretarial orders extending reservation boundaries, the States have not yet sought to intervene in that litigation. They, along with the state agencies themselves, insist that Special Master Tuttle erred in refusing to adjudicate the boundary issues, that their exceptions in this respect should be sustained, and that appropriate action should be taken to resolve the disputes in this original action. In this respect, we disagree with the States. It is clear enough to us, and it should have been clear enough to others, that our 1963 opinion and 1964 decree anticipated that, if at all possible, the boundary disputes would be settled in other forums. At this juncture, we are unconvinced that the United States District Court for the Southern District of California, in which the challenge to the Secretary's actions has been filed, is not an available and suitable forum to settle these disputes. We note that the United States has moved to dismiss the action filed by the agencies based on lack of standing, the absence of indispensable parties, sovereign immunity, and the applicable statute of limitations.[27] There will be time enough, if any of these grounds for dismissal are sustained and not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court. If the litigation goes forward and is concluded, there will then also be time enough to determine the impact of the judgment on our outstanding decree with respect to Indian reservation water rights.[28]

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[27] The District Court in the agencies' suit has stayed further proceedings pending this Court's decision in the present case. *Metropolitan Water District* v. *United States*, Civ. No. 81–0678–GT(M) (Apr. 28, 1982).

[28] The dissent, *post*, at 655, ascertains "no discernible purpose" in our refusal to award the Tribes an immediate increase in their water rights in the

Hence, in our judgment, the litigation filed in the United States District Court for the Southern District of California should go forward, intervention motions, if any are to be made, should be promptly made, and the litigation expeditiously adjudicated. If there are issues in that action without substantial connection to the issues in this original action, they should be severed and adjudicated separately if their consideration would substantially delay the final resolution of the questions which have made it necessary to keep our decree in this action open to accommodate the results of unresolved issues.[29]

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areas determined to be part of the reservations by the *ex parte* secretarial orders. The dissent agrees with the Special Master that the Tribes should now be given an increase, qualified by the proviso that these rights will be reduced *pro tanto* for practicably irrigable acreage in an area which subsequent litigation determines not to be Indian land. Unless it is assumed that any challenges to the Secretary's determinations are bound to fail, the dissent's approach has little to commend it in terms of judicial economy or finality. Its, as well as our, resolution anticipates further litigation that may affect the terms of our decree. Moreover, it would require us to decide now, perhaps unnecessarily, the propriety of the Master's findings on irrigable acreage. The dissent's reasoning would also deprive the States, albeit on a "conditional basis," *post*, at 656, of valuable water rights now vested in them, without affording them the slightest semblance of a fair hearing on their claims. Cf. *Fuentes* v. *Shevin*, 407 U. S. 67 (1972) (invalidating a procedure allowing prejudgment taking of property without notice or hearing). The dissent identifies no plausible basis for its conclusion that an *ex parte* determination by an executive officer of a party to this litigation should constitute a "final determination" within the meaning of our decree.

The dissent also observes, *post*, at 657–658, n. 10, that, under our holding, the States have no real incentive to bring the pending litigation to a prompt conclusion. If his approach were adopted, however, the United States and the Tribes would similarly lack incentive. At present, we have no reason to believe that the District Court will fail to ensure that the pending litigation will be promptly concluded.

[29] If the States and/or the agencies wish to challenge the recently finalized administrative action regarding the "Checkerboard area," see n. 25, *supra*, they should amend their complaint and raise the issue in the District Court suit.

As for the several judicial adjudications of boundary disputes that determined certain lands to be Indian lands, very little need be said. The Special Master observed, and the States proclaim, that the States were not parties to these adjudications and are not bound by them in a res judicata sense. This is correct, but neither the States nor the California agencies, in their exceptions or briefs, have asserted that any of the decrees mistakenly determined that the parcels of land at issue in the adjudications were reservation lands. To the contrary, the States' brief in support of their exceptions declares that "[w]e do not seek to challenge title determined in any of the cases relied upon by the United States." Exceptions of State of Arizona et al. 64.

This being so, these adjudications are final as a practical matter, and the only issue remaining concerning these parcels, which the States concede are Indian land, is the same issue that would remain if the Special Master had made the same boundary determinations and the States were content to accept them—namely, how much practicably irrigable acreage exists in each such parcel? That issue Special Master Tuttle determined as to each parcel involved in this litigation. Insofar as we can discern from the States' brief, *id.*, at 117, Table 1, the States do not differ with the Master's determination of irrigable acreage in the areas added to the reservations by way of judicial decree, except perhaps to the extent of a few acres in the tract labeled FM–11 by the parties.[30] The States argued to the Master that a small portion of FM–11 is too sandy to be irrigable. The Master, however,

[30] Seventeen acres of FM–11 were determined to be part of the Fort Mojave Reservation by the judgment in *Fort Mojave Tribe* v. *La Follette*, Civ. No. 69–324MR (Ariz., Feb. 7, 1977). See Supplemental Memorandum for United States with Respect to Its First Exception 5 (Sept. 27, 1982). The remainder of FM–11 has not been added to the reservation by judicial decree; it is part of the "Checkerboard area." See *id.*, at 3; n. 25, *supra*. The States claim that 24 acres of FM–11 are too sandy to be practicably irrigable, but it appears that few, if any, of these 24 acres are within the part of FM–11 awarded to the Tribe in the *La Follette* decree. See State Parties' Exhibits 142, 158(G).

recited evidence that there is no sandy land in the FM–11 tract, and the States suggest no basis for rejecting the Master's determination that this land is practicably irrigable.[31]

Therefore, we conclude that the decree should be amended by providing to the respective reservations appropriate water rights to service the irrigable acreage the Master found to be contained within the tracts adjudicated by court decree to be reservation lands.

There is no issue about the expansion of the Cocopah Reservation by congressional statute. The water right for that addition to the reservation could not be given and was not given a retroactive priority date. The right accorded dates from June 24, 1974, and hence will not disturb the prior rights of the States or the other parties to this case.

VI

Because of our disposition of the above issues, it is not necessary to resolve the other exceptions brought by the States and state agencies pertaining to the amount of irrigable acreage within the so-called omitted lands or within the boundaries that we have not recognized as finally determined at this time. It is similarly unnecessary for us to pass on the exceptions brought by the United States concerning the recommended decree. The parties are directed to submit, before September 19, 1983, a proposed decree to carry this opinion into effect.

It is so ordered.

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[31] At the hearing before Master Tuttle, the States presented the expert testimony of economists who stated that sandy acreage could not practicably be farmed because crop yields would be too low and production costs too high. The States have excepted to the Master's rejection of this *economic* testimony. However, the Master accepted the testimony of the United States' *soils* expert, who concluded that no sandy lands existed on FM–11. Tuttle Report, at 188–189. The States have not contested the Master's finding that the soil on FM–11 is not sandy, and this ends the matter. It is thus unnecessary for us to consider the States' arguments regarding the economic feasibility of farming on sandy soil.

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

JUSTICE BRENNAN, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, concurring in part and dissenting in part.

I join Part III of the Court's opinion, granting the petitions to intervene in this action filed by the Fort Mojave, Colorado River, Chemehuevi, Cocopah, and Quechan Tribes (collectively, the Tribes). I also agree with the basic premise of Part IV of the Court's opinion that in Article IX of our 1964 decree, 376 U. S. 340, 353, we retained the power to reconsider our quantification of the Tribes' reserved water rights, as set out in Article II(D) of the 1964 decree, *id.*, at 343–345. See *ante*, at 618. I part company with the Court, however, in its refusal to exercise that power, given the unique circumstances of this litigation and the timing of the Tribes' and United States' motions. In addition, I find inexplicable the Court's decision to sustain the exceptions of Arizona, California, and the California agencies (hereinafter States) to the Special Master's proposed solution to the boundary lands controversy.

I

The so-called "omitted" lands are irrigable areas, within the Tribes' reservations, which the United States failed to identify during the extensive proceedings before Special Master Rifkind that preceded our 1964 decree. The fact that irrigable lands were not called to the attention of the Master or the Court is significant because the Master and the Court held that the amount of water which the Tribes were entitled to divert from the mainstream of the Colorado depended on the number of "irrigable acres" within each reservation. 373 U. S. 546, 601 (1963); Report of Special Master Rifkind 263–265 (hereinafter Rifkind Report). Although the States vociferously dispute exactly how much of the omitted lands

are in fact irrigable, they do not dispute two facts critical to the question now before the Court. First, even under the States' legal theories a substantial portion of the omitted lands are irrigable—at least 18,500 acres, see Report of Special Master Tuttle 109, 125 (hereinafter Tuttle Report)—and would have supported an award of additional diversion rights in our 1964 decree had they been identified at that time. Second, the United States completely failed to present evidence regarding the irrigability of these lands until after the Tribes sought leave to intervene in these proceedings in 1977.

There are strong arguments for correcting the quantifications of the Tribes' diversion rights in the 1964 decree, to include the amounts of water that could be used economically to irrigate the omitted lands. As this litigation now stands, the considerations of finality are not so strong, nor the interests of justice so weak, as the Court would have them. The system contemplated by our 1964 decree for allocating the waters of the Colorado River's Lower Basin has yet to become final, either as a formal or as a practical matter, and correction of the decree at this time would in no way compromise our continuing intention to effect a final allocation of the Lower Basin mainstream. Furthermore, awarding additional diversion rights to reflect the irrigable acreage not considered prior to the 1964 decree would correct a manifest injustice to the Tribes, who were not themselves before this Court in 1964, and it would do so with little, if any, prejudice to interests of other parties to this litigation.

A

The Court's opinion excessively extols the principle of "finality," but overlooks the caveat that "finality" means different things in different contexts, and that the law accords finality different weight depending on the context. First, the Court borrows support from formal, largely nondiscretionary doctrines such as res judicata. It admits, however, that res

judicata has no applicability to this case, *ante*, at 619, for the simple reason that the omitted lands claims have been raised in the course of the same proceeding in which they were supposedly decided before, and that proceeding has not yet reached the stage of final judgment. In a case such as this, when a party seeks reconsideration of questions decided at an earlier stage of a single, continuing litigation, the law allows courts more discretion than in a case in which the party wants to upset a final judgment in another proceeding, before another judge. See generally 1B J. Moore & T. Currier, Moore's Federal Practice ¶¶0.401, 0.404[1] (1982) (hereinafter Moore); cf. *United States* v. *United States Smelting Refining & Mining Co.*, 339 U. S. 186, 199 (1950).

A final judgment makes a difference. It marks a formal point at which considerations of economy, certainty, reliance, and comity take on more strength than they have before the judgment. A court's decision to reconsider a prior ruling before the case becomes final, however, is ultimately a matter of "good sense." Moore §0.404[10], at 573. Concern for finality remains an important policy, even before final judgment. In the absence of some overriding reason, a court should be reluctant to reopen that which has been decided merely to correct an error, even though it has the power to do so. See *Messenger* v. *Anderson*, 225 U. S. 436, 444–445 (1912). Nevertheless, federal courts have traditionally thought that correcting a manifest injustice was reason enough to reconsider a prior ruling, see Moore ¶0.404[1], p. 408, and, although they may hold a party to its failure to litigate a claim when it had the opportunity, they have regarded finality concerns as less compelling when the question at issue has never actually been contested, see *Hartford Life Ins. Co.* v. *Blincoe*, 255 U. S. 129, 136 (1921).[1]

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[1] The equity doctrine of "changed circumstances," see *ante*, at 624–625, reflects many of the same principles. Yet even if changed circumstances are necessary to modify an injunction—and I doubt that an equity court would turn its back on manifest injustice—they have never been the *sine*

The Court also uses "finality" in a more practical sense, appealing to the obvious benefits to society of having property rights be certain. This meaning of finality underlies the Court's invocation of Abraham Lincoln and the development needs of the West. *Ante*, at 620–621. More importantly, it was central to the Court's choice of an "irrigable acreage" standard in 1963, for that measure accorded the highest degree of certainty to all Lower Basin interests. Special Master Rifkind rejected Arizona's proposal that the Indians be allocated only enough water to satisfy their presently foreseeable needs, precisely because that solution would be subject to re-evaluation in the future, "plac[ing] all junior rights in jeopardy of the uncertain and the unknowable." Rifkind Report 263–264. Therefore, he urged—and the Court held, 373 U. S., at 600–601:

> "[T]he most feasible decree that could be adopted in this case, even accepting Arizona's contention, would be to establish a water right for each of the five Reservations in the amount of water necessary to irrigate all of the practicably irrigable acreage on the Reservation. . . . This will preserve the full extent of the water rights created by the United States and will establish rights of fixed magnitude and priority so as to provide certainty for both the United States and non-Indian users." Rifkind Report 265.

Thus, although the Court stresses Special Master Rifkind's interest in a fixed and final decree, see *ante*, at 622–624, and n. 15, that interest is largely irrelevant to the question at hand. One can share Special Master Rifkind's interest in having a fixed decree, and even Abraham Lincoln's scorn for scoundrels in courthouse basements, and still think it desirable to correct the decree before it becomes fixed. Our interest in a fixed, reliable decree is well enough served if we make clear

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qua non of adjusting a decree in the process of making it final. The question before us is whether we should do that.

that it should not be subject to reopening, even to correct the kind of clear error that the Tribes and the United States have shown here, once this litigation becomes final.

The Court acknowledges that this litigation was far from final when the United States and the Tribes raised the claims now at issue, because the Court had not confirmed a list of the "present perfected rights," or rights to use Colorado River mainstream flows that vested before the effective date of the Boulder Canyon Project Act of 1928, 43 U. S. C. § 617. *Ante*, at 611. The allocation system for the Lower Basin could not become final until an authoritative list of "present perfected rights" and their priority dates had been established.[2] Article II of the 1964 decree identified a number of federal "present perfected rights," including those of the Tribes, representing rights to divert about 900,000 acre-feet of mainstream flows per year. The 1964 decree, however, did not address any "present perfected rights" acquired under state law. The full list of "present perfected rights" was not submitted to or confirmed by this Court until 1979. See 439 U. S. 419. As quantified by our 1979 decree, state "present perfected rights" accounted for rights to divert well over 3 million acre-feet of mainstream flows. Thus, in 1977,

[2] It is unnecessary to describe fully the complex structure of our 1964 decree. Suffice it to say that the Indian Tribes' rights at issue in this case are among the "present perfected rights," but they are not the only such rights. These rights are important because the Secretary of the Interior has an obligation to satisfy them to their full extent, and that water is charged against the States' overall entitlements under the 1964 decree. Furthermore, in drought years "present perfected rights" cannot be made to bear pro rata reductions along with other water users; rather, the Secretary is obligated to satisfy them in full, starting with the right established first in time and proceeding chronologically (except for the Indian rights, which must be satisfied first regardless of priority, 439 U. S. 419, 421 (1979)). As a practical matter, then, the more "present perfected rights" there are, the less certain it is that other users will receive a specific amount of water in any given year, especially in years when mainstream flows are less than the 7.5 million acre-feet benchmark used in the 1964 decree.

when the Tribes first sought to intervene in this litigation for the purpose of raising their omitted lands claims, and in 1978, when the United States moved for entry of a supplemental decree concerning the omitted lands, issues critical to the 1964 decree's allocation system had yet to be finally determined.[3]

Furthermore, it has long been recognized that the primary object of this litigation was to establish a regimen for allocating the Lower Basin waters sufficiently reliable to permit Congress and Arizona to go forward with the Central Arizona Project, a massive public works effort to make Colorado River water available to agricultural interests in central Arizona. Tuttle Report 38–39; Meyers, The Colorado River, 19 Stan. L. Rev. 1, 73 (1966) (hereinafter Meyers). That purpose has been accomplished. The Central Arizona Project was authorized in 1968, and construction has now reached an advanced stage. But even at this late date the Project is still several years from completion. And until it is ready to begin diverting Colorado River water, the allocation system in our 1964 decree has little practical importance, because Arizona lacks the capacity to use most of the water rights allocated to it in the 1964 decree.

In sum, the interest in "finality" does not dispose of this case. Principles of judicial economy provide the sole basis for the Court's refusal to correct the 1964 decree. But no significant adjudicative resources were expended on the omitted lands claims in the proceedings prior to the 1964 decree, because they were not raised at all. And, although the United States' failure to identify the omitted irrigable lands 25 years ago should not be excused, I cannot join in depriving the Tribes permanently of significant rights to water on that basis alone, especially when I see little prejudice to the

[3] The 1979 decree was handed down before we acted on the Tribes' motions to intervene or any of the claims now before the Court. The decree expressly left these matters open for resolution and referred them to Judge Tuttle as Special Master. *Id.*, at 421–422, 436–437.

States from reopening the 1964 decree to the extent necessary to correct the error.[4]

B

The Tribes will suffer a manifest injustice if we fail to consider the omitted lands claims. Under the uncorrected 1964 decree, the Tribes stand to lose forever valuable rights to which they are entitled under the Court's construction of the Executive Orders creating their reservations, 373 U. S., at 595–601. This loss occurs entirely because the United States failed to perform its obligations as trustee and advocate to present evidence to the Court of *all* irrigable lands within the reservations, or at least to make a record of its justification for not presenting such evidence.

It is certainly not the case that the United States made a considered decision to waive the Tribes' claims to water for the omitted lands. Cf. *ante*, at 617–618, n. 7, and 622–623, n. 14 (suggesting otherwise). The existence of some omitted

[4] The Court suggests that if we reopened the question of irrigable acreage we would also have to reconsider the "irrigable acreage" standard itself. See *ante*, at 625–626. In raising that specter, the Court ignores the obvious distinction between the standard and its application to the omitted lands. No issue was the subject of more controversy in the proceedings leading up to our 1964 decree than the "irrigable acreage" standard. Unlike the actual quantification of the acreage, the standard was discussed extensively, both in Special Master Rifkind's report, at 257–266, and in the Court's opinion, 373 U. S. 546, 600–601 (1963). The "irrigable acreage" standard *has* been fully and fairly litigated. Nor does the Court's opinion or Special Master Rifkind's report indicate that some other standard of measurement would have been chosen had the Court been apprised of the irrigable acreage in the omitted lands. This Court adopted the "irrigable acreage" standard for the reasons stated in its opinion—it is the only "feasible and fair way by which reserved water for the reservations can be measured," *id.*, at 601. It reflects the purposes for which the reservations were created, and once final it need not be readjusted in light of changed circumstances, unlike an equitable measure linked to current or expected population. If a few acres worth of water more or less would have changed our decision, we would not have rejected the argument that Indian water rights be determined by familiar equitable principles rather than by the more objective standard.

irrigable lands came to light at one point in the hearings, when an agricultural specialist mentioned that some mesa lands adjacent to irrigable acreage claimed by the United States could also be irrigated. App. to Brief for State Parties in Support of Exceptions 11. Special Master Rifkind immediately pressed the United States' representative for an express waiver on the spot of all claims to water for irrigable acreage not identified in the pre-1964 hearings, but the attorney responded, "I am probably not authorized to give anything away that we ought to claim." *Id.*, at 12.[5]

Heckman v. *United States*, 224 U. S. 413 (1912), see *ante*, at 627, does not require us to make the Tribes bear the cost of the United States' error. The relevant question in *Heckman*, raised by non-Indian defendants, was whether individual Indians were necessary parties in a suit by the United States to set aside conveyances by those Indians of lands they were forbidden by statute to alienate, and over which the United States had significant trust responsibilities. 224 U. S., at 444. The Court held that the United States had power to enforce the statutory restrictions without the acquiescence of the Indians, and that by virtue of the restrictions the individual Indians had no interest in the subject matter of the suit. *Id.*, at 445. In passing, the Court noted that representation of Indian interests by the United States "traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty." *Ibid.*

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[5] See *ante*, at 622–623, n. 14. A close reading of the exchange between Special Master Rifkind and the Government attorney reveals that the Special Master did not continue to press his demand for a binding waiver. In light of the United States' delicate trust responsibilities in Indian water cases, it would have been improper to require the attorney to make a split-second decision to concede an important class of claims in response to surprise testimony from a witness. Cf. Manual for Complex Litigation § 1.80, p. 89 (1982); Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1291, 1297–1298 (1976).

Were it not for the trust relationship recognized in *Heckman* and other cases, the United States' litigation decisions could not estop the Tribes, who were not separately represented. Insofar as *Heckman* intimates that the United States' power to compromise Indian interests is not subject to judicial scrutiny, it has long since been repudiated by this Court. See, *e. g.*, *Shoshone Tribe* v. *United States*, 299 U. S. 476 (1937); *United States* v. *Creek Nation*, 295 U. S. 103, 110 (1935); *Cramer* v. *United States*, 261 U. S. 219, 227–229 (1923). Instead, we have recognized that the United States' relationship to Indian interests is much like that of a fiduciary to a beneficiary. Under the modern view, the "discharge of the national duty" requires sharp attention to the quality of the United States' fulfillment of its trust obligations, including the obligation to represent Indian interests in litigation.

There has often been reason to question the quality of that representation, especially when rights to scarce water in the West were at stake. In 1973, the National Water Commission reported: "In the history of the United States Government's treatment of Indian Tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters." National Water Comm'n, Water Policies for the Future—Final Report to the President and to the Congress of the United States 475. President Nixon admitted as much in a 1970 message to Congress:

> "The United States Government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people; frequently they are also the subject of extensive legal dispute. In many of these legal confrontations, the Federal government is faced with an inherent conflict of interest. The Secretary of the Interior and the Attorney General must at the same time advance *both* the *national* interest in the use of land and

water rights *and* the *private* interests of Indians in land which the government holds as trustee.

". . . There is considerable evidence that the Indians are the losers when such situations arise." H. R. Doc. No. 91–363, pp. 9–10, 116 Cong. Rec. 23261 (emphasis in original).

The Court carefully explains that the United States had no "actual conflict of interest" with regard to Lower Basin water rights, by which it apparently means that the recognition of Indian water rights did not diminish other federally reserved water rights. See *ante*, at 627. I agree. Nevertheless, history discloses that the United States has not always taken such a narrow view of its interests in water rights controversies. On the Colorado River and elsewhere, it has constructed extensive water projects to serve nonfederal interests; congressional authorization of the Boulder Canyon Dam was the crucial event in the development of the Lower Basin, shaping this litigation from its inception. See 373 U. S., at 564–590. The United States has sometimes been slow to press Indian claims when they conflicted with those of politically influential non-Indian interests. See, *e. g.*, *Pyramid Lake Paiute Tribe* v. *Morton*, 354 F. Supp. 252, 256–257 (DC 1973). See generally Federal Protection of Indian Resources: Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 92d Cong., 1st Sess., 235–249, 907–914 (1971) (hereinafter Senate Hearings); F. Cohen, Handbook of Federal Indian Law 596–599 (1982) (hereinafter Cohen).[6] We

[6] There are many ways of compromising a claim besides making a decision not to press it. Devoting fewer resources to investigating and preparing the claim than its economic importance would warrant has the same effect. In cases such as this, the Justice Department is responsible for pressing the Indians' claims in court, but the Interior Department and the experts it employs are responsible for developing the facts of the claim and bringing it to the attention of the Justice Department. The practical result of this bifurcated responsibility may often be to confer effective

should not, therefore, leap to the conclusion that the irrigability of *all* reservation lands, including the omitted lands, "was fully and fairly litigated in 1963," *ante*, at 628.

This case provides proof (if any is needed) that those with direct interests—economic, historical, spiritual—in the outcome of a case are their own best representatives. Upon entering this litigation, the Tribes swiftly exposed the extent of the United States' pre-1964 neglect. I would not hold that the United States had so violated the ordinary standards of attorney care as to be liable for "inadequate" representation of the Indian interests in this litigation, if that were the standard of liability, on the basis of the mere fact that it failed to claim water rights for some irrigable acreage. But I do not find in this record any justification for the United States' failure to present evidence on the omitted lands. Even if the United States did intend to waive the omitted lands claims, I see no good reason, before final judgment, to deny the Tribes a hearing on claims that have never been litigated. As a matter of justice, the Tribes deserve this chance to defend rights which should have been theirs.

C

In deciding whether to correct the 1964 decree, we should also consider any possible prejudice which the States might suffer as a result. Of course, the States would prefer that we not allocate additional water rights to the Tribes; at least at some point in the future, additional Indian rights may make the rights of junior state appropriators less certain. With regard to timeliness and finality, however, prejudice means prejudice from procedure rather than from the result. Hence, the important question is whether the States would

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power to waive Indian claims on Interior Department hydrologists and agricultural experts. See Senate Hearings 445–449 (testimony of W. Kiechel, Jr., Deputy Assistant Attorney General, Land and Natural Resources Division).

be any worse off because the additional Indian rights were confirmed in 1983 rather than 1964.

The Special Master considered this issue at length and determined that the States would not be significantly prejudiced by adjustments in the 1964 decree. Tuttle Report 38–46.[7] The whole question of reliance by the States, however, involves the highest degree of speculation. First, the amount of water entering the Lower Basin at Lee Ferry, Ariz., and available for use by Lower Basin interests has historically averaged far more than the 7.5 million acre-feet contemplated by the 1964 decree. See Rifkind Report 117. Until far more development occurs in the Upper Basin States, that situation can be expected to continue. Furthermore, improvements in irrigation, farming, and conservation technology may well permit more efficient exploitation of the present and future quantities of available water, so that more users will be accommodated by the same or less amounts of water.

In addition, the Tribes are not currently able to use all the rights allocated to them under the 1964 decree.[8] Until sub-

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[7] The Special Master observed that in 1968 Congress authorized construction of the Central Arizona Project based on projections of mainstream flows available for diversion by Arizona far lower than current projections, so that it is not possible to argue that the Central Arizona Project would not be commercially viable if the Indians receive additional water rights. Tuttle Report 38–41; see S. Rep. No. 408, 90th Cong., 1st Sess., 18–21, 32–35 (1967). The Special Master also found that water would be available to meet the full diversion capacity of water projects begun by Nevada after 1964. Tuttle Report 44–46. The Metropolitan Water District of Southern California—the junior major appropriator in California—presented some evidence of reliance, but did not "fully explain why [it] will receive less water if the Tribes receive additional water rights." *Id.*, at 42. In any event, under current projections of demand the Metropolitan Water District will not be ready to use its existing entitlements before the year 2010. *Ibid.*

[8] From 1975, when the Fort Mojave Tribe began to use its water for the first time, through 1981, the Tribes collectively diverted only 77% of the water to which they were entitled under the 1964 decree. In individual

stantial new irrigation systems or industrial plants are built, any additional water rights that the Tribes receive will have little or no practical effect on the availability of water to other Lower Basin interests. The Tribes can probably lease their rights to others with the consent of the United States, but they have not explored this option extensively. See Cohen 592–593; Meyers 71; cf. 2 Op. Solicitor of Dept. of Interior Relating to Indian Affairs 1917–1974, p. 1930 (1964). Even if the Tribes leased all of their rights to other Lower Basin users, it would merely mean that existing interests with the means to divert water from the Colorado River would pay a market rate for additional water. If the Tribes do not lease their rights, the water will simply be available for use by other Lower Basin interests, in accord with the allocation system established by the 1964 decree. In any event, non-Indian users will not be deprived of water in the near future on account of the rights at issue in this case.

In sum, correcting the 1964 decree to reflect additional irrigable acreage in the omitted lands would not harm the States more than they would have been harmed had the omitted lands been considered in framing the 1964 decree. In truth, Indian water rights are unlikely to affect state interests to any significant degree until well into the next generation,

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years, diversions ranged from 83% of the 1964 decree awards (1981) to 72% (1978). U. S. Dept. of Interior, Bureau of Reclamation, Compilation of Records in Accordance with Article V of the Decree of the Supreme Court of the United States in *Arizona* v. *California* Dated March 9, 1964—Calendar Years 1925–1981. The Chemehuevi diverted no water at all, although they are entitled to 11,340 acre-feet a year, *ibid.*, because there appears to be no diversion system in place on their reservation, either for purposes of irrigation or for other development. See Senate Hearings 1075 (testimony of R. Esquerra). The Special Master's Report makes clear that substantial capital investment would be required before the Tribes could begin to use additional water. See, *e. g.*, Tuttle Report 165–184, 242–248. On the Fort Mojave Reservation alone the United States' expert estimated that over $2.1 million would be required to develop six units of land for which the United States claimed additional water rights. See United States Exhibits 132–140.

when all concerned will have had plenty of time to prepare. Yet if we foreclose the Tribes now from asserting their rights to water for the omitted lands, those rights will be lost forever, through no fault of their own. The balance of hardships in this case is decidedly in the Tribes' favor. In order to avert a manifest injustice to the Tribes before this litigation becomes final and the allocation system in the 1964 decree begins to have a practical effect, I would reopen the 1964 decree to recognize additional water rights for the Tribes.

II

Reasonable judges might differ over some aspects of this case, but I would not have thought the Special Master's solution to the boundary lands controversy was among them. The Court's failure to approve a decree that includes a quantification of the water rights appurtenant to the disputed boundary areas serves no discernible purpose, and it is profoundly inconsistent with its emphasis in Part IV of its opinion on the ideals of finality, judicial economy, and predictability of water rights. At no point does the Court explain its rejection of the Special Master's entirely reasonable proposal regarding the boundary lands.

In our 1963 opinion, we rejected Special Master Rifkind's *de novo* determination of boundary disputes concerning two of the reservations, 373 U. S., at 601, and our 1964 decree was left open to the extent of permitting an award of additional water rights should the boundaries be "finally determined," Art. II(D)(5), 376 U. S., at 345. The 1979 decree recognized that the actual boundaries of all five reservations are subject to dispute. 439 U. S., at 421–422. At the outset of the current phase of this litigation, all parties agreed that it was time to bring the maximum degree of certainty possible to the Lower Basin allocation system, a task requiring "final determination" of the disputed boundaries, at least for the purpose of quantifying the Tribes' entitlement to water. The United States and the Tribes urged before the Special Master that certain administrative determinations by

the Secretary of the Interior had finally determined the boundaries of the reservations, where the disputed boundaries lay between reservation land and other federal lands.[9] The States argued, as they had in 1963, that this Court should determine the relevant boundaries *de novo*.

The Special Master chose a middle course, calculated to put an end to further litigation in this Court. He took evidence on and determined the amount of irrigable acreage within the boundaries recognized by the Secretary of the Interior, and he calculated the corresponding water rights for inclusion in the final decree. However, he also recommended that the final decree include the following proviso:

> "Provided, further, . . . that lands presently determined for this purpose to be within the boundaries of the above-named Reservations and later determined to be outside the boundaries of the above-named Reservations, as well as any accretions thereto to which the owners of such land may be entitled, should not be included as irrigable acreage within the Reservations and that the above specified diversion requirements of such land that is irrigable shall be reduced by the unit diversion quantities listed in the [1979 decree]." Tuttle Report 282–283.

The effect of this proviso would be to grant the Indian Tribes the water rights appurtenant to the disputed boundary areas on a conditional basis. If the States succeeded in overturning any of the Secretary's boundary determinations in an appropriate forum, the corresponding water rights—precisely quantified for each area in the Special Master's Report, *id.*, at 192–196, 239–277—would automatically be subtracted from the Tribes' entitlements.

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[9] The Court determines that other disputed boundaries have been "finally determined" by judicial adjudications that the States have not challenged. It approves amending the 1964 decree to include water rights appurtenant to these parcels. *Ante*, at 640–641. To this extent, I concur in Part V of the Court's opinion.

The advantages of the Special Master's proposal are obvious. First and foremost, it remains faithful to the approach taken in our 1963 opinion. On the one hand, it does not require this Court to decide in the first instance either what are the exact boundaries of the reservations or whether the Secretary's administrative boundary determinations are binding on all parties for all purposes. On the other hand, it settles the maximum possible extent of Indian water rights. It allows the States to rely absolutely on that figure, and it informs them precisely how much water is at stake if they choose to litigate particular boundary questions in other forums. In 1963, the same considerations led us to adopt the "irrigable acreage" standard itself. Special Master Rifkind recommended rejecting an open-ended decree because it "would place all junior water rights in jeopardy of the uncertain and the unknowable," Rifkind Report 264, whereas a fixed decree would "provide certainty for both the United States and non-Indian users," *id.*, at 265. Finally, the Special Master's proposal would preclude further litigation in this Court over quantification of the water rights reserved for any boundary areas in fact within the reservations.

The Court disregards these virtues. Simply turning the clock back to 1964, it guarantees that the original jurisdiction litigation over Lower Basin water rights will proceed to another "round," and possibly still more "rounds" thereafter, as one-by-one the border questions are settled by litigation. If any of the Secretary's determinations are upheld, the Court will have to duplicate the efforts of the present Special Master. See *ante*, at 638.[10] The full extent of the Tribes' rights

[10] The Court seems to believe that pending litigation in the Southern District of California involving only some of the boundary issues presented by this case, as well as only some of the parties, provides an appropriate forum for resolving the boundary disputes once and for all. *Ante*, at 639. It suggests that other parties enter the lawsuit voluntarily, and that they use it to decide additional issues. *Ante*, at 639, n. 29. However, under the Court's ruling today the States have absolutely no reason to prosecute additional claims—as long as the boundary issues are not decided, the water

to divert mainstream water will remain uncertain for the near future, just as finality in this case begins to have practical importance. See *supra*, at 647.

For the reasons described in Part I–C, *supra*, awarding additional water rights to the Tribes works no immediate harm to state interests. The Court's preference for prolonging this litigation and its attendant uncertainty is at odds with the principles upon which it resolves the omitted lands issue. I would accept the Special Master's resolution of the boundary lands issue for purposes of framing a final decree in this action.

III

The Court's disposition of the omitted lands and boundary lands issues makes it unnecessary for it to reach the remaining issues in this case. Although my own views would require us to reach those issues, I do not think it worthwhile to discuss them at any length. The States have filed a number of highly specific exceptions to the Special Master's determinations regarding the irrigability of particular parcels. Although formal concepts of "plain error" and "abuse of discretion" do not apply to the recommendations of special masters in original jurisdiction litigation, the care with which the present Special Master has explained his conclusions on these technical issues demands respect, and I would overrule the States' exceptions. The United States has also filed four exceptions. The first asks that we recognize for purposes of our decree the Secretary of the Interior's resolution of an

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rights that turn on them belong to the States. (As defendant, of course, the United States has no choice but to litigate.) The Court also makes the unprecedented suggestion that we might be willing to decide the boundary questions *de novo* if the States' District Court suit is barred by lack of standing, sovereign immunity, or the statute of limitations. *Ante*, at 638. I would not leave that impression. Because "[c]ertainty of rights is particularly important with respect to water rights in the Western United States," *ante*, at 620, such results in the District Court would "finally determine" the boundaries of the reservations within the meaning of Article II(D)(5) of the 1964 decree.

additional border question concerning the Fort Mojave Reservation; the others involve essentially clerical matters of conforming the Special Master's recommended decree to our two prior decrees. I would sustain the exceptions of the United States.

TUTEN *v.* UNITED STATES

CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 81-6756. Argued March 1, 1983—Decided March 30, 1983

In 1971, petitioner, who was then 19 years old, pleaded guilty to the charge of carrying a pistol without a license in violation of a provision of the District of Columbia Code and was placed on probation for two years under § 5010(a) of the Federal Youth Corrections Act (YCA). At the end of the 2-year probationary period, he was unconditionally discharged from the YCA program. In 1980, petitioner was again convicted of carrying a pistol without a license under the same provision of the District of Columbia Code, and was sentenced to imprisonment as a felon, rather than a misdemeanant, under the recidivist provision of the Code. The District of Columbia Court of Appeals affirmed, rejecting petitioner's contention that his earlier conviction could not properly provide the basis for his being sentenced as a recidivist because, following his successful completion of the 2-year probationary term, that conviction had been expunged under § 5021(b) of the YCA, which provides that where a youth offender has been placed on probation, the court may thereafter, in its discretion, "unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction."

Held: Under the interpretation of § 5021(b) plainly suggested by its language, the conviction of a youth offender placed on probation under § 5010(a) is not set aside where, as here, the court has *not* exercised its discretion to discharge him unconditionally "prior to the expiration of the maximum period of probation theretofore fixed by the court." This limitation is fully consistent with the YCA's rehabilitation purposes as well as with Congress' intent to employ the set-aside as an incentive for positive behavior by youths sentenced under the YCA. Accordingly, the trial court was free to take petitioner's previous conviction into account in imposing sentence under the recidivist provision of the District of Columbia Code. Pp. 663-668.

440 A. 2d 1008, affirmed.

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

Linda Gillespie Stuntz argued the cause for petitioner. With her on the briefs was *Erwin N. Griswold.*

Barbara E. Etkind argued the cause for the United States. With her on the brief were *Solicitor General Lee, Assistant Attorney General Jensen, Deputy Solicitor General Frey,* and *Kathleen A. Felton.*

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether a conviction upon which a youth offender was sentenced to probation under the Federal Youth Corrections Act of 1950, 18 U. S. C. § 5005 *et seq.*, was automatically set aside after he served his full term of probation.

I

In 1971 petitioner Melvin Tuten, who was 19 years old, pleaded guilty to the charge of carrying a pistol without a license in violation of D. C. Code § 22–3204 (1981).[1] He was placed on probation for two years under the Federal Youth Corrections Act of 1950 (YCA), 18 U. S. C. § 5005 *et seq.* At the end of the 2-year probationary period, petitioner was unconditionally discharged from the YCA program.

In 1980 petitioner was tried and convicted of carrying a pistol without a license under the same provision of the D. C. Code. The prosecutor urged that petitioner's previous conviction made him subject to the enhanced penalty provided

[1] Section 22–3204 provides:

"No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in § 22–3215 [by a fine of not more than $1,000, or imprisonment for not more than one year, or both], unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than 10 years."

by D. C. Code § 22–3204 (1981) for one who previously "has been convicted in the District of Columbia of a violation of this section." The trial judge agreed and, based on the earlier conviction, sentenced petitioner as a felon rather than a misdemeanant. The judge imposed a sentence of two to six years' imprisonment.

On appeal to the District of Columbia Court of Appeals, petitioner contended that the earlier conviction could not properly provide the basis for his being sentenced as a recidivist because that conviction had been expunged under the YCA, § 5021(b), following his successful completion of the 2-year probationary term. The court rejected this assertion and affirmed the sentence. 440 A. 2d 1008 (1982). It relied primarily upon the "ordinary meaning" of the language of § 5021. 440 A. 2d, at 1013. Section 5021 provides:

> "(a) Upon the unconditional discharge by the Commission of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Commission shall issue to the youth offender a certificate to that effect.
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> "(b) Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect."

The court concluded that the automatic set-aside provision of subsection (b) applies only to a youth offender who receives an unconditional discharge *before* the expiration of his probationary period. The court also stated that "the legislative history contains no persuasive reasons" to depart from the ordinary meaning of the statutory language, and noted that

"the case law and public policy support the plain meaning of the statute." 440 A. 2d, at 1013.[2] We granted certiorari, 459 U. S. 905 (1982), and we now affirm.

II

This Court has in previous decisions described and analyzed the YCA in considerable detail in the course of deciding particular issues arising under the Act. See *Ralston* v. *Robinson*, 454 U. S. 201 (1981); *Durst* v. *United States*, 434 U. S. 542 (1978); *Dorszynski* v. *United States*, 418 U. S. 424 (1974). The Act generally applies to persons under 22 years of age at the time of their conviction[3] who are sentenced in federal courts or in courts of the District of Columbia.[4] "[T]he principal purpose of the YCA is to rehabilitate persons who, because of their youth, are unusually vulnerable to the danger of recidivism." *Ralston* v. *Robinson*, *supra*, at 206. To achieve this purpose, the Act gives courts a number of alternatives in sentencing youth offenders. First, a court may commit a youth offender to the custody of the Attorney General for institutional treatment and supervision under the Act. 18 U. S. C. §§ 5010(b) and (c). The Act affords the Attorney General a broad range of discretion in providing institutional treatment, which includes educational and vocational training as well as psychiatric counseling. §§ 5006(g),

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[2] Two courts have expressed a contrary view. See *United States* v. *Arrington*, 618 F. 2d 1119, 1124 (CA5 1980), cert. denied, 449 U. S. 1086 (1981); *United States* v. *Sinkfield*, 484 F. Supp. 595, 598 (ND Ga. 1980). Cf. *United States* v. *Villar*, 416 F. Supp. 887, 889 (SDNY 1976).

[3] 18 U. S. C. § 5006(e). As we noted in *Dorszynski* v. *United States*, 418 U. S. 424, 433, n. 9 (1974), the Act also applies in some circumstances to certain convicted persons between the ages of 22 and 26. 18 U. S. C. § 4216. It ordinarily does not apply to convicted persons under the age of 18, who are eligible for sentencing under the Federal Juvenile Delinquency Act, 18 U. S. C. § 5031 *et seq.* (1976 ed. and Supp. V). It also does not apply to certain multiple offenders in the District of Columbia. D. C. Code § 22–3202(d)(1) (1981).

[4] 18 U. S. C. § 5024.

5011, 5013. See *Dorszynski*, *supra*, at 434.[5] Second, if the court finds, as it did in this case, that a youth offender does not need to be committed to custody, it may place him on probation under the supervision of a probation officer or supervisory agent. § 5010(a). Finally, if the court finds that the defendant will not benefit from rehabilitative treatment, it may sentence him under any of the penalty provisions applicable to adult offenders. § 5010(d).

As we noted in *Durst* v. *United States*, *supra*, at 548, "[a] particularly valuable benefit for the offender sentenced under the YCA is the prospect of obtaining a certificate setting aside his conviction" under § 5021 of the Act. Congress' purpose in adopting § 5021 was to promote the rehabilitation of youth offenders by providing a substantial incentive for positive behavior while serving a sentence under the YCA.[6] Congress recognized that a criminal conviction often carries with it numerous civil and social disabilities. For example, a conviction may result in the loss of the rights to vote, to hold a public office, to serve on a jury, and to practice various occupations and professions.[7] As in this case, a conviction may also make an offender subject to increased penalties for

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[5] See also H. R. Rep. No. 2979, 81st Cong., 2d Sess., 4 (1950); *United States* v. *Ward*, 337 F. Supp. 185, 193 (DC 1971). Cf. Narcotic Addict Rehabilitation Act of 1966, 18 U. S. C. § 4251(c).

[6] See, *e. g.*, Hearings on S. 1114 and S. 2609 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st Sess., 14 (1949) (testimony of Judge Laws). Congress reaffirmed this goal when it extended § 5021 to youth offenders initially sentenced to probation. See *infra*, at 665–666. Senator Dodd, who sponsored the 1961 amendment, explained that the provision "provides an additional incentive for maintaining good behavior by holding out to the youth an opportunity to clear his record." 107 Cong. Rec. 8709 (1961).

[7] See generally Special Project—The Collateral Consequences of a Criminal Conviction, 23 Vand. L. Rev. 929 (1970); S. Rubin, H. Weihofen, G. Edwards, & S. Rosenzweig, The Law of Criminal Correction 611–632 (1963); P. Tappan, Loss and Restoration of Civil Rights of Offenders, in National Probation and Parole Association, Crime Prevention Through Treatment 86–104 (1952).

subsequent convictions. Like various state expungement statutes,[8] § 5021 enables an eligible youth offender to reenter society and conduct his life free from the disabilities that accompany a criminal conviction. *Dorszynski*, *supra*, at 429, n. 6.[9]

Until 1961, the YCA's set-aside provision was applicable only to a youth who was committed to the custody of the Attorney General under § 5010(b) or § 5010(c) and was unconditionally discharged prior to expiration of the maximum sentence imposed.[10] It was not applicable to an offender who, like petitioner, was sentenced initially to probation rather than to confinement. The YCA was amended in 1961 to add § 5021(b), Pub. L. 87–336, 75 Stat. 750, in order to correct this inconsistency in the Act. See H. R. Rep. No. 433, 87th Cong., 1st Sess., 1 (1961); S. Rep. No. 1048, 87th Cong., 1st Sess., 1 (1961). Under § 5021(b), youth offenders sentenced initially to probation under § 5010(a) are afforded an opportunity to have their convictions set aside similar to that which

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[8] See, *e. g.*, Cal. Penal Code Ann. § 1203.45 (West 1982); Kan. Stat. Ann. § 21–4619 (1981); Minn. Stat. § 242.31 (1982).

[9] See, *e. g.*, Hearings, *supra* n. 6, at 14 (testimony of Judge Laws) ("Committed youth offenders who earn their final discharge before the end of their maximum term have their records cleared and all their civil rights restored"); *id.*, at 117 (letter from Judge Wyche) ("I believe that a boy who makes one mistake should be permanently forgiven that mistake if his subsequent conduct indicates that he has changed his behavior. One blot on his record may cause him great harm when he applies for a position in later years"). See also United States Board of Parole Ann. Rep. 30 (1962) ("It was the intention of the authors of the statute that such setting aside of conviction action would, in fact, expunge the record of that conviction"). Of course, federal legislation may impose disabilities even on persons whose convictions have been expunged. See *Dickerson* v. *New Banner Institute, Inc.*, *ante*, p. 103.

[10] Generally, a youth offender would be considered for an early discharge under § 5017 if there was a reasonable probability that the youth offender would remain free from further law violations. See United States Board of Parole, *supra*, at 30.

had previously been afforded only to youth offenders sentenced under §§ 5010(b) and (c).

We are now asked to decide when § 5021 requires the setting aside of the conviction of a youth offender who has been placed on probation. Petitioner maintains that after a youth offender successfully completes the term of probation to which he was initially sentenced, his conviction must be automatically set aside under § 5021(b). As the court below noted, however, this interpretation is contrary to the language of the statute itself, which provides that a "discharge shall automatically set aside the conviction" if the court "unconditionally discharge[s] [the] youth offender from probation *prior to* the expiration of the maximum period of probation theretofore fixed by the court" (emphasis added). The clear import of § 5021(b) was described by this Court in *Durst*. "[Section 5021(b)] extend[s] the benefit of a certificate [setting aside the conviction] to youths sentenced to probation under § 5010(a) when the court unconditionally discharges the youth *prior to expiration of the sentence of probation imposed.*" 434 U. S., at 548 (emphasis added). See also *Dorszynski*, 418 U. S., at 435. Statements in the legislative history of the 1961 amendment echo the language of § 5021(b) limiting the set-aside to youth offenders discharged before their original probationary terms expire.[11]

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[11] See, *e. g.*, H. R. Rep. No. 433, 87th Cong., 1st Sess., 2–3 (1961); S. Rep. No. 1048, 87th Cong., 1st Sess., 2–3 (1961).

The only suggestion to the contrary contained in the legislative history is a statement of Senator Dodd, who introduced the bill to amend 18 U. S. C. § 5021 which was ultimately enacted as Pub. L. 87–336, 75 Stat. 750. See *supra*, at 665 and this page. Describing the law as it existed before the addition of subsection (b), he stated:

"Under section 5021 of title 18, a committed youth who is unconditionally discharged before the expiration of the maximum sentence imposed upon him automatically has his conviction set aside. No such provision exists for the youth who is released from probation. *His conviction remains on*

Under the interpretation of § 5021(b) plainly suggested by the language of the statute, the conviction of a youth offender who has been placed on probation under § 5010(a) is not set aside where, as here, the court has *not* exercised its discretion to discharge him unconditionally "prior to the expiration of the maximum period of probation theretofore fixed by the court," which in this case was two years. This limitation is fully consistent with the rehabilitative purposes of the YCA as well as with Congress' intent to employ the set-aside as an incentive for positive behavior by youths sentenced under the Act. The incentive might be significantly weaker if convictions were set aside regardless of whether the youth offender, by his conduct during the probationary period, had convinced the sentencing court to discharge him before the expiration of his probationary term. Although it would also have been reasonable for Congress to make the set-aside available to any youth offender who completes probation without incident, this result is certainly not compelled by the purposes of the Act. Moreover, the remedial purposes of the Act are not frustrated by the possibility that a court may

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the record until the original sentence expires. The law, as it stands now, discriminates against the youth on probation who is generally charged with a lesser offense." 107 Cong. Rec. 8709 (1961) (emphasis added).

This remark implies that prior to the adoption of § 5021(b), the conviction of a youth offender who was sentenced to probation would automatically be set aside after his original term of probation expired. There is nothing in the Act that so provided, however. Nor is there any support in the prior legislative history of the Act or in the past practices of courts or agencies under the Act to justify this understanding. Indeed, the suggestion that convictions under the YCA are automatically set aside after the original sentence expires is flatly contradicted by Senator Dodd's subsequent observation that § 5021 only "hold[s] out to the youth *an opportunity* to clear his record," *ibid.* (emphasis added), as well as by statements contained in the Report submitted by Senator Dodd a few months later. See S. Rep. No. 1048, *supra.* We are therefore unwilling to assume that Congress would have relied on the isolated remark spoken on the floor of the Senate when it amended § 5021.

inadvertently fail to grant an early unconditional discharge.[12] A youth offender who believes that the sentencing court's failure to grant an early unconditional discharge from probation was an oversight may, following the completion of his probationary period, move that court to exercise its discretion to grant him an early unconditional discharge *nunc pro tunc* and to set aside his conviction. See *United States* v. *Fryer*, 545 F. 2d 11, 13, n. 3 (CA6 1976).[13]

In short, the language of § 5021(b), the legislative history, and the rehabilitative purposes of the YCA all point to a single conclusion: that petitioner's previous conviction was not set aside under § 5021(b) because he was unconditionally discharged from probation upon the completion, not prior to the completion, of the 2-year term of probation to which he was initially sentenced under § 5010(a). The trial court was therefore free in this case to take petitioner's previous conviction into account in imposing sentence under the recidivist provision of the District of Columbia's penal statute. Accordingly, the judgment of the District of Columbia Court of Appeals is

Affirmed.

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[12] Prior to the expiration of a youth offender's term of probation, a probation officer is required to file a report evaluating the probationer's conduct and progress and reminding the court that an early unconditional discharge will automatically set aside the conviction. See, *e. g.*, Administrative Office of the United States Courts, Guide to Judiciary Policies and Procedures: Probation Manual, Vol. X–A, § 5011 (1980). Such procedures ensure that the court is made aware of its duty to decide whether granting an early unconditional discharge is warranted in light of the remedial ends of the YCA.

[13] A person sentenced under a recidivist statute on the basis of a prior conviction that is subsequently set aside under such a procedure can move for a reduction of sentence from the second sentencing court. See, *e. g.*, Fed. Rule Crim. Proc. 35; D. C. Super. Ct. Crim. Rule 35(a).

Syllabus

LOCAL 926, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO, ET AL. *v.* JONES

APPEAL FROM THE COURT OF APPEALS OF GEORGIA

No. 81–1574. Argued December 1, 1982—Decided April 4, 1983

Respondent filed a charge with a Regional Director of the National Labor Relations Board (Board), alleging that petitioner Union (Union) had procured his discharge by a company from his position as a "supervisor" because he was not a member in good standing with the Union. Supervisors are expressly excluded from the definition of "employee" under the National Labor Relations Act. The Union's conduct allegedly violated § 8(b)(1)(A) of the Act, which proscribes unions from coercing employees in the exercise of their rights under § 7 to engage in concerted action, and § 8(b)(1)(B), which prohibits unions from coercing employers in the selection of their representatives for the purposes of collective bargaining or the adjustment of grievances. The Regional Director refused to issue a complaint, concluding that there was insufficient evidence to establish that the Union had caused respondent's discharge or had coerced the company in the selection of its bargaining representative. Instead of appealing to the Board's General Counsel, respondent filed suit against the Union and others in a Georgia state court, alleging that the Union had interfered with his employment contract by coercing the company into breaching the contract. The trial court dismissed the complaint, concluding that the common-law tort action was pre-empted because the subject matter of the complaint was arguably within the Board's exclusive jurisdiction, but the Georgia Court of Appeals reversed the dismissal of the case against the Union.

Held: Respondent's state-court action against the Union is pre-empted by the National Labor Relations Act. Pp. 675–684.

(a) If the conduct that a State seeks to regulate or to make the basis of liability is actually or arguably prohibited or protected by the Act, otherwise applicable state law and procedures are ordinarily pre-empted. However, when the conduct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it cannot be inferred that Congress intended to deprive the State of the power to act, the state regulation or sanction is not pre-empted. Pp. 675–676.

(b) Here, the Union arguably violated § 8(b)(1)(A), because it is not unusual for workers in the construction industry, such as respondent, to

fluctuate between supervisory and nonsupervisory positions and, in view of the low-level supervisory position that respondent held, it was not unlikely that he would from time to time serve in a nonsupervisory position and that he might be intimidated by the Union's conduct once he again became a statutory employee. The Union's conduct also arguably violated § 8(b)(1)(B), since it was at least arguable that respondent was a "supervisor" within the Act's meaning, his complaint filed with the Regional Director having indicated that he would have collective-bargaining responsibilities. It was for the Board, not the state courts, to decide whether respondent was the kind of supervisor who could invoke § 8(b)(1)(B). Cf. *Iron Workers* v. *Perko*, 373 U. S. 701. Pp. 678–680.

(c) Pre-emption cannot be avoided on the theory that the Regional Director concluded that the Board lacked jurisdiction to adjudicate the complaint because of respondent's supervisory status, since the Regional Director instead addressed the merits of the complaint. Nor did the Regional Director's rejection of the complaint for insufficient evidence satisfy all of the federal-law interests involved, so as to clear the way for a state cause of action. The pre-emption doctrine not only mandates substantive pre-emption by the federal law in the areas to which it applies, but also protects the exclusive jurisdiction of the Board over matters arguably within the Act's reach. Nor can pre-emption be avoided on the asserted grounds that the state cause of action and the § 8(b)(1)(B) unfair labor practice charge were not sufficiently alike, *Sears Roebuck & Co.* v. *Carpenters*, 436 U. S. 180, distinguished; or that respondent should be permitted to proceed in the state court because he could be awarded punitive damages and attorney's fees there, whereas he would be limited to backpay if his complaint had gone forward before the Board. Pp. 680–684.

Appeal dismissed and certiorari granted; 159 Ga. App. 693, 285 S. E. 2d 30, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which POWELL and O'CONNOR, JJ., joined, *post*, p. 684.

Laurence Gold argued the cause for appellants. With him on the briefs were *Joseph Jacobs*, *Harris Jacobs*, *James T. Langford*, and *George Kaufmann*.

Elinor Hadley Stillman argued the cause for the National Labor Relations Board as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Lee*, *Norton J. Come*, and *Linda Sher*.

Robert F. Gore argued the cause and filed a brief for appellee.

JUSTICE WHITE delivered the opinion of the Court.

This case presents the question whether a state-court action brought by one who is a "supervisor"[1] within the meaning of the National Labor Relations Act § 2(11), 29 U. S. C. § 152(11), for interference by a union with his contractual relationships with his employer is pre-empted by the National Labor Relations Act (NLRA or Act).

I

Respondent Robert C. Jones[2] was offered a supervisory position by the Georgia Power Co. (Company). Jones reported for work on June 12, 1978. By agreement, he took vacation time after his second day on the job and reported for work again on June 20, 1978. On this latter date he was discharged.

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[1] A supervisor is defined as follows:

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." § 2(11), 61 Stat. 138.

Supervisors are expressly excluded from the definition of employee in § 2(3), 29 U. S. C. § 152(3). Only "employees" are given rights under § 7, 29 U. S. C. § 157, which provides in relevant part:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." 61 Stat. 140.

[2] We refer to Jones as respondent because, as we shall explain, see n. 7, *infra*, we review this case on writ of certiorari rather than on appeal.

Jones believed that the Company had been persuaded to discharge him by the union bargaining agent, Local 926 of the International Union of Operating Engineers (Union). The reason for the Union's hostility, he believed, was his decision years ago to work for a nonunion employer. On June 28, 1978, Jones filed a charge with the Regional Director of the National Labor Relations Board (Board) against the Union, alleging that the Union had "procured" his discharge, "and thereby coerced [the Company] in the selection of its supervisors and bargaining representative, because [Jones] had not been a member in good standing of said labor organization." Allegedly, this action violated §§ 8(b)(1)(A) and (B) of the Act.[3] App. to Juris. Statement 25a.

In a letter dated July 19, 1978, the Regional Director said that further proceedings on respondent's charge were unwarranted and that he would not issue a complaint.[4] He ex-

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[3] Sections 8(a) and 8(b) define certain employer and union practices as unfair labor practices. As pertinent to this case, § 8(b), 61 Stat. 141, 29 U. S. C. § 158(b), provides:

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section . . ."

Section 8(a)(3), 61 Stat. 140, as amended, 29 U. S. C. § 158(a)(3), makes it an unfair labor practice for an employer—

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

[4] The following is the text of the letter:

July 19, 1978
Robert C. Jones
2954 Orchard Lane, S. E.
Atlanta, Georgia 30354
Re: International Union of Operating
Engineers, Local 926
Case 10–CB–2905

plained that there was insufficient evidence to establish that the Union had caused Jones' discharge; there was also a lack of evidence indicating that the Union had restrained or coerced the Company in the selection of its representative for purposes of collective bargaining. The Regional Director had instead come to the conclusion that Jones' discharge had been a part of changes in the Company's supervisory structure and that the Union had merely participated in discussions regarding the changes.

Instead of appealing to the General Counsel,[5] Jones proceeded to state court, suing both the Union and the Company. Count I of his complaint claimed that the Union had interfered with the contract between him and the Company. The allegations were simple. He pleaded that he had been a member of Local 926 from 1969 to 1974, when he resigned

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Dear Mr. Jones:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it does not appear that further proceedings on the charge are warranted. The Region concluded that the evidence was insufficient to establish that the Union caused your discharge or that it restrained or coerced the Employer in the selection of its representative for the purposes of collective bargaining. Rather, it appears that the Employer implemented certain changes in its supervisory structure which included your removal from the project. While the Union did participate in discussions regarding the changes, there was no evidence that it engaged in any unlawful conduct regarding your status as a supervisor. I am, therefore, refusing to issue complaint in this matter.

Form NLRB–4938, Procedure for Filing an Appeal, is attached. The appeal period expires at the close of business on August 1, 1978.

Very truly yours,
/s/ Curtis L. Mack
Regional Director

App. to Juris. Statement 26a.

[5] Appeal to the General Counsel is provided by 29 CFR § 102.19 (1982). Respondent said he "didn't see much point" in taking such an appeal. App. 105 (deposition of Robert C. Jones, Feb. 20, 1979).

from the Union. More recently, the Company had offered him the job of equipment supervisor at one of its plants, and he and the Company had entered into a contract in reliance on which he had terminated his prior employment. The crucial allegation was that petitioner Thomas D. Archer, the business agent and representative of the Union, had "maliciously and with full intent, intimidated and coerced Georgia Power Company, or caused Georgia Power Company to be intimidated and coerced, into breaching its employment contract with the Plaintiff." Respondent prayed for a judgment of $80,000 against petitioners, to be composed of $25,000 in lost wages, $50,000 in punitive damages, and $5,000 in attorney's fees, interest, and costs. Count II of his complaint sought relief against the Company and alleged that the Company had breached its employment contract.

The Georgia trial court dismissed the complaint, concluding that the common-law tort action had been pre-empted because the subject matter of the complaint was arguably within the exclusive jurisdiction of the Board. The court observed that there was no justification for allowing joint federal-state control over the alleged conduct, since the state interest in protecting state citizens from the alleged conduct was insignificant and the risk of interference with the Board's jurisdiction was substantial.

The Georgia Court of Appeals reversed the dismissal of the case against the Union.[6] 159 Ga. App. 693, 285 S. E. 2d 30 (1981). Following Georgia precedent it considered to be controlling, *Sheet Metal Workers International Assn.* v. *Carter*, 133 Ga. App. 872, 212 S. E. 2d 645 (1975), and *International Brotherhood of Electrical Workers* v. *Briscoe*, 143 Ga. App. 417, 239 S. E. 2d 38 (1977), the State Court of Appeals held the cause of action not pre-empted because Georgia had a deep and abiding interest in protecting its citizens' contractual rights and because the cause of action, which sounded in

[6] The court affirmed the dismissal of the cause of action against the employer. The merits of that decision are not before us.

tort, was so unrelated to the concerns of the federal labor laws that it would not interfere with the administration of those laws. As an additional reason for not finding pre-emption, the court stated that the Union's acts were not even arguably within the ambit of § 7 or § 8 of the NLRA, thus purporting to distinguish *Iron Workers* v. *Perko*, 373 U. S. 701 (1963). The Georgia Supreme Court denied review, and petitioners appealed.

We postponed to the hearing on the merits consideration of our appellate jurisdiction. 456 U. S. 987 (1982). Petitioners now acknowledge that this is not a mandatory appeal.[7] We agree, but, treating the papers as a petition for writ of certiorari, we grant the petition. Concluding that the Georgia Court of Appeals erred, we reverse.

II

The issue before us "is a variant of a familiar theme." *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 239 (1959). The Court has often been asked to determine whether particular state causes of action or regulations may coexist with the comprehensive amalgam of substantive law and regulatory arrangements that Congress set up in the

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[7] Petitioners initially argued in their jurisdictional statement that they were entitled to a mandatory appeal. They believed that this case fell within 28 U. S. C. § 1257(2), which allows parties an appeal as of right when a state statute is challenged in state court as being repugnant to the laws of the United States and the state court upholds the validity of the statute. The Georgia right-to-work law, Ga. Code Ann. § 54–905 (1981), recodified at Ga. Code Ann. § 34–6–24 (1982), was identified as the statute whose validity had been wrongly upheld. Petitioners now acknowledge that the Georgia Court of Appeals did not consider the question of whether the NLRA prohibited Jones' reliance on the State's right-to-work law; the court held only that the Georgia common-law tort action for interference with contractual relations was not pre-empted by the national labor laws. Petitioners' current perception appears correct. Because a common-law cause of action cannot be said to be a "statute" for purposes of § 1257(2), this case is not within our § 1257(2) appellate jurisdiction.

NLRA to govern labor-management relations affecting interstate commerce. *E. g.*, *Sears, Roebuck & Co.* v. *Carpenters*, 436 U. S. 180 (1978); *Farmer* v. *Carpenters*, 430 U. S. 290 (1977); *Linn* v. *Plant Guard Workers*, 383 U. S. 53 (1966); *Garmon*, *supra*. Our approach to the pre-emption issue has thus been stated and restated. First, we determine whether the conduct that the State seeks to regulate or to make the basis of liability is actually or arguably protected or prohibited by the NLRA. *Garmon*, *supra*, at 245; see *Sears*, *supra*, at 187–190. Although the "*Garmon* guidelines [are not to be applied] in a literal, mechanical fashion," *Sears*, *supra*, at 188, if the conduct at issue is arguably prohibited or protected otherwise applicable state law and procedures are ordinarily pre-empted. *Farmer*, *supra*, at 296. When, however, the conduct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the State of the power to act, we refuse to invalidate state regulation or sanction of the conduct. *Garmon*, *supra*, at 243–244. The question of whether regulation should be allowed because of the deeply rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the Board's exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the asserted cause of action to the State as a protection to its citizens. See *Sears*, *supra*, at 188–189; *Farmer*, *supra*, at 297.[8]

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[8] The NLRA has been held to pre-empt state law and state causes of action relating to conduct that is neither protected nor prohibited, where it is determined that Congress intended the conduct to be unregulated and left to the free play of economic forces. See *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132, 140 (1976); *Teamsters* v. *Morton*, 377 U. S. 252, 260 (1964). This branch of the pre-emption doctrine is not at issue in this case.

Not only is this case a variant of a familiar theme, but we have heard this same tune before. In *Iron Workers* v. *Perko*, *supra*, the Court considered whether a common-law tort action for interference with a contract of employment was pre-empted by the NLRA. Perko, a member of the Iron Workers' Union, was employed at times as a superintendent and at other times as a foreman. While acting as a superintendent, he violated a Union rule, and his membership was suspended in consequence. Union representatives then told Perko's employer that because of Perko's transgression Union members would no longer take orders from him. Some weeks thereafter he was discharged on account of his dispute with the Union.

We concluded that Perko's common-law cause of action was pre-empted because it was founded on conduct that for several reasons was arguably within the ambit of § 7 or § 8. First, Perko was discharged both as a superintendent and a foreman. Even conceding that the position of superintendent was supervisory and beyond the reach of the Act, the foreman's position was arguably nonsupervisory and covered by the Act. Hence, Perko's discharge arguably violated the proscription of § 8(b)(1)(A) against a union interfering with the protected rights of employees and that of § 8(b)(2) against causing an employer to discriminate against an employee contrary to § 8(a)(3). Second, the Union arguably violated § 8(b)(1)(A), since causing the discharge of a supervisor might coerce employees, who would fear meeting their supervisor's fate, into forgoing their § 7 rights to engage in concerted action. Third, the Union's conduct might also have violated § 8(b)(1)(B), which prohibits unions from restraining or coercing "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Perko, we concluded, may well have had sufficient grievance-handling responsibilities to come within the realm of supervisors whose selection the Union could not seek to dictate.

Since Jones, unlike Perko, had a job only as a supervisor and not also as an employee, the Union does not rely on the first reason given in *Perko* for finding the challenged conduct arguably subject to the proscriptions of the Act. It is urged that the other two reasons given in *Perko* for such a holding are fully applicable here. The Union adds that Jones' cause of action threatens to punish the workers' arguably protected conduct in protesting, noncoercively, the selection of people for supervisory positions whether or not they entail collective-bargaining responsibilities. For these reasons, the Union submits that Jones' state-court action is preempted. We agree.

III

In *Perko*, the Court thought the Board could reasonably construe § 8(b)(1)(A) to prohibit the discharge of a supervisor for failure to observe Union rules because the discharge would inevitably tend to coerce nonsupervisory employees to submit to Union regimentation and hence coerce them in the exercise of their § 7 rights. In that event, the Board could also order the Union to reimburse the supervisor for his lost wages. The Board's subsequent holdings apply a variant of this approach in the construction industry, where it is not unusual for workers to fluctuate, as Perko did, 373 U. S., at 706, between supervisory and nonsupervisory positions. In *Local Union No. 725, Plumbers*, 225 N. L. R. B. 138 (1976), enf'd, 572 F. 2d 550 (CA5 1978), the Union caused the employer to breach a promise to hire the charging party as a supervisor. For two reasons, the Board held that the Union had violated § 8(b)(1)(A) and was liable to the charging party for backpay. First, it was found that certain employees depending on Union job referrals had learned of the Union's conduct and were thereby intimidated in the exercise of their rights under the Act. Second, the Board reasoned that "because workers in the construction industry frequently cycle in and out of supervisory jobs, discrimination against [an individual] in his attempt to become a supervisor would carry

over to intimidate him once he again became a statutory employee." See 572 F. 2d, at 552. The Board's "fluctuating status" approach is arguably applicable to this case. Jones was employed in the construction industry, and, in view of the low-level supervisory position he held, it was not unlikely that he would from time to time serve in a nonsupervisory position.[9] It also is as clear here as it was in *Perko* that the Union's conduct was arguably prohibited by § 8(b)(1)(B), which forbids a union to coerce an employer in the choice of his bargaining representative. In *Perko*, there was some doubt whether Perko was a supervisor within the meaning of the Act; here there is no doubt in that respect. Of course, not every supervisor is a "representative 'for the purposes of collective bargaining or the adjustment of grievances'" within the meaning of § 8(b)(1)(B), *Florida Power & Light Co.* v. *Electrical Workers*, 417 U. S. 790, 811, n. 21 (1974). But in this case, Jones was to occupy the position of equipment supervisor; it is enough if in this position he would be authorized or expected to deal with grievances arising under the collective-bargaining agreement, *American Broadcasting Cos.* v. *Writers Guild*, 437 U. S. 411, 427, n. 25 (1978);[10] and Jones' com-

[9] Since the Board's decision in *Local 725*, it has become evident that the Board will not adhere to the general proposition voiced in *Perko* that the discharge of a supervisor for failure to abide by union rules is alone enough to discourage employees from exercising their § 7 rights. *Parker-Robb Chevrolet, Inc.*, 262 N. L. R. B. 402, 404 (1982). The Board asserts, however, that the holding in *Local 725*, reflecting the peculiarities of the construction industry, survives its later decision.

[10] Recognizing that an employer so frequently draws his collective-bargaining representative from the existing pool of supervisors, the Board has held that the Union violates § 8(b)(1)(B) by coercing the choice of a supervisor even without proving that the supervisor in question actually has collective-bargaining authority. The Court of Appeals for the Second Circuit has disagreed with the Board in this respect. *NLRB* v. *Rochester Musicians Assn. Local 66*, 514 F. 2d 988, 992 (1975). The Court of Appeals for the Third Circuit, on the other hand, has not entirely rejected the Board's position. *Newspaper Guild, Erie Newspaper Guild, Local 187* v. *NLRB*, 489 F. 2d 416, 420–422 (1973).

plaint filed with the Regional Director indicated that he would have collective-bargaining responsibilities. It is at least arguable that this was the case; and it was for the Board, not the state courts, to decide whether Jones was the kind of a supervisor who could invoke § 8(b)(1)(B). We thus agree with the Union and the Board that the Union, if it was responsible for Jones' discharge, arguably coerced the Company in the choice of its collective-bargaining representative.

IV

For several reasons, none of them sound in our view, the Georgia Court of Appeals thought that the Act did not pre-empt the cause of action that Jones submitted to the state courts. First, the Court of Appeals may have interpreted the Regional Director's letter as indicating that the Board lacked jurisdiction to adjudicate Jones' complaint because of Jones' supervisory status. That is plainly not the case, for the Regional Director's statement did not decline jurisdiction but addressed the merits of the complaint. See generally *Garmon*, 359 U. S., at 245–246.

Second, the Court of Appeals believed that the Regional Director's rejection of the complaint for insufficient evidence of a violation satisfied all of the interests of the federal law and cleared the way for a state cause of action. If this position was grounded on the notion that supervisors do not have a cause of action in any circumstances, it is contrary to Board cases and to *Perko*. If, as seems more likely, the argument is that the complainant adequately submitted his dispute to the Board, it is untenable. Jones did not exhaust his administrative remedies, for he did not appeal to the General Counsel. Beyond that, the *Garmon* pre-emption doctrine not only mandates the substantive pre-emption by the federal labor law in the areas to which it applies, but also protects the exclusive jurisdiction of the Board over matters arguably within the reach of the Act. Even if Jones had satisfied ordinary primary-jurisdiction requirements, which he did not, he

would not have taken adequate account of the decision of Congress to vest in one administrative agency nationwide jurisdiction to adjudicate controversies within the Act's purview. Matters within the exclusive jurisdiction of the Board are normally for it, not a state court, to decide. This implements the congressional desire to achieve *uniform* as well as *effective* enforcement of the national labor policy.

In addition to relying on the reasoning of the Georgia Court of Appeals, Jones argues that there should be no preemption because the state cause of action and the unfair labor practice charge are not sufficiently alike. Jones relies on *Sears, Roebuck & Co.*, where we said that "the critical inquiry" in deciding whether a state claim is pre-empted because the challenged conduct is arguably prohibited by the federal labor laws is "whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board." 436 U. S., at 197. Jones asserts that a § 8(b)(1)(B) unfair labor practice claim is made out only by proving coercion of an employer in the selection of its bargaining representative, whereas, he explains, to make out his state cause of action it need only be shown that the Union caused, either coercively or noncoercively, the employer's selection of a supervisor. Because federal law does not forbid noncoerced, but union-caused discharges, it is said that the state cause of action is as distinct from the federal unfair labor practice claim as were the causes of action this Court found not preempted in *Linn* v. *Plant Guard Workers*, 383 U. S. 53 (1966); *Farmer* v. *Carpenters*, 430 U. S. 290 (1977); and *Sears, Roebuck & Co.* v. *Carpenters*, *supra*.[11]

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[11] In *Linn* v. *Plant Guard Workers*, we held that an action for a malicious and injurious libel in the course of a labor dispute, although an unfair practice and prohibited by the Act, was not pre-empted since it was unprotected conduct and since remedying injury to reputation was of only slight concern to the national labor policy and was a matter deeply rooted in state law. For similar reasons, in *Farmer* v. *Carpenters* we held that insofar as

We reject this argument. First, the argument concedes that the state cause of action is pre-empted to the extent that it covers coercive influence on the employer; and we note that Jones' complaint in the state court alleged that the Union agent had "intimidated and coerced" Georgia Power into breaching its contract with Jones. Jones thus sought to prove a coerced discharge and breach of contract, the very claim that is concededly pre-empted. Second, permitting state causes of action for noncoercive interference with contractual relationships to go forward in the state courts would continually require the state court to decide in the first instance whether the Union's conduct was coercive, and hence beyond its power to sanction, or noncoercive, and thus the proper subject of a state suit. Decisions on such questions of federal labor law should be resolved by the Board.

Third, even if the Georgia law reaches noncoercive interference with contractual relationships, a fundamental part of such a claim is that the Union actually caused the discharge and hence was responsible for the employer's breach of contract. Of course, this same crucial element must be proved to make out a § 8(b)(1)(B) case: the discharge must be shown to be the result of Union influence. Even on Jones' view of the elements of his state-law cause of action, the federal and state claims are thus the same in a fundamental respect, and here the Regional Director had concluded that the Union was not at fault.

This was not the case in *Sears*. There the state-court action was for trespass. It challenged only the location of the Union picketing. The unfair labor practice charge, however, would have focused on whether the picketing had recognitional or work reassignment objectives, issues "completely

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the state-court suit rested on claims of discriminatory hiring hall referrals and breach of contract, it was pre-empted, but that it was not pre-empted and could go forward insofar as it alleged the outrageous and intentional infliction of emotional distress. We deal with *Sears, Roebuck & Co.* in the text, *infra*, this page and 683.

unrelated to the simple question whether a trespass had occurred." 436 U. S., at 198. Permitting the trespass action to go forward accordingly created "no realistic risk of interference with the Labor Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices." *Ibid.* The same cannot be said here. The Regional Director concluded that the Union had in no way been responsible for Jones' discharge. That same issue of causation would have been presented for decision had Jones' case come before the Board, just as the issue would recurringly be at the core of § 8(b)(1)(B) cases. Despite the Regional Director's determination, and the Board's undoubted jurisdiction to decide the issue had a complaint issued, Jones sought to relitigate the question in the state courts. The risk of interference with the Board's jurisdiction is thus obvious and substantial.

We thus cannot agree that Jones' efforts to recover damages from the Union for interference with his contractual relationships with his employer was of only peripheral concern to the federal labor policy. Our decisions in *Perko* and its companion case, *Plumbers* v. *Borden*, 373 U. S. 690 (1963), refute Jones' submission. They also foreclose any claim that Jones' action against the Union for interference with his job is so deeply rooted in local law that Georgia's interest in enforcing that law overrides the interference with the federal labor law that prosecution of the state action would entail.

Beyond this is the proposition, pressed by the Union, that although an employer may not be coerced in its choice of a collective-bargaining agent employees have the protected right to exert noncoercive influence on the choice of low-level supervisors.

> "[C]ourts have generally held over Board protest that employees' strikes over changes in even low level supervisory personnel are not protected. *See Henning & Cheadle, Inc.* v. *NLRB*, [522 F. 2d 1050, 1055 (CA7

1975)]; *American Art Clay Co.* v. *NLRB*, [328 F. 2d 88, 90–91 (CA7 1964)]; *Dobbs Houses, Inc.* v. *NLRB*, [325 F. 2d 531, 538–539 (CA5 1963)]. On the other hand, courts have found protected the writing of letters expressing opposition, *NLRB* v. *Phoenix Mutual Life Insurance Co.*, 167 F. 2d 983 (7th Cir.) *cert. denied*, 335 U. S. 845 . . . (1948), or the simple voicing of complaints, *NLRB* v. *Guernsey-Muskingum Elec. Coop., Inc.*, 285 F. 2d 8 (6th Cir. 1960). By thus examining both the substantive interest and the means of advancing it, courts have balanced more finely the competing interests involved. The result is a general absence of *per se* rules." *Abilities and Goodwill, Inc.* v. *NLRB*, 612 F. 2d 6, 9 (CA1 1979).

Thus, had Jones' complaint come before the Board, his complaint would arguably have been rejected on the ground that the Union's conduct in this case was protected activity.

Finally, the argument is made that Jones should be permitted to go forward in the state court because he could be awarded punitive damages and attorney's fees, whereas he would be limited to backpay if his complaint had gone forward before the Board. But such a claim was squarely rejected in *San Diego Building Trades Council* v. *Garmon*, 359 U. S., at 246–247.

The judgment below is accordingly

Reversed.

JUSTICE REHNQUIST, with whom JUSTICE POWELL and JUSTICE O'CONNOR join, dissenting.

I disagree with the Court's conclusion that the National Labor Relations Act pre-empts the state-law claims in this case. On balance I think the result reached by the Court is wrong, though the question is a close one; more importantly, I cannot accept the Court's analysis of our recent decision in *Sears, Roebuck & Co.* v. *Carpenters*, 436 U. S. 180 (1978).

Jones filed suit in the Georgia courts alleging that an agent of Local 926 (Union) had "maliciously and with full intent intimidated and coerced Georgia Power . . . , or caused Georgia Power . . . to be intimidated and coerced, into breaching its employment contract with plaintiff." In addition, Jones alleged, in an amendment to his complaint, App. to Juris. Statement 18a–19a, 2a, that the Union and Georgia Power Co. (Company) jointly conspired to interfere with his contractual relations. The Court apparently acknowledges, *ante*, at 682, and I agree, that Jones' complaint fairly may be read as stating two claims under Georgia tort law—a claim that the Union *coerced* the Company into firing Jones and a claim that the Union *noncoercively* caused his discharge.[1] The trial court dismissed Jones' complaint, reasoning that the tort doctrines on which it rested were pre-empted. The Georgia Court of Appeals reversed, ordering reinstatement of Jones' complaint. 159 Ga. App. 693, 285 S. E. 2d 30 (1981).

The Court recognizes that, if the conduct of the Union on which Jones' complaint was predicated was "arguably prohibited" by the Act, then the proper standard for pre-emption analysis is found in *Sears, Roebuck & Co.* v. *Carpenters, supra:* is "the controversy presented to the state court . . . *identical to* . . . or different from" the federal labor law claim. *Id.*, at 197 (emphasis added).[2] Other passages in

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[1] The Georgia Court of Appeals also took this view of Jones' state-law complaint: "A ruling that the union was found *not* to have 'coerced' an employer in the selection of the employer's representative under the Act does not preclude this suit based on malicious *interference* with an employment contract." 159 Ga. App. 693, 697, 285 S. E. 2d 30, 33 (1981).

[2] The Court, while observing that the decision in *Iron Workers* v. *Perko*, 373 U. S. 701 (1963), involved a factual situation very similar to that in this case, also recognizes that *Perko*'s pre-emption analysis is no longer dispositive. In *Perko*, the mere fact that a state claim was based upon arguably prohibited conduct dictated the conclusion that the state claim was pre-empted. *Id.*, at 708 ("It is enough to hold, as we do, that it is plain on a number of scores that the subject matter of this lawsuit 'arguably' comes within the Board's jurisdiction to deal with unfair labor prac-

our *Sears* opinion elaborate upon this rule, requiring, for example, that a federal claim must be "*the same as* the controversy presented to the state court." *Id.*, at 198; see also *id.*, at 196–197.

The Court offers two basic arguments as to why Jones' claim of noncoercive interference with contractual relations and the federal labor law claims in this case were identical.[3] In doing so, it interprets the "identical controversies" standard of *Sears* in a new and unjustified manner. The Court first reasons that "permitting state causes of action for noncoercive interference with contractual relationships to go forward in the state courts would continually require the state court to decide in the first instance whether the Union's conduct was coercive, and hence beyond its power to sanction, or

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tices"). This type of rigid interpretation of *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), does not survive our more recent decisions in *Sears, Roebuck & Co.* v. *Carpenters*, 436 U. S. 180 (1978); *Farmer* v. *Carpenters*, 430 U. S. 290 (1977); *Linn* v. *Plant Guard Workers*, 383 U. S. 53 (1966). As one commentator has remarked, "the *Garmon* test can now be described only by reference to its exceptions." Bryson, A Matter of Wooden Logic: Labor Law Preemption and Individual Rights, 51 Texas L. Rev. 1037, 1041 (1973).

[3] The Court also reasons that Jones "concedes that [his] state cause of action is pre-empted to the extent that it covers coercive influence on the employer; and we note that Jones' complaint in the state court alleged that the Union agent had 'intimidated and coerced' Georgia Power into breaching its contract with Jones. Jones thus sought to prove a coerced discharge and breach of contract, the very claim that is concededly pre-empted." *Ante*, at 682. This argument, of course, applies only to that portion of Jones' complaint that is based on coercive conduct, not on noncoercive conduct, see n. 1, *supra*, and accompanying text. Even as to coercive conduct, see *infra*, at 688–692, the argument is unpersuasive: it rests on the assumption that Jones' argument implicitly concedes that his coercive interference claim is identical to the controversy that the Board would resolve under §§ 8(b)(1)(A) and (B). I do not find any indication in respondent's brief of such a concession, and for the reasons given *infra*, at 688–692, I believe that Jones' coercive interference claim, like his noncoercive interference claim, was sufficiently distinguishable from the unfair labor practice charges at issue to avoid pre-emption.

noncoercive, and thus the proper subject of a state suit. Decisions on such questions of federal labor law should be resolved by the Board." *Ante*, at 682.

This argument rests on a basic misunderstanding of our prior decisions. In stating the "identical controversies" standard in *Sears*, we said that a claim brought in state court is unpre-empted unless "the controversy presented to the state court is identical to . . . *that which could have been, but was not, presented to the Labor Board.*" 436 U. S., at 197 (emphasis added). Plainly, *Sears* envisioned that state courts would decide in the first instance whether a particular claim is pre-empted under the "identical" controversy standard. Likewise, *Farmer* v. *Carpenters*, 430 U. S. 290 (1977)—relied upon in *Sears*' formulation of the "identical" standard, 436 U. S., at 197—indicated that state courts may, and in fact must, sort out pre-empted from nonpre-empted portions of a complaint, even when no action before the Board has been taken. See 430 U. S., at 304–305. The *Farmer* and *Sears* models are analogous to the situation presented in this case. Just as state courts may distinguish the abusive *manner* of discrimination from discrimination itself, in cases modeled on *Farmer*, *supra*, at 305, and the pure trespass aspects of picketing from the objectives of the same picketing in *Sears* cases, they could distinguish claims of coercive interference from those of noncoercive interference in cases like this one. As *Farmer* and *Sears* hold, state courts are competent to make such judgments without interfering with federal labor law policy. In short, while it is correct that the Board, and not state courts, is charged with deciding national labor policy, it is equally clear that no such exclusive jurisdiction is conferred on the Board with respect to questions of pre-emption.[4]

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[4] A state-law claim for intentional interference with contractual relations is as deeply rooted in and important to local concerns as the claims involved in *Farmer* and *Sears*. In *Farmer* v. *Carpenters*, *supra*, at 302–303, we noted that while the tort of intentional infliction of emotional

The second argument relied on by the Court is that "a fundamental part of . . . a [noncoercive interference with contractual relations] claim is that the Union actually caused the discharge . . . . [T]his same crucial element must be proved to make out a § 8(b)(1)(B) case: the discharge must be shown to be the result of Union influence. . . . [T]he federal and state claims are thus the same in a fundamental respect . . . ." *Ante*, at 682.

This view amounts to a substantial reformulation of the *Sears* requirement that state and federal controversies be identical before a claim based on arguably prohibited conduct is pre-empted. On its face the Court's definition of identical is dubious: two items or concepts are not ordinarily thought to be identical merely because they share a common element, or, in the Court's words, because they are "the same in *a* fundamental respect," *ante*, at 682 (emphasis added). Moreover, *Sears* supports no such definition of identical. *Sears* illustrated the standard by reference to our decisions in *Farmer* v. *Carpenters*, *supra*, which was given as an example of "nonidentical" controversies, and *Garner* v. *Teamsters*, 346 U. S. 485 (1953), representing controversies that are "identical." See *Sears, Roebuck & Co.* v. *Carpenters*, 436 U. S., at 197. Given the reference, it is worth examining *Farmer* and *Garner* in somewhat greater detail.

In *Farmer*, one Richard Hill belonged to the local of a national union, which operated a hiring hall. Hill was apparently subjected to discrimination in job referrals from the hall and to a campaign of personal harassment. He filed suit in

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distress was of comparatively recent origins, a State nonetheless "has a substantial interest" in protecting "the health and well-being of its citizens." Georgia has long sought to protect the right of its citizens "to earn a livelihood, and to seek redress against anyone who wrongfully causes him to be discharged from employment." *Wiley* v. *Georgia Power Co.*, 134 Ga. App. 187, 190, 213 S. E. 2d 550, 553 (1975); *Southern R. Co.* v. *Chambers*, 126 Ga. 404, 55 S. E. 37 (1906). There can be no doubt that safeguarding the integrity of contractual relations is an interest of paramount importance in an economy such as ours.

state court claiming, first, that the local had discriminated against him, and, second, that it had intentionally engaged in conduct causing him emotional distress. We observed that "these allegations of tortious conduct might form the basis for unfair labor practice charges before the Board," *Farmer* v. *Carpenters*, 430 U. S., at 302, and that Hill's tort claims were intertwined with "federally prohibited discrimination," hence creating "a potential for interference with the federal scheme of regulation." *Id.*, at 304.

Despite this inevitable overlap between state and federal claims, we held that Hill's claim of intentional infliction of emotional distress was not pre-empted. We relied on the fact that the state and federal claims—*despite sharing related factual bases*—would have had different "focus[es]." *Ibid.* Resolution of the state claim would turn on the abusiveness of the defendant's conduct, while the federal claim turned on whether "Union officials discriminated . . . against [Hill]." *Ibid.* Because the state claim required "something more" than the federal claim, *id.*, at 305, we concluded in *Sears* that the two claims were not identical.[5]

The Court's reformulation of the "identical" controversies standard of *Sears*—claims are identical if they share an im-

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[5] In contrast, *Garner* v. *Teamsters* involved truly indistinguishable state and federal claims. The state statute at issue, titled the "Pennsylvania Labor Relations Act," prohibited certain types of union coercion in "language almost *identical* to" the NLRA. 346 U. S., at 488 (emphasis added). (In *Sears*, we noted that laws expressly governing labor relations are "more likely to involve the accommodation [of employee and employer interests] which Congress reserved to the Board." 436 U. S., at 198, n. 27.) Likewise, the subject of the state and federal suits in *Garner* was labeled by the Court as "the *same* controversy," 346 U. S., at 489 (emphasis added), and the Pennsylvania Supreme Court believed that the two suits involved "'correction of the *identical* grievance.'" *Id.*, at 486, quoting *Garner* v. *Teamsters*, 373 Pa. 19, 28, 94 A. 2d 893, 898 (1953) (emphasis added). *Garner*, then, offers no support for the notion that claims may be "identical" for the purposes of *Sears* merely because they share the requirement of proof of certain facts; instead, our reliance upon the case in *Sears* stands only for the principle that identical really means identical.

portant factual element—is inconsistent with both *Sears* and *Farmer*. In *Sears* the federal and state claims involved several common, fundamental factual questions—whether any picketing had occurred; if so, where; and whether the property owner consented to it or not. These basic factual determinations, which the state courts and Board might resolve differently, would be critical to deciding both unfair labor practice claims and state trespass claims. Likewise, in cases following the *Farmer* model, state courts may make credibility determinations regarding whether any discrimination occurred, and if so, whether it did so in a manner supporting a claim for intentional infliction of emotional distress. The same factual issues would be involved in deciding an unfair labor practice charge under § 8 of the Act. Our decisions in *Farmer* and *Sears* thus make clear that the mere risk of differing factual determinations by the Board and state courts is insufficient to require pre-emption. Accordingly, the Court's reliance on the fact that the state and federal controversies at issue here are the same in one respect is misplaced. Instead, *Sears* and *Farmer* demand a more searching inquiry into the relationship between state and federal controversies.

While recognizing that the question is not free from doubt, I would conclude that the state and federal controversies at issue here are not identical, and, therefore, that Jones' claims are not pre-empted. The evident purpose of § 8(b)(1)(A) is to safeguard employees in their right, secured by § 7 of the Act, to join or refrain from joining concerted actions, see *NLRB* v. *Boeing Co.*, 412 U. S. 67, 71 (1973). The Board's most recent discussion of the ability of a supervisor to assert a claim under § 8(a)(1) states:

> "The discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act, as when they give testimony adverse to their employers' interest or when they refuse to commit unfair labor practices. The discharge of su-

pervisors as a result of their participation in union or concerted activity—either by themselves or when allied with rank-and-file employees—is *not* unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act." *Parker-Robb Chevrolet, Inc.*, 262 N. L. R. B. 402, 404 (1982).

In order for a supervisor, such as Jones, to make a claim under § 8(b)(1)(A), therefore, he must show not only that *his* contractual relations were interfered with, but that because of this, the various rights guaranteed by § 7 of the Act to other persons—actual employees—were interfered with. This "entail[s] relatively complex factual and legal determinations"—such as what the rights of those employees are, how they were interfered with by action directed at Jones, and so forth—"completely unrelated to the simple question" whether Jones can show that the Union caused him to lose his job, see *Sears, Roebuck & Co.* v. *Carpenters*, 436 U. S., at 198. Because of these different factual issues, which reveal basically different focuses of policy, I do not think that Jones' state-law claims are pre-empted by § 8(b)(1)(A).[6]

In order to state a claim under § 8(b)(1)(B), a supervisor must show coercion of his employer in the choice of bargaining representatives. The provision "reflect[s] a clearly focused congressional concern with the *protection of employers*

[6] The policies effectuated by § 8(b)(1)(A) and the state tort sanction against intentional interference with contractual relations are entirely different. The former seeks to protect employees' right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, . . . to refrain from any or all of such activities. . . ." 29 U. S. C. § 157. The latter, however, is entirely unconcerned with these employee rights to concerted action; the state law instead seeks to protect a form of property—one's contractual relations with another. Cf. *Nottingham* v. *Wrigley*, 221 Ga. 386, 388, 144 S. E. 2d 749, 751 (1965). This concern with property rights is not unlike the state claim in *Sears*, which involved a state-law trespass action.

in the selection of representatives to engage in two particular and explicitly stated activities." *Florida Power & Light Co.* v. *Electrical Workers*, 417 U. S. 790, 803 (1974) (emphasis added). "Congress was *exclusively concerned* with union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment." *Ibid.* (emphasis added). In contrast, in order to make out a claim of intentional interference with contractual relations, the question whether the plaintiff was to act as a bargaining representative, or any other particular kind of employee, is entirely irrelevant. Likewise, the question whether the employer—with whose interests § 8(b)(1)(B) of the Act is "exclusively concerned"—is harmed by interference with an employee's contractual relationship is irrelevant to the state cause of action. As in *Sears*, the state-court action will focus on a far simpler and neater set of facts than would an action before the Board.[7] Because of these differences between the controversies that the Board would decide and those that state courts would decide, I am persuaded that Jones' state claims were not pre-empted.[8]

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[7] Insofar as Jones' claim for *noncoercive* interference with contractual relations is concerned, the differences between the state and federal controversies would be even more marked. The controversy before the Board would involve difficult issues of coercion, while that in the state courts would focus merely on causation.

[8] I do not address the question, not faced by the Court, whether the proper disposition of the case is dismissal for want of a final judgment.

METROPOLITAN EDISON CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

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

No. 81–1664. Argued January 11, 1983—Decided April 4, 1983

Despite a no-strike clause in the collective-bargaining agreement between petitioner employer and the Electrical Workers union, which represented over half of petitioner's employees, union members participated in four unlawful work stoppages between 1970 and 1974, and on each occasion petitioner disciplined the local union officials more severely than the other participants. Twice the union filed a grievance because of the disparate treatment accorded its officials, and in both cases the arbitrators upheld petitioner's actions, finding that union officials have an affirmative duty to uphold the bargaining agreement, the breach of which duty justified petitioner's imposition of more severe sanctions. Subsequently, in 1977, an unrelated union, the Operating Engineers, set up an informational picket line at the entrance to the site where petitioner was constructing a nuclear generating station. Electrical Workers union members refused to cross the picket line. Eventually, after a settlement between the Operating Engineers and petitioner was reached, the picket line came down and the union's members returned to work. Petitioner then disciplined all of its employees who had refused to cross the picket line by imposing 5- to 10-day suspensions, but imposed 25-day suspensions on two local Electrical Workers officials for failure to attempt to end the strike by crossing the picket line. The Electrical Workers union filed an unfair labor practice charge against petitioner, and the National Labor Relations Board affirmed the Administrative Law Judge's holding that the selective discipline of union officials violated § 8(a)(3) of the National Labor Relations Act, which makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The Court of Appeals enforced the Board's order, holding that an employer may impose greater discipline on union officials only when the collective-bargaining agreement specifies that the officials have an affirmative duty to prevent illegal work stoppages, and that if the agreement does not provide for such a duty, any disparate treatment of union officials violates § 8(a)(3). The court rejected petitioner's argument that the two earlier arbitration

awards were sufficient to impose a contractual duty on the union officials to cross the picket line.

Held: In the absence of an explicit contractual duty, the imposition of more severe sanctions on union officials than on other employees for participating in an unlawful work stoppage violates § 8(a)(3). Pp. 699–710.

(a) Section 8(a)(3) not only proscribes discrimination that affects union membership, it also makes unlawful discrimination against employees who participate in concerted activities protected by § 7 of the Act. Holding union office clearly falls within such protected activities, and an employer's unilateral imposition of discipline on union officials inhibits qualified employees from holding office. While the disruptive effect of wildcat strikes makes it important to ensure compliance with no-strike clauses, it does not follow that an employer may assume that a union official is required to attempt to enforce a no-strike clause by complying with the employer's directions and may impose a penalty on the official for declining to comply. The imposition of such a penalty violates § 8(a)(3). The Board's decision here furthers Congress' policy in seeking to avoid the dilemma presented to the union official whereby his failure to comply with the employer's direction would place his job in jeopardy but compliance might cause him to take actions that would diminish the respect and authority necessary to perform his job as a union official. Pp. 699–705.

(b) While a union may waive the protection afforded union officials against the imposition of more severe sanctions than those imposed on other employees for participating in an unlawful work stoppage, no waiver occurred here. Such a waiver must be clear and unmistakable, and the two prior arbitration awards did not establish a pattern of decisions clear enough to convert the union's silence after those awards were made into a binding waiver. There is no showing that the parties intended to incorporate those awards into the subsequent agreement. Pp. 705–710.

663 F. 2d 478, affirmed.

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

Donald F. Sileo argued the cause for petitioner. With him on the briefs was *Anthony A. DeSabato.*

Norton J. Come argued the cause for respondent National Labor Relations Board. With him on the brief were *Solicitor General Lee, Deputy Solicitor General Wallace, Jerrold J. Ganzfried, Robert E. Allen, Linda Sher,* and *Elinor Hadley Stillman. Laurence J. Cohen* argued the cause for re-

spondent Local Union 563, IBEW. With him on the brief were *Richard Kirschner*, *Marsha Berzon*, and *Laurence Gold.**

JUSTICE POWELL delivered the opinion of the Court.

The issue is whether an employer may discipline union officials more severely than other union employees for participating in an unlawful work stoppage.

I

Metropolitan Edison Company began construction of a two-unit nuclear generating station at Three Mile Island in 1968. Over half of its employees were represented by the International Brotherhood of Electrical Workers. Article XI of the collective-bargaining agreement between the company and the union provided:

> "The Brotherhood and its members agree that during the term of this agreement there shall be no strikes or walkouts by the Brotherhood or its members, and the Company agrees that there shall be no lockouts of the Brotherhood or its members, it being the desire of both parties to provide uninterrupted and continuous service to the public." App. to Pet. for Cert. A–32.

Despite this no-strike clause, union members participated in four unlawful work stoppages between 1970 and 1974.[1] On each occasion the company disciplined the local union officials more severely than the other participants. Twice the union filed a grievance because of the disparate treatment accorded

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*Briefs of *amici curiae* urging reversal were filed by *Peter D. Walther*, *Mark M. Wilcox*, and *Stephen A. Bokat* for the Chamber of Commerce of the United States; by *Lawrence T. Zimmerman*, *Steven R. Semler*, and *Robert L. Baum* for the Edison Electric Institute; and by *Mallory Erle Phillips, Jr.*, and *Mark E. Edwards* for Miller Brewing Co.

[1] Although the collective-bargaining agreement applicable to the incident in this case took effect on May 1, 1976, the no-strike clause has remained unchanged at all relevant times.

its officials, and in both cases the arbitrators upheld the company's actions.[2] They found that union officials have an affirmative duty to uphold the bargaining agreement. The breach of that duty justified the company's imposition of more severe sanctions.

On August 30, 1977, an unrelated union, the Operating Engineers, set up an informational picket line at the entrance to the Three Mile Island construction site. When members of the Electrical Workers union refused to cross the picket line, company officials spoke to David Lang, the local union president. They told him that he had a duty as a union official to ensure that the Electrical Workers' members complied with the no-strike clause. It was the company's view that Lang could fulfill this duty only by crossing the picket line and thereby inducing other employees to follow.

Although instructed repeatedly to cross the line, Lang declined to do so. He was aware that the other employees were unlikely to follow him and sought instead to learn the cause of the picket line. On being told that the line would not be removed unless the Operating Engineers' business agent ordered it, Lang attempted to reach him. He also directed Gene Light, the Electrical Workers' vice president, to

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[2] In 1972, Metropolitan Edison disciplined union officials more severely than the other employees for not instructing striking employees to return to work. The company's actions were upheld by the arbitrator, who found "that Union officials have an *affirmative duty* to protect the authority of the Union leadership from illegitimate action on the part of employees, and to uphold the sanctity of the Agreement and its established grievance procedures." App. to Pet. for Cert. A–60 (emphasis in original).

Two years later the company again determined that a senior shop steward was not taking sufficient corrective action during an unlawful work stoppage and imposed a greater penalty on him than on the other participants. This action also was upheld on arbitration. See *id.*, at A–62, A–71.

Once in 1970 and again in 1973, the company imposed a more severe penalty on union officials who participated in an unlawful work stoppage. The officials were suspended for one and five days respectively, but the union chose not to take these cases to arbitration. See App. 29, 32.

continue his efforts to persuade the pickets to remove their line. After approximately four hours, Light and Lang were able to negotiate a settlement between the Operating Engineers and Metropolitan Edison. The settlement required the company to establish a separate entrance to the construction site. When this was done, the picket line came down and the union's members returned to work.

Metropolitan Edison disciplined all of its employees who refused to cross the picket line by imposing 5- to 10-day suspensions. Light and Lang, however, each received 25-day suspensions and were warned that future participation in any unlawful work stoppage would result in their immediate discharge. The company explained that the additional penalty was imposed because of their failure as union officials to make "every bona fide effort to prevent the unlawful work stoppage," specifically their failure to attempt to end the strike by crossing the picket line.[3]

The union filed an unfair labor practice charge, and the Regional Director for the National Labor Relations Board issued a complaint against the company. The Administrative Law Judge concluded that under *Precision Castings Co.*, 233 N. L. R. B. 183 (1977), selective discipline of union officials violated §§ 8(a)(1) and (3) of the National Labor Relations Act, 61 Stat. 140, as amended, 29 U. S. C. §§ 158(a)(1) and

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[3] The company stated that the employees were being disciplined for "failure to report to work as scheduled and participation in an unlawful work stoppage." *Metropolitan Edison Co.*, 252 N. L. R. B. 1030, 1333 (1980). It specified that Light and Lang were being disciplined for the same reason but added:

"In addition, you are being disciplined for your failure as an elected official of Local Union 563 IBEW to demonstrate to the Company, in an objective manner, your affirmative duty as an elected officer to:

. . . . . .

"(c) Make every effort, including returning to work yourself, to end the unlawful work stoppage.

"*Your participation in any unlawful work stoppage in the future will result in your immediate discharge.*" *Ibid.* (emphasis in original).

(3).[4] The Board affirmed the Administrative Law Judge's conclusions and findings. *Metropolitan Edison Co.*, 252 N. L. R. B. 1030 (1980).

On petition for review and cross-petition for enforcement, the Court of Appeals for the Third Circuit enforced the Board's order. 663 F. 2d 478, 484 (1981). It held that an employer may impose greater discipline on union officials only when the collective-bargaining agreement specifies that the officials have an affirmative duty to prevent illegal work stoppages. *Id.*, at 482. If the agreement does not provide for such a duty, any disparate treatment of union officials violates § 8(a)(3). The court reasoned that in the absence of a clear contractual duty, requiring a union official to take affirmative steps to end an illegal work stoppage would place him in an intolerable position. If he failed to follow the company's directions, he would place his job in jeopardy. If he complied with the company's demands and crossed the picket line, he would lose the respect and support of the union members. *Id.*, at 482–483.

The Court of Appeals rejected the company's argument that the two earlier arbitration awards were sufficient to impose a contractual duty on the union officials to cross the

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[4] Sections 8(a)(1) and (3), as set forth in 29 U. S. C. §§ 158(a)(1) and (3), provide in relevant part:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

Although §§ 8(a)(1) and (a)(3) are not coterminous, a violation of § 8(a)(3) constitutes a derivative violation of § 8(a)(1). See *Indiana & Michigan Electric Co.* v. *NLRB*, 599 F. 2d 227, 229, n. 2 (CA7 1979); cf. R. Gorman, Basic Text on Labor Law 137 (1976). Because the Board has not suggested that there is an independent violation of § 8(a)(1), we consider only the § 8(a)(3) charge.

picket line. The court held that it was not bound by these arbitration decisions in determining the extent of the officials' contractual obligations. *Id.*, at 483. It noted that a previous arbitration decision normally would not bind an arbitrator later construing the same collective-bargaining agreement. Absent an express contractual provision making earlier arbitration decisions binding,[5] the court declined to give these decisions any greater effect than an arbitrator would. *Id.*, at 483–484.

We granted certiorari to consider these recurring questions of federal labor law. 457 U. S. 1116 (1982). We now affirm.

II

This case does not present the question whether an employer may impose stricter penalties on union officials who take a leadership role in an unlawful strike. The Administrative Law Judge found that neither Light nor Lang acted as a strike leader.[6] Nor does this case question the employer's right to discipline union officials who engage in unprotected activity. Neither the union nor the Board has argued that union officials who fail to honor a no-strike clause are immunized from being disciplined in the same manner as

[5] The bargaining agreement provided that arbitration decisions would be binding only for the term of the agreement. See 663 F. 2d 478, 484 (CA3 1981) (citing Article IX, § 9.2, ¶ 4, of the collective-bargaining agreement).

[6] The Board has held that employees who instigate or provide leadership for unprotected strikes may be subject to more severe discipline than other employees. See *Midwest Precision Castings Co.*, 244 N. L. R. B. 597, 598 (1979); *Chrysler Corp.*, 232 N. L. R. B. 466, 474 (1977). In making this factual determination the Board has recognized that a remark made by a union official may have greater significance than one made by a rank-and-file member. See *Midwest Precision Castings*, *supra*, at 599.

In this case the Board accepted the Administrative Law Judge's finding that Light and Lang were not strike leaders, and the Court of Appeals affirmed that finding. See 663 F. 2d, at 484. We note also that the disciplinary notices issued to both Light and Lang made clear that the additional penalties imposed on them were not based on any perceived leadership role in initiating or maintaining the strike. See n. 3, *supra*.

other strike participants. The narrow question presented is whether an employer unilaterally may define the actions a union official is required to take to enforce a no-strike clause and penalize him for his failure to comply.

Metropolitan Edison advances two arguments to justify the additional sanctions it imposed on Light and Lang. It contends first that its actions did not violate § 8(a)(3) because a union official has a duty to ensure compliance with the terms of the collective-bargaining agreement. Breach of this duty justifies the imposition of an additional penalty on union officials. Alternatively, the company contends that a union in effect may waive any statutory protection that otherwise would be accorded its officials by agreeing that they will undertake specific action to assure compliance with the no-strike clause. In this case, the arbitration awards and the union's acquiescence in the harsher sanctions imposed on its officials are sufficient to establish a clear contractual duty. We examine these arguments in turn.

A

Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U. S. C. § 158(a)(3). By its terms, the statute requires proof that disparate treatment has been accorded union members and that the employer's action is likely to discourage participation in union activities. See *NLRB* v. *Brown*, 380 U. S. 278, 286 (1965). Congress, however, did not intend to make unlawful all acts that might have the effect of discouraging union membership. See *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 311 (1965). Rather, the intention was to forbid only those acts that are motivated by an anti-union animus. See, *e. g.*, *NLRB* v. *Great Dane Trailers, Inc.*, 388 U. S. 26, 33 (1967); *NLRB* v. *Brown*, *supra*, at 286–287.

In determining whether Metropolitan Edison's conduct constitutes a § 8(a)(3) violation, we are guided by well-established precedent. Where there is direct evidence of an employer's antiunion motive, the Court has recognized that otherwise legitimate actions may constitute unfair labor practices.[7] See *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 227 (1963). Where, as here, there is only circumstantial evidence of intent to discriminate, identification of a § 8(a)(3) violation involves a more difficult inquiry. Intent must be inferred from conduct. But an employer may take actions in the course of a labor dispute that present a possible complex of motives, see *id.*, at 228, and it is often difficult to identify the true motive.

In these situations, the Court has divided an employer's conduct into two classes. See *NLRB* v. *Great Dane Trailers, Inc.*, 388 U. S., at 33–34. Some conduct is so "'inherently destructive of employee interests'" that it carries with it a strong inference of impermissible motive. See *id.*, at 33 (quoting *NLRB* v. *Brown*, *supra*, at 287). In such a situation, even if an employer comes forward with a nondiscriminatory explanation for its actions, the Board "may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." 388 U. S., at 33–34. On the other hand, if the adverse effect of the discriminatory conduct on employee rights is "'comparatively slight,' an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct." *Id.*, at 34 (emphasis in original). Congress

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[7] This case does not present the issue of the proper allocation of burdens and order of proof in a "mixed motive" case, or in cases where an employee contends that an employer's otherwise legitimate act masks an impermissible purpose. See *NLRB* v. *Transportation Management Corp.*, 674 F. 2d 130 (CA1), cert. granted, 459 U. S. 1014 (1982).

has entrusted this determination in the first instance to the Board, see *NLRB* v. *Erie Resistor Corp.*, *supra*, at 236, and we turn now to its decisions.

B

The Board has found that disciplining union officials more severely than other employees for participating in an unlawful work stoppage "is contrary to the plain meaning of Section 8(a)(3) and would frustrate the policies of the Act if allowed to stand." *Precision Castings Co.*, 233 N. L. R. B., at 184.[8] This conduct, in the Board's view, is "inherently destructive" of protected individual rights because it discriminates solely on the basis of union status. See *Consolidation Coal Co.*, 263 N. L. R. B. 1306 (1982); *Indiana & Michigan Electric Co.*, 237 N. L. R. B. 226 (1978), enf. denied, 599 F. 2d 227 (CA7 1979). The Board has concluded that an employer's contractual right to be free of unauthorized strikes does not counterbalance the "discriminatory effects of singling out union officers for especially harsh treatment." *Consolidation Coal Co.*, 263 N. L. R. B., at 1309. Disciplining

[8] The Board's position on this question has not always been entirely clear. Some early Board opinions noted, as alternative rationales, that union officials have a greater duty than the rank and file to uphold a no-strike clause. Compare *University Overland Express, Inc.*, 129 N. L. R. B. 82, 92 (1960); *Stockham Pipe Fittings Co.*, 84 N. L. R. B. 629, (1949), with *Chrysler Corp.*, 232 N. L. R. B., at 475; *Pontiac Motors Division*, 132 N. L. R. B. 413, 415 (1961). See also Note, Discriminatory Discipline of Union Representatives for Breach of their "Higher Duty" in Illegal Strikes, 1982 Duke L. J. 900, 904–912 (reviewing Board's treatment of status-based responsibility). *Precision Castings* has eliminated any ambiguity, however, and the Board's position has been upheld by almost every Court of Appeals that has considered this question. See *NLRB* v. *South Central Bell Telephone Co.*, 688 F. 2d 345, 355 (CA5 1982); *Szewczuga* v. *NLRB*, 222 U. S. App. D. C. 336, 347, 686 F. 2d 962, 973 (1982); *C. H. Heist Corp.* v. *NLRB*, 657 F. 2d 178, 182–183 (CA7 1981) (distinguishing *Indiana & Michigan Electric Co.* v. *NLRB*, 599 F. 2d 227 (CA7 1979)). But cf. *NLRB* v. *Armour-Dial, Inc.*, 638 F. 2d 51, 55–56 (CA8 1981) (upholding harsher penalties only because officials "fomented" illegal work stoppage).

union officials discriminatorily may have only an indirect effect on the rank and file's decision to strike, but it may well deter qualified employees from seeking union office. See *ibid.*

We defer to the Board's conclusion that conduct such as Metropolitan Edison's adversely affects protected employee interests. Section 8(a)(3) not only proscribes discrimination that affects union membership, it also makes unlawful discrimination against employees who participate in concerted activities protected by § 7 of the Act. See *Radio Officers* v. *NLRB*, 347 U. S. 17, 39–40 (1954). Holding union office clearly falls within the activities protected by § 7, see *General Motors Corp.*, 218 N. L. R. B. 472, 477 (1975), and there can be little doubt that an employer's unilateral imposition of discipline on union officials inhibits qualified employees from holding office, see *Szewczuga* v. *NLRB*, 222 U. S. App. D. C. 336, 347, 686 F. 2d 962, 973 (1982).

Determining that such conduct adversely affects protected employee interests does not conclude the inquiry. If the employer comes forward with a legitimate explanation for its conduct, the Board must "strike the proper balance between the asserted business justifications and the invasion of employee rights." *NLRB* v. *Great Dane Trailers, Inc.*, *supra*, at 33–34. In this case the company has argued that its actions were justified because there is an implied duty on the part of the union officials to uphold the terms of the collective-bargaining agreement. Unquestionably there is support for the proposition that union officials, as leaders of the rank and file, have a legal obligation to support the terms of the contract and to set a responsible example for their members. See *Indiana & Michigan Electric Co.* v. *NLRB*, 599 F. 2d, at 230–232. And in view of the disruptive effects of wildcat strikes, the importance of ensuring compliance with no-strike clauses is self-evident. See *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235, 248–249, and n. 17 (1970); *Complete Auto Transit, Inc.* v. *Reis*, 451 U. S. 401, 418–419

(1981) (POWELL, J., concurring in part and concurring in judgment). But it does not follow that an employer may assume that a union official is required to attempt to enforce a no-strike clause by complying with the employer's directions and impose a penalty on the official for declining to comply. As the Board has concluded, the imposition of such a penalty would violate § 8(a)(3).

We think the Board's view is consistent with the policies served by the Act. "The entire process of collective bargaining is structured and regulated on the assumption that '[t]he parties . . . proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest.'" *General Building Contractors Assn.* v. *Pennsylvania*, 458 U. S. 375, 394 (1982) (quoting *NLRB* v. *Insurance Agents*, 361 U. S. 477, 488 (1960)). Congress has sought to ensure the integrity of this process by preventing both management and labor's representatives from being coerced in the performance of their official duties.[9] See *Florida Power & Light Co.* v. *Electrical Workers*, 417 U. S. 790, 810–811 (1974); *id.*, at 814 (WHITE, J., dissenting). Cf. 29 U. S. C. § 158(a)(2) (specifying employer domination of unions as an unfair labor practice). If, as the company urges, an employer could define unilaterally

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[9] For example, when this Court upheld the Board's decision that foremen could constitute an appropriate unit for collective bargaining, see *Packard Motor Car Co.* v. *NLRB*, 330 U. S. 485 (1947), Congress responded by excluding supervisors from the coverage of the Act. See *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 279–284 (1974); 29 U. S. C. § 152(3). Congress was concerned that if supervisors were included in a bargaining unit, "'management will be deprived of the undivided loyalty of its foremen.'" *Florida Power & Light Co.* v. *Electrical Workers*, 417 U. S. 790, 809–810 (1974) (quoting S. Rep. No. 105, 80th Cong., 1st Sess., 5 (1947)). This concern was not limited to ensuring the loyalty of management's representatives. The House Report recognized that "no one, whether employer or employee need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust." H. R. Rep. No. 245, 80th Cong., 1st Sess., 17 (1947) (emphasis in original); see also *id.*, at 14 (stating that management, "as well as workers, are entitled to loyal representatives in the plants").

the actions that a union official is required to take, it would give the employer considerable leverage over the manner in which the official performs his union duties. Failure to comply with the employer's directions would place the official's job in jeopardy. But compliance might cause him to take actions that would diminish the respect and authority necessary to perform his job as a union official. This is the dilemma Congress sought to avoid. We believe the Board's decision furthers these policies and uphold its determination.

III

The company argues that even if § 8(a)(3) would prohibit it from imposing a more severe penalty on union officials than on other employees, the union in effect has waived the protection afforded by the statute. The substance of this contention is that, in this case, the prior arbitration awards and the union's acquiescence in the harsher sanctions imposed on its officials are sufficient to establish a corresponding contractual duty. We are met at the outset, however, by the union's response that the statutory right to be free from discrimination may never be waived. We examine first the union's argument.

A

This Court long has recognized that a union may waive a member's statutorily protected rights, including "his right to strike during the contract term, and his right to refuse to cross a lawful picket line." *NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U. S. 175, 180 (1967) (footnotes omitted). Such waivers are valid because they "rest on 'the premise of fair representation' and presuppose that the selection of the bargaining representative 'remains free.'" *NLRB* v. *Magnavox Co.*, 415 U. S. 322, 325 (1974) (quoting *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, 280 (1956)); cf. *NLRB* v. *Allis-Chalmers Manufacturing Co.*, *supra*, at 180–181. Waiver should not undermine these premises. Thus a union may bargain away its members' economic rights, but it may not surrender rights that impair the employees' choice of

their bargaining representative. See *NLRB* v. *Magnavox Co.*, *supra*, at 325.

We think a union's decision to bind its officials to take affirmative steps to end an unlawful work stoppage is consistent with "the premise of fair representation."[10] Such a waiver imposes no constraints on the employees' ability to choose which union will represent them. Imposition of this duty is more closely related to the economic decision a union makes when it waives its members' right to strike. It merely requires union officials to take steps that are ancillary to the union's promise not to strike and provides the employer with an additional means of enforcing this promise.

The union argues that while a union may waive rights that are collective in nature, such as the right to strike, it may not waive individual rights, such as the right to hold union office.[11] In *Ford Motor Co.* v. *Huffman*, 345 U. S. 330 (1953),

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[10] The Board's position on this question has not been consistent. Compare *Super Valu Xenia*, 228 N. L. R. B. 1254, 1259 (1977) (upholding discipline of union officials where collective-bargaining agreement expressly imposed higher duty on union officials), with *Gould Corp.*, 237 N. L. R. B. 881 (1978) (discharge of union steward not validated by contractually imposed duty), enf. denied, 612 F. 2d 728 (CA3 1979). Recently, in *Consolidation Coal Co.*, 263 N. L. R. B. 1306 (1982), two Board members held that a contractual duty will not justify the imposition of more severe sanctions on union officials. See *id.*, at 1310 (Members Fanning and Jenkins). Member Zimmerman would have allowed waiver where the duty was explicit. See *id.*, at 1311–1312. Two members would have found an affirmative duty even absent such waiver. See *id.*, at 1313 (Chairman Van de Water, dissenting); *id.*, at 1319 (Member Hunter, dissenting). To the extent *Consolidation Coal* provides any guidance as to the Board's present views, it suggests that a majority of the Board would find no statutory violation where the bargaining agreement imposes a specific duty on union officials. The Courts of Appeals that have considered this question have agreed that this statutory protection may be waived. See, *e. g.*, *NLRB* v. *South Central Bell Telephone Co.*, 688 F. 2d, at 356; *Fournelle* v. *NLRB*, 216 U. S. App. D. C. 173, 182–183, 670 F. 2d 331, 340–341 (1982); *Gould, Inc.* v. *NLRB*, 612 F. 2d 728, 733 (CA3 1979), cert. denied, 449 U. S. 890 (1980); *C. H. Heist Corp.* v. *NLRB*, 657 F. 2d, at 183.

[11] The union contends that *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 51 (1974), demonstrates that the individual right not to be discrimi-

however, the Court recognized that in securing the good of the entire bargaining unit, some differences in the treatment of individual union members might occur:

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Id.*, at 338.

No-strike provisions, central to national labor policy, often have proved difficult to enforce. See *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S., at 248–249, and n. 17; *Complete Auto Transit, Inc.* v. *Reis*, 451 U. S., at 423–424 (POWELL, J., concurring in part and concurring in judgment). A union and an employer reasonably could choose to secure the integrity of a no-strike clause by requiring union officials to take affirmative steps to end unlawful work stoppages. Indeed, a union could choose to bargain away this statutory protection to secure gains it considers of more value to its members. Its decision to undertake such contractual obligations promotes labor peace and clearly falls within the range of reasonableness accorded bargaining representatives.

B

We consider finally whether the union waived its officials' rights. In *Mastro Plastics Corp., supra*, the question was whether a general no-strike provision waived the specific right to strike over an unfair labor practice. While reserv-

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nated against may never be waived. In *Gardner-Denver*, however, we noted that waiver would be inconsistent with the purposes of the statute at issue there. As discussed above, the National Labor Relations Act contemplates that individual rights may be waived by the union so long as the union does not breach its duty of good-faith representation.

ing the question whether a union might waive this right if it were "explicitly stated," the Court determined that "there is no adequate basis for implying [the] existence [of waiver] without a more compelling expression of it than appears in . . . this contract." 350 U. S., at 283. Thus, we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is "explicitly stated." More succinctly, the waiver must be clear and unmistakable.[12]

In this case, Metropolitan Edison does not contend that the general no-strike clause included in the bargaining agreement imposed any explicit duty on the union officials. Rather it argues that the union's failure to change the relevant contractual language in the face of two prior arbitration decisions constitutes an implicit contractual waiver. Not to give these decisions any effect, the company argues, would impair the effectiveness of the dispute resolution process for which the parties bargained.

We agree that the grievance-arbitration procedure forms an integral part of the collective-bargaining process. See *Clayton* v. *Automobile Workers*, 451 U. S. 679, 686–687 (1981); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 578 (1960). And we do not doubt that prior ar-

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[12] The Courts of Appeals have agreed that the waiver of a protected right must be expressed clearly and unmistakably. See, *e. g.*, *Chesapeake & Potomac Telephone Co.* v. *NLRB*, 687 F. 2d 633, 636 (CA2 1982); *NLRB* v. *Southern California Edison Co.*, 646 F. 2d 1352, 1364 (CA9 1981); *Communication Workers of America, Local 1051* v. *NLRB*, 644 F. 2d 923, 927 (CA1 1981). The holding in *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962), is not to the contrary. There the Court found that a contract provision establishing that a dispute shall be settled exclusively and finally by compulsory arbitration makes clear that the union may not strike over such a dispute. See *id.*, at 105. *Lucas Flour* established that there does not have to be an express waiver of statutory rights, but waiver was implied in that situation only because of the unique conjunction between arbitration and no-strike clauses. Cf. *Gateway Coal Co.* v. *Mine Workers*, 414 U. S. 368, 382 (1974).

bitration decisions may be relevant—both to other arbitrators and to the Board—in interpreting bargaining agreements.[13] But to waive a statutory right the duty must be established clearly and unmistakably. Where prior arbitration decisions have been inconsistent, sporadic, or ambiguous, there would be little basis for determining that the parties intended to incorporate them in subsequent agreements. Assessing the clarity with which a party's duties have been defined of course will require consideration of the specific circumstances of each case. Cf. *Carbon Fuel Co.* v. *Mine Workers*, 444 U. S. 212, 221–222 (1979).

As noted above, the company argues that when the prior bargaining agreement was renegotiated, the union's silence manifested a clear acceptance of the earlier arbitration decisions. During the history of collective bargaining between these two parties, however, there were only two arbitration decisions that imposed a higher duty on union officials. We do not think that two arbitration awards establish a pattern of decisions clear enough to convert the union's silence into binding waiver. This is especially so in light of the provision in the bargaining agreement that "[a] decision [by an arbitrator] shall be binding . . . for the term of *this* agreement." See n. 5, *supra* (emphasis added). We conclude that there is

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[13] An arbitration decision may be relevant to establishing waiver of this statutory right when the arbitrator has stated that the bargaining agreement itself clearly and unmistakably imposes an explicit duty on union officials to end unlawful work stoppages. Absent such a statement, the arbitration decision would not demonstrate that the union specifically intended to waive the statutory protection otherwise afforded its officials. In this case, however, the two arbitration decisions did not purport to determine the parties' specific intent.

Even if the arbitration decisions do not state that there is a specific and explicit duty, they still may be relevant in determining the parties' intent. Where there is a clear and consistent pattern of arbitration decisions the parties, in some circumstances, may be said to have incorporated the decisions into their subsequent bargaining agreements. Cf. *Carbon Fuel Co.* v. *Mine Workers*, 444 U. S. 212, 221–222 (1979).

no showing that the parties intended to incorporate the two prior arbitration decisions into the subsequent agreement.

IV

We accept the Board's conclusion that the imposition of more severe sanctions on union officials for participating in an unlawful work stoppage violates § 8(a)(3). While a union may waive this protection by clearly imposing contractual duties on its officials to ensure the integrity of no-strike clauses, we find that no waiver occurred here. Accordingly, the judgment of the Court of Appeals is

Affirmed.

Syllabus

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS *v.* AIKENS

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

No. 81–1044. Argued November 9, 1982—Decided April 4, 1983

Respondent, a black employee of the United States Postal Service, filed suit under Title VII of the Civil Rights Act of 1964, claiming that the Postal Service had discriminated against him on account of his race by refusing to promote him. After a bench trial, the District Court entered judgment for the Postal Service, but the Court of Appeals ultimately reversed, holding that the District Court had erred in requiring respondent to offer direct proof of discriminatory intent and to show as part of his prima facie case that he was "as qualified or more qualified" than the people who were promoted.

Held: By framing the issue here in terms of whether a prima facie case is established by an employee's showing only that he was black, that he applied for a promotion for which he possessed the minimum qualifications, and that the employer selected a nonminority applicant, the parties and the Court of Appeals have unnecessarily evaded the ultimate question of discrimination *vel non*. By establishing a prima facie case, the plaintiff creates a rebuttable presumption that the employer unlawfully discriminated against him, and to rebut the presumption the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. But when the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, as was done here, the presumption drops from the case and the factfinder must then decide the ultimate factual issue of whether the defendant intentionally discriminated against the plaintiff. Here, the District Court erroneously thought that respondent was required to submit direct evidence of discriminatory intent, and erroneously focused on the question of prima facie case rather than directly on the question of discrimination. Thus it is not clear that its findings of fact in favor of the Postal Service were not influenced by its mistaken view of the law; accordingly, the case is remanded so that the District Court may decide on the basis of the evidence before it whether the Postal Service discriminated against respondent. Pp. 713–717.

214 U. S. App. D. C. 239, 665 F. 2d 1057, vacated and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which BRENNAN, J., joined, *post*, p. 717. MARSHALL, J., concurred in the judgment.

Deputy Solicitor General Wallace argued the cause for petitioner. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General McGrath*, and *Marleigh D. Dover*.

Jack Greenberg argued the cause for respondent. With him on the brief were *L. Harold Aikens, Jr.*, *James M. Nabrit III*, *Charles Stephen Ralston*, *Clyde E. Murphy*, *Gail J. Wright*, and *Barry L. Goldstein*.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Louis Aikens filed suit under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. §2000e *et seq.*, claiming that the United States Postal Service discriminated against him on account of his race. Aikens, who is black, claimed that the Postal Service had discriminatorily refused to promote him to higher positions in the Washington, D. C., Post Office where he had

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*Briefs of *amici curiae* urging reversal were filed by *Stephen A. Bokat* for the Chamber of Commerce of the United States; and by *Robert E. Williams*, *Douglas S. McDowell*, and *Edward E. Potter* for the Equal Employment Advisory Council.

Briefs of *amici curiae* urging affirmance were filed by *Joan E. Bertin*, *Mary L. Heen*, *E. Richard Larson*, and *Isabelle Katz Pinzler* for the American Civil Liberties Union et al.; and by *James E. Daniels*, *Paul A. Crotty*, and *Phyllis N. Segal* for the NOW Legal Defense and Education Fund et al.

J. Albert Woll, *Robert M. Weinberg*, *Michael H. Gottesman*, and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae*.

been employed since 1937. After a bench trial, the District Court entered judgment in favor of the Postal Service, but the Court of Appeals reversed. 206 U. S. App. D. C. 109, 642 F. 2d 514 (1980). We vacated the Court of Appeals' judgment and remanded for reconsideration in light of *Texas Department of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981). 453 U. S. 902 (1981).

On remand, the Court of Appeals reaffirmed its earlier holding that the District Court had erred in requiring Aikens to offer direct proof of discriminatory intent. It also held that the District Court erred in requiring Aikens to show, as part of his prima facie case, that he was "as qualified or more qualified" than the people who were promoted. 214 U. S. App. D. C. 239, 240, 241, 665 F. 2d 1057, 1058, 1059 (1981) *(per curiam)*. We granted certiorari.[1] 455 U. S. 1015 (1982).

The Postal Service argues that an employee who has shown only that he was black, that he applied for a promotion for which he possessed the minimum qualifications, and that the employer selected a nonminority applicant has not established a "prima facie" case of employment discrimination under Title VII. Aikens argues that he submitted sufficient evidence that the Postal Service discriminated against him to warrant a finding of a prima facie case.[2] Because this case

[1] We have consistently distinguished disparate-treatment cases from cases involving facially neutral employment standards that have disparate impact on minority applicants. See, *e. g.*, *Texas Department of Community Affairs* v. *Burdine*, 450 U. S. 248, 252, n. 5 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802, n. 14 (1973).

[2] Aikens showed that white persons were consistently promoted and detailed over him and all other black persons between 1966 and 1974. Aikens has been rated as "'an outstanding supervisor whose management abilities were far above average.'" App. 8. There was no derogatory or negative information in his personnel folder. He had more supervisory seniority and training and development courses than all but one of the white persons who were promoted above him. He has a master's degree and has completed three years of residence towards a Ph. D. Aikens had substan-

was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a prima facie case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination *vel non*.[3]

By establishing a prima facie case, the plaintiff in a Title VII action creates a rebuttable "presumption that the employer unlawfully discriminated against" him. *Texas Department of Community Affairs* v. *Burdine*, *supra*, at 254. See *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973). To rebut this presumption, "the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." *Burdine*, 450 U. S., at 255. In other words, the defendant must "produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Id.*, at 254.

But when the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case,[4] and re-

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tially more education than the white employees who were advanced ahead of him; of the 12, only 2 had any education beyond high school and none had a college degree. He introduced testimony that the person responsible for the promotion decisions at issue had made numerous derogatory comments about blacks in general and Aikens in particular. If the District Court were to find, on the basis of this evidence, that the Postal Service did discriminate against Aikens, we do not believe that this would be reversible error.

[3] As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves. Thus, we agree with the Court of Appeals that the District Court should not have required Aikens to submit direct evidence of discriminatory intent. See *Teamsters* v. *United States*, 431 U. S. 324, 358, n. 44 (1977) ("[T]he *McDonnell Douglas* formula does not require direct proof of discrimination").

[4] It appears that at one point in the trial the District Court decided that Aikens had made out a prima facie case. When Aikens concluded his case in chief, the Postal Service moved to dismiss on the ground that there was no prima facie case. Tr. 256. The District Court denied this motion. *Id.*, at 259. See App. to Pet. for Cert. 47a.

sponds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the *McDonnell-Burdine* presumption "drops from the case," 450 U. S., at 255, n. 10, and "the factual inquiry proceeds to a new level of specificity." *Id.*, at 255. After Aikens presented his evidence to the District Court in this case, the Postal Service's witnesses testified that he was not promoted because he had turned down several lateral transfers that would have broadened his Postal Service experience. See Tr. 311–313, 318–320, 325; App. to Pet. for Cert. 53a. The District Court was then in a position to decide the ultimate factual issue in the case.

The "factual inquiry" in a Title VII case is "[whether] the defendant intentionally discriminated against the plaintiff." *Burdine*, *supra*, at 253. In other words, is "the employer . . . treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 577 (1978), quoting *Teamsters* v. *United States*, 431 U. S. 324, 335, n. 15 (1977). The prima facie case method established in *McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco*, *supra*, at 577. Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff." *Burdine*, *supra*, at 253.

On the state of the record at the close of the evidence, the District Court in this case should have proceeded to this specific question directly, just as district courts decide disputed

questions of fact in other civil litigation.[5] As we stated in *Burdine:*

> "The plaintiff retains the burden of persuasion. . . . [H]e may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U. S., at 256.

In short, the district court must decide which party's explanation of the employer's motivation it believes.

All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be "eyewitness" testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern "the basic allocation of burdens and order of presentation of proof," *Burdine*, 450 U. S., at 252, in deciding this ultimate question. The law often obliges finders of fact to inquire into a person's state of mind. As Lord Justice Bowen said in treating this problem in an action for misrepresentation nearly a century ago:

> "The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as

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[5] Of course, the plaintiff must have an adequate "opportunity to demonstrate that the proffered reason was not the true reason for the employment decision," but rather a pretext. *Burdine*, 450 U. S., at 256. There is no suggestion in this case that Aikens did not have such an opportunity.

anything else." *Edgington* v. *Fitzmaurice*, 29 Ch. Div. 459, 483 (1885).

The District Court erroneously thought that respondent was required to submit direct evidence of discriminatory intent, see n. 3, *supra*, and erroneously focused on the question of prima facie case rather than directly on the question of discrimination. Thus we cannot be certain that its findings of fact in favor of the Postal Service were not influenced by its mistaken view of the law. We accordingly vacate the judgment of the Court of Appeals, and remand the case to the District Court so that it may decide on the basis of the evidence before it whether the Postal Service discriminated against Aikens.

It is so ordered.

JUSTICE MARSHALL concurs in the judgment.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, concurring.

I join the Court's opinion. I write to stress the fact, however, that, as I read its opinion, the Court today reaffirms the framework established by *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), for Title VII cases. Under that framework, once a Title VII plaintiff has made out a prima facie case and the defendant-employer has articulated a legitimate, nondiscriminatory reason for the employment decision, the plaintiff bears the burden of demonstrating that the reason is pretextual, that is, it is "not the true reason for the employment decision." *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 256 (1981). As the Court's opinion today implies, *ante*, at 714–715, this burden "merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." 450 U. S., at 256.

This ultimate burden may be met in one of two ways. First, as the Court notes, a plaintiff may persuade the court

that the employment decision more likely than not was motivated by a discriminatory reason. *Ante*, at 714, 716, and 717. In addition, however, this burden is also carried if the plaintiff shows "that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U. S., at 256, citing *McDonnell Douglas*, 411 U. S., at 804–805. While the Court is correct that the ultimate determination of factual liability in discrimination cases should be no different from that in other types of civil suits, *ante*, at 716, the *McDonnell Douglas* framework requires that a plaintiff prevail when at the third stage of a Title VII trial he demonstrates that the legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision.

KUSH ET AL. *v.* RUTLEDGE

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

No. 81–1675. Argued January 12, 1983—Decided April 4, 1983

In his action in Federal District Court, and in state administrative and judicial proceedings, respondent, a white male, asserted a variety of common-law and statutory claims against Arizona State University and certain of its officials (including petitioners) arising out of incidents occurring while he was a member of the University's football squad. One of the claims was that three of the petitioners had engaged in a conspiracy to intimidate and threaten various potential material witnesses in order to prevent them from testifying "freely, fully and truthfully" in the action, in violation of the first part of 42 U. S. C. § 1985(2) (1976 ed., Supp. V). The District Court dismissed the entire complaint. The Court of Appeals, while affirming the dismissal of certain of respondent's claims and remanding as to others, reversed with respect to the claim at issue. The court concluded that respondent's claims of witness intimidation, insofar as they related to obstruction of justice at the state level, were not actionable under the second part of § 1985(2)—which prohibits a conspiracy to obstruct the due course of justice in a State "with intent to deny any citizen the equal protection of the laws"—because there was no sufficient allegation of racial or class-based invidiously discriminatory animus. The court concluded, however, that such an allegation—which was held to be necessary in *Griffin* v. *Breckenridge*, 403 U. S. 88, to avoid creating a general federal tort law with regard to a portion of § 1985(3)—was not applicable to alleged intimidation of witnesses in the federal courts in violation of the first part of § 1985(2).

Held: No allegations of racial or class-based invidiously discriminatory animus are required to establish a cause of action under the first part of § 1985(2). The statutory provisions now codified at § 1985 were originally enacted as § 2 of the Civil Rights Act of 1871, and the substantive meaning of the 1871 Act has not been changed. The provisions relating to institutions and processes of the Federal Government (including the first part of § 1985(2))—unlike those encompassing activity that is usually of primary state concern (including the second part of § 1985(2) and the part of § 1985(3) involved in *Griffin, supra*)—contain no language requiring that the conspirators act with intent to deprive their victims of the equal protection of the laws. Thus, the reasoning of *Griffin* is not applicable here, and given the structure of § 2 of the 1871 Act, it is clear

that Congress did not intend to impose a requirement of class-based animus on persons seeking to prove a violation of their rights under the first part of § 1985(2). The legislative history supports this conclusion. Pp. 724–727.

660 F. 2d 1345, affirmed.

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

Michael L. Gallagher argued the cause for petitioners. With him on the brief was *Michael K. Kennedy*.

Robert Ong Hing argued the cause and filed a brief for respondent.*

JUSTICE STEVENS delivered the opinion of the Court.

Respondent is a white football player of unknown political affiliation who seeks to recover damages under 42 U. S. C. § 1985(2) (1976 ed., Supp. V) for an alleged conspiracy to intimidate potential witnesses in a federal lawsuit. Petitioners argue that the action must be dismissed because there is no claim that the conspiracy was motivated by the kind of "racial, or perhaps otherwise class-based, invidiously discriminatory animus" we held to be necessary in *Griffin* v. *Breckenridge*, 403 U. S. 88, 102 (1971). We reject their contention, because the critical language in § 1985(3), the statute that applied to the *Griffin* conspiracy, does not apply to the violation of the first part of § 1985(2) alleged in this case.

I

The issue before us is narrow and may be briefly stated. In both federal and state tribunals, respondent Rutledge has asserted a variety of common-law and statutory claims against Arizona State University and its officials arising out of incidents that occurred while he was a member of the University's football squad. One of his claims is that three of the petitioners—the Arizona State University athletic director, head football coach, and assistant football coach—

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

engaged in a conspiracy to intimidate and threaten various potential material witnesses in order to prevent them from testifying "freely, fully and truthfully" in his lawsuit in federal court.[1]

The District Court granted a motion to dismiss the entire complaint on the grounds that the action was barred by the Eleventh Amendment and that respondent had failed to al-

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[1] This is the essence of the § 1985(2) claim as described in the briefs and arguments in this Court. The Court of Appeals recognized that whether respondent had "adequately alleged a claim under the first part of section 1985(2) is a close question," but decided it in the affirmative. *Rutledge* v. *Arizona Bd. of Regents*, 660 F. 2d 1345, 1355 (CA9 1981). Under the liberal pleading rules of *Conley* v. *Gibson*, 355 U. S. 41, 47–48 (1957), the Court of Appeals properly construed the amended complaint as raising the issue presented to this Court on certiorari.

Count Five of the amended complaint, which was added two days after the filing of the original complaint in United States District Court, does not expressly allege that witnesses were intimidated in connection with a *federal*-court proceeding. It alleges in part that:

"56. On information and belief, since the time of filing the statutorily mandated claim with the Arizona Board of Regents, defendants Kush, Miller and Horton have conspired to prevent, by intimidation and threat, various material witnesses from freely, fully and truthfully testifying as to matters raised in the within complaint.

"57. On information and belief, since the time of filing the statutorily mandated claim with the Arizona Board of Regents, defendants Kush, Miller and Horton have conspired for the purpose of hindering or obstructing the due course of justice with an intent to deny the plaintiff equal protection of the laws by threatening and intimidating potential material witnesses, to prevent the plaintiff from lawfully enforcing his rights and to 'cover up' the wrongful acts of defendants Kush and Maskill." App. to Pet. for Cert. E–11 to E–12.

These allegations might appear to describe only a conspiracy to interfere with potential witnesses before the Arizona Board of Regents. But ¶ 56 reflects the specific language of the first clause of § 1985(2), which relates to witness intimidation in connection with federal proceedings, see n. 4, *infra*, whereas ¶ 57 closely follows the wording of the second clause of that provision, which applies to witness intimidation in state-court proceedings, see n. 3, *infra*. Paragraph 60 then alleges generally that § 1985(2) has been violated by the defendants. Thus ¶ 56 of the complaint can fairly be read as alleging a conspiracy related to federal judicial proceedings.

lege a violation of his civil rights. It concluded that respondent had failed to state a § 1985 claim because he had not shown that he was a member of an identifiable class, and because his general allegations of a conspiracy were unsupported by specific facts. App. to Pet. for Cert. A–2. The Court of Appeals affirmed the dismissal of all claims against the University and its Board of Regents and of the vicarious liability claims against petitioner Miller, remanded for further proceedings on the other state-law tort claims against petitioners, and affirmed the dismissal of all federal civil rights claims against petitioners except the one at issue here. *Rutledge* v. *Arizona Bd. of Regents*, 660 F. 2d 1345 (CA9 1981).[2]

The Court of Appeals construed respondent's allegations of witness intimidation, see n. 1, *supra*, as containing two components—obstruction of justice at the state level, and interference with federal litigation. The former was not actionable under the second part of § 1985(2),[3] the court held, because "there exists no sufficient allegation of racial or class-based invidiously discriminatory animus." 660 F. 2d, at 1355. The court acknowledged that this Court's decision in *Griffin* v. *Breckenridge*, *supra*, had interpreted a portion of § 1985(3) to include such a requirement in order to avoid the constitutional issues that would have attended enactment

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[2] The Court of Appeals concluded:

"On remand the district court may wish to require the appellant to amend Count Five to make more particular his allegations under part one of section 1985(2) and to eliminate those allegations pertaining to the second part of that section. Nothing in this opinion should be construed to prevent this course of action." 660 F. 2d, at 1355.

[3] The second portion of § 1985(2) provides:

"[O]r if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, *with intent to deny to any citizen the equal protection of the laws*, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws . . ." (emphasis added).

of a general federal tort law. It decided that the same principles applied to claims based on private conspiracies to obstruct justice in state-court proceedings.

But the Court of Appeals concluded that no allegations of class-based animus were required under the first part of § 1985(2), which proscribes intimidation of witnesses in the federal courts.[4] It relied on the plain language of the Civil Rights Act of 1871 and on the legislative history. Noting the Federal Government's unquestioned constitutional authority to protect the processes of its own courts, and the absence of any need to limit the first part of § 1985(2) to avoid creating a general federal tort law, the Court of Appeals declined to impose the limitation set forth in *Griffin* v. *Breckenridge*. 660 F. 2d, at 1355.

Because other Circuits have read the first part of § 1985(2) more narrowly, see *Kimble* v. *D. J. McDuffy, Inc.*, 648 F. 2d 340, 346–348 (CA5) (en banc), cert. denied, 454 U. S. 1110 (1981); *Jones* v. *United States*, 536 F. 2d 269, 271 (CA8 1976), cert. denied, 429 U. S. 1039 (1977), we granted certiorari limited to the question of statutory construction, 458 U. S. 1120 (1982). As have the Courts of Appeals for the District of Columbia Circuit, *McCord* v. *Bailey*, 204 U. S. App. D. C. 334, 345, 636 F. 2d 606, 616 (1980), cert. denied, 451 U. S. 983 (1981), and the Third Circuit, *Brawer* v. *Horowitz*, 535 F. 2d 830, 840 (1976), we agree with the Ninth Circuit's analysis.[5]

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[4] The first part of § 1985(2) provides:

"If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror . . . ."

[5] Our limited grant of certiorari does not encompass the question whether the alleged conspiracy to interfere with witnesses gave rise to any recov-

II

The statutory provision that is now codified as § 1985 of Title 42 of the United States Code was originally enacted as § 2 of the Civil Rights Act of 1871, 17 Stat. 13. The length and style of § 2 of the 1871 Act, reprinted in full as an Appendix to this opinion, make it somewhat difficult to parse. Nevertheless, if its several components are carefully identified, its meaning becomes clear.

Although § 2 contained only one long paragraph when it was originally enacted, that single paragraph outlawed five broad classes of conspiratorial activity. In general terms, § 2 proscribed conspiracies that interfere with (a) the performance of official duties by federal officers; (b) the administration of justice in federal courts; (c) the administration of justice in state courts; (d) the private enjoyment of "equal protection of the laws" and "equal privileges and immunities under the laws"; and (e) the right to support candidates in federal elections. As now codified in § 1985, the long paragraph is divided into three subsections. One of the five classes of prohibited conspiracy is proscribed by § 1985(1), two by § 1985(2), and two by § 1985(3). The civil remedy for a violation of any of the subsections is found at the end of § 1985(3). The reclassification was not intended to change the substantive meaning of the 1871 Act.[6]

Three of the five broad categories, the first two and the fifth, relate to institutions and processes of the Federal Government—federal officers, § 1985(1); federal judicial proceedings, the first portion of § 1985(2); and federal elections, the second part of § 1985(3). The statutory provisions dealing

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erable damages. This issue remains open for consideration by the District Court on remand from the Court of Appeals.

[6] When Congress passed legislation in 1874 to consolidate and collect all federal statutes and laws in the Revised Statutes, 18 Stat. 113, it expressed no intention to change the meaning of the laws, although minor changes in language were made to accommodate the consolidation. Cf. *Pott* v. *Arthur*, 104 U. S. 735, 736 (1881).

with these categories of conspiratorial activity contain no language requiring that the conspirators act with intent to deprive their victims of the equal protection of the laws. Nor was such language found in the corresponding portions of § 2 of the 1871 Act. See Appendix to this opinion.[7]

The remaining two categories, however, encompass underlying activity that is not institutionally linked to federal interests and that is usually of primary state concern. The second part of § 1985(2) applies to conspiracies to obstruct the course of justice in state courts, and the first part of § 1985(3) provides a cause of action against two or more persons who "conspire or go in disguise on the highway or on the premises of another."[8] Each of these portions of the statute contains language requiring that the conspirators' actions be motivated by an intent to deprive their victims of the equal protection of the laws.

This limiting language was construed in *Griffin* v. *Breckenridge*, 403 U. S. 88 (1971), a case in which a unanimous Court held that § 1985(3) applies to purely private conspiracies. In explaining why that holding would not create an open-ended federal tort law applicable "to all tortious, conspiratorial interferences with the rights of others," *id.*, at 101, we expressly stated:

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[7] Although the provisions dealing with interference with federal judicial proceedings and state judicial proceedings now appear together in § 1985(2), they were separated by other material in the original version of § 2. See Appendix to this opinion.

[8] For the second clause of § 1985(2), see n. 3, *supra*. The first portion of § 1985(3), which actually contains two separate clauses, reads as follows:

"If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, *for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;* or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . ." (emphasis added).

> "The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." *Id.*, at 102.

Although *Griffin* itself arose under the first clause of § 1985(3), petitioners argue that its reasoning should be applied to the remaining portions of § 1985 as well. We cannot accept that argument for three reasons. First, the scope of the *Griffin* opinion is carefully confined to "the portion of § 1985 (3) now before us," *id.*, at 99; see also *id.*, at 102, n. 9. There is no suggestion in the opinion that its reasoning applies to any other portion of § 1985. Second, the analysis in the *Griffin* opinion relied heavily on the fact that the sponsors of the 1871 bill added the "equal protection" language in response to objections that the "enormous sweep of the original language" vastly extended federal authority and displaced state control over private conduct. *Id.*, at 99–100. That legislative background does not apply to the portions of the statute that prohibit interference with federal officers, federal courts, or federal elections. Third, and of greatest importance, the statutory language that provides the textual basis for the "class-based, invidiously discriminatory animus" requirement simply does not appear in the portion of the statute that applies to this case. See n. 4, *supra*.

Given the structure of § 2 of the 1871 Act, it is clear that Congress did not intend to impose a requirement of class-based animus on persons seeking to prove a violation of their rights under the first clause of § 1985(2).[9] The legislative

[9] We are unpersuaded by petitioners' argument that a contrary conclusion is required because the authorization of remedies found at the end of § 1985(3) applies to the entire section. The location of the remedial language merely confirms our view that the meaning of any part of § 1985 is informed by its entire text.

history supports the conclusion we have drawn from the language of the statute. Protection of the processes of the federal courts was an essential component of Congress' solution to disorder and anarchy in the Southern States. Neither proponents nor opponents of the bill had any doubt that the Constitution gave Congress the power to prohibit intimidation of parties, witnesses, and jurors in federal courts.[10]

The judgment of the Court of Appeals is

Affirmed.

APPENDIX TO OPINION OF THE COURT

Section 2 of the 1871 Civil Rights Act, 17 Stat. 13 (emphasis supplied).

"That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or to injure his

[10] See Cong. Globe, 42d Cong., 1st Sess., 486 (1871) (remarks of Rep. Cook, supporter); *id.*, at App. 220 (remarks of Sen. Thurman, opponent). The legislative history is discussed accurately and persuasively by the Court of Appeals for the District of Columbia Circuit in *McCord* v. *Bailey*, 204 U. S. App. D. C. 334, 345, 636 F. 2d 606, 615–617 (1980), cert. denied, 451 U. S. 983 (1981).

person while engaged in the lawful discharge of the duties of his office, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty, *or by force, intimidation, or threat to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his having so attended or testified,* or by force, intimidation, or threat to influence the verdict, presentment, or indictment, of any juror or grand juror in any court of the United States, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or on account of his being or having been such juror, or shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, *or shall conspire together for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws,* or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy, each and every person so offending

shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States or district or supreme court of any Territory of the United States having jurisdiction of similar offences, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April ninth, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication.'"

TEXAS *v.* BROWN

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 81–419. Argued January 12, 1983—Decided April 19, 1983

A Fort Worth, Tex., police officer stopped respondent's automobile at night at a routine driver's license checkpoint, asked him for his license, shined his flashlight into the car, and saw an opaque, green party balloon, knotted near the tip, fall from respondent's hand to the seat beside him. Based on his experience in drug offense arrests, the officer was aware that narcotics frequently were packaged in such balloons, and while respondent was searching in the glove compartment for his license, the officer shifted his position to obtain a better view and noticed small plastic vials, loose white powder, and an open bag of party balloons in the glove compartment. After respondent stated that he had no driver's license in his possession and complied with the officer's request to get out of the car, the officer picked up the green balloon, which seemed to contain a powdery substance within its tied-off portion. Respondent was then advised that he was under arrest, an on-the-scene inventory search of the car was conducted, and other items were seized. At a suppression hearing in respondent's state-court trial for unlawful possession of heroin, a police department chemist testified that heroin was contained in the balloon seized by the officer and that narcotics frequently were so packaged. Suppression of the evidence was denied, and respondent was convicted. The Texas Court of Criminal Appeals reversed, holding that the evidence should have been suppressed because it was obtained in violation of the Fourth Amendment. Rejecting the State's contention that the so-called "plain view" doctrine justified the seizure, the court concluded that under *Coolidge* v. *New Hampshire*, 403 U. S. 443, for that doctrine to apply, not only must the officer be legitimately in a position to view the object, but also it must be "immediately apparent" to the police that they have evidence before them, and thus the officer here had to *know* that incriminating evidence was before him when he seized the balloon.

Held: The judgment is reversed, and the case is remanded.

617 S. W. 2d 196, reversed and remanded.

JUSTICE REHNQUIST, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR, concluded that the police officer did not violate the Fourth Amendment in seizing the green balloon from respondent's automobile. The plain-view doctrine provides grounds for

a warrantless seizure of a suspicious item when the officer's access to the item has some prior justification under the Fourth Amendment. This rule merely reflects an application of the Fourth Amendment's central requirement of reasonableness to the law governing seizures of property. Here, the officer's initial stop of respondent's vehicle was valid, and his actions in shining his flashlight into the car and changing his position to see what was inside did not violate any Fourth Amendment rights. The "immediately apparent" language in *Coolidge*, *supra*, does not establish a requirement that a police officer "know" that certain items are contraband or evidence of a crime. "The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." *Payton* v. *New York*, 445 U. S. 573, 587. Probable cause is a flexible, common-sense standard, merely requiring that the facts available to the officer would warrant a man of reasonable caution to believe that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. In view of the police officer's testimony here, corroborated by that of the police department chemist, as to the common use of balloons in packaging narcotics, the officer had probable cause to believe that the balloon contained an illicit substance. Moreover, the requirement of the plain-view doctrine under *Coolidge*, *supra*, that the officer must discover incriminating evidence "inadvertently," without knowing in advance the location of the particular evidence and intending to seize it by use of the doctrine as a pretext, was no bar to the seizure here. Pp. 735–744.

JUSTICE POWELL, joined by JUSTICE BLACKMUN, concurring in the judgment, concluded that the articulation in *Coolidge*, *supra*, of the plain-view exception to the Warrant Clause requirements of the Fourth Amendment is dispositive of the issue here. Respondent conceded that the officer's initial intrusion was lawful and that the discovery of the tied-off balloon was inadvertent in that it was observed in the course of a lawful inspection of the front seat area of the automobile. If probable cause must be shown to justify the seizure, it existed here, in light of the evidence that tied-off balloons are common containers for carrying illegal narcotics. Moreover, a law enforcement officer may rely on his training and experience to draw inferences and make deductions that might well elude an untrained person. Pp. 744–746.

JUSTICE STEVENS, joined by JUSTICE BRENNAN and JUSTICE MARSHALL, concurring in the judgment, concluded that under the "plain view" exception to the Fourth Amendment's warrant requirement the officer's warrantless temporary seizure of the balloon was proper, but that before the balloon's contents could be used as evidence, the State

had to justify opening it without a warrant, a question that remains open to the state court on remand. Pp. 747–751.

REHNQUIST, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C. J., and WHITE and O'CONNOR, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 744. POWELL, J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined, *post*, p. 744. STEVENS, J., filed an opinion concurring in the judgment, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 747.

C. Chris Marshall argued the cause for petitioner. With him on the briefs were *Tim Curry*, *L. T. Wilson*, and *Stephen R. Chaney*.

Allan K. Butcher argued the cause for respondent. With him on the brief was *J. Don Carter*.*

JUSTICE REHNQUIST announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR joined.

Respondent Clifford James Brown was convicted in the District Court of Tarrant County, Tex., for possession of heroin in violation of state law. The Texas Court of Criminal Appeals reversed his conviction, holding that certain evidence should have been suppressed because it was obtained in violation of the Fourth Amendment to the United States Constitution.[1] 617 S. W. 2d 196. That court rejected the

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**Solicitor General Lee*, *Assistant Attorney General Jensen*, *Deputy Solicitor General Frey*, and *Joshua I. Schwartz* filed a brief for the United States as *amicus curiae* urging reversal.

[1] Brown argues that the decision below rested on an independent and adequate state ground, and therefore that this Court lacks jurisdiction. *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210 (1935). The position is untenable. The opinion of the Texas Court of Criminal Appeals rests squarely on the interpretation of the Fourth Amendment to the United States Constitution in *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971), and on Texas cases interpreting that decision, *e. g.*, *Howard* v. *State*, 599 S. W. 2d 597 (Tex. Crim. App. 1979); *DeLao* v. *State*, 550 S. W. 2d 289 (Tex. Crim. App. 1977); *Duncan* v. *State*, 549 S. W. 2d 730 (Tex. Crim. App. 1977); and *Nicholas* v. *State*, 502 S. W. 2d 169 (Tex. Crim. App. 1973). The only men-

State's contention that the so-called "plain view" doctrine justified the police seizure. Because of apparent uncertainty concerning the scope and applicability of this doctrine, we granted certiorari, 457 U. S. 1116, and now reverse the judgment of the Court of Criminal Appeals.

On a summer evening in June 1979, Tom Maples, an officer of the Fort Worth police force, assisted in setting up a routine driver's license checkpoint on East Allen Street in that city. Shortly before midnight Maples stopped an automobile driven by respondent Brown, who was alone. Standing alongside the driver's window of Brown's car, Maples asked him for his driver's license. At roughly the same time, Maples shined his flashlight into the car and saw Brown withdraw his right hand from his right pants pocket. Caught between the two middle fingers of the hand was an opaque, green party balloon, knotted about one-half inch from the tip. Brown let the balloon fall to the seat beside his leg, and then reached across the passenger seat and opened the glove compartment.

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tion of the Texas Constitution occurs in a summary of Brown's contentions at the outset of the lower court's opinion.

Brown relies principally on *Howard* v. *State*, *supra*, and *Duncan* v. *State*, *supra*. Neither decision supports the proposition that the Texas Court of Criminal Appeals based its decision upon state law. In *Howard*, the State argued that the plain-view doctrine justified the seizure of a closed translucent medicine jar from an automobile. The Court of Criminal Appeals rejected the claim, relying on *Coolidge* v. *New Hampshire*, *supra*, and stating that the State's arguments "cannot be squared with the Supreme Court's interpretation of the plain view doctrine." 599 S. W. 2d, at 602. The court also relied on *Thomas* v. *State*, 572 S. W. 2d 507 (Tex. Crim. App. 1976), which it characterized as "[f]ollowing the teachings of *Coolidge* v. *New Hampshire*." 599 S. W. 2d, at 602. An additional opinion of the court on the State's motion for rehearing merely elaborated upon the application of the plain-view doctrine set forth in the court's original opinion. Similarly, in *Duncan*, the Court of Criminal Appeals rejected the State's reliance on the plain-view theory, citing to *Coolidge* for a statement of the applicable law, as well as to *Nicholas* v. *State*, *supra*. Like the court's other decisions in the area, *Nicholas* relied only on *Coolidge*.

Because of his previous experience in arrests for drug offenses, Maples testified that he was aware that narcotics frequently were packaged in balloons like the one in Brown's hand. When he saw the balloon, Maples shifted his position in order to obtain a better view of the interior of the glove compartment. He noticed that it contained several small plastic vials, quantities of loose white powder, and an open bag of party balloons. After rummaging briefly through the glove compartment, Brown told Maples that he had no driver's license in his possession. Maples then instructed him to get out of the car and stand at its rear. Brown complied, and, before following him to the rear of the car, Maples reached into the car and picked up the green balloon; there seemed to be a sort of powdery substance within the tied-off portion of the balloon.

Maples then displayed the balloon to a fellow officer who indicated that he "understood the situation." The two officers then advised Brown that he was under arrest.[2] They

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[2] It is not clear on the record before us when Brown was arrested. The Court of Criminal Appeals stated, at one point in its opinion, that it did not question "the propriety of the arrest since appellant failed to produce a driver's license." 617 S. W. 2d 196, 200. This statement might be read to suggest that Brown was arrested upon his failure to produce a license, instead of at some point following seizure of the balloon from the car. The transcript of the suppression hearing, however, indicates rather clearly that Brown was not formally arrested until after seizure of the balloon. App. 28–31. In the face of such indications, we decline to interpret the above-quoted clause from the Court of Criminal Appeals' opinion as evidencing a belief that an arrest occurred prior to seizure of the balloon. Rather, we think it likely that the court was simply reasoning that Brown's arrest, whenever it may have taken place, was justified because of his failure to produce a driver's license.

We do not address the argument that seizure of the balloon would have been justified under *New York* v. *Belton*, 453 U. S. 454 (1981), which permits warrantless searches of the passenger compartment of an automobile incident to an arrest, because of the absence of clear factual findings regarding the time at which, and the reason for which, Brown was arrested and because the lower court was not able to consider that decision.

also conducted an on-the-scene inventory of Brown's car, discovering several plastic bags containing a green leafy substance and a large bottle of milk sugar. These items, like the balloon, were seized by the officers. At the suppression hearing conducted by the District Court, a police department chemist testified that he had examined the substance in the balloon seized by Maples and determined that it was heroin. He also testified that narcotics frequently were packaged in ordinary party balloons.

The Court of Criminal Appeals, discussing the Fourth Amendment issue, observed that "'plain view *alone* is never enough to justify the warrantless seizure of evidence.'" 617 S. W. 2d, at 200, quoting *Coolidge* v. *New Hampshire*, 403 U. S. 443, 468 (1971) (opinion of Stewart, J., joined by Douglas, BRENNAN, and MARSHALL, JJ.) It further concluded that "Officer Maples had to *know* that 'incriminatory evidence was before him when he seized the balloon.'" 617 S. W. 2d, at 200 (emphasis supplied), quoting *DeLao* v. *State*, 550 S. W. 2d 289, 291 (Tex. Crim. App. 1977). On the State's petition for rehearing, three judges dissented, stating their view that "[t]he issue turns on whether an officer, relying on years of practical experience and knowledge commonly accepted, has probable cause to seize the balloon in plain view." 617 S. W. 2d, at 201.

Because the "plain view" doctrine generally is invoked in conjunction with other Fourth Amendment principles, such as those relating to warrants, probable cause, and search incident to arrest, we rehearse briefly these better understood principles of Fourth Amendment law. That Amendment secures the persons, houses, papers, and effects of the people against unreasonable searches and seizures, and requires the existence of probable cause before a warrant shall issue. Our cases hold that procedure by way of a warrant is preferred, although in a wide range of diverse situations we have recognized flexible, common-sense exceptions to this requirement. See, *e. g.*, *Warden* v. *Hayden*, 387 U. S. 294 (1967)

(hot pursuit); *United States* v. *Jeffers*, 342 U. S. 48, 51–52 (1951) (exigent circumstances); *United States* v. *Ross*, 456 U. S. 798 (1982) (automobile search); *Chimel* v. *California*, 395 U. S. 752 (1969), *United States* v. *Robinson*, 414 U. S. 218 (1973), and *New York* v. *Belton*, 453 U. S. 454 (1981) (search of person and surrounding area incident to arrest); *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973) (search at border or "functional equivalent"); *Zap* v. *United States*, 328 U. S. 624, 630 (1946) (consent). We have also held to be permissible intrusions less severe than full-scale searches or seizures without the necessity of a warrant. See, *e. g.*, *Terry* v. *Ohio*, 392 U. S. 1 (1968) (stop and frisk); *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975) (seizure for questioning); *Delaware* v. *Prouse*, 440 U. S. 648 (1979) (roadblock). One frequently mentioned "exception to the warrant requirement," *Coolidge* v. *New Hampshire*, *supra*, at 456, is the so-called "plain view" doctrine, relied upon by the State in this case.

While conceding that the green balloon seized by Officer Maples was clearly visible to him, the Court of Criminal Appeals held that the State might not avail itself of the "plain view" doctrine. That court said:

> "For the plain view doctrine to apply, not only must the officer be legitimately in a position to view the object, but it must be immediately apparent to the police that they have evidence before them. This 'immediately apparent' aspect is central to the plain view exception and is here relied upon by appellant. [Citation omitted.] In this case then, Officer Maples had to know that 'incriminatory evidence was before him when he seized the balloon.'" 617 S. W. 2d, at 200.

The Court of Criminal Appeals based its conclusion primarily on the plurality portion of the opinion of this Court in *Coolidge* v. *New Hampshire*, *supra*. In the *Coolidge* plurality's view, the "plain view" doctrine permits the warrantless seizure by police of private possessions where three require-

ments are satisfied.[3] First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. *Id.*, at 465–468. Second, the officer must discover incriminating evidence "inadvertently," which is to say, he may not "know in advance the location of [certain] evidence and intend to seize it," relying on the plain-view doctrine only as a pretext. *Id.*, at 470. Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure. *Id.*, at 466. While the lower courts generally have applied the *Coolidge* plurality's discussion of "plain view," it has never been expressly adopted by a majority of this Court. On the contrary, the plurality's formulation was sharply criticized at the time, see, *Coolidge* v. *New Hampshire*, 403 U. S., at 506 (Black, J., dissenting); *id.*, at 516–521 (WHITE, J., dissenting). While not a binding precedent, as the considered opinion of four Members of this Court it should obviously be the point of reference for further discussion of the issue.

The *Coolidge* plurality observed: "it is important to keep in mind that, in the vast majority of cases, *any* evidence seized by the police will be in plain view, at least at the moment of seizure," simply as "the normal concomitant of any search, legal or illegal." *Id.*, at 465. The question whether property in plain view of the police may be seized therefore must turn on the legality of the intrusion that enables them to perceive and physically seize the property in question. The *Coolidge* plurality, while following this approach to "plain

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[3] The plurality also remarked that "plain view *alone* is never enough to justify the warrantless seizure of evidence." 403 U. S., at 468. The court below appeared to understand this phrase to impose an independent limitation upon the scope of the plain-view doctrine articulated in *Coolidge*. The context in which the plurality used the phrase, however, indicates that it was merely a rephrasing of its conclusion, discussed below, that in order for the plain-view doctrine to apply, a police officer must be engaged in a lawful intrusion or must otherwise legitimately occupy the position affording him a "plain view."

view," characterized it as an independent exception to the warrant requirement. At least from an analytical perspective, this description may be somewhat inaccurate. We recognized in *Payton* v. *New York*, 445 U. S. 573, 587 (1980), the well-settled rule that "objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." A different situation is presented, however, when the property in open view is "'situated on private premises to which access is not otherwise available for the seizing officer.'" *Ibid.*, quoting *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 354 (1977). As these cases indicate, "plain view" provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment.[4] "Plain view" is perhaps better understood, therefore, not as an independent "exception" to the Warrant

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[4] Thus, police may perceive an object while executing a search warrant, or they may come across an item while acting pursuant to some exception to the Warrant Clause, *e. g.*, *Warden* v. *Hayden*, 387 U. S. 294 (1967); *Terry* v. *Ohio*, 392 U. S. 1 (1968). Alternatively, police may need no justification under the Fourth Amendment for their access to an item, such as when property is left in a public place, see *Payton* v. *New York*, 445 U. S. 573, 587 (1980).

It is important to distinguish "plain view," as used in *Coolidge* to justify *seizure* of an object, from an officer's mere observation of an item left in plain view. Whereas the latter generally involves no Fourth Amendment search, see *infra*, at 740; *Katz* v. *United States*, 389 U. S. 347 (1967), the former generally does implicate the Amendment's limitations upon seizures of personal property. The information obtained as a result of observation of an object in plain sight may be the basis for probable cause or reasonable suspicion of illegal activity. In turn, these levels of suspicion may, in some cases, see, *e. g.*, *Terry* v. *Ohio*, *supra*; *United States* v. *Ross*, 456 U. S. 798 (1982), justify police conduct affording them access to a particular item.

Clause, but simply as an extension of whatever the prior justification for an officer's "access to an object" may be.

The principle is grounded on the recognition that when a police officer has observed an object in "plain view," the owner's remaining interests in the object are merely those of possession and ownership, see *Coolidge* v. *New Hampshire*, *supra*, at 515 (WHITE, J., dissenting). Likewise, it reflects the fact that requiring police to obtain a warrant once they have obtained a first-hand perception of contraband, stolen property, or incriminating evidence generally would be a "needless inconvenience," 403 U. S., at 468, that might involve danger to the police and public. *Ibid.* We have said previously that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on . . . Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware* v. *Prouse*, 440 U. S., at 654. In light of the private and governmental interests just outlined, our decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately. See *Marron* v. *United States*, 275 U. S. 192 (1927); *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 358 (1931); *United States* v. *Lefkowitz*, 285 U. S. 452, 465 (1932); *Harris* v. *United States*, 390 U. S. 234, 236 (1968); *Frazier* v. *Cupp*, 394 U. S. 731 (1969). This rule merely reflects an application of the Fourth Amendment's central requirement of reasonableness to the law governing seizures of property.

Applying these principles, we conclude that Officer Maples properly seized the green balloon from Brown's automobile. The Court of Criminal Appeals stated that it did not "question . . . the validity of the officer's initial stop of appellant's vehicle as a part of a license check," 617 S. W. 2d, at 200, and we agree. *Delaware* v. *Prouse*, *supra*, at 654–655. It is likewise beyond dispute that Maples' action in shining his

flashlight to illuminate the interior of Brown's car trenched upon no right secured to the latter by the Fourth Amendment. The Court said in *United States* v. *Lee*, 274 U. S. 559, 563 (1927): "[The] use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution." Numerous other courts have agreed that the use of artificial means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection.[5]

Likewise, the fact that Maples "changed [his] position" and "bent down at an angle so [he] could see what was inside" Brown's car, App. 16, is irrelevant to Fourth Amendment analysis. The general public could peer into the interior of Brown's automobile from any number of angles; there is no reason Maples should be precluded from observing as an officer what would be entirely visible to him as a private citizen. There is no legitimate expectation of privacy, *Katz* v. *United States*, 389 U. S. 347, 361 (1967) (Harlan, J., concurring); *Smith* v. *Maryland*, 442 U. S. 735, 739–745 (1979), shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers. In short, the conduct that enabled Maples to observe the interior of Brown's car and of his open glove compartment was not a search within the meaning of the Fourth Amendment.

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[5] *E. g.*, *United States* v. *Chesher*, 678 F. 2d 1353, 1356–1357, n. 2 (CA9 1982); *United States* v. *Ocampo*, 650 F. 2d 421, 427 (CA2 1981); *United States* v. *Pugh*, 566 F. 2d 626, 627, n. 2 (CA8 1977), cert. denied, 435 U. S. 1010 (1978); *United States* v. *Coplen*, 541 F. 2d 211 (CA9 1976), cert. denied, 429 U. S. 1073 (1977); *United States* v. *Lara*, 517 F. 2d 209 (CA5 1975); *United States* v. *Johnson*, 506 F. 2d 674 (CA8 1974), cert. denied, 421 U. S. 917 (1975); *United States* v. *Booker*, 461 F. 2d 990, 992 (CA6 1972); *United States* v. *Hanahan*, 442 F. 2d 649 (CA7 1971); *People* v. *Waits*, 196 Colo. 35, 580 P. 2d 391 (1978); *Redd* v. *State*, 240 Ga. 753, 243 S. E. 2d 16 (1978); *State* v. *Chattley*, 390 A. 2d 472 (Me. 1978); *State* v. *Vohnoutka*, 292 N. W. 2d 756 (Minn. 1980); *Dick* v. *State*, 596 P. 2d 1265 (Okla. Crim. App. 1979); *State* v. *Miller*, 45 Ore. App. 407, 608 P. 2d 595 (1980); *Albo* v. *State*, 379 So. 2d 648 (Fla. 1980).

Thus there can be no dispute here as to the presence of the first of the three requirements held necessary by the *Coolidge* plurality to invoke the "plain view" doctrine.[6] But the Court of Criminal Appeals, as we have noted, felt the State's case ran aground on the requirement that the incriminating nature of the items be "immediately apparent" to the police officer. To the Court of Criminal Appeals, this apparently meant that the officer must be possessed of near certainty as to the seizable nature of the items. Decisions by this Court since *Coolidge* indicate that the use of the phrase "immediately apparent" was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the "plain view" doctrine.

In *Colorado* v. *Bannister*, 449 U. S. 1, 3–4 (1980), we applied what was in substance the plain-view doctrine to an officer's seizure of evidence from an automobile. *Id.*, at 4, n. 4. The officer noticed that the occupants of the automobile matched a description of persons suspected of a theft and that auto parts in the open glove compartment of the car similarly resembled ones reported stolen. The Court held that these facts supplied the officer with "probable cause," *id.*, at 4, and therefore, that he could seize the incriminating items from the car without a warrant. Plainly, the Court did not view the "immediately apparent" language of *Coolidge* as establishing any requirement that a police officer "know" that certain items are contraband or evidence of a crime. Indeed, *Colorado* v. *Bannister*, *supra*, was merely an application of the rule, set forth in *Payton* v. *New York*, 445 U. S. 573 (1980), that "[t]he seizure of property in plain view involves no invasion of privacy and *is presumptively reasonable, assuming that there is probable cause to associate the property*

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[6] While seizure of the balloon required a warrantless, physical intrusion into Brown's automobile, this was proper, assuming that the remaining requirements of the plain-view doctrine were satisfied. *United States* v. *Ross*, 456 U. S. 798 (1982).

with criminal activity." *Id.*, at 587 (emphasis added). We think this statement of the rule from *Payton*, *supra*, requiring probable cause for seizure in the ordinary case,[7] is consistent with the Fourth Amendment and we reaffirm it here.

As the Court frequently has remarked, probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief," *Carroll* v. *United States*, 267 U. S. 132, 162 (1925), that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required. *Brinegar* v. *United States*, 338 U. S. 160, 176 (1949). Moreover, our observation in *United States* v. *Cortez*, 449 U. S. 411, 418 (1981), regarding "particularized suspicion," is equally applicable to the probable-cause requirement:

> "The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

With these considerations in mind it is plain that Officer Maples possessed probable cause to believe that the balloon in Brown's hand contained an illicit substance. Maples testified that he was aware, both from his participation in previous narcotics arrests and from discussions with other officers,

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[7] We need not address whether, in some circumstances, a degree of suspicion lower than probable cause would be sufficient basis for a seizure in certain cases.

that balloons tied in the manner of the one possessed by Brown were frequently used to carry narcotics. This testimony was corroborated by that of a police department chemist who noted that it was "common" for balloons to be used in packaging narcotics. In addition, Maples was able to observe the contents of the glove compartment of Brown's car, which revealed further suggestions that Brown was engaged in activities that might involve possession of illicit substances. The fact that Maples could not see through the opaque fabric of the balloon is all but irrelevant: the distinctive character of the balloon itself spoke volumes as to its contents—particularly to the trained eye of the officer.

In addition to its statement that for seizure of objects in plain view to be justified the basis upon which they might be seized had to be "immediately apparent," and the requirement that the initial intrusion be lawful, both of which requirements we hold were satisfied here, the *Coolidge* plurality also stated that the police must discover incriminating evidence "inadvertently," which is to say, they may not "know in advance the location of [certain] evidence and intend to seize it," relying on the plain-view doctrine only as a pretense. 430 U. S., at 470. Whatever may be the final disposition of the "inadvertence" element of "plain view,"[8] it clearly was no bar to the seizure here. The circumstances of this meeting between Maples and Brown give no suggestion that the roadblock was a pretext whereby evidence of narcotics violation might be uncovered in "plain view" in the course of a check for driver's licenses. Here, although the officers no doubt had an expectation that some of the cars they halted on East Allen Street—which was part of a "medium" area of narcotics traffic, App. 33—would contain narcotics or para-

[8] See *State* v. *King*, 191 N. W. 2d 650, 655 (Iowa 1971); *United States* v. *Santana*, 485 F. 2d 365, 369–370 (CA2 1973), cert. denied, 415 U. S. 931 (1974); *United States* v. *Bradshaw*, 490 F. 2d 1097, 1101, n. 3 (CA4), cert. denied, 419 U. S. 895 (1974); *North* v. *Superior Court*, 8 Cal. 3d 301, 306–307, 502 P. 2d 1305, 1308 (1972).

phernalia, there is no indication in the record that they had anything beyond this generalized expectation. Likewise, there is no indication that Maples had any reason to believe that any particular object would be in Brown's glove compartment or elsewhere in his automobile. The "inadvertence" requirement of "plain view," properly understood, was no bar to the seizure here.

Maples lawfully viewed the green balloon in the interior of Brown's car, and had probable cause to believe that it was subject to seizure under the Fourth Amendment. The judgment of the Texas Court of Criminal Appeals is accordingly reversed, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE WHITE, concurring.

While joining JUSTICE REHNQUIST's plurality opinion, I continue to disagree with the views of four Justices in *Coolidge* v. *New Hampshire*, 403 U. S. 443, 469 (1971), that plain-view seizures are valid only if the viewing is "inadvertent." Nor does the Court purport to endorse that view in its opinions today.

JUSTICE POWELL, with whom JUSTICE BLACKMUN joins, concurring in the judgment.

I concur in the judgment, and also agree with much of the plurality's opinion relating to the application in this case of the plain-view exception to the Warrant Clause. But I do not join the plurality's opinion because it goes well beyond the application of the exception. As I read the opinion, it appears to accord less significance to the Warrant Clause of the Fourth Amendment than is justified by the language and purpose of that Amendment. In dissent in *United States* v. *Rabinowitz*, 339 U. S. 56 (1950), Justice Frankfurter wrote eloquently:

> "One cannot wrench 'unreasonable searches' from the text and context and historic content of the Fourth

> Amendment. . . . When [that] Amendment outlawed 'unreasonable searches' and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity." *Id.*, at 70.

To be sure, the opinions of this Court in Warrant Clause cases have not always been consistent. They have reflected disagreement among Justices as to the extent to which the Clause defines the reasonableness standard of the Amendment. In one of my earliest opinions, *United States* v. *United States District Court*, 407 U. S. 297 (1972), I cited Justice Frankfurter's *Rabinowitz* dissent in emphasizing the importance of the Warrant Clause. 407 U. S., at 316. Although I would not say that exceptions can be justified only by "absolute necessity,"[1] I stated that they were "few in number and carefully delineated." *Id.*, at 318. This has continued to be my view, as expressed recently in *Arkansas* v. *Sanders*, 442 U. S. 753, 759 (1979). It is a view frequently repeated by this Court. See, *e. g.*, *United States* v. *Ross*, 456 U. S. 798, 825 (1982); *Mincey* v. *Arizona*, 437 U. S. 385, 390 (1978) (unanimous decision); *Vale* v. *Lousiana*, 399 U. S. 30, 34 (1970); *Katz* v. *United States*, 389 U. S. 347, 357 (1967); *Camara* v. *Municipal Court*, 387 U. S. 523, 528–529 (1967); *Jones* v. *United States*, 357 U. S. 493, 499 (1958).

This case involves an application of the plain-view exception, first addressed at some length by the plurality portion of the opinion in *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971). The plurality today states that this opinion "has

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[1] I have considered the automobile exception, for example, as one clearly justified because of the nature of the vehicle. See, *e. g.*, *Arkansas* v. *Sanders*, 442 U. S. 753, 760–761 (1979); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 561–562 (1976); *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 279 (1973) (POWELL, J., concurring).

never been expressly adopted by a majority of this Court." *Ante*, at 737. Whatever my view might have been when *Coolidge* was decided, I see no reason at this late date to imply criticism of its articulation of this exception. It has been accepted generally for over a decade.[2] Moreover, it seems unnecessary to cast doubt on *Coolidge* in this case. Its plurality formulation is dispositive of the question before us.

Respondent Brown does not dispute that Officer Maples' initial intrusion was lawful. Brown also concedes that the discovery of the tied-off balloon was inadvertent in that it was observed in the course of a lawful inspection of the front seat area of the automobile. If probable cause must be shown, as the *Payton* dicta suggest, see *Payton* v. *New York*, 445 U. S. 573, 587 (1980), I think it is clear that it existed here. Officer Maples testified that he previously had made an arrest in a case where narcotics were carried in tied-off balloons similar to the one at issue here. Other officers had told him of such cases. Even if it were not generally known that a balloon is a common container for carrying illegal narcotics, we have recognized that a law enforcement officer may rely on his training and experience to draw inferences and make deductions that might well elude an untrained person. *United States* v. *Cortez*, 449 U. S. 411, 418 (1981). We are not advised of any innocent item that is commonly carried in uninflated, tied-off balloons such as the one Officer Maples seized.

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[2] See, *e. g.*, *United States* v. *Chesher*, 678 F. 2d 1353, 1356–1357 (CA9 1982); *United States* v. *Irizarry*, 673 F. 2d 554, 558–560 (CA1 1982); *United States* v. *Tolerton*, 669 F. 2d 652, 653–655 (CA10), cert. denied, 456 U. S. 949 (1982); *United States* v. *Antill*, 615 F. 2d 648, 649 (CA5) *(per curiam)*, cert. denied, 449 U. S. 866 (1980); *United States* v. *Duckett*, 583 F. 2d 1309, 1313–1314 (CA5 1978); *United States* v. *Williams*, 523 F. 2d 64, 66–67 (CA8 1975), cert. denied, 423 U. S. 1090 (1976); *United States* v. *Truitt*, 521 F. 2d 1174, 1175–1178 (CA6 1975); *United States* v. *Pacelli*, 470 F. 2d 67, 70–72 (CA2 1972), cert. denied, 410 U. S. 983 (1973); *United States* v. *Drew*, 451 F. 2d 230, 232–234 (CA5 1971).

Accordingly, I concur in the judgment as it is consistent with principles established by our prior decisions.

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

The Texas Court of Criminal Appeals held that the warrantless seizure of respondent's balloon could not be justified under the plain-view doctrine because incriminating evidence was not immediately apparent. This Court reverses, holding that even though the contents of the balloon were not visible to the officer, incriminating evidence was immediately apparent because he had probable cause to believe the balloon contained an illicit substance. I agree with the Court that contraband need not be visible in order for a plain-view seizure to be justified. I therefore concur in the conclusion that the Texas Court interpreted the Fourth Amendment more strictly than is required.

The plurality's explanation of our disposition of this case is, however, incomplete. It gives inadequate consideration to our cases holding that a closed container may not be opened without a warrant, even when the container is in plain view and the officer has probable cause to believe contraband is concealed within. *United States* v. *Chadwick*, 433 U. S. 1 (1977); *Arkansas* v. *Sanders*, 442 U. S. 753 (1979); *United States* v. *Ross*, 456 U. S. 798, 811–812 (1982). Final determination of whether the trial court properly denied the suppression motion requires a more complete understanding of the plain-view doctrine, as well as the answer to a factual inquiry that remains open to the state court on remand.

Although our Fourth Amendment cases sometimes refer indiscriminately to searches and seizures, there are important differences between the two that are relevant to the plain-view doctrine. The Amendment protects two different interests of the citizen—the interest in retaining possession of property and the interest in maintaining personal privacy. A seizure threatens the former, a search the latter. As a matter of timing, a seizure is usually preceded by a search,

but when a container is involved the converse is often true. Significantly, the two protected interests are not always present to the same extent; for example, the seizure of a locked suitcase does not necessarily compromise the secrecy of its contents, and the search of a stopped vehicle does not necessarily deprive its owner of possession.

An object may be considered to be "in plain view" if it can be seized without compromising any interest in privacy. Since seizure of such an object threatens only the interest in possession, circumstances diminishing that interest may justify exceptions to the Fourth Amendment's usual requirements. Thus, if an item has been abandoned, neither Fourth Amendment interest is implicated, and neither probable cause nor a warrant is necessary to justify seizure. See, *e. g.*, *Abel* v. *United States*, 362 U. S. 217, 241 (1960); cf. *United States* v. *Lisk*, 522 F. 2d 228, 230 (CA7 1975). And if an officer has probable cause to believe that a publicly situated item is associated with criminal activity, the interest in possession is outweighed by the risk that such an item might disappear or be put to its intended use before a warrant could be obtained. The officer may therefore seize it without a warrant. See *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 354 (1975); *Payton* v. *New York*, 445 U. S. 573, 587 (1980). The "plain view" exception to the warrant requirement is easy to understand and to apply in cases in which no search is made and no intrusion on privacy occurs.

The Court's more difficult plain-view cases, however, have regularly arisen in two contexts that link the seizure with a prior or subsequent search. The first is the situation in which an officer who is executing a valid search for one item seizes a different item. The Court has been sensitive to the danger inherent in such a situation that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will. That danger is averted by strict attention to two of the core requirements of plain view: seizing the item must entail no significant additional invasion of privacy, and

at the time of seizure the officer must have probable cause to connect the item with criminal behavior. See *United States* v. *Lefkowitz*, 285 U. S. 452, 465 (1932); cf. *Coolidge* v. *New Hampshire*, 403 U. S. 443, 465–466 (1971).

The second familiar context is the situation in which an officer comes upon a container in plain view and wants both to seize it and to examine its contents. In recent years, the Court has spoken at some length about the latter act, *e. g.*, *Ross*, *supra; Chadwick*, *supra; Sanders*, *supra*, emphasizing the Fourth Amendment privacy values implicated whenever a container is opened. In this case, however, both the search of a container (the balloon) and the antecedent seizure are open to challenge.[1] In that regard, it more closely resembles *Coolidge*, *supra*.[2] All of these cases, however, demonstrate that the constitutionality of a container search is not automatically determined by the constitutionality of the prior seizure. See *Chadwick*, 433 U. S., at 13–14, n. 8; *Sanders*, 442 U. S., at 761–762. Separate inquiries are necessary, taking into account the separate interests at stake.

If a movable container is in plain view, seizure does not implicate any privacy interests. Therefore, if there is probable cause to believe it contains contraband, the owner's possessory interest in the container must yield to society's interest in making sure that the contraband does not vanish during

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[1] In defending the Texas Court of Criminal Appeals' judgment before this Court, the respondent did not rely upon a challenge to the search of the balloon. I nevertheless believe it is necessary to elaborate upon the distinction between the balloon's search and its seizure in this case in order to clarify what the Court does and does not hold today. Moreover, it is not clear to me whether, as a matter of Texas law, the respondent would still be permitted to present an argument that the evidence should be suppressed because it was obtained after a search of the balloon. See n. 3, *infra*.

[2] Although *Coolidge* is not always thought of as a container case, the Court was required to confront New Hampshire's separate attempts to justify both its warrantless seizure of a container, an immobilized automobile, see 403 U. S., at 464–473, and its subsequent warrantless searches of the container's interior, see *id.*, at 458–464.

the time it would take to obtain a warrant. The item may be seized temporarily. It does not follow, however, that the container may be opened on the spot. Once the container is in custody, there is no risk that evidence will be destroyed. Some inconvenience to the officer is entailed by requiring him to obtain a warrant before opening the container, but that alone does not excuse the duty to go before a neutral magistrate. *Johnson* v. *United States*, 333 U. S. 10, 15 (1948); *McDonald* v. *United States*, 335 U. S. 451, 455 (1948). As JUSTICE POWELL emphasizes, *ante*, at 744–745, the Warrant Clause embodies our government's historical commitment to bear the burden of inconvenience. Exigent circumstances must be shown before the Constitution will entrust an individual's privacy to the judgment of a single police officer.

In this case, I have no doubt concerning the propriety of the officer's warrantless seizure of the balloon. For the reasons stated by JUSTICES POWELL and REHNQUIST, I agree that the police officer invaded no privacy interest in order to see the balloon, and that when he saw it he had probable cause to believe it contained drugs. But before the balloon's contents could be used as evidence against the respondent, the State also had to justify opening it without a warrant.[3] I can perceive two potential justifications. First, it is entirely possible that what the officer saw in the car's glove compartment, coupled with his observation of respondent and the contents of his pockets, provided probable cause to believe that contraband was located somewhere in the car—and not merely in the one balloon at issue. If so, then under *United States* v. *Ross*, 456 U. S. 798 (1982), which was not decided until after the Texas Court of Criminal Appeals reviewed this case, it was permissible to examine the contents of any container in the car, including this balloon.

Alternatively, the balloon could be one of those rare single-purpose containers which "by their very nature cannot sup-

[3] Arguably, as a matter of Texas law the respondent has waived his right to demand such a justification. That is, of course, an issue for the Texas courts.

port any reasonable expectation of privacy because their contents can be inferred from their outward appearance." *Sanders*, *supra*, at 764–765, n. 13. Whereas a suitcase or a paper bag may contain an almost infinite variety of items, a balloon of this kind might be used only to transport drugs. Viewing it where he did could have given the officer a degree of certainty that is equivalent to the plain view of the heroin itself. If that be true, I would conclude that the plain-view doctrine supports the search as well as the seizure even though the contents of the balloon were not actually visible to the officer.[4]

This reasoning leads me to the conclusion that the Fourth Amendment would not require exclusion of the balloon's contents in this case if, but only if, there was probable cause to search the entire vehicle or there was virtual certainty that the balloon contained a controlled substance.[5] Neither of these fact-bound inquiries was made by the Texas courts, and neither should be made by this Court in the first instance. Moreover, it may be that on remand the Texas Court of Criminal Appeals will find those inquiries unnecessary because the respondent may have waived his right to demand them. See n. 3, *supra*. I therefore concur in the judgment.

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[4] Conversely, the fact that an object is visible does not automatically mean that it is in plain view in the sense that no invasion of privacy is required to seize it. This case does not require elaboration of what the Fourth Amendment demands before an officer may seize a visible item that he could not reach without, for example, entering a private home or destroying a valuable container. See *Taylor* v. *United States*, 286 U. S. 1, 5 (1932).

[5] Sometimes there can be greater certainty about the identity of a substance within a container than about the identity of a substance that is actually visible. One might actually see a white powder without realizing that it is heroin, but be virtually certain a balloon contains such a substance in a particular context. It seems to me that in evaluating whether a person's privacy interests are infringed, "virtual certainty" is a more meaningful indicator than visibility.

UNITED STATES ET AL. *v.* RYLANDER ET AL.

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

No. 81–1120. Argued January 18, 1983—Decided April 19, 1983

The Internal Revenue Service (IRS) summoned respondent Rylander (respondent) to appear before an IRS agent and to produce for examination, and testify with respect to, records of two corporations of which respondent was president. When respondent failed to comply with the summons, the District Court enforced it and ordered him to produce the corporate records. Subsequently, after a hearing, the District Court held respondent in civil contempt for failure to comply with the court's enforcement order, finding that he had failed to introduce any evidence in support of his claim that he did not possess the records. The Court of Appeals reversed, holding that respondent's out-of-court declaration that he did not possess the documents, together with his invocation of the privilege against self-incrimination under the Fifth Amendment, required the Government to shoulder the burden of producing evidence that respondent was able to produce the records in question, and that, notwithstanding the issuance of the enforcement order, respondent was free to relitigate the question of his possession or control of the records in the contempt proceeding.

Held: The Court of Appeals was incorrect both in its view of the relationship between the enforcement proceeding and the contempt proceeding, and in its view of the effect of respondent's invocation of his Fifth Amendment privilege on the burden of production at the contempt hearing. Pp. 756–762.

(a) Because a proceeding to enforce an IRS summons is an adversary proceeding in which the defendant may contest the summons on any appropriate ground, and because lack of possession or control of records is such a ground, the issue may not be raised for the first time in a contempt proceeding. In the latter proceeding, the defendant may assert a *present* inability to comply with the enforcement order, but in raising this defense he has the burden of production. Thus, while respondent in the contempt hearing could not attack the enforcement order on the ground that he lacked possession or control of the records at the time the order was issued, he could defend the contempt charge on the ground that he was *then* unable to comply because he lacked possession or control. Pp. 756–757.

(b) While assertion of the Fifth Amendment privilege may be a valid ground upon which a witness such as respondent declines to answer questions, it is not a substitute for evidence that would assist in meeting a burden of production. *Curcio* v. *United States*, 354 U. S. 118, distinguished. The Court of Appeals' view would convert the privilege from the shield against compulsory self-incrimination that it was intended to be into a sword whereby a claimant asserting the privilege would be freed from adducing proof in support of a burden that would otherwise have been his. Pp. 757–761.

656 F. 2d 1313, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, *post*, p. 762.

Deputy Solicitor General Wallace argued the cause for petitioners. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Archer*, *Jerrold J. Ganzfried*, *Charles E. Brookhart*, *Jo-Ann Horn*, and *William A. Whitledge*.

Joseph F. Harbison III, by appointment of the Court, 456 U. S. 1005, argued the cause and filed a brief for respondents.

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Rylander was held in civil contempt by the United States District Court for the Eastern District of California because of his failure to comply with its earlier order enforcing an Internal Revenue Service (IRS) summons for corporate books and records. The Court of Appeals for the Ninth Circuit reversed that holding, concluding that Rylander's showing at the contempt hearing, together with his invocation of the privilege against compulsory self-incrimination, required the Government to shoulder the burden of producing evidence that Rylander was able to produce the documents in question. Because of a conflict among the various Courts of Appeals on this issue, we granted certiorari, 456 U. S. 943 (1982), and we now reverse.

In January 1979, the IRS issued a summons to Rylander pursuant to 26 U. S. C. § 7602. The summons ordered him to appear before an agent of the Service in Sacramento, Cal., and to produce for examination, and testify with respect to, books and records of two corporations. Rylander was the president of each corporation. When he failed to comply with the summons, the District Court issued an order to show cause why the summons should not be enforced. Rylander for several months succeeded in evading service, but in November 1979 the Marshal was able to personally serve the fourth successive order to show cause issued by the court. In January 1980, on the return date of that order, Rylander failed to file a responsive pleading and did not appear at the show cause hearing. He had sent an unsworn letter to the court claiming he was neither the president of either corporation nor associated with them in any way. The District Court enforced the IRS summons and ordered Rylander to appear before an agent of the Service in February 1980 to produce the corporate records.

Rylander neither sought reconsideration of the enforcement order nor did he appeal from it. He appeared as ordered before the agent, but failed to produce the records. After this encounter, the District Court issued an order to show cause why Rylander should not be held in contempt. Rylander again successfully evaded service of the court's order, and the court in May 1980 found that he was willfully avoiding service and issued a bench warrant for his arrest.

The contempt hearing took place on two different dates in October 1980. After an initial skirmish, Rylander took the witness stand and verified an "Oath in Purgation of Contempt" which he had earlier submitted to the court. The essence of this declaration was that he did not possess the records and had not disposed of them to other persons. He refused to submit to additional questioning under oath from the Government, asserting the privilege against compulsory

self-incrimination conferred by the Fifth Amendment to the United States Constitution.

The District Court held Rylander in contempt, finding that he had "fail[ed] to introduce any evidence" in support of his claim that he did not possess the records. The court affirmatively found that Rylander "as president or other corporate officer, had possession or control, or both, of the books and records of said corporations." App. to Pet. for Cert. 17a–18a. Thus 21 months after the IRS had issued a summons to him, Rylander was finally faced with a civil contempt order directing him to either produce the subpoenaed records or face imprisonment.

Rylander appealed to the Court of Appeals, which reversed the District Court. 656 F. 2d 1313 (CA9 1981). The Court of Appeals agreed that the Government, in a contempt proceeding, meets its initial burden by showing only a failure to comply and the burden is then on the defendant to come forward with evidence showing "'categorically and in detail'" why he is unable to comply. *Id.*, at 1318. But the Court of Appeals concluded that a defendant need not meet this burden where "he properly claims that his testimony as to the whereabouts of the documents might be incriminatory." *Id.*, at 1319. The court stated further:

> "When the defendant has made a bona fide fifth amendment claim, his statement that the documents are not in his possession or under his control is sufficient to satisfy his burden of production. The burden then shifts to the government to produce evidence showing that the documents in question actually exist and are in the defendant's possession or under his control." *Ibid.*

After concluding that Rylander's failure to raise this defense in the enforcement proceeding did not limit his argument in the contempt proceeding, the court determined that if Rylander's Fifth Amendment claim is valid, his burden of

production had been met.[1] We think the Court of Appeals was incorrect both in its view of the relationship between the enforcement proceeding and the contempt proceeding, and in its view of the effect of Rylander's invocation of his Fifth Amendment privilege on the burden of production at the latter hearing.

On numerous occasions this Court has been called upon to review the statutory authorization for the IRS to summon witnesses and records and seek judicial enforcement of such summons. See, *e. g.*, *United States* v. *LaSalle National Bank*, 437 U. S. 298 (1978); *Fisher* v. *United States*, 425 U. S. 391 (1976); *United States* v. *Powell*, 379 U. S. 48 (1964); *Reisman* v. *Caplin*, 375 U. S. 440 (1964). There is no disagreement here concerning that basic statutory scheme. In the present case, the Court of Appeals held that notwithstanding the issuance of the enforcement order, Rylander was free to relitigate the question of his possession or control of the records in the contempt proceeding. The Court of Appeals emphasized that the enforcement proceeding was summary in nature, that the Government's burden was light, and that there had been no express finding in the enforcement proceeding that Rylander was in possession or control of the records.

We think the Court of Appeals' view of the matter gave insufficient weight to this Court's observations in *Maggio* v. *Zeitz*, 333 U. S. 56, 69 (1948):

> "It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding

[1] The Court of Appeals remanded to the District Court for a finding concerning the validity of Rylander's Fifth Amendment claim and, provided the claim is sustained, an opportunity for the Government to introduce additional evidence concerning Rylander's ability to comply.

> an act should not be so inconclusive as to foster experimentation with disobedience."

See also *id.*, at 75. Because a proceeding to enforce an IRS summons is an adversary proceeding in which the defendant may contest the summons "on any appropriate ground," *Reisman* v. *Caplin*, *supra*, at 449, and because lack of possession or control of records is surely such a ground, the issue may not be raised for the first time in a contempt proceeding. Cf. *United States* v. *Bryan*, 339 U. S. 323 (1950); *United States* v. *Fleischman*, 339 U. S. 349 (1950). See also *United States* v. *Euge*, 444 U. S. 707 (1980).

In a civil contempt proceeding such as this, of course, a defendant may assert a *present* inability to comply with the order in question. *Maggio* v. *Zeitz*, *supra*, at 75–76; *Oriel* v. *Russell*, 278 U. S. 358, 366 (1929). While the court is bound by the enforcement order, it will not be blind to evidence that compliance is now factually impossible. Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action. It is settled, however, that in raising this defense, the defendant has a burden of production. *McPhaul* v. *United States*, 364 U. S. 372, 379 (1960); *Maggio* v. *Zeitz*, *supra*, at 75–76; *Oriel* v. *Russell*, *supra*, at 366. See also *United States* v. *Fleischman*, *supra*, at 362–363. Thus while Rylander could not attack the enforcement order on the ground that he lacked possession or control of the records at the time the order was issued, he could defend the contempt charge on the ground that he was *then* unable to comply because he lacked possession or control.

The Court of Appeals, while recognizing that Rylander was obligated to assume the burden of production in making this defense, felt that the showing made by Rylander at the October 1980 hearing was sufficient to shift the burden back to the Government. We disagree. We first analyze the effect of Rylander's denial of possession when he took the witness stand at the contempt hearing and when he submitted the

"Oath in Purgation of Contempt." Since he declined to be cross-examined with respect to his assertions of nonpossession, the District Court was entirely justified in concluding, as it did, that Rylander "fail[ed] to introduce any evidence at the contempt trial." This was a time for testimony, and Rylander's *ex parte* affidavit and uncross-examined testimony were properly disregarded by the District Court. *McGautha* v. *California*, 402 U. S. 183, 215 (1971); *Brown* v. *United States*, 356 U. S. 148, 155 (1958).

The Court of Appeals also gave weight to the fact that Rylander's asserted reason for refusing to allow cross-examination was his claim that answering such questions might lead him to incriminate himself. But while the assertion of the Fifth Amendment privilege against compulsory self-incrimination may be a valid ground upon which a witness such as Rylander declines to answer questions, it has never been thought to be in itself a substitute for evidence that would assist in meeting a burden of production. We think the view of the Court of Appeals would convert the privilege from the shield against compulsory self-incrimination which it was intended to be into a sword whereby a claimant asserting the privilege would be freed from adducing proof in support of a burden which would otherwise have been his. None of our cases support this view.

We have squarely rejected the notion, apparently subscribed to by the Court of Appeals, that a possible failure of proof on an issue where the defendant had the burden of proof is a form of "compulsion" which requires that the burden be shifted from the defendant's shoulders to that of the government. *McGautha* v. *California*, *supra; Williams* v. *Florida*, 399 U. S. 78 (1970); see also *Barnes* v. *United States*, 412 U. S. 837 (1973); *Turner* v. *United States*, 396 U. S. 398 (1970); *Yee Hem* v. *United States*, 268 U. S. 178 (1925); *Wilson* v. *United States*, 162 U. S. 613 (1896). In *Williams*, the Court said:

> "The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. When he presents his witnesses, he must reveal their identity and submit them to cross-examination which in itself may prove incriminating or which may furnish the State with leads to incriminating rebuttal evidence. *That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.* The pressures generated by the State's evidence may be severe but they do not vitiate the defendant's choice to present an alibi defense and witnesses to prove it, even though the attempted defense ends in catastrophe for the defendant. However 'testimonial' or 'incriminating' the alibi defense proves to be, it cannot be considered 'compelled' within the meaning of the Fifth and Fourteenth Amendments." 399 U. S., at 83–84 (emphasis added).

The Court of Appeals nonetheless thought that this Court's decision in *Curcio* v. *United States*, 354 U. S. 118 (1957), prevented Rylander from being required to carry his burden of production or risk the consequences from his failure of proof. We do not read the case that way. The issue in *Curcio*, as stated by the Court in its opinion in that case, was "whether petitioner's personal privilege against self-incrimination attaches to questions relating to the whereabouts of the union books and records which he did not produce pursuant to subpoena." *Id.*, at 122. The Court went on to distinguish cases such as *Hale* v. *Henkel*, 201 U. S. 43 (1906), holding that a corporation had no Fifth Amendment privilege against self-incrimination, and cases such as *Wilson* v. *United States*, 221 U. S. 361 (1911), and *United States* v. *White*, 322 U. S. 694 (1944), holding respectively that the custodians of neither records belonging to unions nor those belonging to corpora-

tions might withhold production of such records on the ground that the custodian might be incriminated by their production. The Court refused to accept the Government's contention, based on those cases, that the custodian had no privilege to refuse to testify about such records on grounds that testimony might incriminate him. In reversing the contempt conviction, however, the Court pointedly noted:

> "This conviction related solely to petitioner's failure to answer questions pursuant to the personal subpoena *ad testificandum*. He has not been charged with failing to produce the books and records demanded in the subpoena *duces tecum*." 354 U. S., at 121.

The instant proceeding is exactly the converse of the one in *Curcio*. Rylander was originally ordered both to produce books and records and to testify about them. But the only order against him remaining at the time of the contempt hearing was the order to produce books and records. The Court of Appeals assumed, as we do, that Rylander's claim of privilege "attached" to questions about the whereabouts of the records; that was the issue decided in *Curcio*. But that is to say no more than if Rylander asserted a valid claim of privilege at the contempt hearing, then the claim could not be overruled by the court and the respondent incarcerated for failure to answer such questions.

Rylander was not, however, incarcerated because he refused to submit himself to cross-examination by the Government at the contempt hearing. He was held in contempt for failure to comply with a previous order of the District Court enforcing an IRS summons against him. This order, unappealed from, necessarily contained an implied finding that no defense of lack of possession or control had been raised and sustained in that proceeding. The only issue open to Rylander in defending the contempt proceeding was to show inability to *then* produce, and because of the presumption of continuing possession arising from the enforcement order, *Maggio* v. *Zeitz*, 333 U. S. 56 (1948), if he sought to

defend on that ground he was required to come forward with evidence in support of it. The fact that his refusal to come forward with such evidence was accompanied by a claim of Fifth Amendment privilege may be an adequate reason for the court's not compelling him to respond to cross-examination at the contempt hearing,[2] but the claim of privilege is not a substitute for relevant evidence.

Rylander was found by the District Court to be in contempt of the enforcement order which required him to produce documents—documents justifiably found by the District Court to be in his possession.[3] He was committed to custody until such time as he should produce the documents, but the District Court again saved him the additional alternative of adducing evidence to show lack of possession or control. Rylander is thus not compelled "to submit to incarceration or run the risk of incriminating himself," 656 F. 2d, at 1319; he is committed until he either produces the documents which the District Court found to be in his possession, or adduces evidence as to his present inability to comply with that order.

We think our cases plainly support this result, and we are frank to say that we have no regret that they do. After 21 months of successfully avoiding sanctions for refusing to re-

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[2] The Government has argued that by submitting the *ex parte* declaration and by taking the witness stand to verify that declaration, Rylander waived his Fifth Amendment privilege. See *Brown* v. *United States*, 356 U. S. 148 (1958). Because of our disposition of the case, we need not decide this question.

[3] While the District Court did not state explicitly that Rylander still possessed the documents at the time of the contempt proceeding, we believe such a finding to be plainly implicit in the court's conclusion that "as president or other corporate officer [Rylander] had possession or control, or both, of the books and records of said corporations." App. to Pet. for Cert. 17a–18a. A finding of present possession was supported in this case; the District Court found that Rylander possessed the documents at the time of the enforcement proceeding and the circumstances themselves warranted an inference of continuing possession. See *Maggio* v. *Zeitz*, 333 U. S. 56, 64–67, 75–76 (1948).

spond to an IRS summons, or show cause why he should not do so, with the District Court at each step patiently assuring itself that Rylander's procedural rights were protected, he was finally held in contempt. The Court of Appeals' view of the matter would require still additional hearings on the issue of possession or control of the corporate books or records, with the Government having the burden of production at the reopened contempt hearing. Given the oft-stated reliance of the federal income tax system on self-assessment, a plainer guide to the successful frustration of this system could hardly be imagined. As we said in an analogous context in *United States* v. *Bryan:*

> "A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity." 339 U. S., at 331.

The judgment of the Court of Appeals is

Reversed.

JUSTICE MARSHALL, dissenting.

I will not join another opinion which creates a new exception to a basic constitutional right—the Fifth Amendment privilege against self-incrimination.

Prior to the decision today, a man could not be held in civil contempt for failure to perform an act which he is currently unable to perform, regardless of whether he was once able to perform the act and wrongfully failed to do so. See *Maggio* v. *Zeitz*, 333 U. S. 56, 72–74, and n. 6 (1948), and authorities cited therein.

Here the District Court made no finding that respondent possessed the documents at the time of the contempt proceeding. It stated only that "as president or other corporate officer [he] *had* possession or control, or both, of the books and records of said corporations." (Emphasis added.) Al-

though "[u]nder some circumstances it may be permissible . . . to reach the conclusion of present control from proof of previous possession," *Maggio* v. *Zeitz*, *supra*, at 65, that is a determination to be made in the first instance by the trier of fact, not by this Court. In this case the District Court found only *past* possession, not *present* possession.

Since the District Court did not find that respondent was currently able to comply with the order to produce the documents, respondent has in effect been held in contempt simply because he invoked the Fifth Amendment when asked to testify at the contempt proceeding about the whereabouts of the documents. At the hearing the judge appointed counsel for the express "purposes of aiding [Rylander] in determining the propriety of the question and whether he desired to assert Fifth Amendment privileges to the questions which are asked." The transcript of Rylander's testimony reads as follows:

"EXAMINATION BY THE COURT

"Q. Mr. Rylander, you have filed an affidavit in which you say that you do not have the records that are the subject of this action; is that true, sir?

"A. That is correct your Honor.

"Q. Where are the records?

"A. I respectfully decline to answer on the advice of counsel and assert my Fifth Amendment.

"THE COURT: Thank you, sir, I don't have to go beyond that, do I?

"MR. HARBISON [counsel for Rylander]: I have no questions your Honor.

"THE COURT: I am not going to direct him to answer because I don't know whether I can, sir.

"MR. HARBISON: I am going to object if you ask him any other questions. The sole purpose was to make your record.

"THE COURT: What else needs to be done in your view to make the record, Mr. Robinson?

"MR. ROBINSON [counsel for the United States]: Your Honor, I move to strike, then, the affidavit on the grounds that I have not had the opportunity to cross-examine him about the contents of that affidavit.

"THE COURT: That motion will be taken under submission. Now you are in a position to make the motion. You may step down, Mr. Rylander."

Respondent was entitled to invoke the Fifth Amendment privilege if his answers might have tended to incriminate him. As this Court stated in *Curcio* v. *United States*, 354 U. S. 118, 128 (1957):

"[F]orcing the custodian [of corporate records] to testify orally about the whereabouts of nonproduced records requires him to disclose the contents of his own mind. He might be compelled to convict himself out of his own mouth. That is contrary to the spirit and letter of the Fifth Amendment."

If respondent's invocation of the privilege was proper, he may not be held in contempt for failing to testify.

"[T]he power to compel testimony is not absolute. There are a number of exemptions from the testimonial duty, the most important of which is the Fifth Amendment privilege against compulsory self-incrimination. The privilege reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty. It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. This Court has been zealous to safeguard the values that underlie the privilege." *Kastigar* v. *United States*, 406 U. S. 441, 444–445 (1972) (footnotes omitted).

I agree with the Court of Appeals that the proper disposition is to

> "remand for the district court to make a finding concerning the validity of Rylander's fifth amendment claim. If the court finds that Rylander's fifth amendment claim is valid, the government will have an opportunity to show that the summoned records are in Rylander's possession or under his control. The court should permit the government to introduce additional evidence in order to meet its burden. At this stage of the proceedings, . . . the government has not met its burden of showing by clear and convincing evidence that Rylander is in contempt." 656 F. 2d 1313, 1319–1320 (citations omitted).

METROPOLITAN EDISON CO. ET AL. *v.* PEOPLE AGAINST NUCLEAR ENERGY ET AL.

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

No. 81–2399. Argued March 1, 1983—Decided April 19, 1983*

Petitioner Metropolitan Edison Co. (Metropolitan) owns two licensed nuclear plants at Three Mile Island near Harrisburg, Pa. On a day when one plant (TMI–1) was shut down for refueling, the other plant (TMI–2) suffered a serious accident that damaged the reactor and caused widespread concern. The Nuclear Regulatory Commission (NRC) then ordered Metropolitan to keep TMI–1 shut down until it could be determined whether the plant could be operated safely, and published a notice of hearing that included an invitation to interested parties to submit briefs on whether psychological harm or other indirect effects of the accident or of renewed operation of TMI–1 should be considered. Respondent People Against Nuclear Energy (PANE), an association of residents of the Harrisburg area who are opposed to further operation of either TMI reactor, responded to this invitation, contending that restarting TMI–1 would cause both severe psychological damage to persons living in the vicinity, and serious damage to the stability, cohesiveness, and well-being of neighboring communities. When the NRC decided not to take evidence of these contentions, PANE filed a petition for review in the Court of Appeals, contending that the National Environmental Policy Act (NEPA), *inter alia*, required the NRC to address its contentions. The court held that the NRC improperly failed to consider whether the risk of an accident at TMI–1 might cause harm to the psychological health and community well-being of residents of the area surrounding Three Mile Island.

Held: The NRC need not consider PANE's contentions. Pp. 771–779.

(a) Section 102(C) of NEPA—which provides that where an agency action significantly affects the quality of the human environment, the agency must evaluate the "environmental impact" and any unavoidable adverse "environmental effects" of its proposed action—does not require the agency to assess *every* impact or effect of its proposed action, but

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*Together with No. 82–358, *United States Nuclear Regulatory Commission et al.* v. *People Against Nuclear Energy et al.*, also on certiorari to the same court.

only the impact or effect on the environment. The statute's context shows that Congress was talking about the physical environment. Although NEPA states its goals in sweeping terms of human health and welfare, these goals are *ends* that Congress has chosen to pursue by *means* of protecting the physical environment. Pp. 772–773.

(b) NEPA does not require agencies to evaluate the effects of risk, *qua* risk. The terms "environmental effects" and "environmental impact" in § 102(C) should be read to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue. Here, the federal action that affects the environment is permitting renewed operation of TMI–1. The direct effects of this action include release of low-level radiation, increased fog, and the release of warm water into the Susquehanna River, all of which effects the NRC has considered. The NRC has also considered the risk of a nuclear accident. But a *risk* of an accident is not an effect on the physical environment. In a causal chain from renewed operation of TMI–1 to psychological health damage, the element of risk and its perception by PANE's members are necessary middle links. That element of risk lengthens the causal chain beyond NEPA's reach. Pp. 773–777.

(c) Regardless of the gravity of the harm alleged by PANE, if a harm does not have a sufficiently close connection to the physical environment, NEPA does not apply. P. 778.

(d) That PANE's claim was made in the wake of the accident at TMI–2 is irrelevant. NEPA is not directed at the effects of past accidents and does not create a remedial scheme for past federal actions. Pp. 778–779.

219 U. S. App. D. C. 358, 678 F. 2d 222, reversed and remanded.

REHNQUIST, J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring opinion, *post*, p. 779.

Deputy Solicitor General Bator argued the cause for petitioners in both cases. With him on the briefs in No. 82–358 were *Solicitor General Lee*, *Assistant Attorney General Dinkins*, *Deputy Solicitor General Claiborne*, *Joshua I. Schwartz*, *James M. Spears*, *Jacques B. Gelin*, *Peter G. Crane*, and *Herzel Plaine*. *James B. Hamlin*, *George F. Trowbridge*, *John B. Rhinelander*, *Deborah B. Bauser*, and *James B. Liberman* filed briefs for petitioners in No. 81–2399.

William S. Jordan III argued the cause and filed a brief for respondents in both cases.†

JUSTICE REHNQUIST delivered the opinion of the Court.

The issue in these cases is whether petitioner Nuclear Regulatory Commission (NRC) complied with the National Environmental Policy Act of 1969, 83 Stat. 852, as amended, 42 U. S. C. § 4321 *et seq.* (1976 ed. and Supp. V) (NEPA), when it considered whether to permit petitioner Metropolitan Edison Co. to resume operation of the Three Mile Island Unit 1 nuclear powerplant (TMI–1). The Court of Appeals for the District of Columbia Circuit held that the NRC improperly failed to consider whether the risk of an accident at TMI–1 might cause harm to the psychological health and community well-being of residents of the surrounding area. 219 U. S. App. D. C. 358, 678 F. 2d 222 (1982). We reverse.

Metropolitan owns two nuclear powerplants at Three Mile Island near Harrisburg, Pa. Both of these plants were licensed by the NRC after extensive proceedings, which included preparation of Environmental Impact Statements (EIS's). On March 28, 1979, TMI–1 was not operating; it had been shut down for refueling. TMI–2 was operating, and it suffered a serious accident that damaged the reactor.[1] Although, as it turned out, no dangerous radiation was re-

†Briefs of *amici curiae* urging reversal were filed by *Michael I. Miller* and *Linda L. Hodge* for the Atomic Industrial Forum; by *Robert L. Baum*, *Peter B. Kelsey*, *Edward H. Comer*, and *William L. Fang* for the Edison Electric Institute; by *William E. Blasier* and *Jan S. Amundson* for the National Association of Manufacturers; and by *James P. McGranery, Jr.*, and *William A. Carnahan* for Scientists and Engineers for Secure Energy, Inc.

Briefs of *amici curiae* urging affirmance were filed by *Margaret Farrell Ewing* and *Bruce J. Ennis* for the American Psychological Association; and by *Ellyn R. Weiss* for the Union of Concerned Scientists.

Bruce J. Terris and *Phillip G. Sunderland* filed a brief for the American Sociological Association as *amicus curiae*.

[1] See generally Report of the President's Commission on the Accident at Three Mile Island (1979).

leased, the accident caused widespread concern. The Governor of Pennsylvania recommended an evacuation of all pregnant women and small children, and many area residents did leave their homes for several days.

After the accident, the NRC ordered Metropolitan to keep TMI–1 shut down until it had an opportunity to determine whether the plant could be operated safely. 44 Fed. Reg. 40461 (1979). The NRC then published a notice of hearing specifying several safety-related issues for consideration. *Metropolitan Edison Co.*, 10 N. R. C. 141 (1979). The notice stated that the Commission had not determined whether to consider psychological harm or other indirect effects of the accident or of renewed operation of TMI–1. It invited interested parties to submit briefs on this issue. *Id.*, at 148.

Respondent People Against Nuclear Energy (PANE) intervened and responded to this invitation. PANE is an association of residents of the Harrisburg area who are opposed to further operation of either TMI reactor. PANE contended that restarting TMI–1 would cause both severe psychological health damage to persons living in the vicinity, and serious damage to the stability, cohesiveness, and well–being of the neighboring communities.[2]

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[2] Specifically, PANE contended, App. to Pet. for Cert. 115a–116a:

"1.) Renewed operation of [TMI–1] would cause severe psychological distress to PANE's members and other persons living in the vicinity of the reactor. The accident at [TMI–2] has already impaired the health and sense of well being of these individuals, as evidenced by their feelings of increased anxiety, tension and fear, a sense of helplessness and such physical disorders as skin rashes, aggravated ulcers, and skeletal and muscular problems. Such manifestations of psychological distress have been seen in the aftermath of other disasters. The possibility that [TMI–1] will reopen severely aggravates these problems. As long as this possibility exists, PANE's members and other persons living in the communities around the plant will be unable to resolve and recover from the trauma which they have suffered. Operation of [TMI–1] would be a constant reminder of the terror which they felt during the accident, and of the possibility that it will happen again. The distress caused by this ever present spectre of disaster

The NRC decided not to take evidence concerning PANE's contentions. *Metropolitan Edison Co.*, 12 N. R. C. 607 (1980); *Metropolitan Edison Co.*, 14 N. R. C. 593 (1981).[3] PANE filed a petition for review in the Court of Appeals, contending that both NEPA and the Atomic Energy Act of 1954, 68 Stat. 921, as amended, 42 U. S. C. § 2011 *et seq.* (1976 ed. and Supp. V), require the NRC to address its contentions.[4] Metropolitan intervened on the side of the NRC.

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makes it impossible . . . to operate TMI 1 without endangering the public health and safety.

"2.) Renewed operation of TMI 1 would cause severe harm to the stability, cohesiveness and well being of the communities in the vicinity of the reactor. Community institutions have already been weakened as a result of a loss of citizen confidence in the ability of these institutions to function properly and in a helpful manner during a crisis. The potential for a reoccurrence of the accident will further stress the community infrastructure, causing increased loss of confidence and a breakdown of the social and political order. Sociologists such as Kai Erikson have documented similar phenomena in other communities following disasters.

"The perception, created by the accident, that the communities near Three Mile Island are undesirable locations for business and industry, or for the establishment of law or medical practice, or homes compounds the damage to the viability of the communities. Community vitality depends upon the ability to attract and keep persons, such as teachers, doctors, lawyers, and businesses critical to economic and social health. The potential for another accident, should TMI 1 be allowed to operate, would compound and make permanent the damage, trapping the residents in disintegrating and dying communities and discouraging . . . essential growth."

[3] Four members of the Commission filed individual opinions. There was no majority opinion.

[4] While the petition for review was pending, the NRC staff prepared an environmental impact assessment (EIA) to determine whether a full EIS is required before TMI–1 could be permitted to renew operation. The NRC's Licensing Board has ruled that the EIA was adequate and that no EIS is required. This ruling was upheld by the Atomic Safety and Licensing Appeal Board. *In re Metropolitan Edison Co.*, Docket No. 50–289 (ALAB–705) (Dec. 10, 1982). Several additional steps, including repairs to a steam generator and NRC approval of those repairs, are necessary before Metropolitan actually resumes operation of TMI–1. Brief for Petitioners in No. 82–358, p. 18, and n. 13.

The Court of Appeals concluded that the Atomic Energy Act does not require the NRC to address PANE's contentions. 219 U. S. App. D. C., at 385–389, 678 F. 2d, at 249–253. It did find, however, that NEPA requires the NRC to evaluate "the potential psychological health effects of operating" TMI–1 which have arisen since the original EIS was prepared. *Id.*, at 371, 678 F. 2d, at 235. It also held that, if the NRC finds that significant new circumstances or information exist on this subject, it shall prepare a "supplemental [EIS] which considers not only the effects on psychological health but also effects on the well-being of the communities surrounding Three Mile Island." *Id.*, at 371–372, 678 F. 2d, at 235–236. We granted certiorari.[5] 459 U. S. 966 (1982).

All the parties agree that effects on human health can be cognizable under NEPA, and that human health may include psychological health. The Court of Appeals thought these propositions were enough to complete a syllogism that disposes of the case: NEPA requires agencies to consider effects on health. An effect on psychological health is an effect on health. Therefore, NEPA requires agencies to consider the effects on psychological health asserted by PANE. See 219 U. S. App. D. C., at 364, 678 F. 2d, at 228. PANE, using similar reasoning, contends that because the psychological health damage to its members would be caused by a change in the environment (renewed operation of TMI–1), NEPA requires the NRC to consider that damage. See Brief for

[5] In the Court of Appeals the NRC argued that there is no "major Federal action" involved in permitting TMI–1 to renew operations because TMI–1 already has an operating license and an EIS was prepared before that license was issued. The Court of Appeals rejected this contention, stating that the "'major federal action' in the case of TMI–1 is . . . the Commission's continued exercise of supervisory responsibility over its operation and maintenance." 219 U. S. App. D. C., at 394, 678 F. 2d, at 231. No party has sought review of this holding, and we intimate no view as to its correctness. Similarly, no party has sought review of the Court of Appeals' Atomic Energy Act holding.

Respondents 23. Although these arguments are appealing at first glance, we believe they skip over an essential step in the analysis. They do not consider the closeness of the relationship between the change in the environment and the "effect" at issue.

Section 102(C) of NEPA, 83 Stat. 853, 42 U. S. C. § 4332(C), directs all federal agencies to

> "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> "(i) the environmental impact of the proposed action, [and]
>
> "(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented . . . ."

To paraphrase the statutory language in light of the facts of this case, where an agency action significantly affects the quality of the human environment, the agency must evaluate the "environmental impact" and any unavoidable adverse environmental effects of its proposal. The theme of § 102 is sounded by the adjective "environmental": NEPA does not require the agency to assess *every* impact or effect of its proposed action, but only the impact or effect on the environment. If we were to seize the word "environmental" out of its context and give it the broadest possible definition, the words "adverse environmental effects" might embrace virtually any consequence of a governmental action that someone thought "adverse." But we think the context of the statute shows that Congress was talking about the physical environment—the world around us, so to speak. NEPA was designed to promote human welfare by alerting governmental actors to the effect of their proposed actions on the physical environment.

The statements of two principal sponsors of NEPA, explaining to their colleagues the Conference Report on the bill that was ultimately enacted, illustrate this point:

> "What is involved [in NEPA] is a congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind: That *we will not intentionally initiate actions which do irreparable damage to the air, land and water* which support life on earth." 115 Cong. Rec. 40416 (1969) (remarks of Sen. Jackson) (emphasis supplied).
>
> "[W]e can now move forward *to preserve and enhance our air, aquatic, and terrestrial environments* . . . to carry out the policies and goals set forth in the bill to provide each citizen of this great country a healthful environment." *Id.*, at 40924 (remarks of Rep. Dingell) (emphasis supplied).

Thus, although NEPA states its goals in sweeping terms of human health and welfare,[6] these goals are *ends* that Congress has chosen to pursue by *means* of protecting the physical environment.

To determine whether § 102 requires consideration of a particular effect, we must look at the relationship between that effect and the change in the physical environment caused by the major federal action at issue. For example, if the Department of Health and Human Services were to implement extremely stringent requirements for hospitals and nursing homes receiving federal funds, many perfectly adequate hospitals and homes might be forced out of existence. The remaining facilities might be so limited or so expensive that

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[6] For example, § 2 of NEPA, 83 Stat. 852, as set forth in 42 U. S. C. § 4321, provides:

"The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality."

many ill people would be unable to afford medical care and would suffer severe health damage. Nonetheless, NEPA would not require the Department to prepare an EIS evaluating that health damage because it would not be proximately related to a change in the physical environment.

Some effects that are "caused by" a change in the physical environment in the sense of "but for" causation, will nonetheless not fall within § 102 because the causal chain is too attenuated. For example, residents of the Harrisburg area have relatives in other parts of the country. Renewed operation of TMI–1 may well cause psychological health problems for these people. They may suffer "anxiety, tension and fear, a sense of helplessness," and accompanying physical disorders, n. 2, *supra*, because of the risk that their relatives may be harmed in a nuclear accident. However, this harm is simply too remote from the physical environment to justify requiring the NRC to evaluate the psychological health damage to these people that may be caused by renewed operation of TMI–1.

Our understanding of the congressional concerns that led to the enactment of NEPA suggests that the terms "environmental effect" and "environmental impact" in § 102 be read to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue. This requirement is like the familiar doctrine of proximate cause from tort law. See generally W. Prosser, Law of Torts, ch. 7 (4th ed. 1971).[7] The issue before us, then, is how to give content to this requirement. This is a question of first impression in this Court.

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[7] In drawing this analogy, we do not mean to suggest that any cause-effect relation too attenuated to merit damages in a tort suit would also be too attenuated to merit notice in an EIS; nor do we mean to suggest the converse. In the context of both tort law and NEPA, courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not.

The federal action that affects the environment in this case is permitting renewed operation of TMI–1.[8] The direct effects on the environment of this action include release of low-level radiation, increased fog in the Harrisburg area (caused by operation of the plant's cooling towers), and the release of warm water into the Susquehanna River. The NRC has considered each of these effects in its EIS, and again in the EIA. See App. 51–58. Another effect of renewed operation is a risk of a nuclear accident. The NRC has also considered this effect.[9] See *id.*, at 58–60.

PANE argues that the psychological health damage it alleges "will flow directly from the risk of [a nuclear] accident." Brief for Respondents 23. But a *risk* of an accident is not an effect on the physical environment. A risk is, by definition, unrealized in the physical world. In a causal chain from renewed operation of TMI–1 to psychological health damage, the element of risk and its perception by PANE's members are necessary middle links.[10] We believe that the element of risk lengthens the causal chain beyond the reach of NEPA.

Risk is a pervasive element of modern life; to say more would belabor the obvious. Many of the risks we face are generated by modern technology, which brings both the possibility of major accidents and opportunities for tremendous achievements. Medical experts apparently agree that risk

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[8] See n. 5, *supra.*

[9] The NRC concluded that the risk of an accident had not changed significantly since the EIS for TMI–1 was prepared in 1972.

We emphasize that in this case we are considering effects caused by the risk of an accident. The situation where an agency is asked to consider effects that will occur if a risk is realized, for example, if an accident occurs at TMI–1, is an entirely different case. The NRC considered, in the original EIS and in the most recent EIA for TMI–1, the possible effects of a number of accidents that might occur at TMI–1.

[10] This risk can be perceived differently by different people. Indeed, it appears that the members of PANE perceive a much greater risk of another nuclear accident at Three Mile Island than is perceived by the NRC and its staff.

can generate stress in human beings, which in turn may rise to the level of serious health damage. For this reason, among many others, the question whether the gains from any technological advance are worth its attendant risks may be an important public policy issue. Nonetheless, it is quite different from the question whether the same gains are worth a given level of alteration of our physical environment or depletion of our natural resources. The latter question rather than the former is the central concern of NEPA.

Time and resources are simply too limited for us to believe that Congress intended to extend NEPA as far as the Court of Appeals has taken it. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 551 (1978). The scope of the agency's inquiries must remain manageable if NEPA's goal of "insur[ing] a fully informed and well-considered decision," *id.*, at 558, is to be accomplished.

If contentions of psychological health damage caused by risk were cognizable under NEPA, agencies would, at the very least, be obliged to expend considerable resources developing psychiatric expertise that is not otherwise relevant to their congressionally assigned functions. The available resources may be spread so thin that agencies are unable adequately to pursue protection of the physical environment and natural resources. As we said in another context in *United States* v. *Dow*, 357 U. S. 17, 25 (1958), "[w]e cannot attribute to Congress the intention to . . . open the door to such obvious incongruities and undesirable possibilities."

This case bears strong resemblance to other cases in which plaintiffs have sought to require agencies to evaluate the risk of crime from the operation of a jail or other public facility in their neighborhood. See, *e. g.*, *Como-Falcon Coalition, Inc.* v. *Department of Labor*, 609 F. 2d 342 (CA8 1979) (Job Corps Center); *Nucleus of Chicago Homeowners Assn.* v. *Lynn*, 524 F. 2d 225 (CA7 1975) (low-income housing); *First National Bank of Chicago* v. *Richardson*, 484 F. 2d 1369 (CA7 1973) (jail). The plaintiffs in these cases could have al-

leged that the risk of crime (or their dislike of the occupants of the facility) would cause severe psychological health damage.[11] The operation of the facility is an event in the physical environment, but the psychological health damage to neighboring residents resulting from unrealized risks of crime is too far removed from that event to be covered by NEPA. The psychological health damage alleged by PANE is no closer to an event in the environment or to environmental concerns.

The Court of Appeals thought that PANE's contentions are qualitatively different from the harm at issue in the cases just described. It thought PANE raised an issue of health damage, while those cases presented questions of fear or policy disagreement. We do not believe this line is so easily drawn. Anyone who fears or dislikes a project may find himself suffering from "anxiety, tension[,] fear, [and] a sense of helplessness." N. 2, *supra*. Neither the language nor the history of NEPA suggests that it was intended to give citizens a general opportunity to air their policy objections to proposed federal actions. The political process, and not NEPA, provides the appropriate forum in which to air policy disagreements.[12]

We do not mean to denigrate the fears of PANE's members, or to suggest that the psychological health damage they fear could not, in fact, occur. Nonetheless, it is difficult for us to see the differences between someone who dislikes a

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[11] Although these cases involved similar facts, they presented different legal issues. They did not consider allegations that risk of crime would lead to psychological health damage. They did hold that the risk of crime, or the plaintiffs' concern about crime, do not constitute environmental effects. Of course, these holdings are not at issue in this litigation.

[12] PANE's original contention seems to be addressed as much to the symbolic significance of continued operation of TMI–1 as to the risk of an accident. See n. 2, *supra*. NEPA does not require consideration of stress caused by the symbolic significance individuals attach to federal actions. Psychological health damage caused by a symbol is even farther removed from the physical environment, and more closely connected with the broader political process, than psychological health damage caused by risk.

government decision so much that he suffers anxiety and stress, someone who fears the effects of that decision so much that he suffers similar anxiety and stress, and someone who suffers anxiety and stress that "flow directly," Brief for Respondents 23, from the risks associated with the same decision. It would be extraordinarily difficult for agencies to differentiate between "genuine" claims of psychological health damage and claims that are grounded solely in disagreement with a democratically adopted policy. Until Congress provides a more explicit statutory instruction than NEPA now contains, we do not think agencies are obliged to undertake the inquiry. See *Maryland National Capital Park & Planning Comm'n* v. *U. S. Postal Service*, 159 U. S. App. D. C. 158, 166, 487 F. 2d 1029, 1037 (1973).

The Court of Appeals' opinion seems at one point to acknowledge the force of these arguments, 219 U. S. App. D. C., at 365, 678 F. 2d, at 229, but seeks to distinguish the situation suggested by the related cases. First, the Court of Appeals thought the harm alleged by PANE is far more severe than the harm alleged in other cases. *Ibid.* It thought the severity of the harm is relevant to whether NEPA requires consideration of an effect. This cannot be the case. NEPA addresses environmental effects of federal actions. The gravity of harm does not change its character.[13] If a harm does not have a sufficiently close connection to the physical environment, NEPA does not apply.

Second, the Court of Appeals noted that PANE's claim was made "in the wake of a unique and traumatic nuclear accident." *Ibid.* We do not understand how the accident at TMI–2 transforms PANE's contentions into "environmental effects." The Court of Appeals "cannot believe that the psychological aftermath of the March 1979 accident falls outside"

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[13] For example, the hospital regulations contemplated in the hypothetical, *supra*, at 773–774, might cause many deaths. But despite the severity of that harm, the deaths would not by any stretch of the imagination be "environmental effects."

NEPA. *Id.*, at 366, 678 F. 2d, at 230. On the contrary, NEPA is not directed at the effects of past accidents and does not create a remedial scheme for past federal actions. It was enacted to require agencies to assess the future effects of future actions. There is nothing in the language or the history of NEPA to suggest that its scope should be expanded "in the wake of" any kind of accident.

For these reasons, we hold that the NRC need not consider PANE's contentions.[14] NEPA does not require agencies to evaluate the effects of risk *qua* risk. The judgment of the Court of Appeals is reversed, and the case is remanded with instructions to dismiss the petition for review.

It is so ordered.

JUSTICE BRENNAN, concurring.

I join the opinion of the Court. There can be no doubt that psychological injuries are cognizable under NEPA. See *ante*, at 771. As the Court points out, however, the particular psychological injury alleged in these cases did not arise, for example, out of the direct sensory impact of a change in the physical environment, cf. *Chelsea Neighborhood Assns.* v. *United States Postal Service*, 516 F. 2d 378, 388 (CA2 1975), but out of a perception of risk. *Ante*, at 775. In light of the history and policies underlying NEPA, I agree with the Court that this crucial distinction "lengthens the causal chain beyond the reach" of the statute. *Ibid.*

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[14] The Court of Appeals held that the NRC need not consider PANE's contentions of community damage unless it found that the contentions of psychological health damage warrant preparation of an EIS. Since we decide that the NRC need not consider the contentions of psychological health damage at all, it follows that the contentions of community damage need not be considered.

ANDERSON ET AL. *v.* CELEBREZZE, SECRETARY OF STATE OF OHIO

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

No. 81–1635. Argued December 6, 1982—Decided April 19, 1983

An Ohio statute requires an independent candidate for President to file a statement of candidacy and nominating petition in March in order to appear on the general election ballot in November. On April 24, 1980, petitioner Anderson announced that he was an independent candidate for President. Thereafter, on May 16, 1980, his supporters tendered a nominating petition and statement of candidacy, satisfying the substantive requirements for ballot eligibility, to respondent Ohio Secretary of State. Respondent refused to accept the documents because they had not been filed within the time required by the Ohio statute. Anderson and petitioner voters then filed an action in Federal District Court, challenging the constitutionality of the statute. The District Court granted summary judgment for petitioners and ordered respondent to place Anderson's name on the general election ballot, holding that the statutory deadline was unconstitutional under the First and Fourteenth Amendments. The Court of Appeals reversed, holding that the early deadline served the State's interest in voter education by giving voters a longer opportunity to see how Presidential candidates withstand the close scrutiny of a political campaign.

Held: Ohio's early filing deadline places an unconstitutional burden on the voting and associational rights of petitioner Anderson's supporters. Pp. 786–806.

(a) In resolving constitutional challenges to a State's election laws, a court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the interests asserted by the State to justify the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of these interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the court in a position to decide whether the challenged provision is unconstitutional. Pp. 786–790.

(b) The Ohio filing deadline not only burdens the associational rights of independent voters and candidates, it also places a significant state-imposed restriction on a nationwide electoral process. A burden that falls unequally on independent candidates or on new or small political parties impinges, by its very nature, on associational choices protected by the First Amendment, and discriminates against those candidates and voters whose political preferences lie outside the existing political parties. And in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest, because the President and Vice President are the only elected officials who represent all the voters in the Nation, and the impact of the votes cast in each State affects the votes cast in other States. Pp. 790–795.

(c) None of the three interests that Ohio seeks to further by its early filing deadline justifies that deadline. As to the State's asserted interest in voter education, it is unrealistic in the modern world to suggest that it takes more than seven months to inform the electorate about the qualifications of a particular candidate simply because he lacks a partisan label. Moreover, it is not self-evident that the interest in voter education is served at all by the early filing deadline. The State's asserted interest in equal treatment for partisan and independent candidates is not achieved by imposing the early filing deadline on both, since, although a candidate participating in a primary election must declare his candidacy on the same date as an independent, both the burdens and benefits of the respective requirements are materially different, and the reasons for early filing for a primary candidate are inapplicable to independent candidates in the general election. And the State's asserted interest in political stability amounts to a desire to protect existing political parties from competition generated by independent candidates who have previously been affiliated with a party, an interest that conflicts with First Amendment values. The Ohio deadline does not serve any state interest "in maintaining the integrity of the various routes to the ballot" for the Presidency, because Ohio's Presidential preference primary does not serve to narrow the field for the general election. *Storer* v. *Brown*, 415 U.S. 724, distinguished. The deadline is not drawn to protect the parties from "intraparty feuding" and may actually impair the State's interest in preserving party harmony. Pp. 796–806.

664 F. 2d 554, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which WHITE, POWELL, and O'CONNOR, JJ., joined, *post*, p. 806.

George T. Frampton, Jr., argued the cause for petitioners. With him on the briefs were *Mitchell Rogovin*, *James E. Pohlman*, and *Thomas A. Young*.

Joel S. Taylor argued the cause for respondent. With him on the brief was *William J. Brown*, Attorney General of Ohio.*

JUSTICE STEVENS delivered the opinion of the Court.

On April 24, 1980, petitioner John Anderson announced that he was an independent candidate for the office of President of the United States. Thereafter, his supporters—by gathering the signatures of registered voters, filing required documents, and submitting filing fees—were able to meet the substantive requirements for having his name placed on the ballot for the general election in November 1980 in all 50 States and the District of Columbia. On April 24, however, it was already too late for Anderson to qualify for a position on the ballot in Ohio and certain other States because the statutory deadlines for filing a statement of candidacy had already passed. The question presented by this case is whether Ohio's early filing deadline placed an unconstitutional burden on the voting and associational rights of Anderson's supporters.

The facts are not in dispute. On May 16, 1980, Anderson's supporters tendered a nominating petition containing approximately 14,500 signatures and a statement of candidacy to respondent Celebrezze, the Ohio Secretary of State. These documents would have entitled Anderson to a place on the ballot if they had been filed on or before March 20, 1980. Respondent refused to accept the petition solely because it had not been filed within the time required by § 3513.25.7 of

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**Arthur N. Eisenberg, Charles S. Sims, Bruce Campbell,* and *John C. Armor* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Paul S. Allen filed a brief for the Libertarian National Committee as *amicus curiae*.

the Ohio Revised Code.[1] Three days later Anderson and three voters, two registered in Ohio and one in New Jersey, commenced this action in the United States District Court for the Southern District of Ohio, challenging the constitutionality of Ohio's early filing deadline for independent candidates. The District Court granted petitioners' motion for summary judgment and ordered respondent to place Anderson's name on the general election ballot. 499 F. Supp. 121 (1980).

The District Court held that the statutory deadline was unconstitutional on two grounds. It imposed an impermissible burden on the First Amendment rights of Anderson and his Ohio supporters and diluted the potential value of votes that might be cast for him in other States. Moreover, by requiring an independent to declare his candidacy in March without mandating comparable action by the nominee of a political party, the State violated the Equal Protection Clause of the Fourteenth Amendment. The District Court noted that the State did not advance any administrative reasons for the early deadline and rejected the State's asserted justification that the deadline promoted "political stability." Not only did that interest have diminished importance in a Presidential

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[1] Section 3513.25.7 provides, in pertinent part:

"Each person desiring to become an independent candidate for an office for which candidates may be nominated at a primary election, except persons desiring to become independent joint candidates for the offices of governor and lieutenant governor, shall file no later than four p.m. of the seventy-fifth day before the day of the primary election immediately preceding the general election at which such candidacy is to be voted for by the voters, a statement of candidacy and nominating petition as provided in section 3513.261 [3513.26.1] of the Revised Code. . . ." Ohio Rev. Code Ann. § 3513.25.7 (Supp. 1982).

The Code sets the first Tuesday after the first Monday in June as the date of the primary election, § 3501.01(E), a date that fell on June 3, 1980. Thus the filing deadline for independent candidates was March 20, 1980, a date 229 days in advance of the general election. Section 3513.25.7(A) requires independent candidates in statewide elections, including Presidential primaries, to submit nominating petitions signed by no less than 5,000 and no more than 15,000 qualified voters.

campaign; it also was adequately vindicated by another statute prohibiting a defeated candidate in a party primary from running as an independent.[2]

The Secretary of State promptly appealed and unsuccessfully requested expedited review in both the Court of Appeals and this Court, but apparently did not seek to stay the District Court's order.[3] The election was held while the appeal was pending. In Ohio Anderson received 254,472 votes, or 5.9 percent of the votes cast; nationally, he received 5,720,060 votes or approximately 6.6 percent of the total.[4]

The Court of Appeals reversed. It first inferred that the Court's summary affirmances in *Sweetenham* v. *Rhodes*, 318 F. Supp. 1262 (SD Ohio 1970), summarily aff'd, 409 U. S. 942 (1972), and *Pratt* v. *Begley*, 352 F. Supp. 328 (ED Ky. 1970), summarily aff'd, 409 U. S. 943 (1972), had implicitly sustained the validity of early filing deadlines. Then, correctly recognizing the limited precedential effect to be accorded summary dispositions,[5] the Court of Appeals independently

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[2] Anderson's name had been entered in the Republican primary in Ohio and 26 other States before he made his decision to run as an independent, and he actually competed unsuccessfully in nine Republican primaries. Nevertheless, the parties agree that his timely withdrawal from the Ohio primary avoided the application of the State's "sore loser" statute, Ohio Rev. Code Ann. § 3513.04 (Supp. 1982), which disqualifies a candidate who ran unsuccessfully in a party primary from running as an independent in the general election. See 499 F. Supp. 121, 135, 140 (SD Ohio 1980); 664 F. 2d 554, 556, n. 3 (CA6 1981).

[3] After the Court of Appeals denied a motion for expedited appeal, respondent filed a petition for a writ of certiorari before judgment in this Court, together with a motion to expedite consideration of the petition. The motion and the petition were both denied before the election in November 1980. 448 U. S. 914 and 918 (1980). Even though the 1980 election is over, the case is not moot. See *Storer* v. *Brown*, 415 U. S. 724, 737, n. 8 (1974).

[4] 14 America Votes, A Handbook of Contemporary American Election Statistics 18–19, 312, 317 (1981).

[5] The Court of Appeals quite properly concluded that our summary affirmances in *Sweetenham* v. *Gilligan* and *Pratt* v. *Begley* were "a rather slender reed" on which to rest its decision. 664 F. 2d, at 560. We have often

reached the same conclusion. It held that Ohio's early deadline "ensures that voters making the important choice of their next president have the opportunity for a careful look at the candidates, a chance to see how they withstand the close

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recognized that the precedential effect of a summary affirmance extends no further than "the precise issues presented and necessarily decided by those actions." A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment. *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U. S. 173, 182–183 (1979); *Mandel* v. *Bradley*, 432 U. S. 173, 176 (1977); see *Fusari* v. *Steinberg*, 419 U. S. 379, 391–392 (1975) (BURGER, C. J., concurring). Neither *Sweetenham* nor *Pratt* involved state-imposed filing deadlines for Presidential candidates. See Juris. Statement in *Pratt* v. *Begley*, O. T. 1972, No. 70–48, p. 4 (independent candidates for U. S. House of Representatives); Juris. Statement in *Sweetenham* v. *Rhodes*, O. T. 1972, No. 70–15, p. 5 (independent candidates for Governor of Ohio and U. S. House of Representatives). Further, *Sweetenham* arose on review of the District Court's refusal to grant injunctive relief placing appellants on the ballot. The court relied at least in part on appellants' failure to take steps to become candidates before the primary, a date 90 days after the challenged filing deadline, or indeed to tender nominating petitions at any time before filing suit. See *id.*, at 30. In *Pratt*, the District Court dismissed a complaint seeking declaratory as well as injunctive relief, concluding that the early filing deadline was reasonable, but it could have refused to place appellants on the ballot on the equitable ground that they had not submitted nominating petitions until more than two and a half months after the party nominees were chosen in the primary. 352 F. Supp., at 329.

As the Court of Appeals acknowledged, our remand in *Mandel* v. *Bradley*, *supra*, does not control this case. Plaintiff, who had sought to run as an independent candidate for United States Senator from Maryland, challenged a Maryland code provision imposing both an early filing deadline and a numerical signature requirement. Neither of the parties addressed the constitutionality of the filing date standing alone. The District Court improperly relied on a prior summary affirmance by this Court to strike down the restriction, and failed to undertake an independent examination of the merits. We remanded for factual findings. *Id.*, at 177–178. On remand, the District Court found that the early filing deadline imposed unconstitutional burdens on the plaintiff. *Bradley* v. *Mandel*, 449 F. Supp. 983, 986–989 (Md. 1978).

scrutiny of a political campaign." 664 F. 2d 554, 563 (CA6 1981).

In other litigation brought by Anderson challenging early filing deadlines in Maine and Maryland, the Courts of Appeals for the First and Fourth Circuits affirmed District Court judgments ordering Anderson's name placed on the ballot. See *Anderson* v. *Quinn*, 495 F. Supp. 730 (Me.), affirmance order, 634 F. 2d 616 (CA1 1980); *Anderson* v. *Morris*, 500 F. Supp. 1095 (Md.), aff'd, 636 F. 2d 55 (CA4 1980).[6] The conflict among the Circuits on an important question of constitutional law led us to grant certiorari. 456 U. S. 960 (1982). We now reverse.

I

After a date toward the end of March, even if intervening events create unanticipated political opportunities, no independent candidate may enter the Presidential race and seek to place his name on the Ohio general election ballot. Thus the direct impact of Ohio's early filing deadline falls upon aspirants for office. Nevertheless, as we have recognized, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock* v. *Carter*, 405 U. S. 134, 143 (1972). Our primary concern is with the tendency of ballot access restrictions "to limit the field of candidates from which voters might choose." Therefore, "[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Ibid.*

The impact of candidate eligibility requirements on voters implicates basic constitutional rights.[7] Writing for a unani-

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[6] Anderson also prevailed on First Amendment and Equal Protection Clause grounds in *Anderson* v. *Hooper*, 498 F. Supp. 898, 905 (NM 1980), and on state-law grounds in *Greaves* v. *Mills*, 497 F. Supp. 283 (ED Ky. 1980), rev'd in part on other grounds, 664 F. 2d 600 (CA6 1981).

[7] In this case, we base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection

mous Court in *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 460 (1958), Justice Harlan stated that it "is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." In our first review of Ohio's electoral scheme, *Williams* v. *Rhodes*, 393 U. S. 23, 30–31 (1968), this Court explained the interwoven strands of "liberty" affected by ballot access restrictions:

> "In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms."

As we have repeatedly recognized, voters can assert their preferences only through candidates or parties or both. "It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues." *Lubin* v. *Panish*, 415 U. S. 709, 716 (1974). The right to vote is "heavily burdened" if that vote may be cast only for major-party candidates at a time when other parties or other candidates are "clamoring for a place on the ballot." *Ibid.*; *Williams* v. *Rhodes*, *supra*, at 31. The exclusion of candidates also burdens voters' free-

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Clause analysis. We rely, however, on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment. These cases, applying the "fundamental rights" strand of equal protection analysis, have identified the First and Fourteenth Amendment rights implicated by restrictions on the eligibility of voters and candidates, and have considered the degree to which the State's restrictions further legitimate state interests. See, *e. g.*, *Williams* v. *Rhodes*, 393 U. S. 23 (1968); *Bullock* v. *Carter*, 405 U. S. 134 (1972); *Lubin* v. *Panish*, 415 U. S. 709 (1974); *Illinois Elections Bd.* v. *Socialist Workers Party*, *supra*.

dom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens.[8]

Although these rights of voters are fundamental, not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates. We have recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer* v. *Brown*, 415 U. S. 724, 730 (1974). To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.[9]

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[8] See *Williams* v. *Rhodes*, 393 U. S., at 31 ("The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes"); *id.*, at 41 (Harlan, J., concurring in result) ("[B]y denying the appellants any opportunity to participate in the procedure by which the President is selected, the State has eliminated the basic incentive that all political parties have for conducting such activities, thereby depriving appellants of much of the substance, if not the form, of their protected rights"); *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U. S., at 186 ("[A]n election campaign is a means of disseminating ideas as well as attaining political office. . . . Overbroad restrictions on ballot access jeopardize this form of political expression").

[9] We have upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself. The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the

Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. *Storer*, *supra*, at 730. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. See *Williams* v. *Rhodes*, *supra*, at 30–31; *Bullock* v. *Carter*, 405 U. S., at 142–143; *American Party of Texas* v. *White*, 415 U. S. 767, 780–781 (1974); *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U. S. 173, 183 (1979). The results of this evaluation will not be automatic; as we have recognized, there is "no substi-

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names of frivolous candidates. *Jenness* v. *Fortson*, 403 U. S. 431 (1971); *American Party of Texas* v. *White*, 415 U. S. 767 (1974); cf. *Storer* v. *Brown*, 415 U. S., at 738–746; *Mandel* v. *Bradley*, 432 U. S. 173 (1977) (remand to assess burden placed by State's signature-gathering requirements on independent candidates). The State also has the right to prevent distortion of the electoral process by the device of "party raiding," the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party's primary election. *Rosario* v. *Rockefeller*, 410 U. S. 752 (1973); cf. *Kusper* v. *Pontikes*, 414 U. S. 51, 59–61 (1973).

We have also upheld restrictions on candidate eligibility that serve legitimate state goals which are unrelated to First Amendment values. See *Clements* v. *Fashing*, 457 U. S. 957 (1982) (incumbent Justice of the Peace may not seek election to state legislature; persons holding specified state and county offices are deemed automatically to resign from present office if they run for another elective office).

tute for the hard judgments that must be made." *Storer* v. *Brown*, *supra*, at 730.[10]

II

An early filing deadline may have a substantial impact on independent-minded voters. In election campaigns, particularly those which are national in scope, the candidates and the issues simply do not remain static over time. Various candidates rise and fall in popularity; domestic and international developments bring new issues to center stage and may affect voters' assessments of national problems. Such developments will certainly affect the strategies of candidates who have already entered the race; they may also create opportunities for new candidacies. See A. Bickel, Reform and Continuity 87–89 (1971). Yet Ohio's filing deadline prevents persons who wish to be independent candidates from entering the significant political arena established in the State by a Presidential election campaign—and creating new political coalitions of Ohio voters—at any time after mid to late March.[11] At this point developments in campaigns for

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[10] See *American Party of Texas* v. *White*, *supra*, at 780–781; *Illinois Elections Bd.* v. *Socialist Workers Party*, *supra*, at 188–189 (BLACKMUN, J., concurring); cf. *Mississippi University for Women* v. *Hogan*, 458 U. S. 718, 724 (1982).

[11] As Professor Bickel has written:

"Never has it been as evident as in 1968 that unforeseen occurrences in the early portion of an election year can fundamentally affect all political expectations. For administrative reasons, there has to be a cutoff date sometime, but there is more than a little of the capricious in laws that force a commitment to act (within or without the major parties) in at least two states before such an upheaval as President Johnson's withdrawal on March 31, 1968, and in many states before important primaries, not to mention such an event as the assassination of Robert F. Kennedy on June 5, 1968." A. Bickel, Reform and Continuity 88 (1971).

Indeed, because it takes time for an independent Presidential candidate and his supporters to gather the requisite 5,000 signatures on nominating petitions, the independent must decide to run well in advance of the March filing deadline. In contrast, Ohio law provides for the automatic inclusion of the Presidential nominees of the major parties on the general election

the major-party nominations have only begun, and the major parties will not adopt their nominees and platforms for another five months. Candidates and supporters within the major parties thus have the political advantage of continued flexibility; for independents, the inflexibility imposed by the March filing deadline is a correlative disadvantage because of the competitive nature of the electoral process.

If the State's filing deadline were later in the year, a newly emergent independent candidate could serve as the focal point for a grouping of Ohio voters who decide, after mid-March, that they are dissatisfied with the choices within the two major parties. As we recognized in *Williams* v. *Rhodes*, 393 U. S., at 33, "[s]ince the principal policies of the major parties change to some extent from year to year, and since the identity of the likely major party nominees may not be known until shortly before the election, this disaffected 'group' will rarely if ever be a cohesive or identifiable group until a few months before the election." [12] Indeed, several

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ballot, Ohio Rev. Code Ann. § 3505.10 (Supp. 1982), even if they have never filed a statement of candidacy in Ohio. Their identities are not established until after the major-party conventions in August.

[12] Five individuals were able to qualify as independent Presidential candidates in Ohio in 1980. 499 F. Supp., at 143–144. But their inclusion on the ballot does not negate the burden imposed on the associational rights of independent-minded voters. These candidates—Gus Hall of the Communist Party, Richard Congress of the Socialist Workers Party, Deirdre Griswold of the Workers World Party, Ed Clark of the Libertarian Party, and Barry Commoner of the Citizen's Party—represented ideologically committed minor parties which did not proceed through the "minor party" provisions of the Ohio Election Code. Their candidacies corresponded to the protected First Amendment interests of some Ohio voters. But, unlike Anderson's, they were unlikely adequately to satisfy the voting and associational interests of voters whose independent political leanings crystallized as a result of developments in the course of the primary campaigns. Cf. Developments in the Law—Elections, 88 Harv. L. Rev. 1111, 1143, n. 130 (1975) ("From the standpoint of potential supporters, minor parties and independent candidates differ in that the latter are free from ties and obligations to party organizations, and support for them is not so total a

important third-party candidacies in American history were launched after the two major parties staked out their positions and selected their nominees at national conventions during the summer.[13] But under § 3513.25.7, a late-emerging Presidential candidate outside the major parties, whose positions on the issues could command widespread community support, is excluded from the Ohio general election ballot. The "Ohio system thus denies the 'disaffected' not only a choice of leadership but a choice on the issues as well." *Williams* v. *Rhodes*, *supra*, at 33.

Not only does the challenged Ohio statute totally exclude any candidate who makes the decision to run for President as an independent after the March deadline, it also burdens the signature-gathering efforts of independents who decide to run in time to meet the deadline. When the primary campaigns are far in the future and the election itself is even more remote, the obstacles facing an independent candidate's organizing efforts are compounded. Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign.[14]

It is clear, then, that the March filing deadline places a particular burden on an identifiable segment of Ohio's independent-minded voters. See *supra*, at 791. As our cases have held,

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commitment of political allegiance because it does not require renunciation of major party affiliation").

Our focus on the associational rights of independent-minded voters distinguishes the burden imposed by Ohio's early filing deadline from that created by the California disaffiliation provision upheld in *Storer* v. *Brown*, 415 U. S. 724 (1974). Although a disaffiliation provision may preclude such voters from supporting a particular ineligible candidate, they remain free to support and promote other candidates who satisfy the State's disaffiliation requirements.

[13] See generally App. to Brief for American Civil Liberties Union as *Amicus Curiae* 10a–12a; Bickel, *supra* n. 11, at 87.

[14] See *Bradley* v. *Mandel*, 449 F. Supp., at 986–987 (findings of fact of three-judge District Court on remand from this Court).

it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status.[15] "Our ballot access cases . . . focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'" *Clements* v. *Fashing*, 457 U. S. 957, 964 (1982) (plurality opinion), quoting *Lubin* v. *Panish*, 415 U. S., at 716.[16]

A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amend-

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[15] In *Bullock* v. *Carter*, 405 U. S., at 144, the Court noted that the disparity in voting power created by high candidate filing fees "cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause." Indeed, the impact fell on an undetermined number of voters. *Id.*, at 149. Yet the filing fees were unconstitutional because of the "obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system." *Id.*, at 144.

See also L. Tribe, American Constitutional Law 774–775 (1978). As Professor Tribe explains, although candidate eligibility requirements may exclude particular candidates, it remains possible that an eligible candidate will "adequately reflect the perspective of those who might have voted for a candidate who has been excluded." *Id.*, at 774, n. 2. But courts quite properly "have more carefully appraised the fairness and openness of laws that determine which political groups can place *any* candidate of their choice on the ballot." *Id.*, at 774. Cf. Developments in the Law—Elections, *supra* n. 12, at 1218, and n. 5.

[16] In addition, because the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny. *Id.*, at 1136, n. 87; see generally *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938); J. Ely, Democracy and Distrust: A Theory of Judicial Review 73–88 (1980).

ment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties. *Clements* v. *Fashing*, *supra*, at 964–965 (plurality opinion). By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream. *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U. S., at 186; *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250–251 (1957) (opinion of Warren, C. J.).[17] In short, the primary values protected by the First Amendment—"a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964)—are served when election campaigns are not monopolized by the existing political parties.

Furthermore, in the context of a Presidential election, state-imposed restrictions[18] implicate a uniquely important

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[17] See generally V. Key, Politics, Parties, and Pressure Groups 278–303 (3d ed. 1952). As Professor Bickel has observed,

"Again and again, minor parties have led from a flank, while the major parties still followed opinion down the middle. In time, the middle has moved, and one of the major parties or both occupy the ground reconnoitered by the minor party; . . . .

"[A]s an outlet for frustration, often as a creative force and a sort of conscience, as an ideological governor to keep major parties from speeding off into an abyss of mindlessness, and even just as a technique for strengthening a group's bargaining position for the future, the minor party would have to be invented if it did not come into existence regularly enough." Bickel, *supra* n. 11, at 79–80.

[18] The Constitution expressly delegates authority to the States to regulate the selection of Presidential electors. U. S. Const., Art. II, § 1; see *McPherson* v. *Blacker*, 146 U. S. 1, 35 (1892). But, as we have emphasized, "we must reject the notion that Art. II, § 1, gives the States power

national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States.[19] Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders.[20] Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries. This Court, striking down a state statute unduly restricting the choices made by a major party's Presidential nominating convention, observed that such conventions serve "the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State." *Cousins* v. *Wigoda*, 419 U. S. 477, 490 (1975). The Ohio filing deadline challenged in this case does more than burden the associational rights of independent voters and candidates. It places a significant state-imposed restriction on a nationwide electoral process.

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to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions." *Williams* v. *Rhodes*, 393 U. S., at 29.

[19] As the District Court recognized in this case:

"The goal of voters such as plaintiff Eisenstat in states where Anderson will appear on the ballot is to amass enough electoral votes to elect Anderson. Ohio's deadline, by denying Anderson a place on the ballot, removes the sixth largest slate of electors from Anderson's reach and thereby reduces the total pool of electoral votes for which he may compete nationwide by 25 electors." 499 F. Supp., at 126.

[20] In approximately two-thirds of the States and the District of Columbia, filing deadlines for independent Presidential candidates occur in August or September. The deadlines in a number of other States are in June or July. Anderson was barred by early filing deadlines in Ohio and four other States; he succeeded in obtaining court orders requiring placement on the ballot in all five. See *supra*, at 784 and 786, and n. 6.

III

The State identifies three separate interests that it seeks to further by its early filing deadline for independent Presidential candidates: voter education, equal treatment for partisan and independent candidates, and political stability. We now examine the legitimacy of these interests and the extent to which the March filing deadline serves them.

Voter Education

There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election. Moreover, the Court of Appeals correctly identified that interest as one of the concerns that motivated the Framers' decision not to provide for direct popular election of the President.[21] We are persuaded, however, that the State's important and legitimate interest in voter education does not justify the specific restriction on participation in a Presidential election that is at issue in this case.

The passage of time since the Constitutional Convention in 1787 has brought about two changes that are relevant to the reasonableness of Ohio's statutory requirement that independents formally declare their candidacy at least seven months in advance of a general election. First, although it took days

[21] "The importance of this interest was made clear at the Constitutional Convention in 1787, where the delegates debated extensively the means of selecting the President. The alternatives that received the most attention in the early debates were appointment by the national legislature and election by the people at large. The former would have made it impossible to guarantee an independent executive. Election by the people was also disfavored, in part because of concern over the ignorance of the populace as to who would be qualified for the job." 664 F. 2d, at 563–564.

See *Williams* v. *Rhodes*, *supra*, at 43–44 (Harlan, J., concurring in result) ("The [Electoral] College was created to permit the most knowledgeable members of the community to choose the executive of a nation whose continental dimensions were thought to preclude an informed choice by the citizenry at large").

and often weeks for even the most rudimentary information about important events to be transmitted from one part of the country to another in 1787,[22] today even trivial details about national candidates are instantaneously communicated nationwide in both verbal and visual form. Second, although literacy was far from universal in 18th-century America,[23] today the vast majority of the electorate not only is literate but also is informed on a day-to-day basis about events and issues that affect election choices and about the ever-changing popularity of individual candidates. In the modern world it is somewhat unrealistic to suggest that it takes more than seven months to inform the electorate about the qualifications of a particular candidate simply because he lacks a partisan label.

Our cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues. In *Dunn* v. *Blumstein*, 405 U. S. 330 (1972), the Court considered the validity of a Tennessee statute requiring residence in the State for one year and in the county for three months as a prerequisite for registration to vote. The Court held the statute unconstitutional, specifically rejecting the argument that the requirements were justified by the State's interest in voter education.

> "Given modern communications, and given the clear indication that campaign spending and voter education occur largely during the month before an election, the State cannot seriously maintain that it is 'necessary' to reside for a year in the State and three months in the county in order to be knowledgeable about congressional, state, or even purely local elections." *Id.*, at 358 (footnotes omitted).

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[22] See 1 A. Beveridge, The Life of John Marshall 250–287 (1916).

[23] See K. Lockridge, Literacy in Colonial New England 1–43, 72–87 (1974); L. Soltow & E. Stevens, The Rise of Literacy and the Common School in the United States: A Socioeconomic Analysis to 1870, pp. 28–57 (1981).

This reasoning applies with even greater force to a Presidential election, which receives more intense publicity.[24] Nor are we persuaded by the State's assertion that, unless a candidate actually files a formal declaration of candidacy in Ohio by the March deadline, Ohio voters will not realize that they should pay attention to his candidacy. Brief for Respondent 38. The validity of this asserted interest is undermined by the State's willingness to place major-party nominees on the November ballot even if they never campaigned in Ohio.

It is also by no means self-evident that the interest in voter education is served at all by a requirement that independent candidates must declare their candidacy before the end of March in order to be eligible for a place on the ballot in November. Had the requirement been enforced in Ohio, petitioner Anderson might well have determined that it would be futile for him to allocate any of his time and money to campaigning in that State. The Ohio electorate might thereby have been denied whatever benefits his participation in local debates could have contributed to an understanding of the issues. A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism. As we observed in another First Amendment context, it is often true "that the best means to that end is to open the channels of communication rather than to close them." *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 770 (1976).[25]

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[24] Cf. *Oregon* v. *Mitchell*, 400 U. S. 112 (1970) (upholding Act of Congress forbidding States to disqualify voters in Presidential elections for failure to meet state residency requirements).

[25] A similar analysis applies to the Court of Appeals' assertion that the State promotes informed voter choices by assuring that the voters are apprised "by a date certain of most of their options." 664 F. 2d, at 564–565. This reasoning assumes that the most relevant point of decision occurs in March, although the voter is not actually required to make a final choice among eligible candidates until November.

Moreover, as a matter of practical politics, the electoral process contains its own cure for voters' ignorance about a particular candidate. Unknown

Equal Treatment

We also find no merit in the State's claim that the early filing deadline serves the interest of treating all candidates alike. Brief for Respondent 33. It is true that a candidate participating in a primary election must declare his candidacy on the same date as an independent. But both the burdens and the benefits of the respective requirements are materially different, and the reasons for requiring early filing for a primary candidate are inapplicable to independent candidates in the general election.

The consequences of failing to meet the statutory deadline are entirely different for party primary participants and independents. The name of the nominees of the Democratic and Republican Parties will appear on the Ohio ballot in November even if they did not decide to run until after Ohio's March deadline had passed, but the independent is simply denied a position on the ballot if he waits too long.[26] Thus, under Ohio's scheme, the major parties may include all events preceding their national conventions in the calculus that produces their respective nominees and campaign platforms, but

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candidates simply do not win large numbers of votes. A key goal of every political campaign is to promote the candidate's name identification among the electorate.

[26] It is true, of course, that Ohio permits "write-in" votes for independents. We have previously noted that this opportunity is not an adequate substitute for having the candidate's name appear on the printed ballot.

"It is suggested that a write-in procedure, under § 18600 *et seq.*, without a filing fee would be an adequate alternative to California's present filing-fee requirement. The realities of the electoral process, however, strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot. . . . [A candidate] relegated to the write-in provision, would be forced to rest his chances solely upon those voters who would remember his name and take the affirmative step of writing it on the ballot." *Lubin* v. *Panish*, 415 U. S., at 719, n. 5.

Indeed, in the 1980 Presidential election, only 27 votes were cast in the State of Ohio for write-in candidates. 14 America Votes, *supra* n. 4, at 317.

the independent's judgment must be based on a history that ends in March.[27]

The early filing deadline for a candidate in a party's primary election is adequately justified by administrative concerns. Seventy-five days appears to be a reasonable time for processing the documents submitted by candidates and preparing the ballot. 499 F. Supp., at 134. The primary date itself must be set sufficiently in advance of the general election; furthermore, a Presidential preference primary must precede the national convention, which is regularly held during the summer. Finally, the successful participant in a party primary generally acquires the automatic support of an experienced political organization; in the Presidential contest he obtains the support of convention delegates.

Neither the administrative justification nor the benefit of an early filing deadline is applicable to an independent candidate. Ohio does not suggest that the March deadline is necessary to allow petition signatures to be counted and verified or to permit November general election ballots to be printed.[28] In addition, the early deadline does not corre-

[27] The Court of Appeals recognized the significance of the flexibility that results from being able to make a later decision, but concluded that the right to select a nominee for the Presidency at a convention conducted in the late summer is a right possessed by the political party, not a right possessed by the nominee personally. "By contrast," the court reasoned, "the independent's candidacy has no existence apart from that of the candidate, and no interest in flexibility in choosing its nominee." 664 F. 2d, at 567. Not only did the Court of Appeals err by ignoring the associational rights of voters who desire to support the independent's candidacy, but its rationale simply has no bearing on the State's asserted "equality" interest.

[28] Respondent conceded in the District Court that the nominating petitions filed on March 20 remain unprocessed in his office until June 15, when he transmits them to county boards of election. The boards do not begin to verify the signatures until the period July 1 to July 15. Finally, the Secretary of State does not certify the names of Presidential candidates, including independents, for inclusion on the ballot until late August, after the party nominating conventions. According to the District Court, based on the stipulated facts, it appears that no more than 75 days are necessary to perform these tasks. 499 F. Supp., at 133–134, 142.

spond to a potential benefit for the independent, as it does for the party candidate. After filing his statement of candidacy, the independent does not participate in a structured intraparty contest to determine who will receive organizational support; he must develop support by other means. In short, "equal treatment" of partisan and independent candidates simply is not achieved by imposing the March filing deadline on both. As we have written, "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness* v. *Fortson*, 403 U. S. 431, 442 (1971).

Political Stability

Although the Court of Appeals did not discuss the State's interest in political stability, that was the primary justification advanced by respondent in the District Court, 499 F. Supp., at 134, and it is again asserted in this Court. Respondent's brief explains that the State has a substantial interest in protecting the two major political parties from "damaging intraparty feuding." Brief for Respondent 41. According to respondent, a candidate's decision to abandon efforts to win the party primary and to run as an independent "can be very damaging to state political party structure." Anderson's decision to run as an independent, respondent argues, threatened to "splinter" the Ohio Republican Party "by drawing away its activists to work in his 'independent' campaign." *Id.*, at 37; see *id.*, at 44.

Ohio's asserted interest in political stability amounts to a desire to protect existing political parties from competition—competition for campaign workers, voter support, and other campaign resources—generated by independent candidates who have previously been affiliated with the party.[29] Our

[29] This particular interest in "political stability" must not be confused with the interest that is implicated by rules designed to prevent "party raiding," see n. 9, *supra*. That interest, sufficient to sustain the chal-

evaluation of this interest is guided by two of our prior cases, *Williams* v. *Rhodes* and *Storer* v. *Brown*.

In *Williams* v. *Rhodes* we squarely held that protecting the Republican and Democratic Parties from external competition cannot justify the virtual exclusion of other political aspirants from the political arena. Addressing Ohio's claim that it "may validly promote a two-party system in order to encourage compromise and political stability," we wrote:

> "The fact is, however, that the Ohio system does not merely favor a 'two-party system'; it favors two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly. There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past." *Williams* v. *Rhodes*, 393 U. S., at 31–32.

Thus in *Williams* v. *Rhodes* we concluded that First Amendment values outweighed the State's interest in protecting the two major political parties.

On the other hand, in *Storer* v. *Brown* we upheld two California statutory provisions that restricted access by inde-

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lenged restriction in *Rosario* v. *Rockefeller*, 410 U. S. 752 (1973), is applicable only to party primaries; but this case involves restrictions on access to the general election ballot. Nor is it the same interest that justifies a rule disqualifying a person who voted in a party primary from signing a petition supporting the candidacy of an independent. Such a rule reflects a "policy of confining each voter to a single nominating act—either voting in the partisan primary or a signature on an independent petition." *Storer* v. *Brown*, 415 U. S., at 743; see *American Party of Texas* v. *White*, 415 U. S., at 785–786.

pendent candidates to the general election ballot. Under California law, a person could not run as an independent in November if he had been defeated in a party primary that year or if he had been registered with a political party within one year prior to that year's primary election. We stated that "California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government," and that destruction of "the political stability of the system of the State" could have "profound consequences for the entire citizenry." 415 U. S., at 736. Further, we approved the State's goals of discouraging "independent candidacies prompted by short-range political goals, pique, or personal quarrel." *Id.*, at 735.

Thus in *Storer* we recognized the legitimacy of the State's interest in preventing "splintered parties and unrestrained factionalism." But we did not suggest that a political party could invoke the powers of the State to assure monolithic control over its own members and supporters.[30] Political competition that draws resources away from the major parties cannot, for that reason alone, be condemned as "unrestrained factionalism." Instead, in *Storer* we examined the two challenged provisions in the context of California's electoral system. By requiring a candidate to remain in the intraparty competition once the disaffiliation deadline had passed, and by giving conclusive effect to the winnowing process performed by party members in the primary election, the challenged provisions were an essential part of "a general state policy aimed at maintaining the integrity of the various routes to the ballot." Moreover, we pointed out that the

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[30] Even though the drafting of election laws is no doubt largely the handiwork of the major parties that are typically dominant in state legislatures, it does not follow that the particular interests of the major parties can automatically be characterized as legitimate state interests.

policy "involves no discrimination against independents." *Storer*, *supra*, at 733.

Ohio's challenged restriction is substantially different from the California provisions upheld in *Storer*. As we have noted, the early filing deadline does discriminate against independents. And the deadline is neither a "sore loser" provision nor a disaffiliation statute.[31] Furthermore, it is important to recognize that *Storer* upheld the State's interest in avoiding political fragmentation in the context of elections wholly within the boundaries of California.[32] The State's interest in regulating a nationwide Presidential election is not nearly as strong; no State could singlehandedly assure "political stability" in the Presidential context. The Ohio deadline does not serve any state interest in "maintaining the integrity of the various routes to the ballot" for the Presidency, because Ohio's Presidential preference primary does not serve to narrow the field for the general election. A major party candidate who loses the Ohio primary, or who does not even run in Ohio, may nonetheless appear on the November general election ballot as the party's nominee. In addition, the national scope of the competition for delegates at the Presidential nominating conventions assures that "intraparty feuding" will continue until August.

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[31] Section 3513.25.7 is a filing deadline, not a "sore loser" statute. It blocks access to the general election ballot 75 days before the primary, at a time when, by definition, no candidate has yet lost the party primary. Ohio has a separate "sore loser" statute, which is admittedly inapplicable to Anderson because he made a timely withdrawal from the Ohio Republican primary. See n. 2, *supra*. Furthermore, as the District Court observed, "it is clear that R.C. 3513.257 acts as a disaffiliation provision only by mere happenstance, not by any reasonably discernible legislative design." 499 F. Supp., at 135.

[32] Hall and Tyner, the Presidential and Vice Presidential candidates, apparently complied with the one-year disaffiliation provision. *Storer*, 415 U. S., at 738. The disaffiliation statute was challenged by Storer and Frommhagen, who wished to run as independents for the United States House of Representatives.

More generally, the early filing deadline is not precisely drawn to protect the parties from "intraparty feuding," whatever legitimacy that state goal may have in a Presidential election. If the deadline is designed to keep intraparty competition within the party structure, its coverage is both too broad and too narrow. It is true that in this case § 3513.25.7 was applied to a candidate who had previously competed in party primaries and then sought to run as an independent. But the early deadline applies broadly to independent candidates who have not been affiliated in the recent past with any political party. On the other hand, as long as the decision to run is made before the March deadline, Ohio does not prohibit independent candidacies by persons formerly affiliated with a political party, or currently participating in intraparty competition in other States—regardless of the effect on the political party structure.

Moreover, the early deadline for filing as an independent may actually impair the State's interest in preserving party harmony. As Professor Bickel perceptively observed:

> "The characteristic American third party, then, consists of a group of people who have tried to exert influence within one of the major parties, have failed, and later decide to work on the outside. States in which there is an early qualifying date tend to force such groups to create minor parties without first attempting to influence the course taken by a major one. For a dissident group is put to the choice of foregoing major-party primary and other prenomination activity by organizing separately early on in an election year, or losing all opportunity for action as a third party later." Bickel, *supra* n. 11, at 87–88.

The same analysis, of course, is applicable to a "dissident group" that coalesces around an independent candidate rather than attempting to form a new political party.

We conclude that Ohio's March filing deadline for independent candidates for the office of President of the United

States cannot be justified by the State's asserted interest in protecting political stability.

> "For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. *Dunn* v. *Blumstein*, 405 U. S., at 343. 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' *NAACP* v. *Button*, 371 U. S. [415], 438 [(1963)]. If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Kusper* v. *Pontikes*, 414 U. S. 51, 58–59 (1973).

IV

We began our inquiry by noting that our primary concern is not the interest of candidate Anderson, but rather, the interests of the voters who chose to associate together to express their support for Anderson's candidacy and the views he espoused. Under any realistic appraisal, the "extent and nature" of the burdens Ohio has placed on the voters' freedom of choice and freedom of association, in an election of nationwide importance, unquestionably outweigh the State's minimal interest in imposing a March deadline.

The judgment of the Court of Appeals is

Reversed.

JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE POWELL, and JUSTICE O'CONNOR join, dissenting.

Article II of the Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" who shall select the President of the United States. U. S. Const., Art. II, § 1, cl. 2. This provision, one of few in the Constitution that grants an express plenary power to the States, conveys "the broadest power of determination" and "[i]t recognizes that [in the

election of a President] the people act through their representatives in the legislature, and *leaves it to the legislature exclusively to define the method of effecting the object.*" *McPherson* v. *Blacker*, 146 U. S. 1, 27 (1892) (emphasis added).

In exercising this power, the Ohio Legislature has provided alternative routes to its general election ballot for capture of Ohio's Presidential electoral votes. *Political parties* can earn the right to field a Presidential candidate in the general election in one of two ways. Parties that obtained at least 5% of the vote in the preceding gubernatorial or Presidential election are automatically entitled to have a candidate on the general election ballot. Other political parties are required to file 120 days before the primary election (in 1980 the date was February 4) a statement of intent to participate in the primary, together with petitions containing signatures of voters equal to 1% of the votes cast in the last gubernatorial or Presidential election (in 1980 approximately 28,000 signatures would have been required). Ohio Rev. Code Ann. § 3517.01 (Supp. 1982).

Ohio also offers *candidates* different routes to the general election ballot. Should a candidate decide to seek the nomination of a political party participating in Ohio's primary election by capturing delegate votes for the party's national convention, the candidate must file a declaration of candidacy and a nominating petition bearing signatures from 1,000 members of the party; the filing must occur no later than the 75th day before the first Tuesday after the first Monday in June of the election year (in 1980 the date was March 20). Ohio Rev. Code Ann. § 3513.05 (Supp. 1982). Of course, because a political party has earned the right to put on the ballot a candidate chosen at its national convention, a candidate seeking the nomination of that party could forgo the Ohio primary process and, if he should win at the national convention, still be placed on the ballot as a party candidate. If a candidate chooses to run as a nonparty candidate, he must file, by

the same date as a party candidate participating in the primary, a statement of candidacy and a nominating petition bearing the signatures of 5,000 qualified voters. Ohio Rev. Code Ann. § 3513.25.7 (Supp. 1982). Since a nonparty candidate does not participate in a national convention, obviously he cannot benefit from the routes made available to political parties.

Today the Court holds that the filing deadline for nonparty candidates in this statutory scheme violated the First Amendment rights of 1980 Presidential hopeful John Anderson and Anderson's supporters. Certainly, absent a court injunction ordering that his name be placed on the ballot, Anderson and his supporters would have been injured by Ohio's ballot access requirements; by failing to comply with the filing deadline for nonparty candidates Anderson would have been excluded from Ohio's 1980 general election ballot.[1] But the Constitution does not require that a State allow any particular Presidential candidate to be on its ballot, and so long as the Ohio ballot access laws are rational and allow nonparty candidates reasonable access to the general election ballot, this Court should not interfere with Ohio's exercise of its Art. II, § 1, cl. 2, power. Since I believe that the Ohio laws meet these criteria, I dissent.

In support of its conclusion that Ohio's filing deadline "may have a substantial impact on independent-minded voters," *ante*, at 790, the Court explains that "[i]f the State's filing deadline were later in the year, a newly emergent independent candidate could serve as the focal point for a grouping of

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[1] Anderson would not have been totally excluded from participating in the general election since Ohio allows for "write-in" candidacies. The Court suggests, however, that this is of no relevance because a write-in procedure "is not an adequate substitute for having the candidate's name appear on the printed ballot." *Ante*, at 799, n. 26. Until today the Court had not squarely so held and in fact in earlier decisions the Court had treated the availability of write-in candidacies as quite relevant. See *Storer* v. *Brown*, 415 U. S. 724, 736, n. 7 (1974).

Ohio voters." *Ante*, at 791. In addition, the Court says: "Not only does the challenged Ohio statute totally exclude any candidate who makes the decision to run for President as an independent after the March deadline, it also burdens the signature-gathering efforts of independents who decide to run in time to meet the deadline." *Ante*, at 792. Finally, the Court intimates that the effect of the filing deadline for nonparty candidates is that election campaigns are "monopolized by the existing political parties." *Ante*, at 794. While if true these findings might provide a basis for finding a substantial impact on nonparty candidates and their supporters, the Court's conclusions are simply unsupported by the record in this case.

Anderson makes no claim, and thus has offered no evidence to show, that the early filing deadline impeded his "signature-gathering efforts." That alone should be enough to prevent the Court from finding that the deadline has such an impact. A statute "is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are." *Pullman Co.* v. *Knott*, 235 U. S. 23, 26 (1914). What information the record does contain on this point leads to a contrary conclusion. The record shows that in 1980 five independent candidates submitted nominating petitions with the necessary 5,000 signatures by the March 20 deadline and thus qualified for the general election ballot in Ohio. See *ante*, at 791–792, n. 12. The Court of Appeals found that this number of nonparty candidates was not unusual in Ohio. 664 F. 2d 554, 565, n. 14 (1981). The importance of this kind of evidence was noted in *Storer* v. *Brown*, 415 U. S. 724 (1974), where the Court said: "Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not." *Id.*, at 742. The most obvious conclusion to be drawn from "past experience" in this case is that a "reasonably diligent independent candidate" choosing to take Ohio's nonparty route has little

difficulty in obtaining the necessary signatures in a timely fashion. See *ibid.*[2]

The Court's intimation that the Ohio filing deadline infringes on a nonparty candidate who makes the decision to run for President after the March deadline is similarly without support in the record.[3] Certainly, if such candidates emerge, the Ohio deadline will prevent their running in the general election as nonparty candidates. Just as certainly, however, Anderson was not such a candidate. Anderson formally announced his candidacy for the Presidency on June 8, 1979—over nine months before Ohio's March 20 deadline. And the record does not reveal the existence of any other in-

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[2] Furthermore, as the Court of Appeals pointed out, one could speculate that nonparty candidates would have more difficulty meeting the signature requirements of various States if the States had less discretion in setting their own deadlines. "We also note that the effect of limiting the states' discretion would be to require uniformity, thus compressing the signature gathering and campaigning requirements in the various states. This would greatly increase the burden on all candidates, who may presently devote their scarce resources to a few states at a time." 664 F. 2d 554, 565, n. 13 (1981).

[3] It would seem that realistically speaking, there is little chance in these modern times of a serious candidate for the Presidency making his decision to run after the spring of the election year. We might judicially take notice that it is presently the spring of the year preceding an election year and numerous candidates have already thrown their hats into the campaign ring. For proof of a contrary point, the Court cites by reference to the candidacies of Martin Van Buren in 1848, James B. Weaver in 1892, Theodore Roosevelt in 1912, and Robert La Follette in 1924. *Ante*, at 792, n. 13. The most obvious response is that the method of Presidential campaigning has so changed since the last of these campaigns that such candidacies are not as likely to arise today. It also should be noted that most, if not all, of these men decided to seek the Presidency far in advance of their actual nomination. Finally, none of these individuals were elected in the years in question and those who split from their political parties may well have been responsible for the election going to a different party, a result which this Court, in *Storer* v. *Brown*, *supra*, said States were at liberty to try to avoid.

dividual who decided to become a nonparty Presidential candidate after the March 20 deadline. In fact, as noted above, the five individuals who did seek electoral votes through the nonparty alternative had no trouble making this decision before the filing deadline and had no trouble qualifying for a position on the general election ballot.

Finally, there is nothing in the record to indicate that this is a case where "independent-minded voters" are prevented from rallying behind a candidate selected later in the election year so as to guarantee "major parties" a monopoly on the election process. Like-minded voters who do not want to participate in an existing political party are at complete liberty to form a new political party and obtain for themselves the same flexibility that established political parties have in the selection of their nominee for President. It is true that Ohio provides this benefit only where a group of voters acts with some foresight and shows a degree of support among the electorate, but this case presents no challenge to these requirements.

On the record before us, the effect of the Ohio filing deadline is quite easily summarized: it requires that a candidate, who has already decided to run for President, decide by March 20 which route his candidacy will take. He can become a nonparty candidate by filing a nominating petition with 5,000 signatures and assure himself a place on the general election ballot. Or he can become a party candidate and take his chances in securing a position on the general election ballot by seeking the nomination of a party's national convention. Anderson chose the latter route and submitted in a timely fashion his nominating petition for Ohio's Republican Primary. Then, realizing that he had no chance for the Republican nomination, Anderson sought to change the form of this candidacy. The Ohio filing deadline prevented him from making this change. Quite clearly, rather than prohibiting him from seeking the Presidency, the filing deadline only pre-

vented Anderson from having two shots at it in the same election year.

Thus, Ohio's filing deadline does not create a restriction "denying the franchise to citizens," such as those faced by the Court in *Kramer* v. *Union School District*, 395 U. S. 621, 626 (1969) (emphasis omitted), *Cipriano* v. *City of Houma*, 395 U. S. 701 (1969) *(per curiam)*, *Evans* v. *Cornman*, 398 U. S. 419 (1970), *Phoenix* v. *Kolodziejski*, 399 U. S. 204 (1970), and *Dunn* v. *Blumstein*, 405 U. S. 330 (1972). Likewise, Ohio's filing deadline does not create a restriction that makes it "virtually impossible" for new-party candidates or nonparty candidates to qualify for the ballot, such as those addressed in *Williams* v. *Rhodes*, 393 U. S. 23, 25 (1968), *Bullock* v. *Carter*, 405 U. S. 134 (1972), and *Lubin* v. *Panish*, 415 U. S. 709 (1974). Yet in deciding this case, we are not without guidance from prior decisions by this Court.

In *Storer* v. *Brown*, the Court was faced with a California statute prohibiting an independent candidate from affiliating with a political party for 12 months preceding the primary election. This required a prospective candidate to decide on the form of his candidacy at a date some eight months earlier than Ohio requires. In upholding, in the face of a First Amendment challenge, this disaffiliation statute and a statute preventing candidates who had lost a primary from running as independents, the Court determined that the laws were "expressive of a general state policy aimed at maintaining the integrity of various routes to the ballot," 415 U. S., at 733, and that the statutes furthered "the State's interest," described by the Court as "compelling," "in the stability of its political system." *Id.*, at 736. The Court explained its holding, saying:

> "The State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences. The general election ballot is reserved for major struggles; it

is not a forum for continuing intraparty feuds. The provision against defeated primary candidates running as independents effectuates this aim, the visible result being to prevent the losers from continuing the struggle and to limit the names on the ballot to those who have won the primaries and those independents who have properly qualified. The people, it is hoped, are presented with understandable choices and the winner in the general election with sufficient support to govern effectively.

"[The disaffiliation statute] carries very similar credentials. It protects the direct primary process by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot. *It works against independent candidacies prompted by short-range political goals, pique, or personal quarrel. It is also a substantial barrier to a party fielding an 'independent' candidate to capture and bleed off votes in the general election that might well go to another party.*

"A State need not take the course California has, but California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government. See The Federalist, No. 10 (Madison). *It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling and as outweighing the interest the candidate and his supporters may have in making a late rather than early decision to seek independent ballot status.* . . . [T]he Constitution does not require the State to choose ineffectual means to achieve its aims. To conclude otherwise might sacrifice the political stability of the system of the State, with profound consequences for the entire citizenry, merely in the in-

terest of particular candidates and their supporters having instantaneous access to the ballot." *Id.*, at 735–736 (emphasis added).

The similarities between the effect of the Ohio filing deadline and the California disaffiliation statute are obvious.

Refusing to own up to the conflict its opinion creates with *Storer*, the Court tries to distinguish it, saying that it "did not suggest that a political party could invoke the powers of the State to assure monolithic control over its own members and supporters." *Ante*, at 803. The Court asserts that the Ohio filing deadline is more like the statutory scheme in *Williams* v. *Rhodes*, *supra*, which was designed to protect "'two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly.'" *Ante*, at 802 (quoting *Williams* v. *Rhodes*, 393 U. S., at 32). See also *ante*, at 802 ("In *Williams* v. *Rhodes* we squarely held that protecting the Republican and Democratic Parties from external competition cannot justify the virtual exclusion of other political aspirants from the political arena." But see *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*). "Ohio's asserted interest in political stability," says the Court, "amounts to a desire to protect existing political parties from competition." *Ante*, at 801. But this simply is not the case. The Ohio filing deadline in no way makes it "virtually impossible," 393 U. S., at 25, for new parties or nonparty candidates to secure a position on the general election ballot. It does require early decisions. But once a decision is made, there is no claim that the additional requirements for new parties and nonparty candidates are too burdensome. In fact, past experience has shown otherwise. What the Ohio filing deadline prevents is a candidate such as Anderson from seeking a party nomination and then, finding that he is rejected by the party, bolting from the party to form an independent candidacy. This is precisely the same behavior that California sought to prevent by the disaffiliation statute this Court upheld in *Storer*.

The Court makes other attempts to distinguish this case from the obviously similar *Storer* case. The Court says Ohio has no interest in preventing "intraparty feuding" because by the nature of the Presidential nominating conventions "'intraparty feuding' will continue until August." *Ante*, at 804.[4] This is certainly no different than the situation in *Storer*. Essentially all of the battles for party nominations in California would have taken place during the 12 months before the party primaries—the period during which an independent candidate had to be disaffiliated with any party.

The Court further notes: "*Storer* upheld the State's interest in avoiding political fragmentation in the context of elections wholly within the boundaries of California. The State's interest in regulating a nationwide Presidential election is not nearly as strong." *Ante*, at 804 (footnote omitted). The Court's characterization of the election simply is incorrect. The Ohio general election in 1980, among other things, was for the appointment of Ohio's representatives to the electoral college. U. S. Const., Art. II, § 1, cl. 2. The Court throughout its opinion fails to come to grips with this fact. While Ohio may have a lesser interest in who is ultimately selected by the electoral college, its interest in who is supported by its own Presidential electors must be at least as strong as its interest in electing other representatives. While the Presidential electors may serve a short term and may speak only one time on behalf of the voters they repre-

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[4] The Court seeks comfort from the idea that the filing deadline is not a "sore loser" statute which prevents a candidate who is defeated in a primary from running as an independent candidate. *Ante*, at 804, n. 31. But the effect of the deadline in this case is much the same. Under the Court's approach, so long as a candidate pulls out of his party race before the votes of the party are counted, he must be recognized as a "newly emergent independent candidate" whose candidacy is created by a dramatic change in national events. To the contrary, I submit that such a candidate is no more than a "sore loser" who ducked out before putting his popularity to the vote of his party.

sent, their role in casting Ohio's electoral votes for a President may be second to none in importance. See *Burroughs* v. *United States*, 290 U. S. 534, 545 (1934).

The Court suggests that *Storer* is not controlling since in that case the Court held that the California disaffiliation statute was not discriminatory because party candidates were prohibited from affiliating with another political party for the 12 months preceding the primary election. The Court says that Ohio's filing deadline does discriminate against nonparty candidates. But merely saying it is so does not make it so. As explained later, nonparty candidates and party candidates wishing to participate in Ohio's primary election must file on the same date. It is true that party candidates can obtain a place on the general election ballot without participating in the primary by obtaining a party's nomination at its national convention. But this is a benefit given to the party and only incidentally received by the winning party candidate; it provides no benefit to one who seeks but fails to obtain a party nomination. On the whole, party candidates have a more difficult chore in getting a place on the general election ballot than do nonparty candidates; a fact of which Anderson and other unsuccessful rivals for the 1980 Republican nomination are doubtless aware. Nonparty candidates, if they file in time and submit the necessary nominating petitions, are assured of a place on the ballot; party candidates must win a party nomination.

In a final attempt to distinguish *Storer*, the Court argues that even if Ohio is serving some interest in preventing "intraparty feuding," the filing deadline is "both too broad and too narrow"; the Court even argues that the filing deadline may in fact impair this interest. *Ante*, at 805. The Court claims that the effect of the deadline is too broad because it applies "to independent candidates who have not been affiliated in the recent past with any political party." *Ibid.* Its effect is too narrow because it "does not prohibit independent candidacies by persons formerly affiliated with

a political party, or currently participating in intraparty competition." *Ibid.* The Court says the filing deadline may impair the States' interest in preserving political stability because it may force independent-minded voters "'to create minor parties without first attempting to influence the course taken by a major one.'" *Ibid.* (quoting A. Bickel, Reform and Continuity 87–88 (1971)). But *each* of these criticisms could have been asserted against the California disaffiliation statute.

The point the Court misses is that in cases like this and *Storer*, we have never required that States meet some kind of "narrowly tailored" standard in order to pass constitutional muster. In reviewing election laws like Ohio's filing deadline, we have said before that a court's job is to ensure that the State "in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life." *Jenness* v. *Fortson*, 403 U. S. 431, 439 (1971). If it does not freeze the status quo, then the State's laws will be upheld if they are "tied to a particularized legitimate purpose, and [are] in no sense invidious or arbitrary." *Rosario* v. *Rockefeller*, 410 U. S. 752, 762 (1973). See also *Marston* v. *Lewis*, 410 U. S. 679 (1973) *(per curiam); Burns* v. *Fortson*, 410 U. S. 686 (1973) *(per curiam); American Party of Texas* v. *White*, 415 U. S. 767 (1974); *Mandel* v. *Bradley*, 432 U. S. 173 (1977) *(per curiam); Clements* v. *Fashing*, 457 U. S. 957 (1982). The Court tries to avoid the rules set forth in some of these cases, saying that such rules were "applicable only to party primaries" and that "this case involves restrictions on access to the general election ballot." *Ante*, at 802, n. 29. The fallacy in this reasoning is quite apparent: one cannot restrict access to the primary ballot without also restricting access to the general election ballot. As the Court said in *Storer* v. *Brown:* "The direct party primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people

choose their public officers. It functions to winnow out and finally reject all but the chosen candidates." 415 U. S., at 735 (footnote omitted).

The Ohio filing deadline easily meets the test described above. In the interest of the "stability of its political system," *Storer* v. *Brown*, 415 U. S., at 736, Ohio must be "free to assure itself that [a nonparty] candidate is a serious contender, *truly independent*, and with a satisfactory level of community support." *Id.*, at 746. This interest alone is sufficient to support Ohio ballot access laws which require that candidates for Presidential electors choose their route early, thus preventing a person who has decided to run for a party nomination from switching to a nonparty candidacy after he discovers that he is not the favorite of his party. But this is not the only interest furthered by Ohio's laws.

Ohio maintains that requiring an early declaration of candidacy gives its voters a better opportunity to take a careful look at the candidates and see how they withstand the close scrutiny of a political campaign. The Court does not dispute the legitimacy of this interest. But the Court finds that "the State's important and legitimate interest in voter education does not justify the specific restriction on participation in a Presidential election that is at issue in this case." *Ante*, at 796. Admitting that the Constitutional Convention in 1787, in establishing the electoral college and providing plenary authority to the States for election of its members to the college, had a heightened awareness of the importance of an informed electorate, the Court tells us how times have changed in the past 200 years and how the problem of ensuring an informed electorate is no longer so great. The Court explains: "In the modern world it is somewhat unrealistic to suggest that it takes more than seven months to inform the electorate about the qualifications of a particular candidate . . . . Our cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues." *Ante*, at 797.

I cannot agree with the suggestion that the early deadline reflects a lack of "faith" in the voters. That Ohio wants to

give its voters as much time as possible to gather information on the potential candidates would seem to lead to the contrary conclusion. There is nothing improper about wanting as much time as possible in which to evaluate all available information when making an important decision. Besides, the Court's assertion that it does not take 7 months to inform the electorate is difficult to explain in light of the fact that Anderson allowed himself some 19 months to complete this task; and we are all well aware that Anderson's decision to make an early go of it is not atypical. The Court's reliance on the quote from *Dunn* v. *Blumstein*, 405 U. S., at 358, that campaign spending and voter education occur "largely during the month before an election" cannot be taken seriously when applied to Presidential campaigns. I see no basis whatsoever for the Court's conclusion that "[t]his reasoning applies with even greater force to a Presidential election." *Ante*, at 798.

"In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley* v. *Valeo*, 424 U. S., at 14–15. This is especially true in the context of candidates for President. "The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated." *Burroughs* v. *United States*, 290 U. S., at 545. I believe the Court of Appeals aptly explained the present day need in saying:

> "To be sure, some of the impediments to an informed electorate that existed in 1787 have been removed by our extensive present day communications network, through which news of a candidacy is transmitted nationwide virtually simultaneously with its announcement. However, rapid communication can only inform the electorate of the existence of a candidacy. Equally crucial to a meaningful vote is the electorate's ability to evaluate

> those who would be President once aware of their desire to fill the post. Ohio may very reasonably conclude that requiring Presidential candidates to be in the public eye for a significant time materially advances its interest in careful selection." 664 F. 2d, at 564.[5]

Ohio also has an interest in assisting its citizens in apportioning their resources among various candidates running for the Presidency. The supply of resources needed for operating a political campaign is limited; this is especially true of two of the most important commodities, money and volunteers. By doing its best to present the field of candidates by spring, right at the time that campaigns begin to intensify, Ohio allows those of its citizens who want to provide support other than voting, adequate time to decide how to divide up that support. While the Court does not give attention to this interest, it is certainly a legitimate one and an important one in terms of the effective campaigning of Presidential candidates.

The Court seems to say that even if these interests would otherwise be served by Ohio's filing deadline, they are "undermined by the State's willingness to place major-party nominees on the November ballot even if they never campaigned in Ohio." *Ante*, at 798. The Court fails to follow its own warning that "'[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.'" *Ante*, at 801 (quoting *Jenness* v. *Fortson*, 403 U. S., at 442). Underlying the Court's entire opinion is the idea that "independent candidates" are treated differently than candidates fielded by the "major parties." But this observation is no more productive than comparing

[5] The Ohio Legislature's decision is not that different from the decision by the Federal Government requiring television networks to provide early access for Presidential candidates. Recently, in *CBS, Inc.* v. *FCC*, 453 U. S. 367 (1981), this Court held that under the Federal Communications Act a Presidential candidate had a right to television access as early as December 1979, some 11 months before the election.

apples and oranges and wondering at the difference between them.

First of all, *any political party, major, minor, or otherwise*, can qualify for a position on Ohio's general election ballot and have that position held open until later in the election year. The reasonableness of this approach is fairly obvious. Political parties have, or at least hope to have, a continuing existence, representing particular philosophies. Each party has an interest in finding the best candidate to advance its philosophy in each election. See *Cousins* v. *Wigoda*, 419 U. S. 477 (1975); *Democratic Party* v. *Wisconsin ex rel. La Follette*, 450 U. S. 107 (1981). The Court suggests that if such a procedure is so important for political parties, then followers of a particular candidate should also have more time. See, *e. g.*, *ante*, at 800, n. 27. This argument simply does not wash. Any group of like-minded voters, if they are of sufficient numbers, is free to form a political party and ensure more time in selecting a candidate to express their views. But followers of a particular candidate need no time to find such a representative; they are organized around that candidate. Such followers have no real organized existence in the absence of that particular candidate.

Comparing party candidates and nonparty candidates is somewhat more useful, but does not change the result. Any candidate wanting to pursue his place on the Ohio general election ballot through Ohio's preliminary procedures must file at the same time. Nevertheless, should an individual who has not filed a statement of candidacy be chosen by a political party as its nominee, Ohio does not attempt to keep that candidate off of its general election ballot. To the extent that this is an advantage to the successful party candidate, however, it is a benefit given to the party, which the party candidate only receives incidentally.[6] Furthermore,

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[6] The Court says that nevertheless this exposes a serious weakness in the State's claim that it wants to put all the candidates before its voters

to the extent the party candidate is benefited, such benefit is counterbalanced by the risk he takes of not getting the party nomination at all. Only the nonparty candidate can assure himself of a place on the general election ballot. Many party candidates may seek the party's nomination, but only one of them will get it.

The Court's decision in this case is not necessary for the protection of like-minded voters who want to support an independent candidate; Ohio laws already protect such voters. This case presents a completely different story. John Anderson decided some 19 months before the 1980 general election to run for President. He decided to run as a Republican Party candidate. When Anderson sought to get on the Ohio ballot after the March 20 deadline, he was not a "newly emergent independent candidate" whose candidacy had been created by dramatic changes in the election campaign. He was a party candidate who saw impending rejection by his party and rather than throw his support to the party's candidate or some other existing candidacy, Anderson wanted to bolt and have a second try.

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early so they will have time to evaluate the candidates. Even if the Court were correct, the other interests advanced by the State would justify the filing deadline for nonparty candidates. But I do not believe the Court is correct.

The Court ignores the fact that voters learn about a nonparty candidacy only by listening to what the candidate has to say. Reality requires a different conclusion about party candidates. Even before a party candidate is chosen, the public will know a great deal about that candidate because of its knowledge about the party. Of course, the Court is correct that the focus of a party will vary somewhat according to the candidate chosen. But this proves only that the time between the choosing of the party's nominee and the general election should be sufficient to allow the voters to evaluate the party's candidate. It does not prove that the voters need as much time evaluating the party candidate as they need for an individual who does not run as the representative of any particular established views. It would in fact be quite reasonable for a State to require, in furtherance of its voter education interest, that the nonparty candidate put himself before the public at an earlier time than it requires of the party candidate.

The Court's opinion protects this particular kind of candidate—an individual who decides well in advance to become a Presidential candidate, decides which route to follow in seeking a position on the general election ballot, and, after seeing his hopes turn to ashes, wants to try another route. The Court's opinion draws no line; I presume that a State must wait until all party nominees are chosen and then allow all unsuccessful party candidates to refight their party battles by forming an "independent" candidacy. I find nothing in the Constitution which requires this result. For this reason I would affirm the judgment of the Court of Appeals.

BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL. *v.* MERCK & CO., INC.

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

No. 81–1273. Argued December 1, 1982—Decided April 19, 1983*

Merck & Co. entered into three fixed-price negotiated contracts with the Defense Supply Agency and one such contract with the Veterans' Administration for the sale of pharmaceutical products to those agencies. The prices were based on Merck's catalog prices. As required by statute, each contract contained a standard access-to-records clause granting the Comptroller General the right to examine any "directly pertinent" records involving transactions related to the contract. Relying on these clauses, the Comptroller General, for the stated purpose of reviewing the reasonableness of the contract prices, demanded of Merck access to cost records pertinent to the contracts, including records of costs of direct materials, labor, and overhead, and support for the prices charged. Merck refused to comply with the demand and brought an action in Federal District Court seeking a declaratory judgment that the Comptroller General's demand exceeded his statutory authority. The District Court granted partial summary judgment for each party, permitting access to records of direct costs, including manufacturing and delivery costs, but barring access to records of indirect costs, including research and development, marketing and promotion, distribution, and administration costs, except to the extent that these costs were included in the direct costs. The Court of Appeals affirmed.

Held: The Comptroller General may inspect Merck's records of direct costs but not records of indirect costs. Pp. 830–844.

(a) It is plain from the face of the statutes in question that the words "directly pertinent" are words of limitation designed to restrict the class of records to which access is permitted by requiring some close connection between the type of record sought and the particular contract. The legislative history underscores what the language reflects: Congress' intention to limit to some degree the Comptroller General's access power. The legislative history also reveals that Congress sought, in granting this access authority, to equip the General Accounting Office (GAO),

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*Together with No. 81–1472, *Merck & Co., Inc.* v. *Bowsher, Comptroller General of the United States, et al.*, also on certiorari to the same court.

which the Comptroller General heads, with a tool to detect fraud, waste, inefficiency, and extravagance in Government contracting. Given these dual, conflicting congressional aims, in construing the statute, the public interest served by GAO investigations must be balanced against the private interest in freedom from officious governmental intermeddling in the contractor's private business affairs. Pp. 830–835.

(b) To define as "directly pertinent" the records of any costs defrayed from commingled revenues that include Government payments under the contract, would completely eviscerate the congressional goal of protecting the privacy of the contractor's business records by permitting far-ranging governmental scrutiny of records of nongovernmental transactions completely unrelated to either the contract or the product procured under the contract. P. 836.

(c) There is no merit to the Government's argument that the GAO has had a consistent and longstanding interpretation of its authority under the access-to-records statutes that supports the view that indirect cost records are subject to examination under the contracts in question. Pp. 837–839.

(d) Here, the appropriate balance of public and private interests weighs in favor of access to Merck's direct cost records but against access to its indirect costs records. Because direct costs have a direct influence on the price charged the Government, the GAO needs to examine records of these costs to determine whether the contractor is making an excessively high profit or the Government is getting a "fair deal" under the contract. On the other hand, even though indirect costs may influence the setting of a catalog price, nevertheless, the degree of intrusion into the contractor's private business affairs is far greater, particularly where fixed-price contracts are involved. Pp. 839–843.

(e) The fact that the records here were sought for the purpose of either conducting an economic study of the pharmaceutical industry or securing information desired by individual Members of Congress did not vitiate the GAO's authority under the statutes to examine directly pertinent records under the contracts in order to determine the reasonableness of the contract prices and to detect inefficiency and wastefulness. Pp. 843–844.

214 U. S. App. D. C. 418, 665 F. 2d 1236, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, POWELL, and REHNQUIST, JJ., joined, and in Part V of which WHITE and MARSHALL, JJ., joined. WHITE, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 845. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, J., joined, *post*, p. 860.

Jerrold J. Ganzfried argued the cause for petitioners in No. 81–1273 and respondents in No. 81–1472. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General McGrath*, *Deputy Solicitor General Geller*, and *Michael Kimmel*.

Philip A. Lacovara argued the cause for respondent in No. 81–1273 and petitioner in No. 81–1472. With him on the briefs was *Ronald A. Stern*.†

JUSTICE O'CONNOR delivered the opinion of the Court.

The issue before the Court is the scope of the authority of the Comptroller General of the United States to examine the records of a private contractor with whom the Government has entered into fixed-price[1] negotiated contracts. We conclude that, under the circumstances presented in this action, the Comptroller General may inspect the contractor's records of direct costs, but not records of indirect costs.

I

In 1973 Merck & Co., Inc. (Merck), entered into three contracts with the Defense Supply Agency of the Department of Defense and one contract with the Veterans' Administration for the sale of pharmaceutical products to the Government. All four contracts were negotiated, rather than awarded after formal advertising.[2] The pharmaceutical products sup-

†*Robert D. Wallick* filed a brief for the Aerospace Industries Association of America, Inc., as *amicus curiae* urging reversal.

Stanley L. Temko and *Charles Lister* filed a brief for SmithKline Corp. as *amicus curiae*.

[1] A pure fixed-price contract requires the contractor to furnish the goods or services for a fixed amount of compensation regardless of the costs of performance, thereby placing the risk of incurring unforeseen costs of performance on the contractor rather than the Government. See 1 R. Nash & J. Cibinic, Federal Procurement Law 413 (3d ed. 1977). Variations on the pure fixed-price contract may contain some formula or technique for adjusting the contract price to account for unforeseen cost elements. See *id.*, at 413–415 (discussing fixed-price contract with escalation clause, fixed-price incentive contract, and fixed-price redeterminable contract).

[2] The Government employs two methods of procurement: advertised procurement, *i. e.*, formal solicitation of competitive bids, and procurement by

plied under each contract were standard commercial products sold by Merck in substantial quantities to the general public. App. 41a. The price term proposed by Merck for each contract was based on the catalog price at which Merck sold the item to the general public or was otherwise determined by adequate competition. Before the award of each of the contracts at the fixed price proposed by Merck, there was no actual negotiation of price, and the Government contracting officers did not request Merck to submit cost data in connection with any of the four contracts.

As required by 10 U. S. C. § 2313(b) and 65 Stat. 700, 41 U. S. C. § 254(c),[3] each contract contained a standard access-

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negotiation. A negotiated contract is the method authorized by statute for use in situations in which the formal advertising and bidding procedure is deemed impractical or unnecessary. See 10 U. S. C. § 2304(a); 41 U. S. C. § 252(c). In procuring by negotiation, the Government agency discusses the terms of the procurement with one or more contractors and awards the contract to the party offering the terms most advantageous to the Government.

[3] Title 10 U. S. C. § 2313(b), which applies to the Defense Supply Agency contracts, provides:

"Except as provided in subsection (c), each contract negotiated under this chapter shall provide that the Comptroller General and his representatives are entitled, until the expiration of three years after final payment, to examine any books, documents, papers, or records of the contractor, or any of his subcontractors, that directly pertain to and involve transactions relating to, the contract or subcontract."

The Veterans' Administration contract is governed by 41 U. S. C. § 254(c), which provides in pertinent part:

"All contracts negotiated without advertising . . . shall include a clause to the effect that the Comptroller General of the United States . . . shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts."

Despite the slight difference in wording, there is no substantive difference between the defense and civilian procurement statutes.

to-records clause granting the Comptroller General the right to examine any directly pertinent records involving transactions related to the contract. Relying on these clauses, in August 1974 the Comptroller General issued a formal demand to Merck for access to the following:

> "all books, documents, papers, and other records directly pertinent to the contracts, which include, but are not limited to (1) records of experienced costs including costs of direct materials, direct labor, overhead, and other pertinent corporate costs, (2) support for prices charged to the Government, and (3) such other information as may be necessary for use to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interests." App. 18a.[4]

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[4] The Comptroller General issued identical demands to five other pharmaceutical companies. These access-to-records demands apparently were the product of congressional interest in competition and profits in the pharmaceutical industry generally.

As early as 1971, Senator Gaylord Nelson suggested during hearings on competition in the drug industry that the Comptroller General invoke his access-to-records authority "to take a look" at the costs incurred by pharmaceutical companies. Hearings on Competitive Problems in the Drug Industry before the Subcommittee on Monopoly of the Senate Select Committee on Small Business, 92d Cong., 1st Sess., 8020 (1971). Following those hearings, Senator Nelson's staff continued to urge the General Accounting Office (GAO) to use the access provisions to obtain cost records "without any strings attached so that the high profits could be publicized by product and firm." App. 144a; *id.*, at 142a–148a. See also Hearings, *supra*, at 8537, 8581–8583.

Finally in June 1973, the GAO responded by proposing a two-phase study of the economics of the pharmaceutical industry to be accomplished through voluntary participation by drug companies. Merck and five other companies agreed to cooperate in the first phase, which contemplated gathering background data on the industry. In April 1974, the GAO issued a proposal for the second phase of the study, aimed at developing data on "salient economic and operational aspects of the industry." App. 141a.

Merck refused to comply with the Comptroller General's request and commenced this action in the United States District Court for the District of Columbia, seeking a declaratory judgment that the Comptroller General's access demand exceeded his statutory authority.[5] The United States intervened and counterclaimed to enforce the Comptroller General's demand.

The District Court granted partial summary judgment for each party. Rejecting Merck's argument that cost records are not "directly pertinent" to the fixed-price contracts that were the predicate of the General Accounting Office (GAO) demand, the court permitted access to all records

> "directly pertaining to the pricing and cost of producing the items furnished by . . . Merck under the . . . contracts . . . including manufacturing costs (including raw and packaging materials, labor and fringe benefits, quality control and supervision), manufacturing overhead (including plant administration, production planning, warehousing, utilities and security), royalty expenses,

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Merck expressed its concern over participating in this phase without adequate assurance of the confidentiality of the cost data it might be requested to supply.

Initially the GAO agreed that the data regarding individual companies and individual drug products should remain confidential and anonymous. *Id.*, at 150a. Senators Nelson and Kennedy and their staffs, however, reiterated that the Subcommittee's objectives could be served only by publication of the data. *Ibid.* The Comptroller General's formal demand letters to the six companies that had participated voluntarily in the Phase I study followed.

[5] Four of the remaining five pharmaceutical companies that received demand letters also challenged the Comptroller General's request. See *SmithKline Corp.* v. *Staats*, 668 F. 2d 201 (CA3 1981), cert. pending, Nos. 81–2082, 81–2268; *Bristol Laboratories Division of Bristol-Myers Co.* v. *Staats*, 620 F. 2d 17 (CA2 1980) *(per curiam)*, aff'd by an equally divided Court, 451 U. S. 400 (1981); *United States* v. *Abbott Laboratories*, 597 F. 2d 672 (CA7 1979); *Eli Lilly & Co.* v. *Staats*, 574 F. 2d 904 (CA7), cert. denied, 439 U. S. 959 (1978).

and delivery costs." App. to Pet. for Cert. in No. 81–1273, p. 39a.

The court barred access, however, to records "with respect to research and development, marketing and promotion, distribution, and administration (except to the extent such data may be included in the cost items listed above)." *Id.*, at 40a. In a brief *per curiam* opinion, the United States Court of Appeals for the District of Columbia Circuit affirmed. *Merck & Co.* v. *Staats*, 214 U. S. App. D. C. 418, 665 F. 2d 1236 (1981).

Both parties sought certiorari. In No. 81–1273, the United States petitioned for review of the Court of Appeals' determination that records of Merck's indirect costs are not subject to examination by the Comptroller General. In No. 81–1472, Merck challenges the determination that records of its direct costs are "directly pertinent" to the contracts in question and are therefore subject to examination. Merck also contends that access to its cost records is barred because the Comptroller General's access demand was not made for a congressionally authorized purpose. We granted certiorari on the petitions of both parties, 456 U. S. 925 (1982), and now affirm.

II

As with any issue of statutory construction,[6] we "'must begin with the language of the statute itself.'" *Bread Political Action Committee* v. *FEC*, 455 U. S. 577, 580 (1982), quoting *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U. S. 176,

[6] The parties agree that the scope of the Comptroller General's authority under the access-to-records clauses in the four contracts turns on the meaning of the statutory language, rather than on the intention of the parties to the contract. We also emphasize at the outset that Merck does not challenge the authority of Congress to impose, as a condition of doing business with the Government, a requirement that contractors disclose all of their cost records to the Comptroller General, regardless of the pertinence of these records to the particular contract. Rather, Merck bases its arguments on its interpretation of the statutory language.

187 (1980). The focal point of controversy is the meaning of the statutory phrase "directly pertain to and involve transactions relating to the contract." See n. 3, *supra*. It is plain from the face of the provisions that these are words of limitation designed to restrict the class of records to which access is permitted by requiring some close connection between the type of records sought and the particular contract.[7]

The legislative history of the access provisions underscores what the language reflects: the intention of Congress to limit to some degree the Comptroller General's access powers. As originally introduced, the bill now codified as 10 U. S. C. § 2313(b) and 41 U. S. C. § 254(c) provided access to "pertinent" records "involving transactions related to" the contract. See 97 Cong. Rec. 13371 (1951).[8] Representative

[7] In partial dissent, JUSTICE BLACKMUN objects that, after a nod in the direction of the statutory language, we inexplicably wander off to explore the statutory purposes. *Post*, at 860. As we observe *infra*, at 834, however, the statutory language does not tell us exactly which records are subject to GAO examination. It is a well-settled canon of statutory construction that, where the language does not dictate an answer to the problem before the Court, "we must analyze the policies underlying the statutory provision to determine its proper scope." *Rose* v. *Lundy*, 455 U. S. 509, 517 (1982). Accordingly, we examine the legislative history to assess the purposes Congress sought to serve by the language it chose. As shown *infra*, the statutory purposes clearly revealed by the legislative record justify allowing access to direct cost records.

[8] This bill was modeled on, and as originally proposed was identical to, a January 1951 amendment to the First War Powers Act of 1941. See Act of Jan. 12, 1951, 64 Stat. 1257. That amendment was a piece of emergency legislation adopted in response to the crisis conditions created by the Korean War. Because of severe wartime inflation, many defense contractors holding fixed-priced contracts could not meet their obligations. To alleviate the problem, Congress gave President Truman emergency authority to renegotiate Government contracts. See H. R. Rep. No. 3227, 81st Cong., 2d Sess., 3–4 (1950). The access-to-records provisions were included in order to deter fraud and profiteering in the renegotiation process. 96 Cong. Rec. 17123 (1951) (remarks of Rep. Celler) ("The amendment will give power to the General Accounting Office to go into the books and delve into the records of these contractors who have been relieved to determine

Hoffman opposed the original bill on the ground that it permitted "unnecessary snooping expeditions" and allowed the GAO to "go into everybody's business and look it over if they just wanted to take a look at it." *Id.*, at 13373. He therefore offered a floor amendment to insert the word "directly" before the word "pertinent," stating that the purpose of the amendment "is to limit the 'snooping' that may be carried on under this bill." *Id.*, at 13377. The sponsor of the original bill, Representative Hardy, did not oppose the amendment, and the amendment passed without debate or discussion.

The passage of the Hoffman amendment clearly reveals that Congress did not want unrestricted "snooping" by the Comptroller General into the business records of a private contractor. The Government nevertheless attempts to discount the significance of Congress' addition of the word "directly." Based on the lack of opposition to the limiting amendment by the bill's sponsor and the lack of debate, the Government argues that the Hoffman modification did not significantly alter the scope of the Hardy bill. We cannot agree. The only explanation in the legislative history of the meaning and purpose of the amendment is that of Representative Hoffman. His statement, which, as the explanation of the sponsor of the language, is an "authoritative guide to the statute's construction," *North Haven Board of Education* v.

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whether or not there is fraud or overreaching or whether they have done anything untoward").

Although the initial access-to-records legislation in the January 1951 amendments was of limited duration, Congress shortly thereafter passed the permanent version at issue here. Representative Hardy, the sponsor of both the temporary and permanent access-to-records provisions, learned that Government procurement officers were negotiating contract modifications under two permanent procurement statutes that lacked access provisions, the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949. "In order to plug this loophole," Representative Hardy introduced the bill to require inclusion of access-to-records clauses in contracts negotiated under these statutes. 97 Cong. Rec. 13198 (1951) (remarks of Rep. Hardy).

Bell, 456 U. S. 512, 527 (1982), expressly indicates that the intent of the amendment was to curtail the scope of investigation authorized under the bill. Although, as the Government emphasizes, Representative Hoffman did not have the votes to defeat the bill in its entirety, he nevertheless had the votes to circumscribe the inquiry that the Comptroller General was authorized to undertake. Moreover, to accept the Government's contention that the amendment had no substantive effect would contradict the settled principle of statutory construction that we must give effect, if possible, to every word of the statute. *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 163 (1982). Therefore, in our attempt to give meaning to the words "directly pertinent," we must be mindful of Congress' aim to protect contractors from broad-ranging governmental intrusion into their private business affairs.

It does not follow, however, that our interpretation of the language added by the Hoffman amendment must be guided solely by that policy, for it is expressive of only one of the aims embraced by Congress in enacting the access-to-records provisions. The legislative history also reveals that Congress sought, in granting the GAO this access authority, to equip that agency with a tool to detect fraud, waste, inefficiency, and extravagance in Government contracting generally. Representative Hardy, the sponsor of the legislation, explained that the two major purposes of the bill were "to give the Comptroller General the proper tools to do the job the Congress has instructed him to do . . . and . . . to provide a deterrent to improprieties and wastefulness in the negotiation of contracts." 97 Cong. Rec. 13198 (1951). With regard to the former purpose, it is clear that Congress envisioned use of the access authority as an adjunct to the Comptroller General's statutory responsibility to "investigate . . . all matters relating to the receipt, disbursement, and application of public funds" and to "make recommendations looking to greater economy or efficiency in public

expenditures." 31 U. S. C. § 53(a). See also 31 U. S. C. §§ 60, 65(a).[9] Obviously, broad access to cost records would enhance the GAO's ability to evaluate the reasonableness of the price charged the Government and to identify areas of waste and inefficiency in procurement.

Because of the lack of debate or discussion of the Hoffman amendment, however, we do not have any indication in the legislative history, nor indeed in the language of the statute itself, of the scope of access authority left to the GAO after the restrictive words were added to the bill. In defining the degree of limitation, we thus traverse uncharted seas guided only by the two general statutory purposes reflected in the legislative history. Consequently, our task in construing the statutes as they apply in this action is to give effect to both of these congressional aims. The tension between these goals is apparent. For some industries and some types of contracts, including perhaps those at issue here, neither objec-

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[9] Representative Hardy further explained the inspiration for the bill. Because of the absence of competitive safeguards when the Government procures by negotiation rather than by formal solicitation of bids, Representative Hardy identified a need to establish "every reasonable safeguard against waste and extravagance in the spending of" Government funds in the context of negotiated contracts. 97 Cong. Rec. 13198 (1951). By permitting the GAO "to check the transaction both from the Government records and the contractors' books," the bill would ensure that the Government did not "come out on the short end of the deal." *Ibid.* Representative Hardy then cited a number of "typical situations in which the authority of this bill would play an effective part." *Ibid.* One example dealt with detection of an inefficient market structure under which, because the Government was purchasing automotive parts from a dealer who in turn bought from a middleman, the Government was paying a price that included "profits upon profits and completely wasteful administrative and handling costs." *Ibid.*

Thus, contrary to Merck's assertion, the 1951 access statutes were designed to detect more than fraud and abuse in the negotiation of procurement contracts. Representative Hardy himself remarked that GAO review under the access provisions would disclose "a lot of other situations besides those involving fraud." *Id.*, at 13199.

tive can be achieved fully without sacrificing the other.[10] Given these dual, conflicting aims, we must balance the public interest served by full GAO investigations against the private interest in freedom from officious governmental intermeddling in the contractor's private business affairs.

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[10] It is possible that the 1951 Congress was aware of this tension. The addition of the Hoffman amendment was a clear compromise. Representative Hoffman had adamantly opposed the Hardy bill from the outset because of the breadth of authority it would give to the GAO. The amendment he offered emerged from a discussion between Representative Hardy and Representative Hoffman and represented the extent of the limitation upon GAO's access authority that Representative Hardy would accept. See 97 Cong. Rec. 13377 (1951) (remarks of Rep. Hoffman).

It does not follow, as JUSTICE WHITE assumes, *post*, at 852, from the fact that the Hoffman amendment was a compromise that the restrictive language is to be given no effect at all. In dissent, JUSTICE WHITE refers to the Hoffman amendment as "largely a sop to the bill's opponents." *Post*, at 853. The legislative record, however, tells us that a majority voted for the Hoffman amendment, and we must give weight to the expressed will of a legislative majority. JUSTICE WHITE also interprets the Hoffman amendment as an "assurance that the bill would not be used as a basis for inspection of books and records having no substantial connection with Government procurement." *Ibid.* Notwithstanding this recognition of the amendment's purpose, however, JUSTICE WHITE adopts a construction of "directly pertinent" that completely eviscerates the limiting purpose of the Hoffman amendment, for he would allow the GAO access to any records helpful in determining the amount of profit being made by the contractor. See *post*, at 856. Thus, under the guise of "interpretation" of the statute, JUSTICE WHITE has "construed" the statute so broadly as to give it a reading indistinguishable in effect from the bills to expand the GAO's access authority that were rejected by Congress in the 1970's. See n. 12, *infra*. Such an approach therefore bespeaks legislation, rather than interpretation.

Recognizing the extreme encroachment upon the privacy of a contractor's business records which his interpretation of the statutes would permit, JUSTICE WHITE attempts to bring "balance" and "reason" to bear on the situation by invoking courts' powers under Fourth Amendment principles to limit the GAO's right of access. *Post*, at 857–858. If, however, Congress had intended the GAO demands to be limited only by the Fourth Amendment, it need not have concerned itself with requiring that records be directly pertinent to the contract.

III

A

The Government contends that the Court of Appeals erred in holding that records of Merck's indirect costs[11] are not "directly pertinent" to the contracts in question. In so arguing, the Government maintains that Merck's indirect costs are directly pertinent to the fixed-price contracts because Merck uses payments made by the Government under these contracts to defray indirect expenses. Thus, the Government would have us define as "directly pertinent" the records of any costs defrayed from commingled general revenues that include Government payments under the contract.

We cannot accept this interpretation of the statute, however, for it completely eviscerates the congressional goal of protecting the privacy of the contractor's business records. Under the Government's proposed definition, records of expenditures to purchase raw materials for the manufacture of an entirely different product than that sold under the Government contract or to invest in the stock of another corporation would be subject to inspection by the Comptroller General. Hence, the Government's interpretation would permit far-ranging governmental scrutiny of a contractor's business records of nongovernmental transactions completely unrelated to either the contract underlying the access demand or the product procured under that contract. Indeed, carried to its logical extreme, the argument would dictate that few, if any, of a private contractor's business records would be immune from GAO scrutiny. In short, the Government's proposed definition of the statutory language admits of no doctrinal limitation, effectively reading the Hoffman limiting language and its "antisnooping" policy out of the statute.

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[11] By indirect costs we mean costs incurred in the areas of research and development, marketing and promotion, distribution, and administration, which are not directly attributable to a particular product.

B

Nor are we persuaded by the Government's argument that the GAO's consistent and longstanding interpretation of its authority under the access-to-records statutes supports the view that indirect cost records are subject to examination under the fixed-price contracts in question here. Even if that interpretation could be characterized as consistent, it would not be entitled to deference, for, as we have noted above, it is inconsistent with the statutory language. See *Southeastern Community College* v. *Davis*, 442 U. S. 397, 411 (1979).

Moreover, to characterize the GAO's current sweeping view of its access authority as "consistent" would be generous. There is significant evidence indicating that in the past the GAO itself has acknowledged a deficiency in its statutory authority to examine indirect cost records.[12] For example,

[12] It is significant to note that the profit study of the defense industry, which Congress authorized as part of the Military Appropriations Act of 1970, Pub. L. 91–121, § 408, 83 Stat. 204, is the only occasion on which Congress has deliberately granted the GAO the kind of broad-ranging authority it asserts here. In conferring this authority, Congress, wary of equipping the GAO to conduct a "fishing expedition," 115 Cong. Rec. 25795 (1969) (remarks of Sen. Ribicoff), carefully limited such authority to "only a single study." *Id.*, at 25793 (remarks of Sen. Proxmire).

Although not conclusive with respect to interpretation of the 1951 access statutes, subsequent congressional rebuffs of GAO requests for expansion of its access authority are instructive both with regard to the GAO's view of the limits of the 1951 legislation and Congress' apparent reluctance to broaden that legislation. For example, a Senate bill introduced in 1973 directed that "the Comptroller General . . . shall . . . have access for the purpose of audit and examination to any books, documents, papers and records . . . which *in the opinion of . . . the Comptroller General may be related or pertinent* to the . . . contracts . . . [or] subcontracts." S. 2049, 93d Cong., 1st Sess. (1973) (emphasis added). Another Senate bill which, like S. 2049 never emerged from committee, would have granted the Comptroller General authority to undertake a study of profits made on Government and commercial contracts by contractors having Government contracts aggregating $1 million or more. To enable the Comptroller General to make such studies, the bill gave him the authority to demand from

in a ruling of particular significance for the facts of this case, the Comptroller General determined in 1967 that the access provisions do not confer upon the GAO the right to examine records relating to a contractor's nongovernmental business, even when such review is necessary to determine whether a catalog-priced item was actually sold in substantial quantities to the general public. App. 162a–163a. Moreover, in late 1969, the GAO prepared a memorandum for Congress in connection with congressional consideration of a proposed grant of additional access authority to the GAO to pursue a study of contractor profits in the defense industry. In the memorandum, the GAO informed Congress that its authority under the 1951 access provisions did not extend to review of records of a contractor's nongovernmental business and that additional access authority was therefore necessary to conduct a profit study. 115 Cong. Rec. 25800–25801 (1969) (reprinting GAO Memorandum on the Adequacy of the Legal Authority of the Comptroller General to Conduct a Comprehensive Study of Profitability in Defense Contracting). Finally, a 1970 internal memorandum also reveals the GAO's belief that amendment of the 1951 access statutes would be necessary to give it the power to examine records of *indirect costs*. App. 160a–161a.[13]

The only statements by the GAO directly supportive of its position here occur in testimony before a congressional Sub-

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the contractor "such information maintained in the normal course of business . . . as the Comptroller General determines necessary or appropriate." S. 3014, 93d Cong., 2d Sess. (1974). See also S. 2268, 94th Cong., 1st Sess. (1975).

[13] We observe that JUSTICE WHITE's dissent makes no attempt at all to deal with this evidence of the GAO's own view of the limits of its access authority. Given the GAO's historic position, excepting of course its position in the *Hewlett-Packard* case and the current litigation, see *infra*, contractors like Merck who entered into fixed-price negotiated contracts with the Government had no reason to expect that consenting to inclusion of the access-to-records clause would subject their businesses to the kind of broad-ranging inquiry which JUSTICE WHITE's dissent approves.

committee in 1963 regarding the GAO's litigation of the scope of its access authority in *Hewlett-Packard Co.* v. *United States*, 385 F. 2d 1013 (CA9 1967), cert. denied, 390 U. S. 988 (1968).[14] In light of the GAO's litigation posture during these hearings, as well as the contrary expressions of GAO opinion noted above, this testimony cannot provide persuasive evidence of the GAO's consistent interpretation or practice.

IV

To summarize, the Government has failed to offer a definition of "directly pertinent" that would give any effect to the limiting purpose of that language. In our view, the appropriate accommodation of the competing goals reflected in the legislative history counsels us to draw the line precisely

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[14] *Hewlett-Packard*, like this case, involved a request by the Comptroller General to review cost records of a contractor who entered into fixed-price negotiated contracts. During that litigation, a congressional Subcommittee commenced hearings to investigate "the need for, or desirability of, recommending legislative action" in light of Hewlett-Packard's refusal to permit inspection of its cost records under the access provisions. Hearings on Relation of Cost Data to Military Procurement before the Subcommittee for Special Investigations of the House Committee on Armed Services, 88th Cong., 1st Sess., 3 (1963). During the course of these hearings, Robert F. Keller, General Counsel of the GAO, testified concerning the GAO's position with respect to the Hewlett-Packard situation.

"It is our position that the contract clause and the statute give us the right to examine the cost records of the contractor and other pertinent data that relates *[sic]* to the items included in the contract, in sufficient completeness and detail to permit us to determine the reasonableness of the negotiated prices." *Id.*, at 10.

Mr. Keller further stated that the GAO could "go beyond direct manufacturing costs" into such areas as "how research costs are allocated as between the Government contract and commercial business." *Id.*, at 23.

In legislative hearings in 1965, which in part addressed "the extent of the GAO's right to examine contractor books and records," Hearings on Comptroller General Reports to Congress on Audits of Defense Contracts before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess., 3 (1965), the Comptroller General again referred to his position in the *Hewlett-Packard* case, which was still pending in the courts, regarding the proper interpretation of the access provisions. *Id.*, at 45.

where both lower courts have drawn it. Thus, under the four fixed-price contracts in question, the Comptroller General should be permitted access to records of direct costs.[15] He should be barred, however, from inspecting records of costs incurred in the areas of research and development, marketing and promotion, distribution, and administration, except to the extent the contractor has allocated these costs as attributable to the particular contract.[16]

Direct costs certainly pertain directly to even a fixed-price contract, for direct costs are, by definition, readily identifiable as attributable to the specific product supplied under the contract. Consequently, as a rational businessman, the contractor will have some regard for these costs in setting even a catalog price in order to avoid a loss on the product. Because these costs therefore have a very direct influence on the price charged the Government, the GAO would need to

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[15] Direct costs would include the direct manufacturing and overhead costs incurred in producing the specific drug items procured under the four contracts, as identified by the District Court. See *supra*, at 829–830.

[16] JUSTICE WHITE objects that this line drawing permits a contractor to restrict the GAO's access authority by the particular accounting practices the contractor chooses to adopt. *Post*, at 856–857, n. 18. That objection, however, is not accurate. We have indicated that, as a general matter, because of the congressional intent to protect the privacy of the contractor's records involving nongovernmental transactions, the Government is precluded from inspecting records of indirect costs. Nevertheless, the Government is permitted access to some records falling within the latter category if the contractor has made the extra effort of identifying, for his own purposes, some indirect costs that he thinks may be attributable to specific products. To the extent the contractor has done so, the Government is permitted access to records of those costs. This principle does not tie the Government's entire access authority to the accounting practices adopted by the contractor. Such inspection represents a windfall, as it were, to the Government based upon the extra effort the contractor has made in allocating his costs. Without that effort, the Government would not otherwise be permitted to inspect such records because of privacy concerns. Given this added benefit to the Government, it is anomalous to argue that its access authority is being "limited" by the contractor's accounting method.

examine records of these costs to determine whether the contractor is making an excessively high profit or the Government is getting a "fair deal" under the contract. Presumably, indirect costs also influence in some manner the setting of a catalog price, although to what extent is unclear, given the somewhat arbitrary accounting allocations that must be made to determine what portion of indirect costs may be attributed to a specific product. Nevertheless, the degree of intrusion into the contractor's private business affairs occasioned by GAO scrutiny of indirect cost records is far greater, particularly where pure fixed-price contracts are involved. Such an inspection would entail exposure to the GAO of many of the contractor's nongovernmental transactions.[17] We therefore conclude that the appropriate balance of public and private interests in this situation weighs in favor of access to direct cost records but against access to Merck's indirect cost records.[18] Our decision in this regard is

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[17] By contrast, where the contract that serves as the predicate for the GAO's access demand is cost-based—as in a cost-plus contract—the contractor is in no position to complain of the intrusiveness of GAO inspection of indirect cost records. By claiming from the Government full reimbursement for these costs under the cost-based contract, the contractor represents that these costs are justified as attributable to the performance of the Government contract, and not to any nongovernmental transactions. Therefore, the public interest served by permitting the GAO to inspect records supporting these claims clearly outweighs any privacy interests the contractor possesses in those records.

[18] JUSTICE WHITE suggests that, when indirect cost records relate both to governmental and nongovernmental transactions, the GAO should be permitted access to the records of any indirect costs that it can prove had a direct and substantial impact on the price charged to the Government under the contract. *Post*, at 857. This approach is unworkable for both the Government and contractors. To decide these "close questions" of direct pertinence, the parties to the fixed-price contract may be forced to resort to the courts. Bright-line rules upon which the parties' expectations may be firmly established are preferable to the protracted litigation that JUSTICE WHITE's suggestion would engender.

in accord with that of the majority of the Courts of Appeals to have considered this issue.[19]

The Government objects strenuously that barring such access impermissibly constrains the GAO in its efforts to improve the procurement process. In an industry in which indirect costs represent such a large proportion of total costs,[20] access to records of those costs is critical to an understanding of the industry with which the Government is dealing and to an assessment of the fairness of the contract price and the advisability of continued adherence to the negotiated procurement methods employed under those contracts.[21]

As we have already noted, however, in adopting the Hoffman amendment, Congress was apparently willing to forgo the benefits that might be gained from permitting the GAO broad access to the contractor's business records in order to protect those contractors from far-reaching governmental scrutiny of their nongovernmental affairs. By inclusion of that language, Congress injected into the determination of which records are accessible considerations besides the Gov-

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[19] In addition to the decision below, see *SmithKline Corp.* v. *Staats*, 668 F. 2d 201 (CA3 1981), cert. pending, Nos. 81–2082, 81–2268, and *Bristol Laboratories Division of Bristol-Myers Co.* v. *Staats*, 620 F. 2d 17 (CA2 1980) *(per curiam)*, aff'd by an equally divided Court, 451 U. S. 400 (1981). See also *Hewlett-Packard Co.* v. *United States*, 385 F. 2d 1013 (CA9 1967) (permitting access to records of direct production costs, including direct material, direct labor, and overhead costs), cert. denied, 390 U. S. 988 (1968).

[20] The Government suggests that direct costs may represent as little as 9% of the sales price of a pharmaceutical product. Brief for Petitioners in No. 81–1273, p. 34.

[21] We observe, however, that the Government has conceded in this action that it has no reason to suspect that Merck has engaged in any fraud or impropriety in connection with the negotiation or performance of these contracts. App. 41a–44a, 76a. Nor does the Government have any reason to believe that the prices charged under these contracts were unreasonable in any way. *Id.*, at 42a, 76a. In fact, the price under each of the contracts was the lowest price at which Merck sold each of the products to anyone at the time the contracts were awarded. *Id.*, at 26a, 42a.

ernment's need for the information. Thus, any impediment that our holding places in the path of the GAO's power to investigate fully Government contracts is one that Congress chose to adopt,[22] and any arguments that this situation should be changed must be addressed to Congress, not the courts.[23]

V

We address briefly Merck's contention that there is yet another independent ground upon which the Comptroller General should be denied access to any of its cost records. Merck argues that the GAO is not entitled to examine these records because the access demand was not made for a congressionally authorized purpose. Specifically, Merck contends that the access-to-records statutes do not permit the Comptroller General to request records for the purpose of either conducting an economic study of the pharmaceutical industry or securing information desired by individual Members of Congress.

Much of what we have already said provides an answer to this contention. The legislative history reveals that Congress granted the GAO authority to examine directly pertinent records under individual procurement contracts in order to assess the reasonableness of the prices paid by the Government and to detect inefficiency and wastefulness. Given this authorized purpose, there is no reason to conclude that the GAO may not compile the information that it may lawfully

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[22] The extent of any burden is, however, unclear. In fact, in testimony before Congress the Comptroller General candidly expressed doubts about the usefulness of access to records of indirect costs in the pharmaceutical industry, suggesting that the attempt to determine from these records the portion of indirect costs allocable to individual drug products would be "a waste of time." Hearings on Competitive Problems in the Drug Industry before the Subcommittee on Monopoly of the Senate Select Committee on Small Business, 92d Cong., 2d Sess., 8578 (1972).

[23] The GAO's own recognition of this dilemma has prompted it, as outlined in n. 12, *supra*, to seek expanded access authority from Congress. Its efforts for expansion are more appropriately directed to that forum.

obtain, within the statutory limits outlined above, from an investigation of individual contracts in order to arrive at a picture of the pharmaceutical industry generally.[24] Moreover, the fact that two Senators encouraged the GAO to use its lawful authority to the fullest extent possible is irrelevant. The GAO is an independent agency within the Legislative Branch that exists in large part to serve the needs of Congress. If the records sought by the GAO are within the scope of the access-to-records provisions, the fact that the Comptroller General's request had its origin in the requests of Congressmen or that the GAO reported the data to Congress does not vitiate its authority.

VI

Because of the GAO's mandate to detect fraud, waste, inefficiency, and extravagance through full audits of Government contracts, we cannot accept Merck's view that the only records directly pertinent to the four fixed-price contracts at issue are those necessary to verify that Merck actually had an established catalog price for the item procured, that it sold the items in substantial quantities to the general public at the catalog price, that it delivered the product specified, and that it received from the Government no more than the amount due under the contract. On the other hand, given the policy of protecting the privacy of contractors' business records also expressed in the statutory language and legislative history,

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[24] The record indicates that compilation of information lawfully obtainable under its access authority is what the GAO intended to accomplish. One GAO official explained: "[I]f we were to use our right of access under specified Federal contracts, we would attempt, *insofar as possible*, to present a report similar to that which we had proposed to present under the April 1974 proposal [for the second phase of the economic study of the pharmaceutical industry]." App. 154a–155a (emphasis added). GAO officials also recognized that the statutory restrictions on its access authority would necessitate some changes in the approach contemplated under the prior two-phase study based on the voluntary participation of the pharmaceutical companies. *Ibid.*

neither can we accept the Government's contention that it must be permitted access to *all* of Merck's cost records. Accordingly, we affirm the judgment below.

It is so ordered.

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

I join Part V of the Court's opinion, and I concur in the remainder to the extent it upholds the GAO's right to inspect Merck's "direct" cost records.[1] I dissent to the extent the Court refuses to allow the GAO access to *any* of Merck's "indirect" cost records.

The statutory provisions at issue, 10 U. S. C. § 2313(b) and 41 U. S. C. § 254(c), clearly were intended to allow the GAO the right to a reasonable degree of access to contractors' records needed to determine whether prices charged to the Government were excessive. Of course, this right was not intended to be unlimited; the Court correctly identifies a congressional intent to protect private contractors from "officious governmental intermeddling." *Ante*, at 835.

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[1] The Court correctly rejects Merck's contention that *none* of its cost records are subject to inspection by the GAO. Merck's theory has been emphatically rejected by every Court of Appeals that has considered it. In addition to the opinion below in the present case, *Merck & Co.* v. *Staats*, 214 U. S. App. D. C. 418, 665 F. 2d 1236 (1981), see *SmithKline Corp.* v. *Staats*, 668 F. 2d 201 (CA3 1981), cert. pending, Nos. 81–2082, 81–2268; *United States* v. *Abbott Laboratories*, 597 F. 2d 672 (CA7 1979); *Eli Lilly & Co.* v. *Staats*, 574 F. 2d 904 (CA7), cert. denied, 439 U. S. 959 (1978); and *Hewlett-Packard Co.* v. *United States*, 385 F. 2d 1013 (CA9 1967), cert. denied, 390 U. S. 988 (1968). Apparently recognizing the untenability of the argument advanced here by Merck, the pharmaceutical manufacturer in *Bristol Laboratories Division of Bristol-Myers Co.* v. *Staats*, 428 F. Supp. 1388 (SDNY 1977), aff'd, 620 F. 2d 17 (CA2 1980), aff'd by an equally divided Court, 451 U. S. 400 (1981), did not even dispute that it was "obliged by the terms of the contracts to provide access to records of its manufacturing costs, records which relate to the pricing of the products delivered and records required to verify all data obtained during the course of the review." 428 F. Supp., at 1389.

Unfortunately, for the conceded purpose of creating a bright-line test, *ante*, at 841, n. 18, the Court goes astray by adopting a rule that flatly bars the GAO from access to all indirect cost records pertaining to most fixed-price contracts, regardless of how urgent the need for them might be. The Court frankly admits that its rule may deny the GAO access to cost records critical to an assessment of the fairness of the contract price, thereby impeding the GAO's ability to protect the public against wasteful Government expenditures. *Ante*, at 842–843. These undesirable consequences could be avoided, without sacrificing the contractors' right to be free from unwarranted GAO "snooping," by holding the Government to the burden of showing that requested records likely had a direct and substantial impact on the price charged to the Government and thus are "directly pertinent" to the contract.

I

In each of the four contracts involved here, the United States agreed to purchase certain pharmaceutical products from Merck at a fixed price. In each instance, Merck proposed a contract price based on its catalog or "market" price, and the Government contracting officer accepted the proposal without any "haggling" or other negotiation as to price. Each of the contracts contains the statutorily mandated provision allowing the GAO the right to inspect Merck's books and records that are "directly pertinent" to the contract.

The GAO now seeks to examine those Merck records that indicate the cost to Merck of the goods sold to the Government. The GAO deems such an examination necessary to carry out its statutory duty to "investigate . . . all matters relating to the receipt, disbursement, and application of public funds," and to "make recommendations looking to greater economy or efficiency in public expenditures." 31 U. S. C. § 53(a).

By inspecting Merck's cost records, the GAO hopes to be able to estimate whether the contract price paid by the Gov-

ernment was a fair one. The GAO has confirmed by experience the common-sense observation that the mere "fact that a product is listed in a manufacturer's catalog and offered to any customer is no assurance that . . . the standard catalog price is reasonable."[2] If the GAO's inspection were to reveal that Merck's prices were unreasonably high, the GAO presumably would recommend to the contracting agencies that they "negotiate prices more carefully or . . . obtain greater competition in future similar procurements,"[3] or that they take other action "looking to greater economy or efficiency," 31 U. S. C. § 53(a), in future expenditures.

The Court concludes, however, that, despite the inclusion of the access-to-records provision in the contracts, the GAO has no right to inspect any of Merck's indirect cost records to determine how much it cost Merck to produce the products sold to the Government. This holding exalts the contractors' privacy interest to such a degree that it displaces the GAO's right to inspect records unquestionably needed for an accurate determination of the fairness of the contract price. Congress did not intend this order of priority of interests. What Congress did intend was that contractors be spared the burden of *unwarranted* intrusions. Congress did not want the GAO to be irresponsibly "snooping" into records lacking relevance to the question whether the Government paid a fair price for the products it purchased. But Congress did not wish to deny the GAO access to records legitimately needed to detect waste, extravagance, and ineffective procurement. To the extent the GAO can prove that some or all of a contractor's indirect cost records fall into this latter category, the GAO's right of access should be sustained.

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[2] Hearings on Relation of Cost Data to Military Procurement before the Subcommittee for Special Investigations of the House Committee on Armed Services, 88th Cong., 1st Sess., 8 (1963) (remarks of Robert F. Keller, General Counsel of the GAO).

[3] App. 23a (affidavit of Paul G. Dembling, General Counsel of the GAO).

II

I begin with the language of the statute. *Jackson Transit Authority* v. *Transit Union*, 457 U. S. 15, 23 (1982); *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 568 (1979). The legislation at issue requires unadvertised Government contracts to include a clause allowing the GAO to examine any of the contractor's books, documents, papers, or records "that directly pertain to, and involve transactions relating to, the contract . . . ." 10 U. S. C. § 2313(b). See 41 U. S. C. § 254(c).

"'[I]t is hard to imagine anything more directly related to a contract than the cost of producing the items covered by it or the matters going into the makeup of the price.'" *Eli Lilly & Co.* v. *Staats*, 574 F. 2d 904, 913 (CA7), cert. denied, 439 U. S. 959 (1978). Accord, *SmithKline Corp.* v. *Staats*, 668 F. 2d 201, 208–209 (CA3 1981), cert. pending, Nos. 81–2082, 81–2268; *Hewlett-Packard Co.* v. *United States*, 385 F. 2d 1013, 1016 (CA9 1967), cert. denied, 390 U. S. 988 (1968). The Court does not contend otherwise. Indeed, all the Court has to say about the literal statutory wording is that it requires "some close connection between the type of records sought and the particular contract." *Ante*, at 831. But there is, of course, no reason why the records of all indirect costs inherently lack the requisite "close connection." As the Court fully recognizes, *ante*, at 842–843, in some instances indirect costs have a critical bearing on the makeup of the contract price. The Government should at least be allowed an opportunity to prove that such is the case, and, to the extent it succeeds in this endeavor, the GAO should be allowed access.

III

Even if, contrary to my belief, the statutory language is somehow regarded as ambiguous, resort to the legislative history further refutes the Court's position. The legislative history of the access-to-records provisions is relatively brief and to the point. It demonstrates beyond doubt that Con-

gress authorized the GAO to examine all of a contractor's books legitimately needed to evaluate Government procurement techniques by ascertaining whether the Government had paid a reasonable price for the contractor's goods or services.

Representative Hardy, the bill's sponsor, indicated that the bill was intended to improve the adequacy of Government procurement techniques in various ways. He expressly remarked:

> "The major purposes of this bill are twofold: One, to give the Comptroller General the proper tools to do the job the Congress has instructed him to do; and, two, to provide a deterrent to improprieties and wastefulness in the negotiation of contracts." 97 Cong. Rec. 13198 (1951).

As noted *supra*, at 846, Congress has instructed the GAO to "investigate . . . all matters relating to the receipt, disbursement, and application of public funds," and to "make recommendations looking to greater economy or efficiency in public expenditures." 31 U. S. C. § 53(a).[4]

Representative Hardy early explained to his colleagues that normal procurement procedures called for competitive bidding but that procurement by negotiation was sometimes necessary. In the latter context, where there is no competitive bidding to "operat[e] as a brake on the price which a contractor can demand from the Government," Representative Hardy saw the need to establish "every reasonable safeguard against waste and extravagance in the spending" of Government funds. 97 Cong. Rec., *supra*, at 13198. He felt that, no matter how "conscientious and honest" the Government representatives might be, the contractor's representatives would, in the great majority of cases, have a tremendous ad-

[4] In addition, "[t]he Comptroller General is authorized and directed to make an expenditure analysis of each agency in the executive branch of the Government . . . which . . . will enable Congress to determine whether public funds have been economically and efficiently administered and expended." 31 U. S. C. § 60.

vantage from the standpoint of both training and experience. *Ibid.* Thus, there was "every chance in the world that the Government [would] come out on the short end of the deal," and Representative Hardy deemed it necessary to "at least enable the [GAO] to check the transaction, both from the Government records and the contractors' books." *Ibid.*

The debate continued two days later when Representative Hardy proposed an amendment that would have allowed agency heads the discretion to omit the access-to-records clause from contracts with foreign contractors, *id.*, at 13371, and Representative Harvey proposed an amendment that would have exempted "a manufacturer or processor who is a supplier of material to a primary contractor and who is not a subcontractor" from the scope of the bill's coverage. *Id.*, at 13376. Both of these proposals were ultimately defeated, but, during the lively debate on the proposed amendments, several Members of Congress stated without contradiction that the bill would allow the GAO extremely broad authority to examine records. For example, Representative Harvey asked whether, if the bill became law, a subcontractor of a primary Government contractor "would be subject to having *all* of his books opened up for inspection by Government officials." *Id.*, at 13372 (emphasis added). Representative Hardy replied that it would, unless the subcontractor only supplied some "casual item" in connection with the performance of the contract. *Ibid.* Based on this understanding, Representative Harvey later argued that his limiting amendment was needed, because otherwise "every manufacturer . . . of . . . goods that eventually find their way into defense production . . . is going to have to supply all the answers to the GAO on everything he manufactures." *Id.*, at 13376. "[E]very section of his books will have to come under the complete scrutiny of the GAO." *Ibid.* In response, Representative Hardy did not dispute this characterization of the scope of the GAO's authority, but he nevertheless opposed the Harvey amendment, because it "would make it impossi-

ble frequently to obtain information which would be vital in the study of a contract." *Ibid.*

Representative Hoffman, a strong opponent of the bill, several times during the debate observed that the "GAO under this bill can go into the books of [contractors] and ask and get from them anything and everything they want." *Id.*, at 13373. He indicated his belief that the bill would allow the GAO "to snoop into [a contractor's] books and find out what [the goods or services] cos[t] or what will be a fair price or what profit we make." *Ibid.* See also *id.*, at 13375, 13377. Standing alone, of course, the statements of an opponent of the bill, such as Representative Hoffman, would not carry much weight,[5] but here, even though all comments pro and con were made in the midst of a free-wheeling debate, the proponent of the bill, Representative Hardy, in no way took issue with Representative Hoffman's view of the scope of the GAO's authority. Representative Hardy's essential response was that it was necessary to require contractors to afford the GAO this broad authority, and that Representative Hoffman's fears of excessive GAO "snooping" were groundless, because the GAO would have neither the inclination nor the manpower to examine the records of every individual supplier. *Id.*, at 13376, 13377.

The original Hardy bill required the inclusion, in negotiated contracts, of a clause allowing the GAO the right to examine any records that were "pertinent" to the contract. At the very end of the debate, Representative Hoffman proposed the amendment that added the word "directly" before the word "pertinent." *Id.*, at 13377. Representative Hoffman explained that he had discussed his amendment with Representative Hardy, the bill's sponsor, and that, although the amendment was "not all that it should be," it was the

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[5] See, *e. g.*, *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U. S. 612, 639–640 (1967); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 394 (1951).

most that Representative Hardy would agree to. *Ibid.*[6] Representative Hoffman then stated that the purpose of his amendment was "to limit the 'snooping' that may be carried on under this bill which we do not have the votes to defeat." *Ibid.* At that point, Representative Hardy remarked that he had no objection to the amendment, and it was accepted without further discussion. *Ibid.*[7]

In light of Representative Hardy's consistent position throughout the debate, it cannot plausibly be argued that he agreed to the Hoffman amendment with the understanding that it effected a drastic reduction in the scope of the bill's coverage or purpose. As outlined above, Representative Hardy continuously spoke of the need to provide a mechanism to combat waste and extravagance in federal procurement, and he vigorously and successfully opposed the Harvey amendment, which would have significantly limited the bill's

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[6] In fact, it appears that it was Representative Hardy, *not* Representative Hoffman, who proposed the language of the amendment that limited the Government to "directly pertinent" records. Representative Hoffman stated that this language was "the best *he* [Representative Hardy] *could think of*." 97 Cong. Rec. 13377 (1951) (emphasis added). Apparently what happened is that Representative Hoffman and Representative Hardy had a private meeting, during which Representative Hoffman suggested the need for a limiting amendment. Representative Hoffman had stronger language in mind, which Representative Hardy refused to accept. Representative Hardy must have then proposed the "directly pertinent" language to placate his colleague, and Representative Hoffman, though not satisfied, "was rather forced to accept it and to agree with him." *Ibid.* Thus, although the Court is correct in stating, *ante*, at 833, that the amendment "circumscribe[d] the inquiry the Comptroller General was authorized to undertake," it is clear that this circumscription was only to the extent agreeable to Representative Hardy, who, as shown by his opposition to the Harvey amendment, and his other remarks throughout the debate, clearly would not have agreed to a sharp reduction in the scope of his bill.

[7] Immediately after passage of the Hoffman amendment, the House passed the bill, as amended, 97 Cong. Rec. 13378 (1951). On the following day, the Senate passed it without any debate whatsoever. *Id.*, at 13411.

scope. His acceptance of the addition of the word "directly" may have been largely a sop to the bill's opponents. The most that can be said is that Representative Hardy accepted the amendment to allay concerns that the legislation "would let the GAO go into everybody's business and look it over if they just wanted to take a look at it." *Id.*, at 13373 (Rep. Hoffman). The amendment gave assurance that the bill would not be used as a basis for inspection of books and records having no substantial connection with Government procurement. But the amendment definitely was not intended to bar the GAO's access to records legitimately needed to assess the reasonableness of prices charged to the Government, and thereby to protect the Government against waste, excessive prices, and ineffective procurement.[8]

IV

Despite the plain statutory language and legislative history, the Court refuses to uphold the GAO's right of access to all cost records that are essential to an accurate determination of whether the Government wasted money by entering into these contracts. Adopting the so-called "*Bristol* test,"[9] the Court affirms a judgment that limits the GAO's access to records pertaining to a contractor's

> "manufacturing costs (including raw and packaging materials, labor and fringe benefits, quality control and supervision), manufacturing overhead (including plant

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[8] Accord, *Merck & Co.* v. *Staats*, 214 U. S. App. D. C., at 431, 665 F. 2d, at 1249 (Mikva, J., concurring in part and dissenting in part); *Eli Lilly & Co.* v. *Staats*, 574 F. 2d, at 916; Comment, 92 Harv. L. Rev. 1148, 1157–1158 (1979) ("The court [in *Eli Lilly*] correctly rejected Lilly's argument that the insertion of the word 'directly' into the 'directly pertinent' formula sharply narrowed the scope of inquiry to be allowed the GAO").

[9] The test was first adopted by the District Court in *Bristol Laboratories Division of Bristol-Myers Co.* v. *Staats*, 428 F. Supp. 1388 (SDNY 1977), aff'd, 620 F. 2d 17 (CA2 1980), aff'd by an equally divided Court, 451 U. S. 400 (1981).

> administration, production planning, warehousing, utilities and security), royalty expenses, and delivery costs." [10]

The *Bristol* test excludes

> "books, documents, papers, or records with respect to research and development, marketing and promotion, distribution and administration (except to the extent such data may be included in the cost items listed above)." [11]

The Court describes this test, perhaps inaccurately,[12] as being based on a "direct costs v. indirect costs" or an "allocated costs v. unallocated costs" dichotomy.

The courts that have adopted this test have no doubt been influenced by a need to come up with *some* form of reasonable limitation on the broad access demand the GAO has made. The GAO claims it has the right to examine records pertaining to *every* cost "defrayed from commingled general revenues that include the Government's payments under the contract." I agree that the GAO's demand is somewhat overbroad; the Court correctly observes, *ante*, at 836, that it would require Merck to allow inspection of cost records totally unrelated to the Government contracts, such as records of expenditures for raw materials used to manufacture products other than those sold to the Government under the contracts.[13] However, I am not convinced that the proper conclusion is to limit the GAO to the cost records allowable under the *Bristol* test.

The *Bristol* court adopted its standard solely on the basis of the cost records that the contractor was *willing* to disclose

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[10] App. to Pet. for Cert. in No. 81–1273, p. 39a. See *ante*, at 829–830.

[11] App. to Pet. for Cert. in No. 81–1273, p. 40a. See *ante*, at 830.

[12] The *Bristol* court itself stated that the costs records held examinable under its test are "by no means . . . limit[ed]" to direct costs. 428 F. Supp., at 1391.

[13] The Court is also correct in concluding, *ante*, at 837–839, that, because the GAO's interpretation of the statute has not been consistent, it is not entitled to particular deference.

to the GAO. The court felt that the contractor's offer "reflected a responsible and reasonable effort to distinguish 'directly pertinent' matter within the meaning of the access to records clause."[14] The court thus accepted the contractor's contention that the cost records it was not willing to disclose had "only the most general relation, if any, to the prices charged."[15]

Although cost records having, at most, only an insubstantial relation to the price charged are not "directly pertinent" to the contract, it is apparent that many of the records deemed unexaminable under *Bristol* relate to costs that may have had a critical bearing on the prices charged, and that would be of central importance to a GAO inquiry into the fairness of these prices. In the pharmaceutical industry, it has been estimated that "direct" or "allocated" costs constitute only about nine percent of the sale price of individual products. The so-called "indirect" or "unallocated" costs—primarily research and development, advertising and other promotion, general administrative expenses, and taxes—and profit are much larger and economically more significant.[16] Yet, under the *Bristol* test, the GAO is denied access to *all* records in this category, thus making it impossible for the GAO to make an accurate assessment of the fairness of the prices and thus the adequacy of the Government's procurement technique.[17]

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[14] 428 F. Supp., at 1391.

[15] *Id.*, at 1390.

[16] *Eli Lilly & Co.*, *supra*, at 913; *Merck & Co.* v. *Staats*, *supra*, at 429, 665 F. 2d, at 1247 (Mikva, J., concurring in part and dissenting in part); Reekie, Price & Quality Competition in the United States Drug Industry, 26 J. Indus. Econ. 223, 235 (1978); Rucker, Public Policy Considerations in the Pricing of Prescription Drugs in the United States, 4 Int'l J. Health Services 171, 173 (1974).

[17] For example, the *Bristol* test might not allow the GAO to examine a contractor's records of advertising costs. One would imagine that, if the GAO were aware that a great percentage of the cost of the products of a certain company went to support a large advertising campaign, rather

In my view, the correct rule in a case of this nature is that any books or records that bear directly on the question whether the Government paid a fair price for the goods or services it purchased are "directly pertinent" to the contract of purchase. Under this test, for example, the cost records of an advertising campaign to promote only the particular products sold to the Government, or a research project designed specifically to develop or improve these products, would clearly be "directly pertinent."[18] On the other hand,

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than, say, to maintain quality control, the GAO might recommend to the contracting agency that it not deal with that company in the future. Yet, under the *Bristol* test, the GAO might not be able to obtain the information needed to make such a recommendation.

[18] On this point, the Court and I appear to be in agreement, although this fact is far from clear from the Court's opinion. At one point, the Court defines indirect costs as "costs incurred in the areas of research and development, marketing and promotion, distribution, and administration, *which are not directly attributable to a particular product.*" *Ante*, at 836, n. 11 (emphasis added). See also *ante*, at 841 (indirect costs are those requiring "somewhat arbitrary accounting allocations"). This definition indicates the Court agrees with me that records of costs in these areas that *are* directly attributable to the products sold to the Government—such as the cost records of an advertising campaign or a research project designed to promote or develop only the specific products sold to the Government—should be considered "direct costs" that are subject to examination by the GAO.

Potential confusion arises, however, in view of the fact that the Court affirms the judgment below in its entirety, even though that judgment can perhaps be read as denying the GAO access to product-specific records in areas such as advertising and research. The judgment denies access to all records in areas such as research and advertising, "except to the extent such data may be included in the cost items [to which the GAO is allowed access]." *Merck & Co.* v. *Staats*, 214 U. S. App. D. C., at 428, 665 F. 2d, at 1246. Product-specific records in areas such as advertising and research do not appear to be included among any of the access-permitted cost items mentioned in the judgment, unless it can be said that they constitute records of "manufacturing costs." See *ibid.*

The Court adds to the uncertainty with its statement, *ante*, at 840, that the GAO should be allowed access to records in such areas as research and advertising "to the extent the contractor has allocated these costs as attrib-

records of advertising campaigns and research projects involving only unrelated products would lack the requisite degree of pertinence. Of course, in many instances a commercial advertisement or a research project will be designed to promote or develop both products sold to the Government and other, unrelated products. With respect to cost records of efforts such as these, there might be some close questions as to whether such records are "directly pertinent" to the Government contracts. If, however, the GAO could bear the burden of proving that the records are of costs that likely had a direct and substantial impact on the price charged to the Government under the contract, I would allow the GAO access to the records.

V

The inquiry does not necessarily come to an end once the GAO establishes that it has a statutory and contractual right to inspect particular records. In addition to the statutory

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utable to the particular contract." This language suggests that the contractor can avoid a GAO examination of even product-specific records in these areas by arbitrarily refusing to attribute these costs to the specific products.

In light of the Court's emphasis on the need for "[b]right-line rules upon which the parties' expectations may be firmly established," *ante*, at 841, n. 18, it is surprising that the Court is not precise on this point. My "objection" is not, as the Court indicates, *ante*, at 840, n. 16, that the Court ties the GAO's ability to inspect indirect cost records to the contractor's accounting practices. Rather, my concern is with the tension between the Court's holding and the judgment it affirms without modification. Under the Court's rationale, product-specific research and advertising costs are "direct costs" and are subject to GAO inspection regardless of the contractor's accounting practices. It is not clear that the judgment below permits this result. Nor is it clear that the judgment would allow the GAO to conduct a "windfall" inspection of contractor-allocated indirect cost records, which the Court expressly sanctions. *Ibid.* The potential problem arises mainly because the opinion speaks generally of a direct-indirect dichotomy, although it affirms a judgment that may not break down neatly along these lines. In any event, I read the Court's opinion as allowing access to all records that are or must fairly be attributed to the specific products sold to the Government.

"directly pertinent" limitation, the GAO's right of inspection is further circumscribed, and the contractors' right to privacy is further protected, by constitutional standards, such as the Fourth Amendment reasonableness requirement.

Where, as here, the GAO wishes to see a contractor's records and the contractor declines to accede voluntarily to a GAO request, the GAO must issue an administrative subpoena. If the contractor refuses to comply with the subpoena, the GAO must apply to a district court for enforcement of the subpoena. 31 U. S. C. § 54(c) (1976 ed., Supp. V).[19]

Once in the district court, a contractor such as Merck has the benefit of all of this Court's jurisprudence limiting the bounds of an agency's right to demand the production of a private entity's records. Essentially, in assessing an agency's application for enforcement of an administrative subpoena, we have insisted that the agency's demand be reasonable. The general rule is that "when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unduly burdensome." *See* v. *City of Seattle*, 387 U. S. 541, 544 (1967). See *United States* v. *Morton Salt Co.*, 338 U. S. 632, 652–653 (1950); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 208 (1946); 1 K. Davis, Administrative Law Treatise § 4:15 (2d ed. 1978). This standard is a flexible one that takes into account the extent to

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[19] The GAO has had this subpoena power only since 1980. See Pub. L. 96–226, § 102(c), 94 Stat. 312 (codified as 31 U. S. C. § 54(c) (1976 ed., Supp. V)). Prior to 1980, the GAO could only sue for specific performance of its contractual right of access. See, *e. g.*, *Hewlett-Packard Co.* v. *United States*, 385 F. 2d 1013 (CA9 1967), cert. denied, 390 U. S. 988 (1968). The GAO can still opt in favor of this latter, slower course, but the Government does not make any claim that its rights in a specific performance action would be any different from those in an action for judicial enforcement of an administrative subpoena. See Tr. of Oral Arg. 29–30.

which the public interest will be served if the subpoena is enforced. *See* v. *City of Seattle*, *supra*, at 545.

In the present case, Merck has claimed that compliance with the GAO's demand would entail substantial expense and disruption of its operations. This claim is based on evidence that the proposed GAO inspection would require Merck to allow an entire team of GAO auditors to remain on site at Merck for over two years.[20] This, of course, is a matter for first-instance determination by the District Court, but, if the proposed GAO inspection would in fact cause such a high degree of interference with Merck's business, a credible argument could be made that compliance would be unreasonable and unduly burdensome and that the GAO's access should therefore be limited in some way.

VI

In view of the foregoing, I would remand these cases to the District Court, with instructions to uphold the GAO's request for access to Merck's "direct" and "indirect" cost records, but only to the extent that: (1) the records sought by GAO related to costs that likely had a direct and substantial impact on the prices charged to the Government under the contracts; and (2) the request is reasonable in scope and would not unduly burden Merck. To the extent the GAO's demand conforms to these statutory and constitutional standards, Merck should be required to allow the GAO's examination to proceed.[21]

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[20] At the time the GAO issued its demand for access to Merck's records, it made identical demands to five other drug companies. Apparently, only one of the six companies, Hoffman-LaRoche, Inc. (Hoffman), voluntarily acceded to the GAO's request. According to Merck, a team of GAO auditors remained on site at Hoffman from July 1975 to July 1977 without completing the review, and, in July 1977, Hoffman terminated its voluntary participation. Of course, even if Merck's claim as to the Hoffman precedent is accurate, Merck would have to prove that a GAO review of its records would require similar or greater disruption.

[21] The Court does not explicitly discuss the degree of access permissible to the GAO in instances where the Government enters into a fixed-price

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

The question before us is the proper construction of the access-to-records clauses required by law to be inserted in various Government contracts. These clauses authorize the Comptroller General to inspect any records that "directly pertain to and involve transactions relating to" the contract into which the clause was inserted. 10 U. S. C. § 2313(b); see 41 U. S. C. § 254(c) (permitting access to "directly pertinent" records "involving transactions related to" the contracts). The Court now holds that these clauses permit access to certain cost records, even when the contract is not cost-based and was negotiated without regard to costs. I cannot agree that cost records are "directly pertinent" to non-cost-based contracts. I therefore dissent insofar as the Court permits access to such records.

The Court correctly begins its analysis by focusing on the language of the statute, noting that it contains "words of limitation designed to restrict the class of records to which access is permitted by requiring some close connection between the type of records sought and the particular contract." *Ante*, at 831. But after this nod in the direction of the statutory language, the Court, unaccountably in my estimation, fails to examine the type of records sought, the nature of the particular contract, and the closeness of the connection between them. Instead, the Court wanders off to explore the general "aims embraced by Congress in enacting the access-to-records provisions": protecting contractors from govern-

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contract in reliance on cost representations by the contractor. There can be little doubt, however, that, in such an instance, the GAO is entitled to inspect all of the contractor's cost records, both direct and indirect. Under these circumstances, the contract is "cost-based" and "the public interest served by permitting the GAO to inspect records supporting these claims clearly outweighs any privacy interests the contractor possesses in those records." *Ante*, at 841, n. 17.

mental intrusion, and equipping the General Accounting Office with a tool to detect fraud and waste in Government contracting. *Ante*, at 833. Given the "tension" between these "dual, conflicting aims," the Court concludes that it must "balance the public interest served by full GAO investigations against the private interest in freedom from officious governmental intermeddling in the contractor's private business affairs." *Ante*, at 834–835. The Court then reaches what it deems an "appropriate accommodation of the competing goals reflected in the legislative history" by holding that the Comptroller General may inspect records of "direct costs," but is barred from inspecting other records except to the extent they are allocated to the particular contract. *Ante*, at 839–840.

I agree that the legislative history reflects conflicting congressional goals, but it appears to me that the necessary "balancing" and "accommodation" of these goals has already been accomplished by Congress. Congress may well have intended to give the GAO a tool to detect fraud and waste and to improve the procurement process, but the particular tool it crafted was a limited one. It gave the Comptroller General access to a narrow category of records: those directly pertinent to the contracts between the Government and its contracting partner.

The Court asserts that Merck's records of direct costs are directly pertinent to its contracts with the Government because such costs "are, by definition, readily identifiable as attributable to the specific *product* supplied under the contract." *Ante*, at 840 (emphasis added). Records of indirect costs are not pertinent to Merck's contracts, the Court says, because such records are "completely unrelated to *either the contract* underlying the access demand *or the product* procured under that contract." *Ante*, at 836 (emphasis added). But, as the Court obviously recognizes, there is a difference between records pertinent to the "contracts" by which the Government does its purchasing, and records pertinent to

"products" ultimately purchased under those contracts.[1] In interpreting the access-to-records statutes we must "presume that Congress chose its words with . . . care," *FBI* v. *Abramson*, 456 U. S. 615, 635 (1982) (O'CONNOR, J., dissenting), and Congress chose to require pertinence to the specific "contract" at issue, not to the "product" procured.

It is a fundamental canon of statutory construction that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U. S. 37, 42 (1979). In its ordinary meaning, a "contract" is a legally enforceable bargain, formed by mutual consent and supported by consideration. Restatement (Second) of Contracts § 17 (1979); 1 W. Jaeger, Williston on Contracts § 18 (3d ed. 1957). Particular goods and services may be the subject matter of a contract, but the "contract" itself is the agreement between the parties. Nothing in the legislative history suggests that Congress intended any other meaning by its choice of the word "contract."[2] The access-to-records statutes were intended to

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[1] For example, Merck's research notes, pharmaceutical formulas, and other trade secrets might be records directly pertinent to the "products" purchased by the Government, and might be of assistance to the Government in evaluating the success of its procurement policies. But unless these records were also pertinent to Merck's contracts with the Government, they would not be available to the Comptroller General under his access-to-records authority.

[2] The first Court of Appeals case interpreting the access-to-records statutes, *Hewlett-Packard Co.* v. *United States*, 385 F. 2d 1013 (CA9 1967), cert. denied, 390 U. S. 988 (1968), reached a result similar to that reached by the Court today. In *Hewlett-Packard*, the Court of Appeals recognized that if the word "contract" were given its ordinary meaning, to refer to "the terms and conditions of an agreement and the procedures whereby those terms and conditions were formulated," cost records could not be regarded as "directly pertinent" to a non-cost-based contract. 385 F. 2d, at 1016. In an effort to provide the Government with greater access, however, the Court of Appeals invented its own definition of the word "contract." Without explanation or citation of authority, the Court of Appeals declared:

permit inspection of cost records when the negotiation of a particular contract depended on representations about the contractor's costs, or when the contract price itself varied according to costs. See 97 Cong. Rec. 13198 (1951) (remarks of Rep. Hardy).[3] There is, however, no indication that Con-

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"[T]he word 'contract,' as used in this statute is intended to have a broader meaning, embracing not only the specific terms and conditions of the agreement, but also the general subject matter. The subject matter of these four contracts is the procurement of described property by the Government." *Ibid.*

The court concluded that cost records "directly pertain to that subject matter, because if out of line with the contract price, the contract may have been an inappropriate means of meeting this particular procurement need of the Government." *Ibid.*

Although the Court in the present case does not explicitly adopt this strained reading of the word "contract," it approves the so-called "*Bristol* test" which was developed partly in reliance on *Hewlett-Packard*, and partly in response to a decision by one of the parties voluntarily to surrender certain types of records. See *Bristol Laboratories Division of Bristol-Myers Co.* v. *Staats*, 428 F. Supp. 1388 (SDNY 1977), aff'd, 620 F. 2d 17 (CA2 1980), aff'd by an equally divided Court, 451 U. S. 400 (1981). The Court of Appeals in this case and the Court of Appeals for the Third Circuit, *SmithKline Corp.* v. *Staats*, 668 F. 2d 201 (1981), cert. pending, Nos. 81–2082, 81–2268, have applied the "*Bristol* test" without independent analysis. In adopting this test, the Court never explains whether it agrees with the definition of "contract" developed in *Hewlett-Packard*, or whether it believes some other definition leads to the same result.

[3] Representative Hardy, the sponsor of the legislation, gave several examples of contracts in which the access-to-records clauses would be useful. The first was a construction contract in which the Government agreed to pay a fixed overhead rate "as a proportion of direct labor costs or as a lump sum . . . based upon the experience of the contractor in performing similar work in the past." The second was a pair of contracts, one cost-plus and one fixed-price, in which "the contractor was charging to the [cost-plus] contract expenses which should have been charged to the fixed-price contract." The third was a contract with a price redetermination clause, authorizing "an increase or decrease in the price payable under the contract as the work progresses or after it has been completed." 97 Cong. Rec. 13198 (1951). In each of these three examples, the contractor's costs were highly relevant to the negotiation or performance of the contract, and cost records thus would have been pertinent to the contract. But neither Rep-

gress intended to permit such inspection when costs were not relevant to the contract's negotiation, its terms, or its performance.

Apparently recognizing that cost records are not accessible to the Comptroller General unless they bear some relationship to the actual contracts at issue, the Court asserts that direct cost records are pertinent to non-cost-based contracts because "the contractor will have some regard for these costs in setting even a catalog price in order to avoid a loss on the product." The Court concludes that "these costs therefore have a very direct influence on the price charged the Government." *Ante*, at 840.[4] But the fact that costs may affect a seller's decision to offer a certain price does not make costs directly pertinent to the contract. A contract, after all, is a meeting of the minds. Many factors may affect one party's willingness to make an offer or the other party's willingness to accept it, but the vast majority of these factors are not mentioned in the bargaining process and play no part in the agreement ultimately reached. An unarticulated motive for one party's assent to a bargain is not pertinent, much less "directly pertinent," to the bargain itself.

Pursuant to the contracts at issue here, Merck has promised to provide various pharmaceutical products and the Government has promised to pay a certain price. The Government's promise was based on Merck's standard catalog price for the products purchased. Information about Merck's pro-

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resentative Hardy nor any other Member of Congress suggested that cost records would be pertinent to a contract in which the price was negotiated without regard to the contractor's costs.

[4] When a contract is not cost-based, the relationship between direct costs and prices may be tenuous. In these cases, there is every reason to suppose that Merck's prices are not related to its direct costs; the Court notes, *ante*, at 842, n. 20, the Government's suggestion that "direct costs may represent as little as 9% of the sales price of a pharmaceutical product." Merck may have taken direct costs into account in setting its catalog price, but it may equally well have relied on other factors, such as market surveys or prices set by its competitors.

duction costs was not requested, and neither the contract price nor its performance was tied to costs in any respect. Merck's costs were thus irrelevant to the bargain reached by the parties. Because the Government chose not to make costs an issue during the negotiations, the terms of the contracts would have been the same whether Merck's costs represented 1 percent, 10 percent, or 100 percent of the price the Government agreed to pay. The conclusion seems inescapable that Merck's costs, and consequently its cost records, are not pertinent to the agreements it entered into with the Government.[5]

If the Government is concerned that it may be paying too high a price for pharmaceutical products, it is always free to ask for cost data in connection with any contract it negotiates in the future. Cost records then would be pertinent, because representations about costs would form part of the basis for the bargain between the parties. In this case, however, costs were not relevant to the Government's decision to contract with Merck. Cost records do not become "directly pertinent" to these contracts simply because the Government now wants information that did not concern it at the time of contracting.

I would hold that when the terms of a contract are not tied to costs and the contractor makes no representations about costs during its negotiations with the Government, cost records do not "directly pertain to and involve transactions relating to the contract" and are not subject to inspection by the Comptroller General. The only records "directly pertinent" to such a contract would be those necessary to verify the terms of the contract and the representations upon which

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[5] I agree with the Court that the Hoffman amendment, adding the word "directly" before "pertinent" in the statute, was intended to "circumscribe the inquiry that the Comptroller General was authorized to undertake." *Ante*, at 833. I find it unnecessary to place much emphasis on this amendment, however, because I do not regard cost records as being at all pertinent to a non-cost-based contract.

the contract was based. In this case, the Comptroller General's access would be limited to those records necessary to verify that Merck actually had an established catalog price for the products it sold, that it sold the products in substantial quantities to the general public at the catalog price, that it delivered the product specified, and that it received from the Government no more than the amount due under the contract. To the extent the Court concludes that the Comptroller General may obtain Merck's cost records as well, I dissent.

Reporter's Note

The next page is purposely numbered 1001. The numbers between 866 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM FEBRUARY 23 THROUGH APRIL 18, 1983

FEBRUARY 23, 1983

Certiorari Granted. (See No. 81–896, *ante*, p. 44.)

FEBRUARY 28, 1983

Affirmed on Appeal

No. 82–952. MARYLAND ET AL. *v.* UNITED STATES ET AL.;

No. 82–953. TANDY CORP. *v.* UNITED STATES ET AL.;

No. 82–992. NORTH AMERICAN TELEPHONE ASSN. *v.* UNITED STATES ET AL.; and

No. 82–1001. ILLINOIS *v.* UNITED STATES ET AL. Affirmed on appeals from D. C. D. C. Reported below: 552 F. Supp. 131.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE WHITE join, dissenting.

These consolidated cases raise questions concerning the settlement of a civil antitrust suit brought by the United States against American Telephone & Telegraph Co. (AT&T). In January 1982, the parties announced a settlement in the form of a consent decree. The proposed settlement was filed in the District Court for the District of Columbia, which ordered the start of procedures provided for in § 2 of the Antitrust Procedures and Penalties Act, 88 Stat. 1706, 15 U. S. C. § 16(b) *et seq.* (Act).

The Act provides:

> "Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest." 15 U. S. C. § 16(e).

The District Court issued a lengthy opinion discussing the proposed decree. 552 F. Supp. 131 (1982). It found that most of the decree's provisions were in the public interest, but stated that it would not approve the decree unless the parties agreed to several changes. The parties acquiesced,

and the District Court then approved and entered the amended decree and a final judgment dismissing the case.

The District Court allowed appellants to intervene for purposes of appealing the final judgment and certified their appeals for immediate consideration by this Court under the Expediting Act, 15 U. S. C. § 29(b).

In Nos. 82–952 and 82–1001, several States contend that the decree improperly pre-empts state regulation of the telephone industry. They contend their regulation of the industry is "state action" which is exempt from the Sherman Act under *Parker* v. *Brown*, 317 U. S. 341 (1943). Thus they do not appear to challenge the conclusion that this consent decree is in the public interest; they claim that the District Court lacked the authority to override state law by entering this consent decree.

The District Court reasoned that "[s]ince the conduct which is the subject of these lawsuits is . . . well within the jurisdiction of the federal antitrust laws . . . it would make no sense to hold that, in providing a remedy for anticompetitive conduct, the Court must refrain from interfering with state regulation," and "[t]he same rationale applies to . . . a consent decree." 552 F. Supp., at 158, and n. 111. I am troubled by the notion that a district court, by entering what is in essence a private agreement between parties to a lawsuit, invokes the Supremacy Clause powers of the Federal Government to pre-empt state regulatory laws. The District Court may well be correct, but I am not prepared to create a precedent in this Court by summarily affirming its decision. This is particularly true when it is not at all clear whether the summary affirmance disposes of the merits of the States' contentions.

In No. 82–953, a competitor of AT&T argues that the District Court should not have eliminated a requirement that Western Electric license its patents for a reasonable royalty to anyone who applies. It also contends that AT&T should not have been permitted to sell telephones through its Phone

Center Stores because competitors, especially local telephone companies, will not be able to compete effectively. In No. 82–992, by contrast, an association of telephone manufacturers, does not object to permitting AT&T to sell telephones, but insists that local telephone companies should not be permitted to do so. These appellants *do* challenge the District Court's conclusion that this settlement is in the public interest.

In order to review the determination that a settlement is in the public interest, it is first necessary to know what "the public interest" means. The Act itself is not very helpful. It does state that "the court may *consider*—

> "(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or *[sic]* relief sought, anticipated effects of alternative remedies actually considered, and *any other considerations bearing upon the adequacy of such judgment;*
>
> "(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial." 88 Stat. 1707, 15 U. S. C. § 16(e) (emphasis supplied).

The legislative history reveals that the sponsors of the Act were concerned that the Department of Justice had settled some civil antitrust cases on what they believed to have been unfavorable terms. Senator Tunney spoke of several "blatantly inequitable and improper antitrust settlements." 119 Cong. Rec. 24598 (1973). The Act appears to have been intended to prevent the Department of Justice from settling civil antitrust cases on terms less favorable than Congress thought it should obtain.

Faced with this paucity of guidance, the District Court undertook to "defin[e] the public interest in accordance with the antitrust laws." 552 F. Supp., at 149. It noted that, be-

cause it was dealing with a settlement, it "is not as free to exercise its discretion in fashioning a remedy as it would be upon a finding of liability." *Id.*, at 151. It thought it should approve the settlement "even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *Ibid.*, quoting *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (Mass. 1975). The District Court summarized the proper standard as follows:

> "After giving due weight to the decisions of the parties as expressed in the proposed decree, the Court will attempt to harmonize competitive values with other legitimate public interest factors. If the decree meets the requirements for an antitrust remedy—that is, if it effectively opens the relevant markets to competition and prevents the recurrence of anticompetitive activity, all without imposing undue and unnecessary burdens upon other aspects of the public interest—it will be approved." 552 F. Supp., at 153 (footnote omitted).

It is not clear to me that this standard, or any other standard the District Court could have devised, admits of resolution by a court exercising the judicial power established by Art. III of the Constitution. The Act applies only when a case has been settled. Thus, by definition, there has been no judicial finding of relevant markets, closed or otherwise, to be opened or of anticompetitive activity to be prevented. The District Court seems to have assumed first that there was an antitrust violation and second that it knew the scope and effects of the violation. But the parties have settled the case and thereby avoided the necessity for such findings.

Even if this problem could be put aside, the case remains problematic at best. Representative Hutchinson, who was a member of the House Committee that considered the Act, stated on the House floor that it

> "imposes on the courts what is essentially a nonjudicial function. In short, the courts will have to decide whether the Department of Justice has exercised its prosecutorial discretion to settle antitrust cases as well as it should. . . . In my opinion, such a process is foreign to the judicial function." 120 Cong. Rec. 36340 (1974).

In an addendum to the Committee Report, Representative Hutchinson stated that the defect of the Act

> "is simply that to require federal courts to determine whether a consent decree is in the public interest is to transfer an 'executive' question to the courts for resolution. The question for the court will be whether the Department of Justice has exercised its prosecutorial discretion well or, perhaps, as well as possible. The question will *not* be whether the Department has violated some legal standard. For none is established by this legislation. Rather, the court is given a plenary and unqualified authority to re-decide an executive decision." H. R. Rep. No. 93–1463, p. 21 (1974) (Additional Views of Mr. Hutchinson) (emphasis in original).

I believe this point is well taken. The question assigned to the district courts by the Act is a classic example of a question committed to the Executive. "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion." *Marbury* v. *Madison*, 1 Cranch 137, 170 (1803). In *Baker* v. *Carr*, 369 U. S. 186, 217 (1962), the Court listed six alternative ways of identifying a political question that is beyond the competence of the Judiciary. Three of these apply to these cases: "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for discovering it; or

the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Ibid.*

The question whether to prosecute a lawsuit is a question of the execution of the laws, which is committed to the Executive by Art. II. There is no standard by which the benefits to the public from a "better" settlement of a lawsuit than the Justice Department has negotiated can be balanced against the risk of an adverse decision, the need for a speedy resolution of the case, the benefits obtained in the settlement, and the availablility of the Department's resources for other cases. How is a court to decide whether a better settlement in a case involving one industry is more important to the public than the benefits that might be gained by immediately working on an antitrust problem in another industry? Finally, the decision requires an evaluation of an initial policy decision—whether the benefits that might be obtained in a lawsuit are worth the risks and costs—that is clearly for nonjudicial discretion.

In short, the language of the Court in *Green* v. *Frazier*, 253 U. S. 233, 240 (1920), seems fully applicable here: "Questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other branches of government." Even though Congress may by statute impose such a duty on the federal courts, they may not perform it. *Muskrat* v. *United States*, 219 U. S. 346 (1911).

Because I am concerned about the implications of the Court's decision in Nos. 82–952 and 82–1001, and because it is not clear to me whether the determination sought to be reviewed in Nos. 82–953 and 82–992 is within the judicial power, I would set these appeals for oral argument and postpone the further consideration of the question of jurisdiction to the hearing of the case on the merits.

Appeals Dismissed

No. 82–1175. BERG *v.* WISCONSIN ET AL. Appeal from Ct. App. Wis. dismissed for want of substantial federal question. Reported below: 108 Wis. 2d 785, 324 N. W. 2d 832.

No. 82–1279. JENSEN *v.* SATRAN, WARDEN, NORTH DAKOTA STATE PENITENTIARY, ET AL. Appeal from C. A. 8th 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: 688 F. 2d 76.

No. 82–1296. STROOM *v.* CARTER. Appeal from D. C. D. C. dismissed for want of jurisdiction.

Certiorari Granted—Vacated and Remanded

No. 82–174. H. S. CROCKER CO., INC. *v.* OSTROFE. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Associated General Contractors of California, Inc.* v. *Carpenters*, 459 U. S. 519 (1983). Reported below: 670 F. 2d 1378.

No. 82–178. MITSUI & CO., LTD., ET AL. *v.* INDUSTRIAL INVESTMENT DEVELOPMENT CORP. ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Associated General Contractors of California, Inc.* v. *Carpenters*, 459 U. S. 519 (1983). Reported below: 671 F. 2d 876.

No. 82–999. CHEMETRON CORP. *v.* BUSINESS FUNDS, INC., ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Herman & MacLean* v. *Huddleston*, 459 U. S. 375 (1983). Reported below: 682 F. 2d 1149.

Miscellaneous Orders

No. ——–——. LOVELESS ET AL. *v.* EASTERN AIR LINES, INC., ET AL. Motion of petitioners to direct the Clerk to file the petition for writ of certiorari out of time denied.

No. D–279. IN RE DISBARMENT OF RESNICK. Disbarment entered. [For earlier order herein, see 458 U. S. 1125.]

No. D–280. IN RE DISBARMENT OF STERN. Disbarment entered. [For earlier order herein, see 458 U. S. 1126.]

No. D–293. IN RE DISBARMENT OF DOYLE. Disbarment entered. [For earlier order herein, see 459 U. S. 939.]

No. D–295. IN RE DISBARMENT OF MOYER. Disbarment entered. [For earlier order herein, see 459 U. S. 939.]

No. D–298. IN RE DISBARMENT OF BURGER. Disbarment entered. [For earlier order herein, see 459 U. S. 940.]

No. D–302. IN RE DISBARMENT OF JOHNSON. Disbarment entered. [For earlier order herein, see 459 U. S. 985.]

No. D–304. IN RE DISBARMENT OF MCCONNELL. Disbarment entered. [For earlier order herein, see 459 U. S. 1083.]

No. D–306. IN RE DISBARMENT OF PHILLIPS. Disbarment entered. [For earlier order herein, see 459 U. S. 1083.]

No. D–314. IN RE DISBARMENT OF MOLOVINSKY. It is ordered that Gale S. Molovinsky, of Potomac, 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–317. IN RE DISBARMENT OF MACK. It is ordered that Ollie R. Mack, Jr., of Philadelphia, 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–318. IN RE DISBARMENT OF KOPS. It is ordered that Floyd J. Kops, of New York, N. Y., be suspended from

the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–319. IN RE DISBARMENT OF FEDER. It is ordered that Alan Jerome Feder, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–320. IN RE DISBARMENT OF RUBENSTEIN. It is ordered that J. Mortimer Rubenstein, of Cliffside Park, N. J., 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–321. IN RE DISBARMENT OF FRIEDLAND. It is ordered that M. Daniel Friedland, of Hartford, Conn., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–322. IN RE DISBARMENT OF MINN. It is ordered that Howard W. Minn, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No D–323. IN RE DISBARMENT OF SHERMAN. It is ordered that Robert Stephen Sherman, 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. 81–430. ILLINOIS *v.* GATES ET UX. Sup. Ct. Ill. [Certiorari granted, 454 U. S. 1140.] Motion of the Solicitor General for leave to file reply brief as *amicus curiae* denied.

No. 81–2159. SILKWOOD, ADMINISTRATOR OF THE ESTATE OF SILKWOOD *v.* KERR-MCGEE CORP. ET AL. C. A. 10th Cir. [Probable jurisdiction postponed, 459 U. S. 1101.] Motion of the parties to dispense with printing the joint appendix granted.

No. 82–849. UNITED STATES *v.* MENDOZA. C. A. 9th Cir. [Certiorari granted, 459 U. S. 1169.] Motion of the parties to dispense with printing the joint appendix granted.

No. 82–1305. BLACKSTONE CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Motion of petitioner to consolidate this case with No. 82–168, *National Labor Relations Board* v. *Transportation Management Corp.* [certiorari granted, 459 U. S. 1014], denied.

No. 82–6080. BAREFOOT *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. [Certiorari granted, 459 U. S. 1169.] Motion of petitioner for leave to proceed *in forma pauperis* granted.

No. 82–6181. IN RE ROSS; and

No. 82–6182. IN RE PATTERSON. Petitions for writs of habeas corpus denied.

No. 82–6033. IN RE REITER. Petition for writ of mandamus denied.

Probable Jurisdiction Postponed

No. 82–912. FEDERAL COMMUNICATIONS COMMISSION *v.* LEAGUE OF WOMEN VOTERS OF CALIFORNIA ET AL. Appeal from D. C. C. D. Cal. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 547 F. Supp. 379.

Certiorari Granted

No. 82–973. IMMIGRATION AND NATURALIZATION SERVICE *v.* STEVIC. C. A. 2d Cir. Certiorari granted. Reported below: 678 F. 2d 401.

No. 82–914. MONSANTO CO. *v.* SPRAY-RITE SERVICE CORP. C. A. 7th Cir. Certiorari granted. JUSTICE

WHITE took no part in the consideration or decision of this petition. Reported below: 684 F. 2d 1226.

Certiorari Denied. (See also No. 82–1279, *supra.*)

No. 81–1389. GOLDENBERG *v.* UNITED STATES (two cases). C. A. 1st Cir. Certiorari denied. Reported below: 663 F. 2d 1120 (first case); 663 F. 2d 1113 (second case).

No. 81–1392. WINTER *v.* UNITED STATES (two cases). C. A. 1st Cir. Certiorari denied. Reported below: 663 F. 2d 1120 (first case); 663 F. 2d 1113 (second case).

No. 81–1394. PRICE *v.* UNITED STATES (two cases). C. A. 1st Cir. Certiorari denied. Reported below: 663 F. 2d 1120 (first case); 663 F. 2d 1113 (second case).

No. 81–6152. CAMPBELL *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 636 P. 2d 352.

No. 81–6593. BURROWS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 640 P. 2d 533.

No. 82–949. FRICKE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 684 F. 2d 1126.

No. 82–954. KECKEISEN *v.* UNITED STATES; PFEFFER *v.* UNITED STATES; and BUCHANAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 82–1046. KANE GAS LIGHT & HEATING CO. *v.* INTERNATIONAL BROTHERHOOD OF FIREMEN & OILERS, LOCAL 112. C. A. 3d Cir. Certiorari denied. Reported below: 687 F. 2d 673.

No. 82–1081. ESTATE OF FRIEDERS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 687 F. 2d 224.

No. 82–1086. GROOM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 692 F. 2d 750.

No. 82–1106. STINE *v.* CROSS. Super. Ct. Pa. Certiorari denied. Reported below: 301 Pa. Super. 645, 447 A. 2d 668.

No. 82–1107. PARKS, AN INDIVIDUAL, AND AS NATURAL MOTHER, GUARDIAN, AND NEXT FRIEND OF WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 685 F. 2d 1387.

No. 82–1111. HARRELL, BY HER PARENTS, HARRELL ET UX. *v.* WILSON COUNTY SCHOOLS ET AL. Ct. App. N. C. Certiorari denied. Reported below: 58 N. C. App. 260, 293 S. E. 2d 687.

No. 82–1112. KLINE *v.* CITY OF FAIRFAX, VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 82–1114. ROSE, AS NEXT FRIEND OF ROSE *v.* NEBRASKA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 687 F. 2d 1164.

No. 82–1117. JAMROCH *v.* FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 104 Ill. App. 3d 1200, 437 N. E. 2d 943.

No. 82–1119. WILLIS *v.* MUSE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 690 F. 2d 903.

No. 82–1124. TAYLOR ET AL. *v.* TRACOR MARINE, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 683 F. 2d 1361.

No. 82–1132. SALDANA *v.* GARZA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 684 F. 2d 1159.

No. 82–1133. LOWENTHAL ET AL. *v.* ROME, PERSONAL REPRESENTATIVE OF THE ESTATE OF LOWENTHAL, ET AL. Ct. App. Md. Certiorari denied. Reported below: 294 Md. 277, 449 A. 2d 411.

No. 82–1138. VOLVO OF AMERICA CORP. ET AL. *v.* ROSACK. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 131 Cal. App. 3d 741, 182 Cal. Rptr. 800.

No. 82–1142. SHARON STEEL CORP. ET AL. *v.* CHASE MANHATTAN BANK, N. A., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 691 F. 2d 1039.

No. 82–1149. MARQUEZ *v.* UNIVERSITY OF WASHINGTON ET AL. Ct. App. Wash. Certiorari denied. Reported below: 32 Wash. App. 302, 648 P. 2d 94.

No. 82–1165. CORDER ET AL. *v.* KIRKSEY, PROBATE JUDGE OF PICKENS COUNTY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 639 F. 2d 1191 and 688 F. 2d 991.

No. 82–1168. MONACO, AN INFANT, BY HIS PARENT AND NATURAL GUARDIAN, MONACO, ET AL. *v.* FEINER ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 87 App. Div. 2d 740, 450 N. Y. S. 2d 344.

No. 82–1178. ROOD *v.* FINNEY ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 418 So. 2d 1.

No. 82–1179. CANNON *v.* UNIVERSITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied.

No. 82–1201. BINTLIFF *v.* CHEMETRON CORP. C. A. 5th Cir. Certiorari denied. Reported below: 682 F. 2d 1149.

No. 82–1291. RENTZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 692 F. 2d 766.

No. 82–5249. TWEETY *v.* MITCHELL, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 682 F. 2d 461.

No. 82–5560. HAMANN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 507.

No. 82–5597. TURNER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 82–5719. CLARKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 681 F. 2d 817.

No. 82–5737. LIPSCOMB *v.* KING. C. A. 7th Cir. Certiorari denied.

No. 82–5771. ZISSIMOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 301.

No. 82–5774. DAVIS *v.* UNITED STATES STEEL SUPPLY, DIVISION OF UNITED STATES STEEL CORP. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 166.

No. 82–5822. KINION *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 105 Ill. App. 3d 1069, 435 N. E. 2d 533.

No. 82–5830. TIRADO, AKA DANTE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 689 F. 2d 307.

No. 82–5838. SMITH *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 104 Ill. App. 3d 1212, 437 N. E. 2d 950.

No. 82–5852. GOTTESMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 685 F. 2d 1387.

No. 82–5873. EDWARDS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 692 F. 2d 766.

No. 82–5963. CARTER *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ET AL. C. A. 5th Cir. Certiorari denied.

No. 82–6000. BRANT *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 109 Wis. 2d 685, 325 N. W. 2d 737.

No. 82–6004. MAZUR *v.* CHEVROLET MOTOR DIVISION, SAGINAW METAL CASTING PLANTS, GENERAL MOTORS CORP. Ct. App. Mich. Certiorari denied.

No. 82–6006. MCCRARY *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 115.

No. 82–6007. PATTASHNICK ET UX. *v.* TASHOFF. Ct. Sp. App. Md. Certiorari denied. Reported below: 52 Md. App. 779.

No. 82–6008. SEXTON *v.* MAYNARD, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 82–6009. COFFER *v.* HESS, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 82–6017. JAWORSKI *v.* POWERS. C. A. 7th Cir. Certiorari denied. Reported below: 684 F. 2d 498.

No. 82–6021. FRENCH *v.* DE ROBERTIS. C. A. 7th Cir. Certiorari denied. Reported below: 692 F. 2d 760.

No. 82–6026. ADAMS *v.* CARLSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 721.

No. 82–6032. MILLER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 82–6039. BROOKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 691 F. 2d 510.

No. 82–6049. HOLMES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 680 F. 2d 1372.

No. 82–6069. MCFADYEN ET AL. *v.* SHURE ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 108 Ill. App. 3d 329, 438 N. E. 2d 1362.

No. 82–6082. DUFFLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 452.

No. 82–6118. ADAIR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 82–6123. HAYES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 696 F. 2d 1004.

No. 82–6140. LEBEDUN *v.* PETROVSKY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 692 F. 2d 752.

No. 82–6143. SLOCUM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 695 F. 2d 650.

No. 82–6162. GUILBERT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 692 F. 2d 1340.

No. 82–18. BALKCOM, WARDEN *v.* MASON. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 669 F. 2d 222.

No. 82–584. JONES, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY *v.* RAMIREZ. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 683 F. 2d 712.

No. 82–116. GREATER WASHINGTON CENTRAL LABOR COUNCIL *v.* DISTRICT OF COLUMBIA ET AL.; and

No. 82–146. FOOD & ALLIED SERVICES TRADE COUNCIL OF METROPOLITAN WASHINGTON *v.* DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Motion of Greater Washington Board of Trade for leave to intervene as a party respondent denied. Alternative request to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 442 A. 2d 110 and 445 A. 2d 960.

No. 82–493. BICHAN *v.* CHEMETRON CORP. ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari, vacate the judgment, and remand the case for further consideration in light of *Associated General Contractors of California, Inc.* v. *Carpenters*, 459 U. S. 519 (1983). Reported below: 681 F. 2d 514.

No. 82–877. BONANNO *v.* UNITED STATES. C. A. 9th Cir. Motion of Jack DiFilippi for leave to join in petition for writ of certiorari denied. Certiorari denied. Reported below: 685 F. 2d 447.

No. 82–959. FLORIDA *v.* KILPATRICK ET AL. Dist. Ct. App. Fla., 1st Dist. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 403 So. 2d 1104.

No. 82–1104. GENERAL ATOMIC CO. *v.* UNITED NUCLEAR CORP. Sup. Ct. N. M. Motion of petitioner to substitute GA Technologies, Inc., as party petitioner denied. Certiorari denied. JUSTICE BRENNAN and JUSTICE BLACKMUN would grant certiorari. Reported below: 98 N. M. 633, 651 P. 2d 1277.

No. 82–5977. HILL *v.* FLORIDA. Sup. Ct. Fla.;

No. 82–5987. RICHARDSON *v.* ALABAMA. Ct. Crim. App. Ala.; and

No. 82–5989. STOKES *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: No. 82–5977, 422 So. 2d 816; No. 82–5987, 419 So. 2d 289; No. 82–5989, 638 S. W. 2d 715.

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. 82–5995. REED *v.* GEORGIA. Ct. App. Ga. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 163 Ga. App. 233, 293 S. E. 2d 469.

Rehearing Denied

No. 82–894. MASTRO ET AL. *v.* UNITED STATES, 459 U. S. 1108;

No. 82–5444. HARVARD *v.* FLORIDA, 459 U. S. 1128;

No. 82–5805. ENGELKE *v.* SHERING, JUDGE OF JUSTICE COURT, CLARK COUNTY, NEVADA, 459 U. S. 1150; and

No. 82–5878. DISILVESTRO *v.* UNITED STATES, 459 U. S. 1177. Petitions for rehearing denied.

MARCH 7, 1983

Appeals Dismissed

No. 82–1098. RODRIGUEZ *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES. Appeal from Ct. App. D. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 452 A. 2d 1170.

No. 82–6054. BECKER *v.* DORAN, SUPERINTENDENT, CALIFORNIA REHABILITATION CENTER. 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: 698 F. 2d 1228.

Miscellaneous Orders

No. A–664. PALMORE *v.* SIDOTI. Application to stay the mandate of the District Court of Appeal of Florida, Second District, addressed to JUSTICE MARSHALL and referred to the Court, denied. JUSTICE STEVENS would grant the application.

No. A–678. WALKER *v.* UNITED STATES. D. C. E. D. Mich. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A–679. CADLE *v.* UNITED STATES. D. C. E. D. Mich. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A–690. HAYFIELD NORTHERN RAILROAD CO., INC., ET AL. *v.* CHICAGO, NORTHWESTERN TRANSPORTATION CO. C. A. 8th Cir. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A–691. IN RE CARTER ET AL. Bkrtcy. Ct. N. D. Ga. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–707. WATSON ET AL. *v.* UNITED STATES ET AL. D. C. S. D. Tex. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. D–324. IN RE DISBARMENT OF JAVITZ. It is ordered that Marvin R. Javitz, of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–325. IN RE DISBARMENT OF HAMPARES. It is ordered that A. James Hampares, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–326. IN RE DISBARMENT OF GALLOWAY. It is ordered that John Michael Galloway, of Anderson, 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–327. IN RE DISBARMENT OF STEVENS. It is ordered that Harry J. Stevens, Jr., of Allenhurst, N. J., 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–328. IN RE DISBARMENT OF JUNCKER. It is ordered that Martin Edward Juncker, of St. Louis, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–329. IN RE DISBARMENT OF WHITE. It is ordered that Paul Anthony White, of Gladstone, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 93, Orig. OKLAHOMA *v.* ARKANSAS ET AL. Motion of Illinois and Tennessee for leave to file a brief as *amici curiae* granted. Motion for leave to file bill of complaint denied. [For earlier order herein, see 459 U. S. 812.]

No. 82–65. BROWN ET AL. *v.* THOMSON, SECRETARY OF STATE OF WYOMING, ET AL. D. C. Wyo. [Probable jurisdiction noted, 459 U. S. 819.] Motion of appellees James L. Thompson et al. for divided argument denied.

No. 82–118. CROWN, CORK & SEAL CO., INC. *v.* PARKER. C. A. 4th Cir. [Certiorari granted, 459 U. S. 986.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

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. [Certiorari granted, 459 U. S. 1034.] Motion of petitioners in No. 82–551 for divided argument denied. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 82–914. MONSANTO CO. *v.* SPRAY-RITE SERVICE CORP. C. A. 7th Cir. [Certiorari granted, *ante*, p. 1010.] Motion of Washington et al. for leave to file a brief as *amici curiae* out of time denied. JUSTICE WHITE took no part in the consideration or decision of this motion.

No. 82–6066. IN RE ROBERTS. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 81–2110. UNITED BUILDING & CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY *v.* MAYOR AND COUNCIL OF THE CITY OF CAMDEN ET AL. Appeal from Sup. Ct. N. J. Probable jurisdiction noted. Reported below: 88 N. J. 317, 443 A. 2d 148.

Certiorari Granted

No. 82–945. SURE-TAN, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari granted. Reported below: 672 F. 2d 592 and 677 F. 2d 584.

No. 82–1127. HELICOPTEROS NACIONALES DE COLOMBIA, S.A. *v.* HALL ET AL. Sup. Ct. Tex. Certiorari granted. Reported below: 638 S. W. 2d 870.

No. 82–1167. UNITED STATES *v.* JACOBSEN ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 683 F. 2d 296.

No. 82–1200. DAILY INCOME FUND, INC., ET AL. *v.* FOX. C. A. 2d Cir. Certiorari granted. Reported below: 692 F. 2d 250.

No. 82–1031. JEFFERSON PARISH HOSPITAL DISTRICT NO. 2 ET AL. *v.* HYDE. C. A. 5th Cir. Motions of Louisiana Hospital Association and American Hospital Association for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 686 F. 2d 286.

Certiorari Denied. (See also Nos. 82–1098 and 82–6054, *supra.*)

No. 81–2355. UNITED STATES *v.* IONIAN GLOW MARINE, INC. C. A. 4th Cir. Certiorari denied. Reported below: 670 F. 2d 462.

No. 81–6922. BROCK ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 1311.

No. 82–86. INTERSTATE COMMERCE COMMISSION *v.* AMERICAN TRUCKING ASSNS., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 2d 452, 669 F. 2d 957, and 673 F. 2d 82.

No. 82–594. INTERSTATE COMMERCE COMMISSION *v.* RITTER TRANSPORTATION, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 221 U. S. App. D. C. 312, 684 F. 2d 86.

No. 82–814. BOFFA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 F. 2d 919.

No. 82–904. CONSTRUCTORA EL MONTE, S.A., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 688 F. 2d 837.

No. 82–931. DAY *v.* TEXAS. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied.

No. 82–962. THOMAS ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 231 Ct. Cl. 984.

No. 82–974. THOMASSEN ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 82–1007. NIESZNER *v.* ORR, SECRETARY OF THE AIR FORCE. C. A. 8th Cir. Certiorari denied. Reported below: 684 F. 2d 562.

No. 82–1042. SUNDHEIMER *v.* COMMODITY FUTURES TRADING COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 688 F. 2d 150.

No. 82–1152. HOGGARD *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 277 Ark. 117, 640 S. W. 2d 102.

No. 82–1154. BOROUGH OF SAYREVILLE ET AL. *v.* MIDDLESEX COUNTY UTILITIES AUTHORITY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 690 F. 2d 358.

No. 82–1158. WEST *v.* WEST. Ct. App. Okla. Certiorari denied.

No. 82–1161. TEAMSTERS LOCAL NO. 243, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* SEARS, ROEBUCK & CO. C. A. 6th Cir. Certiorari denied. Reported below: 683 F. 2d 154.

No. 82–1182. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* NORMAN. C. A. 9th Cir. Certiorari denied.

No. 82–1185. MUIR ET AL. *v.* ALABAMA EDUCATIONAL TELEVISION COMMISSION ET AL.; and

No. 82–1196. BARNSTONE ET AL. *v.* UNIVERSITY OF HOUSTON, KUHT–TV, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 688 F. 2d 1033.

No. 82–1189. UNITED TRANSPORTATION UNION *v.* SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY ET AL. Sp. Ct. R. R. R. A. Certiorari denied. Reported below: 555 F. Supp. 1382.

No. 82–1195. MEYER *v.* THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 686 F. 2d 818.

No. 82–1205. SAWYER ET AL. *v.* IRANIAN STUDENT ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 688 F. 2d 837.

No. 82–1218. FLOWERS INDUSTRIES, INC., ET AL. *v.* BROWN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 688 F. 2d 328.

No. 82–1234. PARKER, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF PARKER, ET AL. *v.* COUNTY OF NASSAU ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 116.

No. 82–5182. LYONS *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Santa Barbara. Certiorari denied.

No. 82–5459. DEVORCE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 299.

No. 82–5716. CHANDLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 568.

No. 82–5768. LAMB *v.* JERNIGAN, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 683 F. 2d 1332.

No. 82–5847. KROWN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 692 F. 2d 663.

No. 82–5887. MEALER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 57 N. Y. 2d 214, 441 N. E. 2d 1080.

No. 82–6001. CASAREALE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 118.

No. 82–6025. GILES *v.* HUNT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 688 F. 2d 831.

No. 82–6027. LUCIEN *v.* FITZSIMMONS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 698 F. 2d 1227.

No. 82–6036. FITZGERALD *v.* PENTHOUSE INTERNATIONAL, LTD., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 691 F. 2d 666.

No. 82–6041. SMITH *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 693 F. 2d 808.

No. 82–6044. MARTIN *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 691 F. 2d 202.

No. 82–6045. MCKINNEY *v.* OHIO. Ct. App. Ohio, Warren County. Certiorari denied.

No. 82–6046. ZIMARDO *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 32 Wash. App. 1008.

No. 82–6047. ENDLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 849.

No. 82–6050. BURT *v.* WAINWRIGHT, DIRECTOR, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 690 F. 2d 906.

No. 82–6051. BAUM ET AL. *v.* ESTATE OF GILLMAN ET AL. C. A. 10th Cir. Certiorari denied.

No. 82–6056. PEPPERS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 82–6117. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 691 F. 2d 510.

No. 82–6135. STALLWORTH *v.* DETROIT BOARD OF EDUCATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 728.

No. 82–6139. READY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 445 A. 2d 982.

No. 82–6153. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 689 F. 2d 191.

No. 82–6171. MURRAY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 82–41. INTERSTATE COMMERCE COMMISSION *v.* STEERE TANK LINES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 666 F. 2d 255.

JUSTICE WHITE, with whom JUSTICE POWELL and JUSTICE REHNQUIST join, dissenting.

The Motor Carrier Act of 1980, 49 U. S. C. § 10101 *et seq.* (1976 ed., Supp. V), authorizes the Interstate Commerce Commission to lift restrictions on motor carriers' existing authority where the removal would, among other things, "rea-

sonably broaden the categories of property authorized by the carriers' certificate or permit." § 10922(h)(1)(B)(i). Pursuant to the statute, the Commission issued guidelines for processing restriction-removal applications. The guidelines invite carriers authorized to haul "one or more named commodities" to apply for a broader authorization, such as authority to transport "commodities in bulk." 49 CFR § 1137.21(b) (1981).

In this case, Maxwell Co. applied to the Commission to broaden the commodity description in one of its existing certificates from "spent silica gel catalyst, in bulk" to "commodities in bulk." After considering submissions from Maxwell, and comments filed by two carriers objecting to the proposed broadening, the Commission's Restriction Removal Board concluded that the application should be granted. The Board found that the proposed broadening "will reduce the consumption of energy resources, will offer potential cost savings and improved efficiency, will enable applicant to provide full service to a broader range of shippers and in rural communities, and will be consistent with the [transportation policies of the Act]." The Commission denied internal appeal.

Steere Tank Lines, one of the objecting carriers, then challenged the Commission's action in the Court of Appeals for the Fifth Circuit, arguing that the Commission's guidelines were not valid under the Act. Relying on its earlier decision in *American Trucking Assns., Inc.* v. *ICC*, 659 F. 2d 452 (1981), cert. denied, *ante*, p. 1022, the court held that the Commission's action was improper. 666 F. 2d 255 (1982). The Fifth Circuit maintained that the Commission's guidelines fail to account for the Motor Carrier Act's mandate that every carrier be "fit, willing, and able . . . to provide the transportation to be authorized by the certificate." 49 U. S. C. § 10922(a)(1) (1976 ed., Supp. V). Accordingly, the court remanded the decision in this case to the Commission for further proceedings.

The Commission now petitions for a writ of certiorari, claiming that the Court of Appeals has engrafted a requirement on restriction-removal proceedings not required or contemplated by Congress and that will impede the Commission's ability to implement the policies of the Motor Carrier Act of 1980. In ruling upon such restriction-removal applications, the Commission is directed by the Act to consider "the impact of the proposed restriction removal upon the consumption of energy resources, potential cost savings and improved efficiency, and the transportation policy set forth in [the Act]" and to "give special consideration to providing and maintaining service to small and rural communities and small shippers." 49 U. S. C. § 10922(h)(2) (1976 ed., Supp. V). The Act does not apply the "fit, willing, and able" requirement to applications for removal of service restrictions; this requirement is expressly applicable only to carriers seeking a new certificate. § 10922(b)(1)(A). In the Commission's view, the result of the Court of Appeals' decision is to render the restriction-removal process the equivalent of an application for new authority, frustrating Congress' intent that restriction-removal applications be processed in a more simplified and expeditious manner.

I would grant certiorari in this case. Although another Circuit that has considered this issue has reached the same result, see *Ritter Transportation, Inc.* v. *ICC*, 221 U. S. App. D. C. 312, 684 F. 2d 86 (1982), cert. denied, *ante*, p. 1022, there is considerable force to the Commission's argument that these decisions frustrate the will of Congress. Nor do I agree with respondents that it is too early to determine whether the Courts of Appeals' decisions will substantially impair national transportation goals. The Commission itself is in the best position to speak to this matter. The Commission reports that its Restriction Removal Board, which regularly processed applications for expanded authority, has been closed down due to a lack of applications being filed. The Commission believes this is at least partially attributable to

the "potential applicant's perception that it is now easier to obtain a *new* certificate under Section 10922(b) than it is to obtain the expansion of an *existing* certificate in a restriction removal proceeding." Reply Brief for Petitioner in *ICC* v. *Ritter Transportation, Inc.*, O. T. 1982, No. 82–594, p. 2. It seems to me that the Courts of Appeals have sidetracked an entire regulatory program of the Commission and that plenary consideration is warranted at this time so that there may be an early judgment as to whether the Courts of Appeals have correctly read the statute.*

No. 82–227. PROVIDENCE JOURNAL CO. *v.* HOME PLACEMENT SERVICE, INC., ET AL. C. A. 1st Cir. Motion of American Newspaper Publishers Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 682 F. 2d 274.

No. 82–869. FROUDE ET AL. *v.* EAGLE-PICHER INDUSTRIES, INC., ET AL. C. A. 1st Cir. Motions of American Home Assurance Co. et al., Insurance Company of North America, and Aetna Casualty & Surety Co. for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of these motions and this petition. Reported below: 682 F. 2d 12.

No. 82–878. KALMAR *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for waiver of time requirement granted. Certiorari denied. Reported below: 688 F. 2d 919.

No. 82–1097. EAGLE-PICHER INDUSTRIES, INC. *v.* LIBERTY MUTUAL INSURANCE CO. ET AL. C. A. 1st Cir. Motion of Insurance Company of North America for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision

*If certiorari were granted, I would hold the petitions filed by the Commission in *ICC* v. *Ritter Transportation, Inc.*, No. 82–594, and *ICC* v. *American Trucking Assns., Inc.*, No. 82–86, pending consideration of this case.

of this motion and this petition. Reported below: 682 F. 2d 12.

No. 82–6035. QUINTANA *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 224 Va. 127, 295 S. E. 2d 643.

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.

Rehearing Denied

No. 82–5794. ANDERSON *v.* SPALDING, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, ET AL., 459 U. S. 1175. Petition for rehearing denied.

No. 82–5862. BOGGS *v.* UNITED STATES, 459 U. S. 1118. Motion for leave to file petition for rehearing denied.

MARCH 9, 1983

Dismissal Under Rule 53

No. 82–6231. BAUMANN *v.* KEOHANE, WARDEN, ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 692 F. 2d 762.

MARCH 11, 1983

Dismissal Under Rule 53

No. 82–1065. CONROCK CO. ET AL. *v.* TEXAS PARTNERS ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 685 F. 2d 1116.

MARCH 21, 1983

Appeal Dismissed

No. 82–1192. DIPIERO *v.* GOODMAN ET AL. Appeal from Ct. App. Mass. dismissed for want of jurisdiction. Treating

the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 14 Mass. App. 929, 436 N. E. 2d 998.

Certiorari Granted—Vacated and Remanded

No. 81–1531. MONTANA *v.* JACKSON. Sup. Ct. Mont. Certiorari granted, judgment vacated, and case remanded to the Supreme Court of Montana to consider whether its judgment is based upon federal or state constitutional grounds, or both, *California* v. *Krivda*, 409 U. S. 33 (1972), and, if its judgment is not based upon state constitutional grounds, for further consideration in light of *South Dakota* v. *Neville*, 459 U. S. 553 (1983). Reported below: 195 Mont. 185, 637 P. 2d 1.

JUSTICE STEVENS, dissenting.

In its opinion explaining its holding that the defendant's refusal to submit to a sobriety test is inadmissible, the majority of the Supreme Court of Montana stated, in part:

> "We hold that such refusal is testimonial in nature and that to admit evidence of the fact of refusal would violate the defendant's Fifth Amendment privilege as guaranteed by the United States Constitution, and would further violate defendant's privilege as guaranteed by Art. II, § 25 of the Montana Constitution." 195 Mont. 185, 185–186, 637 P. 2d 1.

After analyzing the federal constitutional question in the light of this Court's opinion in *Schmerber* v. *California*, 384 U. S. 757 (1966), the court continued:

> "The issue is also controlled by Art. II, § 25 of our own constitution, which provides that 'No person shall be compelled to testify against himself in a criminal proceeding.' The issue involves a communication that is testimonial in nature, and we must resolve the issue by applying Art. II, § 25. Clearly, to permit evidence of defendant's refusal to take the breathalyzer test would

violate not only the United States Constitution, but also our own constitution.

"In *State* v. *Finley* (1977), 173 Mont. 162, 566 P. 2d 1119, we held that a defendant's privilege against self-incrimination was not violated by admitting into evidence a videotape recording of his post-arrest words and actions. We decided that the tape had not been introduced for the incriminating content of the words uttered by the defendant, but rather for the purpose of aiding the jury in understanding the testimony of the witnesses who had observed the defendant's unsteady walk and his slurred speech after his arrest. We specifically noted that the videotape did not contain incriminating responses to interrogation by the police. But the same situation does not exist here. It is obvious that defendant's refusal is inherently self-incriminating because it carries a strong inference of guilt—the prosecutor would surely argue that defendant's refusal to take the test was prompted only by his knowledge that the test results would reveal his intoxication, and therefore incriminate him.

"We hold under our own constitution, that if a communication of refusal, whether written, verbal, or otherwise, involves the defendant's consciousness of the facts and the operation of his mind in expressing it, the communication is testimonial in nature. A defendant's silence or negative reply to an officer's request which calls for an immediate reply is clearly an overt communication of the defendant's thoughts in response to the request. *Doyle* v. *Ohio* (1976), 426 U. S. 610 . . . . It is the act of refusal that is pertinent and suggestive of guilt, rather than the way in which it is communicated. Under our constitution, the privilege against self-incrimination forbids any compulsory communication of an accused person's thoughts, whether by acts or words spoken, and the fact that it does not extend its protection to forbid

the compulsory exhibition of physical characteristics does not nullify the protection it does provide." 195 Mont., at 191–192, 637 P. 2d, at 4–5.

Consistent with the views I expressed in dissent in *South Dakota* v. *Neville*, 459 U. S. 553, 566 (1983), I believe the statements I have quoted are sufficient to demonstrate that the judgment of the Montana Supreme Court rests on an adequate and independent state ground and that this Court is therefore without jurisdiction to vacate its judgment. I therefore respectfully dissent.

Miscellaneous Orders

No. A–704. BARONE ET AL. *v.* UNITED STATES. C. A. 11th Cir. Application for recall and stay of mandate, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–728. DAILY LOCAL NEWS CO. *v.* GAWTHROP, JUDGE OF THE COURT OF COMMON PLEAS IN THE FIFTEENTH JUDICIAL DISTRICT OF PENNSYLVANIA, ET AL.; and

No. A–729. PHILADELPHIA NEWSPAPERS, INC. *v.* GAWTHROP, JUDGE OF THE COURT OF COMMON PLEAS IN THE FIFTEENTH JUDICIAL DISTRICT OF PENNSYLVANIA, ET AL. Sup. Ct. Pa. The orders heretofore entered by JUSTICE BRENNAN on March 3, 1983, are vacated and the applications for stay are denied.

No. A–771. WATT, SECRETARY OF THE INTERIOR, ET AL. *v.* COMMUNITY FOR CREATIVE NON-VIOLENCE ET AL. C. A. D. C. Cir. The order heretofore entered by THE CHIEF JUSTICE on March 17, 1983, is continued pending the timely filing and disposition of a petition for writ of certiorari.

No. D–278. IN RE DISBARMENT OF PAGLIANITE. Disbarment entered. [For earlier order herein, see 458 U. S. 1125.]

No. D–303. IN RE DISBARMENT OF OTIS. Disbarment entered. [For earlier order herein, see 459 U. S. 1082.]

No. D–315. IN RE DISBARMENT OF COBURN. Disbarment entered. [For earlier order herein, see 459 U. S. 1141.]

No. D–320. IN RE DISBARMENT OF RUBENSTEIN. J. Mortimer Rubenstein, of Cliffside Park, N. J., 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 February 28, 1983 [*ante*, p. 1009], is hereby discharged.

No. 81–984. FIRST NATIONAL CITY BANK *v.* BANCO PARA EL COMERCIO EXTERIOR DE CUBA. C. A. 2d Cir. [Certiorari granted, 459 U. S. 942.] Motion of the Solicitor General to permit Richard G. Wilkins, Esquire, to present oral argument *pro hac vice* on behalf of the United States as *amicus curiae* 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 second supplemental brief after argument denied.

No. 81–2386. DELCOSTELLO *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS ET AL. C. A. 4th Cir. [Certiorari granted, 459 U. S. 1034.] Motion of respondent Anchor Motor Freight, Inc., for special permission to divide oral argument denied.

No. 82–242. BURFORD, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* SIERRA CLUB ET AL. C. A. D. C. Cir. [Certiorari granted *sub nom. Gorsuch* v. *Sierra Club*, 459 U. S. 942.] Motion of respondent Environmental Defense Fund for reconsideration of order of February 22, 1983 [459 U. S. 1197], denying leave to file motion for divided argument out of time denied.

No. 82–357 (A–759). MICHIGAN *v.* CLIFFORD ET AL. Ct. App. Mich. [Certiorari granted, 459 U. S. 1168.] Motion of Timothy A. Baughman, Esquire, to permit Janice M. Joyce

Bartee to present oral argument *pro hac vice* on behalf of petitioner granted. Application of petitioner for leave to file a brief in excess of the page limitations, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied.

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, 459 U. S. 1168.] Motion of respondents to limit questions presented for review and/or to dismiss the writ as improvidently granted denied.

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, 459 U. S. 1034.] Motion of National Right to Work Legal Defense Foundation for leave to file a brief as *amicus curiae* granted.

No. 82–502. PALLAS SHIPPING AGENCY, LTD. *v.* DURIS. C. A. 6th Cir. [Certiorari granted, 459 U. S. 1014.] Motion of Local 1291 et al. for leave to file a brief as *amici curiae* granted.

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. [Certiorari granted, 459 U. S. 1034.] Motion of Limerick Ecology Action, Inc., et al. for leave to file a brief as *amici curiae* granted. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 82–647. KIRKPATRICK *v.* CHRISTIAN HOMES OF ABILENE, INC., ET AL. Ct. App. Tex., 11th Sup. Jud. Dist. [Certiorari granted, 459 U. S. 1145.] Motion of petitioner to

direct the Clerk to schedule oral argument during April 1983 granted.

No. 82–660. UNITED STATES *v.* CRONIC. C. A. 10th Cir. [Certiorari granted, 459 U. S. 1199.] Motion of respondent to discharge counsel appointed by lower court and for leave to proceed *pro se* denied. Motion for appointment of counsel granted, and it is ordered that David W. Duncan, Esquire, of Durango, Colo., be appointed to serve as counsel for respondent in this case.

No. 82–1041. DICKMAN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. [Certiorari granted, 459 U. S. 1199.] Motion of the parties to dispense with printing the joint appendix granted.

No. 82–1066. UNITED STATES *v.* PTASYNSKI ET AL. D. C. Wyo. [Probable jurisdiction noted, 459 U. S. 1199.] Motion of the Solicitor General to direct the Clerk to schedule oral argument during April 1983 granted.

No. 82–1135. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* WIGGINS. C. A. 5th Cir. [Certiorari granted, 459 U. S. 1199.] Motion of respondent for appointment of counsel granted, and it is ordered that Craig Smyser, Esquire, of Houston, Tex., be appointed to serve as counsel for respondent in this case. In all other respects the motion is denied.

No. 82–1156. TELEDYNE MOVIBLE OFFSHORE, INC., ET AL. *v.* THOMPSON. Appeal from Sup. Ct. La.; and

No. 82–1253. SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, ET AL. *v.* BARTLETT. C. A. 8th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 82–1260. COPPERWELD CORP. ET AL. *v.* INDEPENDENCE TUBE CORP. C. A. 7th Cir. Motion of petitioners to suggest that the Court invite the Solicitor General to present the views of the United States denied. Motions of American

Iron & Steel Institute, National Association of Manufacturers, and Chamber of Commerce of the United States for leave to file briefs as *amici curiae* granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE WHITE took no part in the consideration or decision of these motions and this order.

No. 82–6077. IN RE WILLIAMS. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 11, 1983, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 82–6134. IN RE MORROW. Petition for writ of mandamus denied.

No. 82–6060. IN RE GREEN. Petition for writ of prohibition and/or mandamus denied.

Probable Jurisdiction Noted

No. 82–1050. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* MATHEWS ET AL. Appeal from D. C. N. D. Ala. Probable jurisdiction noted.

Certiorari Granted

No. 82–708. SUMMA CORP. *v.* CALIFORNIA EX REL. STATE LANDS COMMISSION ET AL. Sup. Ct. Cal. Certiorari granted. Reported below: 31 Cal. 3d 288, 644 P. 2d 792.

No. 82–1095. PULLEY, WARDEN *v.* HARRIS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 692 F. 2d 1189.

Certiorari Denied. (See also No. 82–1192, *supra.*)

No. 81–1326. BARONI ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 662 F. 2d 287.

No. 81–1881. CHARLES *v.* WADE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 665 F. 2d 661.

No. 81–6404. TALLEY *v.* CROSSON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 663 F. 2d 713.

No. 82–630. TISCHENDORF, AKA MONTGOMERY *v.* TISCHENDORF. Sup. Ct. Minn. Certiorari denied. Reported below: 321 N. W. 2d 405.

No. 82–803. BIALECKI *v.* LITTLE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 696 F. 2d 980.

No. 82–811. ELROD, SHERIFF OF COOK COUNTY, ILLINOIS, ET AL. *v.* MASSARELLA; and

No. 82–844. UNITED STATES EX REL. MASSARELLA *v.* ELROD, SHERIFF OF COOK COUNTY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 682 F. 2d 688.

No. 82–893. STOLLER *v.* MARSH, SECRETARY OF THE ARMY. C. A. D. C. Cir. Certiorari denied. Reported below: 221 U. S. App. D. C. 22, 682 F. 2d 971.

No. 82–998. STUART *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 689 F. 2d 759.

No. 82–1017. MCCLURE *v.* UNDERSEA INDUSTRIES, INC., DBA SCUBAPRO, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 671 F. 2d 1287 and 685 F. 2d 1309.

No. 82–1026. MARINE MIDLAND BANK *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 231 Ct. Cl. 496, 687 F. 2d 395.

No. 82–1029. IVERY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 686 F. 2d 410.

No. 82–1057. BROTHERHOOD OF RAILWAY & AIRLINE CLERKS, CONSOLIDATED SYSTEM BOARD OF ADJUSTMENT 46, ET AL. *v.* BURLINGTON NORTHERN INC. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 696 F. 2d 1000.

No. 82–1078. BROWN *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 639 S. W. 2d 758.

No. 82–1084. ASSOCIATION OF CO-OPERATIVE MEMBERS, INC., ET AL. *v.* FARMLAND INDUSTRIES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 684 F. 2d 1134.

No. 82–1129. NEW ORLEANS STEAMSHIP ASSN. *v.* WILLIAMS ET AL.; and

No. 82–1134. INTERNATIONAL LONGSHOREMEN'S ASSN. ET AL. *v.* WILLIAMS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 673 F. 2d 742 and 688 F. 2d 412.

No. 82–1163. S.E.A. TOWING CO., INC. *v.* GREAT ATLANTIC INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 688 F. 2d 1000.

No. 82–1164. DOTSON ET AL. *v.* MOUNTAIN MISSION SCHOOL, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 692 F. 2d 752.

No. 82–1174. INTERSTATE MARINA DEVELOPMENT CO. *v.* WRIGHT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 846.

No. 82–1181. JAMES *v.* DISTRICT OF COLUMBIA COURT OF APPEALS. Ct. App. D. C. Certiorari denied. Reported below: 452 A. 2d 163.

No. 82–1190. STILLWATER CONDOMINIUM ASSN. *v.* AMERICAN HOME ASSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 848.

No. 82–1193. MARASHI *v.* FORBES FURNITURE CO. ET AL. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 415 So. 2d 1389.

No. 82–1202. STEERE TANK LINES, INC. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 687 F. 2d 104.

No. 82–1204. WER-COY FABRICATION CO., INC. *v.* SHEET METAL WORKERS INTERNATIONAL ASSN., LOCAL UNION NO. 292, AFL–CIO. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 458.

No. 82–1206. REUSSER, ADMINISTRATOR OF THE ESTATE OF REUSSER *v.* AMERICAN BANKERS INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 845.

No. 82–1211. FRY ET AL. *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 639 S. W. 2d 463.

No. 82–1214. LEHNER *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 1187.

No. 82–1224. KATV–CHANNEL 7 *v.* THOMAS. C. A. 8th Cir. Certiorari denied. Reported below: 692 F. 2d 548.

No. 82–1227. FORBES *v.* NEWMAN. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 82–1235. LUNA *v.* TEXAS. Ct. App. Tex., 5th Sup. Jud. Dist. Certiorari denied.

No. 82–1236. MORTON ET AL. *v.* ZIDELL EXPLORATIONS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 695 F. 2d 347.

No. 82–1238. MEYERSON ET AL. *v.* ESPANOLA WAY CORP. C. A. 11th Cir. Certiorari denied. Reported below: 690 F. 2d 827.

No. 82–1245. MOWDER ET AL. *v.* ILLINOIS EX REL. ROBERTS, STATE'S ATTORNEY, SANGAMON COUNTY, ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied.

No. 82–1249. OJEDA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 89 App. Div. 2d 941, 454 N. Y. S. 2d 488.

No. 82–1250. FLORIDA EX REL. SMITH, TRUSTEE *v.* ORANGE COUNTY, FLORIDA, ET AL. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 421 So. 2d 83.

No. 82–1251. ROME *v.* SUPREME COURT OF KANSAS. C. A. 10th Cir. Certiorari denied.

No. 82–1252. BECTON *v.* DETROIT TERMINAL OF CONSOLIDATED FREIGHTWAYS. C. A. 6th Cir. Certiorari denied. Reported below: 687 F. 2d 140.

No. 82–1254. LEWIS *v.* CENTRAL PIEDMONT COMMUNITY COLLEGE. C. A. 4th Cir. Certiorari denied. Reported below: 689 F. 2d 1207.

No. 82–1265. ILLINOIS *v.* GARCIA. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 109 Ill. App. 3d 142, 440 N. E. 2d 269.

No. 82–1268. CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON *v.* EGGER, COMMISSIONER OF THE INTERNAL REVENUE SERVICE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 691 F. 2d 878.

No. 82–1284. KNIGHT ET AL. *v.* NATIONAL UNION FIRE INSURANCE OF PITTSBURGH, PENNSYLVANIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 685 F. 2d 1387.

No. 82–1288. AMERICAN BROADCASTING COS., INC. *v.* CLARK. C. A. 6th Cir. Certiorari denied. Reported below: 684 F. 2d 1208.

No. 82–1294. AZTEC STEEL CO. ET AL. *v.* FLORIDA STEEL CORP. C. A. 11th Cir. Certiorari denied. Reported below: 691 F. 2d 480.

No. 82–1298. MCMANUS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 299 Pa. Super. 621, 445 A. 2d 244.

No. 82–1314. FOGARTY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 692 F. 2d 542.

No. 82–1315. BUNCH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 729.

No. 82–1316. DILEO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 82–1323. MARRALE *v.* UNITED STATES; and
No. 82–1336. MARRALE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 695 F. 2d 658.

No. 82–1329. FISHERMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 690 F. 2d 748.

No. 82–1332. AVILES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 692 F. 2d 769.

No. 82–1333. MARIN RIDGELAND CO. ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 689 F. 2d 1329.

No. 82–1337. PECORA *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 52 Md. App. 779.

No. 82–1340. COMPANIA DE GAS DE NUEVO LAREDO, S.A. *v.* ENTEX, INC. C. A. 5th Cir. Certiorari denied. Reported below: 686 F. 2d 322.

No. 82–1343. HONIGMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 448.

No. 82–1357. BRATTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 729.

No. 82–1358. QUENZER *v.* QUENZER. Sup. Ct. Wyo. Certiorari denied. Reported below: 653 P. 2d 295.

No. 82–1359. CIOTTI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 696 F. 2d 986.

No. 82–1366. ADAMS *v.* DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS. C. A. Fed. Cir. Certiorari denied. Reported below: 703 F. 2d 584.

No. 82–1368. COOPER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 298.

No. 82–1375. EHLINGER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 689 F. 2d 191.

No. 82–1392. STRAIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 849.

No. 82–5821. AMES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 685 F. 2d 421.

No. 82–5876. BOYLES *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied.

No. 82–5882. GOMEZ-GOMEZ *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 11th Cir. Certiorari denied. Reported below: 681 F. 2d 1347.

No. 82–5890. PAYNE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 639 S. W. 2d 597.

No. 82–5895. MORRIS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 639 S. W. 2d 589.

No. 82–5921. RUIZ ET AL. *v.* ESTELLE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 679 F. 2d 1115 and 688 F. 2d 266.

No. 82–5939. BALLESTEROS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 691 F. 2d 869.

No. 82–6020. LAGRANGE *v.* TEXAS. Ct. App. Tex., 13th Sup. Jud. Dist. Certiorari denied.

No. 82–6055. HENDERSON *v.* RAINES. C. A. 9th Cir. Certiorari denied.

No. 82–6062. FORNASH *v.* MARSHALL. C. A. 6th Cir. Certiorari denied. Reported below: 686 F. 2d 1179.

No. 82–6064. POOL *v.* WYRICK, WARDEN, MISSOURI STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied.

No. 82–6067. HAMMER *v.* MEACHUM, DIRECTOR OF OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 691 F. 2d 958.

No. 82–6071. SULIE *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 689 F. 2d 128.

No. 82–6074. CEGIELSKI *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 109 Wis. 2d 698, 327 N. W. 2d 724.

No. 82–6076. OXLEY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 421 So. 2d 925.

No. 82–6078. RONSON *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. Cir. Certiorari denied.

No. 82–6084. THRASHER *v.* MISSOURI STATE HIGHWAY COMMISSION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 691 F. 2d 504.

No. 82–6085. ROBERTS *v.* KING, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 82–6086. MURRAY *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 692 F. 2d 755.

No. 82–6092. BACHERT *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 499 Pa. 398, 453 A. 2d 931.

No. 82–6095. EVANS *v.* MALM FIREPLACES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 694 F. 2d 723.

No. 82–6097. JACKSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 1121.

No. 82–6098. ANDERSON *v.* MINTZES. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 451.

No. 82–6101. SAWYER *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 420 So. 2d 302.

No. 82–6102. ADAMS *v.* MATHIS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 692 F. 2d 769.

No. 82–6105. DONALDSON *v.* MAGGIO, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 423 So. 2d 1171.

No. 82–6107. TROLIA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 107 Ill. App. 3d 487, 437 N. E. 2d 804.

No. 82–6112. MOORE *v.* SMITH, SUPERINTENDENT, KENTUCKY STATE REFORMATORY. C. A. 6th Cir. Certiorari denied. Reported below: 694 F. 2d 115.

No. 82–6119. CARPENTER *v.* REES, WARDEN, KENTUCKY STATE REFORMATORY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 452.

No. 82–6124. DYKES *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 82–6125. HUANG *v.* FITZPATRICK ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 692 F. 2d 745.

No. 82–6129. LEE ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 58 N. Y. 2d 771, 445 N. E. 2d 214.

No. 82–6130. RIZZO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1234.

No. 82–6131. PARKER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 421 So. 2d 834.

No. 82–6132. WULFFENSTEIN *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 657 P. 2d 289.

No. 82–6133. WHITLEY *v.* BEACHMAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 460.

No. 82–6136. VASQUEZ *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 82–6138. BROOKS *v.* PRESIDENT OF THE UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 694 F. 2d 716.

No. 82–6147. BROWN *v.* MINNEAPOLIS ELECTRIC STEEL CASTINGS CO. ET AL. Sup. Ct. Minn. Certiorari denied.

No. 82–6150. FEJERAN, AKA CRUZ *v.* PEOPLE OF THE TERRITORY OF GUAM. C. A. 9th Cir. Certiorari denied. Reported below: 687 F. 2d 302.

No. 82–6151. HAYES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1233.

No. 82–6155. SPITLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 696 F. 2d 986.

No. 82–6161. DONOVAN *v.* HARRIS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 112.

No. 82–6170. BARRETT *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 278 S. C. 414, 297 S. E. 2d 794.

No. 82–6173. ANGULO-QUINONES *v.* UNITED STATES; CUESTAS-FUENTES *v.* UNITED STATES; and CESAR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 694 F. 2d 725.

No. 82–6177. SIMMONS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1234.

No. 82–6179. REEVES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 692 F. 2d 766.

No. 82–6183. OSTRER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 118.

No. 82–6185. FAIL *v.* SEARS, ROEBUCK & CO. C. A. 5th Cir. Certiorari denied. Reported below: 692 F. 2d 756.

No. 82–6196. TABARES ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 690 F. 2d 906.

No. 82–6207. ESTRADA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 849.

No. 82–6212. GIBSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 690 F. 2d 697.

No. 82–6215. WILSON *v.* ROSE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 731.

No. 82–6220. COLLINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 690 F. 2d 431.

No. 82–6224. ANTONELLI *v.* KUNEV ET AL. C. A. 8th Cir. Certiorari denied.

No. 82–6235. ROWE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 696 F. 2d 993.

No. 82–6243. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1234.

No. 82–6251. RIDDLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 681 F. 2d 717 and 694 F. 2d 233.

No. 82–6252. SHEELEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 696 F. 2d 986.

No. 82–6259. GOLDEN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 250 Ga. 428, 297 S. E. 2d 479.

No. 82–6261. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 691 F. 2d 498.

No. 82–6271. KEVAL *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 224 U. S. App. D. C. 160, 694 F. 2d 280.

No. 82–925. DALY *v.* SPRAGUE ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 675 F. 2d 716.

No. 82–1221. HARRIS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 57 N. Y. 2d 335, 442 N. E. 2d 1205.

No. 82–930. NEW YORK *v.* NELSON. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 57 N. Y. 2d 826, 442 N. E. 2d 54.

No. 82–944. BAGNELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and vacate the conviction. Reported below: 679 F. 2d 826.

No. 82–1223. MINNESOTA MINING & MANUFACTURING CO. *v.* BLUME ET AL. C. A. 6th Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 684 F. 2d 1166.

No. 82–1233. O'BANNON, SECRETARY OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, ET AL. *v.* COLEMAN ET AL. C. A. 3d Cir. Motion of respondent Coleman for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 692 F. 2d 748.

No. 82–5922. SMITH *v.* MISSISSIPPI. Sup. Ct. Miss.;

No. 82–6019. HARRIS *v.* PULLEY, WARDEN, CALIFORNIA STATE PRISON AT SAN QUENTIN. C. A. 9th Cir.; and

No. 82–6089. MORRIS *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: No. 82–5922, 419 So. 2d 563; No. 82–6019, 692 F. 2d 1189; No. 82–6089, 641 S. W. 2d 883.

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. 82–6145. TATUM *v.* REGENTS OF THE UNIVERSITY OF NEBRASKA-LINCOLN ET AL. C. A. 8th Cir. Petitioner is directed to file a response to the motion of respondents for damages within 30 days. Certiorari denied.

Rehearing Denied

No. 82–764. WHITE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, 459 U. S. 1088;

No. 82–5528. BUTTRUM *v.* GEORGIA, 459 U. S. 1156; and

No. 82–5793. HORTON *v.* GEORGIA, 459 U. S. 1188. Petitions for rehearing denied.

No. 82–5497. CHODOS *v.* UNITED STATES ET AL., 459 U. S. 1111; and

No. 82–5524. JONES *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, 459 U. S. 1174. Motions for leave to file petitions for rehearing denied.

MARCH 28, 1983

Affirmed on Appeal

No. 82–901. KNIGHT ET AL. *v.* MINNESOTA COMMUNITY COLLEGE FACULTY ASSN. ET AL. Affirmed on appeal from D. C. Minn. Reported below: 571 F. Supp. 1.

Appeal Dismissed

No. 82–1269. FINK *v.* BOARD OF EDUCATION OF WARREN COUNTY SCHOOLS. Appeal from Pa. Commw. Ct. dismissed for want of substantial federal question. Reported below: 65 Pa. Commw. 320, 442 A. 2d 837.

Certiorari Granted—Reversed and Remanded. (See No. 82–713, *ante*, p. 533.)

Miscellaneous Orders

No. A–751 (82–6368). ROSE *v.* FLORIDA. Sup. Ct. Fla. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. D–309. IN RE DISBARMENT OF MCCLELLAN. Disbarment entered. [For earlier order herein, see 459 U. S. 1140.]

No. D–316. IN RE DISBARMENT OF HARRIS. Disbarment entered. [For earlier order herein, see 459 U. S. 1167.]

No. D–330. IN RE DISBARMENT OF BLUESTEIN. It is ordered that William Jacob Bluestein, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 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, 459 U. S. 967.] Motion of American Jewish Congress for leave to file a brief as *amicus curiae* denied. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

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, 459 U. S. 1034.] Motions of Associated Builders & Contractors, Inc., and Legal Foundation of America for leave to file briefs as *amici curiae* granted.

No. 82–695. FRANCHISE TAX BOARD OF CALIFORNIA *v.* CONSTRUCTION LABORERS VACATION TRUST FOR SOUTH-

ERN CALIFORNIA ET AL. C. A. 9th Cir. [Probable jurisdiction postponed, 459 U. S. 1085.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 82–713. THURSTON MOTOR LINES, INC. *v.* JORDAN K. RAND, LTD., *ante*, p. 533. Motion to substitute Blackburn Truck Lines, Inc., as party petitioner in place of Thurston Motor Lines, Inc., denied without prejudice to consideration of the motion by the United States Court of Appeals for the Ninth Circuit on remand.

No. 82–940. HISHON *v.* KING & SPALDING. C. A. 11th Cir. [Certiorari granted, 459 U. S. 1169.] Motion of the parties to unseal the record granted.

No. 82–973. IMMIGRATION AND NATURALIZATION SERVICE *v.* STEVIC. C. A. 2d Cir. [Certiorari granted, *ante*, p. 1010.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 82–6164. IN RE JOHNSON. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 82–898. MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES *v.* KNIGHT ET AL.; and

No. 82–977. MINNESOTA COMMUNITY COLLEGE FACULTY ASSN. ET AL. *v.* KNIGHT ET AL. Appeals from D. C. Minn. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 571 F. Supp. 1.

Certiorari Granted

No. 82–960. NATIONAL LABOR RELATIONS BOARD *v.* CITY DISPOSAL SYSTEMS, INC. C. A. 6th Cir. Certiorari granted. Reported below: 683 F. 2d 1005.

No. 82–1071. ALUMINUM COMPANY OF AMERICA ET AL. *v.* CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT ET AL.

C. A. 9th Cir. Certiorari granted. Reported below: 686 F. 2d 708.

Certiorari Denied

No. 81–2402. PERFORMANCE PRODUCTS, INC. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 675 F. 2d 994.

No. 82–739. JUREN ET AL. *v.* UNITED STATES. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 687 F. 2d 493.

No. 82–873. RICE ET AL. *v.* SOUTHERN CALIFORNIA EDISON CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 354.

No. 82–900. MIDDLETON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 690 F. 2d 820.

No. 82–1008. COUNTY OF VENTURA *v.* TILLETT. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 133 Cal. App. 3d 105, 183 Cal. Rptr. 741.

No. 82–1109. KEARNEY & TRECKER CORP. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 231 Ct. Cl. 571, 688 F. 2d 780.

No. 82–1137. AMERICAN RADIO ASSN. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 690 F. 2d 334.

No. 82–1171. EVERETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 692 F. 2d 596.

No. 82–1244. CITYTRUST ET AL. *v.* JOY; and
No. 82–1309. BALDWIN ET AL. *v.* JOY. C. A. 2d Cir. Certiorari denied. Reported below: 692 F. 2d 880.

No. 82–1274. TIMBERLAND MACHINES & ENGINEERING CORP. ET AL. *v.* MAINLAND INDUSTRIES, INC. Ct. App. Ore. Certiorari denied. Reported below: 58 Ore. App. 585, 649 P. 2d 613.

No. 82–1277. CARSONITE INTERNATIONAL CORP. ET AL. *v.* CARSON MANUFACTURING CO., INC. C. A. 9th Cir. Certiorari denied. Reported below: 686 F. 2d 665 and 688 F. 2d 647.

No. 82–1297. TEXSTAR CORP., TRANSFEREE OF THE ASSETS OF UNITEX INDUSTRIES, INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 688 F. 2d 362.

No. 82–1299. BRYDLE ET UX. *v.* KALASUNAS ET UX. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 722.

No. 82–1306. COLUMBIA GAS OF WEST VIRGINIA, INC. *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 82–1308. WILMINGTON MEDICAL CENTER, INC., ET AL. *v.* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 689 F. 2d 1161 and 693 F. 2d 22.

No. 82–1317. J. KAUFMAN IRON WORKS, INC., ET AL. *v.* SHACKELTON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 689 F. 2d 334.

No. 82–1318. DEMASI ET AL. *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. Reported below: —— R. I. ——, 448 A. 2d 1210; and —— R. I. ——, 452 A. 2d 1150.

No. 82–1322. UNITED STATES ET AL. *v.* WILLAMETTE INDUSTRIES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 689 F. 2d 865.

No. 82–1328. PFOTZER ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 82–1351. M. R. YUDOFSKY & ASSOCIATES ET AL. *v.* KENTUCKY DEPARTMENT OF FINANCE. Ct. App. Ky. Certiorari denied.

No. 82–1370. KARAPINKA *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied.

No. 82–1400. YOKUM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 694 F. 2d 719.

No. 82–5791. JOHNSTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 685 F. 2d 934.

No. 82–5799. LEWIS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 88 Ill. 2d 429, 430 N. E. 2d 994.

No. 82–5992. KILBANE ET AL. *v.* MARSHALL ET AL.;
No. 82–6109. STEELE *v.* TAYLOR, SUPERINTENDENT, COLUMBUS CORRECTIONAL FACILITY; and
No. 82–6169. KILBANE *v.* MARSHALL. C. A. 6th Cir. Certiorari denied. Reported below: 684 F. 2d 1193 and 697 F. 2d 128.

No. 82–6040. CHIRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 692 F. 2d 596.

No. 82–6059. ALLEN *v.* BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES GRAND LODGE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 692 F. 2d 747.

No. 82–6113. PELLOT *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 302 Pa. Super. 570, 448 A. 2d 1160.

No. 82–6121. BRASWELL ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 692 F. 2d 751.

No. 82–6122. COCHRAN *v.* ILLINOIS ET AL. Sup. Ct. Ill. Certiorari denied.

No. 82–6127. DORSEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 109 Ill. App. 3d 218, 440 N. E. 2d 394.

No. 82–6137. MA *v.* FIRST NATIONAL CORPORATION OF APPLETON ET AL. C. A. 7th Cir. Certiorari denied.

No. 82–6142. LE BRUN *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1230.

No. 82–6144. UDELL *v.* UNIVERSITY OF LOWELL ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 698 F. 2d 1213.

No. 82–6148. JOHL ET AL. *v.* MOUKAWSHER ET AL. C. A. 2d Cir. Certiorari denied.

No. 82–6152. BARTO *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 82–6157. ROBERTS *v.* LOCAL ONE, AMALGAMATED LITHOGRAPHERS OF AMERICA. C. A. 2d Cir. Certiorari denied.

No. 82–6158. PRUITT *v.* ROGERS. C. A. 8th Cir. Certiorari denied. Reported below: 696 F. 2d 1001.

No. 82–6159. DESROCHES *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied.

No. 82–6166. MARSHALL *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 499 Pa. 208, 452 A. 2d 1012.

No. 82–6167. UNITED STATES EX REL. SPEIGHT *v.* HARRIS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 297.

No. 82–6174. WEXLER *v.* LEES. C. A. 3d Cir. Certiorari denied. Reported below: 701 F. 2d 161.

No. 82–6175. WHITEHAWK *v.* SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied. Reported below: 693 F. 2d 825.

No. 82–6178. JACKSON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 82–6195. SULLIVAN *v.* FOGG, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 117.

No. 82–6197. BRAYBOY *v.* SCULLY, WARDEN, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 695 F. 2d 62.

No. 82–6219. BONTEMPO *v.* FENTON, WARDEN, RAHWAY STATE PENITENTIARY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 692 F. 2d 954.

No. 82–6221. EVANS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 694 F. 2d 726.

No. 82–6245. ADAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 721.

No. 82–6276. WILLIAMS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 698 F. 2d 1214.

No. 82–6278. PROCTOR *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 82–6286. MCKINNEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 703 F. 2d 578.

No. 82–6290. WHITING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 696 F. 2d 1006.

No. 82–6293. BADILLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 117.

No. 82–6294. WEAVER *v.* CARRIGLITTO ET AL. C. A. 3d Cir. Certiorari denied.

No. 82–6323. BOGER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 82–1131. WHEAT *v.* MISSISSIPPI. Sup. Ct. Miss.;

No. 82–6108. NELSON *v.* ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Sup. Ct. Ga.;

No. 82–6115. HILL *v.* GEORGIA. Sup. Ct. Ga.; and

No. 82–6154. MARTIN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 82–1131, 420 So. 2d 229; No. 82–6108, 250 Ga. 152, 296 S. E. 2d 590; No. 82–6115, 250 Ga. 277, 295 S. E. 2d 518; No. 82–6154, 420 So. 2d 583.

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. 82–1283. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* CARTER. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 677 F. 2d 427 and 691 F. 2d 777.

Rehearing Denied

No. 82–875. IRISH PEOPLE, INC. *v.* SMITH, ATTORNEY GENERAL OF THE UNITED STATES, 459 U. S. 1172;

No. 82–5836. BALLENTINE *v.* HARRIS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, 459 U. S. 1213;

No. 82–5925. MCCOLPIN *v.* UNITED STATES, 459 U. S. 1216;

No. 82–5932. WATNICK *v.* ELGIN STATE HOSPITAL, 459 U. S. 1216;

No. 82–6010. LOTT *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, 459 U. S. 1220;

No. 82–6042. WADE *v.* UNITED STATES, 459 U. S. 1221; and

No. 82–6063. SCHLOMANN *v.* RALSTON, WARDEN, 459 U. S. 1221. Petitions for rehearing denied.

APRIL 4, 1983

Appeals Dismissed

No. 82–927. BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS *v.* CONNOLLY, SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL.; and

No. 82–936. LANGONE ET AL. *v.* CONNOLLY, SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL. Appeals from Sup. Jud. Ct. Mass. dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari denied. Reported below: 388 Mass. 185, 446 N. E. 2d 43.

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

These appeals present substantial, unresolved questions regarding the accommodation of competing First Amendment values: the interests of would-be candidates and voters in eligibility for the ballot, and the interests of party members in political association without undue governmental intrusion. Massachusetts law requires that a person seeking to be placed on the party primary ballot for a statewide office must be an enrolled member of that party and must file certain documents, including nominating papers signed by a specified number of voters. Mass. Gen. Laws Ann., ch. 53, §§ 9, 44, 45, and 48 (West Supp. 1982–1983). The statute itself contains no other express requirements for access to the ballot, but the Massachusetts Supreme Judicial Court has held that these rules are "supplemented by" a rule—the "15% rule"—adopted by the Massachusetts Democratic Party. This rule permits an individual to run in the party primary only if he or she has received 15% of the votes on any ballot at the state party's convention to endorse candidates, which is held before the primary. According to the Massachusetts court, the 15% rule is designed to assure that primary candidates have a "modicum of support from members with substantial affiliation with the party." *Langone* v. *Secretary*

of Commonwealth, 388 Mass. 185, 194, 446 N. E. 2d 43, 47 (1983).

Frederick C. Langone, who wished to be a candidate in the Democratic primary for Lieutenant Governor in 1982, satisfied all of the requirements for ballot eligibility that were expressly set forth in the statute, including the submission of 10,000 certified signatures. Nevertheless, the Secretary of the Commonwealth of Massachusetts excluded him from the primary ballot because he had not obtained at least 15% of the votes cast at the party convention, as the 15% rule required. He filed suit in state court seeking an injunction requiring the Secretary to place his name on the primary ballot. The Attorney General of Massachusetts intervened as a plaintiff and filed a complaint seeking declaratory and injunctive relief. Two questions of law were reserved and reported to the full Supreme Judicial Court of Massachusetts, which rendered its decision in favor of the Secretary's implementation of the statute.

The Massachusetts Supreme Judicial Court construed Chapter 53 to recognize the Democratic Party's 15% rule because it believed that such a construction was required by the United States Constitution in order to avoid an impermissible infringement of the associational rights of party members. It noted that nomination papers may be signed by voters who are not members of the party, and that persons may vote in a party primary even if they have not enrolled in the party until immediately before they vote. Therefore, the court reasoned, additional restrictions serve the political party's "legitimate—indeed, compelling—interest in ensuring that its selection process accurately reflects the collective voice of those who, in *some meaningful sense*, are affiliated with it." *Id.*, at 193, 446 N. E. 2d, at 47. If Chapter 53 were construed to nullify the 15% rule, the Massachusetts court believed that it would "as effectively eliminat[e] that party's control of who its candidates in general elections will be as did the Wisconsin statute held unconstitutional in *Democratic*

Party of U. S. v. *Wisconsin* [450 U. S. 107 (1981)]." *Id.*, at 194, 446 N. E. 2d, at 47. That burden would necessitate "strict scrutiny, which it does not survive." *Id.*, at 191, 446 N. E. 2d, at 46. In essence, the Massachusetts court held that the United States Constitution prevents a State from enforcing a statute that gives a place on the primary ballot to any party member who satisfies the State's own eligibility requirements.[1]

The Massachusetts court rejected appellants' contentions that the statute, as construed to recognize the 15% rule, would defeat the legislative purpose in providing for primary elections and would violate the constitutional rights of candidates and voters. It recognized that the First and Fourteenth Amendments of the United States Constitution guarantee the rights of free speech and association of candidates and voters. It further acknowledged that, because the 15% rule was enforced through the State's supervision of the primary election process, the 15% rule should be treated "as though it were expressly contained in G. L. c. 53." *Id.*, at 195, 446 N. E. 2d, at 48. But it concluded that the burden on candidacy and voting rights imposed by enforcement of the 15% rule was insufficient to warrant strict scrutiny. Although the rule restricts access to the primary ballot, it allows each person the same opportunity to gather the neces-

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[1] The Massachusetts Supreme Judicial Court made this position explicit in a recent advisory opinion to the Governor. A bill pending before the Governor would have provided: "Notwithstanding the charter, rule or by-law of a political party, any candidate, who is enrolled in such political party, submitting nomination papers subject to the provisions of this chapter shall be a candidate for nomination at the state primary." The proposed language would have nullified the 15% rule. According to the court's opinion, the proviso would violate the First and Fourteenth Amendments of the United States Constitution because it would "abridge the constitutional rights of the Democratic party and its members to associate by allowing candidates to be placed on the Democratic State primary ballot in contravention of the party's charter." *Opinion of the Justices*, 385 Mass. 1201, 1207–1208, 434 N. E. 2d 960, 964 (1982).

sary signatures and convention support. In addition, a candidate for statewide office may appear on the general election ballot as an independent. To the extent that voters wish to associate and express their ideas as Democrats, the Massachusetts court reasoned, they could be represented by the several candidates who obtained the requisite convention support. Further, the state court found that the rule was rationally related to the furtherance of legitimate state interests—maintaining the integrity and stability of existing political parties, and assuring that party nominees are "truly representative of the party." *Id.*, at 198, 446 N. E. 2d, at 50.

The appeal in No. 82–927 has been filed by the Attorney General of Massachusetts, seeking to vindicate the State's interest in regulating the primary election ballot; his jurisdictional statement also asserts that the decision below improperly elevates the associational rights of party regulars over those of other party members. The appeal in No. 82–936 has been filed by would-be candidate Langone and several of his supporters, contending, *inter alia*, that enforcement of the 15% rule infringed their fundamental constitutional rights.

The case is properly before this Court on appeal. The Massachusetts Supreme Judicial Court, the highest court in the Commonwealth, expressly construed Chapter 53 "not to exclude, but rather, to accommodate the 15% rule."[2] *Id.*, at

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[2] The second question reported by the single Justice to the Supreme Judicial Court asked:

"Whether the decision by the Secretary of the Commonwealth that he will not place upon the Democratic state primary ballots those candidates who failed to obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the 'Charter of the Democratic Party of the Commonwealth', but otherwise complied with the statutory requirements to have their names placed upon the ballots violated the constitutional or statutory rights of the voters, the candidate, or their supporters?"

On July 6, 1982, the court issued an order answering this question in the negative. It stated: "Upon consideration of the argument and briefs of the

200, 446 N. E. 2d, at 51. It explained that the statute was to be "augmented" or "supplemented" by the 15% rule and acknowledged that the enforcement of the rule is "State action." "For the purpose of evaluating the plaintiffs' claims that the 15% rule violates rights guaranteed to them by the Federal and State Constitutions," the court wrote, "we treat the rule as though it were expressly contained in G. L. c. 53." *Id.*, at 195, 446 N. E. 2d, at 48. Its opinion then rejected appellants' constitutional challenges to the statute so construed. We therefore have appellate jurisdiction under 28 U. S. C. § 1257(2). See *Perry Education Assn.* v. *Perry Local Educators' Assn.*, *ante*, at 43, n. 5; *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 214–215, and n. 7 (1977) (appellate review of a state-court decision upholding the validity of a state statute authorizing the negotiation of agency shop agreements).

Unquestionably the issues presented by these appeals are substantial. Appellant Bellotti, the Attorney General, asserts the interests of the Commonwealth of Massachusetts in regulating the primary election process. As his jurisdictional statement contends:

> "This case deserves plenary consideration because this issue is of substantial importance to every state which has adopted the primary system as the means by which political parties choose their nominees. The challenged decision can permit the virtual nullification of the primary process; if the parties have the absolute right to set minimum ballot access qualifications, then a state may not be able to retain control of the political process to ensure an open and fair selection of primary candidates." Juris. Statement in No. 82–927, pp. 14–15 (footnote omitted).

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parties, we interpret the State statutes in light of the State and Federal constitutions and rule that the Secretary must give effect to the relevant charter provision."

In addition, appellant Langone and his supporters seek to vindicate their First Amendment associational and voting rights. We have recognized that these rights extend to candidates and voters in primary elections as well as general elections. See *Bullock* v. *Carter*, 405 U. S. 134 (1972); *Kusper* v. *Pontikes*, 414 U. S. 51 (1973). In this case, Langone satisfied the Commonwealth's express statutory requirements for the primary election ballot. Yet he was excluded by the application of an additional prerequisite imposed by the Democratic Party; his supporters were thereby prevented from associating in support of his candidacy and his ideas in the primary campaign. Of course, our cases also establish that the interests of a would-be candidate and his supporters in ballot access are limited by legitimate state interests. But none of our previous cases has decided whether the interests recognized by the Massachusetts Supreme Judicial Court in this case are sufficient to justify enforcement of the 15% rule to exclude candidates from the ballot.

Democratic Party of United States v. *Wisconsin ex rel. La Follette*, 450 U. S. 107 (1981), does not control this case. There this Court rejected Wisconsin's requirement that delegates to the party's Presidential nominating convention, selected in a primary open to nonparty voters, must cast their convention votes in accordance with the primary election results. In our view, the interests advanced by the State—preserving the overall integrity of the electoral process, providing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters—did not justify its substantial intrusion into the associational freedom of members of the National Party. But Wisconsin's requirement constituted a more significant intrusion on the associational rights of party members than the interpretation of the Massachusetts statute rejected by the Supreme Judicial Court under the perceived compulsion of our *Democratic Party* decision. Wisconsin *required* convention delegates to cast their votes for candidates who might have drawn their

support from nonparty members. The results of the party's decisionmaking process might thereby have been distorted. Here, if Chapter 53 nullified the 15% rule, Massachusetts would require only that enrolled party members be given a *chance* to vote for candidates whose nominating papers were signed by some nonparty members and who have drawn less than 15% of the votes at the party convention. If these candidates have only minimal support from the enrolled party members who vote in the primary, they will simply be ignored. Further, Wisconsin's asserted interests were less weighty than those set forth by the Massachusetts Attorney General. Surely the Commonwealth has a significant interest in protecting the First Amendment associational and voting rights of its citizens. Finally, unlike Wisconsin's attempt to control delegates in a nationwide party contest, the Massachusetts rule applies to campaigns for statewide office.[3]

I would note probable jurisdiction in No. 82–936, the appeal by candidate Langone and his supporters, and would hold the appeal in No. 82–927 for resolution in light of our disposition of No. 82–936.[4] After plenary consideration we might decide that the Commonwealth may constitutionally enforce the 15% rule, or we might not; but plainly we should

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[3] Similarly, our decision in *Cousins* v. *Wigoda*, 419 U. S. 477 (1975), invalidated a state court's determination that, despite a contrary determination by the Credentials Committee, a certain slate of delegates should be seated at the Democratic National Convention in 1972.

[4] Appellants in No. 82–936 assert their own constitutional rights as a candidate and voters. If appellant in No. 82–927, the Attorney General of Massachusetts, is in fact challenging the constitutionality of the statute as construed, he appears to be championing the First and Fourteenth Amendment rights of third parties—candidates and voters—who are capable of presenting their own claims in litigation. His jurisdictional statement may also be read, however, as asserting that the Supreme Judicial Court incorrectly interpreted the constitutional right of freedom of association and as a result unnecessarily required the Commonwealth to enforce the 15% rule. It is not clear that this claim, standing by itself, would be within this Court's appellate jurisdiction, although I believe that it would be sufficiently important to warrant review on certiorari.

not dismiss these appeals for want of a substantial federal question.

No. 82–1093. ABLE, DBA CRIMINAL DEFENSE CLINIC ET AL. *v.* TEXAS ET AL. Appeal from Ct. App. Tex., 1st Sup. Jud. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 82–6238. JONES ET AL. *v.* MITCHELL ET AL. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 688 F. 2d 837.

No. 82–6239. JONES ET AL. *v.* JEFFERSON PARISH SCHOOL BOARD. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 688 F. 2d 837.

No. 82–1153. MOTOR CLUB OF AMERICA INSURANCE CO. *v.* NEW JERSEY ET AL. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. Reported below: 91 N. J. 542, 453 A. 2d 861.

No. 82–1281. SHELLY & SANDS, INC., ET AL. *v.* PENNSYLVANIA DEPARTMENT OF TRANSPORTATION. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 499 Pa. 75, 451 A. 2d 678.

No. 82–6203. WAKEMAN ET AL. *v.* SOUTH DAKOTA. Appeal from Sup. Ct. S. D. dismissed for want of substantial federal question. Reported below: 326 N. W. 2d 220.

Certiorari Granted—Vacated and Remanded

No. 81–1278. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Florida* v. *Royer*, *ante*, p. 491. Reported below: 667 F. 2d 1029.

No. 82–397. STATE BAR OF TEXAS *v.* HOWELL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *District of Columbia Court of Appeals* v. *Feldman*, *ante*, p. 462. Reported below: 674 F. 2d 1027.

No. 82–1360. CROSS ET AL. *v.* BAXTER ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of § 2 of the Voting Rights Act of 1965, 42 U. S. C. § 1973, as amended in 1982. Reported below: 639 F. 2d 1383 and 688 F. 2d 279.

Miscellaneous Orders

No. ——. BOUMA ET UX. *v.* LARRY C. IVERSON, INC. Motion to direct the Clerk to file the petition for writ of certiorari granted.

No. A–725. CAVANAUGH *v.* UNITED STATES. C. A. 10th Cir. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A–758 (82–540). MISSISSIPPI *v.* SMITH, ATTORNEY GENERAL. D. C. D. C. Application for stay of proceedings, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. D–311. IN RE DISBARMENT OF MASON. Disbarment entered. [For earlier order herein, see 459 U. S. 1141.]

No. D–312. IN RE DISBARMENT OF ERGAZOS. Disbarment entered. [For earlier order herein, see 459 U. S. 1141.]

No. D–331. IN RE DISBARMENT OF BISHOP. It is ordered that Brian Alan Bishop, of Nevada City, 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. 80–1158. FLORIDA *v.* RODRIQUEZ, 451 U. S. 1022. Respondent is requested to file a response to the petition for rehearing within 30 days.

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, 459 U. S. 820.] Motion of Public Service Commission of New York for leave to file a supplemental brief after argument granted.

No. 81–2110. UNITED BUILDING & CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY *v.* MAYOR AND COUNCIL OF THE CITY OF CAMDEN ET AL. Sup. Ct. N. J. [Probable jurisdiction noted, *ante*, p. 1021.] Motion of appellant to dispense with printing the joint appendix 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, 459 U. S. 821.] Motion of the Solicitor General for leave to file a supplemental brief after argument granted. Motion of petitioners in No. 81–2147 for leave to file a response to the supplemental brief after argument granted.

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, 459 U. S. 1034.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 82–647. KIRKPATRICK *v.* CHRISTIAN HOMES OF ABILENE, INC., ET AL. Ct. App. Tex., 11th Sup. Jud. Dist. [Certiorari granted, 459 U. S. 1145.] Motion of Texas for divided argument denied.

No. 82–1066. UNITED STATES *v.* PTASYNSKI ET AL. D. C. Wyo. [Probable jurisdiction noted, 459 U. S. 1199.] Motion of Texas for divided argument and for additional time for oral argument denied.

No. 82–1325. I.A.M. NATIONAL PENSION FUND *v.* ELSER ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 82–6080 (A–773). BAREFOOT *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. [Certiorari granted, 459 U. S. 1169.] Motion of petitioner for divided argument to permit NAACP Legal Defense & Educational Fund, Inc., to present oral argument as *amicus curiae* granted. Application of counsel for petitioner to stay further proceedings in the United States Court of Appeals for the Fifth Circuit, case No. 82–1680, pending the sending down of the judgment of this Court, presented to JUSTICE WHITE, and by him referred to the Court, granted. Request for stay of further proceedings in the United States District Court for the Western District of Texas denied.

No. 82–6208. GREEN *v.* WHITE, SUPERINTENDENT, MISSOURI TRAINING CENTER FOR MEN. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 25, 1983, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 82–6342. IN RE MAXWELL; and

No. 82–6353. IN RE GRAY. Petitions for writs of habeas corpus denied.

No. 82–6264. IN RE PREWITT. Petition for writ of mandamus denied.

No. 82–1313. IN RE DOAN. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted. (See also No. 81–1574, *ante*, at 675.)

No. 82–1273. MAINE *v.* THORNTON. Sup. Jud. Ct. Me. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Case is consolidated with No. 82–15, *Oliver* v. *United States* [certiorari granted, 459 U. S. 1168], and a total of one hour allotted for oral argument. Reported below: 453 A. 2d 489.

Certiorari Denied. (See also Nos. 82–927, 82–936, 82–1093, 82–6238, and 82–6239, *supra.*)

No. 81–1595. CONNECTICUT ET AL. *v.* CUISINARTS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 665 F. 2d 24.

No. 81–2239. BLACK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 675 F. 2d 129.

No. 81–5181. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 649 F. 2d 305.

No. 81–6746. MEDINA-PENA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 671 F. 2d 1376.

No. 82–587. MOORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 675 F. 2d 802.

No. 82–882. FALCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 299.

No. 82–972. GIBSON ET AL. *v.* FEDERAL TRADE COMMISSION; and

No. 82–984. GIBSON ET UX. *v.* FEDERAL TRADE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 682 F. 2d 554.

No. 82–1052. OLD BEN COAL CO. *v.* BLAIZE ET AL. C. A. 7th Cir. Certiorari denied.

No. 82–1076. LOUISIANA ET AL. *v.* DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 690 F. 2d 180.

No. 82–1079. DICKINSON *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 682 F. 2d 355.

No. 82–1155. OTASCO, INC. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 689 F. 2d 162.

No. 82–1172. BRATTON *v.* UNITED STATES; and
No. 82–1225. GREENLEAF *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 692 F. 2d 182.

No. 82–1173. UNDERWRITERS AT LLOYDS *v.* OPE SHIPPING, LTD., ET AL.; and
No. 82–1356. OPE SHIPPING, LTD., ET AL. *v.* ALLSTATE INSURANCE CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 687 F. 2d 639.

No. 82–1209. BREWTON FASHIONS, INC., A DIVISION OF JUDY BOND *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 11th Cir. Certiorari denied. Reported below: 682 F. 2d 918.

No. 82–1339. TOWN OF HUNTINGTON, NEW YORK, ET AL. *v.* HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 689 F. 2d 391.

No. 82–1341. DIAMOND M DRILLING CO. ET AL. *v.* WOOD. C. A. 5th Cir. Certiorari denied. Reported below: 691 F. 2d 1165.

No. 82–1342. WILLIAMS ET AL. *v.* MILONAS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 691 F. 2d 931.

No. 82–1344. CELE *v.* KINNEY ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 82–1348. STOVALL *v.* CONTINENTAL FEDERAL SAVINGS & LOAN ASSN. Sup. Ct. Okla. Certiorari denied.

No. 82–1353. WHITE ET AL. *v.* ROUGHTON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 689 F. 2d 118.

No. 82–1361. MAIER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 691 F. 2d 421.

No. 82–1363. SILVER, DBA ALLIED BOND & COLLECTION AGENCY *v.* WOOLF, ACTING BANKING COMMISSIONER OF CONNECTICUT. C. A. 2d Cir. Certiorari denied. Reported below: 694 F. 2d 8.

No. 82–1364. AQUATIC TECHNICAL SERVICES, INC. *v.* COUNTY OF NASSAU ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 58 N. Y. 2d 689, 444 N. E. 2d 1015.

No. 82–1372. CULLEN *v.* BMW OF NORTH AMERICA, INC. C. A. 2d Cir. Certiorari denied. Reported below: 691 F. 2d 1097.

No. 82–1374. RIVINIUS ET AL. *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 328 N. W. 2d 220.

No. 82–1416. TASSONE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 459.

No. 82–1452. ERRANTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 695 F. 2d 45.

No. 82–1454. COWARD ET AL. *v.* COLGATE-PALMOLIVE CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 686 F. 2d 1230.

No. 82–1463. HUCKABY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 698 F. 2d 915.

No. 82–1467. FROST *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 696 F. 2d 1006.

No. 82–1476. INNELLA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 690 F. 2d 834.

No. 82–1485. REED *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 697 F. 2d 517.

No. 82–5944. BISHOP *v.* STEPHENSON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 688 F. 2d 829.

No. 82–5965. MALLOY *v.* PURVIS, SHERIFF, MOBILE COUNTY, ALABAMA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 681 F. 2d 736.

No. 82–6011. LAIRD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 692 F. 2d 769.

No. 82–6031. GEDRAITIS ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 690 F. 2d 351.

No. 82–6160. BREKKE *v.* POWELL. C. A. 7th Cir. Certiorari denied.

No. 82–6176. WILLIAMS *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 693 F. 2d 132.

No. 82–6191. STASTNY *v.* BOARD OF TRUSTEES OF CENTRAL WASHINGTON UNIVERSITY. Ct. App. Wash. Certiorari denied. Reported below: 32 Wash. App. 239, 647 P. 2d 496.

No. 82–6200. MARAS *v.* AMMERMAN. C. A. D. C. Cir. Certiorari denied. Reported below: 223 U. S. App. D. C. 426, 692 F. 2d 150.

No. 82–6201. MOTT *v.* JOHN DEERE DUBUQUE WORKS OF DEERE & CO. C. A. 8th Cir. Certiorari denied.

No. 82–6202. MINTZ *v.* DIRECTOR, DEPARTMENT OF MOTOR VEHICLES OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 691 F. 2d 507.

No. 82–6209. JONES *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 693 F. 2d 547.

No. 82–6211. UNITED STATES EX REL. BLACKWELL *v.* FRANZEN, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 496.

No. 82–6213. ASH *v.* CVETKOV ET AL. C. A. 9th Cir. Certiorari denied.

No. 82–6217. ASHLEY *v.* GARRISON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 692 F. 2d 751.

No. 82–6218. CUMMINGS *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 722.

No. 82–6222. HARVEY *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 82–6225. HOLSEY *v.* BAYLOR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 691 F. 2d 494.

No. 82–6228. BRIM, AKA MERTZ *v.* SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 693 F. 2d 44.

No. 82–6233. GRIEF *v.* PENNSYLVANIA UNEMPLOYMENT COMPENSATION BOARD OF REVIEW. Sup. Ct. Pa. Certiorari denied.

No. 82–6237. MILLER *v.* ATLANTA BOARD OF EDUCATION. C. A. 11th Cir. Certiorari denied. Reported below: 691 F. 2d 510.

No. 82–6253. BROADWAY *v.* BOGAN. C. A. 11th Cir. Certiorari denied.

No. 82–6275. EVANS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 422 So. 2d 802.

No. 82–6279. McDONALD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 692 F. 2d 376.

No. 82–6302. DANCY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 696 F. 2d 578.

No. 82–6303. BROOKS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 697 F. 2d 517.

No. 82–6311. LLORENS *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 455.

No. 82–6315. MULLINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 698 F. 2d 686.

No. 82–6316. WILSON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

No. 82–6317. YATES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 828.

No. 82–6320. MARTIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 696 F. 2d 49.

No. 82–6326. MEAGHER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 694 F. 2d 726.

No. 82–6340. TAVOLINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 118.

No. 82–6341. RIOLA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 694 F. 2d 670.

No. 82–6349. CALABRESE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1404.

No. 82–6356. NICKS *v.* HAZLETT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 726.

No. 82–6357. McCORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 695 F. 2d 823.

No. 82–6198. DUVALLON *v.* FLORIDA. C. A. 11th Cir. Motion of petitioner to defer consideration of the petition for

certiorari denied. Certiorari denied. Reported below: 691 F. 2d 483.

Rehearing Denied

No. 82–5719. CLARKSON *v.* UNITED STATES, *ante*, p. 1013; and

No. 82–6028. GREISINGER *v.* DAVIS, SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, 459 U. S. 1221. Petitions for rehearing denied.

APRIL 6, 1983

Dismissal Under Rule 53

No. 82–1228. CARTER-WALLACE, INC. *v.* JOHNSON & JOHNSON. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 714 F. 2d 114.

APRIL 8, 1983

Dismissal Under Rule 53

No. 82–1388. CONTINENTAL AIR LINES, INC. *v.* GERDOM ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 692 F. 2d 602.

APRIL 9, 1983

Dismissal Under Rule 53

No. 82–1457. PARLIAMENT INSURANCE CO. *v.* LEFCOE. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 694 F. 2d 725.

APRIL 12, 1983

Vacated and Remanded After Certiorari Granted

No. 82–647. KIRKPATRICK *v.* CHRISTIAN HOMES OF ABILENE, INC., ET AL. Ct. App. Tex., 11th Sup. Jud. Dist. [Certiorari granted, 459 U. S. 1145.] The Court has considered the memorandum filed by petitioner in response to the representations of the State of Texas in its brief before this

Court which bring to light a question of state law not passed upon or relied upon below. The resolution of this question may establish that petitioner is entitled to the relief he seeks as a matter of Texas statutory law. If this is so, a decision of the constitutional question on which we granted certiorari would be unnecessary. See *Paschall* v. *Christie-Stewart, Inc.*, 414 U. S. 100 (1973); *Musser* v. *Utah*, 333 U. S. 95 (1948). Accordingly, the judgment is vacated and the case is remanded for further proceedings to determine whether, under Texas law, petitioner could have obtained and may still obtain a decree designating him as the father of his child pursuant to the provisions of Tex. Fam. Code Ann. §§ 13.01–13.09 (Supp. 1982–1983). The Clerk is directed to issue the mandate forthwith.

Miscellaneous Order

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, 459 U. S. 1034.] This case is hereby scheduled for argument on April 26, 1983, in place of No. 82-647, *Kirkpatrick* v. *Christian Homes of Abilene, Inc., et al.*

APRIL 18, 1983

Affirmed on Appeal

No. 82–6257. FULK ET AL. *v.* MORITZ ET AL. Appeal from D. C. N. D. Ohio. Motion of appellant for leave to proceed *in forma pauperis* granted. Judgment affirmed. JUSTICE STEVENS and JUSTICE O'CONNOR would dismiss the appeal for want of jurisdiction, treat the papers whereon the appeal was taken as a petition for writ of certiorari, and deny certiorari.

Appeals Dismissed

No. 82–905. SOONER FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* OKLAHOMA TAX COMMISSION ET AL. Appeal from

Sup. Ct. Okla. dismissed for want of substantial federal question. Reported below: 662 P. 2d 1366.

No. 82–1382. TOLUB ET AL. *v.* EVANS, AS CHIEF ADMINISTRATIVE JUDGE OF THE STATE OF NEW YORK, ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 58 N. Y. 2d 1, 444 N. E. 2d 1.

No. 82–1420. SANFORD ET AL. *v.* DUMAS. Appeal from Dist. Ct. App. Fla., 5th Dist., dismissed for want of substantial federal question. Reported below: 413 So. 2d 58.

No. 82–983. DUNCAN *v.* PECK. 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. 82–1237. STELLA *v.* MERCY HOSPITAL ET AL. 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: 705 F. 2d 458.

No. 82–6249. VELILLA *v.* UTC/HAMILTON STANDARD DIVISION ET AL. Appeal from Sup. Ct. Conn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 82–1243. BUNKER *v.* NATIONAL GYPSUM CO. Appeal from Sup. Ct. Ind. dismissed for want of substantial federal question. JUSTICE BRENNAN took no part in the consideration or decision of this case. Reported below: 441 N. E. 2d 8.

No. 82–1293. TEMPLE ET AL. *v.* ALABAMA PUBLIC SERVICE COMMISSION ET AL. Appeal from Sup. Ct. Ala. dismissed for want of jurisdiction. Reported below: 425 So. 2d 1366.

No. 82–1386. FIELDS *v.* SUMMIT ENGINEERING. Appeal from Sup. Ct. Mont. dismissed for want of properly presented federal question. Reported below: —— Mont. ——, 653 P. 2d 1204.

No. 82–1445. THE DON'T BANKRUPT WASHINGTON COMMITTEE *v.* CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction it appearing appellant lacks standing to bring this appeal. Reported below: 696 F. 2d 692.

No. 82–1477. PACIFIC STANDARD LIFE INSURANCE CO. ET AL. *v.* COMMITTEE TO SAVE NUKOLII ET AL. Appeal from Sup. Ct. Haw. Motions of National Association of Home Builders et al. and National Association of Realtors for leave to file briefs as *amici curiae* granted. Appeal dismissed for want of substantial federal question. Reported below: 65 Haw. 318, 653 P. 2d 766.

Certiorari Granted—Vacated and Remanded

No. 82–1399. ALESSI ET AL. *v.* COMMITTEE ON PROFESSIONAL STANDARDS, THIRD JUDICIAL DEPARTMENT. Ct. App. N. Y. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *In re R. M. J.*, 455 U. S. 191 (1982). Reported below: 58 N. Y. 2d 689, 444 N. E. 2d 1015.

Vacated and Remanded After Certiorari Granted

No. 82–25. JONES, A MINOR CHILD, BY HIS MOTHER AND NEXT FRIEND, JONES, ET AL. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. [Certiorari granted, 459 U. S. 965.] Judgment vacated and case remanded for further consideration in light of Miss. Code Ann. § 91–1–15 (Supp. 1982), as to the Jones petitioners, and in light of *Adkins* v. *McEldowney*, —— W. Va. ——, 280 S. E. 2d 231 (1981), as to the Simms petitioners.

Miscellaneous Orders

No. D–319. IN RE DISBARMENT OF FEDER. Disbarment entered. [For earlier order herein, see *ante*, p. 1009.]

No. D–327. IN RE DISBARMENT OF STEVENS. Harry J. Stevens, Jr., of Short Hills, N. J., 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 March 7, 1983 [*ante*, p. 1019], is hereby discharged.

No. D–332. IN RE DISBARMENT OF PARSONS. It is ordered that Edward Parsons, 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. 81–2332. NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY *v.* CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF VIRGINIA ET AL. C. A. 4th Cir. [Certiorari granted, 459 U. S. 1145.] Motions of National Institute of Municipal Law Officers and United States Conference of Mayors et al. for leave to file briefs as *amici curiae* granted. JUSTICE POWELL took no part in the consideration or decision of these motions.

No. 82–91. IMMIGRATION AND NATURALIZATION SERVICE *v.* PHINPATHYA. C. A. 9th Cir. [Certiorari granted, 459 U. S. 965.] Motion of respondent to enlarge record, suggestion of mootness, and motion to stay further proceedings pending administrative action denied.

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. Sup. Ct. Haw. [Probable jurisdic-

tion noted, 459 U. S. 1101.] Motion of appellee for divided argument denied.

No. 82–862. CONSOLIDATED RAIL CORPORATION *v.* LESTRANGE. C. A. 3d Cir. [Certiorari granted, 459 U. S. 1199.] Motion to substitute Lee Ann LeStrange Darrone, as Administratrix of Estate of Thomas LeStrange, in place of respondent Thomas LeStrange, deceased, granted.

No. 82–6080. BAREFOOT *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. [Certiorari granted, 459 U. S. 1169.] Motion of Washington Legal Foundation for leave to file a brief as *amicus curiae* granted. Motion of Florida for leave to participate in oral argument as *amicus curiae* and for additional time for argument denied.

No. 82–6204. TOLBERT *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari granted.

No. 82–6472. IN RE LIPSCOMB. Petition for writ of habeas corpus denied.

No. 82–6288. IN RE TYLER. Petition for writ of mandamus denied.

No. 82–1378. IN RE COMEAUX; and

No. 82–1385. IN RE INTERNATIONAL HARVESTER CO. ET AL. Petitions for writs of mandamus and/or prohibition denied.

Probable Jurisdiction Noted or Postponed

No. 82–1248. SCHALL, COMMISSIONER OF NEW YORK CITY DEPARTMENT OF JUVENILE JUSTICE *v.* MARTIN ET AL.; and

No. 82–1278. ABRAMS, ATTORNEY GENERAL OF NEW YORK *v.* MARTIN ET AL. Appeals from C. A. 2d Cir. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 689 F. 2d 365.

No. 82–1295. ESCAMBIA COUNTY, FLORIDA, ET AL. *v.* MCMILLAN ET AL. Appeal from C. A. 5th Cir. Motion of State Association of County Commissioners of Florida et al. for leave to file a brief as *amici curiae* granted. Probable jurisdiction noted. Reported below: 688 F. 2d 960.

No. 82–1401. CALDER ET AL. *v.* JONES ET AL. Appeal from Ct. App. Cal., 2d App. Dist. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 138 Cal. App. 3d 128, 187 Cal. Rptr. 825.

Certiorari Granted

No. 82–1256. LYNCH, MAYOR OF PAWTUCKET, ET AL. *v.* DONNELLY ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 691 F. 2d 1029.

No. 82–1448. UNITED STATES *v.* STAUFFER CHEMICAL CO. C. A. 6th Cir. Certiorari granted. Reported below: 684 F. 2d 1174.

No. 82–1150. ELLIS ET AL. *v.* BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYES, ET AL. C. A. 9th Cir. Motion of William L. Dickinson for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 685 F. 2d 1065.

Certiorari Denied. (See also Nos. 82–983, 82–1237, and 82–6249, *supra.*)

No. 81–1438. HAMMERMILL PAPER CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 658 F. 2d 155.

No. 81–2162. PIONEER FINISHING CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 667 F. 2d 199.

No. 81–2202. WESTINGHOUSE ELECTRIC CORP. *v.* TRIBBLE. C. A. 8th Cir. Certiorari denied. Reported below: 669 F. 2d 1193.

No. 82–809. TABELING *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 842.

No. 82–929. BURKS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 104 Ill. App. 3d 1203, 437 N. E. 2d 944.

No. 82–964. DUNNE ET AL. *v.* HANSEN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 681 F. 2d 484.

No. 82–978. TONUBBEE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 420 So. 2d 126.

No. 82–990. MARVIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 687 F. 2d 1221.

No. 82–1016. SOUTH CENTRAL BELL TELEPHONE CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 688 F. 2d 345.

No. 82–1024. BOEING CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 230 Ct. Cl. 663, 680 F. 2d 132.

No. 82–1033. OHIO *v.* WILMOTH. Sup. Ct. Ohio. Certiorari denied. Reported below: 1 Ohio St. 3d 118, 438 N. E. 2d 105.

No. 82–1070. BENEDETTO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 298.

No. 82–1088. GUMM, DBA DESERT-AIRE MOBILE HOME STYLING & SALES, INC. ET AL. *v.* TURNER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 685 F. 2d 1384.

No. 82–1090. ASHLAND OIL, INC. *v.* DELTA OIL PRODUCTS CORP. C. A. 7th Cir. Certiorari denied. Reported below: 685 F. 2d 175.

No. 82–1092. CONTINENTAL MANORS, INC. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 688 F. 2d 844.

No. 82–1103. PYRAMID LAKE PAIUTE TRIBE OF INDIANS *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 681 F. 2d 1134.

No. 82–1121. LOUISIANA PUBLIC SERVICE COMMISSION *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 688 F. 2d 357.

No. 82–1148. QUEEN ET AL. *v.* TENNESSEE VALLEY AUTHORITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 689 F. 2d 80.

No. 82–1162. GEORGE BANTA CO., INC., BANTA DIVISION *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 222 U. S. App. D. C. 288, 686 F. 2d 10.

No. 82–1169. CPC INTERNATIONAL INC. *v.* DIMMITT AGRI INDUSTRIES, INC.; and

No. 82–1347. DIMMITT AGRI INDUSTRIES, INC. *v.* CPC INTERNATIONAL, INC. C. A. 5th Cir. Certiorari denied. Reported below: 679 F. 2d 516.

No. 82–1184. CICALE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 691 F. 2d 95.

No. 82–1191. STEPHENS *v.* UNITED STATES;

No. 82–1207. VADINO *v.* UNITED STATES; and

No. 82–1208. NATALE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 680 F. 2d 1329.

No. 82–1198. PLANT ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 682 F. 2d 914.

No. 82–1203. SCALES, AS NEXT FRIEND OF SCALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 685 F. 2d 970.

No. 82–1216. WORLDWIDE CHURCH OF GOD *v.* SUPERIOR COURT OF CALIFORNIA, ORANGE COUNTY (GIPE, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 82–1220. UNION NATIONAL BANK OF LITTLE ROCK *v.* PAXTON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 688 F. 2d 552.

No. 82–1222. ILLINOIS ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 7th Cir. Certiorari denied.

No. 82–1230. MOORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 459.

No. 82–1261. STANDARD-COOSA-THATCHER CARPET YARN DIVISION, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 691 F. 2d 1133.

No. 82–1267. ROCK *v.* COOMBE, SUPERINTENDENT, EASTERN NEW YORK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 694 F. 2d 908.

No. 82–1270. LOMAS SANTA FE, INC., ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 693 F. 2d 71.

No. 82–1287. RANDOLPH ASSOCIATES *v.* WAKEFERN FOOD CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1403.

No. 82–1290. ROTH'S IGA FOODLINER, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 694 F. 2d 723.

No. 82–1354. NEWMAN ET AL. *v.* ALABAMA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 683 F. 2d 1312.

No. 82–1362. GREAT LAKES DREDGE & DOCK CO. *v.* EBANKS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 688 F. 2d 716.

No. 82–1376. FREEMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 459.

No. 82–1379. JONES *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 82–1380. ROONEY *v.* COLUMBIA PICTURES INDUSTRIES, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 117.

No. 82–1387. ZACK *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 692 F. 2d 28.

No. 82–1394. CENTRAL FLORIDA ENTERPRISES, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 221 U. S. App. D. C. 162, 683 F. 2d 503.

No. 82–1396. MICHIGAN *v.* JONES. Sup. Ct. Mich. Certiorari denied. Reported below: 416 Mich. 354, 331 N. W. 2d 406.

No. 82–1397. LANIGAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 696 F. 2d 986.

No. 82–1398. M/V POLLUX ET AL. *v.* GOODPASTURE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 688 F. 2d 1003.

No. 82–1402. LOCAL DIVISION 1028, AMALGAMATED TRANSIT UNION *v.* CITY OF AURORA. C. A. 7th Cir. Certiorari denied.

No. 82–1405. CARRIONE *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 188 Conn. 681, 453 A. 2d 1137.

No. 82–1406. LUKOVSKY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 692 F. 2d 527.

No. 82–1407. NIGGLE ET UX. *v.* OLD KENT BANK & TRUST CO. Ct. App. Mich. Certiorari denied.

No. 82–1411. KONDRAT *v.* MARTINET. Ct. App. Ohio, Lake County. Certiorari denied.

No. 82–1412. MOENCH INVESTMENT CO., LTD., ET AL. *v.* UNION PACIFIC LAND RESOURCES CORP. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 696 F. 2d 88.

No. 82–1415. EDMUNDSON INVESTMENT CO. ET AL. *v.* FLORIDA TRECO, INC. Ct. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. Reported below: 633 S. W. 2d 599.

No. 82–1418. CHAPMAN INDUSTRIES CORP. *v.* N.A. SALES CO., INC. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 115.

No. 82–1419. HAYES *v.* SUPREME COURT JUSTICES OF NEVADA. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 442.

No. 82–1422. ADAMS ET AL. *v.* GOULD, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 687 F. 2d 27.

No. 82–1425. BRAQUET ET AL. *v.* ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 419 So. 2d 30.

No. 82–1429. TROUT *v.* LEHMAN, SECRETARY OF THE NAVY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 223 U. S. App. D. C. 427, 692 F. 2d 151.

No. 82–1430. ZOSLAW ET UX., DBA MARIN MUSIC CENTRE *v.* MCA DISTRIBUTING CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 693 F. 2d 870.

No. 82–1435. CONTRA COSTA THEATRE, INC. *v.* CITY OF CONCORD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 686 F. 2d 798.

No. 82–1440. TILLEY *v.* ANDERSON, REGIONAL ADMINISTRATOR OF STATE PRISON OF SOUTHERN MICHIGAN. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 458.

No. 82–1441. KINNEY ET UX. *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL. C. A. 10th Cir. Certiorari denied.

No. 82–1459. BUCKLEY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 689 F. 2d 893.

No. 82–1468. REMINGA, EXECUTRIX OF THE ESTATE OF REMINGA, ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 695 F. 2d 1000.

No. 82–1475. WYLLIE ET AL. *v.* DUNN. C. A. 6th Cir. Certiorari denied. Reported below: 697 F. 2d 121.

No. 82–1494. SURGENT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 718 F. 2d 1087.

No. 82–1503. EVANS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 697 F. 2d 240.

No. 82–1505. GRINDROD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 694 F. 2d 649.

No. 82–1520. LANDSBERGER *v.* COMMISSIONER OF REVENUE OF MINNESOTA. Sup. Ct. Minn. Certiorari denied.

No. 82–1535. GARLING *v.* SECRETARY OF DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. D. C. Cir. Certiorari denied. Reported below: 225 U. S. App. D. C. 51, 696 F. 2d 133.

No. 82–1550. MASON ET AL. *v.* PANAMA CANAL CO. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 223 U. S. App. D. C. 426, 692 F. 2d 150.

No. 82–1552. GRIGSBY *v.* DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 701 F. 2d 147.

No. 82–1553. LANZIERI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 118.

No. 82–1567. SWIATEK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 698 F. 2d 1226.

No. 82–5649. PAUL *v.* MAGGIO, WARDEN, LOUISIANA STATE PENITENTIARY; and

No. 82–5769. BARKLEY *v.* MAGGIO, WARDEN, LOUISIANA STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 82–5864. ACKER *v.* ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 82–5881. WALKER *v.* MORRIS, SUPERINTENDENT, MECKLENBURG CORRECTIONAL CENTER. Sup. Ct. Va. Certiorari denied.

No. 82–5915. JENNINGS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 691 F. 2d 511.

No. 82–5926. FARRELL *v.* OREGON EX REL. JUVENILE DEPARTMENT OF MULTNOMAH COUNTY. Ct. App. Ore. Certiorari denied. Reported below: 58 Ore. App. 258, 648 P. 2d 401.

No. 82–5929. WARREN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 687 F. 2d 347.

No. 82–5936. HOLMES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 454 A. 2d 1308.

No. 82–5948. MORGAN *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 421 So. 2d 520.

No. 82–5961. RHODES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 692 F. 2d 766.

No. 82–5968. CRAFT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 691 F. 2d 205.

No. 82–5971. HOWARD *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 452 A. 2d 966.

No. 82–6003. McCREE *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 689 F. 2d 797.

No. 82–6005. GAYLE, AKA WAITERS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 58 N. Y. 2d 636, 444 N. E. 2d 1003.

No. 82–6023. BURTON *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 82–6034. BROWN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 82–6103. GRESHAM *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 223 U. S. App. D. C. 427, 692 F. 2d 151.

No. 82–6116. FALTICO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 687 F. 2d 273.

No. 82–6146. RIVERS, BY HIS MOTHER AND NATURAL GUARDIAN, RIVERS, ET AL. *v.* BLUM, COMMISSIONER, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 692 F. 2d 871.

No. 82–6156. STAMPS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 103 Ill. App. 3d 1201, 435 N. E. 2d 1385.

No. 82–6184. MOORE *v.* UNITED STATES (four cases). C. A. 3d Cir. Certiorari denied.

No. 82–6189. SMART *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 278 S. C. 515, 299 S. E. 2d 686.

No. 82–6199. WISE *v.* ENGLE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 731.

No. 82–6216. TIETBOHL *v.* WOODS ET AL. C. A. 9th Cir. Certiorari denied.

No. 82–6226. HARVEY *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 695 F. 2d 563.

No. 82–6227. GARRETT *v.* OKLAHOMA ET AL. Ct. App. Okla. Certiorari denied.

No. 82–6229. HARRIS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 188 Conn. 574, 452 A. 2d 634.

No. 82–6232. HEREFORD *v.* BRITTAIN. Ct. App. D. C. Certiorari denied.

No. 82–6236. WHITE *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 82–6240. COLEMAN *v.* LLOYDS BANK OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 701 F. 2d 184.

No. 82–6242. SPROGIS-MASTINS *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists. Certiorari denied.

No. 82–6244. GRAY *v.* JAGO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 723.

No. 82–6246. DINKENS *v.* WAINWRIGHT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 693 F. 2d 134.

No. 82–6247. MURPHY *v.* STEPHENSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 696 F. 2d 990.

No. 82–6248. YOUNG *v.* COUNTY OF SAUK, WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 109 Wis. 2d 686, 325 N. W. 2d 738.

No. 82–6258. DABON *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 694 F. 2d 720.

No. 82–6260. HARRISON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 82–6265. SIMMONS *v.* ROUSE, SUPERINTENDENT, LAKE CORRECTIONAL INSTITUTION. C. A. 11th Cir. Certiorari denied. Reported below: 693 F. 2d 134.

No. 82–6266. CLARK *v.* SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 693 F. 2d 59.

No. 82–6268. JACKSON *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 82–6269. BARNES *v.* HENRY. C. A. 9th Cir. Certiorari denied. Reported below: 691 F. 2d 506.

No. 82–6270. BRUNGS *v.* PUBLIC LIBRARY OF COLUMBUS ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 82–6272. COVINGTON *v.* OSBORNE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 685 F. 2d 429.

No. 82–6273. BECKER *v.* ARCADIAN GARDENS. C. A. 2d Cir. Certiorari denied.

No. 82–6277. SUBILOSKY *v.* CALLAHAN, SUPERINTENDENT, MCI-NORFOLK, MASSACHUSETTS. C. A. 1st Cir. Certiorari denied. Reported below: 689 F. 2d 7.

No. 82–6280. SWANSON *v.* DAVIS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 728.

No. 82–6281. ZARRILLI *v.* RANDALL ET AL. C. A. 1st Cir. Certiorari denied.

No. 82–6282. SCHUMAN *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 698 F. 2d 1227.

No. 82–6283. THAPER *v.* NEW JERSEY DEPARTMENT OF EDUCATION ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 82–6285. PERRON *v.* PERRON. Sup. Ct. P. R. Certiorari denied. Reported below: —— P. R. R. ——.

No. 82–6289. REAL *v.* CLARKE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 696 F. 2d 1000.

No. 82–6292. WALKER *v.* SOLEM, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 687 F. 2d 1235.

No. 82–6295. TANNER *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 696 F. 2d 1000.

No. 82–6298. JOHNSON *v.* GRIFFIN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 82–6307. GREEN *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 694 F. 2d 108.

No. 82–6309. HURNS *v.* CLEVELAND POLICE DEPARTMENT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 696 F. 2d 994.

No. 82–6310. HAMM *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 82–6312. LYONS *v.* WALTERS, ADMINISTRATOR, VETERANS ADMINISTRATION, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 82–6319. SARTORE *v.* ADAMS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 695 F. 2d 565.

No. 82–6322. BASTANIPOUR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 697 F. 2d 170.

No. 82–6325. HAZRA *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied.

No. 82–6329. BURTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 701 F. 2d 160.

No. 82–6339. LEVY *v.* FAIRFAX COUNTY GOVERNMENT. C. A. 4th Cir. Certiorari denied. Reported below: 694 F. 2d 717.

No. 82–6346. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 701 F. 2d 160.

No. 82–6355. ALFARO-GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 691 F. 2d 510.

No. 82–6364. UNDERWOOD-NUNEZ *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1231.

No. 82–6369. PUCHALA ET AL. *v.* COINTELPRO ET AL. C. A. 7th Cir. Certiorari denied.

No. 82–6374. CONERLY ET AL. *v.* UNITED STATES; and No. 82–6376. DICKENS ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 695 F. 2d 765.

No. 82–6385. KIMBERLIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 692 F. 2d 760.

No. 82–6392. PARKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 82–6393. CAPO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 693 F. 2d 1330.

No. 82–6395. COWHIG *v.* MARSH, SECRETARY OF THE ARMY. C. A. 1st Cir. Certiorari denied. Reported below: 693 F. 2d 234.

No. 82–6397. MARQUARDT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 695 F. 2d 1300.

No. 82–6403. COTNER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 82–6404. LEWIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 169.

No. 82–6416. BETHEA *v.* LEEKE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 696 F. 2d 988.

No. 82–6418. PHILLIPS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1511.

No. 82–6420. MORRIS *v.* UNITED STATES DEPARTMENT OF JUSTICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 696 F. 2d 994.

No. 82–6421. BOYD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 696 F. 2d 63.

No. 82–6422. CALLAHAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 701 F. 2d 186.

No. 82–6427. BEDOYA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 117.

No. 82–6430. JOHNSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 82–6431. WHAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 696 F. 2d 993.

No. 82–665. SPALDING ET AL. *v.* AIKEN. C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 684 F. 2d 632.

Statement of CHIEF JUSTICE BURGER concerning the denial of certiorari.

The time has come to consider limitations on the availability of the writ of habeas corpus in federal courts, especially

for prisoners pressing stale claims that were fully ventilated in state courts. Others have expressed frustration in coping with stale cases, see, *e. g.*, *Illinois* v. *Allen*, 397 U. S. 337, 351, 357 (1970) (Douglas, J., concurring); *McMann* v. *Richardson*, 397 U. S. 759, 773 (1970), and this petition underscores the views of those who have expressed concern as to the misuse and abuse of the writ. Relief on claims presented many years after conviction should be limited to cases in which the petitioner can demonstrate a miscarriage of justice or a colorable claim of innocence. The astonishing facts underlying this petition are illustrative and instructive.

On October 14, 1965, a jury in King County, Wash., found Arthur Aiken and his codefendant guilty of murder in the first degree for the robbery and slayings of three gas station attendants in separate incidents within one month. Each victim was shot several times. The jury imposed the death penalty. On direct appeal, Aiken advanced numerous challenges to his conviction. Following a remand to the trial court, the Washington Supreme Court affirmed the conviction and the sentence, *State* v. *Aiken*, 72 Wash. 2d 306, 434 P. 2d 10 (1967). On petition for certiorari to this Court, the conviction was vacated and the case remanded for reconsideration in light of *Bruton* v. *United States*, 391 U. S. 123 (1968). 392 U. S. 652 (1968). After a second petition for certiorari, the conviction was again vacated and remanded for reconsideration in light of *Maxwell* v. *Bishop*, 398 U. S. 262 (1970), *Boulden* v. *Holman*, 394 U. S. 478 (1969), and *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968). 403 U. S. 946 (1971). The state trial court then resentenced Aiken to three consecutive life prison terms.

On July 26, 1979, *fourteen years* after his original conviction and *eight years* after his resentencing, Aiken filed this petition in the United States District Court for the Western District of Washington under 28 U. S. C. § 2254. He raised claims concerning pretrial publicity, the voluntariness of his confession, and the trial court's failure to grant severance—

all claims that had been raised and decided a decade earlier in his first appeal to the Washington Supreme Court. All but the pretrial publicity issue had been presented in his original petition for review here.

On February 22, 1980, the District Court denied the habeas petition because Aiken had prejudiced the State by waiting more than five years before filing his petition, see Habeas Corpus Rule 9(a).[1] The Court of Appeals for the Ninth Circuit reversed, holding that prejudice may not be presumed. On remand, the State presented evidence that it could locate only 30 of the 87 witnesses who testified at trial and that 136 of the State's 138 exhibits were lost or destroyed. Finding that the evidence demonstrated that it would be difficult to retry Aikens should his petition for relief be granted, the District Court again dismissed the petition, concluding that prejudice as to retrial was also a ground for dismissal under Rule 9(a).[2] The Court of Appeals for the

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[1] That measure provides:

"A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred."

As originally drafted, Rule 9(a) would have provided that a 5-year delay creates a presumption of prejudice rather than the present standard which requires the state to prove prejudice in every case, see Advisory Committee's Note to Habeas Corpus Rule 9, 28 U. S. C., p. 272. The 5-year presumption was deleted by Congress, 90 Stat. 1335, see H. R. Rep. No. 94–1471, pp. 4–5 (1976), on the grounds that it was "unsound policy to require the defendant to overcome a presumption of prejudice and that the legislation brings Rule 9(a) into conformity with other provisions of law," *id.*, at 5 (footnotes omitted), and "into conformity with case law," *id.*, at 5, n. 9. See also 122 Cong. Rec. 30222–30223 (1976).

[2] In so holding, the court relied on a comment in the Advisory Committee Note to the identical provision (Rule 9(a)) governing 28 U. S. C. § 2255 proceedings. That comment states:

"Subdivision (a) provides a flexible, equitable time limitation based on laches to prevent movants from withholding their claims so as to prejudice

Ninth Circuit again reversed, reasoning that Rule 9(a) allows consideration only of the State's difficulty in "respond[ing] to the [habeas] petition," and not consideration of the difficulty in retrying the petitioner. 684 F. 2d 632, 634 (1982). The District Court was ordered to entertain further proceedings pursuant to § 2254(d).

The privileges of the writ of habeas corpus are not unlimited. Rather the doctrine of laches should apply to habeas actions as it applies to other actions for relief. Alternatively, Rule 9(a) should be changed to bar relief when delay has prejudiced the state's ability to retry the petitioner.

The scope of habeas corpus as an avenue for repeated collateral attacks on criminal convictions has expanded enormously through decisions of this Court in the last three decades, see *Stone* v. *Powell*, 428 U. S. 465, 474–482 (1976). As the ability to attack criminal convictions collaterally has expanded, so too has the range of costs to the judicial system grown. As we noted last Term, collateral review undermines the interest in repose that underlies the principle of res judicata, degrades the importance of the trial, frustrates penological goals and drains the resources of the judicial system, *Engle* v. *Isaac*, 456 U. S. 107, 124–129 (1982). See also *Stone* v. *Powell*, *supra*, at 491, n. 31; *Brown* v. *Allen*, 344 U. S. 443, 532–548 (1953) (Jackson, J., concurring); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 259–266 (1973) (POWELL, J., concurring). See Friendly, Is Innocence Irrelevant?, 38 U. Chi. L. Rev. 142, 146–148 (1970).

Claims presented by way of habeas corpus petitions many years after conviction impose especially heavy burdens on the prison system, on society, and on the administration of justice. Our willingness to entertain these late claims tells prisoners that they need never reconcile themselves to what has happened: they need never "make peace" with society, learn a new way of life, or attempt to build a realistic future. Our

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the government both in meeting the allegations of the motion *and in any possible retrial.*" (Emphasis added.) 28 U. S. C., p. 286.

society's constant willingness to reopen cases long closed tells the public that we have no confidence that the laws are administered justly. Because reprosecution becomes increasingly difficult, and sometimes impossible, as time from the original conviction elapses, such relief on the basis of stale claims often results in the permanent release of dangerous individuals without supervision of any sort.

Inmates exploit society's misplaced sentiment. When reexamination of the circumstances surrounding the detention comes late in the day, there is always a danger that process will be abused. A prisoner has an incentive to "store up" technical challenges to his conviction and then press his claims seriatim when reconsideration of his allegations is difficult and when reprosecution is impossible because key witnesses and exhibits have disappeared. Cf. *Del Vecchio* v. *United States*, 556 F. 2d 106, 109, and n. 6 (CA2 1977).[3]

> "One form of abuse said to exist is that of a prisoner, knowing he or she has a valid claim for relief, intentionally forgoing presenting that claim until evidence of guilt has dissipated so that reconviction would be impossible." ABA Standards for Criminal Justice, commentary following Standard 22–2.4 (2d ed. 1980).

I would allow summary dismissal of habeas petitions when the state can prove that the lapse of time has made reprosecution impossible. Exceptions should be limited to

[3] See also *United States* v. *Frady*, 456 U. S. 152 (1982) (19-year delay in asserting claim). In *Marshall* v. *Fowler*, No. 82–876, cert. denied, *post*, p. 1098, a petition presenting a claim of coerced confession was filed eight years after petitioner's original conviction. In May 1974, an Ohio trial court held a 4-day hearing on this claim, hearing 18 witnesses and generating 600 pages of transcript. A divided panel of the Court of Appeals for the Sixth Circuit nevertheless remanded the habeas petition for an evidentiary hearing. The petition raises a purely factual contention. I cannot imagine how the evidence that is received now could possibly be more probative than the evidence received eight years ago, when memories were fresh. Thus, the views expressed herein apply equally to *Marshall* v. *Fowler*.

cases where the petitioner can make a colorable claim of innocence, demonstrate that a significant miscarriage of justice has occurred, or show that his claim is based on grounds that, with the exercise of reasonable diligence, could not have been discovered earlier.

No. 82–666. MILLER BREWING CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 222 U. S. App. D. C. 336, 686 F. 2d 962.

No. 82–876. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY *v.* FOWLER ET AL. C. A. 6th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. For THE CHIEF JUSTICE's views concerning this case, see *Spalding* v. *Aiken*, *ante*, p. 1093. Reported below: 683 F. 2d 983.

No. 82–986. MARYLAND *v.* DIEHL. Ct. App. Md. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 294 Md. 466, 451 A. 2d 115.

No. 82–1409. BALKCOM, WARDEN, GEORGIA STATE PRISON *v.* GOODWIN. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 684 F. 2d 794.

No. 82–1051. BENDETTI *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for leave to file supplement to petition for writ of certiorari granted. Certiorari denied. Reported below: 692 F. 2d 750.

No. 82–1157. MEACHUM ET AL. *v.* LONGVAL. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 693 F. 2d 236.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

Respondent Norman Longval robbed a drugstore in Swampscott, Mass. Longval, who had a previous record for larcenies and had served time for armed robbery, stole the getaway car and carried a shotgun during the robbery.

One of Longval's codefendants, Richard Ellard, pleaded guilty. Ellard stated that he was drunk at the time and did not carry the gun. The sentencing judge noted that Ellard had not been in serious trouble before, and sentenced him to three years' imprisonment and three years' probation with a special term of probation requiring him to obtain treatment for alcoholism.

Longval stood trial for armed robbery, assault with a deadly weapon, and unlawfully carrying a sawed-off shotgun, and was convicted. The trial judge sentenced Longval to 40–50 years in prison. The state appellate court later reduced this sentence to 30–40 years.

Longval sought a writ of error from the Massachusetts Supreme Judicial Court, claiming that the trial judge had improperly threatened him in an effort to coerce him into pleading guilty. The Supreme Judicial Court appointed a Special Master, who found that during the presentation of the prosecution's case-in-chief, the trial judge told Longval's defense attorney, in substance, that

> "the evidence in this case as it is coming in is very serious—robbery of a drug store, taking [*i. e.* theft of] drugs, use of a shot-gun. I am wondering if you and the Commonwealth have had any discussion regarding a plea [of guilty]. I strongly suggest that you ask your client to consider a plea, because, if the jury returns a verdict of guilty, I might be disposed to impose a substantial prison sentence. You know that I am capable of doing that because you know of the sentences in a previous trial." 693 F. 2d 236, 237 (CA1 1982).

The Special Master did not construe this statement as a threat. Rather, he thought the judge made "a statement to a young lawyer of the judge's then general impression of the evidence as it had developed to that point."

The Supreme Judicial Court affirmed Longval's conviction. *Commonwealth* v. *Longval*, 378 Mass. 246, 390 N. E. 2d 1117 (1979). It found that the judge had merely advised Longval's attorney of the sentences he had imposed in other cases and of the seriousness of the offense described in the evidence that had been presented, and advised him "not to forgo any advantage that might accrue to [him] by means of plea bargaining." *Id.*, at 251–252, 390 N. E. 2d, at 1120.

Longval unsuccessfully petitioned for a writ of habeas corpus in the District Court. On appeal, the Court of Appeals reversed. 651 F. 2d 818 (CA1 1981). We granted a petition for a writ of certiorari, vacated the judgment of the Court of Appeals, and remanded for further consideration in light of *United States* v. *Goodwin*, 457 U. S. 368 (1982). 458 U. S. 1102 (1982).

On remand, the Court of Appeals adhered to its original view. 693 F. 2d 236 (1982). It held that the trial judge's comments led to "a reasonable apprehension of vindictiveness," *id.*, at 237, that requires resentencing before a different judge. The Court of Appeals thought that a judge may not make "a forceful recommendation to consider pleading [guilty], ending on a note of the judge's power to impose a substantial sentence if [the recommendation is] not complied with." *Id.*, at 238. Thus, the Court of Appeals adopted a *per se* rule that requires resentencing whenever a state trial judge makes any statement that is "susceptible of appearing from the defendant's perspective to be an attempt to coerce him to plead." *Id.*, at 237.

The Court of Appeals relied upon *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), and *Blackledge* v. *Perry*, 417 U. S. 21 (1974). The respondents in *Pearce* had obtained reversal of their criminal convictions on federal constitutional grounds. They were retried, convicted, and then given sen-

tences that were up to two and a half times as long as their original sentences. This Court held that the harsher sentences suggested that the States were punishing criminal defendants for exercising their federal constitutional rights. We stated that the sentencing authority could only impose longer sentences if it explained its reasons on the record. *Blackledge* extended *Pearce* to establish a presumption of prosecutorial vindictiveness in cases where prosecutors press more serious charges on defendants who obtain reversals of their convictions.

I think the decision below is quite problematic. First, in this case, unlike *Pearce* and *Blackledge*, there is a fully credible alternative explanation for the trial judge's behavior, one that *was credited* by the state court. The Supreme Judicial Court construed the judge's comments simply to inform Longval of the facts of life in his courtroom. This Court has often stressed the importance of providing criminal defendants with full information. For example, in *Boykin* v. *Alabama*, 395 U. S. 238 (1969), we reversed a conviction on a guilty plea because we were not certain that the defendant had "a full understanding of what the plea connotes and of its consequence." *Id.*, at 244. Surely defendants should be as well informed of the possible consequences of a not-guilty plea. If this judge routinely handed out long sentences after convictions of serious crimes, it would be in Longval's interest to know that; certainly the prosecutor with whom Longval and his counsel had engaged in plea-bargaining negotiations already knew the judge's sentencing habits. It seems incongruous at best to want defendants to be fully informed and then to adopt a *per se* rule condemning judges who provide them with information.

Second, in *Goodwin*, *supra*, we held that the *Pearce-Blackledge* presumption does not apply where a prosecutor presses more serious charges in a plea-bargaining situation. The rationale of the decision is that vindictiveness is less likely during pretrial plea bargaining than after a trial and an appeal. The Court of Appeals sought to distinguish *Good-*

win on the ground that this case involves a judge rather than a prosecutor, and judges are expected to be impartial. I believe the *Goodwin* rationale is fully applicable in this case. If anything, the impartial position of the judge suggests that we should be more reluctant to apply a presumption of vindictiveness to judges than to prosecutors.

Guilty pleas result from discussions and negotiations between opposing advocates and require them to predict the probability of conviction and the severity of the sentence that is likely to be imposed. It is at least arguable that this process is made fairer when the accused has complete information concerning the sentence he is likely to receive. Because I doubt whether a *per se* presumption of judicial vindictiveness is warranted in cases such as this, I would grant certiorari.

No. 82–1177. AETNA CASUALTY & SURETY CO. ET AL. *v.* UNITED STATES ET AL. C. A. 4th Cir. Motion of petitioners to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 681 F. 2d 186.

No. 82–1426. UNGER *v.* CONSOLIDATED FOODS CORP. C. A. 7th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 693 F. 2d 703.

No. 82–5950. SPENCER *v.* ISRAEL, WARDEN. C. A. 7th Cir. Certiorari denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

A defendant's right to due process is violated when the trial judge, in charging the jury on the issue of criminal intent, "require[s] the jury, if satisfied as to [specified] facts . . . , to find intent *unless* the defendant offer[s] evidence to the contrary." *Sandstrom* v. *Montana*, 442 U. S. 510, 515 (1979). Such a presumption is inconsistent with the constitutional requirement that the State prove every element of a criminal offense beyond a reasonable doubt. *In re Winship*, 397 U. S. 358 (1970).

At petitioner's trial on the charge of first-degree murder, the trial judge twice instructed the jury as follows:

> "When there are no circumstances to prevent or rebut the presumption, the law presumes that a reasonable person intends all of the natural, probable and usual consequences of his deliberate acts. If one person assaults another violently with a dangerous weapon likely to kill, and the person thus assaulted dies therefrom, then when there are no circumstances to prevent or rebut the presumption, the legal and natural presumption is that death was intended."

For reasons fully elaborated by three federal judges who have considered the constitutionality of an identical instruction, the instruction in this case was impermissible because it described a mandatory presumption of intent. See *Pigee* v. *Israel*, 670 F. 2d 690, 697–699 (CA7) (Baker, J., dissenting), cert. denied, 459 U. S. 846 (1982); *Austin* v. *Israel*, 516 F. Supp. 461 (ED Wis. 1981); *Harris* v. *Israel*, 515 F. Supp. 568 (ED Wis. 1981). The decision below, which denied petitioner's request for the issuance of a certificate of probable cause to appeal, therefore cannot be squared with *Sandstrom*. I would grant certiorari to correct the lower court's clear departure from this Court's precedents.

No. 82–6187. STEWART *v.* FLORIDA. Sup. Ct. Fla.;

No. 82–6194. COPELAND *v.* SOUTH CAROLINA. Sup. Ct. S. C.;

No. 82–6206. TAYLOR *v.* LOUISIANA. Sup. Ct. La.;

No. 82–6210. BURDEN *v.* GEORGIA. Sup. Ct. Ga.;

No. 82–6262. WALLACE *v.* ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Super. Ct. Ga., Butts County;

No. 82–6284. BRILEY *v.* MITCHELL, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Sup. Ct. Va.; and

No. 82–6306. RAINES *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: No. 82–6187, 420 So. 2d

862; No. 82–6194, 278 S. C. 572, 300 S. E. 2d 63; No. 82–6206, 422 So. 2d 109; No. 82–6210, 250 Ga. 313, 297 S. E. 2d 242; No. 82–6306, 429 So. 2d 1111.

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. 82–835. THOMPSON ET AL. *v.* PEOPLES LIBERTY BANK, 459 U. S. 1191;

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No. 82–1075. CPG PRODUCTS CORP. ET AL. *v.* ANTI-MONOPOLY, INC., 459 U. S. 1227;

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No. 82–1108. SIEGEL *v.* NEW YORK ET AL., 459 U. S. 1209;

No. 82–1296. STROOM *v.* CARTER, *ante*, p. 1007;

No. 82–5417. ANGLE, AKA MCCLURE *v.* BOWEN ET AL., 459 U. S. 1210;

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No. 82–5897. REESE *v.* SISTER SUZANNE MARIE ET AL., 459 U. S. 1215; and

No. 82–5918. ATHERTON *v.* FALCONE, GARY & ROSENFELD, LTD., ET AL., 459 U. S. 1215. Petitions for rehearing denied.

No. 82–5949. SIMS *v.* MARYLAND, 459 U. S. 1217;

No. 82–5955. BARKER *v.* MARINE TRANSPORTATION LINES, INC., ET AL., 459 U. S. 1217;

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No. 82–5994. MORRIS *v.* UNITED STATES, 459 U. S. 1219;

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No. 82–6032. MILLER *v.* CALIFORNIA, *ante*, p. 1015; and

No. 82–6182. IN RE PATTERSON, *ante*, p. 1010. Petitions for rehearing denied.

No. 81–827. JEFFERSON COUNTY PHARMACEUTICAL ASSN., INC. *v.* ABBOTT LABORATORIES ET AL., *ante*, p. 150. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 82–5148. WILLIAMS *v.* UNITED STATES, 459 U. S. 916;

No. 82–5395. LANGONE *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, 459 U. S. 1110; and

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VI. Searches and Seizures.

1. *Airport search of luggage—Validity of suspect's consent.*—Where (1) detectives, upon observing respondent at airport, asked to see his airline ticket and driver's license, which bore different names, (2) after respondent said that a friend had made ticket reservation in an assumed name, de-

tectives informed him that they were narcotics agents and suspected him of transporting narcotics, and asked him to accompany them to a small room nearby, (3) respondent's luggage was brought to room without his consent, (4) without responding to detectives' request that he consent to luggage search, respondent unlocked a suitcase in which marihuana was found and stated that he did not object to detectives' prying open another suitcase, which also contained marihuana, and (5) respondent was then told he was under arrest, Florida District Court of Appeal's judgment—reversing conviction of possession of marihuana on ground that respondent had been confined in small room without probable cause when his consent to search was obtained, and thus consent was invalid as tainted by unlawful confinement—was affirmed. Florida v. Royer, p. 491.

2. *Automobile search—Plain-view doctrine.*—Where police officer, after stopping respondent's car at a routine driver's license checkpoint and asking for his license, (1) shined flashlight into car and saw respondent drop on front seat an opaque, green party balloon, knotted near tip, (2) was aware that narcotics frequently were packaged in such balloons, (3) shifted his position for a better view while respondent was searching glove compartment for license and saw plastic vials, loose white powder, and an open bag of party balloons in glove compartment, (4) requested that respondent get out of car when he said he had no license in his possession, (5) picked up balloon which seemed to contain a powdery substance, and (6) then arrested respondent, who was convicted for unlawful possession of heroin after trial court refused to suppress evidence seized from car, Texas Court of Criminal Appeals' judgment—reversing conviction on ground that plain-view doctrine was not applicable and thus evidence was obtained in violation of Fourth Amendment—was reversed. Texas v. Brown, p. 730.

3. *Police surveillance—Use of radio beeper.*—Where (1) police, believing that an individual was using chloroform to manufacture illicit drugs, arranged with seller to place a radio beeper inside a chloroform container sold to individual, (2) officers followed car in which chloroform was placed, maintaining contact by using both visual surveillance and beeper monitoring, until chloroform reached respondent's cabin, (3) after three days of intermittent visual surveillance, a search warrant was secured and incriminating evidence was discovered in cabin, and (4) respondent was convicted of a federal drug offense, monitoring of beeper signals did not invade any legitimate expectation of privacy on respondent's part, and thus there was neither a "search" nor a "seizure" within contemplation of Fourth Amendment. United States v. Knotts, p. 276.

VII. States' Immunity from Suit.

Water rights—Indian Tribes' intervention in action.—States' Eleventh Amendment sovereign immunity was not compromised—nor was this Court's judicial power over controversy enlarged—by allowing Indian

CONSTITUTIONAL LAW—Continued.

Tribes to intervene in original action involving several States' water rights in Colorado River, since Tribes did not assert new claims against States but only sought to participate in an adjudication of their water rights that United States had commenced earlier when it became a party to action; however, determination of Tribes' rights in earlier decree in action precluded relitigation of issue of "irrigable acreage" of Tribes' reservations, and boundaries of certain reservations were conclusively determined in earlier quiet title actions. Arizona v. California, p. 605.

VIII. Supremacy Clause.

Sales tax on federal contractors—Validity of Washington statutes.—Supremacy Clause is not violated by Washington statutes that impose a sales tax on federal contractors as to materials sold to them for work on federal projects, but that, with regard to nonfederal projects, impose tax on landowner as to full price of project, including contractor's labor costs and markup as well as cost of materials sold to contractor. Washington v. United States, p. 536.

CONTEMPT. See **Constitutional Law,** V.

CONTRACTS. See **Constitutional Law,** I, 2; VIII; **Federal Tort Claims Act; Government Contracts; Jurisdiction,** 1.

COURTS OF APPEALS. See **Jurisdiction,** 1.

CRIMINAL LAW. See also **Constitutional Law,** VI; **Federal Youth Corrections Act; Gun Control Act of 1968.**

Jury instructions—Presumption of intent.—Where Connecticut trial court instructed jury generally that every person is conclusively presumed to intend natural and necessary consequences of his acts, Connecticut Supreme Court's judgment—reversing respondent's convictions for attempted murder and robbery on ground that unconstitutional "conclusive presumption" language in general instructions was not cured by other instructions on specific offenses—was affirmed. Connecticut v. Johnson, p. 73.

DEADLINE FOR FILING FOR INDEPENDENT PRESIDENTIAL CANDIDATE. See **Constitutional Law,** II.

DEDUCTIONS FOR BUSINESS EXPENSES. See **Internal Revenue Code,** 2.

DISCHARGE OF EMPLOYEES. See **National Labor Relations Act,** 2.

DISCLOSURE OF GRAND JURY RECORDS. See **Antitrust Acts,** 1.

DISCRIMINATION AGAINST NONRESIDENTS OF CITY. See **Constitutional Law,** I, 2.

DISCRIMINATION BASED ON AGE. See **Constitutional Law**, I, 1.

DISCRIMINATION BASED ON RACE. See **Civil Rights Act of 1871**, 1; **Civil Rights Act of 1964**; **Voting Rights Act of 1965.**

DISCRIMINATION IN EMPLOYMENT. See **Constitutional Law**, I, 1; **Civil Rights Act of 1964.**

DISCRIMINATORY PRICING. See **Antitrust Acts**, 2, 3.

DISTRIBUTION TO SHAREHOLDERS OF CORPORATE ASSETS. See **Internal Revenue Code**, 2.

DISTRICT COURTS. See **Jurisdiction.**

DISTRICT OF COLUMBIA. See **Federal Youth Corrections Act**; **Jurisdiction**, 2.

DRUGS. See **Federal Food, Drug, and Cosmetic Act.**

DUE PROCESS. See **Criminal Law.**

EASEMENTS FOR WATERFOWL BREEDING AND NESTING GROUNDS. See **Wetlands Act of 1961.**

ELECTIONS. See **Constitutional Law**, II; **Voting Rights Act of 1965.**

ELEVENTH AMENDMENT. See **Constitutional Law**, VII.

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964**; **National Labor Relations Act.**

EMPLOYMENT DISCRIMINATION. See **Constitutional Law**, I, 1; **Civil Rights Act of 1964.**

ENFORCEMENT OF INTERNAL REVENUE SERVICE SUMMONS. See **Constitutional Law**, V.

ENVIRONMENTAL IMPACT OF RESTARTING NUCLEAR PLANT. See **National Environmental Policy Act.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law**, III.

EXPUNCTION OF CONVICTIONS. See **Gun Control Act of 1968.**

FARMERS HOME ADMINISTRATION. See **Federal Tort Claims Act.**

FEDERAL CONTRACTORS' TAX LIABILITY. See **Constitutional Law**, VIII.

FEDERAL EMPLOYEES' COMPENSATION ACT.

Liability for Government employee's death—Third party's right to indemnification from Government.—Act's prohibition of actions against United States by a Government employee or any other person otherwise entitled to recover damages from United States because of employee's in-

FEDERAL EMPLOYEES' COMPENSATION ACT—Continued.
jury or death did not bar petitioner aircraft manufacturer's third-party indemnity action against United States, where administrator of estate of a Government employee, killed in crash of an aircraft manufactured by petitioner, filed suit for damages against petitioner in Federal District Court, and petitioner impleaded United States as a third-party defendant, asserting a right to indemnification under Federal Tort Claims Act, United States having paid death benefits to employee's survivors under Compensation Act. Lockheed Aircraft Corp. v. United States, p. 190.

FEDERAL FOOD, DRUG, AND COSMETIC ACT.

Generic drugs—FDA approval.—A generic drug product having same active ingredients as a brand-name drug previously approved by Food and Drug Administration, but having different inactive ingredients, is a "new drug" and is subject under Act to FDA approval prior to marketing of product. United States v. Generix Drug Corp., p. 453.

FEDERAL INCOME TAXES. See **Internal Revenue Code.**

FEDERAL JURISDICTION AS AFFECTED BY STATE-COURT SUIT. See **Jurisdiction,** 1.

FEDERAL-QUESTION JURISDICTION. See **Jurisdiction,** 3.

FEDERAL RULES OF CRIMINAL PROCEDURE. See **Antitrust Acts,** 1.

FEDERAL-STATE RELATIONS. See **Antitrust Acts,** 1; **Constitutional Law,** I; **Jurisdiction,** 1; **National Labor Relations Act,** 2; **Voting Rights Act of 1965; Wetlands Act of 1961.**

FEDERAL TORT CLAIMS ACT. See also **Federal Employees' Compensation Act.**

Government's liability—"Misrepresentations" by employees.—Act's provision precluding recovery under Act for "misrepresentation" claims did not bar respondent's claim based on alleged failure of a Farmers Home Administration employee to properly inspect and supervise construction of a house as required under contract between respondent and builder—respondent having obtained a loan from Administration for construction of house, and Administration having refused to pay for defects after its employee had approved construction and builder had refused to cure subsequently discovered defects. Block v. Neal, p. 289.

FEDERAL YOUTH CORRECTIONS ACT.

Discharge from program after probation—Effect on subsequent sentence as recidivist.—Under § 5021(b) of Act—which provides that when a youthful offender has been placed on probation, court may unconditionally discharge offender "prior" to expiration of probation period, which discharge shall automatically set aside conviction—conviction of youth offender is not

FEDERAL YOUTH CORRECTIONS ACT—Continued.

set aside where, as here, offender is unconditionally discharged from Act's program at end of probation period; thus, petitioner's previous conviction, resulting in probation under Act, was properly considered in imposing sentence under recidivist provision of District of Columbia Code upon a second conviction for carrying a pistol without a license. Tuten v. United States, p. 660.

FIFTH AMENDMENT. See **Constitutional Law**, V.

FILING DEADLINE FOR INDEPENDENT PRESIDENTIAL CANDIDATES. See **Constitutional Law**, II.

FINAL DECISIONS. See **Jurisdiction**, 1.

FIREARMS DEALERS AND MANUFACTURERS. See **Gun Control Act of 1968.**

FIRST AMENDMENT. See **Constitutional Law**, II–IV.

FIXED-PRICE GOVERNMENT CONTRACTS. See **Government Contracts.**

FOOD AND DRUG ADMINISTRATION. See **Federal Food, Drug, and Cosmetic Act.**

FOURTEENTH AMENDMENT. See **Constitutional Law**, II; III; **Criminal Law.**

FOURTH AMENDMENT. See **Constitutional Law**, VI.

FREEDOM OF ASSOCIATION. See **Constitutional Law**, II.

FREEDOM OF SPEECH. See **Constitutional Law**, III.

FREEDOM OF THE PRESS. See **Constitutional Law**, IV.

FREIGHT RATES. See **Jurisdiction**, 3.

GAME WARDENS. See **Constitutional Law**, I, 1.

GENERIC DRUGS. See **Federal Food, Drug, and Cosmetic Act.**

GOVERNMENT CONTRACTS. See also **Constitutional Law**, VIII.

Fixed-price negotiated contracts—Inspection of contractor's records.—Under federal statutes governing negotiated Government contracts, Comptroller General may inspect—pursuant to standard access-to-records clauses in fixed-price negotiated contracts to supply products to federal agencies—only records of contractor's direct costs, not records of indirect costs. Bowsher v. Merck & Co., p. 824.

GOVERNMENT EMPLOYEES. See **Constitutional Law**, I, 1; **Federal Employees' Compensation Act; Federal Tort Claims Act.**

GOVERNMENT'S LIABILITY FOR EMPLOYEES' ACTS. See **Federal Tort Claims Act.**

GRAND JURY RECORDS. See **Antitrust Acts**, 1.

GUN CONTROL ACT OF 1968.

Licensing of firearms dealer and manufacturer—"Conviction" of a crime.—Disabilities imposed by Act—precluding issuance of a license as a firearms dealer or manufacturer to a person "convicted" of a crime punishable by imprisonment for more than one year, or to a corporation controlled by such a person—were applicable to a person (chairman of board and a stockholder of respondent corporation) who pleaded guilty in an Iowa court to an offense punishable by imprisonment for more than one year, even though record of state proceeding with regard to "deferred" judgment was expunged under Iowa law following a successfully served term of probation, and thus licenses issued to respondent on basis of applications that did not disclose such person's Iowa guilty plea were properly revoked. Dickerson v. New Banner Institute, Inc., p. 103.

HOSPITALS' SALES OF PHARMACEUTICAL PRODUCTS. See **Antitrust Acts**, 3.

HOUSING ACT OF 1949. See **Federal Tort Claims Act.**

IMMUNITY OF FEDERAL GOVERNMENT FROM STATE TAXES. See **Constitutional Law**, VIII.

IMMUNITY OF POLICE OFFICER FROM DAMAGES LIABILITY FOR PERJURY. See **Civil Rights Act of 1871**, 2.

INCOME TAXES. See **Internal Revenue Code.**

INDEMNIFICATION CLAIMS AGAINST GOVERNMENT. See **Federal Employees' Compensation Act.**

INDEPENDENT CANDIDATES FOR PRESIDENT. See **Constitutional Law**, II.

INDIANS. See **Constitutional Law**, VII.

INSPECTION OF GOVERNMENT CONTRACTORS' RECORDS. See **Government Contracts.**

INSTRUCTIONS TO JURY. See **Criminal Law.**

INTENT TO DISCRIMINATE. See **Civil Rights Act of 1871**, 1; **Civil Rights Act of 1964.**

INTERFERENCE WITH EMPLOYMENT. See **National Labor Relations Act**, 2.

INTERNAL REVENUE CODE.

1. *Bank's income—Refund of state taxes—Tax benefit rule.*—Tax benefit rule did not require a bank to recognize 1973 income with respect to state-tax refunds paid in 1973 by State to bank's shareholders, where bank had

INTERNAL REVENUE CODE—Continued.
paid disputed state taxes for its shareholders in 1972 and had taken a deduction therefor in its 1972 federal tax return under § 164(e) of 1954 Code. Hillsboro National Bank v. Commissioner, p. 370.

2. *Corporation's income—Distribution of assets to shareholders—Tax benefit rule.*—Tax benefit rule required a dairy corporation to recognize income with respect to distribution of cattle feed to its shareholders on its adoption of a liquidation plan and distribution of its assets, where corporation had deducted cost of feed as a business expense in its prior taxable year as permitted by § 162 of 1954 Code. United States v. Bliss Dairy, Inc., p. 370.

INTERNAL REVENUE SERVICE SUMMONS. See **Constitutional Law,** V.

INTERSTATE COMMERCE. See **Constitutional Law,** I; **Jurisdiction,** 3.

INTERSTATE COMMERCE ACT. See **Jurisdiction,** 3.

INTERVENTION. See **Constitutional Law,** VII.

INTIMIDATION OF WITNESSES. See **Civil Rights Act of 1871,** 1.

INVESTIGATIVE DETENTIONS. See **Constitutional Law,** VI, 1.

INVOLUNTARY RETIREMENT BECAUSE OF AGE. See **Constitutional Law,** I, 1.

IOWA. See **Gun Control Act of 1968.**

JURISDICTION. See also **Constitutional Law,** VII.

1. *Arbitrability of contract dispute—Federal jurisdiction—Pending state-court action.*—Where construction contract between petitioner hospital and respondent contractor provided for ultimate arbitration of any unsettled disputes, Federal District Court—in respondent's action seeking arbitration of a dispute under United States Arbitration Act—abused its discretion in staying exercise of its jurisdiction pending resolution of petitioner's earlier state-court action for a declaratory judgment that there was no right to arbitration; Court of Appeals, which had jurisdiction of District Court's stay order as constituting either a "final decision" or an exception to finality rule, properly decided that dispute was arbitrable under Act, since court had parties' briefs and evidentiary submissions on merits of arbitrability. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., p. 1.

2. *District of Columbia Bar admission rules—United States District Court's jurisdiction.*—Where District of Columbia Court of Appeals denied respondents' petitions for waivers of that court's District of Columbia Bar admission rule requiring that applicants be graduates of a law school approved by American Bar Association, such proceedings were judicial in nature, and thus United States District Court for District of Columbia had no

JURISDICTION—Continued.

subject-matter jurisdiction over respondents' complaints insofar as they sought review of Court of Appeals' denials of their petitions for waiver; however, District Court had jurisdiction over elements of respondents' complaints attacking constitutionality of bar admission rule. District of Columbia Court of Appeals v. Feldman, p. 462.

3. *Federal-question jurisdiction—Common carrier's claim for freight charges.*—Federal-question jurisdiction existed over petitioner common carrier's Federal District Court action, where petitioner alleged that respondent failed to pay a specified amount in motor freight charges, as required by petitioner's tariffs on file with Interstate Commerce Commission, and that action arose under Interstate Commerce Act. Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., p. 533.

JURY INSTRUCTIONS. See **Criminal Law.**

JUVENILE OFFENDERS. See **Federal Youth Corrections Act.**

LABOR UNIONS. See **Constitutional Law,** III; **National Labor Relations Act.**

LICENSING OF FIREARMS DEALERS AND MANUFACTURERS. See **Gun Control Act of 1968.**

LOCKHART, TEX. See **Voting Rights Act of 1965.**

LUGGAGE SEARCHES. See **Constitutional Law,** VI, 1.

MAIL SYSTEMS OF SCHOOLS. See **Constitutional Law,** III.

MANDATORY RETIREMENT BECAUSE OF AGE. See **Constitutional Law,** I, 1.

MANUFACTURERS OF AIRCRAFT. See **Federal Employees' Compensation Act.**

MANUFACTURERS OF FIREARMS. See **Gun Control Act of 1968.**

MANUFACTURERS OF PHARMACEUTICAL PRODUCTS. See **Antitrust Acts,** 3.

MAYORS' EXECUTIVE ORDERS. See **Constitutional Law,** I, 2.

"MEETING COMPETITION" DEFENSE TO PRICE DISCRIMINATION. See **Antitrust Acts,** 2.

MIGRATORY BIRD HUNTING STAMP ACT. See **Wetlands Act of 1961.**

MINNESOTA. See **Constitutional Law,** IV.

MISREPRESENTATIONS BY GOVERNMENT EMPLOYEES. See **Federal Tort Claims Act.**

MOTOR CARRIERS' FREIGHT CHARGES. See **Jurisdiction,** 3.

MULTIPLE OFFENDERS. See **Federal Youth Corrections Act.**

MUNICIPAL CONTRACTS. See **Constitutional Law, I, 2.**

MUNICIPAL ELECTIONS. See **Voting Rights Act of 1965.**

NATIONAL ENVIRONMENTAL POLICY ACT.

Restarting nuclear plant—Psychological harm to area residents.—In considering whether to permit restarting of petitioner's nuclear plant after a serious accident at another of petitioner's nuclear plants at same location, Nuclear Regulatory Commission was not required, under Act, to consider contention that risk of an accident if plant were restarted would cause harm to psychological health and community well-being of area residents. Metropolitan Edison Co. v. People Against Nuclear Energy, p. 766.

NATIONAL LABOR RELATIONS ACT.

1. *Unfair labor practice—Employer sanctions for violations of no-strike clause—Union officials.*—Section 8(a)(3) of Act is violated when an employer imposes more severe sanctions on employees who are union officials than on other employees for participating in a work stoppage in violation of a no-strike clause in collective-bargaining agreement, and there is no provision in agreement specifying that union officials have an affirmative duty to prevent illegal work stoppages. Metropolitan Edison Co. v. NLRB, p. 693.

2. *Unfair labor practice—Union's interference with employment contract—Pre-emption of state-court action.*—Act pre-empts state-court action against petitioner union for alleged interference with an employment contract by causing employer to discharge respondent—who had unsuccessfully sought relief from National Labor Relations Board on asserted ground that union had violated Act by procuring respondent's discharge from his position as a "supervisor" because he was not a member in good standing with union—since union's alleged conduct was arguably prohibited by Act. Operating Engineers v. Jones, p. 669.

NESTING GROUNDS FOR WATERFOWL. See **Wetlands Act of 1961.**

NEVADA. See **Constitutional Law, VII.**

NEW DRUGS. See **Federal Food, Drug, and Cosmetic Act.**

NEW MEXICO. See **Constitutional Law, VII.**

NEWSPAPERS. See **Constitutional Law, IV.**

NORTH CAROLINA. See **Jurisdiction, 1.**

NORTH DAKOTA. See **Wetlands Act of 1961.**

NO-STRIKE CLAUSES. See **National Labor Relations Act, 1.**

NUCLEAR REGULATORY COMMISSION. See **National Environmental Policy Act.**

OFFICERS OF UNIONS. See National Labor Relations Act, 1.

OHIO. See Constitutional Law, II.

PERJURY. See Civil Rights Act of 1871, 2.

PHARMACISTS. See Antitrust Acts, 3.

PLAIN-VIEW DOCTRINE. See Constitutional Law, VI, 2.

POLICE OFFICER'S DAMAGES LIABILITY FOR PERJURY. See Civil Rights Act of 1871, 2.

POLICE SURVEILLANCE BY USE OF RADIO BEEPER. See Constitutional Law, VI, 3.

PRE-EMPTION OF STATE-COURT ACTIONS BY NATIONAL LABOR RELATIONS ACT. See National Labor Relations Act, 2.

PRESIDENTIAL CANDIDATES. See Constitutional Law, II.

PRESUMPTION OF EMPLOYMENT DISCRIMINATION. See Civil Rights Act of 1964.

PRESUMPTION OF INTENT. See Criminal Law.

PRICE DISCRIMINATION. See Antitrust Acts, 2, 3.

PRIMA FACIE CASE OF EMPLOYMENT DISCRIMINATION. See Civil Rights Act of 1964.

PRIVILEGE AGAINST SELF-INCRIMINATION. See Constitutional Law, V.

PROBABLE CAUSE FOR ARREST. See Constitutional Law, VI, 1.

PROBABLE CAUSE FOR SEIZURE OF EVIDENCE. See Constitutional Law, VI, 2.

PROBATION. See Federal Youth Corrections Act.

PSYCHOLOGICAL EFFECT OF RESTARTING NUCLEAR PLANT. See National Environmental Policy Act.

PUBLIC CONTRACTS. See Constitutional Law, I, 2; VIII; Government Contracts.

PUBLIC EMPLOYEES. See Constitutional Law, I, 1; Federal Employees' Compensation Act; Federal Tort Claims Act.

RACIAL DISCRIMINATION. See Civil Rights Act of 1871, 1; Civil Rights Act of 1964; Voting Rights Act of 1965.

RADIO BEEPER SURVEILLANCE BY POLICE. See Constitutional Law, VI, 3.

RECIDIVIST STATUTES. See Federal Youth Corrections Act.

REFUNDS OF STATE TAXES AS INCOME FOR FEDERAL TAX PURPOSES. See **Internal Revenue Code**, 1.

RETIREMENT. See **Constitutional Law**, I, 1.

REVOCATION OF LICENSES. See **Gun Control Act of 1968.**

RIGHT OF ASSOCIATION. See **Constitutional Law**, II.

RIGHT TO VOTE. See **Voting Rights Act of 1965.**

ROBINSON-PATMAN ACT. See **Antitrust Acts**, 2, 3.

SALES OF PHARMACEUTICAL PRODUCTS. See **Antitrust Acts**, 3.

SALES TAXES. See **Constitutional Law**, VIII.

SCHOOLS. See **Constitutional Law**, III.

SEARCHES AND SEIZURES. See **Constitutional Law**, VI.

SELF-INCRIMINATION. See **Constitutional Law**, V.

STATE-COURT SUIT AS AFFECTING FEDERAL-COURT JURISDICTION. See **Jurisdiction**, 1.

STATE SALES TAXES. See **Constitutional Law**, VIII.

STATES' IMMUNITY FROM SUIT. See **Constitutional Law**, VII.

STATE USE TAXES. See **Constitutional Law**, IV.

STRIKES. See **National Labor Relations Act**, 1.

SUITCASE SEARCHES. See **Constitutional Law**, VI, 1.

SUMMONS ISSUED BY INTERNAL REVENUE SERVICE. See **Constitutional Law**, V.

SUPREMACY CLAUSE. See **Constitutional Law**, VIII.

SUPREME COURT. See **Constitutional Law**, VII.

SURVEILLANCE BY POLICE BY USE OF RADIO BEEPER. See **Constitutional Law**, VI, 3.

TAX BENEFIT RULE. See **Internal Revenue Code.**

TAXES. See **Constitutional Law**, IV; VIII; **Internal Revenue Code.**

TEACHERS. See **Constitutional Law**, III.

TENTH AMENDMENT. See **Constitutional Law**, I, 1.

TEXAS. See **Constitutional Law**, VI, 2.

TORT LIABILITY OF GOVERNMENT. See **Federal Tort Claims Act.**

TRADE ASSOCIATIONS. See **Antitrust Acts**, 3.

UNFAIR LABOR PRACTICES. See **National Labor Relations Act.**

UNION OFFICERS. See **National Labor Relations Act,** 1.

UNIONS. See **Constitutional Law,** III; **National Labor Relations Act.**

UNITED STATES' ACQUISITION OF WATERFOWL BREEDING AND NESTING GROUNDS. See **Wetlands Act of 1961.**

UNITED STATES ARBITRATION ACT. See **Jurisdiction,** 1.

UNITED STATES' INDEMNIFICATION LIABILITY. See **Federal Employees' Compensation Act.**

UNITED STATES' LIABILITY FOR EMPLOYEES' ACTS. See **Federal Tort Claims Act.**

USE TAXES. See **Constitutional Law,** IV.

UTAH. See **Constitutional Law,** VII.

VOTING RIGHTS. See **Constitutional Law,** II; **Voting Rights Act of 1965.**

VOTING RIGHTS ACT OF 1965.

City voting plan—Effect on minority voting strength.—Where appellant city had been governed by a mayor and two commissioners who all served same 2-year terms and were elected at large, with commission posts being designated by number, but in 1973 city adopted a plan whereby it was governed by a mayor and four councilmen serving staggered 2-year terms through at-large elections using numbered-post system, entire 1973 plan was subject to federal preclearance under § 5 of Act; 1973 plan, when compared to prior practice, did not have effect of denying or abridging right to vote so as to lead to retrogression in minority voting strength. Lockhart v. United States, p. 125.

WAIVER OF BAR ADMISSION RULES. See **Jurisdiction,** 2.

WASHINGTON. See **Constitutional Law,** VIII.

WATERFOWL BREEDING AND NESTING GROUNDS. See **Wetlands Act of 1961.**

WATER RIGHTS. See **Constitutional Law,** VII.

WETLANDS ACT OF 1961.

Waterfowl breeding and nesting grounds—Federal easements—Revocation of State's consent.—Once a State's Governor has consented, as required by § 3 of Act, to Federal Government's acquisition of easements over specified wetland areas in State for migratory waterfowl breeding and nesting grounds, such consent cannot be revoked by a subsequent Governor; thus, where successive North Dakota Governors between 1961 and 1977 consented to acquisition of easements covering certain wetlands, 1977

WETLANDS ACT OF 1961—Continued.
state statutes limiting easements to a maximum term of 99 years, and authorizing landowners to drain after-expanded wetlands contrary to easement agreements, may not be applied to wetlands acquired by United States under previously given consents. North Dakota v. United States, p. 300.

WITNESS' DAMAGES LIABILITY FOR PERJURY. See **Civil Rights Act of 1871,** 2.

WITNESSES. See **Civil Rights Act of 1871.**

WORDS AND PHRASES.

1. *"Claim arising out of . . . misrepresentation."* Federal Tort Claims Act, 28 U. S. C. § 2680(h). Block v. Neal, p. 289.

2. *"Convicted . . . of . . . a crime."* Gun Control Act of 1968, 18 U. S. C. §§ 922(g)(1), (h)(1). Dickerson v. New Banner Institute, Inc., p. 103.

3. *"Environmental impact"; "Environmental effects."* §§ 102(C)(i), (ii), National Environmental Policy Act, 42 U. S. C. §§ 4332(C)(i), (ii). Metropolitan Edison Co. v. People Against Nuclear Energy, p. 766.

4. *"New drug."* § 201(p), Federal Food, Drug, and Cosmetic Act, 21 U. S. C. § 321(p). United States v. Generix Drug Corp., p. 453.

WORKERS' COMPENSATION. See **Federal Employees' Compensation Act.**

WORK STOPPAGES. See **National Labor Relations Act,** 1.

WYOMING. See **Constitutional Law,** I, 1.

YOUTH OFFENDERS. See **Federal Youth Corrections Act.**


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