
FDLP152647

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# UNITED STATES REPORTS

## VOLUME 462

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## CASES ADJUDGED

IN

# THE SUPREME COURT

AT

## OCTOBER TERM, 1982

JUNE 6 THROUGH JUNE 23, 1983

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HENRY C. LIND

REPORTER OF DECISIONS

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UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1986

# JUSTICES

OF THE

# SUPREME COURT

DURING THE TIME OF THESE REPORTS

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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.

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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.

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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.

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(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

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## PICKETT ET AL. *v.* BROWN ET AL.

APPEAL FROM THE SUPREME COURT OF TENNESSEE

No. 82–5576. Argued April 27, 1983—Decided June 6, 1983

Under Tennessee law the father of an illegitimate child is responsible for the child's support. Enforcement of this obligation depends on the establishment of paternity. A Tennessee statute provides that a paternity and support action must be filed within two years of the child's birth unless the father has provided support or has acknowledged his paternity in writing, or unless the child is, or is liable to become, a public charge, in which case the State or any person can bring suit at any time prior to the child's 18th birthday. In May 1978, appellant mother of an illegitimate child born in November 1968 brought a paternity and support action in the Tennessee Juvenile Court against appellee Brown, who moved to dismiss the action on the ground that it was barred by the 2-year limitations period. The court held that the limitations period violated, *inter alia*, the Equal Protection Clause of the Fourteenth Amendment, because it imposed a restriction on the support rights of some illegitimate children that was not imposed on the identical rights of legitimate children. The Tennessee Supreme Court reversed and upheld the constitutionality of the 2-year limitations period.

*Held:* The 2-year limitations period in question denies certain illegitimate children the equal protection of the law guaranteed by the Fourteenth Amendment. Pp. 7–18.

(a) Restrictions on support suits by illegitimate children "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest." *Mills* v. *Habluetzel*, 456 U. S. 91, 99. The period for obtaining paternal support has to be long enough to provide a

reasonable opportunity for those with an interest in illegitimate children to bring suit on their behalf; and any time limit on that opportunity has to be substantially related to the State's interest in preventing the litigation of stale or fraudulent claims. *Id.*, at 99–100. Pp. 7–11.

(b) Here, the 2-year limitations period does not provide an illegitimate child who is not covered by one of the exceptions in the statute with an adequate opportunity to obtain support. The mother's financial difficulties caused by the child's birth, the loss of income attributable to the need to care for the child, continuing affection for the child's father, a desire to avoid family and community disapproval, and emotional strain and confusion that often attend the birth of an illegitimate child, all may inhibit a mother from filing a paternity suit within two years after the child's birth. Pp. 12–13.

(c) Nor is the 2-year limitations period substantially related to the legitimate state interest in preventing the litigation of stale or fraudulent claims. It amounts to a restriction effectively extinguishing the support rights of illegitimate children that cannot be justified by the problems of proof surrounding paternity actions. The State's argument that the different treatment accorded legitimate and illegitimate children is substantially related to the above legitimate state interest is seriously undermined by the exception for illegitimate children who are, or are likely to become, public charges, since claims filed on behalf of these children when they are more than two years old would be just as stale or as vulnerable to fraud as claims filed on behalf of illegitimate children who are not public charges at the same age. Moreover, the fact that Tennessee tolls most actions during a child's minority, when considered in combination with the above factors, leads one to question whether the burden placed on illegitimate children is designed to advance permissible state interests. And the advances in blood testing render more attenuated the relationship between a statute of limitations and the State's interest in preventing the litigation of stale or fraudulent claims. Pp. 13–18.

638 S. W. 2d 369, reversed and remanded.

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

*Harold W. Horne*, by appointment of the Court, 459 U. S. 1100, argued the cause and filed a brief for appellants.

*Susan Short Kelly*, Assistant Attorney General of Tennessee, argued the cause for appellees. With her on the brief were *William M. Leech, Jr.*, Attorney General, and *Robert B. Littleton.**

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**James D. Weill, Marian Wright Edelman*, and *Judith L. Lichtman* filed a brief for the Children's Defense Fund et al. as *amici curiae* urging reversal.

JUSTICE BRENNAN delivered the opinion of the Court.

This case requires us to decide the constitutionality of a provision of a Tennessee statute[1] that imposes a 2-year limitations period on paternity and child support actions brought on behalf of certain illegitimate children.

I

Under Tennessee law both fathers and mothers are responsible for the support of their minor children. See Tenn. Code Ann. §34–101 (1977); *Rose Funeral Home, Inc.* v. *Julian*, 176 Tenn. 534, 539, 144 S. W. 2d 755, 757 (1940); *Brooks* v. *Brooks*, 166 Tenn. 255, 257, 61 S. W. 2d 654 (1933). This duty of support is enforceable throughout the child's minority. See *Blackburn* v. *Blackburn*, 526 S. W. 2d 463, 466 (Tenn. 1975); *Whitt* v. *Whitt*, 490 S. W. 2d 159, 160 (Tenn. 1973). See also Tenn. Code Ann. §§36–820, 36–828 (1977). Tennessee law also makes the father of a child born out of wedlock responsible for "the necessary support and education of the child." §36–223. See also *Brown* v. *Thomas*, 221 Tenn. 319, 323, 426 S. W. 2d 496, 498 (1968). Enforcement of this obligation depends on the establishment of paternity. Tennessee Code Ann. §36–224(1) (1977)[2] provides for the fil-

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[1] Tennessee Code Ann. §36–224(2) (1977) reads as follows:

"(2) Proceedings to establish the paternity of the child and to compel the father to furnish support and education for the child may be instituted during the pregnancy of the mother or after the birth of the child, but shall not be brought after the lapse of more than two (2) years from the birth of the child, unless paternity has been acknowledged by the father in writing or by the furnishing of support. Provided, however, that the department of human services or any person shall be empowered to bring a suit in behalf of any child under the age of eighteen (18) who is, or is liable to become a public charge."

[2] Tennessee Code Ann. §36–224(1) (1977) reads as follows:

"(1) A petition to establish paternity of a child, to change the name of the child if it is desired, and to compel the father to furnish support and education for the child in accordance with this chapter may be filed by the mother, or her personal representative, or, if the child is likely to become a public charge by the state department of human services or by any person. Said petition may be filed in the county where the mother or child resides

ing of a petition which can lead both to the establishment of paternity and to enforcement of the father's duty of support. With a few exceptions, however, the petition must be filed within two years of the child's birth. See § 36–224(2); n. 1, *supra*.

In May 1978, Frances Annette Pickett filed an action pursuant to § 36–224(1) seeking to establish that Braxton Brown was the father of her son, Jeffrey Lee Pickett, who was born on November 1, 1968. App. 3. Frances Pickett also sought an order from the court requiring Brown to contribute to the support and maintenance of the child. *Ibid.* Brown denied that he was the father of the child. *Id.*, at 13. It is uncontested that he had never acknowledged the child as his own or contributed to the child's support. *Id.*, at 5–6, 13–14; Brief for Appellants 5. Brown moved to dismiss the suit on the ground that it was barred by the 2-year limitations period established by § 36–224(2). Frances Pickett responded with a motion challenging the constitutionality of the limitations period. App. 5–7, 13.[3]

The Juvenile Court held that the 2-year limitations period violated the Equal Protection Clause of the Fourteenth

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or is found or in the county where the putative father resides or is found. The fact that the child was born outside this state shall not be a bar to filing a petition against the putative father. After the death of the mother or in case of her disability said petition may be filed by the child acting through a guardian or next friend."

[3] Frances Pickett challenged the statute on equal protection and due process grounds under both the Federal and State Constitutions. App. 6–7. She also alleged that the statute amounted to cruel and unusual punishment under both the Federal and State Constitutions. *Ibid.* The Juvenile Court did not address this claim. The Tennessee Supreme Court later noted that she did not seriously press it before that court. 638 S. W. 2d 369, 371 (1982). She also does not advance it before this Court.

Pickett also sought permission to amend her complaint to bring the paternity suit in the name of her child. App. 6.

After Pickett filed her motion challenging the constitutionality of the statute the State Attorney General was notified and he intervened to defend the statute. See *id.*, at 13; 638 S. W. 2d, at 371.

Amendment of the Federal Constitution and certain provisions of the Tennessee Constitution. *Id.*, at 14. The court based its conclusion on the fact that the limitations period governing paternity actions imposed a restriction on the support rights of some illegitimate children that was not imposed on the identical rights of legitimate children. *Ibid.* Without articulating any clear standard of review, the court rejected the State's argument that the 2-year limitations period was justified by the State's interest in preventing the litigation of "stale or spurious" claims. *Id.*, at 15. In the court's view, this argument was undermined by the exception to the limitations period established for illegitimate children who are, or are likely to become, public charges, for "the possibilities of fraud, perjury, or litigation of stale claims [are] no more inherent in a case brought [for] a child who is not receiving public assistance than [in] a case brought for a child who is a public charge." *Ibid.*[4]

On appeal,[5] the Tennessee Supreme Court reversed the judgment of the Juvenile Court and upheld the constitutionality of the 2-year limitations period. 638 S. W. 2d 369 (1982). In addressing Frances Pickett's equal protection and due process challenges to the statute, the court first reviewed our decision in *Mills* v. *Habluetzel*, 456 U. S. 91 (1982), and several decisions from other state courts. Based on this review, the court stated that the inquiry with respect to both claims was "essentially the same: whether the state's policy as

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[4] The court also found that the statute discriminated between "children born out of wedlock who are receiving public assistance and such children whose mothers are not receiving public assistance." App. 15–16. In this regard, the court pointed out that a mother's fulfillment of her obligation to support her child does not relieve the father of his duty of support. *Id.*, at 16.

The court granted Pickett permission to amend her complaint to bring the suit in the name of her child. *Ibid.*

[5] The Juvenile Court "allowed an interlocutory appeal by certifying that the constitutionality of [Tenn. Code Ann.] § 36–224(2) was the sole determinative question of law in the proceedings." 638 S. W. 2d, at 371.

reflected in the statute affords a fair and reasonable opportunity for the mother to decide in a rational way whether or not the child's best interest would be served by her bringing a paternity suit." 638 S. W. 2d, at 376. The court concluded that "[t]he Legislature could rationally determine that two years is long enough for most women to have recovered physically and emotionally, and to be able to assess their and their children's situations logically and realistically." *Id.*, at 379.

The court also found that the 2-year statute of limitations was substantially related to the State's valid interest in preventing the litigation of stale or fraudulent claims. *Id.*, at 380. The court justified the longer limitations period for illegitimates who are, or are likely to become, public charges, on the ground that "[t]he state's countervailing interest in doing justice and reducing the number of people on welfare is served by allowing the state a longer time during which to sue." *Ibid.* The court also suggested that "the Tennessee statute is 'carefully tuned' to avoid hardship in predictable groups of cases, since it contains an exception for actions against men who have acknowledged their children in writing or by supporting them, and it has been held that . . . regular or substantial payments are not required in order to constitute 'support.'" *Id.*, at 379 (footnote omitted). Finally, the court found that the uniqueness of the limitations period in not being tolled during the plaintiff's minority did not "alone requir[e] a holding of unconstitutionality of a two-year period, as opposed to any other period which can end during the plaintiff's minority." *Id.*, at 380.[6]

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[6] The court also rejected the due process challenge to the statute. *Id.*, at 376, 380.

In addition, the court found that the Juvenile Court had committed a harmless error, from which Brown and the State did not appeal, in allowing Pickett "to amend her complaint to add the name of the child, by the mother as next friend, as a plaintiff." *Id.*, at 380. The court stated that § 36–224(1) "does not permit an action to be brought by the child except in case of death or disability of the mother." *Ibid.*

We noted probable jurisdiction. 459 U. S. 1068 (1982). We reverse.

II

We have considered on several occasions during the past 15 years the constitutional validity of statutory classifications based on illegitimacy. See, *e. g.*, *Mills* v. *Habluetzel*, *supra; United States* v. *Clark*, 445 U. S. 23 (1980); *Lalli* v. *Lalli*, 439 U. S. 259 (1978); *Trimble* v. *Gordon*, 430 U. S. 762 (1977); *Mathews* v. *Lucas*, 427 U. S. 495 (1976); *Jimenez* v. *Weinberger*, 417 U. S. 628 (1974); *New Jersey Welfare Rights Org.* v. *Cahill*, 411 U. S. 619 (1973); *Gomez* v. *Perez*, 409 U. S. 535 (1973); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972); *Glona* v. *American Guarantee & Liability Insurance Co.*, 391 U. S. 73 (1968); *Levy* v. *Louisiana*, 391 U. S. 68 (1968). In several of these cases, we have held the classifications invalid. See, *e. g.*, *Mills* v. *Habluetzel*, *supra; Trimble* v. *Gordon*, *supra; Jimenez* v. *Weinberger*, *supra; New Jersey Welfare Rights Org.* v. *Cahill*, *supra; Gomez* v. *Perez*, *supra; Weber* v. *Aetna Casualty & Surety Co.*, *supra; Glona* v. *American Guarantee & Liability Insurance Co.*, *supra; Levy* v. *Louisiana*, *supra.* Our consideration of these cases has been animated by a special concern for discrimination against illegitimate children. As the Court stated in *Weber:*

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the

social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise." 406 U. S., at 175–176 (footnotes omitted).

In view of the history of treating illegitimate children less favorably than legitimate ones, we have subjected statutory classifications based on illegitimacy to a heightened level of scrutiny. Although we have held that classifications based on illegitimacy are not "suspect," or subject to "our most exacting scrutiny," *Trimble* v. *Gordon*, *supra*, at 767; *Mathews* v. *Lucas*, 427 U. S., at 506, the scrutiny applied to them "is not a toothless one . . . ." *Id.*, at 510. In *United States* v. *Clark*, *supra*, we stated that "a classification based on illegitimacy is unconstitutional unless it bears 'an evident and substantial relation to the particular . . . interests [the] statute is designed to serve.'" 445 U. S., at 27. See also *Lalli* v. *Lalli*, *supra*, at 265 (plurality opinion) ("classifications based on illegitimacy . . . are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests"). We applied a similar standard of review to a classification based on illegitimacy last Term in *Mills* v. *Habluetzel*, 456 U. S. 91 (1982). We stated that restrictions on support suits by illegitimate children "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest." *Id.*, at 99.

Our decisions in *Gomez* and *Mills* are particularly relevant to a determination of the validity of the limitations period at issue in this case. In *Gomez* we considered "whether the laws of Texas may constitutionally grant legitimate children a judicially enforceable right to support from their natural fathers and at the same time deny that right to illegitimate children." 409 U. S., at 535. We stated that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally,"

*id.*, at 538, and held that "once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother." *Ibid.* The Court acknowledged the "lurking problems with respect to proof of paternity," *ibid.*, and suggested that they could not "be lightly brushed aside." *Ibid.* But those problems could not be used to form "an impenetrable barrier that works to shield otherwise invidious discrimination." *Ibid.*

In *Mills* we considered the sufficiency of Texas' response to our decision in *Gomez*. In particular, we considered the constitutionality of a 1-year statute of limitations governing suits to identify the natural fathers of illegitimate children. 456 U. S., at 92. The equal protection analysis focused on two related requirements: the period for obtaining paternal support has to be long enough to provide a reasonable opportunity for those with an interest in illegitimate children to bring suit on their behalf; and any time limit on that opportunity has to be substantially related to the State's interest in preventing the litigation of stale or fraudulent claims. *Id.*, at 99–100.

The Texas statute failed to satisfy either requirement. The 1-year period for bringing a paternity suit did not provide illegitimate children with an adequate opportunity to obtain paternal support. *Id.*, at 100. The Court cited a variety of factors that make it unreasonable to require that a paternity suit be brought within a year of a child's birth. *Ibid.*[7] In addition, the Court found that the 1-year limita-

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[7] The Court suggested that "[f]inancial difficulties caused by childbirth expenses or a birth-related loss of income, continuing affection for the child's father, a desire to avoid disapproval of family and community, or the emotional strain and confusion that often attend the birth of an illegitimate child all encumber a mother's filing of a paternity suit within 12 months of birth." 456 U. S., at 100. The Court also pointed out that "[e]ven if the

tions period was not "substantially related to the State's interest in avoiding the prosecution of stale or fraudulent claims." *Id.*, at 101. The problems of proof surrounding paternity suits do not "justify a period of limitation which so restricts [support rights] as effectively to extinguish them." *Ibid.* The Court could "conceive of no evidence essential to paternity suits that invariably will be lost in only one year, nor is it evident that the passage of 12 months will appreciably increase the likelihood of fraudulent claims." *Ibid.* (footnote omitted).[8]

In a concurring opinion, JUSTICE O'CONNOR, joined by four other Members of the Court,[9] suggested that longer limitations periods also might be unconstitutional. *Id.*, at 106.[10] JUSTICE O'CONNOR pointed out that the strength of the State's interest in preventing the prosecution of stale or fraudulent claims was "undercut by the countervailing state interest in ensuring that genuine claims for child support are satisfied." *Id.*, at 103. This interest "stems not only from a desire to see that 'justice is done,' but also from a desire to reduce the number of individuals forced to enter the welfare rolls." *Ibid.* (footnote omitted). JUSTICE O'CONNOR also

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mother seeks public financial assistance and assigns the child's support claim to the State, it is not improbable that 12 months would elapse without the filing of a claim." *Ibid.* In this regard, the Court noted that "[s]everal months could pass before a mother finds the need to seek such assistance, takes steps to obtain it, and is willing to join the State in litigation against the natural father." *Ibid.* (footnote omitted).

[8] The Court found no need to reach a due process challenge to the statute. *Id.*, at 97.

[9] THE CHIEF JUSTICE, JUSTICE BRENNAN, and JUSTICE BLACKMUN joined JUSTICE O'CONNOR's concurring opinion. *Id.*, at 102. JUSTICE POWELL joined Part I of JUSTICE O'CONNOR's concurring opinion, but did not join the Court's opinion. *Id.*, at 106 (POWELL, J., concurring in judgment).

[10] JUSTICE O'CONNOR wrote separately because she feared that the Court's opinion might "be misinterpreted as approving the 4-year statute of limitation now used in Texas." *Id.*, at 102.

suggested that the State's concern about stale or fraudulent claims "is substantially alleviated by recent scientific developments in blood testing dramatically reducing the possibility that a defendant will be falsely accused of being the illegitimate child's father." *Id.*, at 104, n. 2. Moreover, JUSTICE O'CONNOR found it significant that a paternity suit was "one of the few Texas causes of action not tolled during the minority of the plaintiff." *Id.*, at 104 (footnote omitted). She stated:

> "Of all the difficult proof problems that may arise in civil actions generally, paternity, an issue unique to illegitimate children, is singled out for special treatment. When this observation is coupled with the Texas Legislature's efforts to deny illegitimate children any significant opportunity to prove paternity and thus obtain child support, it is fair to question whether the burden placed on illegitimates is designed to advance permissible state interests." *Id.*, at 104–105.

Finally, JUSTICE O'CONNOR suggested that "practical obstacles to filing suit within one year of birth could as easily exist several years after the birth of the illegitimate child." *Id.*, at 105. In view of all these factors, JUSTICE O'CONNOR concluded that there was "nothing special about the first year following birth" that compelled the decision in the case. *Id.*, at 106.

Against this background, we turn to an assessment of the constitutionality of the 2-year statute of limitations at issue here.

## III

Much of what was said in the opinions in *Mills* is relevant here, and the principles discussed in *Mills* require us to invalidate this limitations period on equal protection grounds.[11]

[11] In this light, we need not reach Pickett's due process challenge to the statute.

Although Tennessee grants illegitimate children a right to paternal support, Tenn. Code Ann. § 36–223 (1977), and provides a mechanism for enforcing that right, § 36–224(1), the imposition of a 2-year period within which a paternity suit must be brought, § 36–224(2), restricts the right of certain illegitimate children to paternal support in a way that the identical right of legitimate children is not restricted. In this respect, some illegitimate children in Tennessee are treated differently from, and less favorably than, legitimate children.

Under *Mills*, the first question is whether the 2-year limitations period is sufficiently long to provide a reasonable opportunity to those with an interest in illegitimate children to bring suit on their behalf. 456 U. S., at 99. In this regard, it is noteworthy that § 36–224(2) addresses some of the practical obstacles to bringing suit within a short time after the child's birth that were described in the opinions in *Mills*. See 456 U. S., at 100; *id.*, at 105–106 (O'CONNOR, J., concurring). The statute creates exceptions to the limitations period if the father has provided support for the child or has acknowledged his paternity in writing. The statute also allows suit to be brought by the State or by any person at any time prior to a child's 18th birthday if the child is, or is liable to become, a public charge. See n. 1, *supra*. This addresses JUSTICE O'CONNOR's point in *Mills* that a State has a strong interest in preventing increases in its welfare rolls. 456 U. S., at 103–104 (concurring opinion). For the illegitimate child whose claim is not covered by one of the exceptions in the statute, however, the 2-year limitations period severely restricts his right to paternal support. The obstacles to filing a paternity and child support suit within a year after the child's birth, which the Court discussed in *Mills*, see *id.*, at 100; n. 7, *supra*, are likely to persist during the child's second year as well. The mother may experience financial difficulties caused not only by the child's birth, but also by a loss of income attributable to the need to care for the child. Moreover, "continuing affection for the child's father, a desire to

avoid disapproval of family and community, or the emotional strain and confusion that often attend the birth of an illegitimate child," 456 U. S., at 100, may inhibit a mother from filing a paternity suit on behalf of the child within two years after the child's birth. JUSTICE O'CONNOR suggested in *Mills* that the emotional strain experienced by a mother and her desire to avoid family or community disapproval "may continue years after the child is born." *Id.*, at 105, n. 4 (concurring opinion).[12] These considerations compel a conclusion that the 2-year limitations period does not provide illegitimate children with "an adequate opportunity to obtain support." *Id.*, at 100.

The second inquiry under *Mills* is whether the time limitation placed on an illegitimate child's right to obtain support is substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims. *Id.*, at 99–100. In this case, it is clear that the 2-year limitations period governing paternity and support suits brought on behalf of certain illegitimate children does not satisfy this test.

First, a 2-year limitations period is only a small improvement in degree over the 1-year period at issue in *Mills*. It, too, amounts to a restriction effectively extinguishing the support rights of illegitimate children that cannot be justified by the problems of proof surrounding paternity actions. As was the case in *Mills*, "[w]e can conceive of no evidence essential to paternity suits that invariably will be lost in only

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[12] Problems stemming from a mother's emotional well-being are of particular concern in assessing the validity of Tennessee's limitations period because § 36–224(1), see n. 2, *supra*, permits suit to be filed only by the mother or by her personal representative if the child is not likely to become a public charge. As the Tennessee Supreme Court stated, § 36–224(1) "does not permit an action to be brought by the child except in case of death or disability of the mother." 638 S. W. 2d, at 380. The Texas statute involved in *Mills* permitted suit to be brought by " 'any person with an interest in the child' . . . ." 456 U. S., at 100. See also Tr. of Oral Arg. 31–33.

[two years], nor is it evident that the passage of [24] months will appreciably increase the likelihood of fraudulent claims." *Id.*, at 101 (footnote omitted).

Second, the provisions of § 36–224(2) undermine the State's argument that the limitations period is substantially related to its interest in avoiding the litigation of stale or fraudulent claims. As noted, see *supra*, at 6, § 36–224(2) establishes an exception to the statute of limitations for illegitimate children who are, or are likely to become, public charges. Paternity and support suits may be brought on behalf of these children by the State or by any person at any time prior to the child's 18th birthday. The State argues that this distinction between illegitimate children receiving public assistance and those who are not is justified by the State's interest in protecting public revenue. See Brief for Appellee Leech 26–30. Putting aside the question of whether this interest can justify such radically different treatment of two groups of illegitimate children,[13] the State's argument does not address the different treatment accorded illegitimate children who are not receiving public assistance and legitimate children. This difference in treatment is allegedly justified by the

[13] The State unquestionably has a legitimate interest in protecting public revenue. As JUSTICE O'CONNOR pointed out in *Mills*, however, the State also has an interest in seeing that " 'justice is done' " by "ensuring that genuine claims for child support are satisfied." 456 U. S., at 103 (concurring opinion). Moreover, an illegitimate child has an interest not only in obtaining paternal support, but also in establishing a relationship to his father. As the Juvenile Court suggested in this case, these interests are not satisfied merely because the mother is providing the child with sufficient support to keep the child off the welfare rolls. App. 16. See n. 4, *supra*. The father's duty of support persists even under these circumstances. App. 16. See also *Rose Funeral Home, Inc.* v. *Julian*, 176 Tenn. 534, 539, 144 S. W. 2d 755, 757 (1940); *Brooks* v. *Brooks*, 166 Tenn. 255, 257, 61 S. W. 2d 654 (1933). In any event, we need not resolve this tension in this case. As we discuss *infra*, the State's interest in protecting the public revenue does not make paternity claims any more or less stale or vulnerable to fraud.

State's interest in preventing the litigation of stale or fraudulent claims. But as the exception for children receiving public assistance demonstrates, the State perceives no prohibitive problem in litigating paternity claims throughout a child's minority. There is no apparent reason why claims filed on behalf of illegitimate children who are receiving public assistance when they are more than two years old would not be just as stale, or as vulnerable to fraud, as claims filed on behalf of illegitimate children who are not public charges at the same age. The exception in the statute, therefore, seriously undermines the State's argument that the different treatment accorded legitimate and illegitimate children is substantially related to the legitimate state interest in preventing the prosecution of stale or fraudulent claims and compels a conclusion that the 2-year limitations period is not substantially related to a legitimate state interest.

Third, Tennessee tolls most actions during a child's minority. See Tenn. Code Ann. § 28–1–106 (1980).[14] In *Parlato* v. *Howe*, 470 F. Supp. 996 (ED Tenn. 1979), the court stated that "[t]he legal disability statute represents a long-standing policy of the State of Tennessee to protect potential causes of actions by minors during the period of their minority." *Id.*, at 998–999. In view of this policy, the court held that a statute imposing a limitations period on medical malpractice actions "was not intended to interfere with the operation of the legal disability statute." *Id.*, at 998. Accord, *Braden* v. *Yoder*, 592 S. W. 2d 896 (Tenn. App. 1979). But see *Jones* v. *Black*, 539 S. W. 2d 123 (Tenn. 1976) (1-year limitations

[14] Tennessee Code Ann. § 28–1–106 (1980) reads as follows:

"If the person entitled to commence an action is, at the time the cause of action accrued, either within the age of eighteen (18) years, or of unsound mind, such person, or his representatives and privies, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceed *[sic]* three (3) years, and in that case within three (3) years from the removal of such disability."

period governing wrongful-death actions applies "regardless of the minority or other disability of any beneficiary of the action"). Many civil actions are fraught with problems of proof, but Tennessee has chosen to overlook these problems in most instances in favor of protecting the interests of minors. In paternity and child support actions brought on behalf of certain illegitimate children, however, the State instead has chosen to focus on the problems of proof and to impose on these suits a short limitations period. Although the Tennessee Supreme Court stated that the inapplicability of the tolling provision to paternity actions did not "alone" require invalidation of the limitations period, 638 S. W. 2d, at 380, it is clear that this factor, when considered in combination with others already discussed, may lead one "to question whether the burden placed on illegitimates is designed to advance permissible state interests." *Mills* v. *Habluetzel*, 456 U. S., at 105 (O'CONNOR, J., concurring). See also *id.*, at 106 (POWELL, J., concurring in judgment).[15]

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[15] There is some confusion about the relationship between § 28–1–106 and § 36–224. Compare Brief for Appellants 18; Tr. of Oral Arg. 10, 13, with Brief for Appellee Leech 13–14, 18; Tr. of Oral Arg. 30–31, 37–38. Even assuming that the limitations period in § 36–224(2) is tolled during the mother's minority, the important point is that it is not tolled during the minority of the child. As noted, see *supra*, at 15, and n. 14, statutes of limitations generally are tolled during a child's minority. This certainly undermines the State's argument that the different treatment accorded legitimate and illegitimate children is justified by its interest in preventing the litigation of stale or fraudulent claims.

It is not critical to this argument that the right to file a paternity action generally is given to the mother. It is the child's interests that are at stake. The father's duty of support is owed to the child, not to the mother. See Tenn. Code Ann. § 36–223 (1977). Moreover, it is the child who has an interest in establishing a relationship to his father. This reality is reflected in the provision of § 36–224(1) that allows the child to bring suit if the mother is dead or disabled. Cf. S. Rep. No. 93–1356, p. 52 (1974) ("[T]he interest primarily at stake in [a] paternity action [is] that of the child"). Restrictive periods of limitation, therefore, necessarily affect the interests of the child and their validity must be assessed in that light.

Finally, the relationship between a statute of limitations and the State's interest in preventing the litigation of stale or fraudulent paternity claims has become more attenuated as scientific advances in blood testing have alleviated the problems of proof surrounding paternity actions. As JUSTICE O'CONNOR pointed out in *Mills*, these advances have "dramatically reduc[ed] the possibility that a defendant will be falsely accused of being the illegitimate child's father." *Id.*, at 104, n. 2 (concurring opinion). See *supra*, at 10–11. See also *Little* v. *Streater*, 452 U. S. 1, 6–8, 12, 14 (1981). Although Tennessee permits the introduction of blood test results only in cases "where definite exclusion [of paternity] is established," Tenn. Code Ann. § 36–228 (1977); see also § 24–7–112 (1980), it is noteworthy that blood tests currently can achieve a "mean probability of exclusion [of] at least . . . 90 percent . . . ." Miale, Jennings, Rettberg, Sell, & Krause, Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage, 10 Family L. Q. 247, 256 (1976).[16] In *Mills*, the Court rejected the argument that recent advances in blood testing negated the State's interest in avoiding the prosecution of stale or fraudulent claims. 456 U. S., at 98, n. 4. It is not inconsistent with this view, however, to suggest that advances in blood testing render more attenuated the relationship between a statute of limitations and the State's interest in preventing the prosecution of stale or fraudulent paternity claims. This is an appropriate consideration in determining whether a

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[16] See also Stroud, Bundrant, & Galindo, Paternity Testing: A Current Approach, 16 Trial 46 (Sept. 1980) ("Recent advances in scientific techniques now enable the properly equipped laboratory to routinely provide attorneys and their clients with a 95–98 percent probability of excluding a man falsely accused of paternity"); Terasaki, Resolution By HLA Testing of 1000 Paternity Cases Not Excluded By ABO Testing, 16 J. Family L. 543 (1978). See generally Ellman & Kaye, Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity?, 54 N. Y. U. L. Rev. 1131 (1979).

period of limitations governing paternity actions brought on behalf of illegitimate children is substantially related to a legitimate state interest.

IV

The 2-year limitations period established by Tenn. Code Ann. § 36–224(2) (1977) does not provide certain illegitimate children with an adequate opportunity to obtain support and is not substantially related to the legitimate state interest in preventing the litigation of stale or fraudulent claims. It therefore denies certain illegitimate children the equal protection of the laws guaranteed by the Fourteenth Amendment. Accordingly, the judgment of the Tennessee Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

*It is so ordered.*

Syllabus

# FEDERAL TRADE COMMISSION ET AL. *v.* GROLIER INC.

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

No. 82–372. Argued March 29, 1983—Decided June 6, 1983

Exemption 5 of the Freedom of Information Act (FOIA) exempts from disclosure under the Act "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." Petitioner Federal Trade Commission (FTC) conducted an investigation of a subsidiary of respondent in connection with a civil penalty action against the subsidiary in Federal District Court filed by the Department of Justice. The action was later dismissed with prejudice when the Government declined to comply with a discovery order. Thereafter, respondent filed a request with the FTC for disclosure of certain documents concerning the investigation of the subsidiary, but the FTC denied the request on the ground that the documents were exempt from disclosure under Exemption 5. Respondent then brought suit in Federal District Court to compel release of the documents. The District Court held that the documents were exempt from disclosure under Exemption 5 as, *inter alia*, attorney work product. The Court of Appeals held that the documents generated during the action against the subsidiary could not be withheld on the basis of the work-product rule unless the FTC could show that "litigation related to the terminated action exists or potentially exists." The court reasoned that the work-product rule encompassed by Exemption 5 was coextensive with the work-product privilege under the Federal Rules of Civil Procedure, and that a requirement that documents must be disclosed in the absence of the existence or potential existence of related litigation best comported with the fact that the work-product privilege is a qualified one.

*Held:* Under Exemption 5, attorney work product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared. By its own terms, Exemption 5 requires reference to whether discovery would normally be required during litigation *with the agency*. Under a literal reading of Federal Rule of Civil Procedure 26(b)(3), the work product of agency attorneys would not be subject to discovery in subsequent litigation unless there was a showing of need and thus would fall within the scope of Exemption 5. But regardless of how Rule 26(b)(3) is construed, the Court of Appeals erred in construing Exemption 5 to protect work-product material only if related litigation

exists or potentially exists. The test under Exemption 5 is whether the documents would be "routinely" or "normally" disclosed upon a showing of relevance. The Court of Appeals' determination that its rule concerning related litigation best comported with the qualified nature of the work-product rule is irrelevant in the FOIA context. Whether its immunity from discovery is absolute or qualified, a protected document cannot be said to be subject to "routine" disclosure. Work-product materials are immune from discovery unless the one seeking discovery can show substantial need in connection with subsequent litigation. Such materials are thus not "routinely" or "normally" available to parties in litigation and hence are exempt under Exemption 5. This result, by establishing a discrete category of exempt information, implements the FOIA's purpose to provide "workable" rules. Pp. 23–28.

217 U. S. App. D. C. 47, 671 F. 2d 553, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and MARSHALL, POWELL, •REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in part and concurring in the judgment, in which BLACKMUN, J., joined, *post*, p. 28.

*Deputy Solicitor General Geller* argued the cause for petitioners. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General McGrath*, *Samuel A. Alito, Jr.*, and *Leonard Schaitman*.

*Daniel S. Mason* argued the cause for respondent. With him on the brief were *Frederick P. Furth*, *Michael P. Lehmann*, and *Richard M. Clark*.

JUSTICE WHITE delivered the opinion of the Court.

The Freedom of Information Act (FOIA), 5 U. S. C. § 552, mandates that the Government make its records available to the public. Section 552(b)(5) exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." It is well established that this exemption was intended to encompass the attorney work-product rule. The question presented in this case is the extent, if any, to which the work-product component of Exemption 5 applies when the litigation for which the requested documents were generated has been terminated.

In 1972, the Federal Trade Commission undertook an investigation of Americana Corp., a subsidiary of respondent Grolier Inc. The investigation was conducted in connection with a civil penalty action filed by the Department of Justice.[1] In 1976, the suit against Americana was dismissed with prejudice when the Government declined to comply with a District Court discovery order. In 1978, respondent filed a request with the Commission for disclosure of documents concerning the investigation of Americana.[2] The Commission initially denied the entire request, stating that it did not have any information responsive to some of the items and that the remaining portion of the request was not specific enough to permit the Commission to locate the information without searching millions of documents contained in investigatory files. The Commission refused to release the few items that were responsive to the request on the basis

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[1] *United States* v. *Americana Corp.*, Civ. No. 388–72 (NJ). Americana was charged with violation of a 1948 cease-and-desist order in making misrepresentations regarding its encyclopedia advertisements and door-to-door sales.

[2] By letter to the Commission, respondent requested the following:

"1) All records and documents which refer or relate to a covert investigation of Americana Corporation and/or Grolier Incorporated, which was made in or about April 1973, by a Federal Trade Commission consumer protection specialist named Wendell A. Reid; and

"2) All records and documents which refer or relate to any covert investigation, made by any employee of the Federal Trade Commission, of any of the following companies: [listing 14 companies, including respondent and Americana Corporation].

"3) All records and documents which refer or relate to any covert investigation, made by any employee of the Federal Trade Commission, of any person, company or other entity." App. 15–16.

"Covert investigation" was defined by respondent to be "any investigation of which the subject entity was not notified in advance and prior to acts taken pursuant to such investigation." *Id.*, at 16. Respondent later abandoned its requests for any documents other than those related to the Americana investigation, defined in the first category of its request.

that they were exempt from mandatory disclosure under § 552(b)(5).[3]

Pursuant to the Commission's Rules, respondent appealed to the agency's General Counsel. Following review of respondent's request, and after a considerable process of give and take, the dispute finally centered on seven documents.[4] Following *in camera* inspection, the District Court determined that all the requested documents were exempt from disclosure under § 552(b)(5), either as attorney work product, as confidential attorney-client communications, or as internal predecisional agency material. On appeal, the Court of Appeals held that four documents generated during the Americana litigation could not be withheld on the basis of the work-product rule unless the Commission could show that "litigation related to the terminated action exists or potentially exists."[5] 217 U. S. App. D. C. 47, 50, 671 F. 2d 553, 556 (1982).

The Court of Appeals reasoned that the work-product rule encompassed by § 552(b)(5) was coextensive with the work-product privilege under the Federal Rules of Civil Proce-

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[3] The requested documents are subject to mandatory disclosure as "identifiable records" under § 552(a)(3), unless covered by a specific exemption. In this case, the Commission claims exemption only under § 552 (b)(5), which provides:

"This section does not apply to matters that are—

. . . . . .

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency . . . ."

[4] The Commission released a number of documents after respondent filed this suit. Respondent abandoned its claim for many others. See n. 2, *supra*.

[5] Respondent withdrew its claim for disclosure of one of the seven documents. The Court of Appeals affirmed the District Court's judgment that another was exempt as an attorney-client communication, 217 U. S. App. D. C., at 48, n. 3, 671 F. 2d, at 554, n. 3, and held that still another was clearly a predecisional document not subject to disclosure under Exemption 5, *id.*, at 51, 671 F. 2d, at 557. These rulings are not at issue here.

dure. A requirement that documents must be disclosed in the absence of the existence or potential existence of related litigation, in the Court of Appeals' view, best comported with the fact that the work-product privilege is a qualified one. We granted the Commission's petition for certiorari, 459 U. S. 986 (1982). Because we find that the Court of Appeals erred in its construction of Exemption 5, we reverse.

Section 552(b) lists nine exemptions from the mandatory disclosure requirements that "represen[t] the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses." *EPA* v. *Mink*, 410 U. S. 73, 80 (1973). The primary purpose of one of these, Exemption 5, was to enable the Government to benefit from "frank discussion of legal or policy matters." S. Rep. No. 813, 89th Cong., 1st Sess., 9 (1965). See H. R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966). In keeping with the Act's policy of "the fullest responsible disclosure," S. Rep. No. 813, at 3, Congress intended Exemption 5 to be "as narro[w] as [is] consistent with efficient Government operation." *Id.*, at 9. See H. R. Rep. No. 1497, at 10.

Both the District Court and the Court of Appeals found that the documents at issue were properly classified as "work product" materials, and there is no serious argument about the correctness of this classification.[6] "It is equally clear that Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5," the privilege being that enjoyed in the context of discovery in civil litigation. *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 154–155 (1975); H. R. Rep. No. 1497, at 10; S. Rep. No. 813, at 2.

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[6] Respondent makes some assertions concerning the ethical conduct of the Commission in continuing its investigations after the *Americana* suit had been instituted and claims that the work-product rule would not apply to documents containing evidence of unethical conduct. Respondent did not raise this issue before the District Court or the Court of Appeals and we decline to address it.

In *Hickman* v. *Taylor*, 329 U. S. 495, 510 (1947), the Court recognized a qualified immunity from discovery for the "work product of the lawyer"; such material could only be discovered upon a substantial showing of "necessity or justification." An exemption from discovery was necessary because, as the *Hickman* Court stated:

> "Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.*, at 511.

The attorney's work-product immunity is a basic rule in the litigation context, but like many other rules, it is not self-defining and has been the subject of extensive litigation.

Prior to 1970, few District Courts had addressed the question whether the work-product immunity extended beyond the litigation for which the documents at issue were prepared. Those courts considering the issue reached varying results.[7] By 1970, only one Court of Appeals had addressed the issue. In *Republic Gear Co.* v. *Borg-Warner Corp.*, 381 F. 2d 551, 557 (CA2 1967), the Court of Appeals held that documents prepared in connection with litigation that was on

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[7] See *Honeywell, Inc.* v. *Piper Aircraft Corp.*, 50 F. R. D. 117 (MD Pa. 1970); *Bourget* v. *Government Employees Ins. Co.*, 48 F. R. D. 29 (Conn. 1969); *Stix Products, Inc.* v. *United Merchants & Mfrs., Inc.*, 47 F. R. D. 334 (SDNY 1969); *LaRocca* v. *State Farm Mutual Automobile Ins. Co.*, 47 F. R. D. 278 (WD Pa. 1969); *Kirkland* v. *Morton Salt Co.*, 46 F. R. D. 28 (ND Ga. 1968); *Chitty* v. *State Farm Mutual Automobile Ins. Co.*, 36 F. R. D. 37 (EDSC 1964); *Insurance Co. of North America* v. *Union Carbide Corp.*, 35 F. R. D. 520 (Colo. 1964); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 207 F. Supp. 407 (MD Pa. 1962); *Thompson* v. *Hoitsma*, 19 F. R. D. 112 (NJ 1956); *Tobacco and Allied Stocks, Inc.* v. *Transamerica Corp.*, 16 F. R. D. 534 (Del. 1954).

appeal were not subject to discovery in a related case. The court also noted that there was potential for further related litigation. Thus, at the time FOIA was enacted in 1966, other than the general understanding that work-product materials were subject to discovery only upon a showing of need, no consensus one way or the other had developed with respect to the temporal scope of the work-product privilege.

In 1970, the Federal Rules of Civil Procedure were amended to clarify the extent to which trial preparation materials are discoverable in federal courts. Rule 26(b)(3) provides, in pertinent part:

> "[A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

Rule 26(b)(3) does not in so many words address the temporal scope of the work-product immunity, and a review of the Advisory Committee's comments reveals no express concern for that issue. Notes of Advisory Committee on 1970 Amendments, 28 U. S. C. App., pp. 441–442. But the literal language of the Rule protects materials prepared for *any* litigation or trial as long as they were prepared by or for a party to the subsequent litigation. See 8 C. Wright & A. Miller, Federal Practice and Procedure § 2024, p. 201 (1970). Whatever problems such a construction of Rule 26(b)(3) may engender in the civil discovery area, see *id.*, at 201–202, it provides a satisfactory resolution to the question whether

work-product documents are exempt under the FOIA. By its own terms, Exemption 5 requires reference to whether discovery would normally be required during litigation *with the agency*. Under a literal reading of Rule 26(b)(3), the work product of agency attorneys would not be subject to discovery in subsequent litigation unless there was a showing of need and would thus fall within the scope of Exemption 5.

We need not rely exclusively on any particular construction of Rule 26(b)(3), however, because we find independently that the Court of Appeals erred in construing Exemption 5 to protect work-product materials only if related litigation exists or potentially exists. The test under Exemption 5 is whether the documents would be "routinely" or "normally" disclosed upon a showing of relevance. *NLRB* v. *Sears, Roebuck & Co.* 421 U. S., at 148–149. At the time this case came to the Court of Appeals, all of the Courts of Appeals that had decided the issue under Rule 26(b)(3) had determined that work-product materials retained their immunity from discovery after termination of the litigation for which the documents were prepared, without regard to whether other related litigation is pending or is contemplated.[8] In addition, an overwhelming majority of the Federal District Courts reporting decisions on the issue under Rule 26(b)(3) were in accord with that view.[9] "Exemption 5 incorporates

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[8] See *In re Murphy*, 560 F. 2d 326, 334 (CA8 1977); *United States* v. *Leggett & Platt, Inc.*, 542 F. 2d 655 (CA6 1976), cert. denied, 430 U. S. 945 (1977); *Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz*, 487 F. 2d 480, 483–384 (CA4 1973). See also *In re Grand Jury Proceedings*, 604 F. 2d 798, 803 (CA3 1979) (work-product privilege continues at least when subsequent litigation is related). Cf. *Kent Corp.* v. *NLRB*, 530 F. 2d 612 (CA5) (work-product privilege does not turn on whether litigation actually ensued), cert. denied, 429 U. S. 920 (1976).

[9] See *In re Federal Copper of Tennessee, Inc.*, 19 B. R. 177 (Bkrtcy. MD Tenn. 1982); *In re International Systems & Controls Corp. Securities Litigation*, 91 F. R. D. 552 (SD Tex. 1981); *United States* v. *Capitol Service, Inc.*, 89 F. R. D. 578 (ED Wis. 1981); *In re LTV Securities Litigation*, 89 F. R. D. 595 (ND Tex. 1981); *First Wisconsin Mortgage Trust* v. *First*

the privileges which the Government enjoys under the relevant statutory and *case law* in the pretrial discovery context." *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U. S. 168, 184 (1975) (emphasis added). Under this state of the work-product rule it cannot fairly be said that work-product materials are "routinely" available in subsequent litigation.

The Court of Appeals' determination that a related-litigation test best comported with the qualified nature of the work-product rule in civil discovery—a proposition with which we do not necessarily agree—is irrelevant in the FOIA context. It makes little difference whether a privilege is absolute or qualified in determining how it translates into a discrete category of documents that Congress intended to exempt from disclosure under Exemption 5. Whether its immunity from discovery is absolute or qualified, a protected document cannot be said to be subject to "routine" disclosure.

Under the current state of the law relating to the privilege, work-product materials are immune from discovery unless the one seeking discovery can show substantial need in connection with subsequent litigation. Such materials are thus not "routinely" or "normally" available to parties in litigation and hence are exempt under Exemption 5. This result, by establishing a discrete category of exempt information, implements the congressional intent to provide "workable" rules. See S. Rep. No. 813, at 5; H. R. Rep. No. 1497, at 2.

Respondent urges that the meaning of the statutory language is "plain" and that, at least in this case, the requested

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*Wisconsin Corp.*, 86 F. R. D. 160 (ED Wis. 1980); *Panter* v. *Marshall Field & Co.*, 80 F. R. D. 718 (ND Ill. 1978); *United States* v. *O. K. Tire & Rubber Co.*, 71 F. R. D. 465 (Idaho 1976); *SCM Corp.* v. *Xerox Corp.*, 70 F. R. D. 508 (Conn.), appeal dism'd, 534 F. 2d 1031 (1976); *Burlington Industries* v. *Exxon Corp.*, 65 F. R. D. 26 (Md. 1974). See also *Hercules, Inc.* v. *Exxon Corp.*, 434 F. Supp. 136 (Del. 1977) (protected when cases are closely related in parties or subject matter); *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 90 F. R. D. 45 (ND Ill. 1981) (protected in later related litigation).

documents must be disclosed because the same documents were ordered disclosed during discovery in previous litigation. It does not follow, however, from an ordered disclosure based on a showing of need that such documents are routinely available to litigants. The logical result of respondent's position is that whenever work-product documents would be discoverable in any particular litigation, they must be disclosed to anyone under the FOIA. We have previously rejected that line of analysis. In *NLRB* v. *Sears, Roebuck & Co.*, *supra*, we construed Exemption 5 to "exempt those documents, and only those documents, *normally* privileged in the civil discovery context." 421 U. S., at 149. (Emphasis added.) It is not difficult to imagine litigation in which one party's need for otherwise privileged documents would be sufficient to override the privilege but that does not remove the documents from the category of the *normally* privileged. See *id.*, at 149, n. 16.

Accordingly, we hold that under Exemption 5, attorney work product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared. Only by construing the Exemption to provide a categorical rule can the Act's purpose of expediting disclosure by means of workable rules be furthered. The judgment of the Court of Appeals is reversed.

*It is so ordered.*

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

The Court rests its judgment on two alternative holdings: one a construction of Federal Rule of Civil Procedure 26(b)(3), *ante*, at 26; the other a more limited holding under Exemption 5 of the Freedom of Information Act (FOIA), 5 U. S. C. § 552(b)(5), *ante*, at 26. I find the latter holding unpersuasive and accordingly would rest exclusively on the former.

I

I agree wholeheartedly with the Court that Rule 26(b)(3) itself does not incorporate any requirement that there be actual or potential related litigation before the protection of the work-product doctrine applies. As the Court notes, "the literal language of the Rule protects materials prepared for *any* litigation or trial as long as they were prepared by or for a party to the subsequent litigation." *Ante*, at 25. A contrary interpretation such as that adopted by the Court of Appeals would work substantial harm to the policies that the doctrine is designed to serve and protect. We described the reasons for protecting work product from discovery in *Hickman* v. *Taylor*, 329 U. S. 495 (1947):

> "In performing his various duties, . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference . . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed . . . the 'work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.*, at 510–511.

The Court of Appeals is doubtless correct in its view that the need to protect attorney work product is at its greatest when the litigation with regard to which the work product was prepared is still in progress; but it does not follow that the need for protection disappears once that litigation (and any "related" litigation) is over. The invasion of "[a]n attorney's thoughts, heretofore inviolate," and the resulting demoralizing effect on the profession, are as great when the invasion takes place later rather than sooner. More concretely, disclosure of work product connected to prior litigation can cause real harm to the interests of the attorney and his client even after the controversy in the prior litigation is resolved. Many Government agencies, for example, deal with hundreds or thousands of essentially similar cases in which they must decide whether and how to conduct enforcement litigation. Few of these cases will be "related" to each other in the sense of involving the same private parties or arising out of the same set of historical facts; yet large classes of them may present recurring, parallel factual settings and identical legal and policy considerations.[1] It would be of substantial benefit to an opposing party (and of corresponding detriment to an agency) if the party could obtain work product generated by the agency in connection with earlier, similar litigation against other persons. He would get the benefit of the agency's legal and factual research and reasoning, enabling him to litigate "on wits borrowed from the ad-

[1] It is possible, I suppose, that such suits might be considered "related" in a very broad reading of the Court of Appeals' "related litigation" test; the courts adopting the test have not had occasion to explore its outer boundaries. But this possibility merely reveals a dilemma: If the test is read so broadly as to classify similar but factually unrelated suits as "related," it is virtually no limitation on the work-product doctrine at all, since almost any work-product document otherwise discoverable under Rule 26(b)(1) will have originated in "related" litigation. But to the extent that the "related" test is read any more narrowly than that, it threatens to cause the harm discussed in text. Hence, the test is either harmful or toothless.

versary." *Id.*, at 516 (Jackson, J., concurring). Worse yet, he could gain insight into the agency's general strategic and tactical approach to deciding when suits are brought, how they are conducted, and on what terms they may be settled. Nor is the problem limited to Government agencies. Any litigants who face litigation of a commonly recurring type—liability insurers, manufacturers of consumer products or machinery, large-scale employers, securities brokers, regulated industries, civil rights or civil liberties organizations, and so on—have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes. Counsel for such a client would naturally feel some inhibition in creating and retaining written work product that could later be used by an "unrelated" opponent against him and his client. Counsel for less litigious clients as well might have cause for concern in particular cases; fear of even one future "unrelated" but similar suit might instill an undesirable caution, and neither client nor counsel can always be entirely sure what might lie over the horizon. This is precisely the danger of "[i]nefficiency, unfairness[,] . . . sharp practices" and demoralization that *Hickman* warned against.[2]

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[2] See generally, *e. g.*, *In re Murphy*, 560 F. 2d 326, 333–335 (CA8 1977); *United States* v. *Leggett & Platt, Inc.*, 542 F. 2d 655, 659–660 (CA6 1976); *Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz*, 509 F. 2d 730 (CA4 1974); *Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz*, 487 F. 2d 480 (CA4 1973).

The Court of Appeals reasoned that "[e]xtending the work-product protection only to subsequent related cases best comports with the fact that the privilege is qualified, not absolute." 217 U. S. App. D. C. 47, 50, 671 F. 2d 553, 556 (1982) (footnote omitted). In my view, this mistakes by 180 degrees the significance of the qualified nature of the privilege. As another Court of Appeals has explained:

"Were the work product doctrine an unpenetrable protection against discovery, we would be less willing to apply it to work produced in anticipation of other litigation. But the work product doctrine provides only a qualified protection against discovery . . . ." *Leggett & Platt*, *supra*, at 660.

Indeed, to the extent that the need for protection of work product does decrease after the end of a suit, that fact might in some cases lower the

I do not understand the Court's holding on this point to be limited to the FOIA context. The Court itself quite accurately characterizes its first holding as a "particular construction of Rule 26(b)(3)." *Ante*, at 26. Indeed, it could hardly do otherwise, since the plain meaning of Exemption 5 is that the scope of the Exemption is coextensive with the scope of the discovery privileges it incorporates. "Exemption 5 . . . exempt[s] those documents, and only those documents, normally privileged in the civil discovery context." *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 149 (1975) (footnote omitted). See also *id.*, at 154–155; *Federal Open Market Committee* v. *Merrill*, 443 U. S. 340, 353 (1979); *Renegotiation Board* v. *Grumman Aircraft Corp.*, 421 U. S. 168, 184 (1975); *EPA* v. *Mink*, 410 U. S. 73, 85–86, 91 (1973).[3] Thus, nothing in either FOIA or our decisions construing it authorizes us to define the coverage of the work-product doctrine under Exemption 5 differently from the definition of its coverage that would obtain under Rule 26(b)(3) in an ordinary lawsuit. If a document is work product under the Rule, and if it is an "inter-agency or intra-agency memorandu[m] or lette[r]" under the Exemption, it is absolutely exempt.[4]

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threshold for overcoming the work-product barrier. A party seeking discovery of work product must show that "he is unable without undue hardship to obtain the substantial equivalent of the materials by other means," Rule 26(b)(3). What hardship is "undue" depends on both the alternative means available and the need for continuing protection from discovery. See 8 C. Wright & A. Miller, Federal Practice and Procedure § 2024, p. 202 (1970).

[3] But see *Federal Open Market Committee* v. *Merrill*, 443 U. S., at 354: "[I]t is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery." Of course, it is settled that the Exemption does incorporate the work-product doctrine. *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S., at 154–155.

[4] We held in *Sears* that Exemption 5 does not apply to "final opinions" explaining agency actions already taken or agency decisions already made. *Id.*, at 150–154. The gist of our holding was that such documents are not within any privilege incorporated into Exemption 5—specifically, that they

## II

Since the Court rejects the "related litigation" test under Rule 26(b)(3), and since that holding necessarily governs the application of the work-product doctrine under Exemption 5, it need go no further. The Court proceeds, however, to put forward a second holding directly under FOIA. It reasons that work product generated in connection with a prior, unrelated litigation would not be " 'routinely' available in subsequent litigation," *ante*, at 27, because at the time of the Court of Appeals' decision in this case a majority of federal courts that had decided the issue had rejected the "related litigation" test. *Ante*, at 26–27. This holding apparently would preclude disclosure under FOIA even in a district or circuit where the precedents under Rule 26(b)(3) *do* incorporate the "related litigation" test, since the "majority view" does not depend on the location of the library in which one reads the cases.[5] I grant that uniformity of statutory interpretation is a good thing as a general matter, but I cannot see taking it this far.

I confess that the source from which the Court draws its reasoning is a mystery to me. I know of no other statutory context in which the test of discoverability (or anything else) is not what the *correct* view of the law is, but what the *cur-*

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are not covered by the Government's executive privilege. *Ibid.* The same would be true of the work-product doctrine; it is difficult to imagine how a final decision could be "prepared in anticipation of litigation or for trial," Rule 26(b)(3). It is also questionable whether such decisions would constitute "inter-agency or intra-agency memorandums or letters," 5 U. S. C. § 552(b)(5).

[5] Presumably, this principle would work in reverse as well. That is, if the settled law of a particular district under Rule 26(b)(3) were that a particular type of document (some sort of investigative report, say) is within the work-product doctrine, but a majority of other courts disagreed, the district court entertaining a FOIA suit would be obliged to follow the majority view and grant disclosure, even though the same document would not be "routinely" disclosed in an ordinary lawsuit in that district.

*rent majority* view is.[6] Certainly the plain language of the statute is to the contrary; it directs a court to exempt material "which would not be available *by law* to a party . . . in litigation with the agency." 5 U. S. C. § 552(b)(5) (emphasis added). "By law" presumably means "by the law as correctly construed by the court deciding the case at hand," not "by the law as construed (whether correctly or incorrectly) by a majority of other federal courts." The Court draws the words "routinely" and "normally" from *Sears*, *supra*, at 149, and n. 16. But as a quick perusal of that case reveals, all we were saying there was that once a privilege is held to apply under Exemption 5, it applies absolutely, without regard to whether a party in ordinary discovery might be able to overcome the privilege by some showing of need (an understanding the Court itself embraces, *ante*, at 28). Alternatively, the Court cites our statement in *Grumman Aircraft*, *supra*, at 184, that "Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and *case law* in the pretrial discovery context." *Ante*, at 26–27 (emphasis by the Court). Again, however, the context of the quoted passage makes clear that it refers simply to the extent to which the correct state of the law with regard to a privilege may be embodied in cases interpreting a statute or erecting a nonstatutory privilege. The scope of the work-product doctrine on a particular disputed point, for example, may be laid out in some binding precedent of the district court entertaining a given FOIA suit, of the court of appeals for that circuit, or of this Court. Absent a control-

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[6] One might posit a different sort of incorporation of case law—one in which the relevant law was that in existence in 1966, when FOIA was enacted. The Court wisely declines to adopt this reading. There is nothing in FOIA that indicates that it intended to "freeze" the law that existed in 1966; the phrase "available by law" certainly seems to refer to the law at any given time. Indeed, this reading would preclude recognition of subsequent changes in *statutory* law, such as the adoption of Rule 26(b)(3) in 1970.

ling precedent, of course, the district court would ordinarily look to the decisions of other courts to inform its own construction of Rule 26(b)(3). But nothing in Exemption 5, *Sears*, *Grumman Aircraft*, or anything else of which I am aware authorizes or directs that district court to do anything other than to determine what the legally correct interpretation of the doctrine is, and then to apply it—even if the interpretation it reaches is contrary to that of a majority of other courts. Under the Court's reading of the word "routinely," however, it appears that the district court would be obliged to adhere to the majority view even if there were unmistakable precedent in its circuit construing Rule 26(b)(3) to the contrary. I see no warrant for this astonishing principle. Hence, although I agree with the Court's construction of Rule 26(b)(3), I join only its judgment.

# WATT, SECRETARY OF THE INTERIOR, ET AL. *v.* WESTERN NUCLEAR, INC.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 81–1686. Argued January 17, 1983—Decided June 6, 1983

The Stock-Raising Homestead Act of 1916 (SRHA) provided for the settlement of homesteads on lands the surface of which was "chiefly valuable for grazing and raising forage crops." Section 9 of the SRHA reserved to the United States title to "all the coal and minerals" in lands patented under the Act. When respondent mining company acquired a fee interest in land covered by a patent under the Act, it proceeded to remove gravel from a pit located on the land to use in paving streets and sidewalks in a company town where its workers lived. The Bureau of Land Management then notified respondent, and later determined, after a hearing, that the removal of the gravel constituted a trespass in violation of a Department of the Interior regulation for which respondent was liable in damages to the United States. The Interior Board of Land Appeals affirmed, holding that gravel is a mineral reserved to the United States in patents issued under the SRHA. Respondent then filed suit in Federal District Court, which affirmed, but the Court of Appeals reversed.

*Held:* Gravel found on lands patented under the SRHA is a mineral reserved to the United States within the meaning of § 9 of the Act. Pp. 42–60.

(a) For a substance to be a mineral reserved under the SRHA, it must not only be a mineral within a familiar definition of that term, as is gravel, but must also be the type of mineral that Congress intended to reserve to the United States in lands patented under the Act. Pp. 42–46.

(b) Congress' purpose in the SRHA of facilitating the concurrent development of both surface and subsurface resources supports construing the mineral reservation to encompass gravel. While Congress expected that homesteaders would use the surface of SRHA lands for stockraising and raising crops, it sought to ensure that valuable subsurface resources would remain subject to disposition by the United States, under the general mining laws or otherwise, to persons interested in exploiting them. Given Congress' understanding that the surface of SRHA lands would be used for ranching and farming, the mineral reservation in the Act is properly interpreted to include substances, such as gravel, that are mineral in character, can be removed from the soil, and can be used for

commercial purposes, and that there is no reason to suppose were intended to be included in the surface estate. Pp. 46–56.

(c) The conclusion that gravel is a mineral for purposes of the SRHA is also supported by the treatment of gravel under other federal statutes concerning minerals, and by federal administrative and judicial decisions over the last 50 years that have consistently recognized that gravel deposits could be located under the general mining laws. Pp. 56–59.

(d) Finally, this conclusion is further buttressed by the rule that land grants are construed favorably to the Government. This rule applies here with particular force, because the legislative history of the SRHA reveals Congress' understanding that the mineral reservation would limit the operation of the Act strictly to the surface of the lands. Pp. 59–60.

664 F. 2d 234, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, and BLACKMUN, JJ., joined. POWELL, J., filed a dissenting opinion, in which REHNQUIST, STEVENS, and O'CONNOR, JJ., joined, *post*, p. 60. STEVENS, J., filed a dissenting opinion, *post*, p. 72.

*John H. Garvey* argued the cause for petitioners. With him on the briefs were *Assistant Attorney General Dinkins*, *Deputy Solicitor General Claiborne*, and *Robert L. Klarquist*.

*Harley W. Shaver* argued the cause for respondent. With him on the brief was *John H. Licht*.*

JUSTICE MARSHALL delivered the opinion of the Court.

The Stock-Raising Homestead Act of 1916, the last of the great Homestead Acts, provided for the settlement of homesteads on lands the surface of which was "chiefly valuable for grazing and raising forage crops" and "not susceptible of irrigation from any known source of water supply." 43 U. S. C. § 292. Congress reserved to the United States title to "all the coal and other minerals" in lands patented under the Act. 43 U. S. C. § 299. The question presented by this case is

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*Briefs of *amici curiae* urging affirmance were filed by *Glenn Parker* and *Steven F. Freudenthal*, Attorney General of Wyoming, for the Wyoming Stock Brokers Association et al.; and by *Thomas E. Meachum* and *Edward Gould Burton* for Eklutna, Inc.

whether gravel found on lands patented under the Act is a mineral reserved to the United States.

## I

### A

The Stock-Raising Homestead Act of 1916 (SRHA), 39 Stat. 862, 43 U. S. C. § 291 *et seq.*, permitted any person qualified to acquire land under the general homestead laws, Act of May 20, 1862, 12 Stat. 392, as amended, 43 U. S. C. § 161 *et seq.*, to make "a stock-raising homestead entry" on "unappropriated, unreserved public lands . . . designated by the Secretary of the Interior as 'stock-raising lands.'"[1] 43 U. S. C. § 291. The Secretary of the Interior was authorized to designate as stockraising lands only

> "lands the surface of which is, in his opinion, chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that six hundred and forty acres are reasonably required for the support of a family." 43 U. S. C. § 292.

To obtain a patent, an entryman was required to reside on the land for three years, 43 U. S. C. § 293, incorporating by reference 37 Stat. 123, ch. 153, 43 U. S. C. § 164, and "to make permanent improvements upon the land . . . tending to increase the value of the [land] for stock-raising purposes of the value of not less than $1.25 per acre." 43 U. S. C. § 293.

Section 9 of the Act, the provision at issue in this case, stated that "[a]ll entries made and patents issued . . . shall be

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[1] The SRHA was effectively suspended by executive action taken pursuant to the Taylor Grazing Act, 48 Stat. 1269, ch. 865, 43 U. S. C. § 315 *et seq.* Both the SRHA and the general homestead laws were repealed by the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 43 U. S. C. § 1701 *et seq.* Existing patents were unaffected by the repeal.

subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same." 39 Stat. 864, as amended, 43 U. S. C. § 299. Section 9 further provided that "[t]he coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal."

B

On February 4, 1926, the United States conveyed a tract of land near Jeffrey City, Wyo., to respondent's predecessor-in-interest. The land was conveyed by Patent No. 974013 issued pursuant to the SRHA. As required by § 9 of the Act, 43 U. S. C. § 299, the patent reserved to the United States "all the coal and other minerals" in the land.

In March 1975 respondent Western Nuclear, Inc., acquired a fee interest in a portion of the land covered by the 1926 patent. Western Nuclear is a mining company that has been involved in the mining and milling of uranium ore in and around Jeffrey City since the early 1950's. In its commercial operations Western Nuclear uses gravel for such purposes as paving and surfacing roads and shoring the shaft of its uranium mine. In view of the expense of having gravel hauled in from other towns, the company decided that it would be economical to obtain a local source of the material, and it acquired the land in question so that it could extract gravel from an open pit on the premises.

After acquiring the land, respondent obtained from the Wyoming Department of Environmental Quality, a state agency, a permit authorizing it to extract gravel from the pit located on the land. Respondent proceeded to remove some 43,000 cubic yards of gravel. It used most of this gravel for paving streets and pouring sidewalks in nearby Jeffrey City, a company town where respondent's mill and mine workers lived.

On November 3, 1975, the Wyoming State Office of the Bureau of Land Management (BLM) served Western Nuclear with a notice that the extraction and removal of the gravel constituted a trespass against the United States in violation of 43 CFR § 9239.0–7 (1975), current version at 43 CFR § 9239.0–7 (1982), a regulation promulgated by the Department of the Interior under the Materials Act of 1947, 61 Stat. 681, as amended by the Surface Resources Act of 1955, 69 Stat. 367, 30 U. S. C. §§ 601–615. The regulation provides that "[t]he extraction, severance, injury, or removal of timber or mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass."

The BLM's appraisal report described the gravel deposit as follows:

> "The deposit located on the property is an alluvial gravel with 6.4 acres of the 14 acre parcel mined for gravel. . . . There are 6–12 inches of overburden on the site . . . . It is estimated that the deposit thickness will average 10 feet or more in thickness." 85 I. D. 129, 131 (1978).

In a technical analysis accompanying the appraisal report, geologist William D. Holsheimer observed that "[t]he gravel is overlain by a soil cover of fairly well developed loamy sand, some 12–18 inches in thickness," and that "[t]here is a relatively good vegetative cover, consisting mainly of sagebrush, and an understory of various native grasses." *Id.*, at 132. The appraisal report concluded that "the highest and best use of the property is for a mineral material (gravel) site." *Id.*, at 131.

After a hearing, the BLM determined that Western Nuclear had committed an unintentional trespass. Using a royalty rate of 30¢ per cubic yard, the BLM ruled that Western Nuclear was liable to the United States for $13,000 in damages for the gravel removed from the site. On appeal to the Interior Board of Land Appeals (IBLA), the IBLA affirmed

the ruling that Western Nuclear had committed a trespass, holding that "gravel in a valuable deposit is a mineral reserved to the United States in patents issued under the Stock-Raising Homestead Act." *Id.*, at 139.[2]

Western Nuclear then filed suit in the United States District Court for the District of Wyoming, seeking review of the Board's decision pursuant to the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.* The District Court affirmed the ruling that the mineral reservation in the SRHA encompasses gravel. *Western Nuclear, Inc.* v. *Andrus*, 475 F. Supp. 654 (1979). Recognizing that "the term 'mineral' does not have a closed, precise meaning," *id.*, at 662, the District Court concluded that the Government's position is supported by the principle that public land grants are to be narrowly construed, *ibid.*, and by "the legislative history, contemporaneous definitions, and court decisions," *id.*, at 663.[3]

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[2] The IBLA also affirmed the BLM's calculation of damages on the basis of a royalty rate of 30¢ per cubic yard, rejecting Western Nuclear's claim that the use of this rate was arbitrary, capricious, and unreasonable. 85 I. D., at 139. The Board adjusted the damages from the appraiser's rounded-off figure of $13,000 to $12,802.50. *Id.*, at 140.

[3] Following the District Court's ruling, the Wyoming Stock Growers Association (WSGA), which had intervened in the proceedings, filed a motion requesting that the court alter or amend its order or hold a new trial. It expressed the concern that a ruling in favor of the Government in its action against respondent would mean ranchers could not use gravel on lands patented under the SRHA. At a hearing on the WSGA's motions, the Government sought to lay this concern to rest:

"What the United States is concerned about are commercial gravel operations. The United States [does] not see how a commercial gravel operation in any way, shape or form lends itself to helping the rancher. All it does is len[d] itself to helping the mineral company or whoever happens to . . . have a commercial operation. In fact, we would think it would take the land out of the ranch production.

"The United States also has no intention of claiming trespass for [the use of] sand and gravel on [the rancher's] own land for purposes related to ranching. That is not the intent of the United States."

The Government, the WSGA, and two other intervenors entered into a stipulation providing that the District Court's judgment would not bar the

Respondent appealed to the Court of Appeals for the Tenth Circuit. That court reversed, holding that the gravel extracted by Western Nuclear did not constitute a mineral reserved to the United States under the SRHA. *Western Nuclear, Inc.* v. *Andrus*, 664 F. 2d 234 (1981). In reaching this conclusion, the Tenth Circuit relied heavily on a ruling made by the Secretary of the Interior prior to the enactment of the SRHA that land containing valuable deposits of gravel did not constitute "mineral land" beyond the reach of the homestead laws. *Id.*, at 240. The court also relied on an analogy to "ordinary rocks and stones," *id.*, at 242, which it said cannot be reserved minerals, lest patentees be left with "only the dirt, and little or nothing more." *Ibid.* The court reasoned that "if ordinary rocks are not reserved minerals, it follows that gravel, a form of fragmented rock, also is not a reserved mineral." *Ibid.*

In view of the importance of the case to the administration of the more than 33 million acres of land patented under the SRHA,[4] we granted certiorari. 456 U. S. 988 (1982). We now reverse.

## II

As this Court observed in a case decided before the SRHA was enacted, the word "minerals" is "used in so many senses, dependent upon the context, that the ordinary definitions of

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intervenors "from raising, in the future, issues of fact and law concerning their property rights in sand and gravel." App. to Pet. for Cert. 44a. The stipulation was approved by the District Court and incorporated in its judgment.

[4] See Dept. of Interior, Report of Director of Bureau of Land Management, 1948, Statistical Appendix, Table 17, p. 22.

Whether gravel is a mineral for purposes of the SRHA is an issue of first impression in the federal courts. In a state condemnation proceeding the New Mexico Supreme Court held, with little explanation, that gravel does not constitute a mineral reserved to the United States under the Act. *State ex rel. Highway Comm'n* v. *Trujillo*, 82 N. M. 694, 487 P. 2d 122 (1971).

the dictionary throw but little light upon its signification in a given case." *Northern Pacific R. Co.* v. *Soderberg*, 188 U. S. 526, 530 (1903). In the broad sense of the word, there is no doubt that gravel is a mineral, for it is plainly not animal or vegetable. But "the scientific division of all matter into the animal, vegetable or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom." *Ibid.* While it may be necessary that a substance be inorganic to qualify as a mineral under the SRHA, it cannot be sufficient. If all lands were considered "minerals" under the SRHA, the owner of the surface estate would be left with nothing.

Although the word "minerals" in the SRHA therefore cannot be understood to include all inorganic substances, gravel would also be included under certain narrower definitions of the word. For example, if the term "minerals" were understood in "its ordinary and common meaning [as] a comprehensive term including every description of stone and rock deposit, whether containing metallic or non-metallic substances," *Waugh* v. *Thompson Land & Coal Co.*, 103 W. Va. 567, 571, 137 S. E. 895, 897 (1927); see, *e. g.*, *Board of County Comm'rs* v. *Good*, 44 N. M. 495, 498, 105 P. 2d 470, 472 (1940); *White* v. *Miller*, 200 N. Y. 29, 38–39, 92 N. E. 1065, 1068 (1910), gravel would be included. If, however, the word "minerals" were understood to include only inorganic substances having a definite chemical composition, see, *e. g.*, *Ozark Chemical Co.* v. *Jones*, 125 F. 2d 1, 2 (CA10 1941), cert. denied, 316 U. S. 695 (1942); *Lillington Stone Co.* v. *Maxwell*, 203 N. C. 151, 152, 165 S. E. 351, 352 (1932); *United States* v. *Aitken*, 25 Philippine 7, 14 (1913), gravel would not be included.

The various definitions of the term "minerals" serve only to exclude substances that are not minerals under any common definition of that word. Cf. *United States* v. *Toole*, 224 F. Supp. 440 (Mont. 1963) (deposits of peat and peat moss, substances which are high in organic content, do not constitute

mineral deposits for purposes of the general mining laws). For a substance to be a mineral reserved under the SRHA, it must be not only a mineral within one or more familiar definitions of that term, as is gravel, but also the type of mineral that Congress intended to reserve to the United States in lands patented under the SRHA. Cf. *Andrus* v. *Charlestone Stone Products Co.*, 436 U. S. 604, 611 (1978).[5]

The legal understanding of the term "minerals" prevailing in 1916 does not indicate whether Congress intended the mineral reservation in the SRHA to encompass gravel. On the one hand, in *Northern Pacific R. Co.* v. *Soderberg*, *supra*, this Court had quoted with approval a statement in an English case that "'everything except the mere surface, which is used for agricultural purposes; anything beyond that which is useful for any purpose whatever, whether it is *gravel*, marble, fire clay, or the like, comes within the word "mineral" when there is a reservation of the mines and minerals from a grant of land.'" 188 U. S., at 536 (emphasis added), quoting *Midland R. Co.* v. *Checkley*, L. R. 4 Eq. 19, 25 (1867).

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[5] The specific listing of coal in the reservation clause of the SRHA sheds no light on what Congress meant by the term "minerals." See *Skeen* v. *Lynch*, 48 F. 2d 1044, 1046–1047 (CA10), cert. denied, 284 U. S. 633 (1931). There were special reasons for expressly addressing coal that negate any inference that the phrase "and other minerals" was meant to reserve only substances *ejusdem generis*. The legal context in which the SRHA was enacted suggests that Congress specifically listed coal to make clear that coal was reserved even though existing law treated it differently from other minerals. Coal had been exempted from the application of the general mining laws. See Coal Lands Act of 1873, 17 Stat. 607, current version at 30 U. S. C. § 71 *et seq.* In addition, the Coal Lands Acts of 1909 and 1910 permitted the acquisition of lands containing coal under patents reserving the coal to the United States. 35 Stat. 844, current version at 30 U. S. C. § 81; 36 Stat. 583, ch. 318, current version at 30 U. S. C. § 83 *et seq.* See also Act of Apr. 30, 1912, 37 Stat. 105, ch. 99, 30 U. S. C. § 90. That the express listing of coal was not intended to limit the phrase "other minerals" is confirmed by the alternate use of the phrases "coal and other minerals" and "all minerals" in the House Report on the bill that became the SRHA. See H. R. Rep. No. 35, 64th Cong., 1st Sess., 18 (1916).

*Soderberg* concerned the proper classification of property chiefly valuable for granite quarries under an 1864 statute which granted certain property to railroads but exempted "mineral lands." The Court held that the property fell within the exemption, concluding that "mineral lands include not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture." 188 U. S., at 536–537.[6]

On the other hand, in 1910 the Secretary of the Interior rejected an attempt to cancel a homestead entry made on land alleged to be chiefly valuable for the gravel and sand located thereon. *Zimmerman* v. *Brunson*, 39 L. D. 310, overruled, *Layman* v. *Ellis*, 52 L. D. 714 (1929). Zimmerman claimed that gravel and sand found on the property could be used for building purposes and that the property therefore constituted mineral land, not homestead land. In refusing to cancel Brunson's homestead entry, the Secretary explained that "deposits of sand and gravel occur with considerable frequency in the public domain." 39 L. D., at 312. He concluded that land containing deposits of gravel and sand useful for building purposes was not mineral land beyond the reach of the homestead laws, except in cases in which the deposits "possess a peculiar property or characteristic giving them a special value." *Ibid.*

Respondent errs in relying on *Zimmerman* as evidence that Congress could not have intended the term "minerals" to encompass gravel. Although the legal understanding of a

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[6] Relying on *Soderberg*, the Supreme Court of Oregon subsequently held that "land more valuable for the building sand it contains than for agriculture . . . is mineral within the meaning of the United States mining statutes." *Loney* v. *Scott*, 57 Ore. 378, 385, 112 P. 172, 175 (1910). See also *State ex rel. Atkinson* v. *Evans*, 46 Wash. 219, 223–224, 89 P. 565, 567–568 (1907) (relying on *Soderberg* in holding that land containing valuable deposits of limestone, silica, silicated rock, and clay constituted mineral land under a state statute).

word prevailing at the time it is included in a statute is a relevant factor to consider in determining the meaning that the legislature ascribed to the word, we do not see how any inference can be drawn that the 64th Congress understood the term "minerals" to exclude gravel. It is most unlikely that many Members of Congress were aware of the ruling in *Zimmerman*, which was never tested in the courts and was not mentioned in the Reports or debates on the SRHA. Cf. *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 468 (1934). Even if Congress had been aware of *Zimmerman*, there would be no reason to conclude that it approved of the Secretary's ruling in that case rather than this Court's opinion in *Soderberg*, which adopted a broad definition of the term "mineral" and quoted with approval a statement that gravel is a mineral.[7]

## III

Although neither the dictionary nor the legal understanding of the term "minerals" that prevailed in 1916 sheds much

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[7] Quite apart from *Soderberg*, even if Congress had been aware of *Zimmerman*, there would be little basis for inferring that it intended to follow the specific ruling in that case rather than the Interior Department's general approach in classifying land as mineral land or nonmineral land. As a leading contemporary treatise pointed out, 2 C. Lindley, American Law Relating to Mining and Mineral Lands § 424, p. 996, and n. 78 (3d ed. 1914), *Zimmerman* was inconsistent with the Department's traditional treatment of the problem. Whereas the Secretary emphasized in *Zimmerman* that gravel is a common substance, other Department rulings recognized that land containing deposits of other common substances constituted "mineral land" if the deposits were found "in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes." *Pacific Coast Marble Co.* v. *Northern Pacific R. Co.*, 25 L. D. 233, 245 (1897). See *Bennett* v. *Moll*, 41 L. D. 584 (1912) (pumice); *McGlenn* v. *Wienbroeer*, 15 L. D. 370 (1892) (building stone); *H. P. Bennett, Jr.*, 3 L. D. 116 (1884) (building stone); *W. H. Hooper*, 1 L. D. 560 (1881) (gypsum).

In 1913 the Interior Department itself listed gravel as a mineral in a comprehensive study of the public lands. Dept. of Interior, United States Geological Survey, Bulletin 537, The Classification of the Public Lands 138–139 (1913).

light on the question before us, the purposes of the SRHA strongly support the Government's contention that the mineral reservation in the Act includes gravel. As explained below, Congress' underlying purpose in severing the surface estate from the mineral estate was to facilitate the concurrent development of both surface and subsurface resources. While Congress expected that homesteaders would use the surface of SRHA lands for stockraising and raising crops, it sought to ensure that valuable subsurface resources would remain subject to disposition by the United States, under the general mining laws or otherwise, to persons interested in exploiting them. It did not wish to entrust the development of subsurface resources to ranchers and farmers. Since Congress could not have expected that stockraising and raising crops would entail the extraction of gravel deposits from the land, the congressional purpose of facilitating the concurrent development of both surface and subsurface resources is best served by construing the mineral reservation to encompass gravel.

A

The SRHA was the most important of several federal land-grant statutes enacted in the early 1900's that reserved minerals to the United States rather than classifying lands as mineral or nonmineral. Under the old system of land classification, the disposition of land owned by the United States depended upon whether it was classified as mineral land or nonmineral land, and title to the entire land was disposed of on the basis of the classification. This system of land classification encouraged particular uses of entire tracts of land depending upon their classification as mineral or nonmineral. With respect to land deemed mineral in character, the mining laws provided incentives for the discovery and exploitation of minerals, but the land could not be disposed of under the major land-grant statutes.[8] With respect to land deemed

[8] For example, mineral land was exempted from the homestead laws, Act of June 21, 1866, § 1, 14 Stat. 66, ch. 127, 43 U. S. C. § 201, from stat-

nonmineral in character, the land-grant statutes provided incentives for parties who wished to use the land for the purposes specified in those statutes, but the land was beyond the reach of the mining laws and the incentives for exploration and development that they provided.

For a number of reasons,[9] the system of land classification came to be viewed as a poor means of ensuring the optimal development of the Nation's mineral resources, and after the turn of the century a movement arose to replace it with a system of mineral reservation. In 1906 President Theodore Roosevelt withdrew approximately 64 million acres of lands

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utes granting lands to railroads, Act of July 1, 1862, § 3, 12 Stat. 492; Act of July 2, 1864, § 3, 13 Stat. 367, and from a statute granting land to States for agricultural colleges, Act of July 2, 1862, § 1, ch. 130, 12 Stat. 503. See generally *United States* v. *Sweet*, 245 U. S. 563, 567–572 (1918); *Deffeback* v. *Hawke*, 115 U. S. 392, 400–401 (1885). If land was classified as mineral land, it could not be conveyed under these statutes.

[9] Land was frequently misclassified as nonmineral. Misclassification resulted both from fraud and from the practical difficulties in telling at the time of classification whether land was more valuable for the minerals it contained than for agricultural purposes. See *Deffeback* v. *Hawke*, *supra*, at 405. Classification depended largely upon affidavits of entrymen, reports by surveyors, information available from field offices of the Land Department, and information provided by persons with an interest in contesting the classification of particular land as nonmineral. Frequent errors were inevitable. See 1 American Law of Mining § 3.1 (1982); *West* v. *Edward Rutledge Timber Co.*, 244 U. S. 90, 98 (1917). If land was erroneously classified as nonmineral and conveyed under a land-grant statute, the patentee received title to the entire land, including any subsequently discovered minerals. See *Diamond Coal & Coke Co.* v. *United States*, 233 U. S. 236, 239–240 (1914); *Shaw* v. *Kellogg*, 170 U. S. 312, 342–343 (1898). Absent proof of fraud, see *Diamond Coal & Coke Co.* v. *United States*, *supra*, at 239–240, the Government had no recourse once title passed.

Even with respect to land properly classified as more valuable for agricultural or other purposes than for the minerals it contained, the system of land classification provided incentives only for the use of surface resources. After land was classified as nonmineral and conveyed under a land-grant statute, only the grantee had an incentive to discover and exploit minerals lying beneath the land. If he did not do so, they would remain undeveloped.

thought to contain coal from all forms of entry, citing the prevalence of land fraud and the need to dispose of coal "under conditions which would inure to the benefit of the public as a whole." 41 Cong. Rec. 2615 (1907). Secretary of the Interior Garfield reported to the President that "the best possible method . . . is for the Government to retain the title to the coal," explaining that "[s]uch a method permits the separation of the surface from the coal and the unhampered use of the surface for purposes to which it may be adapted." Report of the Secretary of the Interior 15 (1907), H. R. Doc. No. 5, 60th Cong., 1st Sess., 15 (1907). President Roosevelt subsequently urged Congress that "[r]ights to the surface of the public land . . . be separated from rights to forests upon it and to minerals beneath it, and these should be subject to separate disposal." Special Message to Congress, Jan. 22, 1909, 15 Messages and Papers of the Presidents 7266.

Over the next several years Congress responded by enacting statutes that reserved specifically identified minerals to the United States,[10] and in 1916 the shift from land classification to mineral reservation culminated with the enactment of the SRHA. Unlike the preceding statutes containing mineral reservations, the SRHA was not limited to lands classified as mineral in character, and it did not reserve only specifically identified minerals. The SRHA applied to all lands

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[10] The Coal Lands Act of 1909 permitted settlers on lands which President Roosevelt had subsequently withdrawn from entry under the homestead laws to obtain patents which reserved the coal to the United States. 35 Stat. 844, current version at 30 U. S. C. § 81. The Coal Lands Act of 1910 made withdrawn lands available for settlement and permitted settlers to obtain patents which reserved the coal to the United States. 36 Stat. 583, ch. 318, current version at 30 U. S. C. § 83 *et seq.* See also Act of Apr. 30, 1912, 37 Stat. 105, ch. 99, 30 U. S. C. § 90. The Agricultural Entry Act of 1914 permitted the acquisition of lands withdrawn from entry, or classified as valuable, because of the phosphate, nitrate, potash, oil, gas, or asphaltic minerals they contained, but provided that patents would reserve to the United States all such minerals. 38 Stat. 509, as amended, 30 U. S. C. § 121 *et seq.*

the surface of which the Secretary of the Interior deemed to be "chiefly valuable for grazing and raising forage crops," 43 U. S. C. § 292, and reserved all the minerals in those lands to the United States.

Congress' purpose in severing the surface estate from the mineral estate was to encourage the concurrent development of both the surface and subsurface of SRHA lands. The Act was designed to supply "a method for the *joint use* of the surface of the land by the entryman of the surface thereof and the person who shall acquire from the United States the right to prospect, enter, extract and remove all minerals that may underlie such lands." H. R. Rep. No. 35, 64th Cong., 1st Sess., 4, 18 (1916) (emphasis added) (hereafter H. R. Rep. No. 35). The Department of the Interior had advised Congress that the law would "induce the entry of lands in those mountainous regions where deposits of mineral are known to exist or are likely to be found," and that the mineral reservation was necessary because the issuance of "unconditional patents for these comparatively large entries under the homestead laws might withdraw immense areas from prospecting and mineral development." Letter from First Assistant Secretary of the Interior to Chairman of the House Committee on the Public Lands, Dec. 15, 1915, reprinted in H. R. Rep. No. 35, at 5.

To preserve incentives for the discovery and exploitation of minerals in SRHA lands, Congress reserved "all the coal and other minerals" to the United States and provided that "coal and other mineral deposits . . . shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal." 43 U. S. C. § 299. The general mining laws were the most important of the "mineral land laws" in existence when the SRHA was enacted. Act of July 4, 1866, 14 Stat. 85; Act of May 10, 1872, 17 Stat. 91, current version at 30 U. S. C. § 21 *et seq.* Those laws, which have remained basically unchanged through the present day, provide an incen-

tive for individuals to locate claims to federal land containing "valuable mineral deposits." 30 U. S. C. § 22. After a claim has been located, the entryman obtains from the United States the right to exclusive possession of "all the surface included within the lines of [his] locatio[n]" and the right to extract minerals lying beneath the surface. 30 U. S. C. § 26. Congress plainly contemplated that mineral deposits on SRHA lands would be subject to location under the mining laws,[11] and the Department of the Interior has consistently permitted prospectors to make entries under the mining laws on SRHA lands.[12]

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[11] This is evident from the provisions in the Act prescribing standards to govern the joint use of SRHA lands by owners of surface estates and prospectors and miners. Section 9 of the SRHA extended to "[a]ny person qualified to locate and enter the coal and other mineral deposits, or having the right to mine and remove the same under the laws of the United States, . . . the right at all times to enter upon the lands entered or patented [under the SRHA] for the purpose of prospecting for coal or other mineral therein." To protect the homesteader, Congress made it a condition of the prospector's entry on the land that he "not injure, damage, or destroy the [homesteader's] permanent improvements," and also provided that the prospector "shall be liable . . . for all damages to the crops on such lands by reason of such prospecting." Any person who, after discovering minerals, acquires from the United States "the right to mine and remove the same" can "reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal," if he (1) obtains the written consent or waiver of the homesteader, (2) compensates the homesteader for any damages to the "crops or other tangible improvements" on the land, or (3) executes a bond to secure the payment of such damages. In 1949 Congress increased the patentee's protection by expanding the liability of the prospector or miner to encompass "any damage that may be caused to the value of the land for grazing." 63 Stat. 215, § 5, 30 U. S. C. § 54.

[12] See Department of the Interior, Circular No. 1278, *Mining Claims on the Public Domain*, 55 I. D. 235, 236 (1935); 43 CFR § 185.1 (1939), current version at 43 CFR § 3811.1 (1982). By their own terms, the mining laws apply to "all valuable mineral deposits in lands belonging to the United States." 30 U. S. C. § 22. Like other interests in land owned by the Government (*e. g.*, leaseholds, easements), mineral estates reserved under

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Since Congress intended to facilitate development of both surface and subsurface resources, the determination of whether a particular substance is included in the surface estate or the mineral estate should be made in light of the use of the surface estate that Congress contemplated. As the Court of Appeals for the Ninth Circuit noted in *United States* v. *Union Oil Co. of California*, 549 F. 2d 1271, 1274, cert. denied, 434 U. S. 930 (1977), "[t]he agricultural purpose indicates the nature of the grant Congress intended to provide homesteaders via the Act."[13] See *Pacific Power & Light Co.*, 45 I. B. L. A. 127, 134 (1980) ("When there is a dispute as to whether a particular mineral resource is included in the [SRHA] reservation, it is helpful to consider the manner in which the material is extracted and used"); 1 American Law of Mining § 3.26 (1982) ("The reservation of minerals to the United States [in the SRHA] should . . . be construed by considering the purposes both of the grant and of the reservation in terms of the use intended"). Cf. *United States* v. *Isbell Construction Co.*, 78 I. D. 385, 390 (1971) (holding that gravel is a mineral reserved to the United States under statute authorizing the grant to States of "grazing district land") ("The reservation of minerals to the United States should be construed by considering the purpose of the grant . . . in terms of the use intended").

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the SRHA constitute "lands belonging to the United States." Cf. *Devearl W. Dimond*, 62 I. D. 260, 262 (1955) (minerals reserved under the SRHA constitute "vacant, unreserved, and undisposed of public lands" under statute adding lands to the Navajo Indian Reservation in Utah). See also Act of Sept. 19, 1964, 78 Stat. 985, § 10, 43 U. S. C. § 1400 (1970 ed.) (for purposes of statute creating Public Land Law Review Commission, "the term 'public lands' includes . . . outstanding interests of the United States in lands patented, conveyed in fee or otherwise, under the public land laws").

[13] In *Union Oil* the Ninth Circuit held that geothermal steam constitutes a mineral reserved to the United States under the SRHA.

Congress plainly expected that the surface of SRHA lands would be used for stockraising and raising crops. This understanding is evident from the title of the Act, from the express provision limiting the Act to lands the surface of which was found by the Secretary of the Interior to be "chiefly valuable for grazing and raising forage crops" and "of such a character that six hundred and forty acres are reasonably required for the support of a family," 43 U. S. C. § 292, and from numerous other provisions in the Act. See, *e. g.*, 43 U. S. C. § 293 (patent can be acquired only if the entryman makes "permanent improvements upon the land entered . . . tending to increase the value of the [land] for stock-raising purposes of the value of not less than $1.25 per acre"); 43 U. S. C. § 299 (prospector liable to entryman or patentee for damages to crops caused by prospecting).

Given Congress' understanding that the surface of SRHA lands would be used for ranching and farming, we interpret the mineral reservation in the Act to include substances that are mineral in character (*i. e.*, that are inorganic), that can be removed from the soil, that can be used for commercial purposes, and that there is no reason to suppose were intended to be included in the surface estate. See 1 American Law of Mining, *supra*, § 3.26 ("A reservation of minerals should be considered to sever from the surface all mineral substances which can be taken from the soil and which have a separate value"). Cf. *Northern Pacific R. Co.* v. *Soderberg*, 188 U. S., at 536–537 ("mineral lands include not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture"); *United States* v. *Isbell Construction Co.*, *supra*, at 390 ("the reservation of minerals should be considered to sever from the surface all mineral substances *which can be taken from the soil and have a separate value*") (emphasis in original). This interpretation of the mineral reservation best serves the congressional purpose of encouraging the concurrent development of both

surface and subsurface resources, for ranching and farming do not ordinarily entail the extraction of mineral substances that can be taken from the soil and that have separate value.[14]

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[14] It is important to remember that, in contrast to the situation in *Zimmerman* v. *Brunson*, 39 L. D. 310 (1910), where treating gravel as a mineral would have required cancellation of a homestead entry, treating a substance as a mineral under the SRHA in no way calls into question any homestead entries, for the SRHA was not limited to nonmineral land. The only consequence is that title to the substance rests with the United States rather than with the owner of the surface estate, and that if the latter wishes to extract the substance and sell it or use it for commercial purposes, he must first acquire the right to do so from the United States.

We note that this case does not raise the question whether the owner of the surface estate may use a reserved mineral to the extent necessary to carry out ranching and farming activities successfully. Although a literal reading of the SRHA would suggest that any use of a reserved mineral is a trespass against the United States, one of the overriding purposes of the Act was to permit settlers to establish and maintain successful homesteads. There is force to the argument that this purpose would be defeated if the owner of the surface estate were unable to use reserved minerals even where such use was essential for stockraising and raising crops.

An analogy may profitably be drawn to *Shiver* v. *United States*, 159 U. S. 491 (1895), in which this Court recognized that an entryman under the homestead laws had a right to cut timber to the extent necessary to establish a homestead, notwithstanding a federal statute making it a crime to cut timber upon "lands of the United States." A literal interpretation of the two statutes would have led to the conclusion that the entryman had no right to cut timber prior to the perfection of his entry, for the land, including the timber, remained the property of the United States during that period, and the statute concerning timber contained no exception for lands entered under the homestead laws. *Id.*, at 497. The Court rejected this mechanical approach to the problem, emphasizing that "the privilege of residing on the land for five years [the period then necessary to perfect a homestead entry and thus obtain a patent] would be ineffectual if [the homesteader] had not also the right to build himself a house, outbuildings, and fences, and to clear the land for cultivation," and concluding that "to that extent the [homestead] act limits and modifies" the statute making it a crime to cut timber on public lands. *Ibid.* Cf. *United States* v. *Cook*, 19 Wall. 591, 593 (1874) (although treaty gave Indians only the right to use and occupy certain land, and although "timber while standing is part of the realty, and . . . can only be sold as the land could be," the Indians' right of

Whatever the precise scope of the mineral reservation may be, we are convinced that it includes gravel. Like other minerals, gravel is inorganic. Moreover, as the Department of the Interior explained in 1929 when it overruled *Zimmerman* v. *Brunson*, 39 L. D. 310 (1910), and held that gravel deposits were subject to location under the mining laws,

> "[w]hile the distinguishing special characteristics of gravel are purely physical, notably, small bulk, rounded surfaces, hardness, these characteristics render gravel readily distinguishable by any one from other rock and fragments of rock and are the very characteristics or properties that long have been recognized as imparting to it utility and value in its natural state." *Layman* v. *Ellis*, 52 L. D., at 720.

Insofar as the purposes of the SRHA are concerned, it is irrelevant that gravel is not metalliferous and does not have a definite chemical composition. What is significant is that gravel can be taken from the soil and used for commercial purposes.

Congress certainly could not have expected that homesteaders whose "experience and efforts [were] in the line of stock raising and farming," Letter from First Assistant Secretary of the Interior to Chairman of the House Committee on the Public Lands (Dec. 15, 1915), reprinted in H. R. Rep. No. 35, at 5, would have the interest in extracting deposits of

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use and occupancy encompassed the right to cut timber "for use upon the premises" or "for the improvement of the land"); *Alabama Coal Lands—Act of Apr. 23, 1912*, 41 L. D. 32, 33 (1912) ("There is at this time no law which provides for the disposition of the coal in these lands. Persons having homestead entries . . . obtain no right to obtain coal therefrom, *except for their own domestic use* . . .") (emphasis added).

In this case, however, respondent cannot rely on any right it may have to use reserved minerals to the extent necessary for ranching and farming purposes, since it plainly did not use the gravel it extracted for any such purpose. The gravel was used for commercial operations that were in no way connected with any ranching or farming activity.

gravel from SRHA lands that others might have. It had been informed that "[t]he farmer-stockman is not seeking and does not desire the minerals," *ibid.*, and it would have had no more reason to think that he would be interested in extracting gravel than that he would be interested in extracting coal. Stockraising and raising crops do not ordinarily involve the extraction of gravel from a gravel pit.

If we were to interpret the SRHA to convey gravel deposits to the farmers and stockmen who made entries under the Act, we would in effect be saying that Congress intended to make the exploitation of such deposits dependent solely upon the initiative of persons whose interests were known to lie elsewhere. In resolving the ambiguity in the language of the SRHA, we decline to construe that language so as to produce a result at odds with the purposes underlying the statute. Instead, we interpret the language of the statute in a way that will further Congress' overriding objective of facilitating the concurrent development of surface and subsurface resources. See, *e. g.*, *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, 285 (1956); *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 350–351 (1943); *Griffiths* v. *Commissioner*, 308 U. S. 355, 358 (1939).

## IV

Our conclusion that gravel is a mineral for purposes of the SRHA is supported by the treatment of gravel under other federal statutes concerning minerals. Although the question has not often arisen, gravel has been treated as a mineral under two federal land-grant statutes that, like the SRHA, reserve all minerals to the United States. In construing a statute which allotted certain Indian lands but reserved the minerals therein to the Indians, the Department of the Interior has ruled that gravel is a mineral. Dept. of Interior, Division of Public Lands, Solicitor's Opinion, M–36379 (Oct. 3, 1956). Similarly, the Interior Board of Land Appeals has held that gravel is reserved to the United States under a

statute authorizing grants to States of "grazing district land." *United States* v. *Isbell Construction Co.*, 78 I. D., at 394–396.

It is also highly pertinent that federal administrative and judicial decisions over the past half-century have consistently recognized that gravel deposits could be located under the general mining laws until common varieties of gravel were prospectively removed from the purview of those laws by the Surface Resources Act of 1955, 69 Stat. 368, § 3, 30 U. S. C. § 611.[15] See *Edwards* v. *Kleppe*, 588 F. 2d 671, 673 (CA9 1978); *Charlestone Stone Products Co.* v. *Andrus*, 553 F. 2d 1209, 1214–1215 (CA9 1977), holding as to a separate mining claim rev'd,[16] 436 U. S. 604 (1978); *Melluzzo* v. *Morton*, 534

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[15] That Act provides that "[n]o deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws." Claims located prior to the effective date of the Act were not affected by its enactment. With respect to deposits of the substances listed in the Act that were not located prior to the effective date of the Act and that are owned by the United States, disposal is permissible only under the Materials Act of 1947, 61 Stat. 681, § 1, as amended, 30 U. S. C. § 601, which provides in pertinent part that "[t]he Secretary [of the Interior], under such rules and regulations as he may prescribe, may dispose of mineral materials (including but not limited to common varieties of the following: sand, stone, gravel, pumice, pumicite, cinders, and clay) . . . ."

The Surface Resources Act is by its terms limited to the locatability of claims under the mining laws and does not limit the scope of the mineral reservation in the SRHA. See Dept. of Interior, Division of Public Lands, Solicitor's Opinion, M–36417 (Feb. 15, 1957).

[16] *Charlestone Stone Products Co.* involved several different mining claims. In the part of its decision that is pertinent for present purposes, the Ninth Circuit upheld the validity of claims to commercially exploitable deposits of sand and gravel. The Secretary of the Interior did not seek certiorari with respect to this portion of the Ninth Circuit's decision, limiting his petition for certiorari to that part of the Ninth Circuit's decision which upheld the validity of a claim to subsurface water. See 436 U. S., at 610 ("The single question presented in the petition is '[w]hether water is a locatable mineral under the mining law of 1872' ").

F. 2d 860, 862–865 (CA9 1976); *Clear Gravel Enterprises, Inc.* v. *Keil*, 505 F. 2d 180, 181 (CA9 1974) *(per curiam)*; *Verrue* v. *United States*, 457 F. 2d 1202, 1203–1204 (CA9 1972); *Barrows* v. *Hickel*, 447 F. 2d 80, 82–83 (CA9 1971); *United States* v. *Schaub*, 163 F. Supp. 875, 877–878 (Alaska 1958); *Taking of Sand and Gravel from Public Lands for Federal Aid Highways*, 54 I. D. 294, 295–296 (1933); *Layman* v. *Ellis*, 52 L. D., at 718–721, overruling *Zimmerman* v. *Brunson*, 39 L. D. 310 (1910).[17] Cf. *United States* v. *Barngrover*, 57 I. D. 533 (1942) (clay and silt deposits); *Stephen E. Day, Jr.*, 50 L. D. 489 (1924) (trap rock). While this Court has never had occasion to decide the appropriate treatment of gravel under the mining laws, the Court did note in *United States* v. *Coleman*, 390 U. S. 599, 604 (1968), that gravel deposits had "served as a basis for claims to land patents" under the mining laws prior to the enactment of the Surface Resources Act of 1955.[18]

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[17] The only decision to the contrary, *Anchorage Sand & Gravel Co.* v. *Schubert*, 114 F. Supp. 436, 438 (Alaska 1953), aff'd on other grounds, 224 F. 2d 623 (CA9 1955), was never followed in either the District in which it was decided or elsewhere in the Ninth Circuit.

[18] The treatment of valuable deposits of gravel as mineral deposits locatable under the mining laws reflects an application of the "prudent-man test" which the Secretary of the Interior has used to interpret the mining laws since 1894. Under this test, which has been repeatedly approved by this Court, *United States* v. *Coleman*, 390 U. S., at 602; *Best* v. *Humboldt Placer Mining Co.*, 371 U. S. 334, 335–336 (1963); *Cameron* v. *United States*, 252 U. S. 450, 459 (1920); *Chrisman* v. *Miller*, 197 U. S. 313, 322 (1905), a deposit is locatable if it is "of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." *Castle* v. *Womble*, 19 L. D. 455, 457 (1894). In the case of "precious metals which are in small supply and for which there is a great demand," there is ordinarily "little room for doubt that they can be extracted and marketed at a profit." *United States* v. *Coleman*, *supra*, at 603. In the case of nonmetalliferous substances such as gravel, the Secretary has required proof that "by reason of accessibility, *bona fides* in development,

The treatment of gravel as a mineral under the general mining laws suggests that gravel should be similarly treated under the SRHA, for Congress clearly contemplated that mineral deposits in SRHA lands would be subject to location under the mining laws, and the applicable regulations have consistently permitted such location. *Supra*, at 51. Simply as a matter of consistent interpretation of statutes concerning the same subject matter, if gravel deposits constituted "mineral deposits" that could be located under the mining laws, then presumptively gravel should constitute a "mineral" reserved to the United States under the SRHA. If gravel were deemed to be part of the surface estate of lands patented under the SRHA, gravel deposits on SRHA lands obviously would not have been locatable, whereas gravel deposits on other lands would have been locatable. There is no indication that Congress intended the mineral reservation in the SRHA to be narrower in scope than the mining laws.

## V

Finally, the conclusion that gravel is a mineral reserved to the United States in lands patented under the SRHA is buttressed by "the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *United States* v. *Union Pacific R. Co.*, 353 U. S. 112, 116 (1957). See *Andrus* v. *Charlestone Stone Products Co.*, 436 U. S., at 617; *Caldwell* v. *United States*, 250 U. S. 14, 20–21 (1919); *Northern Pacific R. Co.* v. *Soderberg*, 188 U. S., at 534. In the present case this principle applies with particu-

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proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit." *Taking of Sand and Gravel from Public Lands for Federal Aid Highways*, 54 I. D. 294, 296 (1933). See *Foster* v. *Seaton*, 106 U. S. App. D. C. 253, 255, 271 F. 2d 836, 838 (1959).

lar force, because the legislative history of the SRHA reveals Congress' understanding that the mineral reservation would "limit the operation of this bill *strictly to the surface of the lands.*" H. R. Rep. No. 35, at 18 (emphasis added). See also 53 Cong. Rec. 1171 (1916) (the mineral reservation "would cover every kind of mineral"; "[a]ll kinds of minerals are reserved") (Rep. Ferris). In view of the purposes of the SRHA and the treatment of gravel under other federal statutes concerning minerals, we would have to turn the principle of construction in favor of the sovereign on its head to conclude that gravel is not a mineral within the meaning of the Act.

VI

For the foregoing reasons, we hold that gravel is a mineral reserved to the United States in lands patented under the SRHA. Accordingly, the judgment of the Court of Appeals is

*Reversed.*

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

The Court's opinion may have a far-reaching effect on patentees of, and particularly successors in title to, the 33 million acres of land patented under the Stock-Raising Homestead Act of 1916 (SRHA). The Act provides, with respect to land patented, that the United States reserves title to "all the coal and other minerals." 43 U. S. C. § 299. At issue here is whether gravel is a mineral within the meaning of the Act. To decide this question, the Court adopts a new definition of the statutory term: "[T]he Act [includes] substances that are mineral in character (*i. e.*, that are inorganic), that can be removed from the soil, that can be used for commercial purposes, and that there is no reason to suppose were intended to be included in the surface estate." *Ante*, at 53.

This definition compounds, rather than clarifies, the ambiguity inherent in the term "minerals."[1] It raises more questions than it answers. Under the Court's definition, it is arguable that all gravel falls within the mineral reservation. *Ante*, at 53–55, and n. 14, 59. This goes beyond the Government's position that gravel *deposits* become reserved only when susceptible to commercial exploitation. See Tr. of Oral Arg. 18–20.[2] And what about sand, clay, and peat?[3]

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[1] To interpret the mineral reservation "to include substances that are mineral in character . . . and that there is no reason to suppose were intended to be included in the surface estate" is tautological, and to include *all* substances "that can be used for commercial purposes" is to ignore the prerequisites to commercial value of quantity and quality. The only factor that can be said to provide any guidance is that the substance must be one "that can be removed from the soil." Moreover, the Department of the Interior has operated under a common definition of the statutory term "mineral" in the general mining laws for quite some time, and I therefore am puzzled why the Court creates a new one today. See 43 CFR § 3812.1 (1982) ("Whatever is recognized as a mineral by the standard authorities, whether metallic or other substance, when found in public lands in quantity and quality sufficient to render the lands valuable on account thereof, is treated as coming within the purview of the mining laws"); see n. 4, *infra*.

[2] The Government's claim is less inclusive because all parties agree that to hold that the homesteader has no right to use sand, gravel, and other common substances for his own purposes would pose a considerable impediment to the task of establishing a home and raising stock, undoubtedly the most important policies underlying the SRHA and the other Homestead Acts. See *infra*, at 71. The Court's solution to the rancher's problem is to allow the owner of the surface estate to use reserved minerals where such use is essential for stockraising and raising crops. See *ante*, at 54–55, n. 14. Thus, the Court apparently would give ranchers this free use of *all* reserved minerals, including "coal," which is specifically mentioned in 43 U. S. C. § 299. I am not sure this Court should so lightly suggest such a broad exception to the mineral rights reserved by Congress. Moreover, such a free-use exception only invites litigation over what is a domestic use, who is a rancher, what is a ranch, what rights successors-in-interest have, and what rights a developer may have to halt such free use of "its" minerals.

[3] My list is not exclusive. "Landowners have sold 'moss rock,' common rock on which moss has grown, to contractors to decorate fireplaces and

As I read the Court's opinion it could leave Western homesteaders with the dubious assurance that only the dirt itself could not be claimed by the Government. It is not easy to believe that Congress intended this result.

I

In construing a congressional Act, the relevant intent of Congress is that existing at the time the statute was enacted. See *Andrus* v. *Charlestone Stone Products Co.*, 436 U. S. 604, 611, and n. 8 (1978); *Winona & St. Peter R. Co.* v. *Barney*, 113 U. S. 618, 625 (1885). The Court avoids this rule of construction by largely ignoring the stated position of the Department of the Interior before 1916 that gravel—like sand and clay—was not a mineral.

In 1916, when the SRHA was enacted, the Department of the Interior's rule for what it considered to be a "valuable mineral deposit" as those terms are used under the general mining laws[4] was clear: "[W]hatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality sufficient to render the

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homes. The rock has become 'valuable,' but it is absurd to think that this common rock should now be included in a mineral reservation to the government." Case Note, 18 Land & Water L. Rev. 201, 216 (1983).

[4] By the phrase "general mining laws," I refer primarily to the Mining Act of 1872, as amended, 30 U. S. C. § 21 *et seq.*, which declares that "all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase . . . ." § 22. See generally *ante*, at 50–51. As the Court notes, *ante*, at 39, mineral exploitation of SRHA lands was made subject to the same restrictions that characterize development of lands under the general mining laws, and thus the interpretation of those laws is directly pertinent to determining congressional intent in 1916. It should be noted, however, that since 1955 it has been clear that a gravel deposit could *not* be "a valuable mineral deposit" under the general mining laws. See 30 U. S. C. § 611. The issue in this case is thus limited to the right of the Government to claim gravel found on SRHA lands, patented to private owners, even though the general mining laws still apply as to most minerals, but not to gravel.

land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws." *Pacific Coast Marble Co.* v. *Northern Pacific R. Co.*, 25 L. D. 233, 244–245 (1897). See Letter from Commissioner Drummond to Surveyors-General, Registers, and Receivers (July 15, 1873) (reprinted in H. Copp, Mineral Lands 61, 62 (1881)). It is important to note that the Department's test had two parts. First, before a substance would cause the Department to characterize land as mineral, it had to be recognized as a mineral by the standard authorities on the subject. See n. 1, *supra*. Second, the mineral had to appear in sufficient quantity and quality to be commercially exploitable.[5]

Under the Department of the Interior's earliest decisions, certain commonplace substances were classified as minerals. See *W. H. Hooper*, 1 L. D. 560, 561 (1881) (gypsum); *H. P. Bennet, Jr.*, 3 L. D. 116, 117 (1884) (permitting placer claims for building stone). But the Department soon began to recognize a small group of substances, that were valuable for certain purposes, as not being "minerals" "under all authorities." In *Dunluce Placer Mine*, 6 L. D. 761, 762 (1888), the Secretary held that a deposit of "brick clay" would not warrant classification as a valuable mineral deposit. The Secretary so held despite a finding that the land on which the deposit was found was "undoubtedly more valuable as a 'clay placer' than for any other purpose." *Id.*, at 761.

The Department followed *Dunluce* in a number of subsequent cases.[6] An important case under the general mining

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[5] Cf. 1 C. Lindley, American Law Relating to Mines and Mineral Lands § 98, pp. 174–175 (3d ed. 1914). The test whether a claimant has located a "valuable mineral deposit" under the general mining laws remains for the most part the same. See *ante*, at 44. As JUSTICE MARSHALL concluded for a unanimous Court in *Andrus* v. *Charlestone Stone Products Co.*, 436 U. S. 604, 610 (1978), mineral land must contain a deposit that *both* is a "mineral" and is "valuable."

[6] See, *e. g.*, *King* v. *Bradford*, 31 L. D. 108, 109–111 (1901) (brick clay); *Bettancourt* v. *Fitzgerald*, 40 L. D. 620, 621–622 (1912) (clay useful for

laws for our purposes is *Zimmerman* v. *Brunson*, 39 L. D. 310 (1910). It involved sand and gravel, and was decided four years before Congress began consideration of the SRHA. After quoting the rule in *Pacific Coast Marble*, the Secretary stated:

> "A search of the standard American authorities has failed to disclose a single one which classifies a deposit such as claimed in this case as mineral, nor is the Department aware of any application to purchase such a deposit under the mining laws. This, taken into consideration with the further fact that deposits of sand and gravel occur with considerable frequency in the public domain, points rather to a general understanding that such deposits, unless they possess a peculiar property or characteristic giving them a special value, were not to be regarded as mineral." 39 L. D., at 312.

The Secretary then reviewed the Department's cases on clay and stone,[7] concluding:

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cement manufacturing); *Holman* v. *Utah*, 41 L. D. 314, 315 (1912) (clay and limestone); *Victor Portland Cement Co.* v. *Southern Pacific R. Co.*, 43 L. D. 325, 326 (1914) (limestone shale); *Mrs. A. T. Van Dolah*, Solicitor's Opinion A–26443 (Oct. 14, 1952) (clay). See also *Gray Trust Co.*, 47 L. D. 18, 20 (1919) (limestone useful in cement and road surfacing found not to qualify land as mineral land); *Union Oil Co.*, 23 L. D. 222, 229 (1896) (petroleum) (overruled by Congress in Act of Feb. 11, 1897, ch. 216, 29 Stat. 526); *Jordan* v. *Idaho Aluminum Min. & Mfg. Co.*, 20 L. D. 500, 501 (1895) (alumina) (but see *Downey* v. *Rogers*, 2 L. D. 707, 709 (1883) (permitting entry for alum); *Tucker* v. *Florida R. & Navigation Co.*, 19 L. D. 414 (1894) (phosphate) (overruled in *Pacific Coast Marble Co.* v. *Northern Pacific R. Co.*, 25 L. D. 233, 246–247 (1897)). Cf. *Southwestern Mining Co.*, 14 L. D. 597, 602 (1892) (salt) (relying on consistent legislative policy to reserve saline lands from all land Acts).

[7] Stone useful for building purposes was not classified as a mineral—at least for a time. See *Conlin* v. *Kelly*, 12 L. D. 1, 2–3 (1891) (declining to follow *H. P. Bennet, Jr.*, 3 L. D. 116, 117 (1884)); *Clark* v. *Ervin*, 16 L. D. 122, 124 (1893); *Hayden* v. *Jamison*, 16 L. D. 537, 539 (1893); *Florence D. Delaney*, 17 L. D. 120, 121 (1893) (glass sand and building stone); Act of Aug. 4, 1892, 27 Stat. 348, 30 U. S. C. § 161 (making building

> "From the above resume it follows that the Department, in the absence of specific legislation by Congress, will refuse to classify as mineral land containing a deposit of material not recognized by standard authorities as such, whose sole use is for general building purposes, and whose chief value is its proximity to a town or city, in contradistinction to numerous other like deposits of the same character in the public domain. *Id.*, at 313.

The Secretary concluded that gravel was such a material, and this clearly remained the Department's position until 1929.

The *Zimmerman* decision was recognized by Department officials in *Litch* v. *Scott*, 40 L. D. 467, 469 (1912), as foreclosing "the question as to the mineral character of the land," even though "it [did] not appear that the [claimant's] removal of the sand or gravel had any connection with the cultivation of the land and it was removed solely for the purpose of sale." And in *Hughes* v. *Florida*, 42 L. D. 401 (1913), First Assistant Secretary Andreius A. Jones wrote: "The Department does not concur with the contention that this deposit [of shell rock] is a mineral within the meaning of the general mining laws. It presents features greatly similar to the deposits of sand and gravel considered in the case of Zimmerman *v.* Brunson. . . ." *Id.*, at 403–404.

Thus, it was beyond question, when the SRHA was adopted in 1916, that the Department had ruled consistently that gravel was not a mineral under the general mining laws.[8] The legislative history is silent on exactly how Con-

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stone a locatable mineral). Cf. *Stanislaus Electric Power Co.*, 41 L. D. 655, 658–661 (1912) (§ 161 does not apply to common, low-grade rock having no special value for building purposes). The Department, however, later recognized claims founded on stone deposits that could be used for special purposes, such as monuments and ornamentation. See *McGlenn* v. *Wienbroeer*, 15 L. D. 370, 374 (1892).

[8] In *United States* v. *Aitken*, 25 Philippine 7 (1913), the court held that *commercial* gravel was not a mineral. Relying on the Department's administrative decisions, the court defined "mineral" as "'[w]hatever is recognized as a mineral by the standard authorities on the subject.'" *Id.*, at

gress defined "mineral," but it is equally clear that the Department participated actively in drafting the SRHA and in advising Congress.[9] In light of this record, one must conclude that Congress intended the term "minerals" in the new statute to have the meaning so recently and consistently given it by the Department in construing and applying the general mining laws.[10] As it was the agency authorized to

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15 (quoting Letter from Commissioner Drummond to Surveyors-General, Registers, and Receivers (July 15, 1873)). The court found that if "an examination be made of the individual adjudicated cases and the decisions of the United States Land Department, upon which these general definitions of the term 'mineral' are based, it will be found that commercial gravel was not a factor in forming them, and that it has never been considered as a mineral." *Id.*, at 16. See D. Barringer & J. Adams, Law of Mines and Mining cxxv (1900) (list of 46 nonmetallic minerals that possess commercial value, but not listing gravel); D. Barringer, Minerals of Commercial Value (1897) (listing over 350 substances, including clay, petroleum, phosphate, salt, but not listing sand or gravel); 2 C. Lindley, *supra* n. 5, § 424, at 996–997 (recognizing Department's policy for "commonplace substances such as ordinary clay, sand and gravel"); 1 W. Snyder, Mines and Mining § 144, p. 117 (1902) (discussing Department's policy not to treat clay as a mineral).

[9] In 1914, a bill to permit homesteading on unappropriated public lands in the West was referred by the House Committee on Public Lands to the Department of the Interior for comment. First Assistant Secretary Jones, six months after deciding *Hughes* v. *Florida*, 42 L. D. 401 (1913), submitted the Department's report on the bill and at the same time submitted the Department's draft of a substitute Stock-Raising Homestead Bill. After Committee hearings on the bills, Jones issued a second report to the Committee. See H. R. Rep. No. 626, 63d Cong., 2d Sess., 1–9 (1914). The House passed the Department's bill, but the full Senate failed to act on it. In the next Congress, the Department's bill was reintroduced in the House. Again the Public Lands Committtee sought the advice of the Department. See H. R. Rep. No. 35, 64th Cong., 1st Sess., 4–8, 13 (1916). In the floor debates, Members made frequent reference to the fact that the Department had drafted the bill. See, *e. g.*, 53 Cong. Rec. 1127 (1916) (statement of Congressman Taylor) (describing Department's report as "one of the best reports we have ever had on any bill since I have been in Congress"); *id.*, at 1130–1131.

[10] The Court concludes that "[i]t is most unlikely that many Members of Congress were aware of the ruling in *Zimmerman*, which was never tested

implement the SRHA, its contemporaneous construction should be persuasive as to congressional intention. This Court previously had accorded this respect to the Department of the Interior. See, *e. g.*, *Burke* v. *Southern Pacific R. Co.*, 234 U. S. 669, 677–678 (1914); *Northern Pacific R. Co.* v. *Soderberg*, 188 U. S. 526, 534 (1903).

## II

Despite the absence of "specific legislation by Congress," the Department in *Layman* v. *Ellis*, 52 L. D. 714 (1929), which did not involve SRHA lands, overruled *Zimmerman* 13 years after the enactment of the SRHA.[11] See 52 L. D., at

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in the courts and was not mentioned in the Reports or debates on the SRHA." *Ante*, at 46. The Court generally does not attribute such ignorance of the law to Congress. See, *e. g.*, *Lorillard* v. *Pons*, 434 U. S. 575, 581 (1978); *National Lead Co.* v. *United States*, 252 U. S. 140, 147 (1920). And assuming ignorance seems especially inappropriate in this case, where during floor debates Congressmen referred to the Department's administrative decisions and its interpretations of prior Homestead Acts. See 53 Cong. Rec. 1174 (1916). See also n. 9, *supra*.

Alternatively, the Court states that, "[e]ven if Congress had been aware of *Zimmerman*, there would be no reason to conclude that it approved of the Secretary's ruling in that case rather than this Court's opinion in [*Northern Pacific R. Co.* v.] *Soderberg*, [188 U. S. 526, 530 (1903)], which . . . quoted with approval a statement that gravel is a mineral." *Ante*, at 46. I do not believe that the *Soderberg* Court's one quotation from an English case is of greater relevance than the established views of the Department that is entrusted with the administration of the Federal Government's public lands and that drafted the very Act before us now. Certainly the *Soderberg* Court did not think so, for in searching for a definition of the word "mineral," it first examined "[t]he rulings of the Land Department, to which we are to look for the contemporaneous construction of these statutes." 188 U. S., at 534. And the holding of *Soderberg* as to the classification of granite was not at all inconsistent with Department policy. See n. 7, *supra*.

[11] *Layman* v. *Ellis* has been reaffirmed in subsequent opinions of the Department, but most of them provide the Court with none of the support it seeks in them. The Court also looks to two federal land-grant statutes that, like the SRHA, reserve all minerals to the United States. *Ante*, at 56–57. See *United States* v. *Isbell Construction Co.*, 78 I. D. 385, 391,

721. As a result, individuals began staking mining claims on public land containing gravel deposits to obtain land patents, not for "mineral" value, but for such purposes as fishing camps and cabin sites. See H. R. Rep. No. 730, 84th Cong., 1st Sess., 5–6 (1955). Legislation in 1955 clarified the confusion that the Department's decisions had created.[12] Ulti-

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394–396 (1971); Dept. of Interior, Division of Public Lands, Solicitor's Opinion, M–36379 (Oct. 3, 1956). Relying on a prior opinion of the Department's Solicitor, the Secretary in *Isbell* reversed the decision of the Director of the Bureau of Land Management holding that gravel was included in the patent. Moreover, the statute at issue in *Isbell* was passed after the Department's decision in *Layman*, and differed in purpose and history from the SRHA. As the Department itself noted in this case, the statute there also differed from the SRHA as written in 1916 in that it originally provided from the date of its enactment for compensation for damages to the lands as well as to improvements. See 85 I. D. 129, 132, n. 2 (1978). The 1956 Solicitor's Opinion simply relied on *Layman*. Interestingly, it took a much narrower view of what was included in the mineral reservation at issue there than the Court has with respect to the SRHA reservation: "[D]eposits of sand and gravel in lands . . . patented under the act which can be shown *as of the date of . . . patent* to have a definite economic value *by reason of the existence and nearness of a market* in which they can be sold at a profit are reserved . . . ." Solicitor's Opinion M–36379, *supra*, at 4 (emphasis added).

[12] In a series of Acts culminating in the Surface Resources Act of 1955, 30 U. S. C. § 611, Congress removed such commonplace "materials" as gravel completely from the purview of the general mining laws. It is arguable, from this fact alone, that Congress never intended gravel to be a mineral under any of the mining laws. See *United States* v. *Coleman*, 390 U. S. 599, 604 (1968) ("'[S]and, stone, [and] gravel . . . are really *building materials*, and are not the type of material contemplated to be handled under the mining laws . . .'") (quoting 101 Cong. Rec. 8743 (1955)) (emphasis added by Court). Indeed, some officials in the Department initially concluded that under the Surface Resources Act "sand and gravel have been declared to be nonmineral substances and should therefore no longer be considered as being reserved to the United States under the mineral reservation in the [SRHA]." Dept. of Interior, Division of Public Lands, Solicitor's Opinion, M–36417, p. 1 (Feb. 15, 1957). Assuming, however, that the Department eventually may have concluded properly that the Act did not quitclaim common materials to SRHA patentees, see *id.*, at 2, it is nevertheless difficult for the Department to contend that the Act is irrelevant

mately, sand and gravel were once again removed from the coverage of the general mining laws;[13] Congress reaffirmed the *Zimmerman* rule that common gravel is not a mineral under the general mining laws;[14] and *Layman* was legislatively overruled.[15]

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to the inquiry whether the Government had title to the gravel in the first instance. Interestingly, the Act specifically permits continued location on public lands of gravel with "distinct and special value," § 611, the same test set forth in *Zimmerman* for determining when a deposit of gravel would be considered a "valuable mineral deposit." See *United States* v. *Kaycee Bentonite Corp.*, 89 I. D. 262, 274 (1982) (1955 congressional test "echoes" *Zimmerman* test).

[13] While the Department's authority to dispose of gravel on "public lands" is clear, see n. 4, *supra*, it is not at all clear with respect to gravel on SRHA lands. The Court assumes without discussion agency jurisdiction to bring a trespass action on SRHA lands under regulations that authorize such actions for trespass on "public lands." Yet there at least is doubt that SRHA lands are "public lands" as that term has been interpreted by this Court. See, *e. g.*, *Bardon* v. *Northern Pacific R. Co.*, 145 U. S. 535, 538 (1892); Mall, Federal Mineral Reservations, 20 Rocky Mt. Min. L. Inst. 399, 443–449 (1975). Furthermore, even if SRHA lands are public lands and gravel is reserved, the Department's regulations apparently fail to permit disposal of minerals for these lands. See 30 U. S. C. § 601; 43 CFR § 3601.1 (1982) (stating that "mineral material disposals" may not be made from "public lands" on which there are "valid, existing claims to the land by reason of settlement, entry, or similar rights obtained under the public land laws"). Thus, the Court's extended discussion of the policy of encouraging mineral development on SRHA lands has little relevance with respect to gravel and other commonplace substances. Indeed, if this case is any indication, it rather appears that the Government wants to prevent development of such materials.

[14] The anomalous status of *Layman* and common varieties of gravel has not escaped the notice of the Department, which has commented that "the arguments advanced by the Department for overruling *Zimmerman* are difficult to distinguish from rationales that would support making common clay locatable." *Kaycee Bentonite*, *supra*, at 274, n. 9.

[15] See n. 12, *supra*. The Court relies on a dozen federal administrative and judicial cases since *Layman* but involving pre-1955 locations for the proposition that gravel deposits could be located under the general mining laws. See *ante*, at 57–58. But none of these cases involves SRHA land, they were concerned primarily with the application of the marketability

It is clear then that Congress never has, as the Court holds, considered all gravel to be a valuable mineral.[16] And I see no basis for inferring congressional intent to classify gravel, contrary to all lay understanding, as mineral.[17]

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test, and none questioned whether gravel was a mineral. The issue here, however, is whether gravel should ever be considered a "mineral" under the SRHA, and the cases are at the most evidence of how gravel should be treated on "public lands" under the mining laws *after Layman* and *before* Congress in 1955 removed all gravel from the purview of the mining laws. See n. 13, *supra*. The only prior case addressing the precise issue before the Court held that ordinary sand and gravel were *not* reserved to the United States within the meaning of the mineral reservation contained in SRHA patents. See *State ex rel. Highway Comm'n* v. *Trujillo*, 82 N. M. 694, 487 P. 2d 122 (1971). Similar cases also suggest that gravel is not a reserved mineral. Cf. *United States* v. *Union Oil Co. of California*, 549 F. 2d 1271, 1279 (CA9) (SRHA reserved "unrelated subsurface resources"), cert. denied, 434 U. S. 930 (1977); *Bumpus* v. *United States*, 325 F. 2d 264 (CA10 1963) (finding a mineral reservation following condemnation not to include gravel).

[16] Not even the Department has gone as far as the Court apparently would. Although *Layman* made common varieties of gravel locatable, gravel that "is principally valuable for use as fill, sub-base, ballast, riprap or barrow was *never* [a valuable mineral deposit]," despite the fact that it "might be marketable at a profit." *United States* v. *Verdugo & Miller, Inc.*, 37 I. B. L. A. 277, 279 (1978) (emphasis in original). See Tr. of Oral Arg. 50.

[17] The Court relies heavily on the rule that land grants are construed favorably to the Government. See *ante*, at 59–60. The Court fails to note, however, that we recently made clear that, notwithstanding this rule, public grants are "'not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication.'" *Leo Sheep Co.* v. *United States*, 440 U. S. 668, 682–683 (1979) (quoting *United States* v. *Denver & Rio Grande R. Co.*, 150 U. S. 1, 14 (1893)). See *Burke* v. *Southern Pacific R. Co.*, 234 U. S. 669, 679 (1914) (Congress intended "mineral lands" to be applied "in their ordinary and popular sense"); *id.*, at 676 ("doubtless the ordinary or popular signification of that term was intended"); *Marvel* v. *Merritt*, 116 U. S. 11, 12 (1885) (statutory terms "mineral . . . substances" have no "scientific meaning different from their popular meaning"). A good indicator of the "ordinary and popular sense" of a word is the common law's use of it. The Court ignores this. See Reeves, The Meaning of the Word "Minerals," 54

## III

Congressional interest in stockraising and mineral development was subordinate to the ultimate congressional purpose of settling the West. See H. R. Rep. No. 35, 64th Cong., 1st Sess., 14 (1916); H. R. Rep. No. 626, 63d Cong., 2d Sess., 10–11 (1914); n. 2, *supra*. More than cattle and more than minerals, it was the belief of Congress that

> "the Nation as a unit needs more States like, for instance, Kansas and Iowa, *where each citizen is the sovereign of a portion of the soil*, the owner of his home and not tenant of some (perhaps) distant landlord, a builder of schools and churches, a voluntary payer of taxes for the support of his local government." H. R. Rep. No. 626, *supra*, at 11 (emphasis added).

In recommending "citizen sovereignty" of the soil,[18] Congress surely did not intend to destroy that sovereignty by reserv-

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N. D. L. Rev. 419, 472 (1978) ("As a general rule . . . sand and gravel are usually held not to be a mineral in private grants or reservations of minerals"); *id.*, at 431; Brief for United States in *Bumpus* v. *United States*, 325 F. 2d 264 (CA10 1973), pp. 7–14 (construing declaration of taking's mineral reservation as not reserving gravel to former landowners).

[18] Quite apart from the clear evidence of congressional intent at the time the SRHA was enacted in 1916, see Part I, *supra*, it is unreasonable to suppose that Congress ever intended—when it was enacting legislation to encourage settlement of the West—to reserve to the Federal Government the commonplace inorganic substances that actually constituted the soil of the patented land. The incentive to move to the West and settle on its semiarid land would have been diminished significantly if it had been understood that only limited rights in what most persons consider a part of the soil itself were being granted. Indeed, the legislative history is clear that, rather than intending to provide rights analogous to grazing leases upon the unappropriated public domain, Congress intended to promote permanent settlement. See 53 Cong. Rec. 1233–1234 (1916) (statement of Congressman Mondell) ("I wish [the Congressman] would not call the laws he refers to surface-entry laws, for they are not. They convey fee titles. They give the owner much more than the surface; they give him all except the body of the reserved mineral").

ing the commonplace substances that actually constitute much of that soil.[19]

The first attempt by the Department of the Interior to acquire ownership of gravel on SRHA lands did not occur until this case began in 1975. One would think it is now too late, after a half-century of inaction, for the Department to take action that raises serious questions as to the nature and extent of titles to lands granted under the SRHA.[20] Owners of patented land are entitled to expect fairer treatment from their Government. In my view, the Department should be required to adhere to the clear intent of Congress at the time this legislation was adopted. I would affirm the judgment of the Court of Appeals.

JUSTICE STEVENS, dissenting.

Whether gravel is a mineral within the meaning of the Stock-Raising Homestead Act of 1916 may be a matter of

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[19] Cf. H. R. Rep. No. 626, *supra* n. 9, at 3 (surface owners' activities "can be carried on without being materially interfered with by the reservation of minerals and the prospecting for a removal of same from the land"). Based on similar concerns, the Department on occasion has limited the breadth of mineral reservations because of the obvious congressional intent. See Solicitor's Opinion M–36379, *supra* n. 11, at 4.

[20] The Department is in no position to adopt a new policy for land patents long granted. See *Andrus* v. *Shell Oil Co.*, 446 U. S. 657 (1980). Its prior actions have caused the population generally, including respondent, to understand that gravel was not a reserved mineral. Cf. *Western Nuclear, Inc.* v. *Andrus*, 475 F. Supp. 654, 660 (Wyo. 1979) ("Until [1975], it was the practice of the Wyoming Highway Department, construction companies, and the ranchers owning the surface estate to treat the gravel as part of the surface estate, the gravel being sold or used by the rancher with the approval of the [Bureau of Land Management]"). As JUSTICE REHNQUIST stated for the Court in *Leo Sheep Co.*, *supra:*

"Generations of land patents have issued without any express reservation of the right now claimed by the Government. Nor has a similar right been asserted before . . . . This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations . . . ." 440 U. S., at 687 (footnotes omitted).

considerable importance in the semiarid lands of the West, but it is of much less importance to the rest of the Nation. For that reason, as well as those set forth at some length in my concurring opinion in *Watt* v. *Alaska*, 451 U. S. 259, 273 (1981), I believe the Court of Appeals should have been permitted to make the final decision upon the unique question of statutory construction presented by this case.* Accordingly, while I join JUSTICE POWELL's opinion explaining why the judgment of the Court of Appeals should be affirmed, I believe an even better disposition would have been simply to deny certiorari.

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*What I said two years ago remains true today:

"The federal judicial system is undergoing profound changes. Among the most significant is the increase in the importance of our courts of appeals. Today they are in truth the courts of last resort for almost all federal litigation. Like other courts of last resort—including this one—they occasionally render decisions that will not withstand the test of time. No judicial system is perfect and no appellate structure can entirely eliminate judicial error. Most certainly, this Court does not sit primarily to correct what we perceive to be mistakes committed by other tribunals. Although our work is often accorded special respect because of its finality, we possess no judicial monopoly on either finality or respect. The quality of the work done by the courts of appeals merits the esteem of the entire Nation, but, unfortunately, is not nearly as well or as widely recognized as it should be. Indeed, I believe that if we accorded those dedicated appellate judges the deference that their work merits, we would be better able to resist the temptation to grant certiorari for no reason other than a tentative prediction that our review of a case may produce an answer different from theirs. In my opinion, that is not a sufficient reason for granting certiorari." 451 U. S., at 275 (footnote omitted).

# UNITED STATES *v.* PTASYNSKI ET AL.

## APPEAL FROM DISTRICT COURT OF WYOMING

No. 82–1066. Argued April 27, 1983—Decided June 6, 1983

The Crude Oil Windfall Profit Tax Act of 1980 exempts from the tax imposed by the Act domestic crude oil defined as oil produced from wells located north of the Arctic Circle or on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline system.

*Held:* This exemption does not violate the Uniformity Clause's requirement that taxes be "uniform throughout the United States." Pp. 80–86.

(a) The Uniformity Clause does not require Congress to devise a tax that falls equally or proportionately on each State nor does the Clause prevent Congress from defining the subject of a tax by drawing distinctions between similar classes. Pp. 80–82.

(b) Identifying "exempt Alaskan oil" in terms of its geographic boundaries does not render the exemption invalid. Neither the language of the Uniformity Clause nor this Court's decisions prohibit all geographically defined classifications. That Clause gives Congress wide latitude in deciding what to tax and does not prohibit it from considering geographically isolated problems. Here, Congress cannot be faulted for determining, based on neutral factors, that "exempt Alaskan oil" required separate favorable treatment. Such determination reflects Congress' considered judgment that unique climatic and geographic conditions required that oil produced from the defined region be exempted from the windfall profit tax, which was devised to tax "windfalls" that some oil producers would receive as the result of the deregulation of domestic oil prices that was part of the Government's program to encourage the exploration for and production of oil. Pp. 84–86.

550 F. Supp. 549, reversed.

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

*Acting Solicitor General Wallace* argued the cause for the United States. With him on the briefs were *Acting Assistant Attorney General Murray, Stuart A. Smith, Gary R. Allen,* and *Kristina E. Harrigan.*

*Stephen F. Williams* argued the cause for appellees. With him on the brief for appellees Ptasynski et al. were *William H. Brown, Michael J. Sullivan, Robert F. Nagel,* and *Michael Boudin. Harold B. Scoggins, Jr.,* and *Gary C.*

*Randall* filed a brief for appellees Independent Petroleum Association et al. *Jim Mattox*, Attorney General, *David R. Richards*, Executive Assistant Attorney General, and *Cynthia Marshall Sullivan*, *Walter Davis*, and *James R. Meyers*, Assistant Attorneys General, filed a brief for appellee State of Texas. *Gene W. Lafitte*, *George J. Domas*, *Deborah Bahn Price*, *David B. Kennedy*, *William H. Mellor III*, and *Gale A. Norton* filed a brief for appellee State of Louisiana.*

JUSTICE POWELL delivered the opinion of the Court.

The issue is whether excluding a geographically defined class of oil from the coverage of the Crude Oil Windfall Profit Tax Act violates the Uniformity Clause.

## I

During the 1970's the Executive Branch regulated the price of domestic crude oil. See H. R. Rep. No. 96–304, pp. 4–5 (1979). Depending on its vintage and type, oil was divided into differing classes or tiers and assigned a corresponding ceiling price. Initially, there were only two tiers, a lower tier for "old oil" and an upper tier for new production. As the regulatory framework developed, new classes of oil were recognized.[1]

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*Briefs of *amici curiae* urging reversal were filed by *Matthew J. Zinn* for Atlantic Richfield Co.; by *Jerry N. Gauche* and *Terrence G. Perris* for Standard Oil Co.; by *Norman C. Gorsuch*, Attorney General, and *Deborah Vogt*, Assistant Attorney General, for the State of Alaska; and by *Representative Silvio O. Conte*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed by *John J. Rademacher* for the American Farm Bureau Federation et al.; by *Wilkes C. Robinson* for the Gulf & Great Plaines Legal Foundation of America et al.; by *David Crump* for the Legal Foundation of America et al.; and by *Daniel J. Popeo* for Senator Don Nickles et al.

[1] In addition to lower- and upper-tier oil, the Federal Energy Administration recognized essentially four other classes of crude oil: stripper oil, Alaska North Slope oil, oil produced on the Naval Petroleum Reserve,

In 1979, President Carter announced a program to remove price controls from domestic oil by September 30, 1981. See *id.*, at 5. By eliminating price controls, the President sought to encourage exploration for new oil and to increase production of old oil from marginally economic operations. See H. R. Doc. No. 96–107, p. 2 (1979). He recognized, however, that deregulating oil prices would produce substantial gains (referred to as "windfalls") for some producers. The price of oil on the world market had risen markedly, and it was anticipated that deregulating the price of oil already in production would allow domestic producers to receive prices far in excess of their initial estimates. See *ibid.* Accordingly, the President proposed that Congress place an excise tax on the additional revenue resulting from decontrol.

Congress responded by enacting the Crude Oil Windfall Profit Tax Act of 1980, 94 Stat. 229, 26 U. S. C. § 4986 *et seq.* (1976 ed., Supp. V). The Act divides domestic crude oil into three tiers[2] and establishes an adjusted base price and a tax rate for each tier. See §§ 4986, 4989, and 4991. The base prices generally reflect the selling price of particular categories of oil under price controls, and the tax rates vary according to the vintages and types of oil included within each tier.[3]

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and incremental tertiary oil. See H. R. Rep. No. 96–304, p. 12 (1979). Alaska North Slope oil was considered a separate class of oil because its disproportionately high transportation costs forced producers to keep the wellhead price well below the ceiling price. See 42 Fed. Reg. 41566–41568 (1977).

[2] These tiers incorporate to a large extent the categories of oil developed under the Federal Energy Administration's crude-oil pricing regulations. Tier two, for example, includes stripper-well oil and oil from a national petroleum reserve held by the United States. See 26 U. S. C. § 4991(d) (1976 ed., Supp. V).

[3] Generally, the windfall profit is the difference between the current wellhead price of the oil and the sum of the adjusted base price. See 26 U. S. C. § 4988(a) (1976 ed., Supp. V). The amount of the tax is calculated by multiplying the resulting difference by the applicable rate. § 4987(a). The tax on each barrel of oil thus varies according to the adjusted base price and rate, both of which are established by the tier into which the oil is placed.

See Joint Committee on Taxation, General Explanation of the Crude Oil Windfall Profit Tax Act of 1980, 96th Cong., 26–36 (Comm. Print 1981). The House Report explained that the Act is "designed to impose relatively high tax rates where production cannot be expected to respond very much to further increases in price and relatively low tax rates on oil whose production is likely to be responsive to price." H. R. Rep. No. 96–304, at 7; see S. Rep. No. 96–394, p. 6 (1979).

The Act exempts certain classes of oil from the tax,[4] 26 U. S. C. § 4991(b) (1976 ed., Supp. V), one of which is "exempt Alaskan oil," § 4991(b)(3). It is defined as:

> "any crude oil (other than Sadlerochit oil) which is produced—
>
> "(1) from a reservoir from which oil has been produced in commercial quantities through a well located north of the Arctic Circle, or
>
> "(2) from a well located on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System." § 4994(e).

Although the Act refers to this class of oil as "exempt Alaskan oil," the reference is not entirely accurate. The Act exempts only certain oil produced in Alaska from the windfall profit tax. Indeed, less than 20% of current Alaskan production is exempt.[5] Nor is the exemption limited to the

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[4] These classes are defined both by the identity of the producer and the nature of the oil. Section 4991(b)(1), for example, exempts oil produced "from a qualified governmental interest or a qualified charitable interest." Congress determined that because the revenues from this oil would be used by nonprofit entities, it was appropriate to exempt them from the tax. See S. Rep. No. 96–394, pp. 60–61 (1979). The Act also exempts types of oil, such as front-end oil. § 4991(b)(4). Subject to certain conditions, front-end oil is oil that is sold to finance tertiary recovery projects. See § 4994(c).

[5] Of the total amount of oil currently produced in Alaska, 82.6% is subject to the windfall profit tax, 12.4% is exempt from the tax because it is produced from a "qualified governmental interest," see n. 4, *supra*, and

State of Alaska. Oil produced in certain offshore territorial waters—beyond the limits of any State—is included within the exemption.

The exemption thus is not drawn on state political lines. Rather it reflects Congress' considered judgment that unique climatic and geographic conditions require that oil produced from this exempt area be treated as a separate class of oil. See H. R. Conf. Rep. No. 96–817, p. 103 (1980). As Senator Gravel explained, the development and production of oil in arctic and subarctic regions is hampered by "severe weather conditions, remoteness, sensitive environmental and geological characteristics, and a lack of normal social and industrial infrastructure."[6] 125 Cong. Rec. 31733 (1979). These factors combine to make the average cost of drilling a well in Alaska as much as 15 times greater than that of drilling a well elsewhere in the United States. See 126 Cong. Rec. 5846 (1980) (remarks of Sen. Gravel).[7] Accordingly, Congress

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5.1% is exempt because it is "exempt Alaskan oil." Brief for State of Alaska as *Amicus Curiae* 7.

[6] A particular problem results from the presence of permafrost, which exists throughout the exempt area. Permafrost is ground that remains frozen continuously, but which will thaw and subside if the surface vegetation insulating it is disturbed. See University of Alaska, Alaska Regional Profiles, Yukon Region 98–100. To protect the surface vegetation, the Alaska Department of Natural Resources limits the use of vehicles and machinery to those months when the surface is frozen and covered with snow. Thus, construction and seismic activities are restricted primarily to periods when the climate is at its harshest. Temperatures of −40 to −50 degrees Fahrenheit are not uncommon, see *id.*, at 15–16, and what normally might be accomplished with relative ease becomes a demanding task.

[7] The American Petroleum Institute reported comparative costs for drilling wells in Alaska, California, Louisiana, and Texas. The average cost of an onshore Alaskan well was $3,181,000. See American Petroleum Institute, 1976 Joint Association Survey on Drilling Costs 12 (1977). The next highest cost was $292,000 in Louisiana. See *id.*, at 28–29. See also Standard & Poor's Industry Surveys, Oil-Gas Drilling and Services, Vol. 150, No. 40, Sec. 1 (Oct. 7, 1982). Although not identical to Senator Gravel's figures, these sources indicate that the cost of developing oil in Alaska far exceeds that in other parts of the country. Moreover, because these

chose to exempt oil produced in the defined region from the windfall profit tax. It determined that imposing such a tax "would discourage exploration and development of reservoirs in areas of extreme climatic conditions." H. R. Conf. Rep. No. 96–817, at 103.

Six months after the Act was passed, independent oil producers and royalty owners filed suit in the District Court for the District of Wyoming, seeking a refund for taxes paid under the Act. On motion for summary judgment, the District Court held that the Act violated the Uniformity Clause, Art. I, § 8, cl. 1.[8] 550 F. Supp. 549, 553 (1982). It recognized that Congress' power to tax is virtually without limitation, but noted that the Clause in question places one specific limit on Congress' power to impose indirect taxes. Such taxes must be uniform throughout the United States, and uniformity is achieved only when the tax "'operates with the same force and effect in every place where the subject of it is found.'" *Ibid.* (quoting *Head Money Cases*, 112 U. S. 580, 594 (1884)).

Because the Act exempts oil from certain areas within one State, the court found that the Act does not apply uniformly throughout the United States. It recognized that Congress could have "a rational justification for the exemption," but concluded that "[d]istinctions based on geography are simply not allowed." 550 F. Supp., at 553. The court then found that the unconstitutional provision exempting Alaskan oil could not be severed from the remainder of the Act. *Id.*, at 554. It therefore held the entire windfall profit tax invalid. *Id.*, at 555.

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figures represent the cost of an average Alaskan well, they reflect the lower expenses incurred in developing oil in nonexempt areas. They thus understate the costs of drilling in the exempt region.

[8] Article I, § 8, cl. 1, provides:

"The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

We noted probable jurisdiction, 459 U. S. 1199 (1983), and now reverse.

## II

Appellees advance two arguments in support of the District Court's judgment. First, they contend that the constitutional requirement that taxes be "uniform throughout the United States" prohibits Congress from exempting a specific geographic region from taxation. They concede that Congress may take geographic considerations into account in deciding what oil to tax. Brief for Taxpayer Appellees 6–7. But they argue that the Uniformity Clause prevents Congress from framing, as it did here, the resulting tax in terms of geographic boundaries. Second, they argue that the Alaskan oil exemption was an integral part of a compromise struck by Congress. Thus, it would be inappropriate to invalidate the exemption but leave the remainder of the tax in effect. Because we find the Alaskan exemption constitutional, we do not consider whether it is severable.

### A

The Uniformity Clause conditions Congress' power to impose indirect taxes.[9] It provides that "all Duties, Imposts and Excises shall be uniform throughout the United States." Art. I, § 8, cl. 1. The debates in the Constitutional Convention provide little evidence of the Framers' intent,[10] but the

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[9] Article I, § 9, cl. 4, provides that direct taxes shall be apportioned among the States by population. Indirect taxes, however, are subject to the rule of uniformity. See *Hylton* v. *United States*, 3 Dall. 171, 176 (1796) (opinion of Paterson, J.).

[10] The Clause was proposed on August 25 and adopted on August 31 without discussion. See 2 M. Farrand, The Records of the Federal Convention of 1787, pp. 417–418, 481 (1911). When the Committee of Style reported the final draft of the Constitution on September 12, it failed to include the Clause. *Id.*, at 594 (Clause interlined by James Madison). This omission was corrected two days later by appending the Clause to Art. I, § 8, cl. 1. *Id.*, at 614.

The origins of the Uniformity Clause are linked to those of the Port Preference Clause, Art. I, § 9, cl. 6. The two were proposed together, *id.*,

concerns giving rise to the Clause identify its purpose more clearly. The Committee of Detail proposed as a remedy for interstate trade barriers that the power to regulate commerce among the States be vested in the National Government, and the Convention agreed. See 2 M. Farrand, The Records of the Federal Convention of 1787, p. 308 (1911); C. Warren, The Making of the Constitution 567–570 (1928). Some States, however, remained apprehensive that the regionalism that had marked the Confederation would persist. *Id.*, at 586–588. There was concern that the National Government would use its power over commerce to the disadvantage of particular States. The Uniformity Clause was proposed as one of several measures designed to limit the exercise of that power. See 2 M. Farrand, *supra*, at 417–418; *Knowlton* v. *Moore*, 178 U. S. 41, 103–106 (1900). As Justice Story explained:

> "[The purpose of the Clause] was to cut off all undue preferences of one State over another in the regulation of subjects affecting their common interests. Unless duties, imposts, and excises were uniform, the grossest and most oppressive inequalities, vitally affecting the pursuits and employments of the people of different States, might exist. The agriculture, commerce, or manufactures of one State might be built up on the ruins of those of another; and a combination of a few States in Congress might secure a monopoly of certain branches of trade and business to themselves, to the injury, if not to the destruction, of their less favored neighbors." 1 J. Story, Commentaries on the Constitution of the United States § 957 (T. Cooley ed. 1873).

See also 3 Annals of Cong. 378–379 (1792) (remarks of Hugh Williamson); Address of Luther Martin to the Maryland Leg-

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at 417–418, and reported out of a special committee as an interrelated limitation on the National Government's commerce power, see *id.*, at 437; *Knowlton* v. *Moore*, 178 U. S. 41, 103–106 (1900). They were separated without explanation on September 14 when the Convention remedied their omission from the September 12 draft.

islature (Nov. 29, 1787), reprinted in 3 M. Farrand, *supra*, at 205.

This general purpose, however, does not define the precise scope of the Clause. The one issue that has been raised repeatedly is whether the requirement of uniformity encompasses some notion of equality. It was settled fairly early that the Clause does not require Congress to devise a tax that falls equally or proportionately on each State. Rather, as the Court stated in the *Head Money Cases*, 112 U. S., at 594, a "tax is uniform when it operates with the same force and effect in every place where the subject of it is found."

Nor does the Clause prevent Congress from defining the subject of a tax by drawing distinctions between similar classes. In the *Head Money Cases*, *supra*, the Court recognized that in imposing a head tax on persons coming into this country, Congress could choose to tax those persons who immigrated through the ports, but not those who immigrated at inland cities. As the Court explained, "the evil to be remedied by this legislation has no existence on our inland borders, and immigration in that quarter needed no such regulation." *Id.*, at 595. The tax applied to all ports alike, and the Court concluded that "there is substantial uniformity within the meaning and purpose of the Constitution." *Ibid.* Subsequent cases have confirmed that the Framers did not intend to restrict Congress' ability to define the class of objects to be taxed. They intended only that the tax apply wherever the classification is found. See *Knowlton* v. *Moore*, *supra*, at 106;[11] *Nicol* v. *Ames*, 173 U. S. 509, 521–522 (1899).

[11] *Knowlton* v. *Moore* represents the Court's most detailed consideration of the Uniformity Clause. See 178 U. S., at 83–106. The issue in *Knowlton*, however, only presented a variation on the question addressed in the *Head Money Cases*, 112 U. S. 580 (1884). Rather than distinguishing between port and inland cities, the statute at issue in *Knowlton* imposed a progressive tax on legacies and varied the rate of the tax among classes of legatees. The argument was that Congress could not distinguish among legacies or people receiving them; it was required to tax all

The question that remains, however, is whether the Uniformity Clause prohibits Congress from defining the class of objects to be taxed in geographic terms. The Court has not addressed this issue squarely.[12] We recently held, however, that the uniformity provision of the Bankruptcy Clause[13] did not require invalidation of a geographically defined class of debtors. See *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 161 (1974). In that litigation, creditors of bankrupt railroads challenged a statute that was passed to reorganize eight major railroads in the northeast and midwest regions of the country. They argued that the statute violated the uniformity provision of the Bankruptcy Clause because it operated only in a single statutorily defined region. The Court found that "[t]he uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legisla-

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legacies at the same rate or none. See *Knowlton* v. *Moore*, 178 U. S., at 83–84. In rejecting this argument, the Court reaffirmed its conclusion in the *Head Money Cases* that Congress may distinguish between similar classes in selecting the subject of a tax. 178 U. S., at 106.

Since *Knowlton*, the Court has not had occasion to consider the Uniformity Clause in any detail. See, *e. g.*, *Florida* v. *Mellon*, 273 U. S. 12, 17 (1927); *LaBelle Iron Works* v. *United States*, 256 U. S. 377, 392 (1921).

[12] In *Downes* v. *Bidwell*, 182 U. S. 244 (1901), the Court considered whether Congress could place a duty on merchandise imported from Puerto Rico. The Court assumed that if Puerto Rico were part of the United States, the duty would be unconstitutional under the Uniformity Clause or the Port Preference Clause. *Id.*, at 249. It upheld the duty because it found that Puerto Rico was not part of the country for the purposes of either Clause. *Id.*, at 287.

[13] Article I, § 8, cl. 4, provides that Congress shall have power "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." Although the purposes giving rise to the Bankruptcy Clause are not identical to those underlying the Uniformity Clause, we have looked to the interpretation of one Clause in determining the meaning of the other. See *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 160–161 (1974).

tion to resolve geographically isolated problems." *Id.*, at 159. The fact that the Act applied to a geographically defined class did not render it unconstitutional. We noted that the Act in fact had operated uniformly throughout the United States. During the period in which the Act was effective, no railroad reorganization proceeding had been pending outside the statutorily defined region. *Id.*, at 160.

In concluding that the uniformity provision had not been violated, we relied in large part on the *Head Money Cases*, *supra*, where the effect of the statute had been to distinguish between geographic regions. We rejected the argument that "the Rail Act differs from the head tax statute because *by its own terms* the Rail Act applies only to one designated region . . . . The definition of the region does not obscure the reality that the legislation applies to all railroads under reorganization pursuant to § 77 during the time the Act applies." 419 U. S., at 161 (emphasis added).

B

With these principles in mind, we now consider whether Congress' decision to treat Alaskan oil as a separate class of oil violates the Uniformity Clause. We do not think that the language of the Clause or this Court's decisions prohibit all geographically defined classifications. As construed in the *Head Money Cases*, the Uniformity Clause requires that an excise tax apply, at the same rate, in all portions of the United States where the subject of the tax is found. Where Congress defines the subject of a tax in nongeographic terms, the Uniformity Clause is satisfied. See *Knowlton* v. *Moore*, 178 U. S., at 106. We cannot say that when Congress uses geographic terms to identify the same subject, the classification is invalidated. The Uniformity Clause gives Congress wide latitude in deciding what to tax and does not prohibit it from considering geographically isolated problems. See *Head Money Cases*, *supra*, at 595. This is the substance of our decision in the *Regional Rail Reorganization Act*

*Cases*, 419 U. S., at 156–161.[14] But where Congress does choose to frame a tax in geographic terms, we will examine the classification closely to see if there is actual geographic discrimination. See *id.*, at 160–161.

In this case, we hold that the classification is constitutional. As discussed above, Congress considered the windfall profit tax a necessary component of its program to encourage the exploration for and production of oil. It perceived that the decontrol legislation would result—in certain circumstances—in profits essentially unrelated to the objective of the program, and concluded that these profits should be taxed. Accordingly, Congress divided oil into various classes and gave more favorable treatment to those classes that would be responsive to increased prices.

Congress clearly viewed "exempt Alaskan oil" as a unique class of oil that, consistent with the scheme of the Act, merited favorable treatment.[15] It had before it ample evidence of the disproportionate costs and difficulties—the fragile ecology, the harsh environment, and the remote location—associated with extracting oil from this region. We cannot fault its determination, based on neutral factors, that this oil required separate treatment. Nor is there any indication that Congress sought to benefit Alaska for reasons that would offend

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[14] *Railway Labor Executives' Assn.* v. *Gibbons*, 455 U. S. 457 (1982), is not to the contrary. There we held that a statute designed to aid one bankrupt railroad violated the uniformity provision of the Bankruptcy Clause. We stated: "The conclusion is . . . inevitable that [the statute] is not a response either to the particular problems of major railroad bankruptcies or to any geographically isolated problem: it is a response to the problems caused by the bankruptcy of *one* railroad." *Id.*, at 470 (emphasis in original). It is clear that in this case Congress sought to deal with a geographically isolated problem.

[15] Congress' view that oil from this area of Alaska merits separate treatment is consistent with the actions of both the Federal Energy Administration, see n. 1, *supra*, and the President, see H. R. Doc. No. 96–107, p. 3 (1979). See also Staff of the Joint Committee on Taxation, The Design of a Windfall Profit Tax 20–23 (Comm. Print 1979).

the purpose of the Clause. Nothing in the Act's legislative history suggests that Congress intended to grant Alaska an undue preference at the expense of other oil-producing States. This is especially clear because the windfall profit tax itself falls heavily on the State of Alaska. See n. 5, *supra*.

## III

Had Congress described this class of oil in nongeographic terms, there would be no question as to the Act's constitutionality. We cannot say that identifying the class in terms of its geographic boundaries renders the exemption invalid. Where, as here, Congress has exercised its considered judgment with respect to an enormously complex problem, we are reluctant to disturb its determination. Accordingly, the judgment of the District Court is

*Reversed.*

# BALTIMORE GAS & ELECTRIC CO. ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC.

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

No. 82–524. Argued April 19, 1983—Decided June 6, 1983*

Section 102(2)(C) of the National Environmental Policy Act (NEPA) requires federal agencies to consider the environmental impact of any major federal action. The dispute in these cases concerns the adoption by the Nuclear Regulatory Commission (NRC) of a series of generic rules to evaluate the environmental effects of a nuclear powerplant's fuel cycle. In these rules, the NRC decided that licensing boards should assume, for purposes of NEPA, that the permanent storage of certain nuclear wastes would have no significant environmental impact (the so-called "zero-release" assumption) and thus should not affect the decision whether to license a particular nuclear powerplant. At the heart of each rule is Table S–3, a numerical compilation of the estimated resources used and effluents released by fuel cycle activities supporting a year's operation of a typical light-water reactor. Challenges to the rules ultimately resulted in a decision by the Court of Appeals, on a petition for review of the final version of the rules, that the rules were arbitrary and capricious and inconsistent with NEPA because the NRC had not factored the consideration of uncertainties surrounding the zero-release assumption into the licensing process in such a manner that the uncertainties could potentially affect the outcome of any decision to license a plant.

*Held:* The NRC complied with NEPA, and its decision is not arbitrary or capricious within the meaning of § 10(e) of the Administrative Procedure Act (APA). Pp. 97–108.

(a) The zero-release assumption, which was designed for the limited purpose of individual licensing decisions and which is but a single figure in Table S–3, is within the bounds of reasoned decisionmaking required by the APA. The NRC, in its statement announcing the final Table S–3 rule, summarized the major uncertainties of long-term storage of nuclear wastes, noted that the probability of intrusion was small, and found the evidence "tentative but favorable" that an appropriate storage site

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*Together with 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.*, also on certiorari to the same court.

could be found. Table S–3 refers interested persons to staff studies that discuss the uncertainties in greater detail. In these circumstances, the NRC complied with NEPA's requirements of consideration and disclosure of the environmental impacts of its licensing decisions. It is not the task of this Court to determine what decision it would have reached if it had been the NRC. The Court's only task is to determine whether the NRC had considered the relevant factors and articulated a rational connection between the facts found and the choice made. Under this standard, the zero-release assumption, within the context of Table S–3 as a whole, was not arbitrary or capricious. Pp. 97–106.

(b) It is inappropriate to cast doubt on the licensing proceedings simply because of a minor ambiguity in the language of an earlier rule as to whether licensing boards were required to consider health effects, socioeconomic effects, or cumulative impacts, where there is no evidence that this ambiguity prevented any party from making as full a presentation as desired or ever affected the decision to license a plant. Pp. 106–108.

222 U. S. App. D. C. 9, 685 F. 2d 459, reversed.

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

*David A. Strauss* argued the cause for petitioners in all cases. With him on the briefs for petitioners in No. 82–545 were *Solicitor General Lee*, *Assistant Attorney General Dinkins*, *Deputy Solicitor General Claiborne*, *John H. Garvey*, *Jacques B. Gelin*, and *E. Leo Slaggie*. *Henry V. Nickel*, *F. William Brownell*, and *George C. Freeman, Jr.*, filed briefs for petitioners in No. 82–524. *James P. McGranery, Jr.*, and *Michael I. Miller* filed briefs for petitioners in No. 82–551. *Raymond M. Momboisse*, *Sam Kazman*, *Ronald A. Zumbrun*, and *Robert K. Best* filed a brief for respondent Pacific Legal Foundation in support of petitioners.

*Timothy B. Atkeson* argued the cause for respondents in all cases and filed a brief for respondent Natural Resources Defense Council, Inc. *Robert Abrams*, Attorney General, *Ezra I. Bialik*, Assistant Attorney General, and *Peter H. Schiff* filed a brief for respondent State of New York.†

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†Briefs of *amicus curiae* urging reversal were filed by *Harold F. Reis* and *Linda L. Hodge* for the Atomic Industrial Forum, Inc.; and by *Wayne T. Elliott* for Scientists and Engineers for Secure Energy, Inc.

JUSTICE O'CONNOR delivered the opinion of the Court.

Section 102(2)(C) of the National Environmental Policy Act of 1969, 83 Stat. 853, 42 U. S. C. § 4332(2)(C) (NEPA), requires federal agencies to consider the environmental impact of any major federal action.[1] As part of its generic rulemaking proceedings to evaluate the environmental effects of the nuclear fuel cycle for nuclear powerplants, the Nuclear

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Briefs of *amici curiae* urging affirmance were filed for the State of Minnesota by *Hubert H. Humphrey III*, Attorney General, and *Jocelyn Furtwangler Olson*, Special Assistant Attorney General; for the State of Wisconsin et al. by *Bronson C. La Follette*, Attorney General of Wisconsin, and *Carl A. Sinderbrand*, Assistant Attorney General; *Robert T. Stephan*, Attorney General of Kansas, and *Robert Vinson Eye*, Assistant Attorney General; *William J. Guste, Jr.*, Attorney General of Louisiana; *Joseph I. Lieberman*, Attorney General of Connecticut; *John J. Easton, Jr.*, Attorney General of Vermont, and *Merideth Wright*, Assistant Attorney General; *John Ashcroft*, Attorney General of Missouri, and *Robert Lindholm*, Assistant Attorney General; *William M. Leech, Jr.*, Attorney General of Tennessee; *Mark V. Meierhenry*, Attorney General of South Dakota; *Paul G. Bardacke*, Attorney General of New Mexico; *Tany S. Hong*, Attorney General of Hawaii; *Chauncey H. Browning, Jr.*, Attorney General of West Virginia, and *Leonard Knee*, Deputy Attorney General; *A. G. McClintock*, Attorney General of Wyoming; *Jim Mattox*, Attorney General of Texas, and *David Richards*, Executive Assistant Attorney General; *Janice E. Kerr* and *J. Calvin Simpson;* for Kansans for Sensible Energy by *John M. Simpson;* and for Limerick Ecology Action, Inc., et al. by *Charles W. Elliott.*

[1] Section 102(2)(C) provides:

"The Congress authorizes and directs that, to the fullest extent possible . . . (2) all agencies of the Federal Government shall—

. . . . . .

"(c) 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,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, [and]

. . . . . .

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

Regulatory Commission (Commission)[2] decided that licensing boards should assume, for purposes of NEPA, that the permanent storage of certain nuclear wastes would have no significant environmental impact and thus should not affect the decision whether to license a particular nuclear powerplant. We conclude that the Commission complied with NEPA and that its decision is not arbitrary or capricious within the meaning of § 10(e) of the Administrative Procedure Act (APA), 5 U. S. C. § 706.[3]

## I

The environmental impact of operating a light-water nuclear powerplant[4] includes the effects of offsite activities necessary to provide fuel for the plant ("front end" activities), and of offsite activities necessary to dispose of the highly toxic and long-lived nuclear wastes generated by the plant ("back end" activities). The dispute in these cases con-

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[2] The original Table S–3 rule was promulgated by the Atomic Energy Commission (AEC). Congress abolished the AEC in the Energy Reorganization Act of 1974, 42 U. S. C. § 5801 *et seq.*, and transferred its licensing and regulatory functions to the Nuclear Regulatory Commission (NRC). The interim and final rules were promulgated by the NRC. This opinion will use the term "Commission" to refer to both the NRC and the predecessor AEC.

[3] Title 5 U. S. C. § 706 states in part:

"The reviewing court shall—

. . . . . .

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

[4] A light-water nuclear powerplant is one that uses ordinary water ($H_2O$), as opposed to heavy water ($D_2O$), to remove the heat generated in the nuclear core. See Van Nostrand's Scientific Encyclopedia 1998, 2008 (D. Considine & G. Considine eds., 6th ed. 1983). The bulk of the reactors in the United States are light-water nuclear reactors. NRC Ann. Rep., Appendix 6 (1980).

cerns the Commission's adoption of a series of generic rules to evaluate the environmental effects of a nuclear powerplant's fuel cycle. At the heart of each rule is Table S–3, a numerical compilation of the estimated resources used and effluents released by fuel cycle activities supporting a year's operation of a typical light-water reactor.[5] The three versions of Table S–3 contained similar numerical values, although the supporting documentation has been amplified during the course of the proceedings.

The Commission first adopted Table S–3 in 1974, after extensive informal rulemaking proceedings. 39 Fed. Reg. 14188 *et seq.* (1974). This "original" rule, as it later came to be described, declared that in environmental reports and impact statements for individual licensing proceedings the environmental costs of the fuel cycle "shall be as set forth" in Table S–3 and that "[n]o further discussion of such environmental effects shall be required." *Id.*, at 14191.[6] The original Table S–3 contained no numerical entry for the long-term

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[5] For example, the tabulated impacts include the acres of land committed to fuel cycle activities, the amount of water discharged by such activities, fossil fuel consumption, and chemical and radiological effluents (measured in curies), all normalized to the annual fuel requirement for a model 1,000 megawatt light-water reactor. See Table S–3, reprinted in the Appendix, *infra*.

[6] Under the Atomic Energy Act of 1954, 68 Stat. 919, as amended, 42 U. S. C. § 2011 *et seq.*, a utility seeking to construct and operate a nuclear powerplant must obtain a separate permit or license at both the construction and the operation stage of the project. After the Commission's staff has examined the application for a construction license, which includes a review of possible environmental effects as required by NEPA, a three-member Atomic Safety and Licensing Board conducts a public adjudicatory hearing and reaches a decision which can be appealed to the Atomic Safety and Licensing Appeal Board and, in the Commission's discretion, to the Commission itself. The final agency decision may be appealed to the courts of appeals. A similar procedure occurs when the utility applies for an operating license, except that a hearing need be held only in contested cases. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 526–527 (1978).

environmental effects of storing solidified transuranic and high-level wastes,[7] because the Commission staff believed that technology would be developed to isolate the wastes from the environment. The Commission and the parties have later termed this assumption of complete repository integrity as the "zero-release" assumption: the reasonableness of this assumption is at the core of the present controversy.

The Natural Resources Defense Council (NRDC), a respondent in the present cases, challenged the original rule and a license issued under the rule to the Vermont Yankee Nuclear Power Corp. The Court of Appeals for the District of Columbia Circuit affirmed Table S–3's treatment of the "front end" of the fuel cycle, but vacated and remanded the portion of the rule relating to the "back end" because of perceived inadequacies in the rulemaking procedures. *Natural Resources Defense Council, Inc.* v. *NRC*, 178 U. S. App. D. C. 336, 547 F. 2d 633 (1976). Judge Tamm disagreed that the procedures were inadequate, but concurred on the ground that the record on waste storage was inadequate to support the zero-release assumption. *Id.*, at 361, 547 F. 2d, at 658.

In *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519 (1978), this Court unanimously reversed the Court of Appeals' decision that the Commission had used inadequate procedures, finding that the Commission had done all that was required by NEPA and the APA and determining that courts generally lack the authority to impose "hybrid" procedures greater than those contemplated by the governing statutes. We remanded for review of whether the original rule was adequately supported by the administrative record, specifically

[7] High-level wastes, which are highly radioactive, are produced in liquid form when spent fuel is reprocessed. Transuranic wastes, which are also highly toxic, are nuclides heavier than uranium that are produced in the reactor fuel. See *Natural Resources Defense Council, Inc.* v. *NRC*, 222 U. S. App. D. C. 9, 16, n. 11, 685 F. 2d, 459, 466, n. 11 (1982).

stating that the court was free to agree or disagree with Judge Tamm's conclusion that the rule pertaining to the "back end" of the fuel cycle was arbitrary and capricious within the meaning of § 10(e) of the APA, 5 U. S. C. § 706. *Id.*, at 536, n. 14.

While *Vermont Yankee* was pending in this Court, the Commission proposed a new "interim" rulemaking proceeding to determine whether to adopt a revised Table S–3. The proposal explicitly acknowledged that the risks from long-term repository failure were uncertain, but suggested that research should resolve most of those uncertainties in the near future. 41 Fed. Reg. 45850–45851 (1976). After further proceedings, the Commission promulgated the interim rule in March 1977. Table S–3 now explicitly stated that solidified high-level and transuranic wastes would remain buried in a federal repository and therefore would have no effect on the environment. 42 Fed. Reg. 13807 (1977). Like its predecessor, the interim rule stated that "[n]o further discussion of such environmental effects shall be required." *Id.*, at 13806. The NRDC petitioned for review of the interim rule, challenging the zero-release assumption and faulting the Table S–3 rule for failing to consider the health, cumulative, and socioeconomic effects of the fuel cycle activities. The Court of Appeals stayed proceedings while awaiting this Court's decision in *Vermont Yankee*. In April 1978, the Commission amended the interim rule to clarify that health effects were not covered by Table S–3 and could be litigated in individual licensing proceedings. 43 Fed. Reg. 15613 *et seq.* (1978).

In 1979, following further hearings, the Commission adopted the "final" Table S–3 rule. 44 Fed. Reg. 45362 *et seq.* (1979). Like the amended interim rule, the final rule expressly stated that Table S–3 should be supplemented in individual proceedings by evidence about the health, socioeconomic, and cumulative aspects of fuel cycle activities. The Commission also continued to adhere to the zero-release

assumption that the solidified waste would not escape and harm the environment once the repository was sealed. It acknowledged that this assumption was uncertain because of the remote possibility that water might enter the repository, dissolve the radioactive materials, and transport them to the biosphere. Nevertheless, the Commission predicted that a bedded-salt repository would maintain its integrity, and found the evidence "tentative but favorable" that an appropriate site would be found. *Id.*, at 45368. The Commission ultimately determined that any undue optimism in the assumption of appropriate selection and perfect performance of the repository is offset by the cautious assumption, reflected in other parts of the Table, that *all* radioactive gases in the spent fuel would escape during the initial 6- to 20-year period that the repository remained open, *ibid.*, and thus did not significantly reduce the overall conservatism of Table S–3. *Id.*, at 45369.

The Commission rejected the option of expressing the uncertainties in Table S–3 or permitting licensing boards, in performing the NEPA analysis for individual nuclear plants, to consider those uncertainties. It saw no advantage in reassessing the significance of the uncertainties in individual licensing proceedings:

> "In view of the uncertainties noted regarding waste disposal, the question then arises whether these uncertainties can or should be reflected explicitly in the fuel cycle rule. The Commission has concluded that the rule should not be so modified. On the individual reactor licensing level, where the proceedings deal with fuel cycle issues only peripherally, the Commission sees no advantage in having licensing boards repeatedly weigh for themselves the effect of uncertainties on the selection of fuel cycle impacts for use in cost-benefit balancing. This is a generic question properly dealt with in the rulemaking as part of choosing what impact values should go into the fuel cycle rule. The Commission concludes, hav-

> ing noted that uncertainties exist, that for the limited purpose of the fuel cycle rule it is reasonable to base impacts on the assumption which the Commission believes the probabilities favor, *i. e.*, that bedded-salt repository sites can be found which will provide effective isolation of radioactive waste from the biosphere." *Id.*, at 45369.

The NRDC and respondent State of New York petitioned for review of the final rule. The Court of Appeals consolidated these petitions for all purposes with the pending challenges to the initial and interim rules.[8] By a divided panel,[9] the court concluded that the Table S–3 rules were arbitrary and capricious and inconsistent with NEPA because the Commission had not factored the consideration of uncertainties surrounding the zero-release assumption into the licensing process in such a manner that the uncertainties could potentially affect the outcome of any decision to license a particular plant. *Natural Resources Defense Council, Inc.* v. *NRC*, 222 U. S. App. D. C. 9, 685 F. 2d 459 (1982). The court first reasoned that NEPA requires an agency to consider all significant environmental risks from its proposed action. If the zero-release assumption is taken as a *finding* that long-term storage poses no significant environmental

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[8] In *Vermont Yankee*, we indicated that the Court of Appeals could consider any additions made to the record by the Commission, and could consolidate review of the initial review with review of later rules. 435 U. S., at 537, n. 14. Consistent with this direction, the parties stipulated that all three versions of the rule could be reviewed on the basis of the whole record. See 222 U. S. App. D. C., at 21, n. 39, 685 F. 2d, at 471, n. 39.

[9] Judge Bazelon wrote the opinion for the court. Judge Wilkey joined the section of the opinion that rejected New York's argument that the waste-disposal technology assumed for calculation of certain effluent release values was economically infeasible. That issue is not before us. Judge Wilkey filed a dissenting opinion on the issues that are under review here. Judge Edwards of the Court of Appeals for the Sixth Circuit, sitting by designation, joined these sections of Judge Bazelon's opinion, and also filed a separate opinion concurring in part and dissenting on the economic infeasibility issue.

risk, which the court acknowledged may not have been the Commission's intent, it found that the assumption represents a self-evident error in judgment and is thus arbitrary and capricious. As the evidence in the record reveals and the Commission itself acknowledged, the zero-release assumption is surrounded with uncertainty.

Alternatively, reasoned the Court of Appeals, the zero-release assumption could be characterized as a *decision-making device* whereby the Commission, rather than individual licensing boards, would have sole responsibility for considering the risk that long-lived wastes will not be disposed of with complete success. The court recognized that the Commission could use generic rulemaking to evaluate environmental costs common to all licensing decisions. Indeed, the Commission could use generic rulemaking to balance generic costs and benefits to produce a generic "net value." These generic evaluations could then be considered together with case-specific costs and benefits in individual proceedings. The key requirement of NEPA, however, is that the agency consider and disclose the actual environmental effects in a manner that will ensure that the overall process, including both the generic rulemaking and the individual proceedings, brings those effects to bear on decisions to take particular actions that significantly affect the environment. The Court of Appeals concluded that the zero-release assumption was not in accordance with this NEPA requirement because the assumption prevented the uncertainties—which were not found to be insignificant or outweighed by other generic benefits—from affecting any individual licensing decision. Alternatively, by requiring that the licensing decision ignore factors that are relevant under NEPA, the zero-release assumption is a clear error in judgment and thus arbitrary and capricious.

We granted certiorari. 459 U. S. 1034 (1982). We reverse.

## II

We are acutely aware that the extent to which this Nation should rely on nuclear power as a source of energy is an important and sensitive issue. Much of the debate focuses on whether development of nuclear generation facilities should proceed in the face of uncertainties about their long-term effects on the environment. Resolution of these fundamental policy questions lies, however, with Congress and the agencies to which Congress has delegated authority, as well as with state legislatures and, ultimately, the populace as a whole. Congress has assigned the courts only the limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes. As we emphasized in our earlier encounter with these very proceedings, "[a]dministrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute . . . , not simply because the court is unhappy with the result reached." *Vermont Yankee*, 435 U. S., at 558.

The controlling statute at issue here is NEPA. NEPA has twin aims. First, it "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action." *Vermont Yankee*, *supra*, at 553. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process. *Weinberger* v. *Catholic Action of Hawaii/Peace Education Project*, 454 U. S. 139, 143 (1981). Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations. See *Strykers' Bay Neighborhood Council* v. *Karlen*, 444 U. S. 223, 227 (1980) *(per curiam)*. Rather, it required only that the agency take a "hard look" at the environmental consequences before taking a major action. See *Kleppe* v. *Sierra Club*, 427 U. S. 390, 410, n. 21 (1976). The role of the courts is simply to ensure that the

agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious. See generally *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 415–417 (1971).

In its Table S–3 rule here, the Commission has determined that the probabilities favor the zero-release assumption, because the Nation is likely to develop methods to store the wastes with no leakage to the environment. The NRDC did not challenge and the Court of Appeals did not decide the reasonableness of this determination, 222 U. S. App. D. C., at 28, n. 96, 685 F. 2d, at 478, n. 96, and no party seriously challenges it here. The Commission recognized, however, that the geological, chemical, physical, and other data it relied on in making this prediction were based, in part, on assumptions which involve substantial uncertainties. Again, no one suggests that the uncertainties are trivial or the potential effects insignificant if time proves the zero-release assumption to have been seriously wrong. After confronting the issue, though, the Commission has determined that the uncertainties concerning the development of nuclear waste storage facilities are not sufficient to affect the outcome of any individual licensing decision.[10]

It is clear that the Commission, in making this determination, has made the careful consideration and disclosure required by NEPA. The sheer volume of proceedings before the Commission is impressive.[11] Of far greater importance,

[10] As the Court of Appeals recognized, 222 U. S. App. D. C., at 31, n. 118, 685 F. 2d, at 481, n. 118, the Commission became increasingly candid in acknowledging the uncertainties underlying permanent waste disposal. Because all three versions of Table S–3 use the same zero-release assumption, and the parties stipulated that the entire record be used in reviewing all three versions, see n. 8, *supra*, we need review only the propriety of the final Table S–3 rule. We leave for another day any general concern with an agency whose initial Environmental Impact Statement (EIS) is insufficient but who later adequately supplements its consideration and disclosure of the environmental impact of its action.

[11] The record includes more than 1,100 pages of prepared direct testimony, two rounds of questions by participants and several hundred pages

the Commission's Statement of Consideration announcing the final Table S–3 rule shows that it has digested this mass of material and disclosed all substantial risks. 44 Fed. Reg. 45367–45369 (1979). The Statement summarizes the major uncertainty of long-term storage in bedded-salt repositories, which is that water could infiltrate the repository as a result of such diverse factors as geologic faulting, a meteor strike, or accidental or deliberate intrusion by man. The Commission noted that the probability of intrusion was small, and that the plasticity of salt would tend to heal some types of intrusions. The Commission also found the evidence "tentative but favorable" that an appropriate site could be found. Table S–3 refers interested persons to staff studies that discuss the uncertainties in greater detail.[12] Given this record

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of responses, 1,200 pages of oral hearings, participants' rebuttal testimony, concluding statements, the 137-page report of the hearing board, further written statements from participants, and oral argument before the Commission. The Commission staff has prepared three studies of the environmental effects of the fuel cycle: Environmental Survey of the Uranium Fuel Cycle, WASH–1248 (Apr. 1974); Environmental Survey of the Reprocessing and Waste Management Portions of the LWR Fuel Cycle, NUREG–0116 (Supp. 1 to WASH–1248) (Oct. 1976) (hereinafter cited as NUREG–0116); and Public Comments and Task Force Responses Regarding the Environmental Survey of the Reprocessing and Waste Management Portions of the LWR Fuel Cycle, NUREG–0216 (Supp. 2 to WASH–1248) (Mar. 1977).

[12] We are reviewing here only the Table S–3 rulemaking proceedings, and do not have before us an individual EIS that incorporates Table S–3. It is clear that the Statement of Consideration supporting the Table S–3 rule adequately discloses the environmental uncertainties considered by the Commission. However, Table S–3 itself refers to other documents but gives only brief descriptions of the environmental effects it encapsulates. There is some concern with an EIS that relies too heavily on separate documents rather than addressing the concerns directly. Although we do not decide whether they have binding effect on an independent agency such as the Commission, it is worth noting that the guidelines from the Council on Environmental Quality in effect during these proceedings required that "care should be taken to ensure that the statement remains an essentially self-contained instrument, capable of being understood by the reader without the need for undue cross reference." 38 Fed. Reg. 20554 (1973), 40

and the Commission's statement, it simply cannot be said that the Commission ignored or failed to disclose the uncertainties surrounding its zero-release assumption.

Congress did not enact NEPA, of course, so that an agency would contemplate the environmental impact of an action as an abstract exercise. Rather, Congress intended that the "hard look" be incorporated as part of the agency's process of deciding whether to pursue a particular federal action. It was on this ground that the Court of Appeals faulted the Commission's action, for failing to allow the uncertainties potentially to "tip the balance" in a particular licensing decision. As a general proposition, we can agree with the Court of Appeals' determination that an agency must allow all significant environmental risks to be factored into the decision whether to undertake a proposed action. We think, however, that the Court of Appeals erred in concluding that the Commission had not complied with this standard.

As *Vermont Yankee* made clear, NEPA does not require agencies to adopt any particular internal decisionmaking structure. Here, the agency has chosen to evaluate generi-

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CFR § 1500.8(b) (1974). The present regulations state that incorporation by reference is permissible if it will not "imped[e] agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described." 40 CFR § 1502.21 (1982). The Court of Appeals noted that NEPA "requires an agency to do more than to scatter its evaluation of environmental damage among various public documents," 222 U. S. App. D. C., at 34, 685 F. 2d, at 484, but declined to find that the incorporation of other documents by reference would invalidate an EIS that used Table S–3 to describe the environmental impact of the fuel cycle. The parties here do not treat this insufficient disclosure argument as a separate argument and, like the Court of Appeals, we decline to strike down the rule on this ground. We do not deny the value of an EIS that can be understood without extensive cross-reference. The staff documents referred to in Table S–3 are public documents, however, and we note that the Commission has proposed an explanatory narrative to accompany Table S–3, which would be included in an individual EIS, that may alleviate some of the concerns of incorporation. See n. 13, *infra*.

cally the environmental impact of the fuel cycle and inform individual licensing boards, through the Table S–3 rule, of its evaluation. The generic method chosen by the agency is clearly an appropriate method of conducting the "hard look" required by NEPA. See *Vermont Yankee*, 435 U. S., at 535, n. 13. The environmental effects of much of the fuel cycle are not plant specific, for any plant, regardless of its particular attributes, will create additional wastes that must be stored in a common long-term repository. Administrative efficiency and consistency of decision are both furthered by a generic determination of these effects without needless repetition of the litigation in individual proceedings, which are subject to review by the Commission in any event. See generally *Ecology Action* v. *AEC*, 492 F. 2d 998, 1002, n. 5 (CA2 1974) (Friendly, J.) (quoting Administrative Conference Proposed Recommendation 73–6).

The Court of Appeals recognized that the Commission has discretion to evaluate generically the environmental effects of the fuel cycle and require that these values be "plugged into" individual licensing decisions. The court concluded that the Commission nevertheless violated NEPA by failing to factor the uncertainty surrounding long-term storage into Table S–3 and precluding individual licensing decisionmakers from considering it.

The Commission's decision to affix a zero value to the environmental impact of long-term storage would violate NEPA, however, only if the Commission acted arbitrarily and capriciously in deciding generically that the uncertainty was insufficient to affect any individual licensing decision. In assessing whether the Commission's decision is arbitrary and capricious, it is crucial to place the zero-release assumption in context. Three factors are particularly important. First is the Commission's repeated emphasis that the zero-release assumption—and, indeed, all of the Table S–3 rule—was made for a limited purpose. The Commission expressly noted its intention to supplement the rule with an explanatory narra-

tive.[13] It also emphasized that the purpose of the rule was not to evaluate or select the most effective long-term waste disposal technology or develop site selection criteria. A separate and comprehensive series of programs has been undertaken to serve these broader purposes.[14] In the proceedings before us, the Commission's staff did not attempt to evaluate the environmental effects of all possible methods of disposing of waste. Rather, it chose to analyze intensively the most probable long-term waste disposal method—burial in a bedded-salt repository several hundred meters below ground—and then "estimate its impacts conservatively, based on the best available information and analysis." 44 Fed. Reg. 45363 (1979).[15] The zero-release assumption cannot be evaluated in isolation. Rather, it must be assessed in relation to the limited purpose for which the Commission made the assumption.

Second, the Commission emphasized that the zero-release assumption is but a single figure in an entire Table, which the

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[13] In March 1981, the Commission submitted a version of the explanatory narrative for public comment as a proposed amendment to the final fuel cycle rule. 46 Fed. Reg. 15154 (1981). The Commission has not yet adopted a final narrative.

[14] In response to *Minnesota* v. *NRC*, 195 U. S. App. D. C. 234, 602 F. 2d 412 (1979), the Commission has initiated a "waste confidence" proceeding to consider the most recent evidence regarding the likelihood that nuclear waste can be safely disposed of and when that, or some other offsite storage solution, can be accomplished. 44 Fed. Reg. 61372 *et seq.* (1979). See *id.*, at 45363. The recently enacted Nuclear Waste Policy Act of 1982, Pub. L. 97–425, 96 Stat. 2201, 42 U. S. C. § 10101 *et seq.* (1982 ed.), has set up a schedule for identifying site locations and a funding mechanism for development of permanent waste repositories. The Environmental Protection Agency has also proposed standards for future waste repositories, 47 Fed. Reg. 58196 *et seq.* (1982).

[15] For example, Table S–3 assumes that plutonium will not be recycled. The Commission noted that, in response to a Presidential directive, it had terminated separate proceedings concerning the possibility of recyling plutonium in mixed oxide fuel. 44 Fed. Reg. 45369, n. 28 (1979). See *In re Mixed Oxide Fuel*, 6 N. R. C. 861 (1977); *In re Mixed Oxide Fuel*, 7 N. R. C. 711 (1978).

Commission expressly designed as a risk-averse estimate of the environmental impact of the fuel cycle. It noted that Table S–3 assumed that the fuel storage canisters and the fuel rod cladding would be corroded before a repository is closed and that all volatile materials in the fuel would escape to the environment.[16] Given that assumption, and the improbability that materials would escape after sealing, the Commission determined that the overall Table represented a conservative (*i. e.*, inflated) statement of environmental impacts. It is not unreasonable for the Commission to counteract the uncertainties in postsealing releases by balancing them with an overestimate of presealing releases.[17] A reviewing court should not magnify a single line item beyond its significance as only part of a larger Table.

Third, a reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential. See, *e. g.*, *Industrial Union Dept.* v. *American Petroleum Institute*, 448 U. S. 607, 656 (1980) (plurality opinion); *id.*, at 705–706 (MARSHALL, J., dissenting).

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[16] The Commission also increased the overall conservatism of the Table by overestimating the amount of fuel consumed by a reactor, underestimating the amount of electricity produced, and then underestimating the efficiency of filters and other protective devices. See Conclusions and Recommendations of the Hearing Board Regarding the Environmental Effects of the Uranium Fuel Cycle, Docket No. Rm 50–3, App. to Pet. for Cert. in No. 82–524, pp. 282a–293a. Additionally, Table S–3, which analyzes both a uranium-recycle and no-recycle system, conservatively lists, for each effluent, the highest of the two releases that would be expected under each cycle. 41 Fed. Reg. 45849, 45850 (1976).

[17] The Court of Appeals recognized that the Commission could weigh certain generic costs and benefits of reactors against each other to produce a generic "net value" to be used in individual licensing proceedings. 222 U. S. App. D. C., at 32, 685 F. 2d, at 482. We see no reason why the Commission does not have equal discretion to evaluate certain environmental costs together to produce a generic net cost.

With these three guides in mind, we find the Commission's zero-release assumption to be within the bounds of reasoned decisionmaking required by the APA. We have already noted that the Commission's Statement of Consideration detailed several areas of uncertainty and discussed why they were insubstantial for purposes of an individual licensing decision. The Table S–3 rule also refers to the staff reports, public documents that contain a more expanded discussion of the uncertainties involved in concluding that long-term storage will have no environmental effects. These staff reports recognize that rigorous verification of long-term risks for waste repositories is not possible, but suggest that data and extrapolation of past experience allow the Commission to identify events that could produce repository failure, estimate the probability of those events, and calculate the resulting consequences. NUREG–0116, at 4–86.[18] The Commission staff also modeled the consequences of repository failure by tracing the flow of contaminated water, and found them to be insignificant. *Id.*, at 4–89 through 4–94. Ultimately, the staff concluded that

> "[t]he radiotoxic hazard index analyses and the modeling studies that have been done indicate that consequences of all but the most improbable events will be small.

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[18] For example, using this approach the staff estimated that a meteor the size necessary to damage a repository would hit a given square kilometer of the earth's surface only once every 50 trillion years, and that geologic faulting through the Delaware Basin in southeast New Mexico (assuming that were the site of the repository) would occur once in 25 billion years. NUREG–0116, at 4–87. The staff determined that a surface burst of a 50 megaton nuclear weapon, far larger than any currently deployed, would not breach the repository. *Ibid.* The staff also recognized the possibility that heat generated by the waste would damage the repository, but suggested this problem could be alleviated by decreasing the density of the stored waste. In recognition that this suggestion would increase the size of the repository, the Commission amended Table S–3 to reflect the greater acreage required under these assumptions. See 44 Fed. Reg. 45369 (1979).

> Risks (probabilities times consequences) inherent in the long term for geological disposal will therefore also be small." *Id.*, at 2–11.

We also find significant the separate views of Commissioners Bradford and Gilinsky. These Commissioners expressed dissatisfaction with the zero-release assumption and yet emphasized the limited purpose of the assumption and the overall conservatism of Table S–3. Commissioner Bradford characterized the bedded-salt repository as a responsible working assumption for NEPA purposes and concurred in the zero-release figure because it does not appear to affect Table S–3's overall conservatism. 44 Fed. Reg. 45372 (1979). Commissioner Gilinsky was more critical of the entire Table, stating that the Commission should confront directly whether it should license any nuclear reactors in light of the problems of waste disposal, rather than hide an affirmative conclusion to this issue behind a table of numbers. He emphasized that the "waste confidence proceeding," see n. 14, *supra*, should provide the Commission an appropriate vehicle for a thorough evaluation of the problems involved in the Government's commitment to a waste disposal solution. For the limited purpose of individual licensing proceedings, however, Commissioner Gilinsky found it "virtually inconceivable" that the Table should affect the decision whether to license, and characterized as "naive" the notion that the fuel cycle effluents could tip the balance in some cases and not in others. 44 Fed. Reg. 45374 (1979).

In sum, we think that the zero-release assumption—a policy judgment concerning one line in a conservative Table designed for the limited purpose of individual licensing decisions—is within the bounds of reasoned decisionmaking. It is not our task to determine what decision we, as Commissioners, would have reached. Our only task is to determine whether the Commission has considered the relevant factors and articulated a rational connection between the facts found and the choice made. *Bowman Transportation, Inc.* v.

*Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 285–286 (1974); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402 (1971). Under this standard, we think the Commission's zero-release assumption, within the context of Table S–3 as a whole, was not arbitrary and capricious.

## III

As we have noted, n. 5, *supra*, Table S–3 describes effluents and other impacts in technical terms. The Table does not convert that description into tangible effects on human health or other environmental variables. The original and interim rules declared that "the contribution of the environmental effects of . . . fuel cycle activities . . . shall be as set forth in the following Table S–3 [and] [n]o further discussion of such environmental effects shall be required." 39 Fed. Reg. 14191 (1974); 42 Fed. Reg. 13806 (1977). Since the Table does not specifically mention health effects, socioeconomic impacts, or cumulative impacts, this declaration does not clearly require or preclude their discussion. The Commission later amended the interim rule to clarify that health effects were not covered by Table S–3 and could be litigated in individual licensing proceedings. In the final rule, the Commission expressly required licensing boards to consider the socioeconomic and cumulative effects in addition to the health effects of the releases projected in the Table. 44 Fed. Reg. 45371 (1979).[19]

The Court of Appeals held that the original and interim rules violated NEPA by precluding licensing boards from considering the health, socioeconomic, and cumulative effects of the environmental impacts stated in technical terms. As does the Commission, we agree with the Court of Appeals that NEPA requires an EIS to disclose the significant health, socioeconomic, and cumulative consequences of the environ-

[19] Of course, just as the Commission has discretion to evaluate generically aspects of the environmental impact of the fuel cycle, it has discretion to have other aspects of the issue decided in individual licensing decisions.

mental impact of a proposed action. See *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U. S. 766 (1983); *Kleppe* v. *Sierra Club*, 427 U. S., at 410; 40 CFR §§ 1508.7, 1508.8 (1982). We find no basis, however, for the Court of Appeals' conclusion that the Commission ever precluded a licensing board from considering these effects.

It is true, as the Commission pointed out in explaining why it modified the language in the earlier rules, that the original Table S–3 rule "at least initially was apparently interpreted as cutting off" discussion of the effects of effluent releases. 44 Fed. Reg. 45364 (1979). But even the notice accompanying the earlier versions stated that the Table was "to be used as a basis for *evaluating* the environmental effects in a cost-benefit analysis for a reactor," 39 Fed. Reg. 14190 (1974) (emphasis added), suggesting that individual licensing boards were to assess the consequences of effluent releases. And when, operating under the initial rule, the Atomic Safety and Licensing Appeal Board suggested the desirability of discussing health effects for comparing nuclear with coal plants, *In re Tennessee Valley Authority (Hartsville Nuclear Plant Units)*, 5 N. R. C. 92, 103, n. 52 (1977), the Commission staff was allowed to introduce evidence of public health consequences. Cf. *In re Public Service Company of Indiana (Marble Hill Nuclear Generating Station)*, 7 N. R. C. 179, 187 (1978).

Respondents have pointed to no case where evidence concerning health or other consequences of the data in Table S–3 was excluded from licensing proceedings. We think our admonition in *Vermont Yankee* applies with equal force here:

> "[W]hile it is true that NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action, it is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions." 435 U. S., at 553.

In short, we find it totally inappropriate to cast doubt on licensing proceedings simply because of a minor ambiguity in the language of the earlier rule under which the environmental impact statement was made, when there is no evidence that this ambiguity prevented any party from making as full a presentation as desired, or ever affected the decision to license the plant.

## IV

For the foregoing reasons, the judgment of the Court of Appeals for the District of Columbia Circuit is

*Reversed.*

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

# APPENDIX TO THE OPINION OF THE COURT

Table S–3.—*Table of Uranium Fuel Cycle Environmental Data*[1]
[Normalized to model LWR annual fuel requirement [WASH–1248]
or reference reactor year [NUREG–0116]]

| Environmental considerations | Total | Maximum effect per annual fuel requirement or reference reactor year of model 1,000 MWe LWR |
|---|---|---|
| NATURAL RESOURCES USE | | |
| Land (acres): | | |
| Temporarily committed [2] | 100 | |
| Undisturbed area | 79 | |
| Disturbed area | 22 | Equivalent to a 110 MWe coal-fired power plant. |
| Permanently committed | 13 | |
| Overburden moved (millions of MT) | 2.8 | Equivalent to 95 MWe coal-fired power plant. |
| Water (millions of gallons): | | |
| Discharged to air | 160 | =2 percent of model 1,000 MWe LWR with cooling tower. |
| Discharged to water bodies | 11,090 | |
| Discharged to ground | 127 | |
| Total | 11,377 | <4 percent of model 1,000 MWe LWR with once-through cooling. |
| Fossil fuel: | | |
| Electrical energy (thousands of MW-hour) | 323 | <5 percent of model 1,000 MWe LWR output. |
| Equivalent coal (thousands of MT) | 118 | Equivalent to the consumption of a 45 MWe coal-fired power plant. |
| Natural gas (millions of scf) | 135 | <0.4 percent of model 1,000 MWe energy output. |
| EFFLUENTS—CHEMICAL (MT) | | |
| Gases (including entrainment): [3] | | |
| $SO_x$ | 4,400 | |
| $NO_x$ [4] | 1,190 | Equivalent to emissions from 45 MWe coal-fired plant for a year. |
| Hydrocarbons | 14 | |
| CO | 29.6 | |
| Particulates | 1,154 | |
| Other gases: | | |
| F | .67 | Principally from $UF_6$ production, enrichment, and reprocessing. Concentration within range of state standards—below level that has effects on human health. |
| HCl | .014 | |
| Liquids: | | |
| $SO_4$ | 9.9 | From enrichment, fuel fabrication, and reprocessing steps. Components that constitute a potential for adverse environmental effect are present in dilute concentrations and receive additional dilution by receiving bodies of water to levels below permissible standards. The constituents that require dilution and the flow of dilution water are:<br>$NH_3$—600 cfs.<br>$NO_3$—20 cfs.<br>Fluoride—70 cfs. |
| $NO_3$ | 25.8 | |
| Fluoride | 12.9 | |
| Ca++ | 5.4 | |
| Cl- | 8.5 | |
| Na+ | 12.1 | |
| $NH_3$ | 10.0 | |
| Fe | .4 | |
| Tailings solutions (thousands of MT) | 240 | From mills only—no significant effluents to environments. |
| Solids | 91,000 | Principally from mills—no significant effluents to environment. |
| EFFLUENTS—RADIOLOGICAL (CURIES) | | |
| Gases (including entrainment): | | |
| Rn-222 | | Presently under reconsideration by the Commission. |

| Environmental considerations | Total | Maximum effect per annual fuel requirement or reference reactor year of model 1,000 MWe LWR |
|---|---|---|
| EFFLUENTS—RADIOLOGICAL—(Continued) (CURIES) | | |
| Gases (including entrainment): | | |
| Ra-226 | .02 | |
| Th-230 | .02 | |
| Uranium | .034 | |
| Tritium (thousands) | 18.1 | |
| C-14 | 24 | |
| Kr-85 (thousands) | 400 | |
| Ru-106 | .14 | Principally from fuel reprocessing plants. |
| I-129 | 1.3 | |
| I-131 | .83 | |
| Tc-99 | | Presently under consideration by the Commission. |
| Fission products and transuranics | .203 | |
| Liquids: | | |
| Uranium and daughters | 2.1 | Principally from milling—included tailings liquor and returned to ground—no effluents, therefore, no effect on environment. |
| Ra-226 | .0034 | From $UF_6$ production. |
| Th-230 | .0015 | |
| Th-234 | .01 | From fuel fabrication plants—concentration 10 percent of 10 CFR 20 for total processing 26 annual fuel requirements for model LWR. |
| Fission and activation products | $5.9 \times 10^{-6}$ | |
| Solids (burned on site): | | |
| Other than high level (shallow) | 11,300 | 9,110 Ci comes from low level reactor wastes and 1,500 Ci comes from reactor decontamination and decommissioning—buried at land burial facilities. 600 Ci comes from mills—included in tailings returned to ground. Approximately 60 Ci comes from conversion and spent fuel storage. No significant effluent to the environment. |
| TRU and HLW (deep) | $1.1 \times 10^{7}$ | Buried at Federal Repository. |
| Effluents—Thermal (billions of British thermal units) | 4,063 | <5 percent of model 1,000 MWe LWR. |
| Transportation (person-rem): | | |
| Exposure of workers and general public | 2.5 | |
| Occupational exposure (person-rem) | 22.6 | From reprocessing and waste management. |

[1] In some cases where no entry appears it is clear from the background documents that the matter was addressed and that, in effect, the Table should be read as if a specific zero entry had been made. However, there are other areas that are not addressed at all in the Table. Table S–3 does not include health effects from the effluents described in the Table, or estimates of releases of Radon-222 from the uranium fuel cycle or estimates of Technetium-99 released from waste management or reprocessing activities. These issues may be the subject of litigation in the individual licensing proceedings.

Data supporting this table are given in the "Environmental Survey of the Uranium Fuel Cycle," WASH–1248, April 1974; the "Environmental Survey of the Reprocessing and Waste Management Portion of the LWR Fuel Cycle," NUREG–0116 (Supp. 1 to WASH–1248); the "Public Comments and Task Force Responses Regarding the Environmental Survey of the Reprocessing and Waste Management Portions of the LWR Fuel Cycle," NUREG–0216 (Supp. 2 to WASH–1248); and in the record of the final rulemaking pertaining to Uranium Fuel Cycle Impacts from Spent Fuel Reprocessing and Radioactive Waste Management, Docket RM–50–3. The contributions from reprocessing, waste management and transportation of wastes are maximized for either of the two fuel cycles (uranium only and no recycle). The contribution from transportation excludes transportation of cold fuel to a reactor and of irradiated fuel and radioactive wastes from a reactor which are considered in Table S–4 of § 51.20(g). The contributions from the other steps of the fuel cycle are given in columns A–E of Table S–3A of WASH–1248.

[2] The contributions to temporarily committed land from reprocessing are not prorated over 30 years, the complete temporary impact accrues regardless of whether the plant services one reactor for one year or 57 reactors for 30 years.

[3] Estimated effluents based upon combustion of equivalent coal for power generation.

[4] 1.2 percent from natural gas use and process.

10 CFR § 51.20(e) (1982).

# MAGGIO, WARDEN *v.* FULFORD

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

No. 82–1408. Decided June 6, 1983

After respondent's murder conviction was affirmed by the Louisiana Supreme Court, and after he had exhausted state postconviction remedies, he was denied habeas corpus relief in Federal District Court. The Court of Appeals reversed, apparently holding that, under 28 U. S. C. § 2254(d)(8), the state trial court's determination that respondent was competent to stand trial was not "fairly supported by the record." The state court had denied respondent's motion for appointment of a competency commission, which motion was filed on the morning of trial and was supported solely by a psychiatrist's testimony—based upon a brief prison cell interview on the preceding day—that respondent had paranoid delusions that rendered him incompetent to stand trial, respondent having said that he was withholding from his counsel the names of alibi witnesses for fear that they would be arrested and prevented from testifying.

*Held:* The Court of Appeals erroneously substituted its own judgment as to the credibility of witnesses for that of the Louisiana courts—a prerogative which 28 U. S. C. § 2254 does not allow it. The trial judge's conclusion as to respondent's competency was "fairly supported by the record," which showed that the judge based his conclusion on, *inter alia*, his observation of respondent's conduct both before and during trial; his inferences regarding the fact that respondent's alleged refusal to disclose his alibi witnesses either never occurred or was remedied; and his conclusion that respondent's surprise, 11th-hour motion for appointment of a competency commission was merely a subterfuge to attempt to obtain a severance to avoid being tried with codefendants.

Certiorari granted; 692 F. 2d 354, reversed.

PER CURIAM.

Respondent John Fulford was found guilty of murder by a Louisiana jury in 1972. His conviction was affirmed on appeal to the Louisiana Supreme Court, *State* v. *Nix*, 327 So. 2d 301 (1975), and, after exhausting state postconviction remedies, he sought federal habeas corpus relief. The

United States District Court for the Western District of Louisiana denied relief, App. to Pet. for Cert. A–21, but the Court of Appeals for the Fifth Circuit reversed, holding that "we cannot, with the certitude befitting a federal court, affirm that Fulford possessed the mental competency to participate meaningfully in his trial." 692 F. 2d 354, 361 (1982) (footnote omitted). We grant the motion of respondent for leave to proceed *in forma pauperis* and the petition for certiorari, and reverse the judgment of the Court of Appeals.

The bone of contention in this case was respondent's competency to stand trial more than 11 years ago. On the morning of trial respondent's counsel moved to appoint a commission to inquire into respondent's competency to stand trial.[1] At the same time counsel moved for a severance. Neither counsel nor respondent had previously broached the question of competency, and nothing appears in the record which suggests that respondent had a history of mental or emotional difficulties.[2] The sole evidence submitted in support of respondent's motion for appointment of a competency commission was the testimony of one Dr. McCray, a local psychiatrist. Until the morning immediately preceding trial, McCray had never seen, nor, so far as the record reveals,

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[1] Respondent's request was apparently submitted pursuant to La. Code Crim. Proc. Ann., Art. 644 (West 1981), which empowers the trial court to appoint a commission of at least two qualified physicians to "examine and report upon the mental condition of a defendant."

Likewise, Art. 643 provides that the "trial court may, in the exercise of its sound discretion, order a mental examination of the defendant when it has reasonable ground to doubt the defendant's mental capacity to proceed."

[2] In his motion for appointment of a competency commission, respondent's counsel alleged: "It has further been reported to counsel that the defendant has been placed before a lunacy commission in the State of Florida in 1953, and was declared a borderline case. . . . [T]he aforesaid report is of this date unconfirmed and counsel had requested a record check in the State of Florida to determine if such a hearing had been convened and the result thereof." 4 Record 933. The record contains no other mention of this incident, much less confirmation of the allegation.

heard of, respondent. Based upon a prison cell interview of approximately one hour the day before trial, McCray testified in the following fashion, as summarized by the Court of Appeals:

> "Dr. McCray noted that an evaluation usually requires several sessions as well as a supporting evaluation from a clinical psychologist. Finding Fulford to be well oriented to time, place and person, Dr. McCray nevertheless testified that Fulford had paranoid delusions which rendered him incompetent to stand trial. Specifically, Fulford had told Dr. McCray that he was withholding the names of alibi witnesses who could prove his innocence for fear that they would be arrested and prevented from testifying in his behalf." *Id.*, at 360.

While the Court of Appeals was less explicit than it might have been on the issue, we think a fair reading of its opinion indicates that it concluded under 28 U. S. C. § 2254(d)(8) that the state court's determination that respondent was competent to stand trial was not "fairly supported by the record." See 692 F. 2d, at 360–361; *Sumner* v. *Mata*, 449 U. S. 539 (1981). We believe that, in reaching this conclusion, the Court of Appeals erroneously substituted its own judgment as to the credibility of witnesses for that of the Louisiana courts—a prerogative which 28 U. S. C. § 2254 does not allow it. *Marshall* v. *Lonberger*, 459 U. S. 422 (1983).

The Louisiana trial judge explained his refusal to order a competency hearing in two *per curiam* opinions, which contained the following factual findings relevant to his decision. First, the trial judge was convinced that respondent was "oriented as to time, date and place and was cognizant of everything around him." 692 F. 2d, at 360. The judge further noted that Fulford's conduct during and after the trial "thoroughly convinced" him that respondent was competent and able to assist in his defense. The trial judge did not "deem it necessary to fill in all the other matters that appeared throughout the trial and all of the post-trial motions that have

been filed because the record will adequately represent this fact." 4 Record 953. As set out in the margin, there is substantial support for the trial judge's statement.[3] Third, the trial judge concluded that the only basis advanced by McCray for his tentative conclusion that respondent suffered from

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[3] For example, two days after he moved for appointment of a competency commission, respondent informed the trial judge that "I can defend myself, and that is the point I'd like to get across." Likewise, at a sentencing hearing in January 1974 Fulford sought permission to pursue appeal of his conviction *pro se*. After the presiding judge expressed reluctance at permitting this, because of Fulford's earlier assertion of incompetence, Fulford stated:

"I gave this a great deal of thought prior to coming here . . . I may talk funny, think I'm from the cotton patch and perhaps I am, but as far as protecting my own appeal that is my election and I believe I can do it artfully and I believe I will have a reversal in the Supreme Court and be awarded a new trial. And I have given this a great deal of thought and I have made the election, it is my right, it is my future, and if I blow it [no one] has blowed it but me, I fully understand my rights, I fully understand what I am doing, what I am facing and the consequences of it and with that in mind I still elect to defend my own self on appeal and I ask you to grant that motion and grant me a constitutional right to do this." 24 Record 2793–2794.

The irony of respondent's change of heart regarding his state of mind was not lost on him. In his habeas petition in District Court respondent noted: "It is awk[w]ard for petitioner to argue in this petition that he was unable to assist in his defense during trial, as attested by Dr. McCray," and "then seek the right to defend pro se during the course of trial." Pet. for Habeas Corpus in No. 76–748 (WD La.), p. 15. The "awkwardness" of respondent's position becomes even more apparent in light of the arguments advanced in support of his claim to a right to have proceeded *pro se* in trial court. Respondent argued that he "was denied the right to defend pro se with-out *[sic]* counsel by Judge Veron after petitioner voluntarily and intelligently elected to do so." *Id.*, at 16.

As the pleadings and briefs filed by respondent in state and federal courts indicate, his legal abilities are scarcely those of a mental incompetent. As one member of the Louisiana Supreme Court has observed, respondent "has demonstrated skill and experience in criminal law in writ applications filed in this Court." *State* v. *Fulford*, 299 So. 2d 789 (1974) (Nixon, J., dissenting).

paranoid delusions—respondent's failure to inform his lawyers of the identities of two alibi witnesses—was unfounded. These two witnesses testified in respondent's behalf less than a week after Fulford convinced McCray that he was withholding the identities of his alibi witnesses. As the Louisiana Supreme Court observed, "it is clear that Mr. Fulford did not withhold the names of his witnesses, and was able to assist his counsel in the preparation and conduct of his defense." 327 So. 2d, at 324.

Most importantly for our purposes, the trial judge concluded that respondent's surprise, 11th-hour motion for appointment of a competency commission "was just a subterfuge on the part of this defendant to attempt to keep from going to trial so that he would be tried at a different time from the other defendants." *Ibid.* The trial judge explained:

> "During the course of the jury selection in this matter, for the two days that it took to select this jury, this Court noted that every time either counsel for defendants would approach defendant Fulford to converse with him concerning the jury selection, defendant Fulford would turn his head in the other direction. I got the distinct impression from what was going on that Mr. Fulford was attempting to play a game with the Court in order to try to get his case severed from the other defendants. I further gathered from the legal maneuverings that there was an attempt to sever Fulford from the other two defendants so that some additional legal maneuvering might be made at some later time. I might further add, that contrary to what the doctor testified at the hearing to determine whether Mr. Fulford was unable to assist counsel in his defense, that the alleged eye witnesses, which Mr. Fulford stated would prove his innocence, were called and did testify as to his alleged alibi. Throughout the entire trial Mr. Fulford was accorded a complete and full defense and I saw nothing from the beginning of the trial to the end that in any

way detracted from any of Mr. Fulford's rights. I hesitate to state but I do feel that this was a plan designed by Mr. Fulford to try to disrupt his trial and to prevent him from being tried with his co-defendants." 5 Record 1024–1025.

Based upon these observations, the trial judge concluded that there was insufficient likelihood that respondent was incompetent to warrant appointment of a commission.

The Louisiana Supreme Court affirmed, relying on the arguments advanced by the trial judge, and noting that his "findings are amply supported by the record." 327 So. 2d, at 324. The Supreme Court of Louisiana also observed that the trial judge had the "ability . . . to observe Mr. Fulford at length during the preliminary hearings and the trial of this case." *Ibid.* It also took note of the "limited time" that Dr. McCray spent with respondent.

The Court of Appeals apparently found all of this unpersuasive. There is no dispute as to the proper legal standard to be applied for determining the correctness of the trial court's actions, see *Pate* v. *Robinson*, 383 U. S. 375, 386 (1966); *Drope* v. *Missouri*, 420 U. S. 162 (1975). Thus, the three judges of the Court of Appeals appear to have differed from the Louisiana trial judge, the seven Justices of the Supreme Court of Louisiana, and the Federal District Judge, only with respect to evaluation of the evidence before the trial court. The principal explanation offered by the Court of Appeals for its refusal to accept the previous judicial assessments of this testimony are contained in the following excerpt from its opinion:

"The State urges that Fulford had the capability to assist his attorney but simply refused to do so. But if this refusal was based on his paranoid delusions, it cannot be successfully urged that Fulford was actually capable of assisting counsel.

"A more troubling aspect of the present issue is the trial court's finding that Fulford was trying to delay the

trial, and possibly obtain a severance. Given the timing of the motion, and a subsequent request by Fulford for a severance, we would uphold the trial court if it had been confronted by a barebones motion, with only the statement of Fulford's attorney as support. That is not the present case. Dr. McCray's testimony was unimpeached. His qualifications as a psychiatrist were unchallenged by the prosecution. Although his examination was brief, it was precisely because of this brevity that he suggested further evaluation was needed. On these facts, we believe that the state court committed constitutional error in not conducting further competency proceedings." 692 F. 2d, at 361.

Before a federal habeas court undertakes to overturn factual conclusions made by a state court, it must determine that these conclusions are not "fairly supported by the record." 28 U. S. C. § 2254(d)(8). Under this standard we have not the slightest hesitation in saying that the trial court's conclusion as to Fulford's competency was "fairly supported by the record." The trial judge's observation of Fulford's conduct, both prior to and during trial; his observation of the testimony of Dr. McCray and the statements of respondent's counsel regarding his refusal to cooperate with them; his inferences regarding the fact that Fulford's alleged refusal to disclose his alibi witnesses either never occurred, or was remedied; the weight he attributed to the unannounced, last-minute timing of the motion for appointment of a competency commission; and the inferences to be drawn from the failure of the defense to pursue psychiatric examination beyond the "tentative" stage, despite ample time and opportunity to do so, all provide ample record support for the trial judge's conclusion that there was insufficient question as to Fulford's competence to warrant appointment of a commission.

The Court of Appeals apparently concluded that the trial judge was obligated to credit both the factual statements and

the ultimate conclusions of Dr. McCray solely because he was "unimpeached." 692 F. 2d, at 361. This is simply not the law.

> "'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . .'" *United States* v. *Oregon Medical Society*, 343 U. S. 326, 339 (1952), quoted in *Marshall* v. *Lonberger*, 459 U. S., at 434.

We are convinced for the reasons stated above that the question whether the trial court's conclusions as to respondent's competency were "fairly supported by the record" must be answered in the affirmative.

The judgment of the Court of Appeals is accordingly

*Reversed.*

JUSTICE WHITE, concurring in the judgment.

The "fairly supported by the record" standard of 28 U. S. C. § 2254(d)(8) applies only to underlying questions of background fact. Questions of law, and mixed questions of law and fact, such as the "ultimate question as to the constitutionality of . . . pretrial identification procedures," *Sumner* v. *Mata*, 455 U. S. 591, 597 (1982), or the question whether a guilty plea is voluntary for purposes of the Constitution, *Marshall* v. *Lonberger*, 459 U. S. 422, 431–432 (1983), may be reviewed more independently. In deciding such questions, "the federal court may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard." *Mata*, 455 U. S., at 597. But only the "fact[s] that underlie th[e] ultimate conclusion" are governed by § 2254(d)(8). *Ibid.*

Our cases have treated the ultimate question whether a defendant is competent to stand trial as at least a mixed

question of law and fact. *Drope* v. *Missouri*, 420 U. S. 162, 174–175, 175, n. 10 (1975); *Pate* v. *Robinson*, 383 U. S. 375, 385–386 (1966). See also *White* v. *Estelle*, 459 U. S. 1118 (1983) (MARSHALL, J., dissenting from denial of certiorari). Our precedents notwithstanding, the Court today reverses the Court of Appeals on the strength of the conclusion that "the trial court's conclusion as to Fulford's competency was 'fairly supported by the record.'" *Ante*, at 117. But since competency is not a purely factual question, § 2254(d)(8) and its "fairly supported" standard are inapplicable. The Court offers no explanation whatsoever for the failure to follow *Drope* and *Pate*, and it would certainly not be appropriate to overrule these cases summarily. If there is any doubt as to the proper classification of the competency question, we should grant certiorari and set this case for oral argument.

Since the Court opts in favor of summary action, however, I cast my vote accordingly. Absent plenary reconsideration of *Drope* and *Pate*, I cannot agree with the Court that competency is a question of historical fact and is to be treated as such by the courts of appeals in reviewing district court judgments in criminal cases or by the district courts in federal habeas corpus proceedings involving state-court convictions. However, I agree with the Court's ultimate conclusion that the judgment of the Court of Appeals must be reversed.

The Court details the undisputed background facts that support the trial judge's conclusion that there was insufficient question as to Fulford's competence to warrant appointment of a competency commission: "Fulford's conduct, both prior to and during trial; . . . the fact that Fulford's alleged refusal to disclose his alibi witnesses either never occurred, or was remedied; . . . the unannounced, last-minute timing of the motion for appointment of a competency commission; and . . . the failure of the defense to pursue psychiatric examination beyond the 'tentative' stage, despite ample time and opportunity to do so." *Ante*, at 117. Dr. McCray's testimony, on the other hand, indicated that there was a genuine

doubt as to Fulford's competency, but, as the Court points out, *ante*, at 117–118, the trial court was under no obligation to credit this testimony, and it did not do so. Hence, even considering the ultimate competency question as a freely reviewable pure question of law, I conclude that the trial judge's refusal to appoint a commission did not deprive Fulford of his federal constitutional rights, and I therefore concur in the judgment.

JUSTICE BRENNAN, with whom JUSTICE STEVENS joins, dissenting.

I agree with JUSTICE WHITE and JUSTICE MARSHALL that § 2254(d) does not apply to questions of competency. I also agree with JUSTICE MARSHALL that it is entirely inappropriate to dispose of this case on nothing more than the necessarily limited briefing filed by the parties to date. I do not agree, however, with JUSTICE MARSHALL's suggestion that we might decide the case with further briefing but not oral argument. Accepting the majority's premise that this case merits this Court's attention at all, I would grant the petition for certiorari and set the case for argument.

JUSTICE MARSHALL, dissenting.

I dissent.

The Court is simply wrong in assuming that 28 U. S. C. § 2254(d) applies to the question whether there is "a sufficient doubt of [the defendant's] competence to stand trial to require further inquiry on the question." *Drope* v. *Missouri*, 420 U. S. 162, 180 (1975). Our decisions clearly establish that whether a competence hearing should have been held is a mixed question of law and fact which is subject to full federal review. *Id.*, at 174–175, 179–181; *Pate* v. *Robinson*, 383 U. S. 375, 385–386 (1966).

Even if the Court were correct in assuming that 28 U. S. C. § 2254(d)(8) applies, there would be no justification for the Court's summary disposition of this case. This Court's Rules

governing petitions for certiorari were designed to help elicit the information necessary to decide whether review by certiorari is warranted. They were not designed to permit a decision on the merits on the basis of the certiorari papers.

In particular, Rule 22.2 states that "a brief in opposition shall be as short as possible." In compliance with this Rule the indigent respondent filed a mimeographed brief in opposition of seven pages, a substantial portion of which is devoted to the argument that the petition presents no question worthy of review by this Court—an argument that might well have been expected to prevail given the traditional learning that this Court "is not, and never has been, primarily concerned with the correction of errors in lower court decisions."[1] Only a few paragraphs of the brief in opposition discuss the record.[2]

If the Court is to decide whether the record supports the trial court's conclusion that no competence hearing was necessary, it should at least afford the parties a chance to brief that issue. This could be done by merely issuing an order (1) noting that the case will be disposed of without oral argument and (2) permitting both sides to file briefs on the merits. I do not think this is asking too much.

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[1] Address by Chief Justice Vinson Before American Bar Association, Sept. 7, 1949, 69 S. Ct. v, vi (1949).

[2] With the full resources of a sovereign State, petitioner filed a printed petition for certiorari plus a full printed appendix. Petitioner's papers were signed by the State Attorney General, the District Attorney, and two Assistant District Attorneys.

# BANKAMERICA CORP. ET AL. *v.* UNITED STATES

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

No. 81–1487. Argued January 19, 1983—Decided June 8, 1983

The fourth paragraph of § 8 of the Clayton Act provides that "[n]o person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers," if such corporations are competitors. The United States brought test cases, consolidated in Federal District Court, against petitioners, certain banks, bank holding companies, mutual life insurance companies, and individuals who each served on the board of directors of one of the banks or bank holding companies and one of the insurance companies. It was stipulated that the interlocked banks and insurance companies compete in the interstate market for mortgage and real estate loans. The Government asserted that the interlocking directorates violated the fourth paragraph of § 8, arguing that the "other than banks" clause simply prevented overlapping regulation of interlocks between banks, which are separately regulated in the first three paragraphs of § 8. The District Court entered summary judgment for petitioners, holding that the statutory proscription applies only to two corporations, neither of which is a bank. The Court of Appeals reversed.

*Held:* The fourth paragraph of § 8 does not bar interlocking directorates between a bank and a competing insurance company. Pp. 126–140.

(a) The most natural reading of the language of the statute is that the interlocked corporations must all be corporations "other than banks" and that thus the fourth paragraph of § 8 does not by its express terms prohibit interlocking directorates between a bank and a competing nonbanking corporation. This reading of the statute is reinforced both by the structure of the Clayton Act and by the structure of the fourth paragraph of § 8. Pp. 128–130.

(b) Great weight is to be given to the contemporaneous interpretation of a challenged statute by an agency charged with its enforcement, but for over 60 years prior to its present interpretation of § 8 the Government made no attempt to apply the statute to interlocks between banks and insurance companies, even though such interlocks were widespread and a matter of public record throughout the period. Mere failure of administrative agencies to act is in no sense a binding administrative

interpretation that the Government lacks the authority to act, but in the circumstances of this case, the Government's failure for over 60 years to exercise the power it now claims strongly suggests that it did not read § 8 as granting such power. Moreover, the business community directly affected, the enforcing agencies, and the Congress all have read the statute the same way for 60 years, thus strongly supporting the conclusion that Congress intended § 8 to be interpreted according to its plain meaning. Pp. 130–133.

(c) If any doubt remains as to the meaning of the statute, that doubt is removed by the legislative history. The evolution of the bill, along with the remarks in committee and on the floor, rebuts the Government's claim that Congress intended to reach bank-nonbank interlocks in the fourth paragraph of § 8. Pp. 133–140.

656 F. 2d 428, reversed.

BURGER, C. J., delivered the opinion of the Court, in which BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 140. POWELL, J., took no part in the decision of the case.

*William Simon* argued the cause for petitioners. With him on the briefs were *John S. Kingdon*, *J. Randolph Wilson*, *William H. Allen*, *Virginia G. Watkin*, *Edward Wolfe*, *H. Helmut Loring*, *Robert D. Raven*, *William Alsup*, *Ira M. Millstein*, and *Richard E. Guggenhime, Sr.*

*Edwin S. Kneedler* argued the cause for the United States. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Baxter*, *Deputy Solicitor General Shapiro*, *Barry Grossman*, *Catherine G. O'Sullivan*, and *Geoffrey S. Stewart.**

CHIEF JUSTICE BURGER delivered the opinion of the Court:

The question presented is whether § 8 of the Clayton Act bars interlocking directorates between a bank and a competing insurance company.

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**Briefs of amici curiae* urging reversal were filed by *Erwin N. Griswold*, *Jack H. Blaine*, and *Allen R. Caskie* for the American Council of Life Insurance; and by *John L. Warden* for the New York Clearing House Association et al.

I

In 1975, the United States brought these companion test cases (now consolidated) against 10 corporations and 5 individuals. The corporations were three banks and their three respective holding companies, and four mutual life insurance companies. The five individuals each served on the board of directors of one of the banks or bank holding companies and one of the insurance companies. It was stipulated that the interlocked banks and insurance companies compete in the interstate market for mortgage and real estate loans.

The Government asserts that interlocking directorates between banks and insurance companies violate § 8 of the Clayton Act, 38 Stat. 732, as amended, 15 U. S. C. § 19. The fourth paragraph of § 8, on which the Government relies, provides:

> "No person at the same time shall be a director in *any two or more corporations*, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, *other than banks, banking associations, trust companies, and common carriers* subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws." (Emphasis added.)

In short, this statute forbids a person to serve simultaneously on the boards of directors of two or more corporations that meet certain specifications, namely, that the corporations be engaged in commerce, at least one of them having capital, surplus, and undivided profits worth more than $1 million, that they be competitors, and that they be

"other than banks, banking associations, trust companies, and common carriers . . . ."

According to the Government, the language "[n]o person at the same time shall be a director in any two or more corporations . . . other than banks" prohibits interlocking directorates between any two or more competing corporations, but excludes from this general prohibition interlocking directorates between banks. The Government argues that the purpose of the "other than banks" clause was simply to prevent overlapping regulation of interlocks between banks, which are separately regulated in the first three paragraphs of § 8. Thus, it interprets the fourth paragraph of § 8 to reach interlocks between banks and nonbanks, which interlocks are otherwise unregulated. Petitioners respond that the "other than banks" clause expressly excludes interlocking directorates involving banks from the scope of the fourth paragraph of § 8.

On cross-motions for summary judgment, the United States District Court for the Northern District of California granted summary judgment for petitioners and dismissed the Government's suits. *United States* v. *Crocker National Corp.*, 422 F. Supp. 686 (1976). The District Court held:

> "[A] normal reading of the statutory language 'two . . . corporations . . . other than banks' compels the conclusion that the statute applies only to two corporations, neither of which is a bank.
>
> . . . . . .
>
> "[A]n ordinary reading of the statutory prohibition '[n]o person . . . shall [serve as] a director in any two or more corporations . . . other than banks' means that banks were not to be subject to this prohibition." *Id.*, at 689–690.

Although the District Court saw no need for further factual inquiry in light of the "clear statutory language," *id.*, at 690, it observed that this interpretation of the statute was "confirmed by 60 years of administrative and Congressional inter-

pretation, as well as by the legislative history underlying section 8." *Id.*, at 703.

A divided Court of Appeals reversed. *United States* v. *Crocker National Corp.*, 656 F. 2d 428 (CA9 1981). Unlike the District Court, the majority viewed the statutory language as ambiguous. It stated that the "other than banks" clause could be interpreted equally plausibly to mean either "two or more corporations [none of which are] banks," or "two or more corporations [not all of which are] banks." *Id.*, at 434 (emphasis deleted). Relying chiefly on its view of the underlying policy of the Clayton Act, the Court of Appeals held that the fourth paragraph of § 8 should be interpreted to bar all interlocking directorates between banks and competing nonbanking corporations.

In the view of the Court of Appeals, petitioners' position left a "gap" in the coverage of § 8. Discerning nothing in the legislative history directly bearing on the applicability of § 8 to interlocking directorates between banks and nonbanking corporations, the Court of Appeals relied on the broad purpose of Congress to condemn "interlocking directorates between large competing corporations," *id.*, at 439, as support for an interpretation of § 8 leaving no "loopholes." It thus interpreted the "other than banks" language to refer back to the interlocks between banks regulated in the preceding paragraphs of § 8; this interpretation left interlocking directorates between banks and nonbanks subject to the general bar of the fourth paragraph of § 8.[1]

We granted certiorari, 456 U. S. 1005 (1982), and we reverse.

## II

The Clayton Act of 1914 was passed in a period when Congress was focusing on the perceived evils of corporate

[1] The Court of Appeals also rejected petitioners' claim that the interlocked insurance companies and bank holding companies were not "competitors" within the meaning of § 8. 656 F. 2d, at 450–451. In light of our disposition of the case, we need not reach this issue.

bigness and monopoly. President Wilson, for example, had made the "trusts" a core issue of his 1912 campaign; Congress followed up with the Pujo Committee investigation into the investment banking trust. See generally Travers, Interlocks in Corporate Management and the Antitrust Laws, 46 Texas L. Rev. 819, 824–829 (1968). Interlocks between large corporations were seen in the public debate as *per se* antagonistic to the public interest; many, including President Wilson, called for legislation that would, among other things, ban all kinds of interlocks. Interlocks were condemned regardless of whether the relationship between the corporations was horizontal or vertical; whether it was accomplished through the sharing of personnel, including directors and officers; or whether it was achieved through interlocking stock holdings or other indirect forms of domination. See, *e. g.*, S. Rep. No. 698, 63d Cong., 2d Sess., 15 (1914); Hearings on Trust Legislation before the House Committee on the Judiciary, 63d Cong., 2d Sess., 816, 818–820, 823, 925 (1914) (hereafter Trust Hearings). Plainly, these were policy matters appropriate for Congress to resolve.

However, when the Clayton Act was enacted, its scope was considerably less comprehensive than many of the proposals pressed upon Congress. Rather than enacting a broad scheme to ban all interlocks between potential competitors, Congress approached the problem of interlocks selectively, limiting both the classes of corporations and the kinds of interlocks subject to regulation.

Three classes of business organizations are regulated by the Clayton Act's provisions concerning corporate interlocks and each class is subject to different restraints. Clayton Act §§ 8 and 10, 15 U. S. C. §§ 19 and 20. Section 10 regulates, but does not prohibit, certain types of interlocks between common carriers and various other corporations with which the carrier has a supplier or customer relationship; it does not regulate horizontal interlocks between competing common carriers. The first three paragraphs of § 8 regulate inter-

locks between banks and trust companies that meet certain geographic and other requirements. These provisions bar a wide range of personnel interlocks, including common directors, officers, and employees. The fourth paragraph of § 8 concerns the class of competing corporations "other than banks, banking associations, trust companies, and common carriers"; it prohibits only shared directors between competing corporations and does not bar any other kind of personnel interlock or any kind of vertical interlock. It is against this pattern of specific and limited regulation of corporate interlocks that we approach the narrow statutory question presented.

The starting point, as always, is the language of the statute. The narrow question here is whether the fourth paragraph of § 8 of the Clayton Act bars interlocking directorates involving a bank and a nonbanking corporation with which it competes. The language of the statute is unambiguous in prohibiting interlocking directorates between "two or more corporations . . . other than banks." The most natural reading of this language is that the interlocked corporations must all be corporations "other than banks." It is self-evident that a bank and a nonbanking corporation are not both corporations "other than banks." Thus, the fourth paragraph of § 8 by its express terms does not prohibit interlocking directorates between a bank and a competing nonbanking corporation. This reading of the statute is reinforced both by the structure of the Clayton Act and by the structure of the fourth paragraph of § 8.

The Clayton Act selectively regulates interlocks with respect to three different classes of business organizations: those interlocks between banks are covered in the first three paragraphs of § 8 and those interlocks involving common carriers are covered by § 10. Viewed in this framework, the purpose of the "other than" clause in the fourth paragraph of § 8 was to exclude altogether interlocking directorates involving either banks or common carriers. Moreover, this inter-

pretation is the only one consistent with the treatment of "common carriers" in the "other than" clause.

The Government does not dispute that the language "two or more corporations . . . other than banks [or] common carriers" completely excludes from the fourth paragraph any interlocking directorates in which any of the corporations involved is a common carrier; it should follow, logically, that it also excludes interlocking directorates involving banks. Put another way, the language "two or more corporations . . . other than banks [or] common carriers" means "two or more corporations *none of which is a common carrier.*" To be consistent, that language must also be interpreted to mean "two or more corporations *none of which is a bank.*"

In our view, it strains the meaning of ordinary words to read "two or more corporations other than *common carriers*" to mean something completely different from "two or more corporations other than *banks*," as the Court of Appeals did. 656 F. 2d, at 442–443. In *Mohasco Corp.* v. *Silver*, 447 U. S. 807, 826 (1980), for example, we rejected as unreasonable the claim that the word "filed" could have two different meanings in two separate subsections of the same statute. Similarly, we reject as unreasonable the contention that Congress intended the phrase "other than" to mean one thing when applied to "banks" and another thing as applied to "common carriers," where the phrase "other than" modifies both words in the same clause.

The language of the fourth paragraph of § 8 supports this interpretation. The fourth paragraph begins with a general bar against interlocking directorates: "No person at the same time shall be a director in any two or more corporations." This general bar is limited by four separate clauses, each of which modifies the phrase "two or more corporations." That is, the statute applies only to "two or more corporations" which satisfy these four additional requirements. Clearly, the first clause need be satisfied by only one of the interlocked corporations. By its own terms, it applies to "any

one" of the "two or more corporations." None of the other clauses contain similar language. Rather, they are all written in general language that applies to all the interlocked corporations. Had Congress wished the "other than banks" clause to apply to only one of the interlocked corporations, it would not have presented any difficulty to have said so explicitly as in the first clause.

In rejecting the Government's present interpretation of § 8, we by no means depart from our long-held policy of giving great weight to the contemporaneous interpretation of a challenged statute by an agency charged with its enforcement, *e. g.*, *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, 210 (1827). But the Government does not come to this case with a consistent history of enforcing or attempting to enforce § 8 in accord with what it urges now. On the contrary, for over 60 years the Government made no attempt, either by filing suit or by seeking voluntary resignations, to apply § 8 to interlocks between banks and nonbanking corporations, even though interlocking directorates between banks and insurance companies were widespread and a matter of public record throughout the period.[2] We find it difficult to believe that the Department of Justice and the Federal Trade Commission, which share authority for enforcement of the Clayton Act, and the Congress, which oversees those agencies, would have overlooked or ignored the pervasive and open

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[2] The District Court found that at present "approximately 40% of the insurance company directors in America are also bank directors." *United States* v. *Crocker National Corp.*, 422 F. Supp. 686, 691 (1976). According to the American Council of Life Insurance, 79% of its 550 members report having directors who are also directors of banks; of that 79%, bank directors constituted an average 33% of the insurance companies' boards. Brief for American Council of Life Insurance as *Amicus Curiae* 3. It is likely that a substantial number of these interlocking directorates are between insurance companies and banks that compete in the credit markets, and hence under the Government's interpretation violate § 8.

practice of interlocking directorates between banks and insurance companies had it been thought contrary to the law.[3]

It is true, of course, that "[a]uthority actually granted by Congress . . . cannot evaporate through lack of administrative exercise," *FTC* v. *Bunte Brothers, Inc.*, 312 U. S. 349, 352 (1941); the mere failure of administrative agencies to act is in no sense "a binding administrative interpretation" that the Government lacks the authority to act. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 590 (1957). However,

> "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *FTC* v. *Bunte Brothers, Inc., supra*, at 352.

Similarly, in *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 513 (1949), this Court held that "[f]ailure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed." In the circumstances of this case, the Government's failure for over 60 years to exercise the power it now claims under § 8 strongly suggests that it did not read the statute as granting such power.

When a court reaches the same reading of the statute as the practical construction given it by the enforcing agencies

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[3] Another indication of the Government's longstanding position is a 1950 Federal Trade Commission Report which specifically interpreted § 8 not to apply to interlocking directorates between banks and nonbanking corporations. Federal Trade Commission, Report on Interlocking Directorates 10 (1951). The Federal Trade Commission's later decision, *In re Perpetual Federal Savings & Loan Assn.*, 90 F. T. C. 608 (1977), vacated on other grounds, 94 F. T. C. 401 (1979), that such interlocking directorates violate § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45 (1976 ed. and Supp. V), does not undermine the Commission's earlier analysis of § 8 of the Clayton Act.

over a 60-year span, that is a powerful weight supporting such reading. Here, moreover, the business community directly affected *and* the enforcing agencies *and* the Congress have read this statute the same way for 60 years. It is not wholly without significance that Members of Congress and their staffs who have written about this issue have stated that § 8 "does not apply to interlocks between commercial banks and competing financial institutions, such as mutual savings banks, insurance companies, and small loan companies." Letter from Rep. Wright Patman to Hon. Arthur F. Burns, Chairman of the Federal Reserve Board (June 1, 1970), reprinted in The Banking Reform Act of 1971: Hearings on H. R. 5700 before the House Committee on Banking and Currency, 92d Cong., 1st Sess., 271 (1971).[4] While these views are not binding on this Court, the weight of informed opinion[5] over the years strongly supports the District Court holding that Congress intended the statute to be interpreted according to its plain meaning.

It is not surprising that for more than a half century literally thousands of citizens in the business world have served as directors of both banks and insurance companies in reli-

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[4] Accord, Subcommittee on Domestic Finance of the House Committee on Banking and Currency, Control of Commercial Banks and Interlocks Among Financial Institutions, 90th Cong., 1st Sess. (Subcomm. Print 1967), reprinted in 1 Subcommittee on Domestic Finance of the House Committee on Banking and Currency, Commercial Banks and Their Trust Activities: Emerging Influence on the American Economy, 90th Cong., 2d Sess., 881, 925–926 (Subcomm. Print 1968) (the Clayton Act "does not apply to interlocks between commercial banks and competing financial institutions, such as mutual savings banks, insurance companies, and small loan companies"); Subcommittee on Antitrust of the House Committee on the Judiciary, Interlocks in Corporate Management, 89th Cong., 1st Sess., 25–26 (Comm. Print 1965) (the fourth paragraph of § 8 "does [not] apply to interlocks with banks").

[5] See also, *e. g.*, Advisory Committee on Banking to the Comptroller of the Currency, National Banks and the Future 94 (1962); 1982 Duke L. J. 938, 939, 949.

ance on what was universally perceived as plain statutory language. These citizens were reassured that the Government's reading of that language indicated that their conduct was lawful. The Government brushes this aside, saying in effect that it will not bring suits against those directors who resign within a reasonable time. Tr. of Oral Arg. 30–31. However, those who elect to resign under this "amnesty" would nonetheless carry a stigma of sorts as violators of federal laws. Equally, and perhaps more, important, such persons face possible civil liability in unknown amounts, liability against which the Government cannot, and does not purport to, render them immune. See *id.*, at 30. While it is arguable that wise antitrust policy counsels against permitting interlocking directorates between banks and competing insurance companies, that policy must be implemented by Congress, and not by a crabbed interpretation of the words of a statute which so many in authority have interpreted in accordance with its plain meaning for so long. If changes in economic factors or considerations of public policy counsel the extension of the Clayton Act to the categories of interlocking directorates implicated here, it is a simple matter for Congress to say so clearly.

If any doubt remains as to the meaning of the statute, that doubt is removed by the legislative history. The relevant provisions of the Clayton Act went through four legislative stages: (1) the initial "tentative bill," (2) the House bill introduced by Representative Clayton, (3) the Senate amendments, and (4) the final bill of the Joint Conference Committee which was enacted into law as the Clayton Act. The evolution of the bill, along with the remarks in Committee and on the floor, rebuts the Government's claim that Congress intended to reach bank-nonbank interlocks in the fourth paragraph of § 8.

The tentative bill proposed by Representative Clayton had three sections dealing with director interlocks. Reprinted in Trust Hearings, at 1577–1579. Section 1 prohibited certain

director and officer interlocks between railroads and specified other corporations, including banks. Section 2 prohibited certain interlocks between banks. Section 4, the precursor to the current paragraph 4 of § 8, presumed a violation of the Sherman Act from the existence of a director interlock. It provided, in pertinent part:

> "That if . . . any two or more corporations, engaged in whole or in part in interstate or foreign commerce, have a common director or directors, the fact of such common director or directors shall be conclusive evidence that there exists no real competition between such corporations; and if such corporations shall have been theretofore, or are, or shall have been . . . natural competitors, such elimination of competition thus conclusively presumed shall constitute a combination between the said corporations in restraint of interstate or foreign commerce . . . ." *Id.*, at 1579.

Extensive hearings were held on this "tentative bill." Louis D. Brandeis, then an adviser to President Wilson, testified that the tentative bill was inadequate to meet what he saw as the need for a broad prohibition against vertical as well as horizontal interlocks. See generally *id.*, at 681–688. Representative Carlin objected: "We attempted to do that by section 4 of the bill. Section 1 deals with the railroads, section 2 with the banks, and section 4 with industrials." *Id.*, at 681. Brandeis responded that "as you have section 4 there your clause is limited to a linking together of two industrial corporations who are competitors . . . ." *Ibid.*

Brandeis also testified to the need to prohibit interlocking directorates between all large banks. *Id.*, at 921–925. He argued that Congress had the power to do this since "banking is interstate commerce." *Id.*, at 923–924. He then turned from the banks to the "other financial concern doing business

in the same place" with which the interlocking directorates should be, but were not under the tentative bill, prohibited:

> "Mr. BRANDEIS: . . . Now, what is a financial concern as I have used that term? I should say that term 'financial concern' includes not only a bank which is a member of a national reserve system but any other bank.
>
> "Mr. VOLSTEAD: Would you include an insurance company?
>
> "Mr. BRANDEIS: And an insurance company also. It seems to me that *both banks and insurance companies, which have a usual place of business in the same place, . . . ought to be included in that prohibition.*" *Id.*, at 925 (emphasis added).

Two facts emerge from this exchange. First, the tentative bill dealt with the different classes of corporations (banks, railroads, and industrials) separately and in different ways. Section 2 dealt exclusively with banks and § 4 exclusively with industrial corporations. Second, the tentative bill was not understood as prohibiting interlocking directorates between banks and "other financial concern[s] doing business in the same place" such as insurance companies.

At the conclusion of the hearings, Representative Clayton introduced H. R. 15657, 63d Cong., 2d Sess. (May 2, 1914), reprinted in Trust Hearings, at 1931–1952, which eventually was enacted as the Clayton Act. Section 9 of that bill generally paralleled the structure of the current § 8. The third paragraph of § 9 (which became the fourth paragraph of the present § 8) provided in pertinent part:

> "[N]o person at the same time shall be a director in any two or more corporations, either of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, *other than common carriers subject to [the Interstate Commerce Act]* . . . ." (Emphasis added.)

The Committee Report on this bill stated that "[t]his section is divided into three paragraphs, each of which relates to the particular class of corporations described, and the provisions of each paragraph are limited in their application to the corporations belonging to the class named herein." H. R. Rep. No. 627, 63d Cong., 2d Sess., 18 (1914), reprinted in Trust Hearings, at 1970. The first paragraph related solely to the "eligibility of directors in interstate-railroad corporations," *ibid.;* the second paragraph dealt with the "eligibility of directors, officers, and employees of banks, banking associations, and trust companies," *id.*, at 1971; and the third, "industrial corporations" paragraph concerned "the eligibility of directors in industrial corporations engaged in commerce," *ibid.* Nothing in this Report suggests that the third paragraph was intended to deal with directors in banks who also serve as directors in industrial corporations.

The House debates on § 9 of H. R. 15657 confirm that Congress intended to deal separately with banks, railroads, and industrial corporations, and did not intend the third paragraph of § 9 to regulate or prohibit interlocks between these different classes of corporations. During a debate over the banking provisions of § 9, Representative Cullop explained the relationship of the industrial corporations paragraph to the banking paragraphs:

> "That [industrial corporations paragraph] refers to some other corporation than a bank. That does not apply to a bank.
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> . . . . . .
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> "This has no reference to the banking business.
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> "Mr. CARLIN: That relates to industrial commerce.
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> "Mr. CULLOP: Yes. That does not relate to banking. That relates to industrial and commercial corporations, or institutions of that kind, *but has no reference whatsoever to the banking business.*" 51 Cong. Rec. 9604 (1914) (emphasis added).

The House passed H. R. 15657 with changes not relevant here and sent the bill to the Senate. There, the provisions

regulating bank interlocks met with considerable opposition and were ultimately eliminated by the Senate Committee on the Judiciary. The Senate Report explained:

> "A Senate amendment to this section strikes out the entire paragraph which relates to interlocking directorates of banks and trust companies [the first three paragraphs of the current § 8]. In proposing this amendment a majority of the Committee believed that such legislation as this more properly belongs to the domain of banking rather than of commerce and such additional regulation of bank directorates as may be wise and just should be made by amendments to the national bank acts, and the enforcement of it given to the Comptroller of the Currency and the Federal Reserve Board." S. Rep. No. 698, 63d Cong., 2d Sess., 48 (1914).

However, the Senate Committee did not change the industrial corporations paragraph at all: "The House provision in this section relating to interlocking directorates of industrial corporations is not proposed to be changed or amended in any respect." *Ibid.* The Senate passed the bill as reported out by the Senate Committee.

Given the Senate's expressed intent not to regulate bank interlocks, it is not reasonable to believe that the Senate understood the third paragraph of § 9, which it left untouched, to bar interlocking directorates involving banks. When the Conference Committee met to iron out differences between the House and Senate bills, it restored the banking provisions but added the words "other than banks, banking associations, trust companies" to the "other than common carriers" clause in the industrial corporations paragraph (which became the fourth paragraph of the current § 8). The most reasonable explanation for this addition is that it clarified what the Senate already understood to be the case: the industrial corporations paragraph did not reach interlocking directorates involving banks.

This interpretation is supported by the floor debate in the House on the Conference bill. Of those who spoke on the

House floor, only Representative Mann thought that the original House version of the industrial corporations paragraph (§ 9, paragraph 3, of H. R. 15657) applied to interlocking directorates with banks. He objected that the amendment adding "banks" to the "other than common carriers" clause therefore materially changed the meaning of the fourth paragraph:

> "I know of nothing more vital which was before the House than the power and the right to prevent interlocking directorates of banks. . . . That was one of the basic things that the committee made findings on, and when this bill was prepared it provided a prohibition against interlocking directorates of banks. The House passed it in that shape. The Senate passed it in that shape. But the House conferees, without authority . . . have provided that banks shall no longer be controlled by this prohibition of interlocking directorates where banks are in competition." 51 Cong. Rec. 16270 (1914).

In response, Representatives Sherley and Webb both argued that Representative Mann had misconstrued the bill as it had originally been passed by the House. Representative Webb explained:

> "[T]he third paragraph of section 9 as the bill passed the House was never intended to apply to banks, because we had an express paragraph in section 9 which took care of interlocking directorates in banks.
>
> ". . . Now, it would be idiotic to say that we included also banks and banking associations in the paragraph referring to industrial corporations; and in order to make the paragraph perfectly plain, we inserted 'other than banks and banks *[sic]* associations' and common carriers, which had no effect upon the meaning of that section." *Id.*, at 16271.

Representative Sherley echoed Representative Webb's argument that at no time in its evolution did the industrial cor-

porations paragraph ever prohibit interlocking directorates involving banks. *Id.*, at 16271–16272. He concluded:

> "To say that it was not within the province of the conference to make it clear that only certain banks should be within the provision touching certain interlocking directorates, and that the provision touching industrial corporations [the present fourth paragraph of § 8] was confined to such industrial corporations and should not by any stretch of construction be held to include banks, is to say what seems to be contrary . . . to the plain common sense of the situation." *Id.*, at 16272.

In reviewing this colloquy, it should be remembered that Representatives Webb and Sherley voted for the Clayton Act as it originally passed the House, while Representative Mann voted against it. *Id.*, at 9911. Thus, greater weight is to be accorded the views of Representatives Webb and Sherley concerning the proper interpretation of the original bill than to the views of Representative Mann. See *NLRB* v. *Fruit & Vegetable Packers*, 377 U. S. 58, 66 (1964). Moreover, the fact that the Speaker of the House overruled Representative Mann's point of order suggests that he accepted Representatives Webb's and Sherley's interpretation. Finally, regardless of which Member correctly interpreted the original House bill, the fact remains that they all agreed that under the Conference bill, interlocking directorates involving banks were not covered by the industrial corporations paragraph.

The dissent argues that the "sole purpose of the ['other than banks' amendment] was to make clear that bank-bank interlocks would be governed exclusively by the preceding paragraphs, rather than by the competing corporations paragraph." *Post*, at 145. This interpretation ignores the fact that the minimum size requirements in the banking and industrial corporations provisions were not comparable. As the Clayton Act was originally enacted, the banking provisions measured size on the basis of "deposits, capital, surplus, and undivided profits" aggregating $5 million or more; the industrial corporations paragraph measured size on the

basis of "capital, surplus, and undivided profits" aggregating $1 million or more without regard to "deposits." Clayton Antitrust Act of 1914, § 8, 38 Stat. 732–733. There is no reason to assume that a bank with "deposits, capital, surplus, and undivided profits" of $5 million is comparable to a bank with "capital, surplus, and undivided profits" of $1 million. Thus, the provisions do not dovetail in the manner suggested by the dissent.

It may well be, as the dissent speculates, *post*, at 146–147, that a number of Congressmen mistakenly thought that banking was not interstate commerce. Nonetheless, Congress chose to deal with the problems of industrial and financial concentration according to the class of corporations involved. It chose to regulate banks in what are now the first three paragraphs of § 8; to regulate common carriers in what is now § 10; and to regulate industrial and commercial corporations in the fourth paragraph of § 8. We are bound to respect that choice; we are not to rewrite the statute based on our notions of appropriate policy.

The judgment of the Court of Appeals is

*Reversed.*

JUSTICE POWELL took no part in the decision of this case.

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

The primary issue in this case is whether ¶ 4 of § 8 of the Clayton Act (the "competing corporations provision"), 15 U. S. C. § 19, prohibits interlocking directorates between banks and nonbanks. The Court holds that it does not, thereby exempting this entire species of interlocks from any regulation whatsoever, even though such interlocks undisputably may have serious anticompetitive consequences directly contrary to the policies of our antitrust laws. I am quite sure that Congress intended no such result, and I therefore dissent.

## I

Subject to certain other exemptions not presently relevant, ¶4 of §8 prohibits interlocking directorates between two or more corporations engaged in whole or part in commerce, "other than banks, banking associations, trust companies, and common carriers . . . ." The question here is whether this "other than banks" exemption is applicable to interlocks where any single one of the interlocked corporations is a bank, as petitioners contend, or whether it applies only when all of the interlocked corporations are banks, as the Government asserts. Both sides argue, with straight faces, that the plain statutory language supports their respective constructions of §8. The Court, with an equally straight face, agrees with the petitioners and solemnly proclaims, *ante*, at 128, that the self-evident, unambiguous language of the statute requires the conclusion that §8 does not prohibit bank-nonbank interlocking directorates. With deference, I must say that it escapes me how either the Court or the litigants can seriously maintain that the meaning of §8 is unambiguous, or even that one side's reading is significantly "more natural" than the other's.

In my view, the literal wording is far from conclusive and should not be dispositive. Consider the following analogy: a statute states that "no person shall own two or more automobiles, other than Fords." According to the Court, such a provision plainly would not prohibit a person from owning one Chevrolet and one Ford. Although such an interpretation is possible, it is equally plausible to interpret the "other than" clause as exempting only the ownership of two Fords from the reach of the statute. Similarly, ¶4 of §8 can easily be read as exempting only an interlock between two banks. The naked statutory wording provides insufficient guidance as to Congress' true intent. It is therefore necessary to consider the legislative history.

## II

In considering the legislative materials, it is important to keep in mind the structure of § 8 and the changes that were made in this provision as it passed through each stage of the enactment process. The first three paragraphs of § 8 proscribe a wide variety of bank-bank interlocks, that is, interlocks between two or more banks. The fourth paragraph bans interlocks between two or more competing corporations engaged in whole or part in commerce "other than" banks or common carriers. See 15 U. S. C. § 19.

As originally passed by the House, the competing corporations paragraph contained the "other than common carriers" proviso, but it did *not* provide any exemption for banks.[1] After the House approved the bill, the legislation went to the Senate, which deleted the paragraphs relating to bank-bank interlocks, but kept the competing corporations provision in the same form passed by the House.[2] Thus, as originally adopted by both the Senate and the House, the competing corporations provision did not contain the "other than banks" language upon which petitioners rely.

The House was unwilling to accept the Senate's deletion of the provisions relating to bank-bank interlocks, so the matter went to a Conference Committee. The conferees agreed to reinclude the provisions banning bank-bank interlocks, with a few minor modifications. The conferees also inserted, for the first time, the "other than banks" proviso into the competing corporations provision.[3] The Senate accepted this change without discussion, but, in the House, there was a

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[1] See 2 E. Kintner, The Legislative History of the Federal Antitrust Laws and Related Statutes 1733 (1978) (reprinting H. R. 15657, 63d Cong., 2d Sess., as agreed upon in the Committee of the Whole House on June 2, 1914).

[2] See 3 Kintner, *supra*, at 2429 (reprinting H. R. 15657, 63d Cong., 2d Sess., as amended and passed by the Senate on Sept. 2, 1914).

[3] See Report of the Conference Committee, H. R. Conf. Rep. No. 1168, 63d Cong., 2d Sess., 4 (1914), reprinted in 3 Kintner, *supra*, at 2458–2459.

brief but highly significant debate upon which both sides in the present case heavily rely.

The House controversy arose when Representative Mann raised a point of order alleging that the addition of the phrase "other than banks" violated the rule that conferees may not change text to which both Houses have agreed. Representative Mann argued that the addition of the new phrase drastically limited the scope of the competing corporations provision by excluding banks from its purview:

> "[W]hen this bill was prepared it provided a prohibition against interlocking directorates of banks. The House passed it in that shape. The Senate passed it in that shape. But the House conferees, without authority and over and beyond any jurisdiction granted to them, have provided that banks shall no longer be controlled by this prohibition of interlocking directorates where banks are in competition." 51 Cong. Rec. 16270 (1914).

Representative Webb, one of the conferees, and Representative Sherley then took the floor to defend the conference action. Representative Webb asserted that the addition of the "other than banks" language did *not* work a material or substantial change in the provision, because "without question . . . the third paragraph of Section 9 [the present ¶4 of §8] as the bill passed the House was never intended to apply to banks, because we had an express paragraph in Section 9 [the present first three paragraphs of §8] which took care of interlocking directorates in banks." *Id.*, at 16271. He described how the Senate had deleted the House's bank-bank provisions, and how the conferees had restored them. He continued:

> "The conference did put in [the 'other than banks' proviso] in order to make perfectly clear what in my opinion is already clear; because in the preceding paragraph we had passed a section with reference to interlocking directorates of banks . . . . Now, it would be idiotic to say

> that we included also banks and banking associations in the paragraph referring to industrial corporations [the present ¶4 of §8]; and in order to make the paragraph perfectly plain, we inserted 'other than banks and banks *[sic]* associations' and common carriers, *which had no effect upon the meaning of that section.*" *Ibid.* (emphasis added).

Representative Sherley concurred in Representative Webb's assessment. *Id.*, at 16272.[4]

Representative Mann was not satisfied by this explanation. He noted that Representatives Webb and Sherley had conceded that the conferees could not make substantive changes in the provision. He remarked, however, that they did not appreciate the import of the original version of the competing corporations paragraph, even though "they should know more about it than I do." *Ibid.* Then, in the only express discussion of bank-nonbank interlocks in all of the legislative debates on the Clayton Act, Representative Mann indicated that the original version would have prohibited interlocks between a bank and the "Sugar Trust" company, a bank and United States Steel Corp., a bank and a hat company, or a bank and any other company that competed with the bank. He implied, although he did not state directly, that the conferees' version of the bill would not reach such interlocks. *Ibid.*

Then, before Representatives Webb and Sherley had an opportunity to respond to Representative Mann's remarks about bank-nonbank interlocks, the Speaker overruled the point of order and held that, although the conferees could not "drag in new subjects of legislation," the subject matter in question was properly before the conferees, because the Sen-

[4] Representative Sherley commented that, even without the new language, "any court would hold that the inclusion by name of banks and trust companies in one instance excluded them from the general provisions in the other, and, in addition, banks and trust companies are not [competitors of] industrial corporations." 51 Cong. Rec. 16272 (1914).

ate had struck out the House bill provisions regulating bank-bank interlocks. The conferees thus did not exceed their authority, and if any Member did not like the Conference Report, he could simply vote against it. *Id.*, at 16273.

Petitioners now strenuously argue, and the Court agrees, *ante*, at 137–139, that this exchange supports their interpretation of § 8. It shows, they say, that both Representative Mann and the conferees agreed that, whether by material change or by mere confirmation of what was already implicit in the bill, the "other than banks" clause requires the conclusion that banks are not within the scope of the competing corporations paragraph. I am convinced, however, that this exchange strongly supports the Government's view of § 8. Although Representative Mann apparently believed that the final version of § 8 would have to be interpreted in the manner suggested by petitioners, the characterization of a bill by one of its opponents has never been deemed persuasive evidence of legislative intent. *NLRB* v. *Fruit & Vegetable Packers*, 377 U. S. 58, 66 (1964). The critical point is that the bill's supporters characterized the addition of the "other than banks" proviso as making no substantive alteration in the scope of coverage of the original version of § 8. Rather, the sole purpose of the addition was to make clear that bank-bank interlocks would be governed exclusively by the preceding paragraphs, rather than by the competing corporations paragraph. The "other than banks" language thus apparently was not intended to touch upon the question of bank-nonbank interlocks.

In light of the statements of the men most familiar with the circumstances surrounding the addition of the "other than banks" language, we should construe this language as not making a substantive change from the original version of § 8. Thus, petitioners are left with the argument that, even without the "other than banks" clause, the provision still does not reach bank-nonbank interlocks. Some Members of the enacting Congress may well have assumed such to be the case,

because it was far from clear at that time that a bank could be a competitor of a corporation "engaged in whole or part in commerce." For example, under the then-prevailing doctrine of *Paul* v. *Virginia*, 8 Wall. 168 (1869), insurance companies were not considered to be engaged in interstate commerce. Furthermore, it was uncertain whether a bank was itself a corporation engaged in commerce. Cf. *Nathan* v. *Louisiana*, 8 How. 73, 81 (1850) (an "individual who uses his money and credit in buying and selling bills of exchange, and who thereby realizes a profit, . . . is not engaged in commerce").[5]

But this Court's more recent cases have made it clear that both banking and insurance corporations are engaged in commerce, and that the antitrust laws apply to them even though some Members of Congress may not have anticipated such a result. See *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 556–559 (1944); *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 336, n. 12 (1963). Thus, because the legislative history does not show "a clear and unequivocal desire of Congress to legislate only within that area previously declared by this Court to be within the federal power," *South-Eastern Underwriters*, *supra*, at 556–557, there would be no merit to an argument that, even without the "other than banks" proviso, the competing corporations provision does not prohibit bank-nonbank interlocks.

The remaining bulk of the legislative history cited by both parties and the Court is, in my opinion, of little relevance. The Government cites numerous statements by Congress-

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[5] The Court correctly notes, *ante*, at 134, that Louis Brandeis "argued" that banking is interstate commerce. Hearings on Trust Legislation before the House Committee on the Judiciary, 63d Cong., 2d Sess., 924 (1914). However, Brandeis conceded that this was only a "possible theory," one that had "not yet been sustained by the Supreme Court." *Id.*, at 923. Representative Graham expressly disagreed with Brandeis' argument. *Id.*, at 924.

men and President Wilson denouncing interlocking directorates in general, and interlocks between competitors in the banking industry in particular. However, all of these statements are far too general to provide the Government with any really substantial support. None was made explicitly in connection with the provision at issue.

Petitioners and the Court counter with statements of witnesses and Congressmen during Committee hearings and floor debates that supposedly indicate that § 8 does not include bank-nonbank interlocks.[6] Although these statements seem very helpful to petitioners, close inspection shows that such is not the case. First, all of these statements were made *prior* to the addition of the "other than banks" proviso. Thus, for the reasons mentioned above, they only support the untenable argument that even the original version of § 8 did not cover bank-nonbank interlocks. Some Congressmen and witnesses apparently thought that only "industrial" corporations engaged "in commerce," but this fact is of no import. Second, it appears that all of these early statements cited by petitioners are taken out of context. They were made in the context of discussions of vertical interlocks or bank-bank interlocks.[7]

Accordingly, the only truly relevant legislative history demonstrates that Congress did not intend to exempt bank-nonbank interlocks from coverage. This conclusion seems

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[6] *E. g.*, "I think there is a grave question as to whether a director in a great life insurance company should be a director in a bank. You have failed to cover that feature." *Id.*, at 823 (S. Untermyer). See also *id.*, at 921–925 (L. Brandeis); 51 Cong. Rec. 9604 (1914) (Rep. Cullop) (competing corporations provision "relates to industrial and commercial corporations, or institutions of that kind, but has no reference whatever to the banking business"). See generally *ante*, at 134–137.

[7] The Court does not expressly indicate whether its holding would be the same in the absence of the "other than banks" proviso, but none of the legislative history that it cites, *ante*, at 133–139, advances its textual argument in the slightest.

inescapable when we add into the equation the rule that exemptions from the antitrust laws must be construed narrowly, see *Union Labor Life Ins. Co.* v. *Pireno*, 458 U. S. 119, 126 (1982); *FMC* v. *Seatrain Lines, Inc.*, 411 U. S. 726, 733 (1973), and the fact that bank-nonbank interlocks have strong anticompetitive effects that run counter to at least the spirit of the Clayton Act. Indeed, neither the Court nor petitioners have identified any logical policy reasons why Congress would have wanted bank-nonbank interlocks, unlike every other species of interlocks between competing corporations, to be totally exempt from any form of regulation. Hence, I am convinced that the Court's holding creates "a loophole in the statute that Congress simply did not intend to create." *United States* v. *Naftalin*, 441 U. S. 768, 777 (1979).[8]

## III

The most appealing argument in favor of the Court's holding comes not from the statutory language or the legislative

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[8] The Court states, *ante*, at 129, that the Government does not dispute that the "other than common carriers" language of § 8 exempts carrier-noncarrier interlocks, and that, to be consistent, the "other than banks" exemption should be interpreted in the same manner. In the first place, the Government has not in this Court taken a position one way or the other on the question whether § 8 applies to carrier-noncarrier interlocks. This issue may be largely academic, for it is difficult to think of examples of situations in which, within the meaning of § 8, a carrier would be a "competitor" of a noncarrier. In any event, a strong argument can be made that § 8 does apply to carrier-noncarrier interlocks. On the same day the House originally passed the Clayton Act, it also passed an amendment to the Interstate Commerce Act (ICA) that would have prohibited carrier-carrier interlocks not approved by the Interstate Commerce Commission. 51 Cong. Rec. 9881, 9910–9912 (1914). A similar bill became law in 1920. See 49 U. S. C. § 11322 (1976 ed., Supp. V). Thus, just as the "other than banks" language was added simply to make clear that the provisions regulating bank-bank interlocks were exclusive, it would seem that the "other than carriers" language was inserted just to clarify that the ICA amendment provided the exclusive means for regulating carrier-carrier interlocks.

history, but from the fact that, for over 60 years, the Government took no action to apply § 8 against bank-nonbank interlocks. The Court correctly notes, *ante*, at 131, that the Government's failure to exercise its authority for such a long time suggests that it did not read the statute as granting such authority. However, as the Court concedes, *ibid.*, the mere failure of an agency to act is in no sense a binding administrative interpretation that the Government lacks power to act. And even if the Justice Department and/or the Federal Trade Commission had in the past expressly adopted petitioners' interpretation of § 8 (and in fact, neither agency ever did so), this fact would hardly be dispositive. At most, it would mean that their present interpretation would not be entitled to the usual degree of deference, since it was inconsistent with their previous view.[9]

There is, of course, no rule of administrative *stare decisis*. Agencies frequently adopt one interpretation of a statute and then, years later, adopt a different view. This and other courts have approved such administrative "changes in course," as long as the new interpretation is consistent with congressional intent.[10] Here, the concerned agencies until recently never formally expressed a view one way or the other, and the legislative history reveals that the Govern-

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[9] See, *e. g.*, *Bowsher* v. *Merck & Co.*, 460 U. S. 824, 838, n. 13 (1983) (WHITE, J., concurring in part and dissenting in part); *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 142–143 (1976); *Morton* v. *Ruiz*, 415 U. S. 199, 236–237 (1974).

[10] See, *e. g.*, *United States* v. *Generix Drug Corp.*, 460 U. S. 453 (1983) (approving new agency statutory interpretation despite many years of contrary interpretation); *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251 (1975) (same); *NLRB* v. *Seven-Up Bottling Co.*, 344 U. S. 344 (1953) (same); *United States* v. *City and County of San Francisco*, 310 U. S. 16, 31–32 (1940) (same). The rule that an agency can change the manner in which it interprets a statute is often said to be subject to the qualification that, if it makes a change, the reasons for doing so must be set forth so that meaningful judicial review will be possible. See *Atchison, T. & S. F. R. Co.* v. *Wichita Bd. of Trade*, 412 U. S. 800, 808 (1973) (plurality opinion); 4 K. Davis, Administrative Law § 20:11 (2d ed. 1983).

ment's present course is the correct one. The Government's past failure to adhere to the proper course should not be used as an excuse for ignoring the true congressional intent. I therefore would affirm the judgment of the Court of Appeals.[11]

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[11] Under my view of § 8, it is necessary to reach petitioners' alternative argument that the interlocked insurance companies and bank holding companies are not "competitors" within the meaning of § 8. But in light of the Court's holding, I see no point in addressing this issue at length. Suffice it to say that I am inclined to agree with the Court of Appeals that bank holding companies and their subsidiary banks are so closely related that they should be treated as one entity for § 8 purposes. See *United States* v. *Crocker National Corp.*, 656 F. 2d 428, 450–451 (CA9 1981).

# DELCOSTELLO *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS ET AL.

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

No. 81–2386. Argued April 25, 1983—Decided June 8, 1983*

The issue in each of these cases is what statute of limitations applies in an employee suit against an employer and a union, alleging the employer's breach of a collective-bargaining agreement and the union's breach of its duty of fair representation by mishandling the ensuing grievance or arbitration proceedings. *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, held in a similar suit that an employee's claim against the employer was governed by a state statute of limitations for vacation of an arbitration award rather than by a state statute for an action for breach of contract, but left open the issues as to what state statute should govern the employee's claim against the union or whether, instead of applying a state statute of limitations, the provisions of § 10(b) of the National Labor Relations Act establishing a 6-month limitations period for making charges of unfair labor practices to the National Labor Relations Board should be borrowed. In No. 81–2386, respondent local union brought a formal grievance under the collective-bargaining agreement based on petitioner employee's alleged improper discharge. After a hearing, a joint union-management committee informed petitioner of its conclusion that the grievance was without merit, and the committee's determination became final on September 20, 1977. On March 16, 1978, petitioner filed suit in Federal District Court, alleging that the employer had discharged him in violation of the collective-bargaining agreement, and that the union had represented him in the grievance procedure in a discriminatory, arbitrary, and perfunctory manner. The District Court ultimately granted summary judgment against petitioner, concluding that *Mitchell* compelled application of Maryland's 30-day statute of limitations for actions to vacate arbitration awards to both of petitioner's claims. The Court of Appeals affirmed. In No. 81–2408, petitioner local union invoked arbitration after it was unsuccessful in processing respondent employees' grievances based on the employer's alleged violations of the bargaining agreement arising from job-assignment practices. On February

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*Together with No. 81–2408, *United Steelworkers of America, AFL–CIO–CLC, et al.* v. *Flowers et al.*, on certiorari to the United States Court of Appeals for the Second Circuit.

24, 1978, the arbitrator issued an award upholding the employer's job assignments, and on January 19, 1979, respondents filed suit in Federal District Court, alleging that the employer had violated the bargaining agreement, and that the union had violated its duty of fair representation in handling respondents' claims. The District Court, applying New York's 90-day statute of limitations for actions to vacate arbitration awards, dismissed the complaint against both the employer and the union. Ultimately, the Court of Appeals, acting in light of the intervening decision in *Mitchell*, rejected the contention that § 10(b) should be applied; affirmed the dismissal as to the employer under the 90-day arbitration statute; but reversed as to the union, concluding that New York's 3-year statute for malpractice actions governed.

*Held:*

1. In this type of suit, the 6-month limitations period in § 10(b) governs claims against both the employer and the union. Pp. 158–172.

(a) When, as here, there is no federal statute of limitations expressly applicable to a federal cause of action, it is generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law. However, when adoption of state statutes would be at odds with the purpose or operation of federal substantive law, timeliness rules have been drawn from federal law—either express limitations periods from related federal statutes, or such alternatives as laches. *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, distinguished. Pp. 158–163.

(b) An employee's suit against both the employer and the union, such as is involved here, has no close analogy in ordinary state law, and the analogies suggested in *Mitchell* suffer from flaws of both legal substance and practical application. Typically short state limitations periods for vacating arbitration awards fail to provide the aggrieved employee with a satisfactory opportunity to vindicate his rights, and analogy to an action to vacate an arbitration award is problematic at best as applied to the employee's claim against the union. While a state limitations period for legal malpractice is the closest state-law analogy for the claim against the union, application of such a limitations period would not solve the problem caused by the too-short time in which the employee could sue the employer, and would preclude the relatively rapid resolution of labor disputes favored by federal law. In contrast, § 10(b)'s 6-month period for filing unfair labor practice charges is designed to accommodate a balance of interests very similar to that at stake here. Both the union's breach of its duty and the employer's breach of the bargaining agreement are often also unfair labor practices. Moreover, in § 10(b) "Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and

an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system." *Mitchell*, *supra*, at 70–71 (Stewart, J., concurring in judgment). Pp. 163–172.

2. The judgment in No. 81–2408 is reversed because it is conceded that the suit was filed more than 10 months after respondents' causes of action accrued. However, in No. 81–2386 the judgment is reversed but the case is remanded since petitioner contends that certain events tolled the running of the limitations period until about three months before he filed suit, but the District Court, applying a 30-day limitations period, declined to consider any tolling issue. P. 172.

679 F. 2d 879, reversed and remanded; 671 F. 2d 87, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., *post*, p. 172, and O'CONNOR, J., *post*, p. 174, filed dissenting opinions.

*William H. Zinman* argued the cause for petitioner in No. 81–2386. With him on the briefs was *Paul A. Levy*. *Robert M. Weinberg* argued the cause for petitioners in No. 81–2408. With him on the briefs were *Michael H. Gottesman*, *Bernard Kleiman*, *Carl Frankel*, and *Laurence Gold*.

*Bernard S. Goldfarb* argued the cause for respondents in No. 81–2386 and filed a brief for respondent Anchor Motor Freight, Inc. *Isaac N. Groner*, by appointment of the Court, 459 U. S. 1143, argued the cause and filed a brief for respondents in No. 81–2408. *Carl S. Yaller* and *Bernard W. Rubenstein* filed a brief for respondent Local 557, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America in No. 81–2386.†

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†*Steven C. Kahn* and *Stephen A. Bokat* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging reversal in both cases. *Alan B. Morrison* filed a brief for Teamsters for a Democratic Union as *amicus curiae* urging reversal in No. 81–2386.

*David Previant*, *Robert M. Baptiste*, and *Roland P. Wilder, Jr.*, filed a brief for the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as *amicus curiae* urging affirmance in No. 81–2386.

*Michael L. Boylan* and *Teddy B. Gordon* filed a brief for Gordon L. Higgins as *amicus curiae* in No. 81–2408.

JUSTICE BRENNAN delivered the opinion of the Court.

Each of these cases arose as a suit by an employee or employees against an employer and a union, alleging that the employer had breached a provision of a collective-bargaining agreement, and that the union had breached its duty of fair representation by mishandling the ensuing grievance-and-arbitration proceedings. See *infra*, at 162; *Bowen* v. *USPS*, 459 U. S. 212 (1983); *Vaca* v. *Sipes*, 386 U. S. 171 (1967); *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S. 554 (1976). The issue presented is what statute of limitations should apply to such suits. In *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56 (1981), we held that a similar suit was governed by a state statute of limitations for vacation of an arbitration award, rather than by a state statute for an action on a contract. We left two points open, however. First, our holding was limited to the employee's claim against the employer; we did not address what state statute should govern the claim against the union.[1] Second, we expressly limited our consideration to a choice between two *state* statutes of limitations; we did not address the contention that we should instead borrow a *federal* statute of limitations, namely, § 10(b) of the National Labor Relations Act, 29 U. S. C. § 160(b).[2] These cases present these two issues.

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[1] Only the employer sought certiorari in *Mitchell*. Hence, the case did not present the question of what limitations period should be applied to the employee's claim against the union. See 451 U. S., at 60; *id.*, at 71–75, and n. 1 (STEVENS, J., concurring in part and dissenting in part).

[2] 49 Stat. 453. That section provides in pertinent part:

"*Provided* . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ."

The petition for certiorari in *Mitchell* presented only the question of which *state* statute of limitations should apply. The parties did not contend in this Court or below that a federal limitations period should be used instead of analogous state law. Only an *amicus* suggested that it would be more appropriate to use § 10(b); moreover, application of § 10(b) rather

We conclude that § 10(b) should be the applicable statute of limitations governing the suit, both against the employer and against the union.

## I

### A

Philip DelCostello, petitioner in No. 81–2386, was employed as a driver by respondent Anchor Motor Freight, Inc., and represented by respondent Teamsters Local 557. On June 27, 1977, he quit or was discharged[3] after refusing to drive a tractor-trailer that he contended was unsafe. He took his complaint to the union, which made unsuccessful informal attempts to get DelCostello reinstated and then brought a formal grievance under the collective-bargaining agreement. A hearing was held before a regional joint union-management committee. The committee concluded that the grievance was without merit. DelCostello was informed of that decision in a letter dated August 19, 1977, forwarding the minutes of the hearing and stating that the minutes would be presented for approval at the committee's meeting on September 20. DelCostello responded in a letter, but the minutes were approved without change. Under the collective-bargaining agreement, the committee's decision is final and binding on all parties.

On March 16, 1978, DelCostello filed this suit in the District of Maryland against the employer and the union. He

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than the state arbitration statute of limitations would not have changed the outcome of the case. Hence, we declined to address the issue. 451 U. S., at 60, n. 2.

Justice Stewart, concurring in the judgment, would have reached the issue and would have applied § 10(b) rather than any state limitations period. *Id.*, at 65–71. See also *id.*, at 64–65 (BLACKMUN, J., concurring); but see *id.*, at 75–76, and nn. 8, 9 (STEVENS, J., concurring in part and dissenting in part).

[3] The employer contends that DelCostello's refusal to perform his work assignment was a "voluntary quit"; DelCostello contends that he was wrongfully discharged. The joint grievance committee upheld the employer's view.

alleged that the employer had discharged him in violation of the collective-bargaining agreement, and that the union had represented him in the grievance procedure "in a discriminatory, arbitrary and perfunctory manner," App. in No. 81–2386, p. 19, resulting in an unfavorable decision by the joint committee. Respondents asserted that the suit was barred by Maryland's 30-day statute of limitations for actions to vacate arbitration awards.[4] The District Court disagreed, holding that the applicable statute was the 3-year state statute for actions on contracts.[5] 510 F. Supp. 716 (1981). On reconsideration following our decision in *Mitchell*, however, the court granted summary judgment for respondents, concluding that *Mitchell* compelled application of the 30-day statute to both the claim against the employer and the claim against the union. 524 F. Supp. 721 (1981).[6] The Court of Appeals affirmed on the basis of the District Court's order. 679 F. 2d 879 (CA4 1982) (mem.).

B

Donald C. Flowers and King E. Jones, respondents in No. 81–2408, were employed as craft welders by Bethlehem Steel Corp. and represented by petitioner Steelworkers Local 2602.[7] In 1975 and 1976 respondents filed several

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[4] Md. Cts. & Jud. Proc. Code Ann. § 3–224 (1980).

[5] § 5–101.

[6] Respondents argue that DelCostello did not raise the argument below that the applicable limitations period is the 6-month period of § 10(b). He did raise the § 10(b) point perfunctorily in opposition to respondents' motion for reconsideration, however, App. in No. 81–2386, p. 264, and he briefed it more thoroughly in the Court of Appeals, *id.*, at 282–290. Respondents likewise addressed the § 10(b) issue fully on the merits in the Court of Appeals; they did not raise any contention that DelCostello had waived the assertion. Brief for Appellees in No. 81–2086 (CA4), pp. 41–45.

[7] The other petitioner is the United Steelworkers of America, with which the Local is affiliated. The two labor organizations will be treated as one party for purposes of this case. Bethlehem Steel Corp. was a defendant below but is not before this Court in the present proceeding.

grievances asserting that the employer had violated the collective-bargaining agreement by assigning certain welding duties to employees in other job categories and departments of the plant, with the result that respondents were laid off or assigned to noncraft work. The union processed the grievances through the contractually established procedure and, failing to gain satisfaction, invoked arbitration. On February 24, 1978, the arbitrator issued an award for the employer, ruling that the employer's job assignments were permitted by the collective-bargaining agreement.

Respondents filed this suit in the Western District of New York on January 9, 1979, naming both the employer and the union as defendants. The complaint alleged that the company's work assignments violated the collective-bargaining agreement, and that the union's "preparation, investigation and handling" of respondents' grievances were "so inept and careless as to be arbitrary and capricious," in violation of the union's duty of fair representation. App. in No. 81–2408, p. 10. The District Court dismissed the complaint against both defendants, holding that the entire suit was governed by New York's 90-day statute of limitations for actions to vacate arbitration awards.[8] The Court of Appeals reversed on the basis of its prior holding in *Mitchell* v. *United Parcel Service, Inc.*, 624 F. 2d 394 (CA2 1980), that such actions are governed by New York's 6-year statute for actions on contracts.[9] *Flowers* v. *Local 2602, United Steel Workers of America*, 622 F. 2d 573 (CA2 1980) (mem.). We granted certiorari and vacated and remanded for reconsideration in light of our reversal in *Mitchell*. *Steelworkers* v. *Flowers*, 451 U. S. 965 (1981). On remand, the Court of Appeals rejected the argument that the 6-month period of § 10(b) applies. Accordingly, following our decision in *Mitchell*, it applied the 90-day arbitration statute and affirmed the dismissal as to the employer. As to the union, however, the

[8] N. Y. Civ. Prac. Law § 7511(a) (McKinney 1980).

[9] § 213(2).

court reversed, concluding that the correct statute to apply was New York's 3-year statute for malpractice actions.[10] 671 F. 2d 87 (CA2 1982).

C

In this Court, petitioners in both cases contend that suits under *Vaca* v. *Sipes*, 386 U. S. 171 (1967), and *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S. 554 (1976), should be governed by the 6-month limitations period of § 10(b) of the National Labor Relations Act, 29 U. S. C. § 160(b). Alternatively, the Steelworkers, petitioners in No. 81–2408, argue that the state statute for vacation of arbitration awards should apply to a claim against a union as well as to one against an employer.[11] We granted certiorari in both cases and consolidated them for argument. 459 U. S. 1034 (1982).

II

A

As is often the case in federal civil law, there is no federal statute of limitations expressly applicable to this suit. In such situations we do not ordinarily assume that Congress intended that there be no time limit on actions at all; rather, our task is to "borrow" the most suitable statute or other rule of timeliness from some other source. We have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law.[12] "The implied absorption of State statutes of limitation

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[10] § 214(6).

[11] DelCostello (petitioner in No. 81–2386) also contends that, if we decide that application of state law is appropriate, our decision in *Mitchell* should not be applied retroactively. We need not reach this contention.

[12] In some instances, of course, there may be some direct indication in the legislative history suggesting that Congress did in fact intend that state statutes should apply. More often, however, Congress has not given any express consideration to the problem of limitations periods. In such cases, the general preference for borrowing state limitations periods could more aptly be called a sort of fallback rule of thumb than a matter of ascertaining legislative intent; it rests on the assumption that, absent some sound rea-

within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles." *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395 (1946).[13] See, *e. g.*, *Runyon* v.

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son to do otherwise, Congress would likely intend that the courts follow their previous practice of borrowing state provisions. See also *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, 703–704 (1966).

Justice Stewart pointed out in *Mitchell* that this line of reasoning makes more sense as applied to a cause of action expressly created by Congress than as applied to one found by the courts to be implied in a general statutory scheme—especially when that general statutory scheme itself contains a federal statute of limitations for a related but separate form of relief. 451 U. S., at 68, n. 4 (opinion concurring in judgment); see also *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221, 228–229 (1958) (BRENNAN, J., concurring). The suits at issue here, of course, are amalgams, based on both an express statutory cause of action and an implied one. See *infra*, at 164–165, and n. 14. We need not address whether, as a general matter, such cases should be treated differently; even if this action were considered as arising solely under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185, the objections to use of state law and the availability of a well-suited limitations period in § 10(b) would call for application of the latter rule.

[13] Respondents in No. 81–2386 argue that the Rules of Decision Act, 28 U. S. C. § 1652, mandates application of state statutes of limitations whenever Congress has provided none. The argument begs the question, since the Act authorizes application of state law only when federal law does not "otherwise require or provide." As we recognized in *Hoosier*, *supra*, at 701, the choice of a limitations period for a federal cause of action is itself a question of federal law. If the answer to that question (based on the policies and requirements of the underlying cause of action) is that a timeliness rule drawn from elsewhere in federal law should be applied, then the Rules of Decision Act is inapplicable by its own terms. As we said in *United States* v. *Little Lake Misere Land Co.*, 412 U. S. 580 (1973):

"There will often be no specific federal legislation governing a particular transaction . . . ; here, for example, no provision of the . . . Act guides us to choose state or federal law in interpreting . . . agreements under the Act. . . . But silence on that score in federal legislation is no reason for limiting the reach of federal law . . . . To the contrary, the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts. 'At the very

*McCrary*, 427 U. S. 160, 180–182 (1976); *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 101–105 (1971); *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696 (1966); *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390 (1906); *Campbell* v. *Haverhill*, 155 U. S. 610 (1895).

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least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or "judicial legislation," rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress. In other words, it must mean recognition of federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation.'" *Id.*, at 593, quoting Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797, 800 (1957).

See also Westen & Lehman, Is There Life for *Erie* After the Death of Diversity?, 78 Mich. L. Rev. 311, 352–359, and nn. 122 and 142, 368–370, 377–378, 380, n. 207, 381–385 (1980); n. 21, *infra*.

Respondents in No. 81–2386 rely on a few turn-of-the-century cases suggesting that the Rules of Decision Act compels application of state limitations periods. See also *post*, at 173, n. 1 (STEVENS, J., dissenting). These cases, however, predate our recognition in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), that "the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written." *Id.*, at 72–73 (footnote omitted); see also Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 81–88 (1923). Since *Erie*, no decision of this Court has held or suggested that the Act requires borrowing state law to fill gaps in federal substantive statutes. Of course, we have continued since *Erie* to apply state limitations periods to many federal causes of action; but we made clear in *Holmberg* v. *Armbrecht*, 327 U. S. 392, 394–395 (1946), that we do so as a matter of interstitial fashioning of remedial details under the respective substantive federal statutes, and not because the Rules of Decision Act or the *Erie* doctrine requires it. "The considerations that urge adjudication by the same law in all courts within a State when enforcing a right created by that State are hardly relevant for determining the rules which bar enforcement of [a] . . . right created not by a State legislature but by Congress." 327 U. S., at 394; see also *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 101 (1945); *Board of Comm'rs* v. *United States*, 308

In some circumstances, however, state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law. In those instances, it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law.

> "[T]he Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. 'Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide.'" *Occidental Life Ins. Co.* v. *EEOC*, 432 U. S. 355, 367 (1977), quoting *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 465 (1975).

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U. S. 343, 349–352 (1939); *Hoosier*, 383 U. S., at 703–704; *id.*, at 709 (WHITE, J., dissenting); *Employees* v. *Westinghouse Corp.*, 348 U. S. 437, 463 (1955) (Reed, J., concurring).

We do not suggest that the *Erie* doctrine is wholly irrelevant to all federal causes of action. On the contrary, where Congress directly or impliedly directs the courts to look to state law to fill in details of federal law, *Erie* will ordinarily provide the framework for doing so. See, *e. g.*, *Commissioner* v. *Estate of Bosch*, 387 U. S. 456, 463–465 (1967) (applying *Erie* rules as to the proper source of state law in a tax case); 1A J. Moore, W. Taggart, A. Vestal, & J. Wicker, Moore's Federal Practice ¶ 0.325 (2d ed. 1982); 19 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4515 (1982); Westen & Lehman, *supra*. But, as *Holmberg* recognizes, neither *Erie* nor the Rules of Decision Act can now be taken as establishing a *mandatory* rule that we apply state law in federal interstices. Indeed, the contrary view urged by respondents cannot be reconciled with the numerous cases that have declined to borrow state law, see *infra*, at 162–163, nor with our suggestion in *Hoosier* that we might not apply state limitations periods in a different case, 383 U. S., at 705, n. 7, 707, n. 9.

Hence, in some cases we have declined to borrow state statutes but have instead used timeliness rules drawn from federal law—either express limitations periods from related federal statutes, or such alternatives as laches. In *Occidental*, for example, we declined to apply state limitations periods to enforcement suits brought by the Equal Employment Opportunity Commission under Title VII of the 1964 Civil Rights Act, reasoning that such application might unduly hinder the policy of the Act by placing too great an administrative burden on the agency. In *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221 (1958), we applied the federal limitations provision of the Jones Act to a seaworthiness action under general admiralty law. We pointed out that the two forms of claim are almost invariably brought together. Hence, "with an eye to the practicalities of admiralty personal injury litigation," *id.*, at 224, we held inapplicable a shorter state statute governing personal injury suits. Again, in *Holmberg*, we held that state statutes of limitations would not apply to a federal cause of action lying only in equity, because the principles of federal equity are hostile to the "mechanical rules" of statutes of limitations. 327 U. S., at 396.

*Auto Workers* v. *Hoosier Cardinal Corp.* was a straightforward suit under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185, for breach of a collective-bargaining agreement by an employer. Unlike the present cases, *Hoosier* did not involve any agreement to submit disputes to arbitration, and the suit was brought by the union itself rather than by an individual employee. We held that the suit was governed by Indiana's 6-year limitations period for actions on unwritten contracts; we resisted the suggestion that we establish some uniform federal period. Although we recognized that "the subject matter of § 301 is 'peculiarly one that calls for uniform law,'" 383 U. S., at 701, quoting *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95, 103 (1962), we reasoned that national uniformity is of less importance when the

case does not involve "those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it," 383 U. S., at 702. We also relied heavily on the obvious and close analogy between this variety of § 301 suit and an ordinary breach-of-contract case. We expressly reserved the question whether we would apply state law to § 301 actions where the analogy was less direct or the relevant policy factors different:

> "The present suit is essentially an action for damages caused by an alleged breach of an employer's obligation embodied in a collective bargaining agreement. Such an action closely resembles an action for breach of contract cognizable at common law. Whether other § 301 suits different from the present one might call for the application of other rules on timeliness, we are not required to decide, and we indicate no view whatsoever on that question. See, *e. g.*, *Holmberg* v. *Armbrecht*, 327 U. S. 392 . . . ." 383 U. S., at 705, n. 7.

Justice Stewart, who wrote the Court's opinion in *Hoosier*, took this caution to heart in *Mitchell*. He concurred separately in the judgment, arguing that the factors that compelled adoption of state law in *Hoosier* did not apply to suits under *Vaca* and *Hines*, and that in the latter situation we should apply the federal limitations period of § 10(b). 451 U. S., at 65–71. As we shall explain, we agree.

B

It has long been established that an individual employee may bring suit against his employer for breach of a collective-bargaining agreement. *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962). Ordinarily, however, an employee is required to attempt to exhaust any grievance or arbitration remedies provided in the collective-bargaining agreement. *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965); cf. *Clayton* v. *Automobile Workers*, 451 U. S. 679 (1981)

(exhaustion of intraunion remedies not always required). Subject to very limited judicial review, he will be bound by the result according to the finality provisions of the agreement. See *W. R. Grace & Co.* v. *Rubber Workers*, 461 U. S. 757, 764 (1983); *Steelworkers* v. *Enterprise Corp.*, 363 U. S. 593 (1960). In *Vaca* and *Hines*, however, we recognized that this rule works an unacceptable injustice when the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation. In such an instance, an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding. *Vaca* v. *Sipes*, 386 U. S. 171 (1967); *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S. 554 (1976); *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56 (1981); *Bowen* v. *USPS*, 459 U. S. 212 (1983); *Czosek* v. *O'Mara*, 397 U. S. 25 (1970). Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective-bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act.[14] "Yet the two claims are inextricably interde-

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[14] The duty of fair representation exists because it is the policy of the National Labor Relations Act to allow a single labor organization to represent collectively the interests of all employees within a unit, thereby depriving individuals in the unit of the ability to bargain individually or to select a minority union as their representative. In such a system, if individual employees are not to be deprived of all effective means of protecting their own interests, it must be the duty of the representative organization "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca* v. *Sipes*, 386 U. S. 171, 177 (1967). See generally *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192 (1944); *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 337 (1953); *Syres* v. *Oil Workers*, 350 U. S. 892 (1955); *Humphrey* v. *Moore*, 375 U. S. 335, 342 (1964);

pendent. 'To prevail against either the company or the Union, . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union.'" *Mitchell*, *supra*, at 66–67 (Stewart, J., concurring in judgment), quoting *Hines*, *supra*, at 570–571. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both. The suit is thus not a straightforward breach-of-contract suit under § 301, as was *Hoosier*, but a hybrid § 301/fair representation claim, amounting to "a direct challenge to 'the private settlement of disputes under [the collective-bargaining agreement].'" *Mitchell*, *supra*, at 66 (Stewart, J., concurring in judgment), quoting *Hoosier*, 383 U. S., at 702. Also unlike the claim in *Hoosier*, it has no close analogy in ordinary state law. The analogies suggested in *Mitchell* both suffer from flaws, not only of legal substance, but more important, of practical application in view of the policies of federal labor law and the practicalities of hybrid § 301/fair representation litigation.

In *Mitchell*, we analogized the employee's claim against the employer to an action to vacate an arbitration award in a commercial setting. We adhere to the view that, as between the two choices, it is more suitable to characterize the claim that way than as a suit for breach of contract. Nevertheless, the parallel is imperfect in operation. The main difference is that a party to commercial arbitration will ordinarily be represented by counsel or, at least, will have some experience in matters of commercial dealings and contract negotiation. Moreover, an action to vacate a commercial arbitral award will rarely raise any issues not already presented and contested in the arbitration proceeding itself. In the labor set-

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R. Gorman, Labor Law 695–728 (1976). The duty stands "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca*, *supra*, at 182.

ting, by contrast, the employee will often be unsophisticated in collective-bargaining matters, and he will almost always be represented solely by the union. He is called upon, within the limitations period, to evaluate the adequacy of the union's representation, to retain counsel, to investigate substantial matters that were not at issue in the arbitration proceeding, and to frame his suit. Yet state arbitration statutes typically provide very short times in which to sue for vacation of arbitration awards.[15] Concededly, the very brevity of New York's 90-day arbitration limitations period was a major factor why, in *Mitchell*, we preferred it to the 6-year statute for breach of contract, 451 U. S., at 63–64; but it does not follow that because 6 years is too long, 90 days is long enough. See also *Hoosier*, *supra*, at 707, n. 9. We conclude that state limitations periods for vacating arbitration awards fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under § 301 and the fair representation doctrine.[16]

Moreover, as JUSTICE STEVENS pointed out in his opinion in *Mitchell*, analogy to an action to vacate an arbitration

[15] The majority of States require filing within 90 days (22 States and the District of Columbia) or 3 months (7 States). See also 9 U. S. C. § 12. Only two States have longer periods—one for one year, the other for 100 days. Other statutes allow 30 days (6 States), 20 days (3 States), or 10 days (2 States). The remainder of the States either impose time limits based on terms of court or have no statutory provision on point.

[16] Besides its brevity, use of an arbitration limitations period raises knotty problems of categorization and consistency. Application of an arbitration statute seems straightforward enough when a grievance has run its full course, culminating in a formal award by a neutral arbitrator. But the union's breach of duty may consist of a wrongful failure to pursue a grievance to arbitration, as in *Vaca* and *Bowen*, or a refusal to pursue it through even preliminary stages. The parallel to vacation of an arbitral award seems tenuous at best in these situations; it is doubtful that many state arbitration statutes would themselves cover such a case in a commercial setting. Yet if it were thought necessary to apply different state rules to these different possibilities, the result would be radical variation in the treatment of cases that are not significantly different with regard to the principles of *Vaca*, *Hines*, and *Mitchell*. Moreover, the difficulty of de-

award is problematic at best as applied to the employee's claim against the union:

> "The arbitration proceeding did not, and indeed, could not, resolve the employee's claim against the union. Although the union was a party to the arbitration, it acted only as the employee's representative; the [arbitration panel] did not address or resolve any dispute between the employee and the union . . . . Because no arbitrator has decided the primary issue presented by this claim, no arbitration award need be undone, even if the employee ultimately prevails." 451 U. S., at 73 (opinion concurring in part and dissenting in part) (footnotes omitted).

JUSTICE STEVENS suggested an alternative solution for the claim against the union: borrowing the state limitations period for legal malpractice. *Id.*, at 72–75; see *post*, at 174 (STEVENS, J., dissenting); *post*, at 175 (O'CONNOR, J., dissenting). The analogy here is to a lawyer who mishandles a commercial arbitration. Although the short limitations period for vacating the arbitral award would protect the interest in finality of the opposing party to the arbitration, the misrepresented party would retain his right to sue his lawyer for malpractice under a longer limitations period. This solution is admittedly the closest state-law analogy for the claim against the union. Nevertheless, we think that it too suffers from objections peculiar to the realities of labor relations and litigation.

The most serious objection is that it does not solve the problem caused by the too-short time in which an employee could sue his employer under borrowed state law. In a commercial setting, a party who sued his lawyer for bungling an

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tecting and mustering evidence to show the union's breach of duty may be even greater in these situations, and it may not be an easy task to ascertain when the cause of action accrues—obviously a matter of great importance when the statute of limitations may be as short as 30 days.

arbitration could ordinarily recover his entire damages, even if the statute of limitations foreclosed any recovery against the opposing party to the arbitration. The same is not true in the § 301/fair representation setting, however. We held in *Vaca*, and reaffirmed this Term in *Bowen*, that the union may be held liable *only* for "increases if any in [the employee's] damages caused by the union's refusal to process the grievance." 386 U. S., at 197–198; 459 U. S., at 223–224; see *Czosek*, 397 U. S., at 29. Thus, if we apply state limitations periods, a large part of the damages will remain uncollectible in almost every case unless the employee sues within the time allotted for his suit against the employer.[17]

Further, while application of a short arbitration period as against employers would endanger employees' ability to recover most of what is due them, application of a longer malpractice statute as against unions would preclude the relatively rapid final resolution of labor disputes favored by federal law—a problem not present when a party to a commercial arbitration sues his lawyer. In No. 81–2408, for example, the holding of the Court of Appeals would permit a suit as long as three years after termination of the grievance proceeding; many States provide for periods even longer.[18] What we said in *Mitchell* about the 6-year contracts statute urged there can as easily be said here:

> "It is important to bear in mind the observations made in the *Steelworkers Trilogy* that 'the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. . . . The processing . . . machinery is actually a vehicle by which meaning and content are given to the collective

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[17] Inability to sue the employer would also foreclose use of such equitable remedies as an order to arbitrate. See *Vaca*, 386 U. S., at 196.

[18] One State's limitations period for legal malpractice is 10 years. Other statutes allow six years (10 States); five years (4 States); four years (5 States); three years (10 States and the District of Columbia); two years (16 States); and one year (4 States).

> bargaining agreement.' *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 581 (1960). Although the present case involves a fairly mundane and discrete wrongful-discharge complaint, the grievance and arbitration procedure often processes disputes involving interpretation of critical terms in the collective-bargaining agreement affecting the entire relationship between company and union . . . . This system, with its heavy emphasis on grievance, arbitration, and the 'law of the shop,' could easily become unworkable if a decision which has given 'meaning and content' to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as [three] years later." 451 U. S., at 63–64.

See also *Hoosier*, 383 U. S., at 706–707; *Machinists* v. *NLRB*, 362 U. S. 411, 425 (1960).[19]

These objections to the resort to state law might have to be tolerated if state law were the only source reasonably available for borrowing, as it often is. In this case, however, we have available a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here—a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state-law parallels.[20] We refer to § 10(b) of the National Labor Relations Act, which establishes a 6-month period for making charges of unfair labor practices to the NLRB.[21]

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[19] The solution proposed by JUSTICE STEVENS also has the unfortunate effect of establishing different limitations periods for the two halves of a § 301/fair representation suit. A very similar consideration led us to reject borrowing of a state statute in *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221 (1958). See also *Vaca*, *supra*, at 186–188, and n. 12; *Clayton* v. *Automobile Workers*, 451 U. S. 679, 694–695 (1981).

[20] This is not to say that the sole options available are a federal statute of limitations or a state one. As *Holmberg* and *Occidental* show, see *supra*, at 161, 162, we have sometimes concluded that Congress' intention can best be carried out by imposing no predefined limitations period at all.

[21] JUSTICE STEVENS suggested in *Mitchell* that use of § 10(b) is inappropriate because there is no indication in its language or history that Con-

The NLRB has consistently held that all breaches of a union's duty of fair representation *are* in fact unfair labor practices. *E. g., Miranda Fuel Co.*, 140 N. L. R. B. 181 (1962), enf. denied, 326 F. 2d 172 (CA2 1963). We have twice declined to decide the correctness of the Board's position,[22] and we need not address that question today. Even if not all breaches of the duty are unfair labor practices, however, the family resemblance is undeniable, and indeed there is a substantial overlap. Many fair representation claims (the one in No. 81–2386, for example) include allegations of discrimination based on membership status or dissident views, which would be unfair labor practices under § 8(b)(1) or (2). Aside from these clear cases, duty of fair representation claims are allegations of unfair, arbitrary, or discriminatory treatment of workers by unions—as are virtually all unfair labor practice charges made by workers against unions. See generally R. Gorman, Labor Law 698–701 (1976). Similarly, it may be the case that alleged violations by an employer of a collective-bargaining agreement will also amount to unfair labor practices. See *id.*, at 729–734.

At least as important as the similarity of the rights asserted in the two contexts, however, is the close similarity of

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gress intended the section to be applied in the present context. 451 U. S., at 75–76, and nn. 8, 9 (opinion concurring in part and dissenting in part). With all respect, we think that this observation, while undoubtedly correct, is beside the point. The same could be said with equal or greater accuracy about the intent of the New York and Maryland Legislatures when they enacted their respective arbitration or malpractice statutes of limitations. See *Occidental Life Ins. Co.* v. *EEOC*, 432 U. S. 355, 367 (1977); n. 12, *supra*. In either situation we are applying a statute of limitations to a different cause of action, not because the legislature enacting that limitations provision intended that it apply elsewhere, but because it is the most suitable source for borrowing to fill a gap in federal law. See also *Mitchell*, 451 U. S., at 61, n. 3; n. 13, *supra*.

[22] *Vaca, supra*, at 186; *Humphrey*, 375 U. S., at 344; see *Mitchell*, 451 U. S., at 67–68, n. 3 (Stewart, J., concurring in judgment).

the considerations relevant to the choice of a limitations period. As Justice Stewart observed in *Mitchell:*

> "In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system. That is precisely the balance at issue in this case. The employee's interest in setting aside the 'final and binding' determination of a grievance through the method established by the collective-bargaining agreement unquestionably implicates 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the . . . agreement and the private settlement of disputes under it.' *Hoosier*, 383 U. S., at 702. Accordingly, '[t]he need for uniformity' among procedures followed for similar claims, *ibid.*, as well as the clear congressional indication of the proper balance between the interests at stake, counsels the adoption of § 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this." 451 U. S., at 70–71 (opinion concurring in judgment) (footnote omitted).

We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy. See, *e. g.*, *Mitchell*, 451 U. S., at 61, n. 3. On the contrary, as the courts have often discovered, there is not always an obvious state-law choice for application to a given federal cause of action; yet resort to state law remains the norm for borrowing of limitations periods. Never-

theless, when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law. See Part II–A, *supra*. As Justice Goldberg cautioned: "[I]n this Court's fashioning of a federal law of collective bargaining, it is of the utmost importance that the law reflect the realities of industrial life and the nature of the collective bargaining process. We should not assume that doctrines evolved in other contexts will be equally well adapted to the collective bargaining process." *Humphrey* v. *Moore*, 375 U. S. 335, 358 (1964) (opinion concurring in result).

III

In No. 81–2408, it is conceded that the suit was filed more than 10 months after respondents' causes of action accrued. The Court of Appeals held the suit timely under a state 3-year statute for malpractice actions. Since we hold that the suit is governed by the 6-month provision of § 10(b), we reverse the judgment.

The situation is less clear in No. 81–2386. Depending on when the joint committee's decision is thought to have been rendered, the suit was filed some seven or eight months afterwards. Petitioner DelCostello contends, however, that certain events operated to toll the running of the statute of limitations until about three months before he filed suit. Since the District Court applied a 30-day limitations period, it expressly declined to consider any tolling issue. 524 F. Supp., at 725. Hence, the judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE STEVENS, dissenting.

For the past century federal judges have "borrowed" state statutes of limitations, not because they thought it was a sen-

sible form of "interstitial law making," but rather because they were directed to do so by the Congress of the United States.[1]

Today the Court holds that the Rules of Decision Act does not determine the result in these cases, because it believes that a separate federal law, growing out of "the policies and requirements of the underlying cause of action," *ante*, at 159, n. 13, "otherwise require[s] or provide[s]." The Court's opinion sets forth a number of reasons why it may make good sense to adopt a 6-month statute of limitations, but nothing in that opinion persuades me that the Constitution, treaties, or statutes of the United States "require or provide" that this particular limitations period must be applied to this case.[2]

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[1] In 1789 the First Congress enacted the Rules of Decision Act (Act), Rev. Stat. § 721, 1 Stat. 92, plainly stating:

"That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

In 1895, construing that Act, we held that state statutes of limitations provided the relevant rules of decision in patent infringement actions, explaining:

"That this section [Rev. Stat. § 721] embraces the statutes of limitations of the several States has been decided by this court in a large number of cases, which are collated in its opinion in *Bauserman* v. *Blunt*, 147 U. S. 647 . . . . Indeed, to no class of state legislation has the above provision been more steadfastly and consistently applied than to statutes prescribing the time within which actions shall be brought within its jurisdiction." *Campbell* v. *Haverhill*, 155 U. S. 610, 614.

Accord, *McClaine* v. *Rankin*, 197 U. S. 154 (1905). In response to the suggestion that the Act was not intended to govern nondiversity cases raising federal questions—such as patent suits or suits under the National Labor Relations Act—we bluntly observed that "[t]he section itself neither contains nor suggests such a distinction." 155 U. S., at 616.

[2] When the Court recognized the cause of action in *Vaca* v. *Sipes*, 386 U. S. 171 (1967), the majority explained: "We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions . . . unlimited discretion to deprive injured employees of all remedies for breach of con-

Congress has given us no reason to depart from our settled practice, grounded in the Rules of Decision Act, of borrowing analogous state statutes of limitation in cases such as this. For the reasons set forth in my separate opinion in *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, 71 (1981), I believe that in a suit for a breach of the duty of fair representation, the appropriate "laws of the several states" are the statutes of limitations governing malpractice suits against attorneys. I would apply those laws to resolve the worker-union disputes in these two cases. And I would continue to abide by our holding in *Mitchell* in resolving the employee-employer dispute presented in No. 81–2386.

For these reasons, I respectfully dissent.

JUSTICE O'CONNOR, dissenting.

As the Court recognizes, "resort to state law [is] the norm for borrowing of limitations periods." *Ante*, at 171. When federal law is silent on the question of limitations, we borrow state law in the belief that, given our longstanding practice and congressional awareness of it, we can safely assume, in the absence of strong indications to the contrary, that Congress intends by its silence that we follow the usual rule.[1]

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tract." *Id.*, at 186. But nothing in the language, structure, or legislative history of the National Labor Relations Act compels the *further* conclusion that Congress intended the federal judiciary to abandon the traditional practice of borrowing state statutes of limitations when no federal statute directly applies. Saying that a statute impliedly creates a cause of action is not the same thing as saying that it impliedly commands the courts to abandon the standard procedure for choosing limitations periods and instead to borrow a period that Congress established for a different purpose.

[1] I believe, basically for the reasons given by the Court, *ante*, at 159–161, n. 13, that our practice of borrowing state periods of limitations depends largely on this general guide for divining congressional intent. See, *e. g.*, *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, 704 (1966); *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395 (1946). I agree with the Court that the Rules of Decision Act, 28 U. S. C. § 1652, only puts the question, for it simply requires application of state law unless federal law applies. See *ante*, at 159–161, n. 13. Therefore, I am unable to join JUSTICE STEVENS' dissent.

In *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696 (1966), we applied the "norm" to a suit under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185. I see no reason in these cases to depart from our usual practice of borrowing state law, for we have no contrary indications strong enough to outweigh our ordinary presumption that Congress' silence indicates a desire that we follow the ordinary rule. As a result, I would look to state law for a limitations period. For the reasons given by JUSTICE STEVENS in his separate opinion in *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, 72–74 (1981), I think that a malpractice action against an attorney provides the closest analogy to an employee's suit against his union for breach of the duty of fair representation, and I would apply the State's statute of limitations for such an action here. In DelCostello's action against his employer, I, like JUSTICE STEVENS, would follow *Mitchell*.[2]

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My disagreement with the Court arises because I do not think that federal law implicitly rejects the practice of borrowing state periods of limitations in this situation.

[2] It is quite appropriate to apply *Mitchell* retroactively. *Mitchell* did not represent a "clear break" with past law, see *Mitchell*, 451 U. S., at 61–62, application of its rule in this case would further the goal of promoting early finality for arbitral awards, *id.*, at 63, and there is no inequity in applying the rule here. See *Lawson* v. *Truck Drivers, Chauffeurs & Helpers*, 698 F. 2d 250, 254 (CA6 1983); see generally *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971).

# EXXON CORP. ET AL. *v.* EAGERTON, COMMISSIONER OF REVENUE OF ALABAMA, ET AL.

## APPEAL FROM THE SUPREME COURT OF ALABAMA

No. 81–1020. Argued February 22, 1983—Decided June 8, 1983*

An Alabama statute imposes a severance tax on oil and gas extracted from wells located in the State. In 1979, a statute (Act 79–434) was enacted which increased the tax, exempted royalty owners from the increase, and prohibited producers from passing on the increase to consumers. Appellant producers were parties to pre-existing contracts that provided for allocation of severance taxes among themselves, the royalty owners, and any nonworking interests. The contracts also required the purchasers to reimburse appellants for severance taxes paid. After paying the increase in the severance tax under protest, appellants and other producers filed suit in an Alabama state court, seeking a declaratory judgment that Act 79–434 was unconstitutional and a refund of the taxes paid. Concluding that both the royalty-owner exemption and the pass-through prohibition violated the Equal Protection Clause of the Fourteenth Amendment and the Contract Clause, and that the pass-through prohibition was also pre-empted by the Natural Gas Policy Act of 1978 (NGPA), the trial court held Act 79–434 invalid in its entirety and ordered appellee Alabama Commissioner of Revenue to refund the taxes. The Alabama Supreme Court reversed.

*Held:*

1. The pass-through prohibition of Act 79–434 was pre-empted by federal law insofar as it applied to sales of gas in interstate commerce, but not insofar as it applied to sales of gas in intrastate commerce. Pp. 180–187.

(a) The Natural Gas Act, which was enacted in 1938, was intended to occupy the field of wholesale sales of natural gas in interstate commerce. Alabama's pass-through prohibition trespassed upon the authority of the Federal Energy Regulatory Commission (FERC) under that Act to regulate the wholesale prices of natural gas sold in interstate commerce, for the prohibition bars gas producers from increasing their prices to pass on a particular expense—the increase in the severance tax—to their purchasers. Whether or not producers should be per-

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*Together with No. 81–1268, *Exchange Oil & Gas Corp. et al.* v. *Eagerton, Commissioner of Revenue of Alabama*, also on appeal from the same court.

mitted to recover this expense from their purchasers is a matter within the sphere of FERC's regulatory authority. Pp. 184–186.

(b) Although the NGPA extended federal authority to control natural gas prices to the intrastate market, Congress also provided that this extension did not deprive the States of the power to establish a price ceiling for intrastate sales at a level lower than the federal ceiling. Since a State may establish a lower price ceiling, it may also impose a severance tax and forbid sellers to pass it through to their customers. Pp. 186–187.

2. The royalty-owner exemption of Act 79–434 does not violate the Contract Clause, since it did not nullify any contractual obligation of which appellants were the beneficiaries. The exemption provides only that the incidence of the severance tax increase shall not fall on royalty owners and nowhere states that producers may not shift the burden of the increase to royalty owners. Pp. 187–189.

3. Nor does the pass-through prohibition of Act 79–434 violate the Contract Clause. While the prohibition affected contractual obligations of which appellants were the beneficiaries, it does not constitute a "Law impairing the Obligations of Contracts" within the meaning of the Contract Clause. The prohibition imposed a generally applicable rule of conduct, the main effect of which was to shield consumers from the burden of the tax increase. Its effect on existing contracts permitting producers to pass the increase through to consumers was only incidental. Cf. *Producers Transportation Co.* v. *Railroad Comm'n of California*, 251 U. S. 228. Pp. 189–194.

4. Neither the pass-through prohibition nor the royalty-owner exemption of Act 79–434 violates the Equal Protection Clause. Both measures pass muster under the standard of rationality applied in considering equal protection challenges to statutes regulating economic and commercial matters. The pass-through prohibition plainly bore a rational relationship to the State's legitimate purpose of protecting consumers from excessive prices. Similarly, the Alabama Legislature could have reasonably determined that the royalty-owner exemption would encourage investment in oil or gas production. Pp. 195–196.

404 So. 2d 1, affirmed in part, reversed in part, and remanded.

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

*Rae M. Crowe* argued the cause for appellants in No. 81–1268. With him on the briefs was *Euel A. Screws, Jr.* *C. B. Arendall, Jr.*, argued the cause for appellants in No. 81–1020. With him on the briefs was *Louis E. Braswell.*

*John J. Breckenridge, Jr.*, argued the cause for appellees in both cases. With him on the briefs were *Charles A. Graddick* and *Herbert I. Burson, Jr.*†

JUSTICE MARSHALL delivered the opinion of the Court.

These cases concern an Alabama statute which increased the severance tax on oil and gas extracted from Alabama wells, exempted royalty owners from the tax increase, and prohibited producers from passing on the increase to their purchasers. Appellants challenge the pass-through prohibition and the royalty-owner exemption under the Supremacy Clause, the Contract Clause, and the Equal Protection Clause.

I

Since 1945 Alabama has imposed a severance tax on oil and gas extracted from wells located in the State. Ala. Code § 40–20–1 *et seq.* (1975). The tax "is levied upon the producers of such oil or gas in the proportion of their ownership at the time of severance, but . . . shall be paid by the person in charge of the production operations." § 40–20–3(a).[1] The person in charge of production operations is "authorized, empowered and required to deduct from any amount due to producers of such production at the time of severance the proportionate amount of the tax herein levied before making payments to such producers." § 40–20–3(a). The statute defines a "producer" as "[a]ny person engaging or continuing in the business of oil or gas production," including

> "the owning, controlling, managing, or leasing of any oil or gas property or oil or gas well, and producing in any

†*Solicitor General Lee, Elliott Schulder, David A. Engels*, and *Jerome M. Feit* filed a brief for the United States et al. as *amici curiae* urging reversal.

[1] The amount of tax that is due and payable constitutes "a first lien upon any of the oil or gas so produced when in the possession of the original producer or any purchaser of such oil or gas in its unmanufactured state or condition." § 40–20–3(a).

> manner any oil or gas . . . and . . . receiving money or other valuable consideration as royalty or rental for oil or gas produced. . . ." § 40–20–1(8).

In 1979 the Alabama Legislature enacted Act 79–434, which increased the severance tax from 4% to 6% of the gross value of the oil and gas at the point of production. Whereas the severance tax had previously fallen on royalty owners in proportion to their interests in the oil or gas produced, the amendment specifically exempted royalty owners from the tax increase:

> "Any person who is a royalty owner shall be exempt from the payment of any increase in taxes herein levied and shall not be liable therefor." 1979 Ala. Acts, No. 79–434, p. 687, § 1, as amended, Ala. Code § 40–20–2(d) (1982).

The amendment also prohibited producers from passing the tax increase through to consumers:

> "The privilege tax herein levied shall be absorbed and paid by those persons engaged in the business of producing or severing oil or gas only, and the producer shall not pass on the costs of such tax payments, either directly or indirectly, to the consumer; it being the express intent of this act that the tax herein levied shall be borne exclusively by the producer or severer of oil or gas." 1979 Ala. Acts, No. 79–434, p. 687, § 1(e).

The amendment became effective on September 1, 1979. The pass-through prohibition was repealed on May 28, 1980. 1980 Ala. Acts, No. 80–708, p. 1438.

Appellants in both No. 81–1020 and No. 81–1268 have working interests in producing oil and gas wells located in Alabama.[2] They drill and operate the wells and are responsible for selling the oil and gas extracted. Appellants are obli-

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[2] Appellants in No. 81–1020 are Exxon Corp., Gulf Oil Corp., and the Louisiana Land and Exploration Co. Appellants in No. 81–1268 are Exchange Oil and Gas Corp., Getty Oil Co., and Union Oil Co. of California.

gated to pay the landowners a percentage of the sale proceeds as royalties, the percentage depending upon the provisions of the applicable lease. Within any given production unit, there may be tracts of land which the owners of the land have leased to nonworking interests, who are also entitled to a share of the sale proceeds. Appellants were parties to contracts providing for the allocation of severance taxes among themselves, the royalty owners, and any nonworking interests in proportion to each party's share of the sale proceeds. Appellants were also parties to sale contracts that required the purchasers to reimburse them for any and all severance taxes on the oil or gas sold.

After paying the 2% increase in the severance tax under protest, appellants and eight other oil and gas producers filed suit in the Circuit Court of Montgomery County, Ala., seeking a declaratory judgment that Act 79–434 was unconstitutional and a refund of the taxes paid under protest. The Circuit Court ruled in favor of appellants, concluding that both the royalty-owner exemption and the pass-through prohibition violate the Equal Protection Clause and the Contract Clause, and that the pass-through prohibition is also pre-empted by the Natural Gas Policy Act of 1978 (NGPA), 15 U. S. C. § 3301 *et seq.* (1976 ed., Supp. V). Although Act 79–434 contained a severability clause, the court held the entire Act invalid and ordered appellee Commissioner of Revenue of the State of Alabama to refund the taxes paid under protest. The Supreme Court of Alabama reversed, holding Act 79–434 valid in its entirety. 404 So. 2d 1 (1981).

Appellants appealed to this Court under 28 U. S. C. § 1257(2). We noted probable jurisdiction. 456 U. S. 970 (1982). We now affirm in part, reverse in part, and remand for further proceedings not inconsistent with this opinion.

## II

We deal first with appellants' contention that the application of the pass-through prohibition to gas was pre-empted

by federal law.[3] The applicable principles of pre-emption were recently summarized in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U. S. 190, 203–204 (1983):

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[3] The Supremacy Clause of the Constitution provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the contrary notwithstanding." Art. VI, cl. 2.

Although appellants in No. 81–1268 also contend that the application of the pass-through prohibition to oil was pre-empted by the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U. S. C. § 751 *et seq.* (1976 ed. and Supp. V), and the regulations promulgated thereunder, we conclude that we have no jurisdiction to consider this contention. The decision below does not discuss this issue, and when "'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'" *Fuller* v. *Oregon*, 417 U. S. 40, 50, n. 11 (1974), quoting *Street* v. *New York*, 394 U. S. 576, 582 (1969). No such showing has been made here. Although appellants in No. 81–1268 have represented to this Court that the trial court held the pass-through prohibition to be pre-empted by the EPAA, Juris. Statement 3, an examination of the trial court opinion reveals that in fact the court made no mention of the EPAA. Nor does anything in the record before us indicate that this issue was raised in the trial court. Appellants did address the EPAA in their brief before the Supreme Court of Alabama, Brief for Appellees Exchange Oil and Gas Corp., Getty Oil Co., Placid Oil Co., Union Oil Co. of California in No. 79–823, pp. 51–53, but that court did not pass on the issue. Under these circumstances we have no jurisdiction to consider whether the EPAA pre-empted the application of the pass-through prohibition to oil, for it does not affirmatively appear that that issue was decided below. *Bailey* v. *Anderson*, 326 U. S. 203, 206–207 (1945). The general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal. See, *e. g.*, *State* v. *Newberry*, 336 So. 2d 181, 182 (Ala. 1976); *State* v. *Graf*, 280 Ala. 71, 72, 189 So. 2d 912, 913 (1966); *Burton* v. *Burton*, 379 So. 2d 617, 618 (Civ. App. 1980); *Crews* v. *Houston County Dept. of Pensions & Security*, 358 So. 2d 451, 455 (Civ. App.), cert. denied, 358 So. 2d 456 (Ala. 1978).

Appellants in No. 81–1268 have also burdened this Court with a labored argument that they were denied due process by the Supreme Court of Alabama's refusal to consider the legislative history of the 1979 amendments

> "Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be found from a '"scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."' *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 153 (1982), quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941)."

Appellants contend that the pass-through prohibition was in conflict with § 110(a) of the NGPA, 92 Stat. 3368, 15 U. S. C. § 3320(a) (1976 ed., Supp. V), which provides in pertinent part as follows:

> "[A] price for the first sale of natural gas shall not be considered to exceed the maximum lawful price appli-

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to the state severance tax, a history which, according to appellants, shows that those amendments were intended to apply only to certain wells located in one county in the State and not to apply statewide. Suffice it to say that the weight to be given to the legislative history of an Alabama statute is a matter of Alabama law to be determined by the Supreme Court of Alabama.

> cable to the first sale of such natural gas under this part if such first sale price exceeds the maximum lawful price to the extent necessary to recover—
>
> "(1) State severance taxes attributable to the production of such natural gas and borne by the seller . . . ."

We agree with the Supreme Court of Alabama[4] that the pass-through prohibition did not conflict with this provision. On its face § 110(a) of the NGPA does not give any seller the affirmative right to include in his price an amount necessary

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[4] See 404 So. 2d, at 6:

"Nowhere in that section [§ 110(a) of the NGPA] is it stated that the oil companies are entitled to 'pass-through' increases on state severance taxes. Rather, the Act merely provides that the lawful ceiling on the first sale at the wellhead may be raised if a severance tax is imposed by the states. The two Acts are aimed at entirely different purposes. In other words, although it would be perfectly permissible for the oil and gas companies to raise the price for the first sale of natural gas, subject to the limitations of the Natural Gas Policy Act, all that Act No. 79–434 requires is that the increase in severance tax mandated by that Act be borne by the producer or severer of the oil or gas."

Relying on this passage, appellee Commissioner of Revenue contends that the pass-through prohibition did not bar a producer from increasing its price by an amount equal to the increase in the severance tax, provided that the producer did not label that increase a tax:

"The Commissioner believes that the seller may include in the lawful maximum price an amount equal to Alabama's severance taxes borne by the seller resulting from the production of natural gas. The Commissioner believes that it was the intent of the Alabama Legislature in adopting the pass-through prohibition that it did not want to be perceived as levying an additional tax on the consumer. Therefore it prohibited anyone from passing along the increase levied by Act 79–434 *as a tax*." Brief for Appellee Eagerton 16–17 (emphasis in original).

We do not agree with appellee that the Supreme Court of Alabama interpreted the pass-through prohibition to leave sellers free to pass through the tax increase so long as they did not tell their customers that that is what they were doing. The statute contains no language that would suggest this limitation, and as we understand the opinion below, the point of the passage relied upon by appellee was only that the pass-through prohibition did not conflict with federal law.

to recover state severance taxes. It simply provides that a seller who does include such an amount in his price shall not be deemed to have exceeded the federal price ceiling if he would not have exceeded it had that amount not been included. Nothing in the legislative history of the NGPA has been called to our attention to indicate that § 110(a) was intended to have a greater effect than its language would indicate.[5]

Although the pass-through prohibition thus was not in conflict with § 110(a) of the NGPA, we nevertheless conclude that it was pre-empted by federal law insofar as it applied to sales of gas in interstate commerce. To that extent, the pass-through prohibition represented an attempt to legislate in a field that Congress has chosen to occupy. The Natural Gas Act (Gas Act), 52 Stat. 821, as amended, 15 U. S. C. §§ 717–717w (1976 ed. and Supp. V), was enacted in 1938 "to provide the Federal Power Commission, now the FERC, with authority to regulate the wholesale pricing of natural gas in the flow of interstate commerce from wellhead to delivery to consumers." *Maryland* v. *Louisiana*, 451 U. S. 725, 748 (1981). As we have previously recognized, *e. g.*, *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 682–683 (1954); *id.*, at 685–687 (Frankfurter, J., concurring), the Gas Act was intended to occupy the field of wholesale sales of natural gas in interstate commerce, a field which had previously been left largely unregulated as a result of the absence of federal action and decisions of this Court striking down state regulation of sales of natural gas in interstate commerce. The Committee Reports on the bill that became the Gas Act clearly evidence this intent:

> "[S]ales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing compa-

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[5] Although the United States and the Federal Energy Regulatory Commission (FERC) in their *amicus* brief point to the statement in the Conference Report that "[a]ll ceiling prices under this Act are exclusive of

> nies to distributing companies) . . . have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. *The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act.*" H. R. Rep. No. 709, 75th Cong., 1st Sess., 1–2 (1937); S. Rep. No. 1162, 75th Cong., 1st Sess., 2 (1937) (citations omitted) (emphasis added).

The Alabama pass-through prohibition trespassed upon FERC's authority over wholesale sales of gas in interstate commerce, for it barred gas producers from increasing their prices to pass on a particular expense—the increase in the severance tax—to their purchasers. Whether or not producers should be permitted to recover this expense from their purchasers is a matter within the sphere of FERC's regulatory authority. See *FPC* v. *United Gas Pipe Line Co.*, 386 U. S. 237, 243 (1967) (emphasis added):

> "One of [the FPC's] statutory duties is to determine just and reasonable rates which will be sufficient to permit the company to recover its costs of service and a reasonable return on its investment. Cost of service is therefore a major focus of inquiry. *Normally included as a cost of service is a proper allowance for taxes . . . .*"

Here, as in *Maryland* v. *Louisiana*, the state statute "interfere[d] with the FERC's authority to regulate the determination of the proper allocation of costs associated with the sale of natural gas to consumers." 451 U. S., at 749. Just as the statute at issue in *Maryland* v. *Louisiana* was pre-empted because it effectively "shift[ed] the incidence of certain expenses . . . to the ultimate consumer of the processed gas without the prior approval of the FERC," *id.*, at 750, Alabama's pass-through prohibition was pre-empted, insofar as

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State severance taxes borne by the seller . . . ," H. R. Conf. Rep. No. 95–1752, p. 90 (1978), we do not see how this statement supports their position that the pass-through prohibition was in conflict with § 110(a).

it applied to sales of gas in interstate commerce, because it required that certain expenses be absorbed by producers.

We reach a different conclusion with respect to the application of the pass-through prohibition to sales of gas in intrastate commerce.[6] Although § 105(a) of the NGPA extended federal authority to control prices to the intrastate market, 15 U. S. C. § 3315(a) (1976 ed., Supp. V), Congress also provided that this extension of federal authority did not deprive the States of the power to establish a price ceiling for intrastate producer sales of gas at a level lower than the federal ceiling. Section 602(a) of the NGPA, 92 Stat. 3411, as set forth in 15 U. S. C. § 3432(a) (1976 ed., Supp. V), states that

> "[n]othing in this chapter shall affect the authority of any State to establish or enforce any maximum lawful price for the first sale of natural gas produced in such State which does not exceed the applicable maximum lawful price, if any, under subchapter I of this chapter."

See *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U. S. 400, 420–421 (1983) (in enacting the NGPA, "Congress explicitly envisioned that the States would regulate intrastate markets in accordance with the overall national policy").

Since a State may establish a lower price ceiling, we think it may also impose a severance tax and forbid sellers to pass it through to their purchasers. For sellers charging the

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[6] The parties stipulated that a substantial portion of the gas extracted by appellants was sold in interstate commerce. App. in No. 81–1020, pp. 78, 184–185. Because the trial court concluded that the pass-through prohibition was in conflict with § 110(a) of the NGPA, it did not determine how much of the taxes at issue in this case were levied on gas sold in intrastate and interstate commerce. If, on remand, when the Supreme Court of Alabama inquires into the question of severability, see *infra*, at 196–197, that court holds that the Alabama Legislature would have intended to impose the tax increase on the severance of gas if and only if the increase could not be passed through to consumers when the gas is sold, such a determination may have to be made.

maximum price allowed by federal law, a state tax increase coupled with a pass-through prohibition will not differ in practical effect from a state tax increase coupled with the imposition of a state price ceiling that maintains the price ceiling imposed by federal law prior to the tax increase. In both cases sellers are required to absorb expenses that they might be able to pass through to their customers absent the state restrictions. Given the absence of any express pre-emption provision in the NGPA and Congress' express approval of one form of state regulation, we do not think it can fairly be inferred that Congress contemplated that the general scheme created by the NGPA would preclude another form of state regulation that is no more intrusive.[7]

We conclude that the pass-through prohibition was pre-empted by federal law insofar as it applied to sales of gas in interstate commerce, but not insofar as it applied to producer sales of gas in intrastate commerce.

## III

We turn next to appellants' contention that the royalty-owner exemption and the pass-through prohibition impaired the obligations of contracts in violation of the Contract Clause.[8]

### A

Appellants' Contract Clause challenge to the royalty-owner exemption fails for the simple reason that there is nothing to suggest that that exemption nullified any contrac-

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[7] We note that these cases do not involve any attempt by a State to prohibit gas producers from passing through the cost of a factor of production such as labor or machinery. Such a prohibition might raise additional considerations not present here because of the inducement it would create for producers to shift away from the factor of production to which the pass-through prohibition applied.

[8] The Contract Clause provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U. S. Const., Art. I, § 10, cl. 1.

tual obligations of which appellants were the beneficiaries.[9] The relevant provision of Act 79–434 states that "[a]ny person who is a royalty owner shall be exempt from the payment of any increase in taxes levied and shall not be liable therefor." On its face this portion of the Act provides only that the legal incidence of the tax increase does not fall on royalty

[9] The contracts into which appellants had entered appear to entitle them to reimbursement from the royalty owners for a share of any severance tax paid by appellants in proportion to the royalty owners' interest in the oil or gas, regardless of whether state law imposes that tax on the producer or on the royalty owner. Appellants cite the following contractual provisions as typical of the agreements which they contend are impaired by the royalty-owner exemption:

"Lessor shall bear and pay, and there shall be deducted from the royalties due hereunder, Lessor's proportionate royalty share of:

"(a) All applicable severance, production and other such taxes levied or imposed upon production from the leased premises." App. in No. 81–1020, pp. 76–77.

"LESSOR AND LESSEE shall bear in proportion to their respective participation in the production hereunder, all taxes levied on minerals covered hereby or any part thereof, or on the severance or production thereof, and all increases . . . in taxes on the lease premises or any part thereof." *Id.*, at 184.

These provisions would seem to entitle appellants to recover from the royalty owners a portion of the tax increase in proportion to the royalty owners' interests in the proceeds of the oil or gas sold by appellants, regardless of the legal incidence of the tax increase.

Even if these contractual provisions were to be interpreted to entitle appellants to reimbursement only for that portion of the severance tax which state law itself imposes on the royalty owners, appellants would still have no objection under the Contract Clause. In that event, the increase in the severance tax would be absorbed by appellants not because the State has nullified any contractual obligation, but simply because the provisions as so interpreted would impose no obligation on the royalty owners to reimburse appellants for the tax increase.

Since appellants have not shown that the royalty-owner exemption affects anything other than the legal incidence of the tax increase, their contention that the exemption is pre-empted by the Gas Act and the NGPA is plainly without merit.

owners, *i. e.*, the State cannot look to them for payment of the additional taxes. In contrast to the pass-through prohibition, the royalty-owner exemption nowhere states that producers may not shift the burden of the tax increase in whole or in part to royalty owners. Nor is there anything in the opinion below to suggest that the Supreme Court of Alabama interpreted the exemption to have this effect. We will not strain to reach a constitutional question by speculating that the Alabama courts might in the future interpret the royalty-owner exemption to forbid enforcement of a contractual arrangement to shift the burden of the tax increase. See *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring).

B

Unlike the royalty-owner exemption, the pass-through prohibition did restrict contractual obligations of which appellants were the beneficiaries. Appellants were parties to sale contracts that permitted them to include in their prices any increase in the severance taxes that they were required to pay on the oil or gas being sold.[10] The contracts were entered into before the pass-through prohibition was enacted and their terms extended through the period during which the prohibition was in effect. By barring appellants from passing the tax increase through to their purchasers, the pass-through prohibition nullified *pro tanto* the purchasers' contractual obligations to reimburse appellants for any severance taxes.

While the pass-through prohibition thus affects contractual obligations of which appellants were the beneficiaries, it does not follow that the prohibition constituted a "Law impairing the Obligations of Contracts" within the meaning of the Con-

[10] For example, appellant Union Oil Co. was a party to a contract concerning oil under which the purchaser was required to reimburse it for "100 percent of the amount by which any severance taxes paid by seller are in excess of the rates of such taxes levied as of April 1, 1976." *Ibid.*

tract Clause. See *United States Trust Co.* v. *New Jersey*, 431 U. S. 1, 21 (1977). "Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U. S., at 410, quoting *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 434 (1934). This Court has long recognized that a statute does not violate the Contract Clause simply because it has the effect of restricting, or even barring altogether, the performance of duties created by contracts entered into prior to its enactment. See *Allied Structural Steel Co.* v. *Spannaus*, 438 U. S. 234, 241–242 (1978). If the law were otherwise, "one would be able to obtain immunity from state regulation by making private contractual arrangements." *United States Trust Co.* v. *New Jersey*, *supra*, at 22.

The Contract Clause does not deprive the States of their "broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result." *United States Trust Co.* v. *New Jersey*, *supra*, at 22. As Justice Holmes put it: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter." *Hudson Co.* v. *McCarter*, 209 U. S. 349, 357 (1908).[11] Thus, a state prohi-

[11] This point was aptly stated in an early decision holding that a statute prohibiting the issuance of notes by unincorporated banking associations did not violate the Contract Clause by preventing the performance of existing contracts entered into by members of such associations:

"[I]t is said that the members had formed a contract *between themselves*, which would be dissolved by the stoppage of their business. And what then? Is that such a violation of contracts as is prohibited by the constitution of the *United States?* Consider to what such a construction would lead. Let us suppose, that in one of the states there is no law against gaming, cock-fighting, horse-racing, or public masquerades, and that compa-

bition law may be applied to contracts for the sale of beer that were valid when entered into, *Beer Co.* v. *Massachusetts*, 97 U. S. 25 (1878), a law barring lotteries may be applied to lottery tickets that were valid when issued, *Stone* v. *Mississippi*, 101 U. S. 814 (1880), and a workmen's compensation law may be applied to employers and employees operating under pre-existing contracts of employment that made no provision for work-related injuries, *New York Central R. Co.* v. *White*, 243 U. S. 188 (1917).[12]

Like the laws upheld in these cases, the pass-through prohibition did not prescribe a rule limited in effect to contractual obligations or remedies, but instead imposed a generally applicable rule of conduct designed to advance "a broad societal interest," *Allied Structural Steel Co.*, *supra*, at 249: protecting consumers from excessive prices. The prohibition applied to all oil and gas producers, regardless of whether they happened to be parties to sale contracts that contained a provision permitting them to pass tax increases through to their purchasers. The effect of the pass-through prohibition

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nies should be formed for the purpose of carrying on these practices. And suppose, that the legislature of that state, being [seriously] convinced of the pernicious effect of these institutions, should venture to interdict them: will it be seriously contended, that the constitution of the *United States* has been violated?" *Myers* v. *Irwin*, 2 Serg. & Rawle 368, 372 (Pa. 1816).

[12] See generally *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 436–437 (1934); *id.*, at 475–477 (Sutherland, J., dissenting); *Dillingham* v. *McLaughlin*, 264 U. S. 370, 374 (1924) ("The operation of reasonable laws for the protection of the public cannot be headed off by making contracts reaching into the future") (Holmes, J.); *Manigault* v. *Springs*, 199 U. S. 473, 480 (1905) ("parties by entering into contracts may not estop the legislature from enacting laws intended for the public good"); *Ogden* v. *Saunders*, 12 Wheat. 213, 291 (1827) (when "laws are passed rendering that unlawful, even incidentally, which was lawful at the time of the contract[,] it is the government that puts an end to the contract, and yet no one ever imagined that it thereby violates the obligation of a contract"); Hale, The Supreme Court and the Contract Clause: II, 57 Harv. L. Rev. 621, 671–674 (1944).

on existing contracts that did contain such a provision was incidental to its main effect of shielding consumers from the burden of the tax increase. Cf. *Henderson Co.* v. *Thompson*, 300 U. S. 258, 266 (1937); *Beer Co.* v. *Massachusetts*, *supra*, at 32.

Because the pass-through prohibition imposed a generally applicable rule of conduct, it is sharply distinguishable from the measures struck down in *United States Trust Co.* v. *New Jersey*, *supra*, and *Allied Structural Steel Co.* v. *Spannaus*, *supra*. *United States Trust Co.* involved New York and New Jersey statutes whose sole effect was to repeal a covenant that the two States had entered into with the holders of bonds issued by The Port Authority of New York and New Jersey.[13] Similarly, the statute at issue in *Allied Structural Steel Co.* directly "'adjust[ed] the rights and responsibilities of contracting parties.'" 438 U. S., at 244, quoting *United States Trust Co.* v. *New Jersey*, *supra*, at 22. The statute required a private employer that had contracted with its employees to provide pension benefits to pay additional benefits, beyond those it had agreed to provide, if it terminated the pension plan or closed a Minnesota office. Since the statute applied only to employers that had entered into pension agreements, its sole effect was to alter contractual duties. Cf. *Worthen Co.* v. *Kavanaugh*, 295 U. S. 56 (1935) (statute which drastically limited the remedies available to mortgagees held invalid under the Contract Clause).

Alabama's power to prohibit oil and gas producers from passing the increase in the severance tax on to their purchasers is confirmed by several decisions of this Court rejecting Contract Clause challenges to state rate-setting schemes that displaced any rates previously established by contract. In

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[13] The statutes under review in *United States Trust Co.* also implicated the special concerns associated with a State's impairment of its own contractual obligations. See 431 U. S., at 25–28; *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U. S. 400, 412–413, and n. 14 (1983).

*Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U. S. 109 (1937), it was held that a party to a long-term contract with a utility could not invoke the Contract Clause to obtain immunity from a state public service commission's imposition of a rate for steam heating that was higher than the rate established in the contract. The Court declared that "the State has power to annul and supersede rates previously established by contract between utilities and their customers." *Id.*, at 113 (footnote omitted). In *Union Dry Goods Co.* v. *Georgia Public Service Corp.*, 248 U. S. 372 (1919), the Court rejected a Contract Clause challenge to an order of a state commission setting the rates that could be charged for supplying electric light and power, notwithstanding the effect of the order on pre-existing contracts. Accord, *Stephenson* v. *Binford*, 287 U. S. 251 (1932) (upholding law which barred private contract carriers from using the highways unless they charged rates which might exceed those they had contracted to charge).

*Producers Transportation Co.* v. *Railroad Comm'n of California*, 251 U. S. 228 (1920), is particularly instructive for present purposes. In that case the Court upheld an order issued by a state commission under a newly enacted statute empowering the commission to set the rates that could be charged by individuals or corporations offering to transport oil by pipeline. The Court rejected the contention of a pipeline owner that the statute could not override pre-existing contracts:

> "That some of the contracts . . . were entered into before the statute was adopted or the order made is not material. A common carrier cannot by making contracts for future transportation or by mortgaging its property or pledging its income prevent or postpone the exertion by the State of the power to regulate the carrier's rates and practices. Nor does the contract clause of the Constitution interpose any obstacle to the exertion of that power." *Id.*, at 232.

There is no material difference between *Producers Transportation Co.* and the cases before us. If a party that has entered into a contract to transport oil is not immune from subsequently enacted state regulation of the rates that may be charged for such transportation, parties that have entered into contracts to sell oil and gas likewise are not immune from state regulation of the prices that may be charged for those commodities. And if the Contract Clause does not prevent a State from dictating the price that sellers may charge their customers, plainly it does not prevent a State from requiring that sellers absorb a tax increase themselves rather than pass it through to their customers. If one form of state regulation is permissible under the Contract Clause notwithstanding its incidental effect on pre-existing contracts, the other form of regulation must be permissible as well.[14]

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[14] Our conclusion is buttressed by the fact that appellants operate in industries that have been subject to heavy regulation. See *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, *supra*, at 416 ("Price regulation existed and was foreseeable as the type of law that would alter contract obligations"); *Veix* v. *Sixth Ward Bldg. & Loan Assn.*, 310 U. S. 32, 38 (1940) ("When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic").

With respect to gas, see *supra*, at 184–186; *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, *supra*, at 413–416. During the time the pass-through prohibition was in effect, the Federal Government controlled the prices of crude oil under the EPAA, 15 U. S. C. § 751 *et seq.* (1976 ed. and Supp. V). Regulations promulgated under the EPAA established maximum prices for most categories of crude oil. 10 CFR Part 212, Subpart D—Producers of Crude Petroleum, § 212.71 *et seq.* (1975).

Appellants' reliance on *Barwise* v. *Sheppard*, 299 U. S. 33 (1936), is misplaced. In *Barwise* the owners of royalty interests challenged a Texas statute that imposed a new tax on oil production, which was to be borne "ratably by all interested parties including royalty interests." The statute authorized the producers to pay the tax and withhold from any royalty owners their proportionate share of the tax. The royalty owners in *Barwise* were parties to contracts that entitled them to specified shares of the oil produced by their lessee and required the lessee to deliver the oil

## IV

Finally, we reject appellants' equal protection challenge to the pass-through prohibition and the royalty-owner exemption. Because neither of the challenged provisions adversely affects a fundamental interest, see, *e. g.*, *Dunn* v. *Blumstein*, 405 U. S. 330, 336–342 (1972); *Shapiro* v. *Thompson*, 394 U. S. 618, 629–631 (1969), or contains a classification based upon a suspect criterion, see, *e. g.*, *Graham* v. *Richardson*, 403 U. S. 365, 372 (1971); *McLaughlin* v. *Florida*, 379 U. S. 184, 191–192 (1964), they need only be tested under the lenient standard of rationality that this Court has traditionally applied in considering equal protection challenges to

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"free of cost." *Id.*, at 35. They contended that the statute, by authorizing the lessee to deduct their portion of the tax from any payments due them, impermissibly impaired the lessee's obligation to deliver the oil "free of cost." This Court concluded that the statute did not run afoul of the Contract Clause:

"[T]he lease was made in subordination to the power of the State to tax the production of oil and to apportion the tax between the lessors and the lessee. . . . Plainly no stipulation in the lease can be of any avail as against the power of the State to impose the tax, prescribe who shall be under a duty to the State to pay it, and fix the time and mode of payment. And this is true even though it be assumed to be admissible for the lessors and lessee to stipulate as to who, as between themselves, shall ultimately bear the tax." *Id.*, at 40.

We reject appellants' assertion that the last sentence of this quotation was meant to indicate that the statute would have violated the Contract Clause if, instead of simply specifying the legal incidence of the tax, it had nullified an agreement as to who would ultimately bear the burden of the tax. We think the thrust of the sentence was simply that even though the law left the lessors and the lessee free to allocate the ultimate burden of the tax as they saw fit, no agreement between them could limit the State's power to decide who must pay the tax and to specify the time and manner of payment.

*Barwise* is relevant to these cases only insofar as it confirms Alabama's power to decide that no part of the legal incidence of the increase in the severance tax would fall on owners of royalty interests. See Part III–A, *supra*.

regulation of economic and commercial matters. See, *e. g.*, *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U. S. 648, 668 (1981); *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 461–463 (1981); *Kotch* v. *Board of River Pilot Comm'rs*, 330 U. S. 552, 564 (1947). Under that standard a statute will be sustained if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose. See, *e. g.*, *Western & Southern Life Ins. Co.*, *supra*, at 668; *Clover Leaf Creamery Co.*, *supra*, at 461–462, 464.

We conclude that the measures at issue here pass muster under this standard. The pass-through prohibition plainly bore a rational relationship to the State's legitimate purpose of protecting consumers from excessive prices. Similarly, we think the Alabama Legislature could have reasonably determined that the royalty-owner exemption would encourage investment in oil or gas production. Our conclusion with respect to the royalty-owner exemption is reinforced by the fact that that provision is solely a tax measure. As we recently stated in *Regan* v. *Taxation with Representation of Washington*, 461 U. S. 540, 547 (1983), "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes." See *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356, 359 (1973); *Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522, 526–527 (1959).

## V

For the foregoing reasons, we conclude that the application of the pass-through prohibition to sales of gas in interstate commerce was pre-empted by federal law, but we uphold both the pass-through prohibition and the royalty-owner exemption against appellants' challenges under the Contract Clause and the Equal Protection Clause. Since the severability of the pass-through prohibition from the remainder

of the 1979 amendments is a matter of state law, we remand to the Supreme Court of Alabama for that court to determine whether the partial invalidity of the pass-through prohibition entitles appellants to a refund of some or all of the taxes paid under protest. See n. 6, *supra*. Accordingly, the judgment of the Supreme Court of Alabama is affirmed in part and reversed in part, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

# UNITED STATES *v.* WHITING POOLS, INC.

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

No. 82–215. Argued April 19, 1983—Decided June 8, 1983

Section 542(a) of the Bankruptcy Reform Act of 1978 (Act) requires an entity, other than a custodian, in possession of property of the debtor that the trustee in bankruptcy can use, sell, or lease under § 363 to deliver that property to the trustee. Section 543(b)(1) requires a custodian in possession or control of any property of the debtor to deliver the property to the trustee. Promptly after the Internal Revenue Service (IRS) seized respondent swimming pool firm's tangible personal property to satisfy a tax lien, respondent filed a petition for reorganization under the Act. The Bankruptcy Court, pursuant to § 543(b)(1), ordered the IRS to turn the property over to respondent on the condition that respondent provide the IRS with specified protection for its interests. The District Court reversed, holding that a turnover order against the IRS was not authorized by either § 542(a) or § 543(b)(1). The Court of Appeals in turn reversed the District Court, holding that a turnover order could issue against the IRS under § 542(a).

*Held:*

1. The reorganization estate includes property of the debtor that has been seized by a creditor prior to the filing of a petition for reorganization. Pp. 202–209.

(a) Both the congressional goal of encouraging reorganization of troubled enterprises and Congress' choice of protecting secured creditors by imposing limits or conditions on the trustee's power to sell, use, or lease property subject to a secured interest, rather than by excluding such property from the reorganization estate, indicate that Congress intended a broad range of property, including property in which a creditor has a secured interest, to be included in the estate. Pp. 203–204.

(b) The statutory language reflects this view of the scope of the estate. Section 541(a)(1) of the Act, which provides that the estate shall include "all legal or equitable interests of the debtor in property as of the commencement of the case," is intended to include any property made available to the estate by other provisions of the Act such as § 542(a). In effect, § 542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of reorganization proceedings. Pp. 204–207.

(c) This interpretation of § 542(a) is supported by its legislative history and is consistent with judicial precedent predating the Act.

Any other interpretation would deprive the reorganization estate of the assets and property essential to its rehabilitation effort and thereby would frustrate the congressional purpose behind the reorganization provisions. Pp. 207–208.

2. Section 542(a) authorizes the Bankruptcy Court to order the IRS to turn over the seized property in question. Pp. 209–211.

(a) The IRS is bound by § 542(a) to the same extent as any secured creditor. Nothing in the Act or its legislative history indicates that Congress intended a special exception for tax collectors. P. 209.

(b) While § 542(a) would not apply if a tax levy or seizure transferred to the IRS ownership of the property seized, the Internal Revenue Code does not transfer ownership of such property until the property is sold to a bona fide purchaser at a tax sale. Pp. 209–211.

674 F. 2d 144, affirmed.

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

*Stuart A. Smith* argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Archer*, *Wynette J. Hewett*, and *George L. Hastings, Jr.*

*Lloyd H. Relin* argued the cause and filed a brief for respondent.

JUSTICE BLACKMUN delivered the opinion of the Court.

Promptly after the Internal Revenue Service (IRS or Service) seized respondent's property to satisfy a tax lien, respondent filed a petition for reorganization under the Bankruptcy Reform Act of 1978, hereinafter referred to as the "Bankruptcy Code." The issue before us is whether § 542(a) of that Code authorized the Bankruptcy Court to subject the IRS to a turnover order with respect to the seized property.

## I

### A

Respondent Whiting Pools, Inc., a corporation, sells, installs, and services swimming pools and related equipment and supplies. As of January 1981, Whiting owed approximately $92,000 in Federal Insurance Contribution Act taxes and federal taxes withheld from its employees, but had failed

to respond to assessments and demands for payment by the IRS. As a consequence, a tax lien in that amount attached to all of Whiting's property.[1]

On January 14, 1981, the Service seized Whiting's tangible personal property—equipment, vehicles, inventory, and office supplies—pursuant to the levy and distraint provision of the Internal Revenue Code of 1954.[2] According to uncontroverted findings, the estimated liquidation value of the property seized was, at most, $35,000, but its estimated going-concern value in Whiting's hands was $162,876. The very next day, January 15, Whiting filed a petition for reorganization, under the Bankruptcy Code's Chapter 11, 11 U. S. C. § 1101 *et seq.* (1976 ed., Supp. V), in the United States Bankruptcy Court for the Western District of New York. Whiting was continued as debtor-in-possession.[3]

The United States, intending to proceed with a tax sale of

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[1] Section 6321 of the Internal Revenue Code of 1954, 26 U. S. C. § 6321, provides:

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

[2] Section 6331 of that Code, 26 U. S. C. § 6331, provides:

"(a) Authority of Secretary

"If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property . . . belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. . . .

"(b) Seizure and sale of property

"The term 'levy' as used in this title includes the power of distraint and seizure by any means. . . . In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible)."

[3] With certain exceptions not relevant here, a debtor-in-possession, such as Whiting, performs the same functions as a trustee in a reorganization. 11 U. S. C. § 1107(a) (1976 ed., Supp. V).

the property,[4] moved in the Bankruptcy Court for a declaration that the automatic stay provision of the Bankruptcy Code, § 362(a), is inapplicable to the IRS or, in the alternative, for relief from the stay. Whiting counterclaimed for an order requiring the Service to turn the seized property over to the bankruptcy estate pursuant to § 542(a) of the Bankruptcy Code.[5] Whiting intended to use the property in its reorganized business.

B

The Bankruptcy Court determined that the IRS was bound by the automatic stay provision. *In re Whiting Pools, Inc.*, 10 B. R. 755 (1981). Because it found that the seized property was essential to Whiting's reorganization effort, it refused to lift the stay. Acting under § 543(b)(1) of the Bankruptcy Code,[6] rather than under § 542(a), the court directed the IRS to turn the property over to Whiting on the condition that Whiting provide the Service with specified protection for its interests. 10 B. R., at 760–761.[7]

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[4] Section 6335, as amended, of the 1954 Code, 26 U. S. C. § 6335, provides for the sale of seized property after notice. The taxpayer is entitled to any surplus of the proceeds of the sale. § 6342(b).

[5] Section 542(a) provides in relevant part:

"[A]n entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate." 11 U. S. C. § 542(a) (1976 ed., Supp. V).

[6] Section 543(b)(1) requires a *custodian* to "deliver to the trustee any property of the debtor transferred to such custodian, or proceeds of such property, that is in such custodian's possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the case."

The Bankruptcy Court declined to base the turnover order on § 542(a) because it felt bound by *In re Avery Health Center, Inc.*, 8 B. R. 1016 (WDNY 1981) (§ 542(a) does not draw into debtor's estate property seized by IRS prior to filing of petition).

[7] Section 363(e) of the Bankruptcy Code provides:

"Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or

The United States District Court reversed, holding that a turnover order against the Service was not authorized by either § 542(a) or § 543(b)(1). 15 B. R. 270 (1981). The United States Court of Appeals for the Second Circuit, in turn, reversed the District Court. 674 F. 2d 144 (1982). It held that a turnover order could issue against the Service under § 542(a), and it remanded the case for reconsideration of the adequacy of the Bankruptcy Court's protection conditions. The Court of Appeals acknowledged that its ruling was contrary to that reached by the United States Court of Appeals for the Fourth Circuit in *Cross Electric Co.* v. *United States*, 664 F. 2d 1218 (1981), and noted confusion on the issue among bankruptcy and district courts. 674 F. 2d, at 145, and n. 1. We granted certiorari to resolve this conflict in an important area of the law under the new Bankruptcy Code. 459 U. S. 1033 (1982).

## II

By virtue of its tax lien, the Service holds a secured interest in Whiting's property. We first examine whether § 542(a) of the Bankruptcy Code generally authorizes the turnover of a debtor's property seized by a secured creditor prior to the commencement of reorganization proceedings. Section 542(a) requires an entity in possession of "property that the trustee may use, sell, or lease under section 363" to

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proposed to be used, sold, or leased, by the trustee, the court shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. In any hearing under this section, the trustee has the burden of proof on the issue of adequate protection." 11 U. S. C. § 363(e) (1976 ed., Supp. V).

Pursuant to this section, the Bankruptcy Court set the following conditions to protect the tax lien: Whiting was to pay the Service $20,000 before the turnover occurred; Whiting also was to pay $1,000 a month until the taxes were satisfied; the IRS was to retain its lien during this period; and if Whiting failed to make the payments, the stay was to be lifted. 10 B. R., at 761.

deliver that property to the trustee. Subsections (b) and (c) of § 363 authorize the trustee to use, sell, or lease any "property of the estate," subject to certain conditions for the protection of creditors with an interest in the property. Section 541(a)(1) defines the "estate" as "comprised of all the following property, wherever located: . . . all legal or equitable interests of the debtor in property as of the commencement of the case." Although these statutes could be read to limit the estate to those "interests of the debtor in property" at the time of the filing of the petition, we view them as a definition of what is included in the estate, rather than as a limitation.

A

In proceedings under the reorganization provisions of the Bankruptcy Code, a troubled enterprise may be restructured to enable it to operate successfully in the future. Until the business can be reorganized pursuant to a plan under 11 U. S. C. §§ 1121–1129 (1976 ed., Supp. V), the trustee or debtor-in-possession is authorized to manage the property of the estate and to continue the operation of the business. See § 1108. By permitting reorganization, Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners. H. R. Rep. No. 95–595, p. 220 (1977). Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if "sold for scrap." *Ibid.* The reorganization effort would have small chance of success, however, if property essential to running the business were excluded from the estate. See 6 J. Moore & L. King, Collier on Bankruptcy ¶ 3.05, p. 431 (14th ed. 1978). Thus, to facilitate the rehabilitation of the debtor's business, all the debtor's property must be included in the reorganization estate.

This authorization extends even to property of the estate in which a creditor has a secured interest. §§ 363(b) and (c); see H. R. Rep. No. 95–595, p. 182 (1977). Although Congress might have safeguarded the interests of secured credi-

tors outright by excluding from the estate any property subject to a secured interest, it chose instead to include such property in the estate and to provide secured creditors with "adequate protection" for their interests. § 363(e), quoted in n. 7, *supra*. At the secured creditor's insistence, the bankruptcy court must place such limits or conditions on the trustee's power to sell, use, or lease property as are necessary to protect the creditor. The creditor with a secured interest in property included in the estate must look to this provision for protection, rather than to the nonbankruptcy remedy of possession.

Both the congressional goal of encouraging reorganizations and Congress' choice of methods to protect secured creditors suggest that Congress intended a broad range of property to be included in the estate.

B

The statutory language reflects this view of the scope of the estate. As noted above, § 541(a)(1) provides that the "estate is comprised of all the following property, wherever located: . . . all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U. S. C. § 541(a)(1) (1976 ed., Supp. V).[8] The House and Senate Re-

[8] Section 541(a)(1) speaks in terms of the debtor's "interests . . . in property," rather than property in which the debtor has an interest, but this choice of language was not meant to limit the expansive scope of the section. The legislative history indicates that Congress intended to exclude from the estate property of others in which the debtor had some minor interest such as a lien or bare legal title. See 124 Cong. Rec. 32399, 32417 (1978) (remarks of Rep. Edwards); *id.*, at 33999, 34016–34017 (remarks of Sen. DeConcini); cf. § 541(d) (property in which debtor holds legal but not equitable title, such as a mortgage in which debtor retained legal title to service or to supervise servicing of mortgage, becomes part of estate only to extent of legal title); 124 Cong. Rec. 33999 (1978) (remarks of Sen. DeConcini) (§ 541(d) "reiterates the general principle that where the debtor holds bare legal title without any equitable interest, . . . the estate acquires bare legal title without any equitable interest in the property"). Similar statements to the effect that § 541(a)(1) does not expand the rights

ports on the Bankruptcy Code indicate that § 541(a)(1)'s scope is broad.[9] Most important, in the context of this case, § 541(a)(1) is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code. See H. R. Rep. No. 95–595, p. 367 (1977). Several of these provisions bring into the estate property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced.[10]

Section 542(a) is such a provision. It requires an entity (other than a custodian) holding any property of the debtor that the trustee can use under § 363 to turn that property over to the trustee.[11] Given the broad scope of the reorga-

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of the debtor in the hands of the estate were made in the context of describing the principle that the estate succeeds to no more or greater causes of action against third parties than those held by the debtor. See H. R. Rep. No. 95–595, pp. 367–368 (1977). These statements do not limit the ability of a trustee to regain possession of property in which the debtor had equitable as well as legal title.

[9] "The scope of this paragraph [§ 541(a)(1)] is broad. It includes all kinds of property, including tangible or intangible property, causes of action (see Bankruptcy Act § 70a(6)), and all other forms of property currently specified in section 70a of the Bankruptcy Act." *Id.*, at 367; S. Rep. No. 95–989, p. 82 (1978).

[10] See, *e. g.*, §§ 543, 547, and 548. These sections permit the trustee to demand the turnover of property that is in the possession of others if that possession is due to a custodial arrangement, § 543, to a preferential transfer, § 547, or to a fraudulent transfer, § 548.

We do not now decide the outer boundaries of the bankruptcy estate. We note only that Congress plainly excluded property of others held by the debtor in trust at the time of the filing of the petition. See § 541(b); H. R. Rep. No. 95–595, p. 368 (1977); S. Rep. No. 95–989, p. 82 (1978). Although it may well be that funds that the IRS can demonstrate were withheld for its benefit pursuant to 26 U. S. C. § 7501 (employee withholding taxes), are excludable from the estate, see 124 Cong. Rec. 32417 (1978) (remarks of Rep. Edwards) (Service may exclude funds it can trace), the IRS did not attempt to trace the withheld taxes in this case. See Tr. of Oral Arg. 18, 28–29.

[11] The House Report expressly includes property of the debtor recovered under § 542(a) in the estate: the estate includes "property recovered by the trustee under section 542 . . . , if the property recovered was merely out of

nization estate, property of the debtor repossessed by a secured creditor falls within this rule, and therefore may be drawn into the estate. While there are explicit limitations on the reach of § 542(a),[12] none requires that the debtor hold a possessory interest in the property at the commencement of the reorganization proceedings.[13]

As does all bankruptcy law, § 542(a) modifies the procedural rights available to creditors to protect and satisfy their liens.[14] See *Wright* v. *Union Central Life Ins. Co.*, 311

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the possession of the debtor, yet remained 'property of the debtor.'" H. R. Rep. No. 95–595, p. 367 (1977); see 4 L. King, Collier on Bankruptcy ¶ 541.16, p. 541–72.10 (15th ed. 1982).

[12] Section 542 provides that the property be usable under § 363, and that turnover is not required in three situations: when the property is of inconsequential value or benefit to the estate, § 542(a), when the holder of the property has transferred it in good faith without knowledge of the petition, § 542(c), or when the transfer of the property is automatic to pay a life insurance premium, § 542(d).

[13] Under the old Bankruptcy Act, a bankruptcy court's summary jurisdiction over a debtor's property was limited to property in the debtor's possession when the liquidation petition was filed. *Phelps* v. *United States*, 421 U. S. 330, 335–336 (1975); *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 426, 432–434 (1924). *Phelps*, which involved a liquidation under the prior Bankruptcy Act, held that a bankruptcy court lacked jurisdiction to direct the Service to turn over property which had been levied on and which, at the time of the commencement of bankruptcy proceedings, was in the possession of an assignee of the debtor's creditors.

*Phelps* does not control this case. First, the new Bankruptcy Code abolished the distinction between summary and plenary jurisdiction, thus expanding the jurisdiction of bankruptcy courts beyond the possession limitation. H. R. Rep. No. 95–595, pp. 48–49 (1977); see *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 54 (1982) (plurality opinion). Moreover, *Phelps* was a liquidation situation, and is inapplicable to reorganization proceedings such as we consider here.

[14] One of the procedural rights the law of secured transactions grants a secured creditor to enforce its lien is the right to take possession of the secured property upon the debtor's default. Uniform Commercial Code § 9–503, 3A U. L. A. 211 (1981). A creditor's possessory interest resulting from the exercise of this right is subject to certain restrictions on the creditor's use of the property. See § 9–504, 3A U. L. A., at 256–257. Here, we address the abrogation of the Service's possessory interest obtained

U. S. 273, 278–279 (1940). See generally Nowak, Turnover Following Prepetition Levy of Distraint Under Bankruptcy Code § 542, 55 Am. Bankr. L. J. 313, 332–333 (1981). In effect, § 542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of reorganization proceedings.[15] The Bankruptcy Code provides secured creditors various rights, including the right to adequate protection, and these rights replace the protection afforded by possession.

C

This interpretation of § 542(a) is supported by the section's legislative history. Although the legislative Reports are silent on the precise issue before us, the House and Senate hearings from which § 542(a) emerged provide guidance. Several witnesses at those hearings noted, without contradiction, the need for a provision authorizing the turnover of property of the debtor in the possession of secured creditors.[16] Section 542(a) first appeared in the proposed legisla-

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pursuant to its tax lien, a secured interest. We do not decide whether any property of the debtor in which a third party holds a possessory interest independent of a creditor's remedies is subject to turnover under § 542(a). For example, if property is pledged to the secured creditor so that the creditor has possession prior to any default, § 542(a) may not require turnover. See 4 L. King, Collier on Bankruptcy ¶ 541.08[9], p. 541–53 (15th ed. 1982).

[15] Indeed, if this were not the effect, § 542(a) would be largely superfluous in light of § 541(a)(1). Interests in the seized property that could have been exercised by the debtor—in this case, the rights to notice and the surplus from a tax sale, see n. 4, *supra*—are already part of the estate by virtue of § 541(a)(1). No coercive power is needed for this inclusion. The fact that § 542(a) grants the trustee greater rights than those held by the debtor prior to the filing of the petition is consistent with other provisions of the Bankruptcy Code that address the scope of the estate. See, *e. g.*, § 544 (trustee has rights of lien creditor); § 545 (trustee has power to avoid statutory liens); § 549 (trustee has power to avoid certain postpetition transactions).

[16] See Hearings on H. R. 31 and H. R. 32 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary,

tion shortly after these hearings. See H. R. 6, § 542(a), 95th Cong., 1st Sess., introduced January 4, 1977. See generally Klee, Legislative History of the New Bankruptcy Code, 54 Am. Bankr. L. J. 275, 279–281 (1980). The section remained unchanged through subsequent versions of the legislation.

Moreover, this interpretation of § 542 in the reorganization context is consistent with judicial precedent predating the Bankruptcy Code. Under Chapter X, the reorganization chapter of the Bankruptcy Act of 1878, as amended, §§ 101–276, 52 Stat. 883 (formerly codified as 11 U. S. C. §§ 501–676), the bankruptcy court could order the turnover of collateral in the hands of a secured creditor. *Reconstruction Finance Corp.* v. *Kaplan*, 185 F. 2d 791, 796 (CA1 1950); see *In re Third Ave. Transit Corp.*, 198 F. 2d 703, 706 (CA2 1952); 6A J. Moore & L. King, Collier on Bankruptcy ¶ 14.03, pp. 741–742 (14th ed. 1977); Murphy, Use of Collateral in Business Rehabilitations: A Suggested Redrafting of Section 7–203 of the Bankruptcy Reform Act, 63 Calif. L. Rev. 1483, 1492–1495 (1975). Nothing in the legislative history evinces a congressional intent to depart from that practice. Any other interpretation of § 542(a) would deprive the bankruptcy estate of the assets and property essential to its rehabilitation effort and thereby would frustrate the congressional purpose behind the reorganization provisions.[17]

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94th Cong., 1st and 2d Sess., 439 (1975–1976) (statement of Patrick A. Murphy); *id.*, at 1023 (statement of Walter W. Vaughan); *id.*, at 1757 (statement of Robert J. Grimmig); *id.*, at 1827–1839 (remarks and statement of Leon S. Forman, National Bankruptcy Conference); Hearings on S. 235 and S. 236 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 125 (1975) (statement of Walter W. Vaughan); *id.*, at 464 (statement of Robert J. Grimmig). In general, we find Judge Friendly's careful analysis of this history for the Court of Appeals, 674 F. 2d 144, 152–156 (1982), to be unassailable.

[17] Section 542(a) also governs turnovers in liquidation and individual adjustment of debt proceedings under Chapters 7 and 13 of the Bankruptcy Code, 11 U. S. C. §§ 701–766, 1301–1330 (1976 ed., Supp. V). See

We conclude that the reorganization estate includes property of the debtor that has been seized by a creditor prior to the filing of a petition for reorganization.

## III

### A

We see no reason why a different result should obtain when the IRS is the creditor. The Service is bound by § 542(a) to the same extent as any other secured creditor. The Bankruptcy Code expressly states that the term "entity," used in § 542(a), includes a governmental unit. § 101 (14). See Tr. of Oral Arg. 16. Moreover, Congress carefully considered the effect of the new Bankruptcy Code on tax collection, see generally S. Rep. No. 95–1106 (1978) (Report of Senate Finance Committee), and decided to provide protection to tax collectors, such as the IRS, through grants of enhanced priorities for unsecured tax claims, § 507 (a)(6), and by the nondischarge of tax liabilities, § 523(a)(1). S. Rep. No. 95–989, pp. 14–15 (1978). Tax collectors also enjoy the generally applicable right under § 363(e) to adequate protection for property subject to their liens. Nothing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector in the form of an exclusion from the estate of property seized to satisfy a tax lien.

### B

Of course, if a tax levy or seizure transfers to the IRS ownership of the property seized, § 542(a) may not apply. The enforcement provisions of the Internal Revenue Code of 1954, 26 U. S. C. §§ 6321–6326 (1976 ed. and Supp. V), do grant to the Service powers to enforce its tax liens that are

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§ 103(a). Our analysis in this case depends in part on the reorganization context in which the turnover order is sought. We express no view on the issue whether § 542(a) has the same broad effect in liquidation or adjustment of debt proceedings.

greater than those possessed by private secured creditors under state law. See *United States* v. *Rodgers*, 461 U. S. 677, 682–683 (1983); *id.*, at 713, 717–718, and n. 7 (concurring in part and dissenting in part); *United States* v. *Bess*, 357 U. S. 51, 56–57 (1958). But those provisions do not transfer ownership of the property to the IRS.[18]

The Service's interest in seized property is its lien on that property. The Internal Revenue Code's levy and seizure provisions, 26 U. S. C. §§ 6331 and 6332, are special proce-

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[18] It could be argued that dictum in *Phelps* v. *United States*, 421 U. S. 330 (1975), suggests the contrary. In that case, the IRS had levied on a fund held by an assignee of the debtor for the benefit of the debtor's creditors. In a liquidation proceeding under the old Bankruptcy Act, the trustee sought an order directing the assignee to turn the funds over to the estate. The Court determined that the levy transferred constructive possession of the fund to the Service, thus ousting the bankruptcy court of jurisdiction. *Id.*, at 335–336. In rebutting the trustee's argument that actual possession by the IRS was necessary to avoid jurisdiction, the Court stated: "The levy . . . gave the United States full legal right to the $38,000 levied upon as against the claim of the petitioner receiver." *Id.*, at 337. This sentence, however, is merely a restatement of the proposition that the levy gave the Service a sufficient possessory interest to avoid the bankruptcy court's summary jurisdiction. The proposition is now irrelevant because of the expanded jurisdiction of bankruptcy courts under the Bankruptcy Code. See n. 13, *supra*.

The Court in *Phelps* made a similar statement in discussing the trustee's claim that § 70a(8) of the old Bankruptcy Act, 11 U. S. C. § 110(a)(8) (trustee is vested "with the title of the bankrupt as of the date of the filing of the petition . . . to . . . property held by an assignee for the benefit of creditors"), continued constructive possession of the property in the estate, notwithstanding the prepetition levy. 421 U. S., at 337, n. 8. The Court rejected this claim. It first cited the trustee's concession that the debtor had surrendered title upon conveying the property to the assignee, *ibid.*, and held that, because the debtor did not hold title to the property as of the date of filing, the property was not covered by § 70a(8). The Court went on, however, to state that "the prebankruptcy levy displaced any title of [the debtor] and § 70a(8) is therefore inapplicable." *Ibid.* Because the initial conveyance of the property to the assignee was said to have extinguished the debtor's claim, this latter statement perhaps was unnecessary to our decision.

dural devices available to the IRS to protect and satisfy its liens, *United States* v. *Sullivan*, 333 F. 2d 100, 116 (CA3 1964), and are analogous to the remedies available to private secured creditors. See Uniform Commercial Code § 9–503, 3A U. L. A. 211–212 (1981); n. 14, *supra*. They are provisional remedies that do not determine the Service's rights to the seized property, but merely bring the property into the Service's legal custody. See 4 B. Bittker, Federal Taxation of Income, Estates and Gifts ¶111.5.5, p. 111–108 (1981). See generally Plumb, Federal Tax Collection and Lien Problems (First Installment), 13 Tax L. Rev. 247, 272 (1958). At no point does the Service's interest in the property exceed the value of the lien. *United States* v. *Rodgers*, 461 U. S., at 690–691; *id.*, at 724 (concurring in part and dissenting in part); see *United States* v. *Sullivan*, 333 F. 2d, at 116 ("the Commissioner acts pursuant to the collection process in the capacity of lienor as distinguished from owner"). The IRS is obligated to return to the debtor any surplus from a sale. 26 U. S. C. § 6342(b). Ownership of the property is transferred only when the property is sold to a bona fide purchaser at a tax sale. See *Bennett* v. *Hunter*, 9 Wall. 326, 336 (1870); 26 U. S. C. § 6339(a)(2); Plumb, 13 Tax L. Rev., at 274–275. In fact, the tax sale provision itself refers to the debtor as the owner of the property after the seizure but prior to the sale.[19] Until such a sale takes place, the property remains the debtor's and thus is subject to the turnover requirement of § 542(a).

## IV

When property seized prior to the filing of a petition is drawn into the Chapter 11 reorganization estate, the Service's tax lien is not dissolved; nor is its status as a secured creditor destroyed. The IRS, under § 363(e), remains enti-

[19] See 26 U. S. C. § 6335(a) ("As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property"), and § 6335(b) ("The Secretary shall as soon as practicable after the seizure of the property give notice to the owner").

tled to adequate protection for its interests, to other rights enjoyed by secured creditors, and to the specific privileges accorded tax collectors. Section 542(a) simply requires the Service to seek protection of its interest according to the congressionally established bankruptcy procedures, rather than by withholding the seized property from the debtor's efforts to reorganize.

The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

Syllabus

# ILLINOIS *v.* GATES ET UX.

## CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 81–430. Argued October 13, 1982—Reargued March 1, 1983—Decided June 8, 1983

On May 3, 1978, the Police Department of Bloomingdale, Ill., received an anonymous letter which included statements that respondents, husband and wife, were engaged in selling drugs; that the wife would drive their car to Florida on May 3 to be loaded with drugs, and the husband would fly down in a few days to drive the car back; that the car's trunk would be loaded with drugs; and that respondents presently had over $100,000 worth of drugs in their basement. Acting on the tip, a police officer determined respondents' address and learned that the husband made a reservation on a May 5 flight to Florida. Arrangements for surveillance of the flight were made with an agent of the Drug Enforcement Administration (DEA), and the surveillance disclosed that the husband took the flight, stayed overnight in a motel room registered in the wife's name, and left the following morning with a woman in a car bearing an Illinois license plate issued to the husband, heading north on an interstate highway used by travelers to the Bloomingdale area. A search warrant for respondents' residence and automobile was then obtained from an Illinois state-court judge, based on the Bloomingdale police officer's affidavit setting forth the foregoing facts and a copy of the anonymous letter. When respondents arrived at their home, the police were waiting and discovered marihuana and other contraband in respondents' car trunk and home. Prior to respondents' trial on charges of violating state drug laws, the trial court ordered suppression of all the items seized, and the Illinois Appellate Court affirmed. The Illinois Supreme Court also affirmed, holding that the letter and affidavit were inadequate to sustain a determination of probable cause for issuance of the search warrant under *Aguilar* v. *Texas*, 378 U. S. 108, and *Spinelli* v. *United States*, 393 U. S. 410, since they failed to satisfy the "two-pronged test" of (1) revealing the informant's "basis of knowledge" and (2) providing sufficient facts to establish either the informant's "veracity" or the "reliability" of the informant's report.

*Held:*

1. The question—which this Court requested the parties to address—whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment should be modified so as, for example, not to require exclusion of evidence obtained in the reason-

able belief that the search and seizure at issue was consistent with the Fourth Amendment will not be decided in this case, since it was not presented to or decided by the Illinois courts. Although prior decisions interpreting the "not pressed or passed on below" rule have not involved a State's failure to raise a defense to a federal right or remedy asserted below, the purposes underlying the rule are, for the most part, as applicable in such a case as in one where a party fails to assert a federal right. The fact that the Illinois courts affirmatively applied the federal exclusionary rule does not affect the application of the "not pressed or passed on below" rule. Nor does the State's repeated opposition to respondents' substantive Fourth Amendment claims suffice to have raised the separate question whether the exclusionary rule should be modified. The extent of the continued vitality of the rule is an issue of unusual significance, and adhering scrupulously to the customary limitations on this Court's discretion promotes respect for its adjudicatory process and the stability of its decisions, and lessens the threat of untoward practical ramifications not foreseen at the time of decision. Pp. 217–224.

2. The rigid "two-pronged test" under *Aguilar* and *Spinelli* for determining whether an informant's tip establishes probable cause for issuance of a warrant is abandoned, and the "totality of the circumstances" approach that traditionally has informed probable-cause determinations is substituted in its place. The elements under the "two-pronged test" concerning the informant's "veracity," "reliability," and "basis of knowledge" should be understood simply as closely intertwined issues that may usefully illuminate the common-sense, practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular place. The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. This flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli*. Pp. 230–241.

3. The judge issuing the warrant had a substantial basis for concluding that probable cause to search respondents' home and car existed. Under the "totality of the circumstances" analysis, corroboration of details of an informant's tip by independent police work is of significant value. Cf. *Draper* v. *United States*, 358 U. S. 307. Here, even standing alone, the facts obtained through the independent investigation of the Bloomingdale police officer and the DEA at least suggested that

respondents were involved in drug trafficking. In addition, the judge could rely on the anonymous letter, which had been corroborated in major part by the police officer's efforts. Pp. 241–246.

85 Ill. 2d 376, 423 N. E. 2d 887, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 246. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 274. STEVENS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 291.

*Paul P. Biebel, Jr.*, First Assistant Attorney General of Illinois, reargued the cause for petitioner. With him on the briefs on reargument were *Tyrone C. Fahner*, former Attorney General, *Neil F. Hartigan*, Attorney General, *Michael A. Ficaro* and *Morton E. Friedman*, Assistant Attorneys General, *Daniel M. Harris*, and *James B. Zagel*. With him on the briefs on the original argument were Messrs. Fahner and Harris.

*Solicitor General Lee* argued the cause on reargument for the United States as *amicus curiae* urging reversal. With him on the brief on reargument were *Assistant Attorney General Jensen*, *Deputy Solicitor General Frey*, *Kathryn A. Oberly*, *Geoffrey S. Stewart*, and *Robert J. Erickson*. With him on the brief on the original argument were Mr. Jensen, *Alan I. Horowitz*, and *David B. Smith*.

*James W. Reilley* reargued the cause for respondents. With him on the brief on reargument were *Barry E. Witlin* and *Thomas Y. Davies*. With him on the brief on the original argument were Mr. Witlin, *Allan A. Ackerman*, and *Clyde W. Woody*.*

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*Briefs of *amici curiae* urging reversal were filed by *George Deukmejian*, Attorney General, *Robert H. Philibosian*, Chief Assistant Attorney General, *William D. Stein*, Assistant Attorney General, and *Clifford K. Thompson, Jr.*, Deputy Attorney General, for the State of California; by *Fred E. Inbau*, *Wayne W. Schmidt*, *James P. Manak*, *Patrick F. Healy*, *William K. Lambie*, and *James A. Murphy* for Americans for Effective Law Enforcement, Inc., et al.; by *Robert L. Toms*, *Evelle J. Younger*,

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents Lance and Susan Gates were indicted for violation of state drug laws after police officers, executing a search warrant, discovered marihuana and other contraband in their automobile and home. Prior to trial the Gateses moved to suppress evidence seized during this search. The Illinois Supreme Court affirmed the decisions of lower state courts granting the motion. 85 Ill. 2d 376, 423 N. E. 2d 887 (1981). It held that the affidavit submitted in support of the State's application for a warrant to search the Gateses' prop-

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*G. Joseph Bertain, Jr.*, and *Lloyd F. Dunn* for Laws at Work et al.; and by *Newman A. Flanagan, Jack E. Yelverton, James P. Manak, Edwin L. Miller, Jr., Austin J. McGuigan*, and *John M. Massameno* for the National District Attorneys Association, Inc.

Briefs of *amici curiae* urging affirmance were filed by *Sidney Bernstein* and *Howard A. Specter* for the Association of Trial Lawyers of America; by *John C. Feirich, Melvin B. Lewis, Joshua Sachs*, and *Michael J. Costello* for the Illinois State Bar Association; by *Herman Kaufman* and *Edward M. Chikofsky* for the New York Criminal Bar Association; and by *James M. Doyle* for the Legal Internship Program, Georgetown University Law Center.

Briefs of *amici curiae* were filed by *Jim Smith*, Attorney General, and *Lawrence A. Kaden* and *Raymond L. Marky*, Assistant Attorneys General, for the State of Florida et al.; by *Gerald Baliles*, Attorney General, and *Jacqueline G. Epps*, Senior Assistant Attorney General, for the Commonwealth of Virginia; by *Morris Harrell, William W. Greenhalgh, William J. Mertens*, and *Steven H. Goldblatt* for the American Bar Association; by *Charles S. Sims* and *Burt Neuborne* for the American Civil Liberties Union et al.; by *Peter L. Zimroth* and *Barbara D. Underwood* for the Committee on Criminal Law of the Association of the Bar of the City of New York; by *Marshall W. Krause, Quin Denvir, Steffan B. Imhoff*, and *Paul Edward Bell* for the National Association of Criminal Defense Lawyers et al.; by *Kenneth M. Mogill* for the National Legal Aid and Defender Association; by *Frank G. Carrington, Jr., Griffin B. Bell, Wayne W. Schmidt, Alan Dye, Thomas Hendrickson, Courtney A. Evans, Rufus L. Edmisten, David S. Crump, Howard A. Kramer, Ronald A. Zumbrun, John H. Findley, Wayne T. Elliott, G. Stephen Parker*, and *Joseph E. Scuro* for Seven Former Members of the Attorney General of the United States' Task Force on Violent Crime (1981) et al.; and by *Dan Johnston, pro se*, for the County Attorney of Polk County, Iowa.

erty was inadequate under this Court's decisions in *Aguilar* v. *Texas*, 378 U. S. 108 (1964), and *Spinelli* v. *United States*, 393 U. S. 410 (1969).

We granted certiorari to consider the application of the Fourth Amendment to a magistrate's issuance of a search warrant on the basis of a partially corroborated anonymous informant's tip. 454 U. S. 1140 (1982). After receiving briefs and hearing oral argument on this question, however, we requested the parties to address an additional question:

> "[W]hether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Weeks* v. *United States*, 232 U. S. 383 (1914), should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment." 459 U. S. 1028 (1982).

We decide today, with apologies to all, that the issue we framed for the parties was not presented to the Illinois courts and, accordingly, do not address it. Rather, we consider the question originally presented in the petition for certiorari, and conclude that the Illinois Supreme Court read the requirements of our Fourth Amendment decisions too restrictively. Initially, however, we set forth our reasons for not addressing the question regarding modification of the exclusionary rule framed in our order of November 29, 1982. *Ibid.*

## I

Our certiorari jurisdiction over decisions from state courts derives from 28 U. S. C. § 1257, which provides that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes

of . . . the United States." The provision derives, albeit with important alterations, see, *e. g.*, Act of Dec. 23, 1914, ch. 2, 38 Stat. 790; Act of June 25, 1948, § 1257, 62 Stat. 929, from the Judiciary Act of 1789, § 25, 1 Stat. 85.

Although we have spoken frequently on the meaning of § 1257 and its predecessors, our decisions are in some respects not entirely clear. We held early on that § 25 of the Judiciary Act of 1789 furnished us with no jurisdiction unless a federal question had been both raised and decided in the state court below. As Justice Story wrote in *Crowell* v. *Randell*, 10 Pet. 368, 392 (1836): "If both of these requirements do not appear on the record, the appellate jurisdiction fails." See also *Owings* v. *Norwood's Lessee*, 5 Cranch 344 (1809).[1]

More recently, in *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434–435 (1940), the Court observed:

> "But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. . . . In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the

[1] The apparent rule of *Crowell* v. *Randell* that a federal claim have been *both* raised and addressed in state court was generally not understood in the literal fashion in which it was phrased. See R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States § 60 (1951). Instead, the Court developed the rule that a claim would not be considered here unless it had been *either* raised or squarely considered and resolved in state court. See, *e. g.*, *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434–435 (1940); *State Farm Mutual Ins. Co.* v. *Duel*, 324 U. S. 154, 160 (1945).

> reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court."

Finally, the Court seemed to reaffirm the jurisdictional character of the rule against our deciding claims "not pressed nor passed upon" in state court in *State Farm Mutual Automobile Ins. Co.* v. *Duel*, 324 U. S. 154, 160 (1945), where we explained that "[s]ince the [State] Supreme Court did not pass on the question, we may not do so." See also *Hill* v. *California*, 401 U. S. 797, 805–806 (1971).

Notwithstanding these decisions, however, several of our more recent cases have treated the so-called "not pressed or passed upon below" rule as merely a prudential restriction. In *Terminiello* v. *Chicago*, 337 U. S. 1 (1949), the Court reversed a state criminal conviction on a ground not urged in state court, nor even in this Court. Likewise, in *Vachon* v. *New Hampshire*, 414 U. S. 478 (1974), the Court summarily reversed a state criminal conviction on the ground, not raised in state court, or here, that it had been obtained in violation of the Due Process Clause of the Fourteenth Amendment. The Court indicated in a footnote, *id.*, at 479, n. 3, that it possessed discretion to ignore the failure to raise in state court the question on which it decided the case.

In addition to this lack of clarity as to the character of the "not pressed or passed upon below" rule, we have recognized that it often may be unclear whether the particular federal question presented in this Court was raised or passed upon below. In *Dewey* v. *Des Moines*, 173 U. S. 193, 197–198 (1899), the fullest treatment of the subject, the Court said

that "[i]f the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued. Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed."[2] We have not attempted, and likely would not have been able, to draw a clear-cut line between cases involving only an "enlargement" of questions presented below and those involving entirely new questions.

The application of these principles in the instant case is not entirely straightforward. It is clear in this case that respondents expressly raised, at every level of the Illinois judicial system, the claim that the Fourth Amendment had been violated by the actions of the Illinois police and that the evidence seized by the officers should be excluded from their trial. It also is clear that the State challenged, at every level of the Illinois court system, respondents' claim that the substantive requirements of the Fourth Amendment had been violated. The State never, however, raised or addressed the question whether the federal exclusionary rule should be modified in any respect, and none of the opinions of the

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[2] In *Dewey*, certain assessments had been levied against the owner of property abutting a street paved by the city; a state trial court ordered that the property be forfeited when the assessments were not paid, and in addition, held the plaintiff in error personally liable for the amount by which the assessments exceeded the value of the lots. In state court the plaintiff in error argued that the imposition of personal liability against him violated the Due Process Clause of the Fourteenth Amendment, because he had not received personal notice of the assessment proceedings. In this Court, he also attempted to argue that the assessment itself constituted a taking under the Fourteenth Amendment. The Court held that, beyond arising from a single factual occurrence, the two claims "are not in anywise necessarily connected," 173 U. S., at 198. Because of this, we concluded that the plaintiff in error's taking claim could not be considered.

Illinois courts give any indication that the question was considered.

The case, of course, is before us on the State's petition for a writ of certiorari. Since the Act of Dec. 23, 1914, ch. 2, 38 Stat. 790, jurisdiction has been vested in this Court to review state-court decisions even when a claimed federal right has been upheld. Our prior decisions interpreting the "not pressed or passed on below" rule have not, however, involved a State's failure to raise a defense to a federal right or remedy asserted below. As explained below, however, we can see no reason to treat the State's failure to have challenged an asserted federal claim differently from the failure of the proponent of a federal claim to have raised that claim.

We have identified several purposes underlying the "not pressed or passed upon" rule: for the most part, these are as applicable to the State's failure to have opposed the assertion of a particular federal right, as to a party's failure to have asserted the claim. First, "[q]uestions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." *Cardinale* v. *Louisiana*, 394 U. S. 437, 439 (1969). Exactly the same difficulty exists when the State urges modification of an existing constitutional right or accompanying remedy. Here, for example, the record contains little, if anything, regarding the subjective good faith of the police officers that searched the Gateses' property—which might well be an important consideration in determining whether to fashion a good-faith exception to the exclusionary rule. Our consideration of whether to modify the exclusionary rule plainly would benefit from a record containing such facts.

Likewise, "due regard for the appropriate relationship of this Court to state courts," *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S., at 434–435, demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials, and, equally important, proposed changes in existing remedies for uncon-

stitutional actions. Finally, by requiring that the State first argue to the state courts that the federal exclusionary rule should be modified, we permit a state court, even if it agrees with the State as a matter of federal law, to rest its decision on an adequate and independent state ground. See *Cardinale*, *supra*, at 439. Illinois, for example, adopted an exclusionary rule as early as 1923, see *People* v. *Brocamp*, 307 Ill. 448, 138 N. E. 728 (1923), and might adhere to its view even if it thought we would conclude that the federal rule should be modified. In short, the reasons supporting our refusal to hear federal claims not raised in state court apply with equal force to the State's failure to challenge the availability of a well-settled federal remedy. Whether the "not pressed or passed upon below" rule is jurisdictional, as our earlier decisions indicate, see *supra*, at 217–219, or prudential, as several of our later decisions assume, or whether its character might be different in cases like this from its character elsewhere, we need not decide. Whatever the character of the rule may be, consideration of the question presented in our order of November 29, 1982, would be contrary to the sound justifications for the "not pressed or passed upon below" rule, and we thus decide not to pass on the issue.

The fact that the Illinois courts affirmatively applied the federal exclusionary rule—suppressing evidence against respondents—does not affect our conclusion. In *Morrison* v. *Watson*, 154 U. S. 111 (1894), the Court was asked to consider whether a state statute impaired the plaintiff in error's contract with the defendant in error. It declined to hear the case because the question presented here had not been pressed or passed on below. The Court acknowledged that the lower court's opinion had restated the conclusion, set forth in an earlier decision of that court, that the state statute did not impermissibly impair contractual obligations. Nonetheless, it held that there was no showing that "there was any real contest at any stage of this case upon the point," *id.*, at 115, and that without such a contest, the routine restate-

ment and application of settled law by an appellate court did not satisfy the "not pressed or passed upon below" rule. Similarly, in the present case, although the Illinois courts applied the federal exclusionary rule, there was never "any real contest" upon the point. The application of the exclusionary rule was merely a routine act, once a violation of the Fourth Amendment had been found, and not the considered judgment of the Illinois courts on the question whether application of a modified rule would be warranted on the facts of this case. In such circumstances, absent the adversarial dispute necessary to apprise the state court of the arguments for not applying the exclusionary rule, we will not consider the question whether the exclusionary rule should be modified.

Likewise, we do not believe that the State's repeated opposition to respondents' substantive Fourth Amendment claims suffices to have raised the question whether the exclusionary rule should be modified. The exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally" and not "a personal constitutional right of the party aggrieved." *United States* v. *Calandra*, 414 U. S. 338, 348 (1974). The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct. See, *e. g.*, *United States* v. *Havens*, 446 U. S. 620 (1980); *United States* v. *Ceccolini*, 435 U. S. 268 (1978); *United States* v. *Calandra*, *supra*; *Stone* v. *Powell*, 428 U. S. 465 (1976). Because of this distinction, we cannot say that modification or abolition of the exclusionary rule is "so connected with [the substantive Fourth Amendment right at issue] as to form but another ground or reason for alleging the invalidity" of the judgment. *Dewey* v. *Des Moines*, 173 U. S., at 197–198. Rather, the rule's modification was, for purposes of the "not pressed or passed upon below" rule, a separate claim that had to be specifically presented to the state courts.

Finally, weighty prudential considerations militate against our considering the question presented in our order of November 29, 1982. The extent of the continued vitality of the rules that have developed from our decisions in *Weeks* v. *United States*, 232 U. S. 383 (1914), and *Mapp* v. *Ohio*, 367 U. S. 643 (1961), is an issue of unusual significance. Sufficient evidence of this lies just in the comments on the issue that Members of this Court recently have made, *e. g.*, *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 415 (1971) (BURGER, C. J., dissenting); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 490 (1971) (Harlan, J., concurring); *id.*, at 502 (Black, J., dissenting); *Stone* v. *Powell*, *supra*, at 537–539 (WHITE, J., dissenting); *Brewer* v. *Williams*, 430 U. S. 387, 413–414 (1977) (POWELL, J., concurring); *Robbins* v. *California*, 453 U. S. 420, 437, 443–444 (1981) (REHNQUIST, J., dissenting). Where difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on our discretion. By doing so we "promote respect . . . for the Court's adjudicatory process [and] the stability of [our] decisions." *Mapp* v. *Ohio*, 367 U. S., at 677 (Harlan, J., dissenting). Moreover, fidelity to the rule guarantees that a factual record will be available to us, thereby discouraging the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances. In Justice Harlan's words, adherence to the rule lessens the threat of "untoward practical ramifications," *id.*, at 676 (dissenting opinion), not foreseen at the time of decision. The public importance of our decisions in *Weeks* and *Mapp* and the emotions engendered by the debate surrounding these decisions counsel that we meticulously observe our customary procedural rules. By following this course, we promote respect for the procedures by which our decisions are rendered, as well as confidence in the stability of prior decisions. A wise exercise of the powers confided in this Court dictates that we reserve for another day the question whether the exclusionary rule should be modified.

## II

We now turn to the question presented in the State's original petition for certiorari, which requires us to decide whether respondents' rights under the Fourth and Fourteenth Amendments were violated by the search of their car and house. A chronological statement of events usefully introduces the issues at stake. Bloomingdale, Ill., is a suburb of Chicago located in Du Page County. On May 3, 1978, the Bloomingdale Police Department received by mail an anonymous handwritten letter which read as follows:

> "This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flys down and drives it back. Sue flys back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.
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> "They brag about the fact they never have to work, and make their entire living on pushers.
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> "I guarantee if you watch them carefully you will make a big catch. They are friends with some big drugs dealers, who visit their house often.
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> "Lance & Susan Gates
> "Greenway
> "in Condominiums"

The letter was referred by the Chief of Police of the Bloomingdale Police Department to Detective Mader, who decided to pursue the tip. Mader learned, from the office of the Illinois Secretary of State, that an Illinois driver's license had

been issued to one Lance Gates, residing at a stated address in Bloomingdale. He contacted a confidential informant, whose examination of certain financial records revealed a more recent address for the Gateses, and he also learned from a police officer assigned to O'Hare Airport that "L. Gates" had made a reservation on Eastern Airlines Flight 245 to West Palm Beach, Fla., scheduled to depart from Chicago on May 5 at 4:15 p. m.

Mader then made arrangements with an agent of the Drug Enforcement Administration for surveillance of the May 5 Eastern Airlines flight. The agent later reported to Mader that Gates had boarded the flight, and that federal agents in Florida had observed him arrive in West Palm Beach and take a taxi to the nearby Holiday Inn. They also reported that Gates went to a room registered to one Susan Gates and that, at 7 o'clock the next morning, Gates and an unidentified woman left the motel in a Mercury bearing Illinois license plates and drove northbound on an interstate highway frequently used by travelers to the Chicago area. In addition, the DEA agent informed Mader that the license plate number on the Mercury was registered to a Hornet station wagon owned by Gates. The agent also advised Mader that the driving time between West Palm Beach and Bloomingdale was approximately 22 to 24 hours.

Mader signed an affidavit setting forth the foregoing facts, and submitted it to a judge of the Circuit Court of Du Page County, together with a copy of the anonymous letter. The judge of that court thereupon issued a search warrant for the Gateses' residence and for their automobile. The judge, in deciding to issue the warrant, could have determined that the *modus operandi* of the Gateses had been substantially corroborated. As the anonymous letter predicted, Lance Gates had flown from Chicago to West Palm Beach late in the afternoon of May 5th, had checked into a hotel room registered in the name of his wife, and, at 7 o'clock the following morning, had headed north, accompanied by an unidentified woman,

out of West Palm Beach on an interstate highway used by travelers from South Florida to Chicago in an automobile bearing a license plate issued to him.

At 5:15 a. m. on March 7, only 36 hours after he had flown out of Chicago, Lance Gates, and his wife, returned to their home in Bloomingdale, driving the car in which they had left West Palm Beach some 22 hours earlier. The Bloomingdale police were awaiting them, searched the trunk of the Mercury, and uncovered approximately 350 pounds of marihuana. A search of the Gateses' home revealed marihuana, weapons, and other contraband. The Illinois Circuit Court ordered suppression of all these items, on the ground that the affidavit submitted to the Circuit Judge failed to support the necessary determination of probable cause to believe that the Gateses' automobile and home contained the contraband in question. This decision was affirmed in turn by the Illinois Appellate Court, 82 Ill. App. 3d 749, 403 N. E. 2d 77 (1980), and by a divided vote of the Supreme Court of Illinois. 85 Ill. 2d 376, 423 N. E. 2d 887 (1981).

The Illinois Supreme Court concluded—and we are inclined to agree—that, standing alone, the anonymous letter sent to the Bloomingdale Police Department would not provide the basis for a magistrate's determination that there was probable cause to believe contraband would be found in the Gateses' car and home. The letter provides virtually nothing from which one might conclude that its author is either honest or his information reliable; likewise, the letter gives absolutely no indication of the basis for the writer's predictions regarding the Gateses' criminal activities. Something more was required, then, before a magistrate could conclude that there was probable cause to believe that contraband would be found in the Gateses' home and car. See *Aguilar* v. *Texas*, 378 U. S., at 109, n. 1; *Nathanson* v. *United States*, 290 U. S. 41 (1933).

The Illinois Supreme Court also properly recognized that Detective Mader's affidavit might be capable of supplement-

ing the anonymous letter with information sufficient to permit a determination of probable cause. See *Whiteley* v. *Warden*, 401 U. S. 560, 567 (1971). In holding that the affidavit in fact did not contain sufficient additional information to sustain a determination of probable cause, the Illinois court applied a "two-pronged test," derived from our decision in *Spinelli* v. *United States*, 393 U. S. 410 (1969).[3] The Illinois Supreme Court, like some others, apparently understood *Spinelli* as requiring that the anonymous letter satisfy each of two independent requirements before it could be relied on. 85 Ill. 2d, at 383, 423 N. E. 2d, at 890. According to this view, the letter, as supplemented by Mader's affidavit, first had to adequately reveal the "basis of knowledge" of the letterwriter—the particular means by which he came by the information given in his report. Second, it had to pro-

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[3] In *Spinelli*, police officers observed Mr. Spinelli going to and from a particular apartment, which the telephone company said contained two telephones with stated numbers. The officers also were "informed by a confidential reliable informant that William Spinelli [was engaging in illegal gambling activities]" at the apartment, and that he used two phones, with numbers corresponding to those possessed by the police. 393 U. S., at 414. The officers submitted an affidavit with this information to a magistrate and obtained a warrant to search Spinelli's apartment. We held that the magistrate could have made his determination of probable cause only by "abdicating his constitutional function," *id.*, at 416. The Government's affidavit contained absolutely no information regarding the informant's reliability. Thus, it did not satisfy *Aguilar*'s requirement that such affidavits contain "some of the underlying circumstances" indicating that "the informant . . . was 'credible'" or that "his information [was] 'reliable.'" *Aguilar* v. *Texas*, 378 U. S. 108, 114 (1964). In addition, the tip failed to satisfy *Aguilar*'s requirement that it detail "some of the underlying circumstances from which the informant concluded that . . . narcotics were where he claimed they were." *Ibid.* We also held that if the tip concerning Spinelli had contained "sufficient detail" to permit the magistrate to conclude "that he [was] relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation," 393 U. S., at 416, then he properly could have relied on it; we thought, however, that the tip lacked the requisite detail to permit this "self-verifying detail" analysis.

vide facts sufficiently establishing either the "veracity" of the affiant's informant, or, alternatively, the "reliability" of the informant's report in this particular case.

The Illinois court, alluding to an elaborate set of legal rules that have developed among various lower courts to enforce the "two-pronged test,"[4] found that the test had not been satisfied. First, the "veracity" prong was not satisfied because, "[t]here was simply no basis [for] conclud[ing] that the anonymous person [who wrote the letter to the Bloomingdale Police Department] was credible." *Id.*, at 385, 423 N. E. 2d, at 891. The court indicated that corroboration by police of details contained in the letter might never satisfy the "veracity" prong, and in any event, could not do so if, as in the present case, only "innocent" details are corroborated. *Id.*, at 390, 423 N. E. 2d, at 893. In addition, the letter gave no indication of the basis of its writer's knowledge of the

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[4] See, *e. g.*, *Stanley* v. *State*, 19 Md. App. 507, 313 A. 2d 847 (1974). In summary, these rules posit that the "veracity" prong of the *Spinelli* test has two "spurs"—the informant's "credibility" and the "reliability" of his information. Various interpretations are advanced for the meaning of the "reliability" spur of the "veracity" prong. Both the "basis of knowledge" prong and the "veracity" prong are treated as entirely separate requirements, which must be independently satisfied in every case in order to sustain a determination of probable cause. See n. 5, *infra*. Some ancillary doctrines are relied on to satisfy certain of the foregoing requirements. For example, the "self-verifying detail" of a tip may satisfy the "basis of knowledge" requirement, although not the "credibility" spur of the "veracity" prong. See 85 Ill. 2d, at 388, 423 N. E. 2d, at 892. Conversely, corroboration would seem not capable of supporting the "basis of knowledge" prong, but only the "veracity" prong. *Id.*, at 390, 423 N. E. 2d, at 893.

The decision in *Stanley*, while expressly approving and conscientiously attempting to apply the "two-pronged test" observes that "[t]he built-in subtleties [of the test] are such, however, that a slipshod application calls down upon us the fury of Murphy's Law." 19 Md. App., at 528, 313 A. 2d, at 860 (footnote omitted). The decision also suggested that it is necessary to "evolve analogous guidelines [to hearsay rules employed in trial settings] for the reception of hearsay in a probable cause setting." *Id.*, at 522, n. 12, 313 A. 2d, at 857, n. 12.

Gateses' activities. The Illinois court understood *Spinelli* as permitting the detail contained in a tip to be used to infer that the informant had a reliable basis for his statements, but it thought that the anonymous letter failed to provide sufficient detail to permit such an inference. Thus, it concluded that no showing of probable cause had been made.

We agree with the Illinois Supreme Court that an informant's "veracity," "reliability," and "basis of knowledge" are all highly relevant in determining the value of his report. We do not agree, however, that these elements should be understood as entirely separate and independent requirements to be rigidly exacted in every case,[5] which the opinion of the Supreme Court of Illinois would imply. Rather, as detailed below, they should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular place.

## III

This totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause[6] than

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[5] The entirely independent character that the *Spinelli* prongs have assumed is indicated both by the opinion of the Illinois Supreme Court in this case, and by decisions of other courts. One frequently cited decision, *Stanley* v. *State*, *supra*, at 530, 313 A. 2d, at 861 (footnote omitted), remarks that "the dual requirements represented by the 'two-pronged test' are 'analytically severable' and an 'overkill' on one prong will not carry over to make up for a deficit on the other prong." See also n. 9, *infra*.

[6] Our original phrasing of the so-called "two-pronged test" in *Aguilar* v. *Texas*, *supra*, suggests that the two prongs were intended simply as guides to a magistrate's determination of probable cause, not as inflexible, independent requirements applicable in every case. In *Aguilar*, we required only that

"the magistrate must be informed of *some of the underlying circumstances* from which the informant concluded that . . . narcotics were where he claimed they were, and *some of the underlying circumstances* from which

is any rigid demand that specific "tests" be satisfied by every informant's tip. Perhaps the central teaching of our decisions bearing on the probable-cause standard is that it is a "practical, nontechnical conception." *Brinegar* v. *United States*, 338 U. S. 160, 176 (1949). "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.*, at 175. Our observation in *United States* v. *Cortez*, 449 U. S. 411, 418 (1981), regarding "particularized suspicion," is also applicable to the probable-cause standard:

> "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

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the officer concluded that the informant . . . was 'credible' or his information 'reliable.'" *Id.*, at 114 (emphasis added).

As our language indicates, we intended neither a rigid compartmentalization of the inquiries into an informant's "veracity," "reliability," and "basis of knowledge," nor that these inquiries be elaborate exegeses of an informant's tip. Rather, we required only that *some* facts bearing on two particular issues be provided to the magistrate. Our decision in *Jaben* v. *United States*, 381 U. S. 214 (1965), demonstrated this latter point. We held there that a criminal complaint showed probable cause to believe the defendant had attempted to evade the payment of income taxes. We commented:

"Obviously any reliance upon factual allegations necessarily entails some degree of reliability upon the credibility of the source. . . . Nor does it indicate that each factual allegation which the affiant puts forth must be independently documented, or that each and every fact which contributed to his conclusions be spelled out in the complaint. . . . *It simply requires that enough information be presented to the Commissioner to enable him to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process.*" *Id.*, at 224–225 (emphasis added).

> 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."

As these comments illustrate, probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. Informants' tips doubtless come in many shapes and sizes from many different types of persons. As we said in *Adams* v. *Williams*, 407 U. S. 143, 147 (1972): "Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability." Rigid legal rules are ill-suited to an area of such diversity. "One simple rule will not cover every situation." *Ibid.*[7]

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[7] The diversity of informants' tips, as well as the usefulness of the totality-of-the-circumstances approach to probable cause, is reflected in our prior decisions on the subject. In *Jones* v. *United States*, 362 U. S. 257, 271 (1960), we held that probable cause to search petitioners' apartment was established by an affidavit based principally on an informant's tip. The unnamed informant claimed to have purchased narcotics from petitioners at their apartment; the affiant stated that he had been given correct information from the informant on a prior occasion. This, and the fact that petitioners had admitted to police officers on another occasion that they were narcotics users, sufficed to support the magistrate's determination of probable cause.

Likewise, in *Rugendorf* v. *United States*, 376 U. S. 528 (1964), the Court upheld a magistrate's determination that there was probable cause to believe that certain stolen property would be found in petitioner's apartment. The affidavit submitted to the magistrate stated that certain furs had been stolen, and that a confidential informant, who previously had furnished confidential information, said that he saw the furs in petitioner's home. Moreover, another confidential informant, also claimed to be reliable, stated that one Schweihs had stolen the furs. Police reports indicated that petitioner had been seen in Schweihs' company, and a third informant stated that petitioner was a fence for Schweihs.

Finally, in *Ker* v. *California*, 374 U. S. 23 (1963), we held that information within the knowledge of officers who searched the Kers' apartment provided them with probable cause to believe drugs would be found there. The officers were aware that one Murphy had previously sold marihuana

Moreover, the "two-pronged test" directs analysis into two largely independent channels—the informant's "veracity" or "reliability" and his "basis of knowledge." See nn. 4 and 5, *supra*. There are persuasive arguments against according these two elements such independent status. Instead, they are better understood as relevant considerations in the totality-of-the-circumstances analysis that traditionally has guided probable-cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability. See, *e. g.*, *Adams* v. *Williams*, *supra*, at 146–147; *United States* v. *Harris*, 403 U. S. 573 (1971).

If, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of probable cause based on his tip. See *United States* v. *Sellers*, 483 F. 2d 37 (CA5 1973).[8] Likewise, if an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability—we have found

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to a police officer; the transaction had occurred in an isolated area, to which Murphy had led the police. The night after this transaction, police observed Mr. Ker and Murphy meet in the same location. Murphy approached Ker's car, and, although police could see nothing change hands, Murphy's *modus operandi* was identical to what it had been the night before. Moreover, when police followed Ker from the scene of the meeting with Murphy he managed to lose them after performing an abrupt U-turn. Finally, the police had a statement from an informant who had provided reliable information previously, that Ker was engaged in selling marihuana, and that his source was Murphy. We concluded that "[t]o say that this coincidence of information was sufficient to support a reasonable belief of the officers that Ker was illegally in possession of marijuana is to indulge in understatement." *Id.*, at 36.

[8] Compare *Stanley* v. *State*, 19 Md. App., at 530, 313 A. 2d, at 861, reasoning that "[e]ven assuming 'credibility' amounting to sainthood, the judge still may not accept the bare conclusion . . . of a sworn and known and trusted police-affiant."

rigorous scrutiny of the basis of his knowledge unnecessary. *Adams* v. *Williams*, *supra*. Conversely, even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case. Unlike a totality-of-the-circumstances analysis, which permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip, the "two-pronged test" has encouraged an excessively technical dissection of informants' tips,[9] with undue at-

[9] Some lower court decisions, brought to our attention by the State, reflect a rigid application of such rules. In *Bridger* v. *State*, 503 S. W. 2d 801 (Tex. Crim. App. 1974), the affiant had received a confession of armed robbery from one of two suspects in the robbery; in addition, the suspect had given the officer $800 in cash stolen during the robbery. The suspect also told the officer that the gun used in the robbery was hidden in the other suspect's apartment. A warrant issued on the basis of this was invalidated on the ground that the affidavit did not satisfactorily describe how the accomplice had obtained his information regarding the gun.

Likewise, in *People* v. *Palanza*, 55 Ill. App. 3d 1028, 371 N. E. 2d 687 (1978), the affidavit submitted in support of an application for a search warrant stated that an informant of proven and uncontested reliability had seen, in specifically described premises, "a quantity of a white crystalline substance which was represented to the informant by a white male occupant of the premises to be cocaine. Informant has observed cocaine on numerous occasions in the past and is thoroughly familiar with its appearance. The informant states that the white crystalline powder he observed in the above described premises appeared to him to be cocaine." *Id.*, at 1029, 371 N. E. 2d, at 688. The warrant issued on the basis of the affidavit was invalidated because "[t]here is no indication as to how the informant or for that matter any other person could tell whether a white substance was cocaine and not some other substance such as sugar or salt." *Id.*, at 1030, 371 N. E. 2d, at 689.

Finally, in *People* v. *Brethauer*, 174 Colo. 29, 482 P. 2d 369 (1971), an informant, stated to have supplied reliable information in the past, claimed that L. S. D. and marihuana were located on certain premises. The informant supplied police with drugs, which were tested by police and confirmed to be illegal substances. The affidavit setting forth these, and other, facts was found defective under both prongs of *Spinelli*.

tention being focused on isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate.

As early as *Locke* v. *United States*, 7 Cranch 339, 348 (1813), Chief Justice Marshall observed, in a closely related context: "[T]he term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation . . . . It imports a seizure made under circumstances which warrant suspicion." More recently, we said that "the *quanta* . . . of proof" appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. *Brinegar*, 338 U. S., at 173. Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to "probable cause" may not be helpful, it is clear that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." *Spinelli*, 393 U. S., at 419. See Model Code of Pre-Arraignment Procedure § 210.1(7) (Prop. Off. Draft 1972); 1 W. LaFave, Search and Seizure § 3.2(e) (1978).

We also have recognized that affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area." *United States* v. *Ventresca*, 380 U. S. 102, 108 (1965). Likewise, search and arrest warrants long have been issued by persons who are neither lawyers nor judges, and who certainly do not remain abreast of each judicial refinement of the nature of "probable cause." See *Shadwick* v. *City of Tampa*, 407 U. S. 345, 348–350 (1972). The rigorous inquiry into the *Spinelli* prongs and the complex superstructure of evidentiary and analytical rules that some have seen implicit in our *Spinelli* decision, cannot be reconciled with the fact that many warrants are—quite properly, 407 U. S., at 348–350—issued on the basis of nontechnical,

common-sense judgments of laymen applying a standard less demanding than those used in more formal legal proceedings. Likewise, given the informal, often hurried context in which it must be applied, the "built-in subtleties," *Stanley* v. *State*, 19 Md. App. 507, 528, 313 A. 2d 847, 860 (1974), of the "two-pronged test" are particularly unlikely to assist magistrates in determining probable cause.

Similarly, we have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." *Spinelli*, *supra*, at 419. "A grudging or negative attitude by reviewing courts toward warrants," *Ventresca*, 380 U. S., at 108, is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." *Id.*, at 109.

If the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the Warrant Clause that might develop at the time of the search. In addition, the possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring "the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States* v. *Chadwick*, 433 U. S. 1, 9 (1977). Reflecting this preference for the warrant process, the traditional standard for review of an issuing magistrate's probable-cause determination has been that so long as the magistrate had a "substantial basis for . . . conclud[ing]" that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. *Jones* v. *United States*, 362 U. S. 257, 271 (1960). See *United States* v.

*Harris*, 403 U. S., at 577–583.[10] We think reaffirmation of this standard better serves the purpose of encouraging recourse to the warrant procedure and is more consistent with our traditional deference to the probable-cause determinations of magistrates than is the "two-pronged test."

Finally, the direction taken by decisions following *Spinelli* poorly serves "[t]he most basic function of any government": "to provide for the security of the individual and of his property." *Miranda* v. *Arizona*, 384 U. S. 436, 539 (1966) (WHITE, J., dissenting). The strictures that inevitably accompany the "two-pronged test" cannot avoid seriously impeding the task of law enforcement, see, *e. g.*, n. 9, *supra*. If, as the Illinois Supreme Court apparently thought, that test must be rigorously applied in every case, anonymous tips would be of greatly diminished value in police work. Ordinary citizens, like ordinary witnesses, see Advisory Committee's Notes on Fed. Rule Evid. 701, 28 U. S. C. App., p. 570, generally do not provide extensive recitations of the basis of their everyday observations. Likewise, as the Illinois Supreme Court observed in this case, the veracity of persons supplying anonymous tips is by hypothesis largely unknown, and unknowable. As a result, anonymous tips seldom could survive a rigorous application of either of the *Spinelli* prongs. Yet, such tips, particularly when supplemented by

[10] We also have said that "[a]lthough in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants," *United States* v. *Ventresca*, 380 U. S. 102, 109 (1965). This reflects both a desire to encourage use of the warrant process by police officers and a recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case. Even if we were to accept the premise that the accurate assessment of probable cause would be furthered by the "two-pronged test," which we do not, these Fourth Amendment policies would require a less rigorous standard than that which appears to have been read into *Aguilar* and *Spinelli*.

independent police investigation, frequently contribute to the solution of otherwise "perfect crimes." While a conscientious assessment of the basis for crediting such tips is required by the Fourth Amendment, a standard that leaves virtually no place for anonymous citizen informants is not.

For all these reasons, we conclude that it is wiser to abandon the "two-pronged test" established by our decisions in *Aguilar* and *Spinelli*.[11] In its place we reaffirm the totality-of-the-circumstances analysis that traditionally has informed probable-cause determinations. See *Jones* v. *United States*, *supra; United States* v. *Ventresca*, 380 U. S. 102 (1965); *Brinegar* v. *United States*, 338 U. S. 160 (1949). The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause

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[11] The Court's decision in *Spinelli* has been the subject of considerable criticism, both by Members of this Court and others. JUSTICE BLACKMUN, concurring in *United States* v. *Harris*, 403 U. S. 573, 585–586 (1971), noted his long-held view "that *Spinelli* . . . was wrongly decided" by this Court. Justice Black similarly would have overruled that decision. *Id.*, at 585. Likewise, a noted commentator has observed that "[t]he *Aguilar-Spinelli* formulation has provoked apparently ceaseless litigation." 8A J. Moore, Moore's Federal Practice ¶ 41.04, p. 41–43 (1982).

Whether the allegations submitted to the magistrate in *Spinelli* would, under the view we now take, have supported a finding of probable cause, we think it would not be profitable to decide. There are so many variables in the probable-cause equation that one determination will seldom be a useful "precedent" for another. Suffice it to say that while we in no way abandon *Spinelli*'s concern for the trustworthiness of informers and for the principle that it is the magistrate who must ultimately make a finding of probable cause, we reject the rigid categorization suggested by some of its language.

existed. *Jones* v. *United States*, 362 U. S., at 271. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli*.

Our earlier cases illustrate the limits beyond which a magistrate may not venture in issuing a warrant. A sworn statement of an affiant that "he has cause to suspect and does believe" that liquor illegally brought into the United States is located on certain premises will not do. *Nathanson* v. *United States*, 290 U. S. 41 (1933). An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and the wholly conclusory statement at issue in *Nathanson* failed to meet this requirement. An officer's statement that "[a]ffiants have received reliable information from a credible person and do believe" that heroin is stored in a home, is likewise inadequate. *Aguilar* v. *Texas*, 378 U. S. 108 (1964). As in *Nathanson*, this is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued. But when we move beyond the "bare bones" affidavits present in cases such as *Nathanson* and *Aguilar*, this area simply does not lend itself to a prescribed set of rules, like that which had developed from *Spinelli*. Instead, the flexible, common-sense standard articulated in *Jones*, *Ventresca*, and *Brinegar* better serves the purposes of the Fourth Amendment's probable-cause requirement.

JUSTICE BRENNAN's dissent suggests in several places that the approach we take today somehow downgrades the

role of the neutral magistrate, because *Aguilar* and *Spinelli* "preserve the role of magistrates as independent arbiters of probable cause . . . ." *Post*, at 287. Quite the contrary, we believe, is the case. The essential protection of the warrant requirement of the Fourth Amendment, as stated in *Johnson* v. *United States*, 333 U. S. 10 (1948), is in "requiring that [the usual inferences which reasonable men draw from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Id.*, at 13–14. Nothing in our opinion in any way lessens the authority of the magistrate to draw such reasonable inferences as he will from the material supplied to him by applicants for a warrant; indeed, he is freer than under the regime of *Aguilar* and *Spinelli* to draw such inferences, or to refuse to draw them if he is so minded.

The real gist of JUSTICE BRENNAN's criticism seems to be a second argument, somewhat at odds with the first, that magistrates should be restricted in their authority to make probable-cause determinations by the standards laid down in *Aguilar* and *Spinelli*, and that such findings "should not be authorized unless there is some assurance that the information on which they are based has been obtained in a reliable way by an honest or credible person." *Post*, at 283. However, under our opinion magistrates remain perfectly free to exact such assurances as they deem necessary, as well as those required by this opinion, in making probable-cause determinations. JUSTICE BRENNAN would apparently prefer that magistrates be restricted in their findings of probable cause by the development of an elaborate body of case law dealing with the "veracity" prong of the *Spinelli* test, which in turn is broken down into two "spurs"—the informant's "credibility" and the "reliability" of his information, together with the "basis of knowledge" prong of the *Spinelli* test. See n. 4, *supra*. That such a labyrinthine body of judicial refinement bears any relationship to familiar definitions of

probable cause is hard to imagine. As previously noted, probable cause deals "with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," *Brinegar* v. *United States*, 338 U. S., at 175.

JUSTICE BRENNAN's dissent also suggests that "[w]ords such as 'practical,' 'nontechnical,' and 'common sense,' as used in the Court's opinion, are but code words for an overly permissive attitude towards police practices in derogation of the rights secured by the Fourth Amendment." *Post*, at 290. An easy, but not a complete, answer to this rather florid statement would be that nothing we know about Justice Rutledge suggests that he would have used the words he chose in *Brinegar* in such a manner. More fundamentally, no one doubts that "under our Constitution only measures consistent with the Fourth Amendment may be employed by government to cure [the horrors of drug trafficking]," *post*, at 290; but this agreement does not advance the inquiry as to which measures are, and which measures are not, consistent with the Fourth Amendment. "Fidelity" to the commands of the Constitution suggests balanced judgment rather than exhortation. The highest "fidelity" is not achieved by the judge who instinctively goes furthest in upholding even the most bizarre claim of individual constitutional rights, any more than it is achieved by a judge who instinctively goes furthest in accepting the most restrictive claims of governmental authorities. The task of this Court, as of other courts, is to "hold the balance true," and we think we have done that in this case.

## IV

Our decisions applying the totality-of-the-circumstances analysis outlined above have consistently recognized the value of corroboration of details of an informant's tip by independent police work. In *Jones* v. *United States*, 362 U. S., at 269, we held that an affidavit relying on hearsay "is not to

be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented." We went on to say that even in making a warrantless arrest an officer "may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge." *Ibid.* Likewise, we recognized the probative value of corroborative efforts of police officials in *Aguilar*—the source of the "two-pronged test"—by observing that if the police had made some effort to corroborate the informant's report at issue, "an entirely different case" would have been presented. *Aguilar*, 378 U. S., at 109, n. 1.

Our decision in *Draper* v. *United States*, 358 U. S. 307 (1959), however, is the classic case on the value of corroborative efforts of police officials. There, an informant named Hereford reported that Draper would arrive in Denver on a train from Chicago on one of two days, and that he would be carrying a quantity of heroin. The informant also supplied a fairly detailed physical description of Draper, and predicted that he would be wearing a light colored raincoat, brown slacks, and black shoes, and would be walking "real fast." *Id.*, at 309. Hereford gave no indication of the basis for his information.[12]

On one of the stated dates police officers observed a man matching this description exit a train arriving from Chicago; his attire and luggage matched Hereford's report and he was

[12] The tip in *Draper* might well not have survived the rigid application of the "two-pronged test" that developed following *Spinelli*. The only reference to Hereford's reliability was that he had "been engaged as a 'special employee' of the Bureau of Narcotics at Denver for about six months, and from time to time gave information to [the police for] small sums of money, and that [the officer] had always found the information given by Hereford to be accurate and reliable." 358 U. S., at 309. Likewise, the tip gave no indication of how Hereford came by his information. At most, the detailed and accurate predictions in the tip indicated that, however Hereford obtained his information, it was reliable.

walking rapidly. We explained in *Draper* that, by this point in his investigation, the arresting officer "had personally verified every facet of the information given him by Hereford except whether petitioner had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of Hereford's information being thus personally verified, [the officer] had 'reasonable grounds' to believe that the remaining unverified bit of Hereford's information—that Draper would have the heroin with him—was likewise true," *id.*, at 313.

The showing of probable cause in the present case was fully as compelling as that in *Draper*. Even standing alone, the facts obtained through the independent investigation of Mader and the DEA at least suggested that the Gateses were involved in drug trafficking. In addition to being a popular vacation site, Florida is well known as a source of narcotics and other illegal drugs. See *United States* v. *Mendenhall*, 446 U. S. 544, 562 (1980) (POWELL, J., concurring in part and concurring in judgment); DEA, Narcotics Intelligence Estimate, The Supply of Drugs to the U. S. Illicit Market From Foreign and Domestic Sources in 1980, pp. 8–9. Lance Gates' flight to West Palm Beach, his brief, overnight stay in a motel, and apparent immediate return north to Chicago in the family car, conveniently awaiting him in West Palm Beach, is as suggestive of a prearranged drug run, as it is of an ordinary vacation trip.

In addition, the judge could rely on the anonymous letter, which had been corroborated in major part by Mader's efforts—just as had occurred in *Draper*.[13] The Supreme Court

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[13] The Illinois Supreme Court thought that the verification of details contained in the anonymous letter in this case amounted only to "[t]he corroboration of innocent activity," 85 Ill. 2d 376, 390, 423 N. E. 2d 887, 893 (1981), and that this was insufficient to support a finding of probable cause. We are inclined to agree, however, with the observation of Justice Moran in his dissenting opinion that "[i]n this case, just as in *Draper*, seemingly innocent activity became suspicious in light of the initial tip." *Id.*, at 396,

of Illinois reasoned that *Draper* involved an informant who had given reliable information on previous occasions, while the honesty and reliability of the anonymous informant in this case were unknown to the Bloomingdale police. While this distinction might be an apt one at the time the Police Department received the anonymous letter, it became far less significant after Mader's independent investigative work occurred. The corroboration of the letter's predictions that the Gateses' car would be in Florida, that Lance Gates would fly to Florida in the next day or so, and that he would drive the car north toward Bloomingdale all indicated, albeit not with certainty, that the informant's other assertions also were true. "[B]ecause an informant is right about some things, he is more probably right about other facts," *Spinelli*, 393 U. S., at 427 (WHITE, J., concurring)—including the claim regarding the Gateses' illegal activity. This may well not be the type of "reliability" or "veracity" necessary to satisfy some views of the "veracity prong" of *Spinelli*, but we think it suffices for the practical, common-sense judgment called for in making a probable-cause determination. It is enough, for purposes of assessing probable cause, that "[c]orroboration through other sources of information reduced the

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423 N. E. 2d, at 896. And it bears noting that *all* of the corroborating detail established in *Draper* was of entirely innocent activity—a fact later pointed out by the Court in both *Jones* v. *United States*, 362 U. S., at 269–270, and *Ker* v. *California*, 374 U. S., at 36.

This is perfectly reasonable. As discussed previously, probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens' demands. We think the Illinois court attempted a too rigid classification of the types of conduct that may be relied upon in seeking to demonstrate probable cause. See *Brown* v. *Texas*, 443 U. S. 47, 52, n. 2 (1979). In making a determination of probable cause the relevant inquiry is not whether particular conduct is "innocent" or "guilty," but the degree of suspicion that attaches to particular types of noncriminal acts.

chances of a reckless or prevaricating tale," thus providing "a substantial basis for crediting the hearsay." *Jones* v. *United States*, 362 U. S., at 269, 271.

Finally, the anonymous letter contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted. The letterwriter's accurate information as to the travel plans of each of the Gateses was of a character likely obtained only from the Gateses themselves, or from someone familiar with their not entirely ordinary travel plans. If the informant had access to accurate information of this type a magistrate could properly conclude that it was not unlikely that he also had access to reliable information of the Gateses' alleged illegal activities.[14] Of

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[14] JUSTICE STEVENS' dissent seizes on one inaccuracy in the anonymous informant's letter—its statement that Sue Gates would fly from Florida to Illinois, when in fact she drove—and argues that the probative value of the entire tip was undermined by this allegedly "material mistake." We have never required that informants used by the police be infallible, and can see no reason to impose such a requirement in this case. Probable cause, particularly when police have obtained a warrant, simply does not require the perfection the dissent finds necessary.

Likewise, there is no force to the dissent's argument that the Gateses' action in leaving their home unguarded undercut the informant's claim that drugs were hidden there. Indeed, the line-by-line scrutiny that the dissent applies to the anonymous letter is akin to that which we find inappropriate in reviewing magistrates' decisions. The dissent apparently attributes to the judge who issued the warrant in this case the rather implausible notion that persons dealing in drugs always stay at home, apparently out of fear that to leave might risk intrusion by criminals. If accurate, one could not help sympathizing with the self-imposed isolation of people so situated. In reality, however, it is scarcely likely that the judge ever thought that the anonymous tip "kept one spouse" at home, much less that he relied on the theory advanced by the dissent. The letter simply says that Sue would fly from Florida to Illinois, without indicating whether the Gateses made the bitter choice of leaving the drugs in their house, or those in their car, unguarded. The judge's determination that there might be drugs or evidence of criminal activity in the Gateses' home was well supported by the less speculative theory, noted in text, that if the informant

course, the Gateses' travel plans might have been learned from a talkative neighbor or travel agent; under the "two-pronged test" developed from *Spinelli*, the character of the details in the anonymous letter might well not permit a sufficiently clear inference regarding the letterwriter's "basis of knowledge." But, as discussed previously, *supra*, at 235, probable cause does not demand the certainty we associate with formal trials. It is enough that there was a fair probability that the writer of the anonymous letter had obtained his entire story either from the Gateses or someone they trusted. And corroboration of major portions of the letter's predictions provides just this probability. It is apparent, therefore, that the judge issuing the warrant had a "substantial basis for . . . conclud[ing]" that probable cause to search the Gateses' home and car existed. The judgment of the Supreme Court of Illinois therefore must be

*Reversed.*

JUSTICE WHITE, concurring in the judgment.

In my view, the question regarding modification of the exclusionary rule framed in our order of November 29, 1982, 459 U. S. 1028 (1982), is properly before us and should be addressed. I continue to believe that the exclusionary rule is an inappropriate remedy where law enforcement officials act in the reasonable belief that a search and seizure was consistent with the Fourth Amendment—a position I set forth in *Stone* v. *Powell*, 428 U. S. 465, 537–539 (1976). In this case, it was fully reasonable for the Bloomingdale, Ill., police to believe that their search of respondents' house and automobile comported with the Fourth Amendment as the search was conducted pursuant to a judicially issued warrant. The

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could predict with considerable accuracy the somewhat unusual travel plans of the Gateses, he probably also had a reliable basis for his statements that the Gateses kept a large quantity of drugs in their home and frequently were visited by other drug traffickers there.

exclusion of probative evidence where the constable has *not* blundered not only sets the criminal free but also fails to serve any constitutional interest in securing compliance with the important requirements of the Fourth Amendment. On this basis, I concur in the Court's judgment that the decision of the Illinois Supreme Court must be reversed.

I

The Court declines to address the exclusionary rule question because the Illinois courts were not invited to modify the rule in the first instance. The Court's refusal to face this important question cannot be ascribed to jurisdictional limitations. I fully agree that the statute which gives us jurisdiction in this cause, 28 U. S. C. § 1257(3), prevents us from deciding federal constitutional claims raised here for the first time on review of state-court decisions. *Cardinale* v. *Louisiana*, 394 U. S. 437, 438–439 (1969). But it is equally well established that "'[n]o particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time.'" *Street* v. *New York*, 394 U. S. 576, 584 (1969) (quoting *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 67 (1928)). Notwithstanding the select and controversial instances in which the Court has reversed a state-court decision for "plain error,"[1] we have consistently dismissed for want of jurisdiction where the federal claim asserted in this Court was not raised below. But this obviously is not such a case. As the Court points out, "[i]t is clear in this case that respondents expressly raised, at every level of the Illinois judicial system, the claim that the Fourth Amendment had been violated by the actions of the Illinois

[1] See, *e. g.*, *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); *Wood* v. *Georgia*, 450 U. S. 261 (1981); *Vachon* v. *New Hampshire*, 414 U. S. 478 (1974) *(per curiam)*. Of course, to the extent these cases were correctly decided, they indicate *a fortiori* that the exclusionary rule issue in this case is properly before us.

police and that the evidence seized by the officers should be excluded from their trial." *Ante*, at 220. Until today, we have not required more.

We have never suggested that the jurisdictional stipulations of § 1257 require that all arguments on behalf of, let alone in opposition to, a federal claim be raised and decided below.[2] See R. Stern & E. Gressman, Supreme Court Practice 230 (5th ed. 1978). *Dewey* v. *Des Moines*, 173 U. S. 193 (1899), distinguished the raising of constitutional claims and the making of arguments in support of or in opposition to those claims.

> "If the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the personal judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued.
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> *"Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed."* *Id.*, at 197–198 (emphasis added).[3]

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[2] The Court has previously relied on issues and arguments not raised in the state court below in order to dispose of a federal question that was properly raised. In *Stanley* v. *Illinois*, 405 U. S. 645, 658 (1972), the Court held that unmarried fathers could not be denied a hearing on parental fitness that was afforded other Illinois parents. Although this issue was not presented in the Illinois courts, the Court found that it could properly be considered: "we dispose of the case on the constitutional premise raised below, reaching the result by a method of analysis readily available to the state court. For the same reason the strictures of *Cardinale* v. *Louisiana*, 394 U. S. 437 (1969), and *Hill* v. *California*, 401 U. S. 797 (1971), have been fully observed." *Id.*, at 658, n. 10. The dissent argued that the Court was deciding a due process claim instead of an equal protection one, but there was no suggestion that it mattered at all that the Court had relied on a different type of equal protection argument.

[3] As the Court explains, *ante*, at 220, n. 2, in *Dewey*, the plaintiff in error argued only that the imposition of personal liability against him violated

Under *Dewey*, which the Court hails as the "fullest treatment of the subject," *ante*, at 219, the exclusionary rule issue is but another argument pertaining to the Fourth Amendment question squarely presented in the Illinois courts.

The presentation and decision of respondents' Fourth Amendment claim fully embraces the argument that due to the nature of the alleged Fourth Amendment violation, the seized evidence should not be excluded. Our decisions concerning the scope of the exclusionary rule cannot be divorced from the Fourth Amendment; they rest on the relationship of Fourth Amendment interests to the objectives of the criminal justice system. See, *e. g.*, *United States* v. *Ceccolini*, 435 U. S. 268 (1978); *Stone* v. *Powell*, 428 U. S. 465 (1976).[4] Similarly, the issues surrounding a proposed good-faith modification are intricately and inseverably tied to the nature of the Fourth Amendment violation: the degree of probable cause, the presence of a warrant, and the clarity of previously announced Fourth Amendment principles all inform the

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the Due Process Clause of the Fourteenth Amendment, because he had not received personal notice of the assessment proceedings. In this Court, the plaintiff in error sought to raise a takings argument for the first time. The Court declined to pass on the issue because, although arising from a single factual occurrence, the two claims "are not in anywise necessarily connected." 173 U. S., at 198.

[4] The Court relies on these cases for the surprising assertion that the Fourth Amendment and exclusionary rule questions are "distinct." I had understood the very essence of *Rakas* v. *Illinois*, 439 U. S. 128 (1978), to be that standing to seek exclusion of evidence could not be divorced from substantive Fourth Amendment rights. Past decisions finding that the remedy of exclusion is not always appropriate upon the finding of a Fourth Amendment violation acknowledge the close relationship of the issues. For example, in *United States* v. *Ceccolini* it was said: "The constitutional question under the Fourth Amendment was phrased in *Wong Sun* v. *United States*, 371 U. S. 471 (1963), as whether 'the connection between the lawless conduct of the police and the discovery of the challenged evidence has "become so attenuated as to dissipate the taint."'" 435 U. S., at 273–274. It is also suprising to learn that the issues in *Stone* v. *Powell* are "distinct" from the Fourth Amendment.

good-faith issue. The Court's own holding that the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis" for concluding that probable cause existed, *ante*, at 244–245, is itself but a variation on the good-faith theme. See Brief for Petitioner on Reargument 4–26.

As a jurisdictional requirement, I have no doubt that the exclusionary rule question is before us as an indivisible element of the claim that the Constitution requires exclusion of certain evidence seized in violation of the Fourth Amendment. As a prudential matter, I am unmoved by the Court's lengthy discourse as to why it must avoid the question. First, the Court turns on its head the axiom that "'due regard for the appropriate relationship of this Court to state courts,' *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S., at 434–435, demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials," *ante*, at 221. This statement, written to explain why a state statute should not be struck down on federal grounds not raised in the state courts,[5] hardly applies when the question is whether a rule of federal law articulated by this Court should now be narrowed to reduce the scope of federal intrusion into the State's administration of criminal justice. Insofar as modifications of the federal exclusionary

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[5] Consider the full context of the statement in *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434 (1940):

"In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court."

rule are concerned, the Illinois courts are bound by this Court's pronouncements. Cf. *Oregon* v. *Hass*, 420 U. S. 714, 719 (1975). I see little point in requiring a litigant to request a state court to overrule or modify one of this Court's precedents. Far from encouraging the stability of our precedents, the Court's proposed practice could well undercut *stare decisis*. Either the presentation of such issues to the lower courts will be a completely futile gesture or the lower courts are now invited to depart from this Court's decisions whenever they conclude such a modification is in order.[6]

The Court correctly notes that Illinois may choose to pursue a different course with respect to the state exclusionary rule. If this Court were to formulate a "good-faith" exception to the federal exclusionary rule, the Illinois Supreme Court would be free to consider on remand whether the state exclusionary rule should be modified accordingly. The possibility that it might have relied upon the state exclusionary rule had the "good-faith" question been posed does not constitute independent and adequate state grounds. "The possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." *United Air Lines, Inc.* v. *Mahin*, 410 U. S. 623, 630–631 (1973); *Beecher* v. *Alabama*, 389 U. S. 35, 37, n. 3 (1967); C. Wright, The Law of Federal Courts § 107, pp. 747–748 (4th ed. 1983). Nor does having the state court first decide whether the federal exclusionary rule should be modified—and presentation of the federal question does not insure that the equivalent state-law issue will be

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[6] The Court observes that "although the Illinois courts applied the federal exclusionary rule, there was never 'any real contest' upon the point." *Ante*, at 223. But the proper forum for a "real contest" on the continued vitality of the exclusionary rule that has developed from our decisions in *Weeks* v. *United States*, 232 U. S. 383 (1914), and *Mapp* v. *Ohio*, 367 U. S. 643 (1961), is this Court.

raised or decided[7]—avoid the unnecessary decision of a federal question. The Court still must reach a federal question to decide the instant case. Thus, in today's opinion, the Court eschews modification of the exclusionary rule in favor of interring the test established by *Aguilar* v. *Texas*, 378 U. S. 108 (1964), and *Spinelli* v. *United States*, 393 U. S. 410 (1969). Nor is the exclusionary rule question avoided—it is simply deferred until "another day."

It also appears that the Court, in disposing of the case, does not strictly follow its own prudential advice. The Illinois Supreme Court found not only a violation of the Fourth Amendment but also of Article I, § 6, of the Illinois Constitution, which also provides assurance against unreasonable searches and seizures. Taking the Court's new prudential standards on their own terms, the Illinois courts should be given the opportunity to consider in the first instance whether a "totality of the circumstances" test should replace the more precise rules of *Aguilar* and *Spinelli*. The Illinois Supreme Court may decide to retain the established test for purposes of the State Constitution just as easily as it could decide to retain an unmodified exclusionary rule.[8]

Finally, the Court correctly notes that a fully developed record is helpful if not indispensable for the decision of many issues. I too resist the decision of a constitutional question

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[7] Nor is there any reason for the Illinois courts to decide that question in advance of this Court's decision on the federal exclusionary rule. Until the federal rule is modified, the state-law question is entirely academic. The state courts should not be expected to render such purely advisory decisions.

[8] Respondents press this very argument. Brief for Respondents 24–27; Brief for Respondents on Reargument 6. Of course, under traditional principles the possibility that the state court might reach a different conclusion in interpreting the State Constitution does not make it improper for us to decide the federal issue. *Delaware* v. *Prouse*, 440 U. S. 648, 651–653 (1979); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 568 (1977).

when such guidance is necessary, but the question of whether the exclusionary rule should be modified is an issue of law which obviously goes far beyond and depends little on the subjective good faith of the police officers that searched the Gateses' property. Moreover, the case comes here with a fully developed record as to the actions of the Bloomingdale, Ill., police. If further factual development of whether the officers in this case acted in good faith were important, that issue should logically be considered on remand, following this Court's statement of the proper legal standards.[9]

The Court's straining to avoid coming to grips with the exclusionary rule issue today may be hard for the country to understand—particularly given earlier statements by some Members of the Court.[10] The question has been fully briefed and argued by the parties and *amici curiae*, including the United States.[11] The issue is central to the enforcement of law and the administration of justice throughout the Nation. The Court of Appeals for the second largest Federal Circuit

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[9] It also should be noted that the requirement that the good-faith issue be presented to the Illinois courts has little to do with whether the record is complete. I doubt that the raising of the good-faith issue below would have been accompanied by any different record. And this Court may dismiss a writ of certiorari as improvidently granted when the record makes decision of a federal question unwise. See, *e. g.*, *Minnick* v. *California Dept. of Corrections*, 452 U. S. 105 (1981).

[10] In *California* v. *Minjares*, 443 U. S. 916, 928 (1979) (REHNQUIST, J., joined by BURGER, C. J., dissenting from the denial of stay), the author of today's opinion for the Court urged that the parties be directed to brief whether the exclusionary rule should be retained. In *Minjares*, like this case, respondents had raised a Fourth Amendment claim but petitioners had not attacked the validity of the exclusionary rule in the state court. See also *Robbins* v. *California*, 453 U. S. 420, 437 (1981) (REHNQUIST, J., dissenting) (advocating overruling of *Mapp* v. *Ohio*, *supra*).

[11] Ironically, in *Mapp* v. *Ohio*, *supra*, petitioners did not ask the Court to partially overrule *Wolf* v. *Colorado*, 338 U. S. 25 (1949). The sole argument to apply the exclusionary rule to the States is found in a single paragraph in an *amicus* brief filed by the American Civil Liberties Union.

has already adopted such an exception, *United States* v. *Williams*, 622 F. 2d 830 (CA5 1980) (en banc), cert. denied, 449 U. S. 1127 (1981), and the new Eleventh Circuit is presumably bound by its decision. Several Members of this Court have for some time expressed the need to consider modifying the exclusionary rule, *ante*, at 224, and Congress as well has been active in exploring the question. See The Exclusionary Rule Bills, Hearings on S. 101, S. 751, and S. 1995 before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary, 97th Cong., 1st and 2d Sess. (1981–1982). At least one State has already enacted a good-faith exception. Colo. Rev. Stat. § 16–3–308 (Supp. 1982). Of course, if there is a jurisdictional barrier to deciding the issue, none of these considerations are relevant. But if no such procedural obstacle exists, I see it as our responsibility to end the uncertainty and decide whether the rule will be modified. The question of whether probable cause existed for the issuance of a warrant and whether the evidence seized must be excluded in this case should follow our reconsideration of the framework by which such issues, as they arise from the Fourth Amendment, are to be handled.

## II

### A

The exclusionary rule is a remedy adopted by this Court to effectuate the Fourth Amendment right of citizens "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." Although early opinions suggested that the Constitution required exclusion of all illegally obtained evidence, the exclusionary rule "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." *Stone* v. *Powell*, 428 U. S., at 486. Because of the inherent trustworthiness of seized tangible evidence and the resulting social costs from its loss through suppression, appli-

cation of the exclusionary rule has been carefully "restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U. S. 338, 348 (1974). Even at criminal trials the exclusionary rule has not been applied indiscriminately to ban all illegally obtained evidence without regard to the costs and benefits of doing so. *Infra*, at 256–257. These developments, born of years of experience with the exclusionary rule in operation, forcefully suggest that the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment.

This evolvement in the understanding of the proper scope of the exclusionary rule embraces several lines of cases. First, standing to invoke the exclusionary rule has been limited to situations where the government seeks to use such evidence against the victim of the unlawful search. *Brown* v. *United States*, 411 U. S. 223 (1973); *Alderman* v. *United States*, 394 U. S. 165 (1969); *Wong Sun* v. *United States*, 371 U. S. 471, 491–492 (1963); *Rakas* v. *Illinois*, 439 U. S. 128 (1978).

Second, the rule has not been applied in proceedings other than the trial itself. In *United States* v. *Calandra*, *supra*, the Court refused to extend the rule to grand jury proceedings. "Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best. . . . We therefore decline to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury." 414 U. S., at 351–352. Similarly, in *United States* v. *Janis*, 428 U. S. 433 (1976), the exclusionary rule was not extended to forbid the use in federal civil proceedings of evidence illegally seized by state officials, since the likelihood of deterring unlawful police conduct was not sufficient to outweigh the social costs imposed by the exclusion.

Third, even at a criminal trial, the same analysis has led us to conclude that the costs of excluding probative evidence outweighed the deterrence benefits in several circumstances. We have refused to prohibit the use of illegally seized evidence for the purpose of impeaching a defendant who testifies in his own behalf. *United States* v. *Havens*, 446 U. S. 620 (1980); *Walder* v. *United States*, 347 U. S. 62 (1954). We have also declined to adopt a "*per se* or 'but for' rule" that would make inadmissible any evidence which comes to light through a chain of causation that began with an illegal arrest. *Brown* v. *Illinois*, 422 U. S. 590, 603 (1975). And we have held that testimony of a live witness may be admitted, notwithstanding that the testimony was derived from a concededly unconstitutional search. *United States* v. *Ceccolini*, 435 U. S. 268 (1978). Nor is exclusion required when law enforcement agents act in good-faith reliance upon a statute or ordinance that is subsequently held to be unconstitutional. *United States* v. *Peltier*, 422 U. S. 531 (1975); *Michigan* v. *DeFillippo*, 443 U. S. 31 (1979).[12] Cf. *United States* v. *Caceres*, 440 U. S. 741, 754–757 (1979) (exclusion not

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[12] To be sure, *Peltier* and *DeFillippo* did not modify the exclusionary rule itself. *Peltier* held that *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973), was not to be given retroactive effect; *DeFillippo* upheld the validity of an arrest made in good-faith reliance on an ordinance subsequently declared unconstitutional. The effect of these decisions, of course, was that evidence was not excluded because of the officer's reasonable belief that he was acting lawfully, and the Court's reasoning, as I discuss *infra*, at 260–261, leads inexorably to the more general modification of the exclusionary rule I favor. Indeed, JUSTICE BRENNAN recognized this in his dissent in *Peltier*, 422 U. S., at 551–552.

I recognize that we have held that the exclusionary rule required suppression of evidence obtained in searches carried out pursuant to statutes, not previously declared unconstitutional, which purported to authorize the searches in question without probable cause and without a valid warrant. See, *e. g.*, *Torres* v. *Puerto Rico*, 442 U. S. 465 (1979); *Almeida-Sanchez* v. *United States*, *supra*; *Sibron* v. *New York*, 392 U. S. 40 (1968); *Berger* v. *New York*, 388 U. S. 41 (1967). The results in these cases may well be different under a "good-faith" exception to the exclusionary rule.

required of evidence tainted by violation of an executive department's rules concerning electronic eavesdropping).

A similar balancing approach is employed in our decisions limiting the scope of the exclusionary remedy for Fifth Amendment violations, *Oregon* v. *Hass*, 420 U. S. 714 (1975); *Harris* v. *New York*, 401 U. S. 222 (1971); *Michigan* v. *Tucker*, 417 U. S. 433 (1974), and our cases considering whether Fourth Amendment decisions should be applied retroactively, *United States* v. *Peltier*, *supra*, at 538–539; *Williams* v. *United States*, 401 U. S. 646, 654–655 (1971) (plurality opinion); *Desist* v. *United States*, 394 U. S. 244, 249–250 (1969); *Linkletter* v. *Walker*, 381 U. S. 618, 636–639 (1965). But see *United States* v. *Johnson*, 457 U. S. 537 (1982).

These cases reflect that the exclusion of evidence is not a personal constitutional right but a remedy, which, like all remedies, must be sensitive to the costs and benefits of its imposition. The trend and direction of our exclusionary rule decisions indicate not a lesser concern with safeguarding the Fourth Amendment but a fuller appreciation of the high costs incurred when probative, reliable evidence is barred because of investigative error. The primary cost, of course, is that the exclusionary rule interferes with the truthseeking function of a criminal trial by barring relevant and trustworthy evidence.[13] We will never know how many guilty defendants go free as a result of the rule's operation. But any rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification,

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[13] The effects of the exclusionary rule are often felt before a case reaches trial. A recent study by the National Institute of Justice of felony arrests in California during the years 1976–1979 "found a major impact of the exclusionary rule on state prosecutions." National Institute of Justice, The Effects of the Exclusionary Rule: A Study in California 2 (1982). The study found that 4.8% of the more than 4,000 felony cases declined for prosecution were rejected because of search and seizure problems. The exclusionary rule was found to have a particularly pronounced effect in drug cases; prosecutors rejected approximately 30% of all felony drug arrests because of search and seizure problems.

and must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness. I do not presume that modification of the exclusionary rule will, by itself, significantly reduce the crime rate—but that is no excuse for indiscriminate application of the rule.

The suppression doctrine entails other costs as well. It would be surprising if the suppression of evidence garnered in good faith, but by means later found to violate the Fourth Amendment, did not deter legitimate as well as unlawful police activities. To the extent the rule operates to discourage police from reasonable and proper investigative actions, it hinders the solution and even the prevention of crime. A tremendous burden is also placed on the state and federal judicial systems. One study reveals that one-third of federal defendants going to trial file Fourth Amendment suppression motions, and 70% to 90% of these involve formal hearings. General Accounting Office, Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions 10 (1979).

The rule also exacts a heavy price in undermining public confidence in the reasonableness of the standards that govern the criminal justice system. "[A]lthough the [exclusionary] rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and the administration of justice." *Stone* v. *Powell*, 428 U. S., at 490–491. As JUSTICE POWELL observed in *Stone* v. *Powell*, *supra*, at 490: "The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice."

For these reasons, "application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States*

v. *Calandra*, 414 U. S., at 348.[14] The reasoning of our recent cases strongly suggests that there is insufficient justification to suppress evidence at a criminal trial which was seized in the reasonable belief that the Fourth Amendment was not violated. The deterrent effect of the exclusionary rule has never been established by empirical evidence, de-

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[14] Our decisions applying the exclusionary rule have referred to the "imperative of judicial integrity," *Elkins* v. *United States*, 364 U. S. 206, 222 (1960), although recent opinions of the Court make clear that the primary function of the exclusionary rule is to deter violations of the Fourth Amendment, *Stone* v. *Powell*, 428 U. S., at 486; *United States* v. *Janis*, 428 U. S. 433, 446 (1976); *United States* v. *Calandra*, 414 U. S., at 348. I do not dismiss the idea that the integrity of the courts may be compromised when illegally seized evidence is admitted, but I am convinced that the force of the argument depends entirely on the type of search or seizure involved. At one extreme, there are lawless invasions of personal privacy that shock the conscience, and the admission of evidence so obtained must be suppressed as a matter of due process, entirely aside from the Fourth Amendment. See, *e. g.*, *Rochin* v. *California*, 342 U. S. 165 (1952). Also deserving of exclusionary treatment are searches and seizures perpetrated in intentional and flagrant disregard of Fourth Amendment principles. But the question of exclusion must be viewed through a different lens when a Fourth Amendment violation occurs because the police have reasonably erred in assessing the facts, mistakenly conducted a search authorized under a presumably valid statute, or relied in good faith upon a warrant not supported by probable cause. In these circumstances, the integrity of the courts is not implicated. The violation of the Fourth Amendment is complete before the evidence is admitted. Thus, "[t]he primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution." *United States* v. *Janis*, *supra*, at 458, n. 35. Cf. *United States* v. *Peltier*, 422 U. S. 531, 537 (1975) ("The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the 'imperative of judicial integrity' is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner"). I am content that the interests in judicial integrity run along with rather than counter to the deterrence concept, and that to focus upon the latter is to promote, not denigrate, the former.

spite repeated attempts. *United States* v. *Janis*, 428 U. S., at 449–453; *Irvine* v. *California*, 347 U. S. 128, 136 (1954). But accepting that the rule deters some police misconduct, it is apparent as a matter of logic that there is little if any deterrence when the rule is invoked to suppress evidence obtained by a police officer acting in the reasonable belief that his conduct did not violate the Fourth Amendment. As we initially observed in *Michigan* v. *Tucker*, 417 U. S., at 447, and reiterated in *United States* v. *Peltier*, 422 U. S., at 539:

> "'The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.'"

The Court in *Peltier* continued, *id.*, at 542:

> "If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

See also *United States* v. *Janis*, *supra*, at 459, n. 35 ("[T]he officers here were clearly acting in good faith . . . a factor that the Court has recognized reduces significantly the potential deterrent effect of exclusion"). The deterrent value of the exclusionary sanction is most effective when officers engage in searches and seizures under circumstances "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Brown* v. *Illinois*, 422 U. S., at 610–611 (POWELL, J., concurring in part). On the

other hand, when officers perform their tasks in the good-faith belief that their action comported with constitutional requirements, the deterrent function of the exclusionary rule is so minimal, if not nonexistent, that the balance clearly favors the rule's modification.[15]

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[15] It has been suggested that the deterrence function of the exclusionary rule has been understated by viewing the rule as aimed at special deterrence, when, in fact, the exclusionary rule is directed at "affecting the wider audience of law enforcement officials and society at large." 1 W. LaFave, Search and Seizure 6 (1983 Supp.). See also Mertens & Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo. L. J. 365, 399–401 (1981). I agree that the exclusionary rule's purpose is not only, or even primarily, to deter the individual police officer involved in the instant case. It appears that this objection assumes that the proposed modification of the exclusionary rule will turn only on the subjective "good faith" of the officer. Grounding the modification in objective reasonableness, however, retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment. *Dunaway* v. *New York*, 442 U. S. 200, 221 (1979) (STEVENS, J., concurring).

Indeed, the present indiscriminate application of the exclusionary rule may hinder the educative and deterrent function of the suppression remedy. "Instead of disciplining their employees, police departments generally have adopted the attitude that the courts cannot be satisfied, that the rules are hopelessly complicated and subject to change, and that the suppression of evidence is the court's problem and not the departments'." Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027, 1050 (1974). If evidence is suppressed only when a law enforcement officer should have known that he was violating the Fourth Amendment, police departments may look more seriously at the officer's misconduct when suppression is invoked. Moreover, by providing that evidence gathered in good-faith reliance on a reasonable rule will not be excluded, a good-faith exception creates an incentive for police departments to formulate rules governing activities of officers in the search-and-seizure area. Many commentators, including proponents of the exclusionary sanction, recognize that the formulation of such rules by police departments, and the training necessary to implement these guidelines in practice, are perhaps the most effective means of protecting Fourth Amendment rights. See K. Davis, Discretionary Justice (1969); McGowan, Rule-Making and the Police, 70 Mich. L. Rev. 659 (1972); Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 416–431 (1974).

B

There are several types of Fourth Amendment violations that may be said to fall under the rubric of "good faith." "[T]here will be those occasions where the trial or appellate court will disagree on the issue of probable cause, no matter how reasonable the grounds for arrest appeared to the officer and though reasonable men could easily differ on the question. It also happens that after the events at issue have occurred, the law may change, dramatically or ever so slightly, but in any event sufficiently to require the trial judge to hold that there was not probable cause to make the arrest and to seize the evidence offered by the prosecution. . . ." *Stone* v. *Powell*, 428 U. S., at 539–540 (WHITE, J., dissenting). The argument for a good-faith exception is strongest, however, when law enforcement officers have reasonably relied on a judicially issued search warrant.

This Court has never set forth a rationale for applying the exclusionary rule to suppress evidence obtained pursuant to a search warrant; it has simply done so without considering whether Fourth Amendment interests will be advanced. It is my view that they generally will not be. When officers have dutifully obtained a search warrant from a judge or magistrate, and execute the warrant as directed by its terms, exclusion of the evidence thus obtained cannot be expected to deter future reliance on such warrants. The warrant is prima facie proof that the officers acted reasonably in conducting the search or seizure; "[o]nce the warrant issues, there is literally nothing more that the policeman can do in seeking to comply with the law." *Stone* v. *Powell*, *supra*, at 498 (BURGER, C. J., concurring).[16] As JUSTICE STEVENS

[16] The Attorney General's Task Force on Violent Crime concluded that the situation in which an officer relies on a duly authorized warrant

"is a particularly compelling example of good faith. A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions. Accordingly, we believe that there should be a rule which states that evidence obtained pursuant to and

put it in writing for the Court in *United States* v. *Ross*, 456 U. S. 798, 823, n. 32 (1982): "[A] warrant issued by a magistrate normally suffices to establish" that a law enforcement officer has "acted in good faith in conducting the search." Nevertheless, the warrant may be invalidated because of a technical defect or because, as in this case, the judge issued a warrant on information later determined to fall short of probable cause. Excluding evidence for these reasons can have no possible deterrent effect on future police conduct, unless it is to make officers less willing to do their duty. Indeed, applying the exclusionary rule to warrant searches may well reduce incentives for police to utilize the preferred warrant procedure when a warrantless search may be permissible under one of the established exceptions to the warrant requirement. See *ante*, at 236; *Brown* v. *Illinois*, 422 U. S., at 611, and n. 3 (POWELL, J., concurring in part); P. Johnson, New Approaches to Enforcing the Fourth Amendment 11 (unpublished paper, 1978). See also *United States* v. *United States District Court*, 407 U. S. 297, 316–317 (1972); *United States* v. *Ventresca*, 380 U. S. 102, 106–107 (1965).

Opponents of the proposed "reasonable belief" exception suggest that such a modification would allow magistrates and judges to flout the probable-cause requirements in issuing warrants. This is a novel concept: the exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges. Magistrates must be neutral and detached from law enforcement operations and I would not presume that a modification of the exclusionary rule will lead magistrates to abdicate their responsibility to apply the law.[17] In any event, I would apply the exclusion-

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within the scope of a warrant is prima facie the result of good faith on the part of the officer seizing the evidence." U. S. Dept. of Justice, Attorney General's Task Force on Violent Crime, Final Report 55 (1981).

[17] Much is made of *Shadwick* v. *City of Tampa*, 407 U. S. 345 (1972), where we held that magistrates need not be legally trained. *Shadwick*'s holding was quite narrow. First, the Court insisted that "an issuing mag-

ary rule when it is plainly evident that a magistrate or judge had no business issuing a warrant. See, *e. g.*, *Aguilar* v. *Texas*, 378 U. S. 108 (1964); *Nathanson* v. *United States*, 290 U. S. 41 (1933). Similarly, the good-faith exception would not apply if the material presented to the magistrate or judge is false or misleading, *Franks* v. *Delaware*, 438 U. S. 154 (1978), or so clearly lacking in probable cause that no well-trained officer could reasonably have thought that a warrant should issue.

Another objection is that a reasonable-belief exception will encompass all searches and seizures on the frontier of the Fourth Amendment and that such cases will escape review on the question of whether the officer's action was permissible, denying needed guidance from the courts and freezing Fourth Amendment law in its present state. These fears are unjustified. The premise of the argument is that a court must first decide the reasonable-belief issue before turning to the question of whether a Fourth Amendment violation has occurred. I see no need for such an inflexible practice. When a Fourth Amendment case presents a novel question of law whose resolution is necessary to guide future action by law enforcement officers and magistrates, there is sufficient reason for the Court to decide the violation issue *before* turning to the good-faith question. Indeed, it may be difficult to

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istrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search." *Id.*, at 350. Second, in *Shadwick*, the Court Clerk's authority extended only to the relatively straightforward task of issuing arrest warrants for breach of municipal ordinances. To issue search warrants, an individual must be capable of making the probable-cause judgments involved. In this regard, I reject the Court's insinuation that it is too much to expect that persons who issue warrants remain abreast of judicial refinements of probable cause. *Ante*, at 235. Finally, as indicated in text, I do not propose that a warrant clearly lacking a basis in probable cause can support a "good-faith" defense to invocation of the exclusionary rule.

determine whether the officers acted reasonably until the Fourth Amendment issue is resolved.[18] In other circumstances, however, a suppression motion poses no Fourth Amendment question of broad import—the issue is simply whether the facts in a given case amounted to probable cause—in these cases, it would be prudent for a reviewing court to immediately turn to the question of whether the officers acted in good faith. Upon finding that they had, there would generally be no need to consider the probable-cause question. I doubt that our Fourth Amendment jurisprudence would suffer thereby. It is not entirely clear to me that the law in this area has benefited from the constant pressure of fully litigated suppression motions. The result usually has been that initially bright-line rules have disappeared in a sea of ever-finer distinctions. Moreover, there is much to be said for having Fourth Amendment jurispru-

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[18] Respondents and some *amici* contend that this practice would be inconsistent with the Art. III requirement of an actual case or controversy. I have no doubt that a defendant who claims that he has been subjected to an unlawful search or seizure and seeks suppression of the evidentiary fruits thereof raises a live controversy within the Art. III authority of federal courts to adjudicate. It is fully appropriate for a court to decide whether there has been a wrong before deciding what remedy to impose. When questions of good-faith immunity have arisen under 42 U. S. C. § 1983, we have not been constrained to reach invariably the immunity question before the violation issue. Compare *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975) (finding constitutional violation and remanding for consideration of good-faith defense), with *Procunier* v. *Navarette*, 434 U. S. 555, 566, n. 14 (1978) (finding good-faith defense first). Similarly, we have exercised discretion at times in deciding the merits of a claim even though the error was harmless, while on other occasions resolving the case solely by reliance on the harmless-error doctrine. Compare *Milton* v. *Wainwright*, 407 U. S. 371, 372 (1972) (declining to decide whether admission of confession was constitutional violation because error, if any, was harmless beyond a reasonable doubt), with *Coleman* v. *Alabama*, 399 U. S. 1 (1970) (upholding right to counsel at preliminary hearing and remanding for harmless-error determination).

dence evolve in part, albeit perhaps at a slower pace, in other settings.[19]

Finally, it is contended that a good-faith exception will be difficult to apply in practice. This concern appears grounded in the assumption that courts would inquire into the subjective belief of the law enforcement officers involved. I would eschew such investigations. "[S]ending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources." *Massachusetts* v. *Painten*, 389 U. S. 560, 565 (1968) (WHITE, J., dissenting). Moreover, "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional." *Scott* v. *United States*, 436 U. S. 128, 136 (1978). Just last Term, we modified the qualified immunity public officials enjoy in suits seeking damages against federal officials for alleged deprivations of constitutional rights, eliminating the subjective component of the standard. See *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982). Although

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[19] For example, a pattern or practice of official conduct that is alleged to violate Fourth Amendment rights may be challenged by an aggrieved individual in a suit for declaratory or injunctive relief. See, *e. g.*, *Zurcher* v. *Stanford Daily*, 436 U. S. 547 (1978). (Of course, there are limits on the circumstances in which such actions will lie. *Rizzo* v. *Goode*, 423 U. S. 362 (1976); *Los Angeles* v. *Lyons*, 461 U. S. 95 (1983).) Although a municipality is not liable under 42 U. S. C. § 1983 on a theory of *respondeat superior*, local governing bodies are subject to suit for constitutional torts resulting from implementation of local ordinances, regulations, policies, or even customary practices. *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978). Such entities enjoy no immunity defense that might impede resolution of the substantive constitutional issue. *Owen* v. *City of Independence*, 445 U. S. 622 (1980). In addition, certain state courts may continue to suppress, as a matter of state law, evidence in state trials for any Fourth Amendment violation. These cases would likely provide a sufficient supply of state criminal cases in which to resolve unsettled questions of Fourth Amendment law. As a final alternative, I would entertain the possibility of according the benefits of a new Fourth Amendment rule to the party in whose case the rule is first announced. See *Stovall* v. *Denno*, 388 U. S. 293, 301 (1967).

searches pursuant to a warrant will rarely require any deep inquiry into reasonableness, I would measure the reasonableness of a particular search or seizure only by objective standards. Even for warrantless searches, the requirement should be no more difficult to apply than the closely related good-faith test which governs civil suits under 42 U. S. C. § 1983. In addition, the burden will likely be offset by the reduction in the number of cases which will require elongated considerations of the probable-cause question, and will be greatly outweighed by the advantages in limiting the bite of the exclusionary rule to the field in which it is most likely to have its intended effects.

III

Since a majority of the Court deems it inappropriate to address the good-faith issue, I briefly address the question that the Court does reach—whether the warrant authorizing the search and seizure of respondents' car and home was constitutionally valid. Abandoning the "two-pronged test" of *Aguilar* v. *Texas*, 378 U. S. 108 (1964), and *Spinelli* v. *United States*, 393 U. S. 410 (1969), the Court upholds the validity of the warrant under a new "totality of the circumstances" approach. Although I agree that the warrant should be upheld, I reach this conclusion in accordance with the *Aguilar-Spinelli* framework.

A

For present purposes, the *Aguilar-Spinelli* rules can be summed up as follows. First, an affidavit based on an informant's tip, standing alone, cannot provide probable cause for issuance of a warrant unless the tip includes information that apprises the magistrate of the informant's basis for concluding that the contraband is where he claims it is (the "basis of knowledge" prong), *and* the affiant informs the magistrate of his basis for believing that the informant is credible (the "veracity" prong). *Aguilar*, *supra*, at 114;

*Spinelli*, *supra*, at 412–413, 416.[20] Second, if a tip fails under either or both of the two prongs, probable cause may yet be established by independent police investigatory work that corroborates the tip to such an extent that it supports "both the inference that the informer was generally trustworthy and that he made his charge . . . on the basis of information obtained in a reliable way." *Spinelli*, *supra*, at 417. In instances where the officers rely on corroboration, the ultimate question is whether the corroborated tip "is as trustworthy as a tip which would pass *Aguilar*'s tests without independent corroboration." 393 U. S., at 415.

In the present case, it is undisputed that the anonymous tip, by itself, did not furnish probable cause. The question is whether those portions of the affidavit describing the results of the police investigation of the respondents, when considered in light of the tip, "would permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed." *Spinelli*, *supra*, at 418. The Illinois Supreme Court concluded that the corroboration was insufficient to permit such a ripening. 85 Ill. 2d 376, 387, 423 N. E. 2d 887, 892 (1981). The court reasoned as follows:

> "[T]he nature of the corroborating evidence in this case would satisfy neither the 'basis of knowledge' nor the

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[20] The "veracity" prong is satisfied by a recitation in the affidavit that the informant previously supplied accurate information to the police, see *McCray* v. *Illinois*, 386 U. S. 300, 303–304 (1967), or by proof that the informant gave his information against his penal interest, see *United States* v. *Harris*, 403 U. S. 573, 583–584 (1971) (plurality opinion). The "basis of knowledge" prong is satisfied by a statement from the informant that he personally observed the criminal activity, or, if he came by the information indirectly, by a satisfactory explanation of why his sources were reliable, or, in the absence of a statement detailing the manner in which the information was gathered, by a description of the accused's criminal activity in sufficient detail that the magistrate may infer that the informant is relying on something more substantial than casual rumor or an individual's general reputation. *Spinelli* v. *United States*, 393 U. S., at 416.

'veracity' prong of *Aguilar*. Looking to the affidavit submitted as support for Detective Mader's request that a search warrant issue, we note that the corroborative evidence here was only of clearly innocent activity. Mader's independent investigation revealed only that Lance and Sue Gates lived on Greenway Drive; that Lance Gates booked passage on a flight to Florida; that upon arriving he entered a room registered to his wife; and that he and his wife left the hotel together by car. The corroboration of innocent activity is insufficient to support a finding of probable cause." *Id.*, at 390, 423 N. E. 2d, at 893.

In my view, the lower court's characterization of the Gateses' activity here as totally "innocent" is dubious. In fact, the behavior was quite suspicious. I agree with the Court, *ante*, at 243, that Lance Gates' flight to West Palm Beach, an area known to be a source of narcotics, the brief overnight stay in a motel, and apparent immediate return north, suggest a pattern that trained law enforcement officers have recognized as indicative of illicit drug-dealing activity.[21]

Even, however, had the corroboration related only to completely innocuous activities, this fact alone would not preclude the issuance of a valid warrant. The critical issue is not whether the activities observed by the police are innocent or suspicious. Instead, the proper focus should be on whether the actions of the suspects, whatever their nature, give rise to an inference that the informant is credible and that he obtained his information in a reliable manner.

Thus, in *Draper* v. *United States*, 358 U. S. 307 (1959), an informant stated on September 7 that Draper would be carrying narcotics when he arrived by train in Denver on the morning of September 8 or September 9. The informant also provided the police with a detailed physical description

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[21] See *United States* v. *Mendenhall*, 446 U. S. 544, 562 (1980) (POWELL, J., concurring in part and concurring in judgment).

of the clothes Draper would be wearing when he alighted from the train. The police observed Draper leaving a train on the morning of September 9, and he was wearing the precise clothing described by the informant. The Court held that the police had probable cause to arrest Draper at this point, even though the police had seen nothing more than the totally innocent act of a man getting off a train carrying a briefcase. As we later explained in *Spinelli*, the important point was that the corroboration showed both that the informant was credible, *i. e.*, that he "had not been fabricating his report out of whole cloth," *Spinelli*, 393 U. S., at 417, and that he had an adequate basis of knowledge for his allegations, "since the report was of the sort which in common experience may be recognized as having been obtained in a reliable way." *Id.*, at 417–418. The fact that the informant was able to predict, two days in advance, the exact clothing Draper would be wearing dispelled the possibility that his tip was just based on rumor or "an offhand remark heard at a neighborhood bar." *Id.*, at 417. Probably Draper had planned in advance to wear these specific clothes so that an accomplice could identify him. A clear inference could therefore be drawn that the informant was either involved in the criminal scheme himself or that he otherwise had access to reliable, inside information.[22]

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[22] Thus, as interpreted in *Spinelli*, the Court in *Draper* held that there was probable cause because "the kind of information related by the informant [was] not generally sent ahead of a person's arrival in a city except to those who are intimately connected with making careful arrangements for meeting him." *Spinelli*, *supra*, at 426 (WHITE, J., concurring). As I said in *Spinelli*, the conclusion that *Draper* itself was based on this fact is far from inescapable. Prior to *Spinelli*, *Draper* was susceptible to the interpretation that it stood for the proposition that "the existence of the tenth and critical fact is made sufficiently probable to justify the issuance of a warrant by verifying nine other facts coming from the same source." *Spinelli*, *supra*, at 426–427 (WHITE, J., concurring). But it now seems clear that the Court in *Spinelli* rejected this reading of *Draper*.

JUSTICE BRENNAN, *post*, at 280, n. 3, 281–282, erroneously interprets my *Spinelli* concurrence as espousing the view that "corroboration of cer-

As in *Draper*, the police investigation in the present case satisfactorily demonstrated that the informant's tip was as trustworthy as one that would alone satisfy the *Aguilar* tests. The tip predicted that Sue Gates would drive to Florida, that Lance Gates would fly there a few days after May 3, and that Lance would then drive the car back. After the police corroborated these facts,[23] the judge could reasonably have inferred, as he apparently did, that the informant, who had specific knowledge of these unusual travel plans, did not make up his story and that he obtained his information in a reliable way. It is theoretically possible, as respondents insist, that the tip could have been supplied by a "vindictive travel agent" and that the Gateses' activities, although unusual, might not have been unlawful.[24] But *Aguilar* and *Spinelli*, like our other cases, do not require that certain guilt be established before a warrant may properly be issued. "[O]nly the probability, and not a prima facie show-

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tain details in a tip may be sufficient to satisfy the veracity, but not the basis of knowledge, prong of *Aguilar*." Others have made the same mistake. See, *e. g.*, Comment, 20 Am. Crim. L. Rev. 99, 105 (1982). I did not say that corroboration could *never* satisfy the "basis of knowledge" prong. My concern was, and still is, that the prong might be deemed satisfied on the basis of corroboration of information that does not in any way suggest that the informant had an adequate basis of knowledge for his report. If, however, as in *Draper*, the police corroborate information from which it can be inferred that the informant's tip was grounded on inside information, this corroboration is sufficient to satisfy the "basis of knowledge" prong. *Spinelli*, 393 U. S., at 426 (WHITE, J., concurring). The rules would indeed be strange if, as JUSTICE BRENNAN suggests, *post*, at 284, the "basis of knowledge" prong could be satisfied by detail in the tip alone, but not by independent police work.

[23] JUSTICE STEVENS is correct, *post*, at 291, that one of the informant's predictions proved to be inaccurate. However, I agree with the Court, *ante*, at 245, n. 14, that an informant need not be infallible.

[24] It is also true, as JUSTICE STEVENS points out, *post*, at 292, n. 3, that the fact that respondents were last seen leaving West Palm Beach on a northbound interstate highway is far from conclusive proof that they were heading directly to Bloomingdale.

ing, of criminal activity is the standard of probable cause." *Spinelli*, *supra*, at 419 (citing *Beck* v. *Ohio*, 379 U. S. 89, 96 (1964)). I therefore conclude that the judgment of the Illinois Supreme Court invalidating the warrant must be reversed.

B

The Court agrees that the warrant was valid, but, in the process of reaching this conclusion, it overrules the *Aguilar-Spinelli* tests and replaces them with a "totality of the circumstances" standard. As shown above, it is not at all necessary to overrule *Aguilar-Spinelli* in order to reverse the judgment below. Therefore, because I am inclined to believe that, when applied properly, the *Aguilar-Spinelli* rules play an appropriate role in probable-cause determinations, and because the Court's holding may foretell an evisceration of the probable-cause standard, I do not join the Court's holding.

The Court reasons, *ante*, at 233, that the "veracity" and "basis of knowledge" tests are not independent, and that a deficiency as to one can be compensated for by a strong showing as to the other. Thus, a finding of probable cause may be based on a tip from an informant "known for the unusual reliability of his predictions" or from "an unquestionably honest citizen," even if the report fails thoroughly to set forth the basis upon which the information was obtained. *Ibid.* If this is so, then it must follow *a fortiori* that "the affidavit of an officer, known by the magistrate to be honest and experienced, stating that [contraband] is located in a certain building" must be acceptable. *Spinelli*, 393 U. S., at 424 (WHITE, J., concurring). It would be "quixotic" if a similar statement from an honest informant, but not one from an honest officer, could furnish probable cause. *Ibid.* But we have repeatedly held that the unsupported assertion or belief of an officer does not satisfy the probable-cause requirement. See, *e. g.*, *Whiteley* v. *Warden*, 401 U. S. 560, 564–565

(1971); *Jones* v. *United States*, 362 U. S. 257, 269 (1960); *Nathanson* v. *United States*, 290 U. S. 41 (1933).[25] Thus, this portion of today's holding can be read as implicitly rejecting the teachings of these prior holdings.

The Court may not intend so drastic a result. Indeed, the Court expressly reaffirms, *ante*, at 239, the validity of cases such as *Nathanson* that have held that, no matter how reliable the affiant-officer may be, a warrant should not be issued unless the affidavit discloses supporting facts and circumstances. The Court limits these cases to situations involving affidavits containing only "bare conclusions" and holds that, if an affidavit contains anything more, it should be left to the issuing magistrate to decide, based solely on "practical[ity]" and "common sense," whether there is a fair probability that contraband will be found in a particular place. *Ante*, at 238–239.

Thus, as I read the majority opinion, it appears that the question whether the probable-cause standard is to be diluted is left to the common-sense judgments of issuing magistrates. I am reluctant to approve any standard that does not expressly require, as a prerequisite to issuance of a warrant, some showing of facts from which an inference may be drawn that the informant is credible and that his information was obtained in a reliable way. The Court is correctly concerned with the fact that some lower courts have been applying *Aguilar-Spinelli* in an unduly rigid manner.[26] I believe, however, that with clarification of the rule of corroborating

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[25] I have already indicated my view, *supra*, at 263–264, that such a "bare-bones" affidavit could not be the basis for a good-faith issuance of a warrant.

[26] *Bridger* v. *State*, 503 S. W. 2d 801 (Tex. Crim. App. 1974), and *People* v. *Palanza*, 55 Ill. App. 3d 1028, 371 N. E. 2d 687 (1978), which the Court describes *ante*, at 234, n. 9, appear to me to be excellent examples of overly technical applications of the *Aguilar-Spinelli* standard. The holdings in these cases could easily be disapproved without reliance on a "totality of the circumstances" analysis.

information, the lower courts are fully able to properly interpret *Aguilar-Spinelli* and avoid such unduly rigid applications. I may be wrong; it ultimately may prove to be the case that the only profitable instruction we can provide to magistrates is to rely on common sense. But the question whether a particular anonymous tip provides the basis for issuance of a warrant will often be a difficult one, and I would at least attempt to provide more precise guidance by clarifying *Aguilar-Spinelli* and the relationship of those cases with *Draper* before totally abdicating our responsibility in this area. Hence, I do not join the Court's opinion rejecting the *Aguilar-Spinelli* rules.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Although I join JUSTICE STEVENS' dissenting opinion and agree with him that the warrant is invalid even under the Court's newly announced "totality of the circumstances" test, see *post*, at 294–295, and n. 8, I write separately to dissent from the Court's unjustified and ill-advised rejection of the two-prong test for evaluating the validity of a warrant based on hearsay announced in *Aguilar* v. *Texas*, 378 U. S. 108 (1964), and refined in *Spinelli* v. *United States*, 393 U. S. 410 (1969).

I

The Court's current Fourth Amendment jurisprudence, as reflected by today's unfortunate decision, patently disregards Justice Jackson's admonition in *Brinegar* v. *United States*, 338 U. S. 160 (1949):

> "[Fourth Amendment rights] are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart.

> Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. . . .
>
> "But the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court." *Id.*, at 180–181 (dissenting opinion).

In recognition of the judiciary's role as the only effective guardian of Fourth Amendment rights, this Court has developed over the last half century a set of coherent rules governing a magistrate's consideration of a warrant application and the showings that are necessary to support a finding of probable cause. We start with the proposition that a neutral and detached magistrate, and not the police, should determine whether there is probable cause to support the issuance of a warrant. In *Johnson* v. *United States*, 333 U. S. 10 (1948), the Court stated:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . 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." *Id.*, at 13–14 (footnote omitted).

See also *Whiteley* v. *Warden*, 401 U. S. 560, 564 (1971); *Spinelli* v. *United States*, *supra*, at 415; *United States* v. *Ventresca*, 380 U. S. 102, 109 (1965); *Aguilar* v. *Texas*, *supra*, at 111; *Jones* v. *United States*, 362 U. S. 257, 270–271

(1960); *Giordenello* v. *United States*, 357 U. S. 480, 486 (1958); *United States* v. *Lefkowitz*, 285 U. S. 452, 464 (1932).

In order to emphasize the magistrate's role as an independent arbiter of probable cause and to insure that searches or seizures are not effected on less than probable cause, the Court has insisted that police officers provide magistrates with the underlying facts and circumstances that support the officers' conclusions. In *Nathanson* v. *United States*, 290 U. S. 41 (1933), the Court held invalid a search warrant that was based on a customs agent's "mere affirmation of suspicion and belief without any statement of adequate supporting facts." *Id.*, at 46. The Court stated: "Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough." *Id.*, at 47.

In *Giordenello* v. *United States*, *supra*, the Court reviewed an arrest warrant issued under the Federal Rules of Criminal Procedure based on a complaint sworn to by a Federal Bureau of Narcotics agent. *Id.*, at 481.[1] Based on the agent's testimony at the suppression hearing, the Court noted that "until the warrant was issued . . . [the agent's] suspicions of petitioner's guilt derived entirely from information given him by law enforcement officers and other persons in Houston, none of whom either appeared before the Commissioner or submitted affidavits." *Id.*, at 485. The Court found it unnecessary to decide whether a warrant could be based solely on hearsay information, for the complaint was "defective in not providing a sufficient basis upon which a

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[1] Although the warrant was issued under the Federal Rules of Criminal Procedure, the Court stated that "[t]he provisions of these Rules must be read in light of the constitutional requirements they implement." 357 U. S., at 485. See *Aguilar* v. *Texas*, 378 U. S. 108, 112, n. 3 (1964) ("The principles announced in *Giordenello* derived . . . from the Fourth Amendment, and not from our supervisory power").

finding of probable cause could be made." *Ibid.* In particular, the complaint contained no affirmative allegation that the agent spoke with personal knowledge nor did it indicate any sources for the agent's conclusion. *Id.*, at 486. The Court expressly rejected the argument that these deficiencies could be cured by "the Commissioner's reliance upon a presumption that the complaint was made on the personal knowledge of the complaining officer." *Ibid.*

As noted, the Court did not decide the hearsay question lurking in *Giordenello*. The use of hearsay to support the issuance of a warrant presents special problems because informants, unlike police officers, are not regarded as presumptively reliable or honest. Moreover, the basis for an informant's conclusions is not always clear from an affidavit that merely reports those conclusions. If the conclusory allegations of a police officer are insufficient to support a finding of probable cause, surely the conclusory allegations of an informant should *a fortiori* be insufficient.

In *Jones* v. *United States*, *supra*, the Court considered "whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations but those of another." *Id.*, at 269. The Court held that hearsay information can support the issuance of a warrant "so long as a substantial basis for crediting the hearsay is presented." *Ibid.* The Court found that there was a substantial basis for crediting the hearsay involved in *Jones*. The informant's report was based on the informant's personal knowledge, and the informant previously had provided accurate information. Moreover, the informant's story was corroborated by other sources. Finally, the defendant was known to the police to be a narcotics user. *Id.*, at 271.

*Aguilar* v. *Texas*, 378 U. S. 108 (1964), merely made explicit what was implicit in *Jones*. In considering a search warrant based on hearsay, the Court reviewed *Nathanson*

and *Giordenello* and noted the requirement established by those cases that an officer provide the magistrate with the underlying facts or circumstances that support the officer's conclusion that there is probable cause to justify the issuance of a warrant. The Court stated:

> "The vice in the present affidavit is at least as great as in *Nathanson* and *Giordenello*. Here, the 'mere conclusion' that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein,' it does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on . . . to show probable cause.' He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion.'" 378 U. S., at 113–114 (footnote omitted).[2]

While recognizing that a warrant may be based on hearsay, the Court established the following standard:

> "[T]he magistrate must be informed of some of the underlying circumstances from which the informant con-

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[2] The Court noted that approval of the affidavit before it "would open the door to easy circumvention of the rule announced in *Nathanson* and *Giordenello*." 378 U. S., at 114, n. 4. The Court stated:

"A police officer who arrived at the 'suspicion,' 'belief' or 'mere conclusion' that narcotics were in someone's possession could not obtain a warrant. But he could convey this conclusion to another police officer, who could then secure the warrant by swearing that he had 'received reliable information from a credible person' that the narcotics were in someone's possession." *Ibid.*

> cluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed . . . was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime' . . . or, as in this case, by an unidentified informant." *Id.*, at 114–115 (footnote omitted).

The *Aguilar* standard was refined in *Spinelli* v. *United States*, 393 U. S. 410 (1969). In *Spinelli*, the Court reviewed a search warrant based on an affidavit that was "more ample," *id.*, at 413, than the one in *Aguilar*. The affidavit in *Spinelli* contained not only a tip from an informant, but also a report of an independent police investigation that allegedly corroborated the informant's tip. 393 U. S., at 413. Under these circumstances, the Court stated that it was "required to delineate the manner in which *Aguilar*'s two-pronged test should be applied . . . ." *Ibid.*

The Court held that the *Aguilar* test should be applied to the tip, and approved two additional ways of satisfying that test. First, the Court suggested that if the tip contained sufficient detail describing the accused's criminal activity it might satisfy *Aguilar*'s basis of knowledge prong. 393 U. S., at 416. Such detail might assure the magistrate that he is "relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Ibid.* Although the tip in the case before it did not meet this standard, "[t]he detail provided by the informant in *Draper* v. *United States*, 358 U. S. 307 (1959), provide[d] a suitable benchmark," *ibid.*, because "[a] magistrate, when confronted with such detail, could reasonably infer that the informant

had gained his information in a reliable way." *Id.*, at 417 (footnote omitted).[3]

Second, the Court stated that police corroboration of the details of a tip could provide a basis for satisfying *Aguilar*.

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[3] There is some tension between *Draper* v. *United States*, 358 U. S. 307 (1959), and *Aguilar*. In *Draper*, the Court considered the validity of a warrantless arrest based on an informant's tip and police corroboration of certain details of the tip. The informant, who in the past had always given accurate and reliable information, told the police that Draper was peddling narcotics. The informant later told the police that Draper had left for Chicago by train to pick up some heroin and would return by train on the morning of one of two days. The informant gave the police a detailed physical description of Draper and of the clothing he was wearing. The informant also said that Draper would be carrying a tan zipper bag and that he walked very fast. 358 U. S., at 309.

On the second morning specified by the informant, the police saw a man "having the exact physical attributes and wearing the precise clothing described by [the informant], alight from an incoming Chicago train and start walking 'fast' toward the exit." *Id.*, at 309–310. The man was carrying a tan zipper bag. The police arrested him and searched him incident to the arrest. *Id.*, at 310.

The Court found that the arrest had been based on probable cause. Having verified every detail of the tip "except whether [Draper] had accomplished his mission and had the three ounces of heroin on his person or in his bag," *id.*, at 313, the police "had 'reasonable grounds' to believe that the remaining unverified bit of [the informant's] information . . . was likewise true." *Ibid.*

There is no doubt that the tip satisfied *Aguilar*'s veracity prong. The informant had given accurate information in the past. Moreover, under *Spinelli*, the police corroborated most of the details of the informant's tip. See *Spinelli* v. *United States*, 393 U. S., at 417; *id.*, at 426–427 (WHITE, J., concurring); *infra*, at 281, and n. 4. There is some question, however, about whether the tip satisfied *Aguilar*'s basis of knowledge prong. The fact that an informant is right about most things may suggest that he is credible, but it does not establish that he has acquired his information in a reliable way. See *Spinelli* v. *United States*, *supra*, at 426–427 (WHITE, J., concurring). *Spinelli*'s "self-verifying detail" element resolves this tension. As one commentator has suggested, "under *Spinelli*, the *Draper* decision is sound as applied to its facts." Note, The Informer's Tip As Probable Cause for Search or Arrest, 54 Cornell L. Rev. 958, 964, n. 34 (1969).

393 U. S., at 417. The Court's opinion is not a model of clarity on this issue since it appears to suggest that corroboration can satisfy both the basis of knowledge and veracity prongs of *Aguilar*. 393 U. S., at 417–418.[4] JUSTICE WHITE's concurring opinion, however, points the way to a proper reading of the Court's opinion. After reviewing the Court's decision in *Draper* v. *United States*, 358 U. S. 307 (1959), JUSTICE WHITE concluded that "[t]he thrust of *Draper* is not that the verified facts have independent significance with respect to proof of [another unverified fact]." 393 U. S., at 427. In his view, "[t]he argument instead relates to the reliability of the source: because an informant is right about some things, he is more probably right about other facts, usually the critical, unverified facts." *Ibid.* JUSTICE WHITE then pointed out that prior cases had rejected "the notion that the past

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[4] The Court stated that the Federal Bureau of Investigation's independent investigative efforts could not "support both the inference that the informer was generally trustworthy and that he had made his charge against Spinelli on the basis of information obtained in a reliable way." *Spinelli* v. *United States*, *supra*, at 417. The Court suggested that *Draper* again provided "a relevant comparison." 393 U. S., at 417. Once the police had corroborated most of the details of the tip in *Draper* "[i]t was . . . apparent that the informant had not been fabricating his report out of whole cloth; since the report was of the sort which in common experience may be recognized as having been obtained in a reliable way, it was perfectly clear that probable cause had been established." 393 U. S., at 417–418.

It is the Court's citation of *Draper* which creates most of the confusion. The informant's credibility was not at issue in *Draper* irrespective of the corroboration of the details of his tip. See n. 3, *supra*. The Court's opinion, therefore, might be read as suggesting that corroboration also could satisfy *Aguilar*'s basis of knowledge test. I think it is more likely, however, especially in view of the discussion *infra*, this page and 282, that the Court simply was discussing an alternative means of satisfying *Aguilar*'s veracity prong, using the facts of *Draper* as an example, and relying on its earlier determination that the detail of the tip in *Draper* was self-verifying. See 393 U. S., at 416–417. It is noteworthy that although the affiant in *Spinelli* had sworn that the informer was reliable, "he [had] offered the magistrate no reason in support of this conclusion." *Id.*, at 416. *Aguilar*'s veracity prong, therefore, was not satisfied. 393 U. S., at 416.

reliability of an officer is sufficient reason for believing his current assertions." *Ibid.* JUSTICE WHITE went on to state:

> "Nor would it suffice, I suppose, if a reliable informant states there is gambling equipment in Apartment 607 and then proceeds to describe in detail Apartment 201, a description which is verified before applying for the warrant. He was right about 201, but that hardly makes him more believable about the equipment in 607. But what if he states that there are narcotics locked in a safe in Apartment 300, which is described in detail, and the apartment manager verifies everything but the contents of the safe? I doubt that the report about the narcotics is made appreciably more believable by the verification. The informant could still have gotten his information concerning the safe from others about whom nothing is known or could have inferred the presence of narcotics from circumstances which a magistrate would find unacceptable." *Ibid.*

I find this reasoning persuasive. Properly understood, therefore, *Spinelli* stands for the proposition that corroboration of certain details in a tip may be sufficient to satisfy the veracity, but not the basis of knowledge, prong of *Aguilar*. As noted, *Spinelli* also suggests that in some limited circumstances considerable detail in an informant's tip may be adequate to satisfy the basis of knowledge prong of *Aguilar*.[5]

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[5] After concluding that the tip was not sufficient to support a finding of probable cause, the Court stated:

"This is not to say that the tip was so insubstantial that it could not properly have counted in the magistrate's determination. Rather, it needed some further support. When we look to the other parts of the application, however, we find nothing alleged which would permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed." *Spinelli* v. *United States*, 393 U. S., at 418.

The Court went on to suggest that corroboration of incriminating facts would be needed. See *ibid.*

Although the rules drawn from the cases discussed above are cast in procedural terms, they advance an important underlying substantive value: Findings of probable cause, and attendant intrusions, should not be authorized unless there is some assurance that the information on which they are based has been obtained in a reliable way by an honest or credible person. As applied to police officers, the rules focus on the way in which the information was acquired. As applied to informants, the rules focus both on the honesty or credibility of the informant and on the reliability of the way in which the information was acquired. Insofar as it is more complicated, an evaluation of affidavits based on hearsay involves a more difficult inquiry. This suggests a need to structure the inquiry in an effort to insure greater accuracy. The standards announced in *Aguilar*, as refined by *Spinelli*, fulfill that need. The standards inform the police of what information they have to provide and magistrates of what information they should demand. The standards also inform magistrates of the subsidiary findings they must make in order to arrive at an ultimate finding of probable cause. *Spinelli*, properly understood, directs the magistrate's attention to the possibility that the presence of self-verifying detail might satisfy *Aguilar*'s basis of knowledge prong and that corroboration of the details of a tip might satisfy *Aguilar*'s veracity prong. By requiring police to provide certain crucial information to magistrates and by structuring magistrates' probable-cause inquiries, *Aguilar* and *Spinelli* assure the magistrate's role as an independent arbiter of probable cause, insure greater accuracy in probable-cause determinations, and advance the substantive value identified above.

Until today the Court has never squarely addressed the application of the *Aguilar* and *Spinelli* standards to tips from anonymous informants. Both *Aguilar* and *Spinelli* dealt with tips from informants known at least to the police. See also, *e. g.*, *Adams* v. *Williams*, 407 U. S. 143, 146 (1972); *United States* v. *Harris*, 403 U. S. 573, 575 (1971); *Whiteley* v. *Warden*, 401 U. S., at 565; *McCray* v. *Illinois*, 386 U. S.

300, 302 (1967); *Jones* v. *United States*, 362 U. S., at 268–269. And surely there is even more reason to subject anonymous informants' tips to the tests established by *Aguilar* and *Spinelli*. By definition nothing is known about an anonymous informant's identity, honesty, or reliability. One commentator has suggested that anonymous informants should be treated as presumptively unreliable. See Comment, Anonymous Tips, Corroboration, and Probable Cause: Reconciling the *Spinelli/Draper* Dichotomy in *Illinois v. Gates*, 20 Am. Crim. L. Rev. 99, 107 (1982). See also *Adams* v. *Williams*, *supra*, at 146 (suggesting that an anonymous telephone tip provides a weaker case for a *Terry* v. *Ohio*, 392 U. S. 1 (1968), stop than a tip from an informant known to the police who had provided information in the past); *United States* v. *Harris*, *supra*, at 599 (Harlan, J., dissenting) ("We cannot assume that the ordinary law-abiding citizen has qualms about [appearing before a magistrate]"). In any event, there certainly is no basis for treating anonymous informants as presumptively reliable. Nor is there any basis for assuming that the information provided by an anonymous informant has been obtained in a reliable way. If we are unwilling to accept conclusory allegations from the police, who are presumptively reliable, or from informants who are known, at least to the police, there cannot possibly be any rational basis for accepting conclusory allegations from anonymous informants.

To suggest that anonymous informants' tips are subject to the tests established by *Aguilar* and *Spinelli* is not to suggest that they can never provide a basis for a finding of probable cause. It is conceivable that police corroboration of the details of the tip might establish the reliability of the informant under *Aguilar*'s veracity prong, as refined in *Spinelli*, and that the details in the tip might be sufficient to qualify under the "self-verifying detail" test established by *Spinelli* as a means of satisfying *Aguilar*'s basis of knowledge prong. The *Aguilar* and *Spinelli* tests must be applied to anonymous informants' tips, however, if we are to continue to insure

that findings of probable cause, and attendant intrusions, are based on information provided by an honest or credible person who has acquired the information in a reliable way.[6]

In light of the important purposes served by *Aguilar* and *Spinelli*, I would not reject the standards they establish. If anything, I simply would make more clear that *Spinelli*, properly understood, does not depart in any fundamental way from the test established by *Aguilar*. For reasons I shall next state, I do not find persuasive the Court's justifications for rejecting the test established by *Aguilar* and refined by *Spinelli*.

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[6] As noted, *supra*, at 277–282, *Aguilar* and *Spinelli* inform the police of what information they have to provide and magistrates of what information they should demand. This advances the important process value, which is intimately related to substantive Fourth Amendment concerns, of having magistrates, rather than police, or informants, determine whether there is probable cause to support the issuance of a warrant. We want the police to provide magistrates with the information on which they base their conclusions so that magistrates can perform their important function. When the police rely on facts about which they have personal knowledge, requiring them to disclose those facts to magistrates imposes no significant burden on the police. When the police rely on information obtained from confidential informants, requiring the police to disclose the facts on which the informants based their conclusions imposes a more substantial burden on the police, but it is one that they can meet because they presumably have access to their confidential informants.

In cases in which the police rely on information obtained from an anonymous informant, the police, by hypothesis, cannot obtain further information from the informant regarding the facts and circumstances on which the informant based his conclusion. When the police seek a warrant based solely on an anonymous informant's tip, therefore, they are providing the magistrate with all the information on which they have based their conclusion. In this respect, the command of *Aguilar* and *Spinelli* has been met and the process value identified above has been served. But *Aguilar* and *Spinelli* advance other values which argue for their application even to anonymous informants' tips. They structure the magistrate's probable-cause inquiry and, more importantly, they guard against findings of probable cause, and attendant intrusions, based on anything other than information which magistrates reasonably can conclude has been obtained in a reliable way by an honest or credible person.

## II

In rejecting the *Aguilar-Spinelli* standards, the Court suggests that a "totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific 'tests' be satisfied by every informant's tip." *Ante*, at 230–231 (footnote omitted). In support of this proposition the Court relies on several cases that purportedly reflect this approach, *ante*, at 230–231, n. 6, 232–233, n. 7, and on the "practical, nontechnical," *ante*, at 231, nature of probable cause.

Only one of the cases cited by the Court in support of its "totality of the circumstances" approach, *Jaben* v. *United States*, 381 U. S. 214 (1965), was decided subsequent to *Aguilar*. It is by no means inconsistent with *Aguilar*.[7] The other three cases[8] cited by the Court as supporting its

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[7] In *Jaben* v. *United States*, the Court considered whether there was probable cause to support a complaint charging petitioner with willfully filing a false tax return. 381 U. S., at 221. After reviewing the extensive detail contained in the complaint, *id.*, at 223, the Court expressly distinguished tax offenses from other types of offenses:

"Some offenses are subject to putative establishment by blunt and concise factual allegations, *e. g.*, '*A* saw narcotics in *B*'s possession,' whereas '*A* saw *B* file a false tax return' does not mean very much in a tax evasion case. Establishment of grounds for belief that the offense of tax evasion has been committed often requires a reconstruction of the taxpayer's income from many individually unrevealing facts which are not susceptible of a concise statement in a complaint. Furthermore, unlike narcotics informants, for example, whose credibility may often be suspect, the sources in this tax evasion case are much less likely to produce false or untrustworthy information. Thus, whereas some supporting information concerning the credibility of informants in narcotics cases or other common garden varieties of crime may be required, such information is not so necessary in the context of the case before us." *Id.*, at 223–224.

Obviously, *Jaben* is not inconsistent with *Aguilar* and involved no general rejection of the *Aguilar* standards.

[8] *Rugendorf* v. *United States*, 376 U. S. 528 (1964); *Ker* v. *California*, 374 U. S. 23 (1963); *Jones* v. *United States*, 362 U. S. 257 (1960).

totality-of-the-circumstances approach were decided before *Aguilar*. In any event, it is apparent from the Court's discussion of them, see *ante*, at 232–233, n. 7, that they are not inconsistent with *Aguilar*.

In addition, one can concede that probable cause is a "practical, nontechnical" concept without betraying the values that *Aguilar* and *Spinelli* reflect. As noted, see *supra*, at 277–282, *Aguilar* and *Spinelli* require the police to provide magistrates with certain crucial information. They also provide structure for magistrates' probable-cause inquiries. In so doing, *Aguilar* and *Spinelli* preserve the role of magistrates as independent arbiters of probable cause, insure greater accuracy in probable-cause determinations, and advance the substantive value of precluding findings of probable cause, and attendant intrusions, based on anything less than information from an honest or credible person who has acquired his information in a reliable way. Neither the standards nor their effects are inconsistent with a "practical, nontechnical" conception of probable cause. Once a magistrate has determined that he has information before him that he can reasonably say has been obtained in a reliable way by a credible person, he has ample room to use his common sense and to apply a practical, nontechnical conception of probable cause.

It also should be emphasized that cases such as *Nathanson* v. *United States*, 290 U. S. 41 (1933), and *Giordenello* v. *United States*, 357 U. S. 480 (1958), discussed *supra*, at 276–277, directly contradict the Court's suggestion, *ante*, at 233, that a strong showing on one prong of the *Aguilar* test should compensate for a deficient showing on the other. If the conclusory allegations of a presumptively reliable police officer are insufficient to establish probable cause, there is no conceivable reason why the conclusory allegations of an anonymous informant should not be insufficient as well. Moreover, contrary to the Court's implicit suggestion, *Aguilar* and *Spinelli* do not stand as an insuperable barrier to the use

of even anonymous informants' tips to establish probable cause. See *supra*, at 277–282. It is no justification for rejecting them outright that some courts may have employed an overly technical version of the *Aguilar-Spinelli* standards, see *ante*, at 234–235, and n. 9.

The Court also insists that the *Aguilar-Spinelli* standards must be abandoned because they are inconsistent with the fact that nonlawyers frequently serve as magistrates. *Ante*, at 235–236. To the contrary, the standards help to structure probable-cause inquiries and, properly interpreted, may actually help a nonlawyer magistrate in making a probable-cause determination. Moreover, the *Aguilar* and *Spinelli* tests are not inconsistent with deference to magistrates' determinations of probable cause. *Aguilar* expressly acknowledged that reviewing courts "will pay substantial deference to judicial determinations of probable cause . . . ." 378 U. S., at 111. In *Spinelli*, the Court noted that it was not retreating from the proposition that magistrates' determinations of probable cause "should be paid great deference by reviewing courts . . . ." 393 U. S., at 419. It is also noteworthy that the language from *United States* v. *Ventresca*, 380 U. S., at 108–109, which the Court repeatedly quotes, see *ante*, at 235, 236, and 237, n. 10, brackets the following passage, which the Court does not quote:

> "This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is based. See *Aguilar* v. *Texas*, *supra*. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not

invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner." 380 U. S., at 108–109.[9]

At the heart of the Court's decision to abandon *Aguilar* and *Spinelli* appears to be its belief that "the direction taken by decisions following *Spinelli* poorly serves '[t]he most basic function of any government': 'to provide for the security of the individual and of his property.'" *Ante*, at 237. This conclusion rests on the judgment that *Aguilar* and *Spinelli* "seriously imped[e] the task of law enforcement," *ante*, at 237, and render anonymous tips valueless in police work. *Ibid.* Surely, the Court overstates its case. See *supra*, at 287–288. But of particular concern to all Americans must be that the Court gives virtually no consideration to the value of insuring that findings of probable cause are based on information that a magistrate can reasonably say has been obtained in a reli-

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[9] The Court also argues that "[i]f the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the Warrant Clause that might develop at the time of the search." *Ante*, at 236. If the Court is suggesting, as it appears to be, that the police will intentionally disregard the law, it need only be noted in response that the courts are not helpless to deal with such conduct. Moreover, as was noted in *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971):

"[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.' '[T]he burden is on those seeking the exemption to show the need for it.'" *Id.*, at 454–455 (plurality opinion) (footnotes omitted).

It therefore would appear to be not only inadvisable, but also unavailing, for the police to conduct warrantless searches in "the hope of relying on consent or some other exception to the Warrant Clause that might develop at the time of the search." *Ante*, at 236.

able way by an honest or credible person. I share JUSTICE WHITE's fear that the Court's rejection of *Aguilar* and *Spinelli* and its adoption of a new totality-of-the-circumstances test, *ante*, at 238, "may foretell an evisceration of the probable-cause standard . . . ." *Ante*, at 272 (WHITE, J., concurring in judgment).

III

The Court's complete failure to provide any persuasive reason for rejecting *Aguilar* and *Spinelli* doubtlessly reflects impatience with what it perceives to be "overly technical" rules governing searches and seizures under the Fourth Amendment. Words such as "practical," "nontechnical," and "common sense," as used in the Court's opinion, are but code words for an overly permissive attitude towards police practices in derogation of the rights secured by the Fourth Amendment. Everyone shares the Court's concern over the horrors of drug trafficking, but under our Constitution only measures consistent with the Fourth Amendment may be employed by government to cure this evil. We must be ever mindful of Justice Stewart's admonition in *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971): "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). In the same vein, *Glasser* v. *United States*, 315 U. S. 60 (1942), warned that "[s]teps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties." *Id.*, at 86.

Rights secured by the Fourth Amendment are particularly difficult to protect because their "advocates are usually criminals." *Draper* v. *United States*, 358 U. S., at 314 (Douglas, J., dissenting). But the rules "we fashion [are] for the innocent and guilty alike." *Ibid.* See also *Kolender* v. *Lawson*, 461 U. S. 352, 362, n. 1 (1983) (BRENNAN, J., concurring); *Brinegar* v. *United States*, 338 U. S., at 181 (Jackson, J., dis-

senting). By replacing *Aguilar* and *Spinelli* with a test that provides no assurance that magistrates, rather than the police, or informants, will make determinations of probable cause; imposes no structure on magistrates' probable-cause inquiries; and invites the possibility that intrusions may be justified on less than reliable information from an honest or credible person, today's decision threatens to "obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law." *Johnson* v. *United States*, 333 U. S., at 17.

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, dissenting.

The fact that Lance and Sue Gates made a 22-hour nonstop drive from West Palm Beach, Florida, to Bloomingdale, Illinois, only a few hours after Lance had flown to Florida provided persuasive evidence that they were engaged in illicit activity. That fact, however, was not known to the judge when he issued the warrant to search their home.

What the judge did know at that time was that the anonymous informant had not been completely accurate in his or her predictions. The informant had indicated that "'Sue . . . drives their car to Florida *where she leaves it to be loaded up with drugs . . . . Sue fl[ies] back after she drops the car off in Florida.*'" 85 Ill. 2d 376, 379, 423 N. E. 2d 887, 888 (1981) (emphasis added). Yet Detective Mader's affidavit reported that she "'left the West Palm Beach area driving the Mercury northbound.'" 82 Ill. App. 3d 749, 757, 403 N. E. 2d 77, 82 (1980).

The discrepancy between the informant's predictions and the facts known to Detective Mader is significant for three reasons. First, it cast doubt on the informant's hypothesis that the Gates already had "'over [$100,000] worth of drugs in their basement,'" 85 Ill. 2d, at 379, 423 N. E. 2d, at 888. The informant had predicted an itinerary that always kept one

spouse in Bloomingdale, suggesting that the Gates did not want to leave their home unguarded because something valuable was hidden within. That inference obviously could not be drawn when it was known that the pair was actually together over a thousand miles from home.

Second, the discrepancy made the Gates' conduct seem substantially less unusual than the informant had predicted it would be. It would have been odd if, as predicted, Sue had driven down to Florida on Wednesday, left the car, and flown right back to Illinois. But the mere facts that Sue was in West Palm Beach with the car,[1] that she was joined by her husband at the Holiday Inn on Friday,[2] and that the couple drove north together the next morning[3] are neither unusual nor probative of criminal activity.

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[1] The anonymous note suggested that she was going down on Wednesday, 85 Ill. 2d, at 379, 423 N. E. 2d, at 888, but for all the officers knew she had been in Florida for a month. 82 Ill. App. 3d, at 755–757, 403 N. E. 2d, at 82–83.

[2] Lance does not appear to have behaved suspiciously in flying down to Florida. He made a reservation in his own name and gave an accurate home phone number to the airlines. Cf. *Florida* v. *Royer*, 460 U. S. 491, 493, n. 2 (1983); *United States* v. *Mendenhall*, 446 U. S. 544, 548 (1980) (Stewart, J., announcing the judgment). And Detective Mader's affidavit does not report that he did any of the other things drug couriers are notorious for doing, such as paying for the ticket in cash, *Royer*, 460 U. S., at 493, n. 2, dressing casually, *ibid.*, looking pale and nervous, *ibid.*; *Mendenhall*, *supra*, at 548, improperly filling out baggage tags, *Royer*, 460 U. S., at 493, n. 2, carrying American Tourister luggage, *ibid.*, not carrying any luggage, *Mendenhall*, 446 U. S., at 564–565 (POWELL, J., concurring in part and concurring in judgment), or changing airlines en route, *ibid.*

[3] Detective Mader's affidavit hinted darkly that the couple had set out upon "that interstate highway commonly used by travelers to the Chicago area." But the same highway is also commonly used by travelers to Disney World, Sea World, and Ringling Brothers and Barnum and Bailey Circus World. It is also the road to Cocoa Beach, Cape Canaveral, and Washington, D. C. I would venture that each year dozens of perfectly innocent people fly to Florida, meet a waiting spouse, and drive off together in the family car.

Third, the fact that the anonymous letter contained a material mistake undermines the reasonableness of relying on it as a basis for making a forcible entry into a private home.[4]

Of course, the activities in this case did not stop when the judge issued the warrant. The Gates drove all night to Bloomingdale, the officers searched the car and found 400 pounds of marihuana, and then they searched the house.[5] However, none of these subsequent events may be considered in evaluating the warrant,[6] and the search of the house was legal only if the warrant was valid. *Vale* v. *Louisiana*, 399 U. S. 30, 33–35 (1970). I cannot accept the Court's casual conclusion that, *before the Gates arrived in Bloomingdale*, there was probable cause to justify a valid entry and search of a private home. No one knows who the informant in this case was, or what motivated him or her to write the note. Given that the note's predictions were faulty in one

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[4] The Court purports to rely on the proposition that "if the [anonymous] informant could predict with *considerable accuracy* the *somewhat unusual travel plans* of the Gateses, he probably also had a reliable basis for his statements that the Gateses kept a large quantity of drugs in their home." *Ante*, at 245–246, n. 14 (emphasis added). Even if this syllogism were sound, but see *Spinelli* v. *United States*, 393 U. S. 410, 427 (1969) (WHITE, J., concurring), its premises are not met in this case.

[5] The officers did not enter the unoccupied house as soon as the warrant issued; instead, they waited until the Gates returned. It is unclear whether they waited because they wanted to execute the warrant without unnecessary property damage or because they had doubts about whether the informant's tip was really valid. In either event their judgment is to be commended.

[6] It is a truism that "a search warrant is valid only if probable cause has been shown to the magistrate and that an inadequate showing may not be rescued by post-search testimony on information known to the searching officers at the time of the search." *Rice* v. *Wolff*, 513 F. 2d 1280, 1287 (CA8 1975). See *Coolidge* v. *New Hampshire*, 403 U. S. 443, 450–451 (1971); *Whiteley* v. *Warden*, 401 U. S. 560, 565, n. 8 (1971); *Aguilar* v. *Texas*, 378 U. S. 108, 109, n. 1 (1964); *Jones* v. *United States*, 357 U. S. 493, 497–498 (1958); *Giordenello* v. *United States*, 357 U. S. 480, 486 (1958); *Taylor* v. *United States*, 286 U. S. 1, 6 (1932); *Agnello* v. *United States*, 269 U. S. 20, 33 (1925).

significant respect, and were corroborated by nothing except ordinary innocent activity, I must surmise that the Court's evaluation of the warrant's validity has been colored by subsequent events.[7]

Although the foregoing analysis is determinative as to the house search, the car search raises additional issues because "there is a constitutional difference between houses and cars." *Chambers* v. *Maroney*, 399 U. S. 42, 52 (1970). Cf. *Payton* v. *New York*, 445 U. S. 573, 589–590 (1980). An officer who has probable cause to suspect that a highly movable automobile contains contraband does not need a valid warrant in order to search it. This point was developed in our opinion in *United States* v. *Ross*, 456 U. S. 798 (1982), which was not decided until after the Illinois Supreme Court rendered its decision in this case. Under *Ross*, the car search may have been valid if the officers had probable cause *after* the Gates arrived.

In apologizing for its belated realization that we should not have ordered reargument in this case, the Court today shows high regard for the appropriate relationship of this Court to state courts. *Ante*, at 221–222. When the Court discusses the merits, however, it attaches no weight to the conclusions of the Circuit Judge of Du Page County, Illinois, of the three judges of the Second District of the Illinois Appellate Court, or of the five justices of the Illinois Supreme Court, all of whom concluded that the warrant was not based on probable cause. In a fact-bound inquiry of this sort, the judgment of three levels of state courts, all of which are better able to evaluate the probable reliability of anonymous informants in

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[7] *Draper* v. *United States*, 358 U. S. 307 (1959), affords no support for today's holding. That case did not involve an anonymous informant. On the contrary, as the Court twice noted, Mr. Hereford was "employed for that purpose and [his] information had always been found accurate and reliable." *Id.*, at 313; see *id.*, at 309. In this case, the police had no prior experience with the informant, and some of his or her information in this case was unreliable and inaccurate.

Bloomingdale, Illinois, than we are, should be entitled to at least a presumption of accuracy.[8] I would simply vacate the judgment of the Illinois Supreme Court and remand the case for reconsideration in the light of our intervening decision in *United States* v. *Ross*.

[8] The Court holds that what were heretofore considered two independent "prongs"—"veracity" and "basis of knowledge"—are now to be considered together as circumstances whose totality must be appraised. *Ante*, at 233. "[A] deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Ibid.* Yet in this case, the lower courts found *neither* factor present. 85 Ill. 2d, at 390, 423 N. E. 2d, at 893. And the supposed "other indicia" in the affidavit take the form of activity that is not particularly remarkable. I do not understand how the Court can find that the "totality" so far exceeds the sum of its "circumstances."

# CHAPPELL ET AL. *v.* WALLACE ET AL.

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

No. 82–167. Argued April 26, 1983—Decided June 13, 1983

Respondent Navy enlisted men brought an action for damages and other relief in Federal District Court against petitioner superior officers, alleging that petitioners in making duty assignments and performance evaluations and in imposing penalties had discriminated against respondents because of their race in violation of their constitutional rights. The District Court dismissed the complaint on the grounds that the actions complained of were nonreviewable military decisions, that petitioners were entitled to immunity, and that respondents had failed to exhaust their administrative remedies. The Court of Appeals reversed.

*Held:* Enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations. The special status of the military has required, the Constitution has contemplated, Congress has created, and this Court has long recognized two systems of justice: one for civilians and one for military personnel. The need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command. Moreover, Congress, the constitutionally authorized source of authority over the military system of justice, has not provided a damages remedy for claims by military personnel that constitutional rights have been violated by superior officers. Any action to provide a judicial response by way of such a remedy would be inconsistent with Congress' authority. Taken together, the unique disciplinary structure of the military establishment and Congress' activity in the field constitute "special factors" which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers. Pp. 298–305.

661 F. 2d 729, reversed and remanded.

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

*Assistant Attorney General McGrath* argued the cause for petitioners. With him on the briefs were *Solicitor General Lee*, *Deputy Solicitor General Geller*, *David A. Strauss*, *Robert E. Kopp*, and *John F. Cordes*.

*John Murcko*, by appointment of the Court, 459 U. S. 1068, argued the cause and filed a brief for respondents.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to determine whether enlisted military personnel may maintain suits to recover damages from superior officers for injuries sustained as a result of violations of constitutional rights in the course of military service.

## I

Respondents are five enlisted men who serve in the United States Navy on board a combat naval vessel. Petitioners are the commanding officer of the vessel, four lieutenants, and three noncommissioned officers.

Respondents brought action against these officers seeking damages, declaratory judgment, and injunctive relief. Respondents alleged that because of their minority race petitioners failed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed penalties of unusual severity. App. 5–16. Respondents claimed, *inter alia*, that the actions complained of "deprived [them] of [their] rights under the Constitution and laws of the United States, including the right not to be discriminated against because of [their] race, color or previous condition of servitude . . . ." *Id.*, at 7, 9, 11, 13, 15. Respondents also alleged a conspiracy among petitioners to deprive them of rights in violation of 42 U. S. C. § 1985.

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*Briefs of *amici curiae* urging reversal were filed by *Mitchell L. Lathrop* and *Terrence L. Bingman* for the Naval Reserve Association; and by *Daniel J. Popeo*, *Paul D. Kamenar*, and *Nicholas E. Calio* for the Washington Legal Foundation.

Briefs of *amici curiae* urging affirmance were filed by *Nanette Dembitz* and *Burt Neuborne* for the American Civil Liberties Union; by *Leonard B. Boudin* for the Bill of Rights Foundation, Inc.; by *Barry Sullivan* for the Lawyers' Committee for Civil Rights Under Law; and by *Jack Greenberg*, *James M. Nabritt III*, *Steven L. Winter*, and *Steven J. Phillips* for the NAACP Legal Defense and Educational Fund, Inc.

The United States District Court for the Southern District of California dismissed the complaint on the grounds that the actions respondents complained of were nonreviewable military decisions, that petitioners were entitled to immunity, and that respondents had failed to exhaust their administrative remedies.

The United States Court of Appeals for the Ninth Circuit reversed. 661 F. 2d 729 (1981). The Court of Appeals assumed that *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), authorized the award of damages for the constitutional violations alleged in their complaint, unless either the actions complained of were not reviewable or petitioners were immune from suit. The Court of Appeals set out certain tests for determining whether the actions at issue are reviewable by a civilian court and, if so, whether petitioners are nonetheless immune from suit. The case was remanded to the District Court for application of these tests.

We granted certiorari, 459 U. S. 966 (1982), and we reverse.

## II

This Court's holding in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, *supra*, authorized a suit for damages against federal officials whose actions violated an individual's constitutional rights, even though Congress had not expressly authorized such suits. The Court, in *Bivens* and its progeny, has expressly cautioned, however, that such a remedy will not be available when "special factors counselling hesitation" are present. *Id.*, at 396. See also *Carlson* v. *Green*, 446 U. S. 14, 18 (1980). Before a *Bivens* remedy may be fashioned, therefore, a court must take into account any "special factors counselling hesitation." See *Bush* v. *Lucas*, *post*, at 378.

The "special factors" that bear on the propriety of respondents' *Bivens* action also formed the basis of this Court's decision in *Feres* v. *United States*, 340 U. S. 135 (1950). There

the Court addressed the question "whether the [Federal] Tort Claims Act extends its remedy to one sustaining 'incident to [military] service' what under other circumstances would be an actionable wrong." *Id.*, at 138. The Court held that, even assuming the Act might be read literally to allow tort actions against the United States for injuries suffered by a soldier in service, Congress did not intend to subject the Government to such claims by a member of the Armed Forces. The Court acknowledged "that if we consider relevant only a part of the circumstances and ignore the status of both the wronged and the wrongdoer in these cases," *id.*, at 142, the Government would have waived its sovereign immunity under the Act and would be subject to liability. But the *Feres* Court was acutely aware that it was resolving the question of whether soldiers could maintain tort suits against the Government for injuries arising out of their military service. The Court focused on the unique relationship between the Government and military personnel—noting that no such liability existed before the Federal Tort Claims Act—and held that Congress did not intend to create such liability. The Court also took note of the various "enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in the armed services." *Id.*, at 144. As the Court has since recognized, "[i]n the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, [and] the effects of the maintenance of such suits on discipline . . . .'" *United States* v. *Muniz*, 374 U. S. 150, 162 (1963), quoting *United States* v. *Brown*, 348 U. S. 110, 112 (1954). See also *Parker* v. *Levy*, 417 U. S. 733, 743–744 (1974); *Stencel Aero Engineering Corp.* v. *United States*, 431 U. S. 666, 673 (1977). Although this case concerns the limitations on the type of nonstatutory damages remedy recognized in *Bivens*, rather than Congress' intent in enacting the Federal Tort Claims Act, the Court's analysis in *Feres* guides our analysis in this case.

The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting. See *Parker* v. *Levy*, *supra*, at 743–744; *Orloff* v. *Willoughby*, 345 U. S. 83, 94 (1953). In the civilian life of a democracy many command few; in the military, however, this is reversed, for military necessity makes demands on its personnel "without counterpart in civilian life." *Schlesinger* v. *Councilman*, 420 U. S. 738, 757 (1975). The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection. The Court has often noted "the peculiar and special relationship of the soldier to his superiors," *United States* v. *Brown*, *supra*, at 112; see *In re Grimley*, 137 U. S. 147, 153 (1890), and has acknowledged that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . ." *Burns* v. *Wilson*, 346 U. S. 137, 140 (1953) (plurality opinion). This becomes imperative in combat, but conduct in combat inevitably reflects the training that precedes combat; for that reason, centuries of experience have developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns. Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment.

Many of the Framers of the Constitution had recently experienced the rigors of military life and were well aware of the differences between it and civilian life. In drafting the

Constitution they anticipated the kinds of issues raised in this case. Their response was an explicit grant of plenary authority to Congress "To raise and support Armies"; "To provide and maintain a Navy"; and "To make Rules for the Government and Regulation of the land and naval Forces." Art. I, § 8, cls. 12–14. It is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline; and Congress and the courts have acted in conformity with that view.

Congress' authority in this area, and the distance between military and civilian life, was summed up by the Court in *Orloff* v. *Willoughby*, *supra*, at 93–94:

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

Only recently we restated this principle in *Rostker* v. *Goldberg*, 453 U. S. 57, 64–65 (1981):

> "The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference."

In *Gilligan* v. *Morgan*, 413 U. S. 1, 4 (1973), we addressed the question of whether Congress' analogous power over the militia, granted by Art. I, § 8, cl. 16, would be impermissibly compromised by a suit seeking to have a Federal District Court examine the "pattern of training, weaponry and or-

ders" of a State's National Guard. In denying relief we stated:

> "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability." *Id.*, at 10 (emphasis in original).

Congress has exercised its plenary constitutional authority over the military, has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure. The resulting system provides for the review and remedy of complaints and grievances such as those presented by respondents. Military personnel, for example, may avail themselves of the procedures and remedies created by Congress in Art. 138 of the Uniform Code of Military Justice, 10 U. S. C. § 938, which provides:

> "Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising

> general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon."

The Board for Correction of Naval Records, composed of civilians appointed by the Secretary of the Navy, provides another means with which an aggrieved member of the military "may correct any military record . . . when [the Secretary of the Navy acting through the Board] considers it necessary to correct an error or remove an injustice." 10 U. S. C. § 1552(a). Respondents' allegations concerning performance evaluations and promotions, for example, could readily have been made within the framework of this intramilitary administrative procedure. Under the Board's procedures, one aggrieved as respondents claim may request a hearing; if the claims are denied without a hearing, the Board is required to provide a statement of its reasons. 32 CFR §§ 723.3(e)(2), (4), (5), 723.4, 723.5 (1982). The Board is empowered to order retroactive backpay and retroactive promotion. 10 U. S. C. § 1552(c). Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence. See *Grieg* v. *United States*, 226 Ct. Cl. 258, 640 F. 2d 1261 (1981), cert. denied, 455 U. S. 907 (1982); *Sanders* v. *United States*, 219 Ct. Cl. 285, 594 F. 2d 804 (1979).[1]

The special status of the military has required, the Constitution has contemplated, Congress has created, and this Court has long recognized two systems of justice, to some ex-

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[1] The record shows that one of the respondents availed himself of his remedy before the Board for Correction of Naval Records by filing an application for correction of naval records. The request for relief was denied by the Board based on a failure to exhaust administrative remedies and to present sufficient relevant evidence. App. 67. The applicant was informed of his right to pursue an appeal from this decision, *ibid.*, and the record does not reflect whether any further action was taken.

tent parallel: one for civilians and one for military personnel. *Burns* v. *Wilson*, 346 U. S., at 140. The special nature of military life—the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel—would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command. Here, as in *Feres*, we must be "concern[ed] with the disruption of '[t]he peculiar and special relationship of the soldier to his superiors' that might result if the soldier were allowed to hale his superiors into court," *Stencel Aero Engineering Corp.* v. *United States*, 431 U. S., at 676 (MARSHALL, J., dissenting), quoting *United States* v. *Brown*, 348 U. S., at 112.

Also, Congress, the constitutionally authorized source of authority over the military system of justice, has not provided a damages remedy for claims by military personnel that constitutional rights have been violated by superior officers. Any action to provide a judicial response by way of such a remedy would be plainly inconsistent with Congress' authority in this field.

Taken together, the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute "special factors" which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers. See *Bush* v. *Lucas*, *post*, p. 367.

## III

Chief Justice Warren had occasion to note that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." Warren, The Bill of Rights and the Military, 37 N. Y. U. L. Rev. 181, 188 (1962). This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service. See, *e. g.*, *Brown* v. *Glines*, 444 U. S. 348 (1980); *Parker* v. *Levy*, 417 U. S. 733 (1974); *Frontiero* v.

*Richardson*, 411 U. S. 677 (1973). But the special relationships that define military life have "supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." Warren, *supra*, at 187.

We hold that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations.[2] The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.[3]

*Reversed and remanded.*

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[2] Respondents and the Court of Appeals rely on *Wilkes* v. *Dinsman*, 7 How. 89 (1849), after remand, *Dinsman* v. *Wilkes*, 12 How. 390 (1852). *Wilkes*, however, is inapposite because it involved a well-recognized common-law cause of action by a marine against his commanding officer for damages suffered as a result of punishment and did not ask the Court to imply a new kind of cause of action. Also, since the time of *Wilkes*, significant changes have been made establishing a comprehensive system of military justice.

[3] We leave it for the Court of Appeals to decide on remand whether the portion of respondents' suit seeking damages flowing from an alleged conspiracy among petitioners in violation of 42 U. S. C. § 1985(3) can be maintained. This issue was not adequately addressed either by the Court of Appeals or in the briefs and oral argument before this Court.

# HARING, LIEUTENANT, ARLINGTON COUNTY POLICE DEPARTMENT, ET AL. *v.* PROSISE

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

No. 81–2169. Argued April 20, 1983—Decided June 13, 1983

A Virginia trial court accepted respondent's plea of guilty to a charge of manufacturing a controlled substance. At the hearing at which respondent pleaded guilty, one of petitioner police officers gave a brief account of the search of respondent's apartment that led to the discovery of material typically used in manufacturing the controlled substance. Thereafter, respondent brought a damages action under 42 U. S. C. § 1983 in Federal District Court against petitioners, officers who participated in the search of his apartment, alleging that his Fourth Amendment rights had been violated. The District Court granted summary judgment for petitioners on the ground that respondent's guilty plea to the criminal charge barred his § 1983 claim. The Court of Appeals reversed in pertinent part and remanded.

*Held:*

1. The § 1983 action is not barred on the asserted ground that under principles of collateral estoppel generally applied by the Virginia courts, respondent's conviction would bar his subsequent civil challenge to police conduct, and that a federal court must therefore give the state conviction the same effect under 28 U. S. C. § 1738, which generally requires federal courts to give preclusive effect to state-court judgments if the courts of the State from which the judgments emerged would do so. Under collateral-estoppel rules applied by Virginia courts, unless an issue was actually litigated and determined in the prior judicial proceeding, it will not be treated as final for purposes of the later action. Furthermore, under Virginia law collateral estoppel precludes litigation of only those issues necessary to support the judgment entered in the first action. Thus, the collateral-estoppel doctrine would not be invoked in this case by Virginia courts for at least three reasons. First, the legality of the search of respondent's apartment was not litigated in the criminal proceedings. Second, the criminal proceedings did not decide against respondent any issue on which he must prevail in order to establish his § 1983 claim, the only question determined by the guilty plea being whether respondent unlawfully engaged in the manufacture of a controlled substance. This question is irrelevant to the legality of the search or to respondent's right to compensation from state officials under

§ 1983. Finally, none of the issues in the § 1983 action could have been "necessarily" determined in the criminal proceeding. A determination as to whether or not the search of respondent's apartment was legal would have been entirely irrelevant in the context of the guilty plea proceeding. Pp. 312–317.

2. Nor is litigation of respondent's § 1983 damages claim barred on the asserted ground that because he had an opportunity to raise his Fourth Amendment claim in the criminal prosecution, by pleading guilty he should be deemed to have either admitted the legality of the search or waived any Fourth Amendment claim. The guilty plea in no way constituted an admission that the search of his apartment was proper under the Fourth Amendment. It may not be assumed that a guilty plea is based on a defendant's determination that he would be unable to prevail on a motion to suppress evidence, since a decision to plead guilty may have any number of other motivations. Cf. *Tollett* v. *Henderson*, 411 U. S. 258, 263, 268. Similarly, although a guilty plea results in the defendant's loss of any meaningful opportunity he might otherwise have had in the criminal proceeding to challenge the admissibility of evidence obtained in violation of the Fourth Amendment, it does not follow that a guilty plea is a "waiver" of antecedent Fourth Amendment claims that may be given effect outside the confines of the criminal proceeding. And while a Fourth Amendment claim ordinarily may not be raised in a habeas corpus proceeding following a guilty plea, that conclusion does not rest on any notion of waiver, but rests on the fact that the claim is irrelevant to the constitutional validity of the conviction. Thus, the justifications for denying habeas review of Fourth Amendment claims following a guilty plea are inapplicable to an action under § 1983. Adoption of a rule of preclusion in this case would threaten important interests in preserving federal courts as an available forum for the vindication of constitutional rights. Pp. 317–323.

667 F. 2d 1133, affirmed.

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

*David R. Lasso* argued the cause for petitioners. With him on the briefs was *Charles G. Flinn.*

*Norman A. Townsend* argued the cause for respondent. With him on the brief were *Sebastian K. D. Graber* and *Bradley S. Stetler.**

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**Fred E. Inbau, Wayne W. Schmidt, James P. Manak, Evelle J. Younger, Daniel B. Hales,* and *David Crump* filed a brief for Ameri-

JUSTICE MARSHALL delivered the opinion of the Court.

The trial court accepted respondent John Franklin Prosise's plea of guilty to one count of manufacturing a controlled substance—phencyclidine. At the hearing at which respondent pleaded guilty, a police officer gave a brief account of the search of respondent's apartment that led to the discovery of material typically used in manufacturing this substance. Thereafter, Prosise brought a damages action under 42 U. S. C. § 1983 in Federal District Court against petitioner Gilbert A. Haring and the other officers who participated in the search of his apartment. The question presented by this case is whether respondent's § 1983 claim is barred by his prior guilty plea.

I

On April 27, 1978, pursuant to a plea agreement, Prosise pleaded guilty in the Circuit Court for Arlington County, Va., to one count of manufacturing phencyclidine. The Commonwealth then called one witness, Detective Henry Allen of the Arlington County Police Department. Allen testified that on September 7, 1977, he responded to a radio call directing him to an Arlington apartment which turned out to be leased to Prosise. By the time he arrived, two uniformed officers had placed Prosise under arrest for the possession of a controlled substance. After entering the apartment, Allen noticed various chemicals in the apartment as well as a quantity of what he believed to be phencyclidine. A warrant was later obtained for a search of the apartment. Allen and Detective Petti then conducted a search which led to the seizure of devices and chemicals used to manufacture phencyclidine,

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cans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Charles S. Sims* and *Burt Neuborne* for the American Civil Liberties Union; and by *Stephen A. Saltzburg* for the University of Virginia School of Law Post-Conviction Assistance Project.

receipts for such chemicals, a paper containing a formula for making phencyclidine, and two buckets containing traces of the substance.

At the conclusion of Allen's testimony, the judge accepted Prosise's guilty plea, finding that it had been entered voluntarily and intelligently and that it had a sufficient basis in fact. On June 23, 1978, the court denied Prosise's motion to withdraw his plea and sentenced him to 25 years' imprisonment.[1]

On January 23, 1979, while under confinement in the Arlington Detention Center, Prosise filed a *pro se* action under 42 U. S. C. § 1983 against Lt. Gilbert A. Haring and various other members of the Arlington County Police Department who had participated in the search of his apartment. His complaint alleged that the officers had unlawfully searched his apartment prior to obtaining a search warrant, and that after obtaining the warrant the officers conducted a search that exceeded the scope of the warrant.

The District Court granted summary judgment for defendants on the ground that Prosise's guilty plea to the charge of manufacturing phencyclidine barred his § 1983 claim. The court reasoned that Prosise's failure to assert his Fourth Amendment claim in state court constituted a waiver of that right, precluding its assertion in any subsequent proceeding. It relied primarily on this Court's decision in *Tollett* v. *Henderson*, 411 U. S. 258 (1973), which held that when a state criminal defendant has pleaded guilty to the offense for which he was indicted by the grand jury, he cannot in a later federal habeas corpus proceeding raise a claim of discrimination in the selection of the grand jury. The District Court stated that, under the reasoning in *Tollett*, a guilty plea would similarly foreclose federal habeas inquiry into the constitutional-

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[1] On July 17, 1979, the Supreme Court of Virginia denied respondent's petition for a writ of error to review the trial court's decision that his plea was voluntary and its refusal to permit the withdrawal of the plea.

ity of a search that turned up evidence of the crime charged. The court concluded:

> "If a defendant who pleads guilty is foreclosed from obtaining his freedom because of an illegal search and seizure, he should not be allowed to secure damages in a § 1983 suit and thereby litigate the antecedent constitutional question relating to the search that could not otherwise be heard because of *Tollett*."

The District Court also appears to have held that Prosise's plea of guilty constituted an implied admission that the search of his apartment was legal. The court stated that even though the constitutionality of the police conduct was not litigated in the state criminal proceedings, Prosise's "plea of guilty estops him from asserting a fourth amendment claim in a § 1983 suit [because his] plea of guilty necessarily implied that the search giving rise to the incriminating evidence was lawful."

The Court of Appeals reversed in pertinent part and remanded for further proceedings. 667 F. 2d 1133 (CA4 1981). It held that the principles governing guilty pleas announced in *Tollett* are applicable only to subsequent habeas corpus proceedings and that the preclusive effect, if any, of a guilty plea upon subsequent proceedings under § 1983 "is to be determined on the basis of other principles, specifically, of collateral estoppel and the full faith and credit statute, 28 U. S. C. § 1738." *Id.*, at 1136–1137. The Court of Appeals proceeded to examine the law of Virginia "to determine whether, and to what extent, that state would give preclusive effect to the criminal judgment here in issue." *Id.*, at 1138. The court found that under Virginia law "criminal judgments, whether by guilty plea or adjudicated guilt, have no preclusive effect in subsequent civil litigation." *Id.*, at 1139. Because the courts of Virginia would not give preclusive effect to the criminal judgment, it was not entitled to any greater effect under § 1738.

The Court of Appeals concluded that in any event a guilty plea should not "have preclusive effect as to potential but not actually litigated issues respecting the exclusion of evidence on fourth amendment grounds." *Id.*, at 1140–1141. The court cited the general view of courts and commentators that "among the most critical guarantees of fairness in applying collateral estoppel is the guarantee that the party sought to be estopped had not only a full and fair opportunity but an adequate incentive to litigate 'to the hilt' the issues in question." *Id.*, at 1141. Unlike a criminal defendant who has been convicted after a full trial on the criminal charges, a defendant who pleads guilty has not necessarily had an adequate incentive to litigate "with respect to potential but unlitigated issues related to the exclusion of evidence on fourth amendment grounds." *Ibid.*

After the Court of Appeals denied rehearing, *id.*, at 1143, petitioners' suggestion for rehearing en banc was denied by an equally divided court. *Ibid.* We granted certiorari, 459 U. S. 904 (1982), to resolve the uncertainty concerning the impact of a guilty plea upon a later suit under § 1983.[2] We now affirm.

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[2] In *Metros* v. *United States District Court for the District of Colorado*, 441 F. 2d 313 (1970), the Court of Appeals for the Tenth Circuit held that a guilty plea to one count of possession of heroin must be given preclusive effect in a subsequent civil rights action against police officers who had searched the premises in which the narcotics were found. Other federal courts have concluded, however, that civil rights plaintiffs are not barred from litigating issues that could have been raised in prior proceedings in state court on a different cause of action. See, *e. g.*, *New Jersey Ed. Assn.* v. *Burke*, 579 F. 2d 764, 772–774 (CA3 1978); *Lombard* v. *Board of Ed. of City of New York*, 502 F. 2d 631, 635–637 (CA2 1974). Since no motion to suppress evidence on Fourth Amendment grounds was ever raised at the state-court proceedings, this case does not present questions as to the scope of collateral estoppel with respect to particular issues that were litigated and decided at a criminal trial in state court. As we did in *Allen* v. *McCurry*, 449 U. S. 90, 93, n. 2 (1980), we now leave those questions to another day.

## II

We must decide whether Prosise's § 1983 action[3] to redress an alleged Fourth Amendment violation[4] is barred by the judgment of conviction entered in state court following his guilty plea. Petitioners' initial argument is that under principles of collateral estoppel generally applied by the Virginia courts, Prosise's conviction would bar his subsequent civil challenge to police conduct, and that a federal court must therefore give the state judgment the same effect under 28 U. S. C. § 1738.[5]

In *Allen* v. *McCurry*, 449 U. S. 90 (1980), the Court considered whether the doctrine of collateral estoppel can be invoked against a § 1983 claimant to bar relitigation of a Fourth Amendment claim decided against him in a state criminal proceeding. The Court rejected the view that, because the § 1983 action provides the only route to federal district court for the plaintiff's constitutional claim, relitigation of the Fourth Amendment question in federal court must be permitted. No support was found in the Constitution or in § 1983

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[3] Title 42 U. S. C. § 1983 at the time in question provided:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[4] The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[5] Title 28 U. S. C. § 1738 provides, in relevant part, that the "Acts, records and judicial proceedings" of any State, Territory, or Possession "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

for the "principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of" whether that claim has already been decided against him after a full and fair proceeding in state court. *Id.*, at 103. The Court concluded that the doctrine of collateral estoppel therefore applies to § 1983 suits against police officers to recover for Fourth Amendment violations. The Court in *Allen* v. *McCurry* did not consider precisely how the doctrine of collateral estoppel should be applied to a Fourth Amendment question that was litigated and decided during the course of a state criminal trial. *Id.*, at 105, n. 25.

We begin by reviewing the principles governing our determination whether a § 1983 claimant will be collaterally estopped from litigating an issue on the basis of a prior state-court judgment. Title 28 U. S. C. § 1738 generally requires "federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Allen* v. *McCurry*, 449 U. S., at 96.[6] In federal actions, including § 1983 actions, a state-court judgment will not be given collateral-estoppel effect, however, where "the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court." *Id.*, at 101.[7] Moreover, additional exceptions to collateral estoppel

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[6] If the state courts would not give preclusive effect to the prior judgment, "the courts of the United States can accord it no greater efficacy" under § 1738. *Union & Planters' Bank* v. *Memphis*, 189 U. S. 71, 75 (1903).

[7] We have recognized various other conditions that must also be satisfied before giving preclusive effect to a state-court judgment. See generally *Montana* v. *United States*, 440 U. S. 147 (1979). For example, collateral-estoppel effect is not appropriate when "controlling facts or legal principles have changed significantly since the state-court judgment," *id.*, at 155, or when "special circumstances warrant an exception to the normal rules of preclusion," *ibid.*; see, *e. g.*, *Porter & Dietsche, Inc.* v. *FTC*, 605 F. 2d 294, 300 (CA7 1979); cf. *Montana* v. *United States*, *supra*, at 163

may be warranted in § 1983 actions in light of the "understanding of § 1983" that "the federal courts could step in where the state courts were unable or unwilling to protect federal rights." *Ibid.* Cf. *id.*, at 95, n. 7; *Board of Regents* v. *Tomanio*, 446 U. S. 478, 485–486 (1980) (42 U. S. C. § 1988 authorizes federal courts, in an action under § 1983, to disregard an otherwise applicable state rule of law if the state law is inconsistent with the federal policy underlying § 1983).

The threshold question is whether, under the rules of collateral estoppel applied by the Virginia courts, the judgment of conviction based upon Prosise's guilty plea would foreclose him in a later civil action from challenging the legality of a search which had produced inculpatory evidence.[8] Because there is no Virginia decision precisely on point, we must look for guidance to Virginia decisions concerning collateral estoppel generally. While it is often appropriate to look to the law as it is generally applied in other jurisdictions for additional guidance, we need not do so in this case because the state-law question is not a particularly difficult one.

The courts of Virginia have long recognized that a valid final "'judgment rendered upon one cause of action'" may bar a party to that action from later litigating "'matters arising in a

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(preclusive effect to a state-court judgment may be inappropriate when the § 1983 claimant has not "'freely and without reservation submit[ted] his federal claims for decision by the state courts . . . and ha[d] them decided there . . . .'") (quoting *England* v. *Medical Examiners*, 375 U. S. 411, 419 (1964)).

[8] It is our practice to accept a reasonable construction of state law by the court of appeals "even if an examination of the state-law issue without such guidance might have justified a different conclusion." *Bishop* v. *Wood*, 426 U. S. 341, 346 (1976). See *id.*, at 346, n. 10. Because we would be particularly hesitant to consider creating a new federal rule of preclusion, however, where a state rule of preclusion may itself be given effect under 28 U. S. C. § 1738, we consider petitioners' assertion that the Virginia courts would give collateral-estoppel effect to Prosise's conviction. We emphasize, however, that, standing alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review. See this Court's Rule 17.

suit upon a different cause of action.'" *Eason* v. *Eason*, 204 Va. 347, 350, 131 S. E. 2d 280, 282 (1963), quoting *Kemp* v. *Miller*, 166 Va. 661, 674–675, 186 S. E. 99, 104 (1936).[9] However, "the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Ibid.* Unless an issue was actually litigated and determined in the former judicial proceeding, Virginia law will not treat it as final. See, *e. g.*, *Luke Construction Co.* v. *Simpkins*, 223 Va. 387, 291 S. E. 2d 204 (1982); *Eason* v. *Eason*, *supra*. Compare *Brown* v. *Felsen*, 442 U. S. 127, 139, n. 10 (1979). Furthermore, collateral estoppel precludes the litigation of only those issues necessary to support the judgment entered in the first action. As the Virginia Supreme Court stated in *Petrus* v. *Robbins*, 196 Va. 322, 330, 83 S. E. 2d 408, 412 (1954), "[t]o render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined,—that is, that the verdict could not have been rendered without deciding that matter." Cf. *Block* v. *Commissioners*, 99 U. S. 686, 693 (1879); *Segal* v. *American Tel. & Tel. Co.*, 606 F. 2d 842, 845, n. 2 (CA9 1979).

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[9] Like the federal courts, the courts of Virginia apply different rules of preclusion to matters arising in a suit between the same parties and based upon the same causes of action as those involved in the previous proceeding. Under the doctrine of res judicata, "'the judgment in the former [action] is conclusive of the latter, not only as to every question which was decided, but also as to every other matter which the parties might have litigated and had determined, within the issues as they were made or tendered by the pleadings, or as incident to or essentially connected with the subject matter of the litigation, whether the same, as a matter of fact, were or were not considered.'" *Eason* v. *Eason*, 204 Va., at 350, 131 S. E. 2d, at 282, quoting *Kemp* v. *Miller*, 166 Va., at 674, 186 S. E., at 103–104. This doctrine does not apply, however, to a later action between different parties or to a later action between the same parties on a different claim or demand. *Ibid.*

It is clear from the foregoing that the doctrine of collateral estoppel would not be invoked in this case by the Virginia courts for at least three reasons. First, the legality of the search of Prosise's apartment was not actually litigated in the criminal proceedings. Indeed, no issue was "actually litigated" in the state proceeding since Prosise declined to contest his guilt in any way. Second, the criminal proceedings did not actually decide against Prosise any issue on which he must prevail in order to establish his § 1983 claim. The only question raised by the criminal indictment and determined by Prosise's guilty plea in Arlington Circuit Court was whether Prosise unlawfully engaged in the manufacture of a controlled substance. This question is simply irrelevant to the legality of the search under the Fourth Amendment or to Prosise's right to compensation from state officials under § 1983.

Finally, none of the issues in the § 1983 action could have been "necessarily" determined in the criminal proceeding. Specifically, a determination that the county police officers engaged in no illegal police conduct would not have been essential to the trial court's acceptance of Prosise's guilty plea. Indeed, a determination that the search of Prosise's apartment was illegal would have been entirely irrelevant in the context of the guilty plea proceeding. Neither state nor federal law requires that a guilty plea in state court be supported by legally admissible evidence where the accused's valid waiver of his right to stand trial is accompanied by a confession of guilt. See *Kibert* v. *Commonwealth*, 216 Va. 660, 222 S. E. 2d 790 (1976); cf. *North Carolina* v. *Alford*, 400 U. S. 25, 37–38, and n. 10 (1970); *Willett* v. *Georgia*, 608 F. 2d 538, 540 (CA5 1979).[10]

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[10] The court below found that, even if the Fourth Amendment issue had been litigated and necessarily determined by the state court, that determination would not be given preclusive effect for an additional reason: under Virginia law, "'a judgment rendered in a criminal prosecution, whether of conviction or acquittal, does not establish in a subsequent civil action the truth of the facts on which it is rendered.'" 667 F. 2d 1133,

We therefore conclude that Virginia law would not bar Prosise from litigating the validity of the search conducted by petitioners. Accordingly, the issue is not foreclosed under 28 U. S. C. § 1738.

## III

We turn next to petitioners' contention that even if Prosise's claim is not precluded under § 1738, this Court should create a special rule of preclusion which nevertheless would bar litigation of his § 1983 claim. As a general matter, even when issues have been raised, argued, and decided in a prior proceeding, and are therefore preclusive under state

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1139 (CA4 1981), quoting *Aetna Casualty & Surety Co.* v. *Anderson*, 200 Va. 385, 388, 105 S. E. 2d 869, 872 (1958). This general rule is based largely on the traditional principle that collateral estoppel may only be asserted by persons who were either a party or privy to the prior action. *Aetna Casualty & Surety Co.* v. *Anderson*, *supra*, at 389, 105 S. E. 2d, at 872. Although the doctrine of mutuality of parties has been abandoned in recent years by the courts of many jurisdictions, see, *e. g.*, *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322, 326–333 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313 (1971), it has not been rejected by the courts of Virginia. *Norfolk & Western R. Co.* v. *Bailey Lumber Co.*, 221 Va. 638, 272 S. E. 2d 217 (1980).

In one reported case, however, the highest court of the State has allowed a stranger to a criminal conviction to invoke the doctrine of collateral estoppel in an action brought against him by the convicted person. *Eagle, Star & British Dominions Ins. Co.* v. *Heller*, 149 Va. 82, 140 S. E. 314 (1927). In *Eagle, Star* the court held that a convicted arsonist was foreclosed from seeking to recover the proceeds of a fire insurance policy. This exception to the mutuality doctrine was expressly limited to cases in which "the plaintiff who brings [the] action has committed the felony, and seeks to recover the fruit of his own crime." *Id.*, at 105, 140 S. E., at 321. That *Eagle, Star* announced only a narrow exception to the rule that a criminal conviction may not be given preclusive effect in a later action was confirmed by the court in *Aetna Casualty & Surety Co.* v. *Anderson*, *supra*, at 389, 105 S. E. 2d, at 872. See also *Smith* v. *New Dixie Lines, Inc.*, 201 Va. 466, 472–473, 111 S. E. 2d 434, 438–439 (1959). Since a § 1983 action is not a suit to "recover the fruit" of the plaintiff's crime, the court below reasonably concluded that, under Virginia law, a criminal conviction would not be given preclusive effect in a § 1983 action with respect to any issues, including issues that were actually and necessarily decided.

law, "[r]edetermination of [the] issues [may nevertheless be] warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Montana* v. *United States*, 440 U. S. 147, 164, n. 11 (1979). Yet petitioners maintain that Prosise should be barred from litigating an issue that was never raised, argued, or decided, simply because he had an opportunity to raise the issue in a previous proceeding. Petitioners reason that by pleading guilty Prosise should be deemed to have either admitted the legality of the search or waived any Fourth Amendment claim, thereby precluding him from asserting that claim in any subsequent suit. According to petitioners, such a federal rule of preclusion imposed in addition to the requirements of § 1738 is necessary to further important interests in judicial administration.

There is no justification for creating such an anomalous rule. To begin with, Prosise's guilty plea in no way constituted an admission that the search of his apartment was proper under the Fourth Amendment. During the course of proceedings in Arlington County Circuit Court, Prosise made no concession with respect to the Fourth Amendment claim.

Petitioners contend that we should infer such an admission because Prosise had a substantial incentive to elect to go to trial if he considered his Fourth Amendment claim meritorious since the State would most likely have been unable to obtain a conviction in the absence of the evidence seized from Prosise's apartment. In our view, however, it is impermissible for a court to assume that a plea of guilty is based on a defendant's determination that he would be unable to prevail on a motion to suppress evidence. As we recognized in *Brady* v. *United States*, 397 U. S. 742, 750 (1970), and reaffirmed in *Tollett* v. *Henderson*, 411 U. S., at 263, a defendant's decision to plead guilty may have any number of other motivations:

> "For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and ac-

> cepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family."

Similarly, a prospect of a favorable plea agreement or "the expectation or hope of a lesser sentence . . . are considerations that might well suggest the advisability of a guilty plea without elaborate consideration of whether [a Fourth Amendment challenge to the introduction of inculpatory evidence] might be factually supported." *Tollett* v. *Henderson*, *supra*, at 268. Therefore, Prosise's decision not to exercise his right to stand trial cannot be regarded as a concession of any kind that a Fourth Amendment evidentiary challenge would fail. Cf. *Brown* v. *Felsen*, 442 U. S., at 137.

We similarly reject the view, argued by petitioners and accepted by the District Court, that by pleading guilty Prosise "waived" any claim involving an antecedent Fourth Amendment violation. Petitioners rely on our prior decisions concerning the scope of federal habeas review of a criminal conviction based upon a guilty plea. See, *e. g.*, *Brady* v. *United States*, *supra*; *Tollett* v. *Henderson*, *supra*; *Blackledge* v. *Perry*, 417 U. S. 21 (1974); *Lefkowitz* v. *Newsome*, 420 U. S. 283 (1975); *Menna* v. *New York*, 423 U. S. 61 (1975) *(per curiam)*. In *Brady*, we reaffirmed that a guilty plea is not simply "an admission of past conduct," but a waiver of constitutional trial rights such as the right to call witnesses, to confront and cross-examine one's accusers, and to trial by jury. *Brady*, *supra*, at 747–748, citing *Boykin* v. *Alabama*, 395 U. S. 238, 242 (1969). For this reason, a guilty plea "not only must be voluntary but must be [a] knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, *supra*, at 748. In *Tollett* v. *Henderson*, we concluded that an intelligent and voluntary plea of guilty generally bars habeas review of

claims relating to the deprivation of constitutional rights that occurred before the defendant pleaded guilty. We held that, because "[t]he focus of federal habeas inquiry is the nature of [defense counsel's] advice and the voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity," 411 U. S., at 266, Henderson was not entitled to a writ of habeas corpus on the basis of infirmities in the selection of the grand jury.

Our decisions subsequent to *Tollett* make clear that a plea of guilty does not bar the review in habeas corpus proceedings of all claims involving constitutional violations antecedent to a plea of guilty. A defendant who pleads guilty may seek to set aside a conviction based on prior constitutional claims which challenge "the very power of the State to bring the defendant into court to answer the charge brought against him." *Blackledge* v. *Perry*, 417 U. S., at 30. Because a challenge to an indictment on grounds of prosecutorial vindictiveness was such a claim, we concluded that a federal court may grant the writ of habeas corpus if it found merit in that constitutional challenge. *Id.*, at 30–31. We also applied this principle in *Menna* v. *New York*, *supra*, in holding that a double jeopardy claim may be raised in federal habeas proceedings following a state-court conviction based on a plea of guilty. In *Lefkowitz* v. *Newsome*, *supra*, we held that *Tollett* does not apply to preclude litigation of a Fourth Amendment claim subsequent to a guilty plea when the State itself permits the claim to be raised on appeal.

Under our past decisions, as the District Court correctly recognized, a guilty plea results in the defendant's loss of any meaningful opportunity he might otherwise have had to challenge the admissibility of evidence obtained in violation of the Fourth Amendment. It does not follow, however, that a guilty plea is a "waiver" of antecedent Fourth Amendment claims that may be given effect outside the confines of the criminal proceeding. The defendant's rights under the Fourth Amendment are not among the trial rights that he

necessarily waives when he knowingly and voluntarily pleads guilty. Moreover, our decisions provide no support for petitioners' waiver theory for the simple reason that these decisions did not rest on any principle of waiver. The cases relied on by petitioners all involved challenges to the validity of a state criminal conviction. Our decisions in *Tollett* and the cases that followed simply recognized that when a defendant is convicted pursuant to his guilty plea rather than a trial, the validity of that conviction cannot be affected by an alleged Fourth Amendment violation because the conviction does not rest in any way on evidence that may have been improperly seized. State law treats a guilty plea as "a break in the chain of events [that] preceded it in the criminal process," *Tollett* v. *Henderson*, *supra*, at 267. Therefore, the conclusion that a Fourth Amendment claim ordinarily may not be raised in a habeas proceeding following a plea of guilty does not rest on any notion of waiver, but rests on the simple fact that the claim is irrelevant to the constitutional validity of the conviction. As we explained in *Menna* v. *New York*, *supra*, at 62–63, n. 2:

> "[W]aiver was not the basic ingredient of this line of cases. The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established." (Emphasis in original; citation omitted.)

It is therefore clear that Prosise did not waive his Fourth Amendment claims by pleading guilty in state court. The cases relied on by petitioners do not establish that a guilty plea is a waiver of Fourth Amendment claims. Moreover, the

justifications for denying habeas review of Fourth Amendment claims following a guilty plea are inapplicable to an action under § 1983. While Prosise's Fourth Amendment claim is irrelevant to the constitutionality of his criminal conviction, and for that reason may not be the basis of a writ of habeas corpus, that claim is the crux of his § 1983 action which directly challenges the legality of police conduct.[11]

Adoption of petitioners' rule of preclusion would threaten important interests in preserving federal courts as an available forum for the vindication of constitutional rights. See *England* v. *Medical Examiners*, 375 U. S. 411, 416–417 (1964); *McClellan* v. *Carland*, 217 U. S. 268, 281 (1910); *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 40 (1909); *Cohens* v. *Virginia*, 6 Wheat. 264, 404 (1821). Under petitioners' rule, whether or not a state judgment would be accorded preclusive effect by state courts, a federal court would be barred from entertaining a § 1983 claim. The rule would require "an otherwise unwilling party to try [Fourth Amendment] questions to the hilt" and prevail in state court "in order to [preserve] the mere possibility" of later bringing a § 1983 claim in federal court. *Brown* v. *Felsen*, 442 U. S.,

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[11] Although petitioners also contend that a special federal rule of preclusion is necessary to preserve important federal interests in judicial administration, we fail to understand how any such interests justify the adoption of a rule that would bar the assertion of constitutional claims which have never been litigated. See *Allen* v. *McCurry*, 449 U. S., at 95, n. 7; cf. *Patsy* v. *Florida Board of Regents*, 457 U. S. 496, 501–502, 512–513, and n. 13 (1982); *Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461, 476 (1982). Petitioners allude generally to the interests that underlie the principles of collateral estoppel, such as the elimination of "the expense, vexation, waste, and possible inconsistent results of duplicatory litigation." *Hoag* v. *New Jersey*, 356 U. S. 464, 470 (1958). Yet these interests are quite simply inapplicable to this case. When a court accepts a defendant's guilty plea, there is no adjudication whatsoever of any issues that may subsequently be the basis of a § 1983 claim. There is thus no repetitive use of judicial resources and no possibility of inconsistent decisions that could justify precluding the bringing of such claims. Cf. *England* v. *Medical Examiners*, 375 U. S., at 419.

at 135. Defendants who have pleaded guilty and who wish to bring a § 1983 claim would be forced to bring that claim in state court, if at all. Not only have petitioners failed to advance any compelling justification for a rule confining the litigation of constitutional claims to a state forum, but such a rule would be wholly contrary to one of the central concerns which motivated the enactment of § 1983, namely, the "grave congressional concern that the state courts had been deficient in protecting federal rights." *Allen* v. *McCurry*, 449 U. S., at 98–99, citing *Mitchum* v. *Foster*, 407 U. S. 225, 241–242 (1972), and *Monroe* v. *Pape*, 365 U. S. 167, 180 (1961). See *Patsy* v. *Florida Board of Regents*, 457 U. S. 496 (1982).

## IV

We conclude that respondent's conviction in state court does not preclude him from now seeking to recover damages under 42 U. S. C. § 1983 for an alleged Fourth Amendment violation that was never considered in the state proceedings. Accordingly, the judgment of the Court of Appeals is

*Affirmed.*

# NEW MEXICO ET AL. *v.* MESCALERO APACHE TRIBE

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 82–331. Argued April 19, 1983—Decided June 13, 1983

With extensive federal assistance, respondent Indian Tribe has established a comprehensive scheme for managing the fish and wildlife resources on its reservation in New Mexico. Federally approved tribal ordinances regulate in detail the conditions under which both members of the Tribe and nonmembers may hunt and fish. New Mexico has hunting and fishing regulations that conflict with, and in some instances are more restrictive than, the tribal regulations, and the State has applied its regulations to hunting and fishing by nonmembers on the reservation. The Tribe filed suit in Federal District Court, seeking to prevent the State from regulating on-reservation hunting and fishing. The District Court ruled in the Tribe's favor and granted declaratory and injunctive relief. The Court of Appeals affirmed.

*Held:* The application of New Mexico's laws to on-reservation hunting and fishing by nonmembers of the Tribe is pre-empted by the operation of federal law. Pp. 330–344.

(a) The exercise of concurrent jurisdiction by the State would effectively nullify the Tribe's unquestioned authority to regulate the use of its resources by members and nonmembers, would interfere with the comprehensive tribal regulatory scheme, and would threaten Congress' overriding objective of encouraging tribal self-government and economic development. Pp. 338–341.

(b) The State has failed to identify any interests that would justify the assertion of concurrent regulatory authority. Any financial interest that the State might have by way of revenues from the sale of licenses to nonmembers who hunt or fish on the reservation or matching federal funds based on the number of state licenses sold, is insufficient justification, especially where the loss of such revenues is likely to be insubstantial. Pp. 341–343.

677 F. 2d 55, affirmed.

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

*Thomas L. Dunigan*, Special Assistant Attorney General of New Mexico, argued the cause for petitioners. With him on the briefs were *Paul Bardacke*, Attorney General, and *Paul A. Lenzini*.

*George E. Fettinger* argued the cause for respondent. With him on the brief were *Kathleen A. Miller* and *Kim Jerome Gottschalk*.

*Deputy Solicitor General Claiborne* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Dinkins*, and *Jacques B. Gelin*.*

JUSTICE MARSHALL delivered the opinion of the Court.

We are called upon to decide in this case whether a State may restrict an Indian Tribe's regulation of hunting and fishing on its reservation. With extensive federal assistance and supervision, the Mescalero Apache Tribe has established a comprehensive scheme for managing the reservation's fish and wildlife resources. Federally approved tribal ordinances regulate in detail the conditions under which both members of the Tribe and nonmembers may hunt and fish. New Mexico seeks to apply its own laws to hunting and fishing by nonmembers on the reservation. We hold that this application of New Mexico's hunting and fishing laws is pre-empted by the operation of federal law.

## I

The Mescalero Apache Tribe (Tribe) resides on a reservation located within Otero County in south central New Mexico. The reservation, which represents only a small portion

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*Briefs of *amici curiae* urging reversal were filed by *Robert K. Corbin*, Attorney General of Arizona, *Steven J. Silver*, Special Assistant Attorney General, *Kenneth L. Eikenberry*, Attorney General of Washington, and *James R. Johnson*, Senior Assistant Attorney General, for the State of Arizona et al.; and by *David L. Wilkinson*, Attorney General, *Richard L. Dewsnup*, Solicitor General, and *Dallin W. Jensen* and *Michael M. Quealy*, Assistant Attorneys General, for the State of Utah.

Briefs of *amici curiae* urging affirmance were filed by *Frank E. Maynes* for the Southern Ute Indian Tribe; by *Martin E. Seneca, Jr.*, for the Uintah and Ouray Tribe; and by *Robert C. Brauchli* for the White Mountain Apache Tribe.

of the aboriginal Mescalero domain, was created by a succession of Executive Orders promulgated in the 1870's and 1880's.[1] The present reservation comprises more than 460,000 acres, of which the Tribe owns all but 193.85 acres.[2] Approximately 2,000 members of the Tribe reside on the reservation, along with 179 non-Indians, including resident federal employees of the Bureau of Indian Affairs and the Indian Health Service.

The Tribe is organized under the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U. S. C. § 461 *et seq.* (1976 ed. and Supp. V), which authorizes any tribe residing on a reservation to adopt a constitution and bylaws, subject to the approval of the Secretary of the Interior (Secretary). The Tribe's Constitution, which was approved by the Secretary on January 12, 1965, requires the Tribal Council

> "[t]o protect and preserve the property, wildlife and natural resources of the tribe, and to regulate the conduct of trade and the use and disposition of tribal property upon the reservation, providing that any ordinance directly affecting non-members of the tribe shall be subject to review by the Secretary of [the] Interior." App. 53a.

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[1] See 1 C. Kappler, Indian Affairs Laws and Treaties 870–873 (1904). The final boundaries were fixed by the Executive Order of Mar. 24, 1883 (Order of President Arthur). Portions of the reservation were briefly included in a National Forest, but were restored to the Mescalero Reservation by the Executive Order of Feb. 17, 1912 (Order of President Taft). An intervening Executive Order of Mar. 1, 1910, issued by President Taft exempted from the reservation two "small holdings claims" covering settlements located before the establishment of the reservation. The Tribe has since purchased all but 23.8 acres of the land covered by these claims.

[2] These lands comprise the 23.8 acres remaining of the "small holdings claims," see n. 1, *supra;* 10 acres granted to St. Joseph's Catholic Church by the Act of Mar. 29, 1928, ch. 299, 45 Stat. 1716; and the unimproved and unoccupied 160-acre "Dodson Tract" in the northwest portion of the reservation. See Brief for United States as *Amicus Curiae* 2, n. 3.

The Constitution further provides that the Council shall

> "adopt and approve plans of operation to govern the conduct of any business or industry that will further the economic well-being of the members of the tribe, and to undertake any activity of any nature whatsoever, not inconsistent with Federal law or with this constitution, designed for the social or economic improvement of the Mescalero Apache people, . . . subject to review by the Secretary of the Interior." *Ibid.*

Anticipating a decline in the sale of lumber which has been the largest income-producing activity within the reservation, the Tribe has recently committed substantial time and resources to the development of other sources of income. The Tribe has constructed a resort complex financed principally by federal funds,[3] and has undertaken a substantial development of the reservation's hunting and fishing resources. These efforts provide employment opportunities for members of the Tribe, and the sale of hunting and fishing licenses and related services generates income which is used to maintain the tribal government and provide services to Tribe members.[4]

Development of the reservation's fish and wildlife resources has involved a sustained, cooperative effort by the

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[3] Financing for the complex, the Inn of the Mountain Gods, came principally from the Economic Development Administration (EDA), an agency of the United States Department of Commerce, and other federal sources. In addition, the Tribe obtained a $6 million loan from the Bank of New Mexico, 90% of which was guaranteed by the Secretary of the Interior under the Indian Financing Act of 1974, 25 U. S. C. § 1451 *et seq.* (1976 ed. and Supp. V), and 10% of which was guaranteed by tribal funds. Certain additional facilities at the Inn were completely funded by the EDA as public works projects, and other facilities received 50% funding from the EDA. App. to Brief in Opposition 7a–8a.

[4] Income from the sale of hunting and fishing licenses, "package hunts" which combine hunting and fishing with use of the facilities at the Inn, and campground and picnicking permits totaled $269,140 in 1976 and $271,520 in 1977. The vast majority of the nonmember hunters and fishermen on the reservation are not residents of the State of New Mexico.

Tribe and the Federal Government. Indeed, the reservation's fishing resources are wholly attributable to these recent efforts. Using federal funds, the Tribe has established eight artificial lakes which, together with the reservation's streams, are stocked by the Bureau of Sport Fisheries and Wildlife of the United States Fish and Wildlife Service, Department of the Interior, which operates a federal hatchery located on the reservation. None of the waters are stocked by the State.[5] The United States has also contributed substantially to the creation of the reservation's game resources. Prior to 1966 there were only 13 elk in the vicinity of the reservation. In 1966 and 1967 the National Park Service donated a herd of 162 elk which was released on the reservation. Through its management and range development[6] the Tribe has dramatically increased the elk population, which by 1977 numbered approximately 1,200. New Mexico has not contributed significantly to the development of the elk herd or the other game on the reservation, which includes antelope, bear, and deer.[7]

The Tribe and the Federal Government jointly conduct a comprehensive fish and game management program. Pursuant to its Constitution and to an agreement with the Bureau of Sport Fisheries and Wildlife,[8] the Tribal Council adopts hunting and fishing ordinances each year. The tribal ordinances, which establish bag limits and seasons and pro-

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[5] The State has not stocked any waters on the reservation since 1976.

[6] These efforts have included controlling and reducing the population of other animals, such as wild horses and cattle, which compete for the available forage on the reservation.

[7] The New Mexico Department of Game and Fish issued a permit for the importation of the elk from Wyoming into New Mexico. The Department has provided the Tribe with any management assistance which the Tribe has requested; such requests have been limited. *Id.*, at 16a.

[8] That agreement, which provides for the stocking of the reservation's artificial lakes by the Bureau, obligates the Tribe to "designate those waters of the Reservation which shall be open to public fishing" and to "establish regulations for the conservation of the fishery resources." App. 71a.

vide for licensing of hunting and fishing, are subject to approval by the Secretary under the Tribal Constitution and have been so approved. The Tribal Council adopts the game ordinances on the basis of recommendations submitted by a Bureau of Indian Affairs' range conservationist who is assisted by full-time conservation officers employed by the Tribe. The recommendations are made in light of the conservation needs of the reservation, which are determined on the basis of annual game counts and surveys. Through the Bureau of Sport Fisheries and Wildlife, the Secretary also determines the stocking of the reservation's waters based upon periodic surveys of the reservation.

Numerous conflicts exist between state and tribal hunting regulations.[9] For instance, tribal seasons and bag limits for both hunting and fishing often do not coincide with those imposed by the State. The Tribe permits a hunter to kill both a buck and a doe; the State permits only buck to be killed. Unlike the State, the Tribe permits a person to purchase an elk license in two consecutive years. Moreover, since 1977, the Tribe's ordinances have specified that state hunting and fishing licenses are not required for Indians or non-Indians who hunt or fish on the reservation.[10] The New Mexico Department of Game and Fish has enforced the State's regulations by arresting non-Indian hunters for illegal possession of game killed on the reservation in accordance with tribal ordinances but not in accordance with state hunting regulations.

In 1977 the Tribe filed suit against the State and the Director of its Game and Fish Department in the United States District Court for the District of New Mexico, seeking to prevent the State from regulating on-reservation hunting or

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[9] These conflicts have persisted despite the parties' stipulation that the New Mexico State Game Commission has attempted to "accommodate the preferences of the Mescalero Apache Tribe and other Indian tribes." App. to Brief in Opposition 25a.

[10] Prior to 1977 the Tribe consented to the application to the reservation of the State's hunting and fishing regulations.

fishing by members or nonmembers. On August 2, 1978, the District Court ruled in favor of the Tribe and granted declaratory and injunctive relief against the enforcement of the State's hunting and fishing laws against any person for hunting and fishing activities conducted on the reservation. The United States Court of Appeals for the Tenth Circuit affirmed. 630 F. 2d 724 (1980). Following New Mexico's petition for a writ of certiorari, this Court vacated the Tenth Circuit's judgment, 450 U. S. 1036 (1981), and remanded the case for reconsideration in light of *Montana* v. *United States*, 450 U. S. 544 (1981). On remand, the Court of Appeals adhered to its earlier decision. 677 F. 2d 55 (1982). We granted certiorari, 459 U. S. 1014 (1982), and we now affirm.

II

New Mexico concedes that on the reservation the Tribe exercises exclusive jurisdiction over hunting and fishing by members of the Tribe and may also regulate the hunting and fishing by nonmembers.[11] New Mexico contends, however, that it may exercise concurrent jurisdiction over nonmembers and that therefore its regulations governing hunting and fishing throughout the State should also apply to hunting and fishing by nonmembers on the reservation. Although New Mexico does not claim that it can require the Tribe to permit nonmembers to hunt and fish on the reservation, it claims that, once the Tribe chooses to permit hunting and fishing by nonmembers, such hunting and fishing is subject to any state-imposed conditions. Under this view the State would be free to impose conditions more restrictive than the Tribe's own regulations, including an outright prohibition. The question in this case is whether the State may so restrict the Tribe's exercise of its authority.

Our decision in *Montana* v. *United States*, *supra*, does not resolve this question. Unlike this case, *Montana* concerned lands located within the reservation but *not* owned by the

[11] Brief for Petitioners 7, 12, 20; Tr. of Oral Arg. 7.

Tribe or its members. We held that the Crow Tribe could not as a general matter regulate hunting and fishing on those lands. 450 U. S., at 557–567.[12] But as to "land belonging to the Tribe or held by the United States in trust for the Tribe," we "readily agree[d]" that a Tribe may "prohibit nonmembers from hunting or fishing . . . [or] condition their entry by charging a fee or establish bag and creel limits." *Id.*, at 557. We had no occasion to decide whether a Tribe may only exercise this authority in a manner permitted by a State.

On numerous occasions this Court has considered the question whether a State may assert authority over a reservation. The decision in *Worcester* v. *Georgia*, 6 Pet. 515, 560 (1832), reflected the view that Indian tribes were wholly distinct nations within whose boundaries "the laws of [a State] can have no force." We long ago departed from the "conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester*," *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148 (1973), and have acknowledged certain limitations on tribal sovereignty. For instance, we have held that Indian tribes have been implicitly divested of their sovereignty in certain respects by virtue of their dependent status,[13] that under certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation,[14] and that in exceptional

[12] Even so, the Court acknowledged that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." 450 U. S., at 565. The Court stressed that in *Montana* the pleadings "did not allege that non-Indian hunting and fishing on [non-Indian] reservation lands [had] impaired [the Tribe's reserved hunting and fishing privileges]," *id.*, at 558, n. 6, or "that non-Indian hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe," *id.*, at 566, and that the existing record failed to suggested "that such non-Indian hunting and fishing . . . threaten the Tribe's political or economic security." *Ibid.*

[13] See, *e. g.*, *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 667–668 (1974); *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191 (1978).

[14] See, *e. g.*, *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134 (1980); *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976).

circumstances a State may assert jurisdiction over the on-reservation activities of tribal members.[15]

Nevertheless, in demarcating the respective spheres of state and tribal authority over Indian reservations, we have continued to stress that Indian tribes are unique aggregations possessing "'attributes of sovereignty over both their members and their territory,'" *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 142 (1980), quoting *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975). Because of their sovereign status, tribes and their reservation lands are insulated in some respects by a "historic immunity from state and local control," *Mescalero Apache Tribe* v. *Jones*, *supra*, at 152, and tribes retain any aspect of their historical sovereignty not "inconsistent with the overriding interests of the National Government." *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 153 (1980).

The sovereignty retained by tribes includes "the power of regulating their internal and social relations," *United States* v. *Kagama*, 118 U. S. 375, 381–382 (1886), cited in *United States* v. *Wheeler*, 435 U. S. 313, 322 (1978). A tribe's power to prescribe the conduct of tribal members has never been doubted, and our cases establish that "'absent governing Acts of Congress,'" a State may not act in a manner that "'infringe[s] on the right of reservation Indians to make their own laws and be ruled by them.'" *McClanahan* v. *Arizona*

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[15] See *Puyallup Tribe* v. *Washington Game Dept.*, 433 U. S. 165 (1977). *Puyallup* upheld the State of Washington's authority to regulate on-reservation fishing by tribal members. Like *Montana* v. *United States*, the decision in *Puyallup* rested in part on the fact that the dispute centered on lands which, although located within the reservation boundaries, no longer belonged to the Tribe; all but 22 of the 18,000 acres had been alienated in fee simple. The Court also relied on a provision of the Indian treaty which qualified the Indians' fishing rights by requiring that they be exercised "in common with all citizens of the Territory," 433 U. S., at 175, and on the State's interest in conserving a scarce, common resource. *Id.*, at 174, 175–177.

*State Tax Comm'n*, 411 U. S. 164, 171–172 (1973), quoting *Williams* v. *Lee*, 358 U. S. 217, 219–220 (1959). See also *Fisher* v. *District Court*, 424 U. S. 382, 388–389 (1976) *(per curiam)*.

A tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is equally well established. See, *e. g.*, *Montana* v. *United States*, 450 U. S. 544 (1981); *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130 (1982). Whether a State may also assert its authority over the on-reservation activities of nonmembers raises "[m]ore difficult questions," *Bracker*, *supra*, at 144. While under some circumstances a State may exercise concurrent jurisdiction over non-Indians acting on tribal reservations, see, *e. g.*, *Washington* v. *Confederated Tribes*, *supra; Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976), such authority may be asserted only if not pre-empted by the operation of federal law. See, *e. g.*, *Ramah Navajo School Bd., Inc.* v. *Bureau of Revenue of New Mexico*, 458 U. S. 832 (1982); *Bracker*, *supra; Central Machinery Co.* v. *Arizona Tax Comm'n*, 448 U. S. 160 (1980); *Williams* v. *Lee*, *supra; Warren Trading Post* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965); *Fisher* v. *District Court*, *supra; Kennerly* v. *District Court of Montana*, 400 U. S. 423 (1971).

In *Bracker* we reviewed our prior decisions concerning tribal and state authority over Indian reservations and extracted certain principles governing the determination whether federal law pre-empts the assertion of state authority over nonmembers on a reservation. We stated that that determination does not depend "on mechanical or absolute conceptions of state or tribal sovereignty, but call[s] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake." 448 U. S., at 145.

We also emphasized the special sense in which the doctrine of pre-emption is applied in this context. See *id.*, at 143–144; *Ramah Navajo School Bd.*, *supra*, at 838. Although a State will certainly be without jurisdiction if its authority

is pre-empted under familiar principles of pre-emption, we cautioned that our prior cases did not limit pre-emption of state laws affecting Indian tribes to only those circumstances. "The unique historical origins of tribal sovereignty" and the federal commitment to tribal self-sufficiency and self-determination make it "treacherous to import . . . notions of pre-emption that are properly applied to . . . other [contexts]." *Bracker*, *supra*, at 143. See also *Ramah Navajo School Bd.*, *supra*, at 838. By resting pre-emption analysis principally on a consideration of the nature of the competing interests at stake, our cases have rejected a narrow focus on congressional intent to pre-empt state law as the sole touchstone. They have also rejected the proposition that pre-emption requires "'an express congressional statement to that effect.'" *Bracker*, *supra*, at 144 (footnote omitted). State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority. *Bracker*, *supra*, at 145. See also *Ramah Navajo School Bd.*, *supra*, at 845, quoting *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941).[16]

Certain broad considerations guide our assessment of the federal and tribal interests. The traditional notions of Indian sovereignty provide a crucial "backdrop," *Bracker*, *supra*, at 143, citing *McClanahan*, *supra*, at 172, against which any assertion of state authority must be assessed. Moreover, both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-govern-

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[16] The exercise of state authority may also be barred by an independent barrier—inherent tribal sovereignty—if it "unlawfully infringe[s] 'on the right of reservation Indians to make their own laws and be ruled by them.'" *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 142 (1980), quoting *Williams* v. *Lee*, 358 U. S. 217, 220 (1959). "See also *Washington* v. *Yakima Indian Nation*, 439 U. S. 463, 502 (1979); *Fisher* v. *District Court*, 424 U. S. 382 (1976) *(per curiam)*; *Kennerly* v. *District Court of Montana*, 400 U. S. 423 (1971)." 448 U. S., at 142–143.

ment, a goal embodied in numerous federal statutes.[17] We have stressed that Congress' objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging "tribal self-sufficiency and economic development." *Bracker*, 448 U. S., at 143 (footnote omitted). In part as a necessary implication of this broad federal commitment, we have held that tribes have the power to manage the use of their territory and resources by both members and nonmembers,[18] *Merrion*, *supra*, at 137; *Bracker*, *supra*, at 151; *Montana* v. *United States*, *supra;* 18 U. S. C. § 1162(b); 25 U. S. C. §§ 1321(b), 1322(b), to undertake and regulate economic activity within the reservation, *Merrion*, 455 U. S., at 137, and to defray

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[17] For example, the Indian Financing Act of 1974, 25 U. S. C. § 1451 *et seq.* (1976 ed. and Supp. V), states: "It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." § 1451. Similar policies underlie the Indian Self-Determination and Education Assistance Act of 1975, 25 U. S. C. § 450 *et seq.*, as well as the Indian Reorganization Act of 1934, 25 U. S. C. § 461 *et seq.* (1976 ed. and Supp. V), pursuant to which the Mescalero Apache Tribe adopted its Constitution. The "intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 152 (1973), quoting H. R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934). The Indian Civil Rights Act of 1968, 25 U. S. C. § 1301 *et seq.*, likewise reflects Congress' intent "to promote the well-established federal 'policy of furthering Indian self-government.'" *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 62 (1978), quoting *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974).

[18] Our cases have recognized that tribal sovereignty contains a "significant geographical component." *Bracker*, *supra*, at 151. Thus the off-reservation activities of Indians are generally subject to the prescriptions of a "nondiscriminatory state law" in the absence of "express federal law to the contrary." *Mescalero Apache Tribe* v. *Jones*, *supra*, at 148–149.

the cost of governmental services by levying taxes. *Ibid.* Thus, when a tribe undertakes an enterprise under the authority of federal law, an assertion of state authority must be viewed against any interference with the successful accomplishment of the federal purpose. See generally *Bracker*, *supra*, at 143 (footnote omitted); *Ramah Navajo School Bd.*, 458 U. S., at 845, quoting *Hines* v. *Davidowitz*, *supra*, at 67 (state authority precluded when it "'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress'").

Our prior decisions also guide our assessment of the state interest asserted to justify state jurisdiction over a reservation. The exercise of state authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity. *Ramah Navajo School Bd.*, *supra*, at 843, and n. 7; *Bracker*, *supra*, at 148–149; *Central Machinery Co.* v. *Arizona Tax Comm'n*, 448 U. S., at 174 (POWELL, J., dissenting). Thus a State seeking to impose a tax on a transaction between a tribe and nonmembers must point to more than its general interest in raising revenues. See, *e. g.*, *Warren Trading Post Co.* v. *Arizona*, 380 U. S. 685 (1965); *Bracker*, *supra*; *Ramah Navajo School Bd.*, *supra*. See also *Confederated Tribes*, 447 U. S., at 157 ("governmental interest in raising revenues is . . . strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services"); *Moe*, 425 U. S., at 481–483 (State may require tribal shops to collect state cigarette tax from nonmember purchasers). A State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention. Cf. *Puyallup Tribe* v. *Washington Game Dept.*, 433 U. S. 165 (1977).

## III

With these principles in mind, we turn to New Mexico's claim that it may superimpose its own hunting and fishing

regulations on the Mescalero Apache Tribe's regulatory scheme.

A

It is beyond doubt that the Mescalero Apache Tribe lawfully exercises substantial control over the lands and resources of its reservation, including its wildlife. As noted *supra*, at 330, and as conceded by New Mexico,[19] the sovereignty retained by the Tribe under the Treaty of 1852 includes its right to regulate the use of its resources by members as well as nonmembers. In *Montana* v. *United States*, we specifically recognized that tribes in general retain this authority.

Moreover, this aspect of tribal sovereignty has been expressly confirmed by numerous federal statutes.[20] Pub. L. 280 specifically confirms the power of tribes to regulate on-reservation hunting and fishing. 67 Stat. 588, 18 U. S. C. § 1162(b); see also 25 U. S. C. § 1321(b).[21] This authority

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[19] New Mexico concedes that the Tribe originally relied on wildlife for subsistence, that tribal members freely took fish and game in ancestral territory, and that the Treaty of July 1, 1852, 10 Stat. 979, between the Tribe and the United States confirmed the Tribe's rights regarding hunting and fishing on the small portion of the aboriginal Mescalero domain that was eventually set apart as the Tribe's reservation. Brief for Petitioners 12. See *Menominee Tribe* v. *United States*, 391 U. S. 404 (1968); *Montana* v. *United States*, 450 U. S. 544, 558–559 (1981). See also *United States* v. *Winans*, 198 U. S. 371, 381 (1905) (recognizing that hunting and fishing "were not much less necessary to the existence of the Indians than the atmosphere they breathed").

[20] The Tribe's authority was also confirmed more generally by the Indian Reorganization Act of 1934, 25 U. S. C. § 476, which reaffirms "all powers vested in any Indian tribe or tribal council by existing law."

[21] The provision of Pub. L. 280 granting States criminal jurisdiction over Indian reservations under certain conditions provides that States are not thereby authorized to

"deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing *or the control, licensing or regulation thereof.*" 18 U. S. C. § 1162(b) (emphasis added). The same language is contained in 25 U. S. C. § 1321(b).

is afforded the protection of the federal criminal law by 18 U. S. C. § 1165, which makes it a violation of federal law to enter Indian land to hunt, trap, or fish without the consent of the tribe. See *Montana* v. *United States*, 450 U. S., at 562, n. 11. The 1981 Amendments to the Lacey Act, 16 U. S. C. § 3371 *et seq.* (1976 ed., Supp. V), further accord tribal hunting and fishing regulations the force of federal law by making it a federal offense "to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife . . . taken or possessed in violation of any . . . Indian tribal law." § 3372(a)(1).[22]

B

Several considerations strongly support the Court of Appeals' conclusion that the Tribe's authority to regulate hunting and fishing pre-empts state jurisdiction. It is important to emphasize that concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation. Concurrent jurisdiction would empower New Mexico wholly to supplant tribal regulations. The State would be able to dictate the terms on which nonmembers are permitted to utilize the reservation's resources. The Tribe would thus exercise its authority over the reservation only at the sufferance of the State. The tribal authority to regulate hunting and fishing by nonmembers, which has been repeatedly confirmed by federal treaties and laws and which we explicitly recognized in *Montana* v. *United States*, *supra*, would have a rather hollow ring if tribal authority amounted to no more than this.

Furthermore, the exercise of concurrent state jurisdiction in this case would completely "disturb and disarrange," *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, *supra*, at 691, the comprehensive scheme of federal and tribal management established pursuant to federal law. As described

[22] Sections 3375(a) and (b) authorize the Secretary to enter into agreements with Indian tribes to enforce the provisions of the law by, *inter alia*, making arrests and serving process.

*supra*, at 326, federal law requires the Secretary to review each of the Tribe's hunting and fishing ordinances. Those ordinances are based on the recommendations made by a federal range conservationist employed by the Bureau of Indian Affairs. Moreover, the Bureau of Sport Fisheries and Wildlife stocks the reservation's waters based on its own determinations concerning the availability of fish, biological requirements, and the fishing pressure created by on-reservation fishing. App. 71a.[23]

Concurrent state jurisdiction would supplant this regulatory scheme with an inconsistent dual system: members would be governed by tribal ordinances, while nonmembers would be regulated by general state hunting and fishing laws. This could severely hinder the ability of the Tribe to conduct a sound management program. Tribal ordinances reflect the specific needs of the reservation by establishing the optimal level of hunting and fishing that should occur, not simply a maximum level that should not be exceeded. State laws in contrast are based on considerations not necessarily relevant to, and possibly hostile to, the needs of the reservation. For instance, the ordinance permitting a hunter to kill a buck and a doe was designed to curb excessive growth of the deer population on the reservation. *Id.*, at 153a–154a. Enforcement of the state regulation permitting only buck to be killed would frustrate that objective. Similarly, by determining the tribal hunting seasons, bag limits, and permit availability, the Tribe regulates the duration and intensity of hunting. These determinations take into account numerous factors, including the game capacity of the terrain, the range utilization of the game animals, and the availability of tribal personnel to monitor the hunts. Permitting the State to enforce different restrictions simply because they have been determined to be appropriate for the State as a whole would impose on the Tribe the possibly insurmountable task of ensuring that the

[23] In addition, as noted earlier, *supra*, at 327–328, the Federal Government played a substantial role in the development of the Tribe's resources.

patchwork application of state and tribal regulations remains consistent with sound management of the reservation's resources.

Federal law commits to the Secretary and the Tribal Council the responsibility to manage the reservation's resources. It is most unlikely that Congress would have authorized, and the Secretary would have established, financed, and participated in, tribal management if it were thought that New Mexico was free to nullify the entire arrangement.[24] Requiring tribal ordinances to yield whenever state law is more restrictive would seriously "undermine the Secretary's [and the Tribe's] ability to make the wide range of determinations committed to [their] authority." *Bracker*, 448 U. S., at 149. See *Fisher* v. *District Court*, 424 U. S., at 390; *United States* v. *Mazurie*, 419 U. S. 544 (1975).[25]

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[24] The Secretary assumed precisely the opposite is true—that state jurisdiction is pre-empted—when he approved a tribal ordinance which provided that nonmembers hunting and fishing on the reservation need not obtain state licenses. That assumption is also embodied in an agreement between the Tribe and the Department of the Interior's Bureau of Sport Fisheries and Wildlife, see n. 8, *supra*, which openly acknowledges that tribal regulations need not agree with state laws. The agreement provides that "*[i]nsofar as possible* said regulations shall be in agreement with State regulations." App. 71a. (Emphasis added.)

[25] Congress' intent to pre-empt state regulation of hunting and fishing on reservations is reinforced by Pub. L. 280. That law, which grants limited criminal and civil jurisdiction over Indian reservations to States which meet certain requirements, contains a provision which expressly excludes authority over hunting and fishing. See n. 21, *supra*. Pub. L. 280 evidences Congress' understanding that tribal regulation of hunting and fishing should generally be insulated from state interference, since "Congress would not have jealously protected" tribal exemption from conflicting state hunting and fishing laws "had it thought that the States had residual power to impose such [laws] in any event." *McClanahan* v. *Arizona Tax Comm'n*, 411 U. S. 164, 177 (1973). In *McClanahan* we concluded that the Buck Act, 4 U. S. C. § 105 *et seq.*, which contains a provision exempting Indians from a grant to the States of general authority to tax residents of federal areas, likewise provided evidence of Congress' intent to exempt Indians from state taxes. *Ibid.*

The assertion of concurrent jurisdiction by New Mexico not only would threaten to disrupt the federal and tribal regulatory scheme, but also would threaten Congress' overriding objective of encouraging tribal self-government and economic development. The Tribe has engaged in a concerted and sustained undertaking to develop and manage the reservation's wildlife and land resources specifically for the benefit of its members. The project generates funds for essential tribal services and provides employment for members who reside on the reservation. This case is thus far removed from those situations, such as on-reservation sales outlets which market to nonmembers goods not manufactured by the tribe or its members, in which the tribal contribution to an enterprise is *de minimis*. See *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S., at 154–159.[26] The tribal enterprise in this case clearly involves "value generated on the reservation by activities involving the Trib[e]." *Id.*, at 156–157. The disruptive effect that would result from the assertion of concurrent jurisdiction by New Mexico would plainly "'stan[d] as an obstacle to the accomplishment of the full purposes and objectives of Congress,'" *Ramah Navajo School Bd.*, 458 U. S., at 845, quoting *Hines* v. *Davidowitz*, 312 U. S., at 67.

C

The State has failed to "identify any regulatory function or service . . . that would justify" the assertion of concurrent regulatory authority. *Bracker*, *supra*, at 148. The hunting and fishing permitted by the Tribe occur entirely on the res-

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[26] In *Washington* v. *Confederated Tribes* the Court held that the sales of tribal smokeshops which sold cigarettes to nonmembers were subject to the state sales and cigarette taxes. 447 U. S., at 154–159. The Court relied on the fact that the tribal smokeshops were not marketing "value generated on the reservation," *id.*, at 156–157, but instead were seeking merely to market a "tax exemption to nonmembers who do not receive significant tribal services." *Id.*, at 157.

ervation. The fish and wildlife resources are either native to the reservation or were created by the joint efforts of the Tribe and the Federal Government. New Mexico does not contribute in any significant respect to the maintenance of these resources, and can point to no other "governmental functions it provides," *Ramah Navajo School Bd.*, *supra*, at 843, in connection with hunting and fishing on the reservation by nonmembers that would justify the assertion of its authority.

The State also cannot point to any off-reservation effects that warrant state intervention. Some species of game never leave tribal lands, and the State points to no specific interest concerning those that occasionally do. Unlike *Puyallup Tribe* v. *Washington Game Dept.*, this is not a case in which a treaty expressly subjects a tribe's hunting and fishing rights to the common rights of nonmembers and in which a State's interest in conserving a scarce, common supply justifies state intervention. 433 U. S., at 174, 175–177. The State concedes that the Tribe's management has "not had an adverse impact on fish and wildlife outside the Reservation." App. to Brief in Opposition 35a.[27]

We recognize that New Mexico may be deprived of the sale of state licenses to nonmembers who hunt and fish on the reservation, as well as some federal matching funds calculated in

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[27] We reject the State's claim that the Tribe's ability to manage its wildlife resources suffers from a lack of enforcement powers and that therefore concurrent jurisdiction is necessary to fill the void. The Tribe clearly can exclude or expel those who violate tribal ordinances. Trespassers may be referred for prosecution under 18 U. S. C. § 1165. Furthermore, the Lacey Act Amendments of 1981, 16 U. S. C. § 3371 *et seq.* (1976 ed., Supp. V), make it a federal offense to violate any tribal law, provide for civil and criminal penalties and authorize forfeiture of fish or wildlife as well as vehicles or equipment used in the violation, §§ 3373, 3374, and provide that the Secretary can grant authority to tribal personnel to enforce these provisions. §§ 3375(a), (b).

part on the basis of the number of state licenses sold.[28] However, any financial interest the State might have in this case is simply insufficient to justify the assertion of concurrent jurisdiction. The loss of revenues to the State is likely to be insubstantial given the small numbers of persons who purchase tribal hunting licenses.[29] Moreover, unlike *Confederated Tribes*, *supra*, and *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976), the activity involved here concerns value generated on the reservation by the Tribe. Finally, as already noted *supra*, at 342, the State has pointed to no services it has performed in connection with hunting and fishing by nonmembers which justify imposing a tax in the form of a hunting and fishing license, *Ramah Navajo School Bd.*, *supra*, at 843; *Central Machinery Co.* v. *Arizona Tax Comm'n*, 448 U. S., at 174 (POWELL, J., dissenting), and its general desire to obtain revenues is simply inadequate to justify the assertion of concurrent jurisdiction in this case. See *Bracker*, 448 U. S., at 150; *Ramah Navajo School Bd.*, *supra*, at 845.[30]

## IV

In this case the governing body of an Indian Tribe, working closely with the Federal Government and under the authority of federal law, has exercised its lawful authority to develop and manage the reservation's resources for the benefit of its members. The exercise of concurrent jurisdiction

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[28] The State receives federal matching funds through the Pittman-Robertson Act, 16 U. S. C. § 669 (hunting), and the Dingell-Johnson Act, 16 U. S. C. § 777 (fishing), which are allocated through a formula which considers the number of licenses sold and the number of acres in the State.

[29] In recent years the Tribe sold 10 antelope licenses compared to 3,500 for the State, 50 elk licenses compared to 14,000 by the State, and 500 deer licenses compared to 100,000 for the State.

[30] New Mexico concedes that it has expended no Dingell-Johnson funds for projects within the reservation during the last six to eight years. App. to Brief in Opposition 17a–18a. It presented no evidence as to expenditures of Pittman-Robertson funds within the reservation.

by the State would effectively nullify the Tribe's unquestioned authority to regulate the use of its resources by members and nonmembers, interfere with the comprehensive tribal regulatory scheme, and threaten Congress' firm commitment to the encouragement of tribal self-sufficiency and economic development. Given the strong interests favoring exclusive tribal jurisdiction and the absence of state interests which justify the assertion of concurrent authority, we conclude that the application of the State's hunting and fishing laws to the reservation is pre-empted.

Accordingly, the judgment of the Court of Appeals is

*Affirmed.*

Syllabus

# CROWN, CORK & SEAL CO., INC. *v.* PARKER

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

No. 82–118. Argued April 18, 1983—Decided June 13, 1983

Respondent, a Negro male, after being discharged by petitioner employer in 1977, filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC), which, on November 9, 1978, upon finding no reasonable cause to believe the charge was true, sent respondent a Notice of Right to Sue pursuant to § 706(f) of Title VII of the Civil Rights Act of 1964. Previously, while respondent's charge was still pending before the EEOC, two other Negro males formerly employed by petitioner had filed a class action against petitioner in Federal District Court, alleging employment discrimination and purporting to represent a class of which respondent was a member. Subsequently, on September 4, 1980, the District Court denied the named plaintiffs' motion for class certification, and the action then proceeded as an individual action. Within 90 days thereafter but almost two years after receiving his Notice of Right to Sue, respondent filed an action under Title VII against petitioner in Federal District Court, alleging that his discharge was racially motivated. The District Court granted summary judgment for petitioner on the ground that respondent had failed to file his action within 90 days of receiving his Notice of Right to Sue as required by § 706(f)(1). The Court of Appeals reversed.

*Held:* The filing of the class action tolled the statute of limitations for respondent and other members of the putative class. Since respondent did not receive his Notice of Right to Sue until after the class action was filed, he retained a full 90 days in which to bring suit after class certification was denied, and hence his suit was timely filed. Pp. 349–354.

(a) While *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538, concerned only intervenors in a class action, the holding of that case—that the filing of a class action tolls the running of the applicable statute of limitations for all asserted members of the class—is to be read as not being limited to intervenors but as extending to class members filing separate actions. Otherwise, class members would be led to file individual actions prior to denial of class certification, in order to preserve their rights. The result would be a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid. Pp. 349–351.

(b) Failure to apply *American Pipe* to class members filing separate actions would also be inconsistent with this Court's reliance on *American*

*Pipe* in *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, where it was held that Rule 23(c)(2) required individual notice to class members so that each of them could decide whether to "opt out" of the class and thereby preserve his right to pursue his own lawsuit. A class member would be unable to pursue his own lawsuit if the limitations period had expired while the class action was pending. Pp. 351–352.

(c) A tolling rule for class actions is not inconsistent with the purposes served by statutes of limitations of putting defendants on notice of adverse claims and of preventing plaintiffs from sleeping on their rights. These ends are met when a class action is filed. Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights. And a class complaint notifies the defendants not only of the claims against them but also of the number and generic identities of the potential plaintiffs. Pp. 352–353.

(d) Once the commencement of a class action suspends the applicable statute of limitations as to all putative members of the class, it remains suspended until class certification is denied. Pp. 353–354.

677 F. 2d 391, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court. POWELL, J., filed a concurring opinion, in which REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 354.

*George D. Solter* argued the cause for petitioner. With him on the brief was *Richard J. Magid.*

*Norris C. Ramsey* argued the cause for respondent. With him on the brief were *James L. Foster, William L. Robinson, Beatrice Rosenberg,* and *Norman J. Chachkin.**

JUSTICE BLACKMUN delivered the opinion of the Court.

The question that confronts us in this case is whether the filing of a class action tolls the applicable statute of limitations, and thus permits all members of the putative class to file individual actions in the event that class certification is

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**Robert E. Williams, Douglas S. McDowell,* and *Thomas R. Bagby* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General Lee, Deputy Solicitor General Wallace, David A. Strauss,* and *Phillip B. Sklover* for the Equal Employment Opportunity Commission; and by *James W. Witherspoon* and *James E. Elliott* for Jack Williams et al.

denied, provided, of course, that those actions are instituted within the time that remains on the limitations period.

I

Respondent Theodore Parker, a Negro male, was discharged from his employment with petitioner Crown, Cork & Seal Company, Inc., in July 1977. In October of that year, he filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that he had been harassed and then discharged on account of his race. On November 9, 1978, the EEOC issued a Determination Letter finding no reasonable cause to believe respondent's discrimination charge was true, and, pursuant to § 706(f) of the Civil Rights Act of 1964 (Act), 78 Stat. 260, as amended, 42 U. S. C. § 2000e–5(f), sent respondent a Notice of Right to Sue. App. 5A, 7A.

Two months earlier, while respondent's charge was pending before the EEOC, two other Negro males formerly employed by petitioner filed a class action in the United States District Court for the District of Maryland. *Pendleton* v. *Crown, Cork & Seal Co.*, Civ. No. M–78–1734. The complaint in that action alleged that petitioner had discriminated against its Negro employees with respect to hiring, discharges, job assignments, promotions, disciplinary actions, and other terms and conditions of employment, in violation of Title VII of the Act, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* The named plaintiffs purported to represent a class of "black persons who have been, continue to be and who in the future will be denied equal employment opportunities by defendant on the grounds of race or color." App. to Brief for Petitioner 2a. It is undisputed that respondent was a member of the asserted class.

In May 1979, the named plaintiffs in *Pendleton* moved for class certification. Nearly a year and a half later, on September 4, 1980, the District Court denied that motion. App. to Brief for Petitioner 7a. The court ruled that the named plaintiffs' claims were not typical of those of the class, that

the named plaintiffs would not be adequate representatives, and that the class was not so numerous as to make joinder impracticable. Thereafter, *Pendleton* proceeded as an individual action on behalf of its named plaintiffs.[1]

On October 27, 1980, within 90 days after the denial of class certification but almost two years after receiving his Notice of Right to Sue, respondent filed the present Title VII action in the United States District Court for the District of Maryland, alleging that his discharge was racially motivated. Respondent moved to consolidate his action with the pending *Pendleton* case, but petitioner opposed the motion on the ground that the two cases were at substantially different stages of preparation. The motion to consolidate was denied. The District Court then granted summary judgment for petitioner, ruling that respondent had failed to file his action within 90 days of receiving his Notice of Right to Sue, as required by the Act's § 706(f)(1), 42 U. S. C. § 2000e–5(f)(1). 514 F. Supp. 122 (1981).

The United States Court of Appeals for the Fourth Circuit reversed. 677 F. 2d 391 (1982). Relying on *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538 (1974), the Court of Appeals held that the filing of the *Pendleton* class action had tolled Title VII's statute of limitations for all members of the putative class. Because the *Pendleton* suit was instituted before respondent received his Notice, and because respondent had filed his action within 90 days after the denial of class certification, the Court of Appeals concluded that it was timely.

Two other Courts of Appeals have held that the tolling rule of *American Pipe* applies only to putative class members who seek to intervene after denial of class certification, and not

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[1] The named plaintiffs in *Pendleton* later settled their claims, and their action was dismissed with prejudice. Respondent Parker, as permitted by *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385, 392–395 (1977), then intervened in that lawsuit for the limited purpose of appealing the denial of class certification. He failed, however, to take a timely appeal.

to those who, like respondent, file individual actions.[2] We granted certiorari to resolve the conflict. 459 U. S. 986 (1982).

## II

### A

*American Pipe* was a federal antitrust suit brought by the State of Utah on behalf of itself and a class of other public bodies and agencies. The suit was filed with only 11 days left to run on the applicable statute of limitations. The District Court eventually ruled that the suit could not proceed as a class action, and eight days after this ruling a number of putative class members moved to intervene. This Court ruled that the motions to intervene were not time-barred. The Court reasoned that unless the filing of a class action tolled the statute of limitations, potential class members would be induced to file motions to intervene or to join in order to protect themselves against the possibility that certification would be denied. 414 U. S., at 553. The principal purposes of the class-action procedure—promotion of efficiency and economy of litigation—would thereby be frustrated. *Ibid.* To protect the policies behind the class-action procedure, the Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.*, at 554.

Petitioner asserts that the rule of *American Pipe* was limited to intervenors, and does not toll the statute of limitations for class members who file actions of their own.[3] Petitioner

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[2] See *Pavlak* v. *Church*, 681 F. 2d 617 (CA9 1982), cert. pending, No. 82–650; *Stull* v. *Bayard*, 561 F. 2d 429, 433 (CA2 1977), cert. denied, 434 U. S. 1035 (1978); *Arneil* v. *Ramsey*, 550 F. 2d 774, 783 (CA2 1977).

[3] Petitioner also argues that *American Pipe* does not apply in Title VII actions, because the time limit contained in § 706(f)(1), 42 U. S. C. § 2000e–5(f)(1), is jurisdictional and may not be tolled. This argument is foreclosed by the Court's decisions in *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 398 (1982), and *Mohasco Corp.* v. *Silver*, 447 U. S. 807, 811, and n. 9 (1980).

relies on the Court's statement in *American Pipe* that "the commencement of the original class suit tolls the running of the statute for all purported members of the class *who make timely motions to intervene* after the court has found the suit inappropriate for class action status." *Id.*, at 553 (emphasis added). While *American Pipe* concerned only intervenors, we conclude that the holding of that case is not to be read so narrowly. The filing of a class action tolls the statute of limitations "as to all asserted members of the class," *id.*, at 554, not just as to intervenors.

The *American Pipe* Court recognized that unless the statute of limitations was tolled by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights. Only by intervening or taking other action prior to the running of the statute of limitations would they be able to ensure that their rights would not be lost in the event that class certification was denied. Much the same inefficiencies would ensue if *American Pipe*'s tolling rule were limited to permitting putative class members to intervene after the denial of class certification. There are many reasons why a class member, after the denial of class certification, might prefer to bring an individual suit rather than intervene. The forum in which the class action is pending might be an inconvenient one, for example, or the class member might not wish to share control over the litigation with other plaintiffs once the economies of a class action were no longer available. Moreover, permission to intervene might be refused for reasons wholly unrelated to the merits of the claim.[4] A putative class member who fears that class

[4] Putative class members frequently are not entitled to intervene as of right under Federal Rule of Civil Procedure 24(a), and permissive intervention under Federal Rule of Civil Procedure 24(b) may be denied in the discretion of the District Court. *American Pipe*, 414 U. S., at 559–560; *id.*, at 562 (concurring opinion); see *Railroad Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 524–525 (1947). In exercising its discretion the district court considers "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties," Fed. Rule

certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations. The result would be a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid.

B

Failure to apply *American Pipe* to class members filing separate actions also would be inconsistent with the Court's reliance on *American Pipe* in *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156 (1974). In *Eisen*, the Court held that Rule 23(c)(2) required individual notice to absent class members, so that each class member could decide whether to "opt out" of the class and thereby preserve his right to pursue his own lawsuit. 417 U. S., at 176. The named plaintiff in *Eisen* argued that such notice would be fruitless because the statute of limitations had long since run on the claims of absent class members. This argument, said the Court, was "disposed of by our recent decision in *American Pipe* . . . which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class." *Id.*, at 176, n. 13.

If *American Pipe*'s tolling rule applies only to intervenors, this reference to *American Pipe* is misplaced and makes no sense. *Eisen*'s notice requirement was intended to inform the class member that he could "preserve his opportunity to press his claim *separately*" by opting out of the class. 417 U. S., at 176 (emphasis added). But a class member would be unable to "press his claim separately" if the limitations period had expired while the class action was pending. The *Eisen* Court recognized this difficulty, but concluded that the right to opt out and press a separate claim remained mean-

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Civ. Proc. 24(b), and a court could conclude that undue delay or prejudice would result if many class members were brought in as plaintiffs upon the denial of class certification. Thus, permissive intervention well may be an uncertain prospect for members of a proposed class.

ingful because the filing of the class action tolled the statute of limitations under the rule of *American Pipe*. 417 U. S., at 176, n. 13. If *American Pipe* were limited to intervenors, it would not serve the purpose assigned to it by *Eisen;* no class member would opt out simply to intervene. Thus, the *Eisen* Court necessarily read *American Pipe* as we read it today, to apply to class members who choose to file separate suits.[5]

C

The Court noted in *American Pipe* that a tolling rule for class actions is not inconsistent with the purposes served by statutes of limitations. 414 U. S., at 554. Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights, see *Delaware State College* v. *Ricks*, 449 U. S. 250, 256–257 (1980); *American Pipe*, 414 U. S., at 561 (concurring opinion); *Burnett* v. *New York Central R. Co.*, 380 U. S. 424, 428 (1965), but these ends are met when a class action is commenced. Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members

[5] Several Members of the Court have indicated that *American Pipe*'s tolling rule can apply to class members who file individual suits, as well as to those who seek to intervene. See *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 474–475 (1975) (MARSHALL, J., joined by Douglas and BRENNAN, JJ., concurring in part and dissenting in part) ("In *American Pipe* we held that initiation of a timely class action tolled the running of the limitation period as to individual members of the class, enabling them to institute separate actions after the District Court found class action an inappropriate mechanism for the litigation"); *United Airlines, Inc.* v. *McDonald*, 432 U. S., at 402 (POWELL, J., joined by BURGER, C. J., and WHITE, J., dissenting) ("Under *American Pipe*, the filing of a class action complaint tolls the statute of limitations until the District Court makes a decision regarding class status. If class status is denied, . . . the statute of limitations begins to run again as to class members excluded from the class. In order to protect their rights, such individuals must seek to intervene in the individual action (or possibly file an action of their own) before the time remaining in the limitations period expires").

to rely on the named plaintiffs to press their claims. And a class complaint "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." *American Pipe*, 414 U. S., at 555; see *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385, 395 (1977). The defendant will be aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class. Tolling the statute of limitations thus creates no potential for unfair surprise, regardless of the method class members choose to enforce their rights upon denial of class certification.

Restricting the rule of *American Pipe* to intervenors might reduce the number of individual lawsuits filed against a particular defendant but, as discussed above, this decrease in litigation would be counterbalanced by an increase in protective filings in all class actions. Moreover, although a defendant may prefer not to defend against multiple actions in multiple forums once a class has been decertified, this is not an interest that statutes of limitations are designed to protect. Cf. *Goldlawr, Inc.* v. *Heiman*, 369 U. S. 463, 467 (1962). Other avenues exist by which the burdens of multiple lawsuits may be avoided; the defendant may seek consolidation in appropriate cases, see Fed. Rule Civ. Proc. 42(a); 28 U. S. C. § 1404 (change of venue), and multidistrict proceedings may be available if suits have been brought in different jurisdictions, see 28 U. S. C. § 1407.[6]

## III

We conclude, as did the Court in *American Pipe*, that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to con-

[6] Petitioner's complaints about the burden of defending multiple suits ring particularly hollow in this case, since petitioner opposed respondent's efforts to consolidate his action with *Pendleton*.

tinue as a class action." 414 U. S., at 554. Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action.

In this case, respondent clearly would have been a party in *Pendleton* if that suit had been permitted to continue as a class action. The filing of the *Pendleton* action thus tolled the statute of limitations for respondent and other members of the *Pendleton* class. Since respondent did not receive his Notice of Right to Sue until after the *Pendleton* action was filed, he retained a full 90 days in which to bring suit after class certification was denied. Respondent's suit was thus timely filed.

The judgment of the Court of Appeals is

*Affirmed.*

JUSTICE POWELL, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, concurring.

I join the Court's opinion. It seems important to reiterate the view expressed by JUSTICE BLACKMUN in *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538 (1974). He wrote that our decision "must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights." *Id.*, at 561 (concurring opinion). The tolling rule of *American Pipe* is a generous one, inviting abuse. It preserves for class members a range of options pending a decision on class certification. The rule should not be read, however, as leaving a plaintiff free to raise different or peripheral claims following denial of class status.

In *American Pipe* we noted that a class suit "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who participate in the judgment.

Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation." *Id.*, at 555. When thus notified, the defendant normally is not prejudiced by tolling of the statute of limitations. It is important to make certain, however, that *American Pipe* is not abused by the assertion of claims that differ from those raised in the original class suit. As JUSTICE BLACKMUN noted, a district court should deny intervention under Rule 24(b) to "preserve a defendant whole against prejudice arising from claims for which he has received no prior notice." *Id.*, at 562 (concurring opinion). Similarly, when a plaintiff invokes *American Pipe* in support of a separate lawsuit, the district court should take care to ensure that the suit raises claims that "concern the same evidence, memories, and witnesses as the subject matter of the original class suit," so that "the defendant will not be prejudiced." *Ibid.* Claims as to which the defendant was not fairly placed on notice by the class suit are not protected under *American Pipe* and are barred by the statute of limitations.

In this case, it is undisputed that the *Pendleton* class suit notified petitioner of respondent's claims. The statute of limitations therefore was tolled under *American Pipe* as to those claims.

# BELL *v.* UNITED STATES

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

No. 82–5119. Argued April 25, 1983—Decided June 13, 1983

A provision of the Bank Robbery Act, 18 U. S. C. § 2113(b), imposes criminal sanctions on "[w]hoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association." Petitioner opened an account at a savings and loan institution using his own name, but giving a false address, birth date, and social security number. Later that day, at another branch, he deposited into his account a third party's $10,000 check on which the endorsement had been altered to show petitioner's account number. Subsequently petitioner closed his account and was paid the total balance in cash. He was convicted of violating § 2113(b) after trial in Federal District Court. The Court of Appeals ultimately affirmed, concluding that the statute embraces all felonious takings—including obtaining money under false pretenses.

*Held:* Section 2113(b) is not limited to common-law larceny, but also proscribes petitioner's crime of obtaining money under false pretenses. Pp. 358–362.

(a) The statutory language does not suggest that it covers only common-law larceny. The language "takes and carries away" is traditional common-law language, but represents only one element of common-law larceny. It is entirely consistent with false pretenses, although not a necessary element of that crime. Moreover, other language of § 2113(b) shows an intention to go beyond common-law larceny. Section 2113(b) does not apply to a case of false pretenses in which there is not a taking and carrying away, but it proscribes petitioner's conduct here. Pp. 360–361.

(b) The legislative history of § 2113(b) also suggests that Congress intended the statute to reach petitioner's conduct. The congressional purpose was to protect banks from those who wished to steal banks' assets—even if they used no force in doing so. Pp. 361–362.

678 F. 2d 547, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 362.

*Roy W. Allman*, by appointment of the Court, 459 U. S. 1100, argued the cause and filed a brief for petitioner.

*Associate Attorney General Giuliani* argued the cause for the United States. On the brief were *Solicitor General Lee*, *Assistant Attorney General Jensen*, *Elliott Schulder*, and *Sara Criscitelli*.

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether 18 U. S. C. § 2113(b), a provision of the Federal Bank Robbery Act, proscribes the crime of obtaining money under false pretenses.

## I

On October 13, 1978, a Cincinnati man wrote a check for $10,000 drawn on a Cincinnati bank. He endorsed the check for deposit to his account at Dade Federal Savings & Loan of Miami and mailed the check to an agent there. The agent never received the check. On October 17, petitioner Nelson Bell opened an account at a Dade Federal branch and deposited $50—the minimum amount necessary for new accounts. He used his own name, but gave a false address, birth date, and social security number. Later that day, at another branch, he deposited the Cincinnati man's $10,000 check into this new account. The endorsement had been altered to show Bell's account number. Dade Federal accepted the deposit, but put a 20-day hold on the funds. On November 7, as soon as the hold had expired, Bell returned to the branch at which he had opened the account. The total balance, with accrued interest, was then slightly over $10,080. Bell closed the account and was paid the total balance in cash.

Bell was apprehended and charged with violating 18 U. S. C. § 2113(b). The statute provides, in relevant part:

> "Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank,

> credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both . . . ."

Bell was convicted after a jury trial in the United States District Court for the Southern District of Florida.

On appeal, a divided panel of the United States Court of Appeals for the Fifth Circuit reversed the conviction on the ground that there was insufficient evidence of specific intent. 649 F. 2d 281 (1981). The en banc court granted the Government's petition for rehearing, however, and affirmed the conviction. 678 F. 2d 547 (1982) (Unit B). In so doing, it concluded that the statute embraces all felonious takings—including obtaining money under false pretenses. The court thus rejected Bell's argument that § 2113(b) is limited to common-law larceny. *Id.*, at 548–549. Because this conclusion is inconsistent with that reached in *United States* v. *Feroni*, 655 F. 2d 707, 708–711 (CA6 1981), and *LeMasters* v. *United States*, 378 F. 2d 262, 267–268 (CA9 1967), we granted certiorari to resolve the conflict.[1] 459 U. S. 1034 (1982). We now affirm.

## II

In the 13th century, larceny was limited to trespassory taking: a thief committed larceny only if he feloniously "took and carried away" another's personal property *from his possession*. The goal was more to prevent breaches of the peace than losses of property, and violence was more likely when property was taken from the owner's actual possession.

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[1] Most Courts of Appeals have taken a broad reading of § 2113(b). See, *e. g.*, *United States* v. *Hinton*, 703 F. 2d 672, 675–677 (CA2 1983), cert. denied, *post*, p. 1121; *United States* v. *Shoels*, 685 F. 2d 379, 381–383 (CA10 1982), cert. pending, No. 82–5550; *United States* v. *Simmons*, 679 F. 2d 1042, 1045–1049 (CA3 1982), cert. pending *sub nom. Brown* v. *United States*, No. 82–5201; *United States* v. *Guiffre*, 576 F. 2d 126, 127–128 (CA7), cert. denied, 439 U. S. 833 (1978); cf. *United States* v. *Johnson*, 575 F. 2d 678, 679–680 (CA8 1978) (dictum); but see *United States* v. *Rogers*, 289 F. 2d 433, 437–438 (CA4 1961) (dictum).

As the common law developed, protection of property also became an important goal. The definition of larceny accordingly was expanded by judicial interpretation to include cases where the owner merely was deemed to be in possession. Thus when a bailee of packaged goods broke open the packages and misappropriated the contents, he committed larceny. *The Carrier's Case*, Y. B. Pasch. 13 Edw. IV, f. 9, pl. 5 (Star Ch. and Exch. Ch. 1473), reprinted in 64 Selden Society 30 (1945). The bailor was deemed to be in possession of the contents of the packages, at least by the time of the misappropriation. Similarly, a thief committed "larceny by trick" when he obtained custody of a horse by telling the owner that he intended to use it for one purpose when he in fact intended to sell it and to keep the proceeds. *King* v. *Pear*, 1 Leach 212, 168 Eng. Rep. 208 (Cr. Cas. Res. 1779). The judges accepted the fiction that the owner retained possession of the horse until it was sold, on the theory that the thief had custody only for a limited purpose. *Id.*, at 213–214, 168 Eng. Rep., at 209.

By the late 18th century, courts were less willing to expand common-law definitions. Thus when a bank clerk retained money given to him by a customer rather than depositing it in the bank, he was not guilty of larceny, for the bank had not been in possession of the money. *King* v. *Bazeley*, 2 Leach 835, 168 Eng. Rep. 517 (Cr. Cas. Res. 1799). Statutory crimes such as embezzlement and obtaining property by false pretenses therefore were created to fill this gap.[2]

The theoretical distinction between false pretenses and larceny by trick may be stated simply. If a thief, through his trickery, acquired *title* to the property from the owner, he has obtained property by false pretenses; but if he merely acquired *possession* from the owner, he has committed larceny

[2] The historical development of common-law larceny and related crimes is discussed in detail in several treatises. See, *e. g.*, W. LaFave & A. Scott, Handbook on Criminal Law 618–622 (1972); J. Hall, Theft, Law and Society 3–58 (2d ed. 1952).

by trick. See LaFave & Scott, *supra* n. 2, at 660–662. In this case the parties agree that Bell is guilty of obtaining money by false pretenses. When the teller at Dade Federal handed him $10,080 in cash, Bell acquired title to the money. The only dispute is whether 18 U. S. C. § 2113(b) proscribes the crime of false pretenses, or whether the statute is instead limited to common-law larceny.

## III

### A

Bell's argument in favor of the narrower reading of § 2113(b) relies principally on the statute's use of the traditional common-law language "takes and carries away." He cites the rule of statutory construction that when a federal criminal statute uses a common-law term without defining it, Congress is presumed to intend the common-law meaning. See *United States* v. *Turley*, 352 U. S. 407, 411 (1957). In § 2113(b), however, Congress has not adopted the elements of larceny in common-law terms. The language "takes and carries away" is but one part of the statute and represents only one element of common-law larceny. Other language in § 2113(b), such as "with intent to steal or purloin," has no established meaning at common law. See *Turley*, *supra*, at 411–412. Moreover, "taking and carrying away," although not a necessary element of the crime, is entirely consistent with false pretenses.

Two other aspects of § 2113(b) show an intention to go beyond the common-law definition of larceny. First, common-law larceny was limited to thefts of tangible personal property. This limitation excluded, for example, the theft of a written instrument embodying a chose in action. LaFave & Scott, *supra* n. 2, at 633. Section 2113(b) is thus broader than common-law larceny, for it covers "any property or money or any other thing of value exceeding $100." Second, and of particular relevance to the distinction at issue here, common-law larceny required a theft from the possession of

the owner. When the definition was expanded, it still applied only when the owner was deemed to be in possession. Section 2113(b), however, goes well beyond even this expanded definition. It applies when the property "belong[s] to," or is "in the care, custody, control, management, or possession of," a covered institution.

In sum, the statutory language does not suggest that it covers only common-law larceny. Although § 2113(b) does not apply to a case of false pretenses in which there is not a taking and carrying away, it proscribes Bell's conduct here. The evidence is clear that he "t[ook] and carrie[d] away, with intent to steal or purloin, [over $10,000 that was] in the care, custody, control, management, or possession of" Dade Federal Savings & Loan.

B

The legislative history of § 2113(b) also suggests that Congress intended the statute to reach Bell's conduct. As originally enacted in 1934, the Federal Bank Robbery Act, ch. 304, 48 Stat. 783, governed only robbery—a crime requiring a forcible taking. Congress apparently was concerned with "'gangsters who operate habitually from one State to another in robbing banks.'"[3] S. Rep. No. 537, 73d Cong., 2d Sess., 1 (1934) (quoting Justice Department memorandum); see 78 Cong. Rec. 2946–2947 (1934); H. R. Rep. No. 1461, 73d Cong., 2d Sess., 2 (1934).

By 1937 the concern was broader, for the limited nature of the original Act "'ha[d] led to some incongruous results.'" H. R. Rep. No. 732, 75th Cong., 1st Sess., 1 (1937) (quoting Attorney General's letter to the Speaker). It was possible for a thief to steal a large amount from a bank "'without displaying any force or violence and without putting any one in fear,'" *id.*, at 2, and he would not violate any federal law.

[3] The narrow concern of the 1934 Congress is illustrated in its rejection of a broad bill that would have gone well beyond bank robbery. The rejected bill, for example, explicitly would have covered taking property by false pretenses. S. 2841, 73d Cong., 2d Sess., § 2 (1934).

Congress amended the Act to fill this gap, adding language now found at §§ 2113(a) and (b). Act of Aug. 24, 1937, ch. 747, 50 Stat. 749. Although the term "larceny" appears in the legislative Reports, the congressional purpose plainly was to protect banks from those who wished to steal banks' assets—even if they used no force in doing so.

The congressional goal of protecting bank assets is entirely independent of the traditional distinction on which Bell relies. To the extent that a bank needs protection against larceny by trick, it also needs protection from false pretenses. We cannot believe that Congress wished to limit the scope of the amended Act's coverage, and thus limit its remedial purpose, on the basis of an arcane and artificial distinction more suited to the social conditions of 18th-century England than the needs of 20th-century America. Such an interpretation would signal a return to the "incongruous results" that the 1937 amendment was designed to eliminate.

## IV

We conclude that 18 U. S. C. § 2113(b) is not limited to common-law larceny.[4] Although § 2113(b) may not cover the full range of theft offenses, it covers Bell's conduct here. His conviction therefore was proper, and the judgment of the Court of Appeals accordingly is

*Affirmed.*

JUSTICE STEVENS, dissenting.

Although federal criminal statutes that are intended to fill a void in local law enforcement should be construed broadly, see, *e. g.*, *United States* v. *Staszcuk*, 517 F. 2d 53, 57–58 (CA7 1975) (en banc), I take a different approach to federal

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[4] There are dicta in *Jerome* v. *United States*, 318 U. S. 101 (1943), that suggest a narrow reading of § 2113(b), but our conclusion today is consistent with the *Jerome* holding. The only issue then before the Court was whether the Act's burglary provision, now codified in § 2113(a), proscribed entering a bank to commit a state-law felony.

laws that merely subject the citizen to the risk of prosecution by two different sovereigns. See, *e. g.*, *United States* v. *Altobella*, 442 F. 2d 310, 316 (CA7 1971). When there is no perceivable obstacle to effective state enforcement, I believe federal criminal legislation should be narrowly construed unless it is clear that Congress intended the coverage in dispute. *McElroy* v. *United States*, 455 U. S. 642, 675 (1982) (STEVENS, J., dissenting); see *Jerome* v. *United States*, 318 U. S. 101, 104–105 (1943).

The history of the bank robbery and bank larceny legislation enacted in 1934 and 1937 persuades me that Congress did not intend federal law to encompass the conduct of obtaining funds from a bank with its consent, albeit under false pretenses. The 1934 Act was a response to the spate of armed bank robberies committed by John Dillinger and other traveling gunmen who outwitted and outmaneuvered a series of local police forces as they moved from State to State in the early 1930's.[1] Congress responded to local requests for federal assistance by enacting a statute that prohibited robbery of federal banks, but rejected the section initially passed by the Senate that made larceny by false pretenses a federal

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[1] The Department of Justice explained the need for new legislation largely by reference to the problem of armed robberies, though it recommended a bill broad enough to cover larceny by false pretenses as well. Its memorandum, quoted in the House Report, explains:

"This bill is directed at one of the most serious forms of crime committed by organized gangsters who operate habitually from one State to another—the robbery of banks. From all sections of this country Federal relief has been requested. It is asserted that these criminals are sufficiently powerful and well equipped to defy local police, and to flee beyond the borders of the State before adequate forces can be organized to resist and capture these bandits." H. R. Rep. No. 1461, 73d Cong., 2d Sess., 2 (1934); see S. Rep. No. 537, 73d Cong., 2d Sess., 1 (1934).

Indeed, the 1934 floor debates in the House included a clear reference to one of Dillinger's well-known escapades. Representative Blanton noted that a man might go into a bank with intent to rob, and "he might use one of these new kind of Indiana six shooters carved out of a piece of wood with a pocket knife." 78 Cong. Rec. 8132 (1934).

offense.[2] It is clear that Congress did not intend the federal law to overlap state jurisdiction to any greater extent than was necessary to cope with the specific evil that had given rise to the legislation.[3]

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[2] For the Department of Justice's memoranda to Congress, see H. R. Rep. No. 1461, *supra* n. 1, at 2; S. Rep. No. 537, *supra* n. 1, at 1. The Senate bill provided, in part:

"Whoever, not being entitled to the possession of property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, takes and carries away, or attempts to take and carry away, such property or money or any other thing of value from any place (1) without the consent of such bank, or (2) *with the consent of such bank obtained by the offender by any trick, artifice, fraud, or false or fraudulent representation,* with intent to convert such property or money or any other thing of value to his use or to the use of any individual, association, partnership, or corporation, other than such bank, shall be punished by a fine of not more than $5,000 or imprisonment for not more than 10 years, or both." S. 2841, § 2, 73d Cong., 2d Sess., 78 Cong. Rec. 8132 (1934) (emphasis supplied).

The House Judiciary Committee recommended that § 2, making bank larceny a federal crime, be stricken out. The House accepted the Committee amendment, and the Senate accepted the changes. *Id.*, at 8767, 8776. During floor discussion of the Committee Report, Representative Hatton Sumners, longtime Chairman of the House Judiciary Committee, made clear his reluctance to extend federal criminal jurisdiction. He explained, in opposing a proposed amendment extending the reach of the bill to other governmental institutions: "I may say to the gentleman that we are going rather far in this bill, since all the property is owned, as a rule, by the citizens of the community where the bank is located. The committee was not willing to go further, and the Attorney General did not ask it to go further." *Id.*, at 8133. As a contemporary observer noted, Sumners "sought throughout the session to confine extensions of federal power to those situations where the need to supplement state and local law enforcing agencies had become imperative." A Note on the Racketeering, Bank Robbery, and "Kick-Back" Laws, 1 Law & Contemp. Prob. 445, 448–449 (1934).

[3] The Department of Justice expressly stated in its memorandum:

"There is no intention that the Federal Government shall supersede the State authorities in this class of cases. It will intervene only to cooperate with local forces when it is evident that the latter cannot cope with the criminals." H. R. Rep. No. 1461, *supra* n. 1, at 2.

Three years later the bank robbery statute was amended at the request of Attorney General Cummings. The Attorney General specifically described the anomaly created by the statute's failure to cover larceny by stealth, theft of money from a bank without violence but also clearly without the bank's consent.[4] The amendment—making burglary and "larceny" of federal banks a federal crime—was adopted routinely, without significant comment or debate.[5] It is fair to infer that Congress viewed the amendment as a limited change that was entirely consistent with the intent of the 1934 Act, including the intent of legislators who perceived a danger in encouraging the unnecessary growth of a national police force.

This interpretation of the legislative history was accepted by all of the Members of this Court in *Jerome* v. *United States*, 318 U. S. 101 (1943), a case decided only six years after the passage of the bank larceny statute. The defendant in that case had been convicted in federal court for entering a national bank with intent to utter a forged promissory note. Although the Court was construing a different section of the statute, its discussion of Congress' intent is equally applicable to the section involved in this case.[6] Justice Douglas observed:

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[4] "The fact that the statute is limited to robbery and does not include larceny and burglary has led to some incongruous results. A striking instance arose a short time ago, when a man was arrested in a national bank while walking out of the building with $11,000 of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the employees, without displaying any force or violence and without putting any one in fear—necessary elements of the crime of robbery—and was about to leave the bank when apprehended. As a result, it was not practicable to prosecute him under any Federal statute." H. R. Rep. No. 732, 75th Cong., 1st Sess., 1–2 (1937).

[5] See, *e. g.*, 81 Cong. Rec. 5376–5377 (1937).

[6] The provision construed by the Court made it a federal offense to enter any bank with intent to commit "any felony or larceny." The Court expressly noted that the term "larceny" was defined in the statute itself—a reference to the section at issue here. 318 U. S., at 105, 106.

> "It is difficult to conclude in the face of this history that Congress, having rejected in 1934 an express provision making state felonies federal offenses, reversed itself in 1937 . . . . It is likewise difficult to believe that Congress, through the same clause, adopted by indirection in 1937 much of the fraud provision which it rejected in 1934." *Id.*, at 105–106.

Further, the Court noted, "there is not the slightest indication that the interstate activities of gangsters against national and insured banks had broken down or rendered ineffective enforcement of state laws covering all sorts of felonies." *Id.*, at 107.[7]

Given the strong evidence of Congress' specific, limited intent, I would confine the bank larceny statute to takings without the bank's consent. Although I cannot deny that the Court's construction of the statutory language is plausible, the language remains ambiguous. I would not at this late date repudiate *Jerome*'s understanding of Congress' intent. I therefore respectfully dissent.

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[7] As the Ninth Circuit wrote in *LeMasters* v. *United States*, 378 F. 2d 262, 268 (1967), quoted in full in *United States* v. *Feroni*, 655 F. 2d 707, 710–711 (CA6 1981):

"In the bank situation we see no reason, urgent or otherwise, why Congress in 1937 should have wanted to enter the field of obtaining by false pretenses, duplicating state law which was adequate and effectively enforced, and the duplication of which would bring innumerable cases, most of them small, within the jurisdiction of federal prosecutors and courts. Congress was as aware in 1937 as it was in 1934, when it rejected the unambiguous provision making obtaining by false pretense from a bank [a] federal crime, that such an extension of federal law would serve no purpose except to confuse and dilute state responsibility for local crimes which were being adequately dealt with by state law."

# BUSH *v.* LUCAS

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

No. 81–469. Argued January 19, 1983—Decided June 13, 1983

Petitioner, an aerospace engineer employed at the George C. Marshall Space Flight Center, a facility operated by the National Aeronautics and Space Administration (NASA), made a number of public statements to the news media highly critical of the Center. Subsequently, respondent Director of the Center demoted petitioner for making the public statements on the ground that they were false and misleading. The Federal Employee Appeals Authority upheld the demotion, but the Civil Service Commission's Appeals Review Board, upon reopening the proceeding at petitioner's request, found that the demotion had violated his First Amendment rights. NASA accepted the Board's recommendation that petitioner be restored to his former position retroactively and that he receive backpay. While his administrative appeal from the demotion was pending, petitioner filed an action against respondent in an Alabama state court, seeking to recover damages for violation of his First Amendment rights. Respondent removed the action to Federal District Court, which granted summary judgment for respondent. The Court of Appeals affirmed, holding that petitioner had no cause of action for damages under the First Amendment for retaliatory demotion in view of the available remedies under the Civil Service Commission regulations.

*Held:* Because petitioner's claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, it would be inappropriate for this Court to supplement that regulatory scheme with a new nonstatutory damages remedy. Pp. 374–390.

(a) The federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation even if Congress has not expressly authorized such a remedy. When Congress provides an alternative remedy, it may indicate its intent that this power should not be exercised. In the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation. Pp. 374–380.

(b) The Government's comprehensive scheme protecting civil servants against arbitrary action by supervisors provides meaningful remedies for

employees who may have been unfairly disciplined for making critical comments about their agencies. Given the history of the development of civil service remedies and the comprehensive nature of the remedies currently available, the question in this case is not what remedy the court should provide for a wrong that would otherwise go unredressed, but whether an elaborate remedial system that has been constructed step by step, with careful attention to policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue. This Court declines to create such a remedy because Congress is in a better position to decide whether or not the public interest would be served by creating it. Pp. 380–390.

647 F. 2d 573, affirmed.

STEVENS, J., delivered the opinion for a unanimous Court. MARSHALL, J., filed a concurring opinion, in which BLACKMUN, J., joined, *post*, p. 390.

*William Harvey Elrod, Jr.*, argued the cause and filed briefs for petitioner.

*Deputy Solicitor General Geller* argued the cause for respondent. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General McGrath*, *David A. Strauss*, *Barbara L. Herwig*, and *Wendy M. Keats*.*

JUSTICE STEVENS delivered the opinion of the Court.

Petitioner asks us to authorize a new nonstatutory damages remedy for federal employees whose First Amendment rights are violated by their superiors. Because such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, we conclude that it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy.

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*Briefs of *amici curiae* urging reversal were filed by *Charles B. Wayne* and *Mark H. Lynch* for the American Civil Liberties Union; by *J. Albert Woll*, *Marsha Berzon*, *Laurence Gold*, *Edward J. Hickey*, *Erick Genser*, *James Rosa*, and *David Barr* for the American Federation of Labor and Congress of Industrial Organizations et al.; by *John F. Bufe*, *Lois G. Williams*, and *Michael David Fox* for the National Treasury Employees Union; and by *John C. Keeney, Jr.*, *Joseph M. Hassett*, and *Peter Raven-Hansen* for Representative Schroeder et al.

Petitioner Bush is an aerospace engineer employed at the George C. Marshall Space Flight Center, a major facility operated by the National Aeronautics and Space Administration in Alabama. Respondent Lucas is the Director of the Center. In 1974 the facility was reorganized and petitioner was twice reassigned to new positions. He objected to both reassignments and sought formal review by the Civil Service Commission.[1] In May and June 1975, while some of his administrative appeals were pending, he made a number of public statements, including two televised interviews, that were highly critical of the agency. The news media quoted him as saying that he did not have enough meaningful work to keep him busy, that his job was "a travesty and worthless," and that the taxpayers' money was being spent fraudulently and wastefully at the Center. His statements were reported on local television, in the local newspaper, and in a national press release that appeared in newspapers in at least three other States.[2]

In June 1975 respondent, in response to a reporter's inquiry, stated that he had conducted an investigation and that petitioner's statements regarding his job had "no basis in fact." App. 15. In August 1975 an adverse personnel action was initiated to remove petitioner from his position. Petitioner was charged with "publicly mak[ing] intemperate remarks which were misleading and often false, evidencing a malicious attitude towards Management and generating an environment of sensationalism demeaning to the Government, the National Aeronautics and Space Administration and the personnel of the George C. Marshall Space Flight Center, thereby impeding Government efficiency and econ-

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[1] The record indicates that petitioner filed two appeals from the first reassignment and three appeals from the second. App. to Pet. for Cert. e–3 to e–4. He asserts that he had previously made unsuccessful attempts within the Center to obtain redress. App. 30.

[2] App. to Pet. for Cert. d–2 to d–3 (memorandum opinion of District Court); *id.*, at e–19 (opinion of Federal Employee Appeals Authority).

omy and adversely affecting public confidence in the Government service." He was also informed that his conduct had undermined morale at the Center and caused disharmony and disaffection among his fellow employees.[3] Petitioner had the opportunity to file a written response and to make an oral presentation to agency officials. Respondent then determined that petitioner's statements were false and misleading and that his conduct would justify removal, but that the lesser penalty of demotion was appropriate for a "first offense." *Ibid.* He approved a reduction in grade from GS–14 to GS–12, which decreased petitioner's annual salary by approximately $9,716.

Petitioner exercised his right to appeal to the Federal Employee Appeals Authority. After a 3-day public hearing, the Authority upheld some of the charges and concluded that the demotion was justified. It specifically determined that a number of petitioner's public statements were misleading and that, for three reasons, they "exceeded the bounds of expression protected by the First Amendment." First, petitioner's statements did not stem from public interest, but from his desire to have his position abolished so that he could take early retirement and go to law school. Second, the statements conveyed the erroneous impression that the agency was deliberately wasting public funds, thus discrediting the agency and its employees. Third, there was no legitimate public interest to be served by abolishing petitioner's position.[4]

Two years after the Appeals Authority's decision, petitioner requested the Civil Service Commission's Appeals Review Board to reopen the proceeding. The Board reexamined petitioner's First Amendment claim and, after making a detailed review of the record and the applicable authorities, applied the balancing test articulated in *Pickering* v. *Board*

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[3] *Id.*, at f–2 to f–3, e–19, e–7.

[4] *Id.*, at e–38 to e–39. Petitioner could have obtained judicial review of the Authority's determination by filing suit in a federal district court or in the United States Court of Claims, but did not do so.

*of Education*, 391 U. S. 563 (1968). On the one hand, it acknowledged the evidence tending to show that petitioner's motive might have been personal gain, and the evidence that his statements caused some disruption of the agency's day-to-day routine. On the other hand, it noted that society as well as the individual had an interest in free speech, including "a right to disclosure of information about how tax dollars are spent and about the functioning of government apparatus, an interest in the promotion of the efficiency of the government, and in the maintenance of an atmosphere of freedom of expression by the scientists and engineers who are responsible for the planning and implementation of the nation's space program." Because petitioner's statements, though somewhat exaggerated, "were not wholly without truth, they properly stimulated public debate." Thus the nature and extent of proven disruption to the agency's operations did not "justify abrogation of the exercise of free speech."[5] The Board recommended that petitioner be restored to his former position, retroactively to November 30, 1975, and that he receive backpay. That recommendation was accepted. Petitioner received approximately $30,000 in backpay.

While his administrative appeal was pending, petitioner filed an action against respondent in state court in Alabama seeking to recover damages for defamation and violation of his constitutional rights. Respondent removed the lawsuit to the United States District Court for the Northern District of Alabama, which granted respondent's motion for summary judgment. It held, first, that the defamation claim could not be maintained because, under *Barr* v. *Matteo*, 360 U. S. 564 (1959), respondent was absolutely immune from liability for damages for defamation; and second, that petitioner's demotion was not a constitutional deprivation for which a damages action could be maintained.[6] The United States Court of Appeals for the Fifth Circuit affirmed. 598 F. 2d 958 (1979).

[5] *Id.*, at f–23 to f–25.

[6] *Id.*, at d–2 to d–17.

We vacated that court's judgment, 446 U. S. 914 (1980), and directed that it reconsider the case in the light of our intervening decision in *Carlson* v. *Green*, 446 U. S. 14 (1980). The Court of Appeals again affirmed the judgment against petitioner. It adhered to its previous conclusion that "plaintiff had no cause of action for damages under the First Amendment for retaliatory demotion in view of the available remedies under the Civil Service Commission regulations." 647 F. 2d 573, 574 (1981). It explained that the relationship between the Federal Government and its civil service employees was a special factor counselling against the judicial recognition of a damages remedy under the Constitution in this context.

We assume for purposes of decision that petitioner's First Amendment rights were violated by the adverse personnel action.[7] We also assume that, as petitioner asserts, civil service remedies were not as effective as an individual damages remedy[8] and did not fully compensate him for the harm he suffered.[9] Two further propositions are undisputed.

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[7] Competent decisionmakers may reasonably disagree about the merits of petitioner's First Amendment claim. Compare the opinion of the District Court, App. D to Pet. for Cert., and the opinion of the Atlanta Field Office of the Federal Employees Appeal Authority issued on August 12, 1976, App. E, both rejecting petitioner's claims, with the opinion of the Appeals Review Board issued on July 14, 1978, App. F, finding that the First Amendment had been violated. This question is not before us.

[8] See *Carlson* v. *Green*, 446 U. S. 14, 20–23 (1980) (factors making Federal Tort Claims Act recovery less "effective" than an action under the Constitution to recover damages against the individual official). Petitioner contends that, unlike a damages remedy against respondent individually, civil service remedies against the Government do not provide for punitive damages or a jury trial and do not adequately deter the unconstitutional exercise of authority by supervisors. Brief for Petitioner 27–29.

[9] His attorney's fees were not paid by the Government, and he claims to have suffered uncompensated emotional and dignitary harms. *Id.*, at 24–26. In light of our disposition of this case, we do not need to decide whether such costs could be recovered as compensation in an action brought directly under the Constitution.

Congress has not expressly authorized the damages remedy that petitioner asks us to provide. On the other hand, Congress has not expressly precluded the creation of such a remedy by declaring that existing statutes provide the exclusive mode of redress.

Thus, we assume, a federal right has been violated and Congress has provided a less than complete remedy for the wrong. If we were writing on a clean slate, we might answer the question whether to supplement the statutory scheme in either of two quite simple ways. We might adopt the common-law approach to the judicial recognition of new causes of action and hold that it is the province of the judiciary to fashion an adequate remedy for every wrong that can be proved in a case over which a court has jurisdiction.[10] Or we might start from the premise that federal courts are courts of limited jurisdiction whose remedial powers do not extend beyond the granting of relief expressly authorized by Congress.[11] Under the former approach, petitioner would obviously prevail; under the latter, it would be equally clear that he would lose.

Our prior cases, although sometimes emphasizing one approach and sometimes the other, have unequivocally rejected both extremes. They establish our power to grant relief that is not expressly authorized by statute, but they also remind us that such power is to be exercised in the light of relevant policy determinations made by the Congress. We

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[10] In *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803), Chief Justice Marshall invoked the authority of Blackstone's Commentaries in support of this proposition. Blackstone had written: "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded. . . . [I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress." 3 Commentaries *23, *109.

[11] See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 428 (1971) (Black, J., dissenting).

therefore first review some of the cases establishing our power to remedy violations of the Constitution and then consider the bearing of the existing statutory scheme on the precise issue presented by this case.

## I

The federal courts' power to grant relief not expressly authorized by Congress is firmly established. Under 28 U. S. C. § 1331, the federal courts have jurisdiction to decide all cases "aris[ing] under the Constitution, laws, or treaties of the United States." This jurisdictional grant provides not only the authority to decide whether a cause of action is stated by a plaintiff's claim that he has been injured by a violation of the Constitution, *Bell* v. *Hood*, 327 U. S. 678, 684 (1946), but also the authority to choose among available judicial remedies in order to vindicate constitutional rights. This Court has fashioned a wide variety of nonstatutory remedies for violations of the Constitution by federal and state officials.[12] The cases most relevant to the problem before us are those in which the Court has held that the Constitution itself supports a private cause of action for damages against a federal official. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971); *Davis* v. *Passman*, 442 U. S. 228 (1979); *Carlson* v. *Green*, *supra*.

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[12] See, *e. g.*, *United States* v. *Lee*, 106 U. S. 196 (1882) (ejectment action against federal officers to enforce Takings Clause of Fifth Amendment); *Wiley* v. *Sinkler*, 179 U. S. 58, 64–65 (1900) (damages against state officer for denying plaintiff's right to vote in federal election); *Ex parte Young*, 209 U. S. 123 (1908) (injunctive relief against state official for violation of Fourteenth Amendment); *Weeks* v. *United States*, 232 U. S. 383, 398 (1914) (exclusion in federal criminal case of evidence seized in violation of Fourth Amendment); *Jacobs* v. *United States*, 290 U. S. 13, 16 (1933) (award of interest as well as principal in just compensation claim founded on the Fifth Amendment); *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S. 1, 15–16 (1971) (school busing to remedy unconstitutional racial segregation). See generally Hill, Constitutional Remedies, 69 Colum. L. Rev. 1109, 1124–1127 (1969).

In *Bivens* the plaintiff alleged that federal agents, without a warrant or probable cause, had arrested him and searched his home in a manner causing him great humiliation, embarrassment, and mental suffering. He claimed damages on the theory that the alleged violation of the Fourth Amendment provided an independent basis for relief. The Court upheld the sufficiency of his complaint, rejecting the argument that a state tort action in trespass provided the only appropriate judicial remedy. The Court explained why the absence of a federal statutory basis for the cause of action was not an obstacle to the award of damages:

> "That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty. See *Nixon* v. *Condon*, 286 U. S. 73 (1932); *Nixon* v. *Herndon*, 273 U. S. 536, 540 (1927); *Swafford* v. *Templeton*, 185 U. S. 487 (1902); *Wiley* v. *Sinkler*, 179 U. S. 58 (1900); J. Landynski, Search and Seizure and the Supreme Court 28 *et seq.* (1966); N. Lasson, History and Development of the Fourth Amendment to the United States Constitution 43 *et seq.* (1937); Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in *Bell* v. *Hood*, 117 U. Pa. L. Rev. 1, 8–33 (1968); cf. *West* v. *Cabell*, 153 U. S. 78 (1894); *Lammon* v. *Feusier*, 111 U. S. 17 (1884). Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But 'it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' *Bell* v. *Hood*, 327 U. S., at 684 (footnote omitted). The present case involves no special factors counselling hesitation in the absence of affirma-

> tive action by Congress. We are not dealing with a question of 'federal fiscal policy,' as in *United States* v. *Standard Oil Co.*, 332 U. S. 301, 311 (1947)." 403 U. S., at 395–396.

The Court further noted that there was "no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." *Id.*, at 397.

In his separate opinion concurring in the judgment, Justice Harlan also thought it clear that the power to authorize damages as a remedy for the vindication of a federal constitutional right had not been placed by the Constitution itself exclusively in Congress' hands. *Id.*, at 401–402. Instead, he reasoned, the real question did not relate to "whether the federal courts have the power to afford one type of remedy as opposed to the other, but rather to the criteria which should govern the exercise of our power." *Id.*, at 406. In resolving that question he suggested that "the range of policy considerations we may take into account is at least as broad as the range of those a legislature would consider with respect to an express[ed] statutory authorization of a traditional remedy." *Id.*, at 407. After weighing the relevant policies he agreed with the Court's conclusion that the Government had not advanced any substantial policy consideration against recognizing a federal cause of action for violation of Fourth Amendment rights by federal officials.

In *Davis* v. *Passman*, *supra*, the petitioner, former deputy administrative assistant to a Member of Congress, alleged that she had been discharged because of her sex, in violation of her constitutional right to the equal protection of the laws. We held that the Due Process Clause of the Fifth Amendment gave her a federal constitutional right to be free from official discrimination and that she had alleged a federal cause

of action. In reaching the conclusion that an award of damages would be an appropriate remedy, we emphasized the fact that no other alternative form of judicial relief was available.[13] The Court also was persuaded that the special concerns which would ordinarily militate against allowing recovery from a legislator were fully reflected in respondent's affirmative defense based on the Speech or Debate Clause of the Constitution. *Id.*, at 246. We noted the absence of any explicit congressional declaration that persons in petitioner's position may not recover damages from those responsible for their injury. *Id.*, at 246–247.

*Carlson* v. *Green*, 446 U. S. 14 (1980), involved a claim that a federal prisoner's Eighth Amendment rights had been violated. The prisoner's mother brought suit on behalf of her son's estate, alleging that federal prison officials were responsible for his death because they had violated their constitutional duty to provide him with proper medical care after he suffered a severe asthmatic attack. Unlike *Bivens* and *Davis*, the *Green* case was one in which Congress had provided a remedy, under the Federal Tort Claims Act, against the United States for the alleged wrong. 28 U. S. C. § 2671 *et seq.* As is true in this case, that remedy was not as completely effective as a *Bivens*-type action based directly on the Constitution.

The Court acknowledged that a *Bivens* action could be defeated in two situations, but found that neither was present. First, the Court could discern "'no special factors counselling hesitation in the absence of affirmative action by Congress.'" 446 U. S., at 18–19, citing *Bivens*, 403 U. S., at 396, and *Davis*, *supra*, at 245. Second, there was no congressional

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[13] "Moreover, since respondent is no longer a Congressman, see n. 1, *supra*, equitable relief in the form of reinstatement would be unavailing. And there are available no other alternative forms of judicial relief. For Davis, as for Bivens, 'it is damages or nothing.' *Bivens*, *supra*, at 410 (Harlan, J., concurring in judgment)." 442 U. S., at 245.

determination foreclosing the damages claim and making the Federal Tort Claims Act exclusive. 446 U. S., at 19, and n. 5. No statute expressly declared the FTCA remedy to be a substitute for a *Bivens* action; indeed, the legislative history of the 1974 amendments to the FTCA "made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." 446 U. S., at 19–20.

This much is established by our prior cases. The federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation. When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the courts' power should not be exercised. In the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.

Congress has not resolved the question presented by this case by expressly denying petitioner the judicial remedy he seeks or by providing him with an equally effective substitute.[14] There is, however, a good deal of history that is relevant to the question whether a federal employee's attempt to recover damages from his superior for violation of his First Amendment rights involves any "special factors counselling hesitation." When those words were first used in *Bivens*, *supra*, at 396, we illustrated our meaning by referring to

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[14] We need not reach the question whether the Constitution itself requires a judicially fashioned damages remedy in the absence of any other remedy to vindicate the underlying right, unless there is an express textual command to the contrary. Cf. *Davis* v. *Passman*, 442 U. S. 228, 246 (1979). The existing civil service remedies for a demotion in retaliation for protected speech are clearly constitutionally adequate. See *infra*, at 386–388.

*United States* v. *Standard Oil Co.*, 332 U. S. 301, 311, 316 (1947), and *United States* v. *Gilman*, 347 U. S. 507 (1954).

In the *Standard Oil* case the Court had been asked to authorize a new damages remedy for the Government against a tortfeasor who had injured a soldier, imposing hospital expenses on the Government and depriving it of his services. Although, as Justice Jackson properly noted in dissent, the allowance of recovery would not have involved any usurpation of legislative power, 332 U. S., at 318, the Court nevertheless concluded that Congress as "the custodian of the national purse" should make the necessary determination of federal fiscal policy.[15] The Court refused to create a damages remedy, which would be "the instrument for determining and establishing the federal fiscal and regulatory policies which the Government's executive arm thinks should prevail in a situation not covered by traditionally established liabilities." *Id.*, at 314.

Similarly, in *Gilman*, the Court applied the *Standard Oil* rationale to reject the Government's attempt to recover indemnity from one of its employees after having been held liable under the FTCA for the employee's negligence. As the Court noted: "The relations between the United States and its employees have presented a myriad of problems with which the Congress over the years has dealt. . . . Government employment gives rise to policy questions of great im-

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[15] "Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours. Congress, not this Court or the other federal courts, is the custodian of the national purse. By the same token it is the primary and most often the exclusive arbiter of federal fiscal affairs. And these comprehend, as we have said, securing the treasury or the government against financial losses however inflicted, including requiring reimbursement for injuries creating them, as well as filling the treasury itself." 332 U. S., at 314–315.

The Court further noted that the type of harm for which the Executive sought judicial redress was not new, and that Congress presumably knew of it but had not exercised its undoubted power to authorize a damages action. *Id.*, at 315–316.

port, both to the employees and to the Executive and Legislative Branches." 347 U. S., at 509. The decision regarding indemnity involved questions of employee discipline and morale, fiscal policy, and the efficiency of the federal service. Hence, the Court wrote, the reasons for deferring to congressional policy determinations were even more compelling than in *Standard Oil*.

> "Here a complex of relations between federal agencies and their staffs is involved. Moreover, the claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them." 347 U. S., at 511–513.

The special factors counselling hesitation in the creation of a new remedy in *Standard Oil* and *Gilman* did not concern the merits of the particular remedy that was sought. Rather, they related to the question of who should decide whether such a remedy should be provided. We should therefore begin by considering whether there are reasons for allowing Congress to prescribe the scope of relief that is made available to federal employees whose First Amendment rights have been violated by their supervisors.

## II

Unlike *Standard Oil* and *Gilman*, this case concerns a claim that a constitutional right has been violated. Nevertheless, just as those cases involved "federal fiscal policy" and the relations between the Government and its employees, the ultimate question on the merits in this case may appropriately be characterized as one of "federal personnel

policy." When a federal civil servant is the victim of a retaliatory demotion or discharge because he has exercised his First Amendment rights, what legal remedies are available to him?

The answer to that question has changed dramatically over the years. Originally the answer was entirely a matter of Executive discretion. During the era of the patronage system that prevailed in the Federal Government prior to the enactment of the Pendleton Act in 1883, 22 Stat. 403, the federal employee had no legal protection against political retaliation. Indeed, the exercise of the First Amendment right to support a political candidate opposing the party in office would routinely have provided an accepted basis for discharge.[16] During the past century, however, the job security of federal employees has steadily increased.

In the Pendleton Act Congress created the Civil Service Commission and provided for the selection of federal civil servants on a merit basis by competitive examination. Although the statute did not address the question of removals in general,[17] it provided that no employee in the public service could be required to contribute to any political fund or fired

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[16] The Report of the Committee on Civil Service and Retrenchment submitted by Senator Pendleton on May 15, 1882, contained a vivid description of the patronage system, reading in part as follows:

"The fact is confessed by all observers and commended by some that 'to the victors belong the spoils;' that with each new administration comes the business of distributing patronage among its friends. . . . [The President] is to do what some predecessor of his has left undone, or to undo what others before him have done; to put this man up and that man down, as the system of political rewards and punishments shall seem to him to demand." S. Rep. No. 576, 47th Cong., 1st Sess., 2 (1882).

See generally House Committee on Post Office and Civil Service, History of Civil Service Merit Systems of the United States and Selected Foreign Countries, 94th Cong., 2d Sess., 26–173 (1976).

[17] See S. Rep. No. 576, *supra* n. 16, at 9; cf. H. R. Rep. No. 1826, 47th Cong., 2d Sess., 1–2 (1882) (rejected provisions of House bill permitting removals only for cause).

for refusing to do so, and it prohibited officers from attempting to influence or coerce the political actions of others.[18]

Congressional attention to the problem of politically motivated removals was again prompted by the issuance of Executive Orders by Presidents Roosevelt and Taft that forbade federal employees to communicate directly with Congress without the permission of their supervisors.[19] These "gag

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[18] Section 13 provided:

"No officer or employee of the United States mentioned in this act shall discharge, or promote, or degrade, or in manner change the official rank or compensation of any other officer or employee, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose." 22 Stat. 407.

Other sections made it unlawful for Government employees to solicit political contributions from, and to give such contributions to, other Government employees, §§ 11, 14, and to receive any political contributions on Government premises, § 12. Section 2 required the Civil Service Commission to promulgate rules providing, *inter alia*, "that no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so," and also "that no person in said service has any right to use his official authority or influence to coerce the political action of any person or body." 22 Stat. 404. See 5 U. S. C. § 2302(b)(3) (1982 ed.); 5 U. S. C. §§ 7321–7323.

[19] In 1906 President Roosevelt issued Executive Order No. 1142, which provided:

"All officers and employees of the United States of every description, serving in or under any of the Executive Departments or independent Government establishments, and whether so serving in or out of Washington, are hereby forbidden, either directly or indirectly, individually or through associations, to solicit an increase of pay or to influence or attempt to influence in their own interest any other legislation whatever, either before Congress or its committees, or in any way save through the heads of the Departments or independent Government establishments in or under which they serve, on penalty of dismissal from the Government service. Theodore Roosevelt."

President Taft issued another Order, Executive Order No. 1514, in 1909:

"It is hereby ordered that no bureau, office, or division chief, or subordinate in any department of the Government, and no officer of the Army or Navy or Marine Corps stationed in Washington, shall apply to either House of Congress, or to any committee of either House of Congress, or to

orders," enforced by dismissal, were cited by several legislators as the reason for enacting the Lloyd-La Follette Act in 1912, 37 Stat. 539, 555, § 6.[20] That statute provided that "no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing . . . ."[21] Moreover, it explicitly guaranteed that the right of civil servants "to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with."[22] As the House Report ex-

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any Member of Congress, for legislation or for appropriations, or for congressional action of any kind, except with the consent and knowledge of the head of the department; nor shall any such person respond to any request for information from either House of Congress, or any committee of either House of Congress, or any member of Congress, except through, or as authorized by, the head of his department. William H. Taft."

See 48 Cong. Rec. 4513, 5223, 5634, 5635, 10673, 10729–10730 (1912).

[20] See *id.*, at 4513 (remarks of Rep. Gregg) ("[I]t is for the purpose of wiping out the existence of this despicable 'gag rule' that this provision is inserted. The rule is unjust, unfair, and against the provisions of the Constitution of the United States, which provides for the right of appeal and the right of free speech to all its citizens"). A number of the bill's proponents asserted that the gag rule violated the First Amendment rights of civil servants. See, *e. g.*, *id.*, at 4653 (remarks of Rep. Calder); *id.*, at 4738 (remarks of Rep. Blackmon); *id.*, at 5201 (remarks of Rep. Prouty); *id.*, at 5223 (remarks of Rep. O'Shaunessy); *id.*, at 5634 (remarks of Rep. Lloyd); *id.*, at 5637–5638 (remarks of Rep. Wilson); *id.*, at 10671 (remarks of Sen. Ashurst); *id.*, at 10673 (remarks of Sen. Reed); *id.*, at 10793 (remarks of Sen. Smith); *id.*, at 10799 (remarks of Sen. La Follette).

[21] The statute also required notice and reasons and an opportunity for the employee to answer the charges in writing with supporting affidavits. These requirements had previously been adopted by President McKinley in an Executive Order issued in 1897, but they were not judicially enforceable. History of Civil Service Merit Systems, *supra* n. 16, at 202–203.

[22] This provision was accompanied by a more specific guarantee that membership in any independent association of postal employees seeking improvements in wages, hours, and working conditions, or the presentation to Congress of any grievance, "shall not constitute or be cause for reduction in rank or compensation or removal of such person or groups of persons from said service."

plained, this legislation was intended "to protect employees against oppression and in the right of free speech and the right to consult their representatives."[23] In enacting the Lloyd-La Follette Act, Congress weighed the competing policy considerations and concluded that efficient management of Government operations did not preclude the extension of free speech rights to Government employees.[24]

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[23] H. R. Rep. No. 388, 62d Cong., 2d Sess., 7 (1912).

[24] Members of the House, which originated § 6, suggested that it would improve the efficiency and morale of the civil service. "It will do away with the discontent and suspicion which now exists among the employees and will restore that confidence which is necessary to get the best results from the employees." 48 Cong. Rec. 4654 (1912) (remarks of Rep. Calder); see *id.*, at 5635 (remarks of Rep. Lloyd).

The Senate Committee initially took a different position, urging in its Report that the relevant language, see *id.*, at 10732 (House version) be omitted entirely:

"As to the last clause in section 6, it is the view of the committee that all citizens have a constitutional right as such to present their grievances to Congress or Members thereof. But governmental employees occupy a position relative to the Government different from that of ordinary citizens. Upon questions of interest to them as citizens, governmental employees have a right to petition Congress direct. A different rule should prevail with regard to their presentation of grievances connected with their relation to the Government as employees. In that respect good discipline and the efficiency of the service requires that they present their grievances through the proper administrative channels." S. Rep. No. 955, 62d Cong., 2d Sess., 21 (1912).

As Senator Bourne explained, "it was believed by the committee that to recognize the right of the individual employee to go over the head of his superior and go to Members of Congress on matters appertaining to his own particular grievances, or for his own selfish interest, would be detrimental to the service itself; that it would absolutely destroy the discipline necessary for good service." 48 Cong. Rec. 10676 (1912).

This view did not prevail. After extended discussion in floor debate concerning the right to organize and the right to present grievances to Congress, *id.*, at 10671–10677, 10728–10733, 10792–10804, the Committee offered and the Senate approved a compromise amendment to the House version—guaranteeing both rights at least in part—which was subsequently enacted into law. *Id.*, at 10804; 37 Stat. 555.

In the ensuing years, repeated consideration of the conflicting interests involved in providing job security, protecting the right to speak freely, and maintaining discipline and efficiency in the federal work force gave rise to additional legislation,[25] various Executive Orders,[26] and the promulgation of detailed regulations by the Civil Service Commission.[27] Federal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed. They apply to a multitude of personnel decisions that are made daily by federal agencies.[28]

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[25] Among the most significant are the Veterans Preference Act of 1944, 58 Stat. 390 (protecting veterans in federal employment by extending the 1912 Act's procedural and substantive protections to adverse actions other than removals, and adding the right to respond orally and to appeal to the Civil Service Commission); the Back Pay Act of 1948, 62 Stat. 354 (extending the protections against removal contained in the 1912 Act to all employees who were suspended without pay; permitting backpay awards to certain categories of employees who were improperly removed or suspended and to victims of improper reductions in force); the Back Pay Act of 1966, 81 Stat. 203 (extending the right to backpay and lost benefits to every employee affected by a personnel action subsequently found to be unjustified); and the Civil Service Reform Act of 1978, 92 Stat. 1134 (shifting adjudicative functions of the Civil Service Commission to the Merit Systems Protection Board, modifying administrative appeals procedures, and providing new protections for so-called "whistleblowers").

[26] Exec. Order No. 10988, § 14, 3 CFR 521 (1959–1963 Comp.), and Exec. Order No. 11491, § 22, 3 CFR 861 (1966–1970 Comp.), printed in note following 5 U. S. C. § 7301, gave all employees in the competitive service the right to appeal adverse actions to the Civil Service Commission, and made the administrative remedy applicable to adverse personnel actions other than removal and suspension without pay.

[27] See 5 CFR §§ 752, 772 (1975).

[28] Not all personnel actions are covered by this system. For example, there are no provisions for appeal of either suspensions for 14 days or less, 5 U. S. C. § 7503 (1982 ed.), or adverse actions against probationary employees, § 7511. In addition, certain actions by supervisors against federal employees, such as wiretapping, warrantless searches, or uncompensated takings, would not be defined as "personnel actions" within the statutory scheme.

Constitutional challenges to agency action, such as the First Amendment claims raised by petitioner, are fully cognizable within this system. As the record in this case demonstrates, the Government's comprehensive scheme is costly to administer, but it provides meaningful remedies for employees who may have been unfairly disciplined for making critical comments about their agencies.[29]

A federal employee in the competitive service may be removed or demoted "only for such cause as will promote the efficiency of the service."[30] The regulations applicable at the time of petitioner's demotion in 1975,[31] which are substantially similar to those now in effect, required that an employee be given 30 days' written notice of a proposed discharge, suspension, or demotion, accompanied by the agency's reasons and a copy of the charges. The employee then had the right to examine all disclosable materials that formed the basis of the proposed action, 5 CFR § 752.202(a) (1975),

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[29] Petitioner received retroactive reinstatement and $30,000 in backpay. An empirical study found that approximately one quarter of the adverse actions in the federal civil service were contested. Merrill, Procedures for Adverse Actions Against Federal Employees, 59 Va. L. Rev. 196, 198–199 (1973). In 1970, agency appeals succeeded in 20% of removal cases and 24% of demotion cases. Before the Civil Service Commission, 47% of those employees who appealed demotions and 24% of those who contested removal were successful. *Id.*, at 204, n. 35.

[30] Prior to the enactment of the Civil Service Reform Act of 1978, this protection was accorded in part by statute, 5 U. S. C. § 7501(a) (removals and suspensions without pay of non-preference-eligible employees); § 7512(a) (removals, suspensions without pay, reductions in grade or pay, and other adverse actions against preference-eligible employees), and in part by Executive Orders, see n. 26, *supra*, implemented in Civil Service Commission regulations, 5 CFR §§ 752.104(a), 752.201 (1975) (adverse actions, including reductions in grade or pay, against covered employees, including non-preference-eligibles). The 1978 amendments retained the general rule, 5 U. S. C. § 7513(a) (1982 ed.), and supplemented it by specifying certain "prohibited personnel practices." § 2302.

[31] Various aspects of the regulations discussed in text were added at different times. See generally Merrill, *supra* n. 29, at 214–218.

the right to answer the charges with a statement and supporting affidavits, and the right to make an oral nonevidentiary presentation to an agency official. § 752.202(b).[32] The regulations required that the final agency decision be made by an official higher in rank than the official who proposed the adverse action, § 752.202(f). The employee was entitled to notification in writing stating which of the initial reasons had been sustained. *Ibid.*; 5 U. S. C. § 7501(b)(4).

The next step was a right to appeal to the Civil Service Commission's Federal Employee Appeals Authority. 5 CFR §§ 752.203, 772.101 (1975).[33] The Appeals Authority was required to hold a trial-type hearing at which the employee could present witnesses, cross-examine the agency's witnesses, and secure the attendance of agency officials, § 772.307(c),[34] and then to render a written decision, § 772.-309(a). An adverse decision by the FEAA was judicially reviewable in either federal district court or the Court of Claims.[35] In addition, the employee had the right to ask

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[32] Under the statute, before and after the 1978 amendments, the agency has the discretionary authority to provide an evidentiary hearing. 5 U. S. C. § 7501(b); 5 U. S. C. § 7513(c) (1982 ed.); see 5 CFR § 752.404(g) (1983). As amended in 1978, the statute gives the employee the right to representation by an attorney or other person. 5 U. S. C. § 7513(b)(3) (1982 ed.); see 5 CFR § 752.404(e) (1983).

[33] The 1978 Civil Service Reform Act gave the Commission's adjudicative functions to the Merit Systems Protection Board (MSPB). 5 U. S. C. §§ 1205, 7543(d), 7701 (1982 ed.).

[34] The Commission's regulations did not specify which party carried the burdens of production and persuasion. Nevertheless, participants in the process and reviewing courts assumed that the burden was on the agency to prove that the adverse action was justified. Merrill, *supra* n. 29, at 251; Johnson & Stoll, Judicial Review of Federal Employee Dismissals and Other Adverse Actions, 57 Cornell L. Rev. 178, 192–193 (1972).

[35] Under the law now in effect, the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals from the MSPB. 5 U. S. C. § 7703 (1982 ed.); Federal Courts Improvement Act of 1982, § 127(a), Pub. L. 97–164, 96 Stat. 37, 28 U. S. C. § 1295 (1982 ed.).

the Commission's Appeals Review Board to reopen an adverse decision by the FEAA. § 772.310.

If the employee prevailed in the administrative process or upon judicial review, he was entitled to reinstatement with retroactive seniority. § 752.402. He also had a right to full backpay, including credit for periodic within-grade or step increases and general pay raises during the relevant period, allowances, differentials, and accumulated leave. § 550.803. Congress intended that these remedies would put the employee "in the same position he would have been in had the unjustified or erroneous personnel action not taken place."[36]

Given the history of the development of civil service remedies and the comprehensive nature of the remedies currently available, it is clear that the question we confront today is quite different from the typical remedial issue confronted by a common-law court. The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue. That question obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff. The policy judgment should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for violations of employees' First Amendment rights.

The costs associated with the review of disciplinary decisions are already significant—not only in monetary terms, but also in the time and energy of managerial personnel who must defend their decisions. Respondent argues that supervisory personnel are already more hesitant than they should be in administering discipline, because the review that en-

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[36] S. Rep. No. 1062, 89th Cong., 2d Sess., 1 (1966).

sues inevitably makes the performance of their regular duties more difficult. Brief for Respondent 37–41. Whether or not this assessment is accurate, it is quite probable that if management personnel face the added risk of personal liability for decisions that they believe to be a correct response to improper criticism of the agency, they would be deterred from imposing discipline in future cases. In all events, Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service. Not only has Congress developed considerable familiarity with balancing governmental efficiency and the rights of employees, but it also may inform itself through factfinding procedures such as hearings that are not available to the courts.

Nor is there any reason to discount Congress' ability to make an evenhanded assessment of the desirability of creating a new remedy for federal employees who have been demoted or discharged for expressing controversial views. Congress has a special interest in informing itself about the efficiency and morale of the Executive Branch. In the past it has demonstrated its awareness that lower-level Government employees are a valuable source of information, and that supervisors might improperly attempt to curtail their subordinates' freedom of expression.[37]

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[37] There is a remarkable similarity between comments made in Congress in 1912, when the Lloyd-La Follette Act was passed, and in 1978, when the Civil Service Reform Act was enacted. In 1912, Representative Calder stated: "There are always two sides to every question, and surely if any man is competent to express an opinion regarding the needs of the postal service it is the men who perform the actual work. If anyone is competent to make known unsatisfactory working conditions, who, might I ask, is better qualified to lay his proper grievances before Congress than the men who have complaints to make and who suffer from these grievances?" 48 Cong. Rec. 4653 (1912). In 1978, a Senate Committee Print stated: "Federal employees are often the source of information about agency operations suppressed by their superiors. Since they are much closer to the actual working situation than top agency officials, they have testified before Con-

Thus, we do not decide whether or not it would be good policy to permit a federal employee to recover damages from a supervisor who has improperly disciplined him for exercising his First Amendment rights. As we did in *Standard Oil*, we decline "to create a new substantive legal liability without legislative aid and as at the common law," 332 U. S., at 302, because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it.

The judgment of the Court of Appeals is

*Affirmed.*

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN joins, concurring.

I join the Court's opinion because I agree that there are "special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 396 (1971). I write separately only to emphasize that in my view a different case would be presented if Congress had not created a comprehensive scheme that was specifically designed to provide full compensation to civil service employees who are discharged or disciplined in violation of their First Amendment rights, cf. *Carlson* v. *Green*, 446 U. S. 14, 23 (1980); *Sonntag* v. *Dooley*, 650 F. 2d 904, 907 (CA7 1981), and that affords a remedy that is substantially as effective as a damages action.

Although petitioner may be correct that the administrative procedure created by Congress, unlike a *Bivens* action,* does

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gress, spoken to reporters, and informed the public. Mid-level employees provide much of the information Congress needs to evaluate programs, budgets, and overall agency performance." Senate Committee on Governmental Affairs, The Whistleblowers, 95th Cong., 2d Sess., 40 (Comm. Print 1978). See also H. R. Rep. No. 95–1403, pp. 386–387 (1978); S. Rep. No. 95–969, p. 8 (1978).

*See, *e. g.*, *Halperin* v. *Kissinger*, 196 U. S. App. D. C. 285, 300–301, 606 F. 2d 1192, 1207–1208 (1979), aff'd in pertinent part by an equally divided Court, 452 U. S. 713 (1981).

not permit recovery for loss due to emotional distress and mental anguish, Congress plainly intended to provide what it regarded as full compensatory relief when it enacted the Back Pay Act of 1966, 5 U. S. C. § 5596 (1982 ed.). The Act was designed to "pu[t] the employee in the same position he would have been in had the unjustified or erroneous personnel action not taken place." See S. Rep. No. 1062, 89th Cong., 2d Sess., 1 (1966). See H. R. Rep. No. 32, 89th Cong., 1st Sess., 5 (1965); cf. *Sampson* v. *Murray*, 415 U. S. 61, 82–83 (1974). Moreover, there is nothing in today's decision to foreclose a federal employee from pursuing a *Bivens* remedy where his injury is not attributable to personnel actions which may be remedied under the federal statutory scheme.

I cannot agree with petitioner's assertion that civil service remedies are substantially less effective than an individual damages remedy. See *ante*, at 372. To begin with, the procedure provided by the civil service scheme is in many respects preferable to the judicial procedure under a *Bivens* action. See Brief for Respondent 18–21. For example, the burden of proof in an action before the Civil Service Commission (now the Merit Systems Protection Board) must be borne by the agency, rather than by the discharged employee. See Civil Service Commission, Conducting Hearings on Employee Appeals 11 (1968); cf. *Finfer* v. *Caplin*, 344 F. 2d 38, 41 (CA2), cert. denied, 382 U. S. 883 (1965); *Pelicone* v. *Hodges*, 116 U. S. App. D. C. 32, 34, 320 F. 2d 754, 756 (1963). Moreover, the employee is not required to overcome the qualified immunity of executive officials as he might be required to in a suit for money damages. See *Butz* v. *Economou*, 438 U. S. 478 (1978). Finally, an administrative action is likely to prove speedier and less costly than a lawsuit. These advantages are not clearly outweighed by the obvious and significant disadvantages of the civil service procedure—that it denies the claimant the option of a jury trial, see *Carlson* v. *Green*, *supra*, at 22–23, and that it affords

only limited judicial review rather than a full trial in federal court, see *Chandler* v. *Roudebush*, 425 U. S. 840, 851–853 (1976).

As the Court emphasizes, "[t]he question is not what remedy the court should provide for a wrong that would otherwise go unredressed." *Ante*, at 388. The question is whether an alternative remedy should be provided when the wrong may already be redressed under "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." *Ibid.* I agree that a *Bivens* remedy is unnecessary in this case.

Syllabus

# NATIONAL LABOR RELATIONS BOARD *v.* TRANSPORTATION MANAGEMENT CORP.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 82–168. Argued March 28, 1983—Decided June 15, 1983

Acting on unfair labor practice charges filed by an employee of respondent, petitioner National Labor Relations Board found that respondent had discharged the employee, a busdriver, for his union activities, in violation of §§ 8(a)(1) and 8(a)(3) of the National Labor Relations Act. The Board applied its rule that the General Counsel has the burden of persuading the Board by a preponderance of the evidence that an antiunion animus contributed to the employer's decision to discharge the employee, and the employer can avoid the conclusion that it violated the Act by proving by a preponderance of the evidence that the employee would have been fired for permissible reasons even if he had not been involved in protected union activities. The Board concluded that respondent failed to carry its burden of persuading the Board that the employee's discharge would have taken place, even if he had not been engaged in protected union activities, because of his practice of leaving his keys in the bus and taking unauthorized breaks. The Court of Appeals refused to enforce the Board's order, based on its view that it was error to place the burden on the employer, and that the General Counsel carried the burden of proving not only that a forbidden motivation contributed to the discharge but also that the discharge would not have taken place independently of the employee's protected conduct.

*Held:*

1. The burden of proof placed on the employer under the Board's rule is consistent with §§ 8(a)(1) and 8(a)(3), as well as with § 10(c) of the Act, which provides that the Board must find an unfair labor practice by a "preponderance of the testimony." The Board's construction of the statute, which is not mandated by the Act, extends to the employer what the Board considers to be an affirmative defense but does not change or add to the elements of the unfair labor practice that the General Counsel has the burden of proving under § 10(c). This is a permissible construction, and the Board's allocation of the burden of proof is reasonable. Cf. *Mt. Healthy City Board of Education* v. *Doyle*, 429 U. S. 274. Pp. 397–404.

2. The Board was justified in this case in finding that the employee would not have been discharged had respondent not considered his pro-

tected activities. Such finding was supported by substantial evidence on the record considered as a whole. Pp. 404–405.

674 F. 2d 130, reversed.

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

*Deputy Solicitor General Wallace* argued the cause for petitioner. With him on the brief were *Solicitor General Lee*, *Carolyn F. Corwin*, *Norton J. Come*, and *Linda Sher*.

*Martin Ames* argued the cause and filed briefs for respondent.*

JUSTICE WHITE delivered the opinion of the Court.

The National Labor Relations Act (NLRA or Act), 29 U. S. C. § 151 *et seq.* (1976 ed. and Supp. V), makes unlawful the discharge of a worker because of union activity, §§ 8(a)(1), (3), as amended, 61 Stat. 140, 29 U. S. C. §§ 158(a)(1), (3),[1] but employers retain the right to discharge workers for any number of other reasons unrelated to the employee's union activities. When the General Counsel of the National Labor Relations Board (Board) files a complaint alleging that an employee was discharged because of his union activities, the employer

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*Briefs of *amici curiae* urging affirmance were filed by *John W. Noble, Jr.*, and *Stephen A. Bokat* for the Chamber of Commerce of the United States; and by *Joseph D. Alviani* for the New England Legal Foundation et al.

Briefs of *amici curiae* were filed by *J. Albert Woll*, *Michael H. Gottesman*, *Robert M. Weinberg*, and *Laurence Gold* for the American Federation of Labor and Congress of Industrial Organizations; and by *Gerard C. Smetana* and *Gary L. Starkman* for the Council on Labor Law Equality.

[1] Section 8(a), as set forth in 29 U. S. C. § 158(a), provides, in relevant part:

"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 . . . ."

may assert legitimate motives for his decision. In *Wright Line*, 251 N. L. R. B. 1083 (1980), enf'd, 662 F. 2d 899 (CA1 1981), cert. denied, 455 U. S. 989 (1982), the Board reformulated the allocation of the burden of proof in such cases. It determined that the General Counsel carried the burden of persuading the Board that an antiunion animus contributed to the employer's decision to discharge an employee, a burden that does not shift, but that the employer, even if it failed to meet or neutralize the General Counsel's showing, could avoid the finding that it violated the statute by demonstrating by a preponderance of the evidence that the worker would have been fired even if he had not been involved with the union. The question presented in this case is whether the burden placed on the employer in *Wright Line* is consistent with §§ 8(a)(1) and 8(a)(3), as well as with § 10(c) of the NLRA, 29 U. S. C. § 160(c), which provides that the Board must find an unfair labor practice by a "preponderance of the testimony."[2]

Prior to his discharge, Sam Santillo was a busdriver for respondent Transportation Management Corp. On March 19, 1979, Santillo talked to officials of the Teamster's Union about organizing the drivers who worked with him. Over

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[2] Section 10(c) provides, in relevant part:

"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . . . If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." 29 U. S. C. § 160(c).

the next four days Santillo discussed with his fellow drivers the possibility of joining the Teamsters and distributed authorization cards. On the night of March 23, George Patterson, who supervised Santillo and the other drivers, told one of the drivers that he had heard of Santillo's activities. Patterson referred to Santillo as two-faced, and promised to get even with him.

Later that evening Patterson talked to Ed West, who was also a busdriver for respondent. Patterson asked, "What's with Sam and the Union?" Patterson said that he took Santillo's actions personally, recounted several favors he had done for Santillo, and added that he would remember Santillo's activities when Santillo again asked for a favor. On Monday, March 26, Santillo was discharged. Patterson told Santillo that he was being fired for leaving his keys in the bus and taking unauthorized breaks.

Santillo filed a complaint with the Board alleging that he had been discharged because of his union activities, contrary to §§ 8(a)(1) and 8(a)(3) of the NLRA. The General Counsel issued a complaint. The Administrative Law Judge (ALJ) determined by a preponderance of the evidence that Patterson clearly had an antiunion animus and that Santillo's discharge was motivated by a desire to discourage union activities. The ALJ also found that the asserted reasons for the discharge could not withstand scrutiny. Patterson's disapproval of Santillo's practice of leaving his keys in the bus was clearly a pretext, for Patterson had not known about Santillo's practice until after he had decided to discharge Santillo; moreover, the practice of leaving keys in buses was commonplace among respondent's employees. Respondent identified two types of unauthorized breaks, coffeebreaks and stops at home. With respect to both coffeebreaks and stopping at home, the ALJ found that Santillo was never cautioned or admonished about such behavior, and that the employer had not followed its customary practice of issuing three written warnings before discharging a driver. The

ALJ also found that the taking of coffeebreaks during working hours was normal practice, and that respondent tolerated the practice unless the breaks interfered with the driver's performance of his duties. In any event, said the ALJ, respondent had never taken any adverse personnel action against an employee because of such behavior. While acknowledging that Santillo had engaged in some unsatisfactory conduct, the ALJ was not persuaded that Santillo would have been fired had it not been for his union activities.

The Board affirmed, adopting with some clarification the ALJ's findings and conclusions and expressly applying its *Wright Line* decision. It stated that respondent had failed to carry its burden of persuading the Board that the discharge would have taken place had Santillo not engaged in activity protected by the Act. The Court of Appeals for the First Circuit, relying on its previous decision rejecting the Board's *Wright Line* test, *NLRB* v. *Wright Line*, 662 F. 2d 899 (1981), refused to enforce the Board's order and remanded for consideration of whether the General Counsel had proved by a preponderance of the evidence that Santillo would not have been fired had it not been for his union activities. 674 F. 2d 130 (1982). We granted certiorari, 459 U. S. 1014 (1982), because of conflicts on the issue among the Courts of Appeals.[3] We now reverse.

Employees of an employer covered by the NLRA have the right to form, join, or assist labor organizations. NLRA § 7, 29 U. S. C. § 157. It is an unfair labor practice to interfere with, restrain, or coerce the exercise of those rights, NLRA

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[3] The Board's *Wright Line* decision has been rejected by the Second and Third Circuits, see *NLRB* v. *New York University Medical Center*, 702 F. 2d 284 (CA2 1983), cert. pending, No. 82–1705; *Behring International, Inc.* v. *NLRB*, 675 F. 2d 83 (CA3 1982), cert. pending, No. 82–438, as well as by the First. Several Circuits have expressly approved the *Wright Line* test. See *NLRB* v. *Senftner Volkswagen Corp.*, 681 F. 2d 557, 560 (CA8 1982); *NLRB* v. *Nevis Industries, Inc.*, 647 F. 2d 905, 909 (CA9 1981); *Peavey Co.* v. *NLRB*, 648 F. 2d 460 (CA7 1981).

§ 8(a)(1), 29 U. S. C. § 158(a)(1), or by discrimination in hire or tenure "to encourage or discourage membership in any labor organization," NLRA § 8(a)(3), 29 U. S. C. § 158(a)(3).

Under these provisions it is undisputed that if the employer fires an employee for having engaged in union activities and has no other basis for the discharge, or if the reasons that he proffers are pretextual, the employer commits an unfair labor practice. He does not violate the NLRA, however, if any antiunion animus that he might have entertained did not contribute at all to an otherwise lawful discharge for good cause. Soon after the passage of the Act, the Board held that it was an unfair labor practice for an employer to discharge a worker where antiunion animus actually contributed to the discharge decision. *Consumers Research, Inc.*, 2 N. L. R. B. 57, 73 (1936); *Louisville Refining Co.*, 4 N. L. R. B. 844, 861 (1938), enf'd, 102 F. 2d 678 (CA6), cert. denied, 308 U. S. 568 (1939); *Dow Chemical Co.*, 13 N. L. R. B. 993, 1023 (1939), enf'd in relevant part, 117 F. 2d 455 (CA6 1941); *Republic Creosoting Co.*, 19 N. L. R. B. 267, 294 (1940). In *Consumers Research*, the Board rejected the position that "antecedent to a finding of violation of the Act, it must be found that the *sole* motive for discharge was the employee's union activity." It explained that "[s]uch an interpretation is repugnant to the purpose and meaning of the Act, and . . . may not be made." 2 N. L. R. B., at 73. In its Third Annual Report, the Board stated: "Where the employer has discharged an employee for two or more reasons, and one of them is union affiliation or activity, the Board has found a violation [of § 8(a)(3)]." 3 NLRB Ann. Rep. 70 (1938). In the following year in *Dow Chemical Co.*, *supra*, the Board stated that a violation could be found where the employer acted out of antiunion bias "whether or not the [employer] may have had some other motive . . . and without regard to whether or not the [employer's] asserted motive was lawful." 13 N. L. R. B., at 1023. This construction of the Act—that to establish an

unfair labor practice the General Counsel need show by a preponderance of the evidence only that a discharge is in any way motivated by a desire to frustrate union activity—was plainly rational and acceptable. The Board has adhered to that construction of the Act since that time.

At the same time, there were decisions indicating that the presence of an antiunion motivation in a discharge case was not the end of the matter. An employer could escape the consequences of a violation by proving that without regard to the impermissible motivation, the employer would have taken the same action for wholly permissible reasons. See, *e. g.*, *Eagle-Picher Mining & Smelting Co.*, 16 N. L. R. B. 727, 801 (1939), enf'd in relevant part, 119 F. 2d 903 (CA8 1941); *Borden Mills, Inc.*, 13 N. L. R. B. 459, 474–475 (1939); *Robbins Tire & Rubber Co.*, 69 N. L. R. B. 440, 454, n. 21 (1946), enf'd, 161 F. 2d 798 (CA5 1947).[4]

The Courts of Appeals were not entirely satisfied with the Board's approach to dual-motive cases. The Board's *Wright*

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[4] The Board argues that its approach to mixed-motive cases was known to Congress and ratified by the passage of the Labor Management Relations Act (LMRA), 61 Stat. 136, which reenacted §§ 8(a)(1) and 8(a)(3) almost without material change. We need not pass on this submission, since we find nothing in the legislative history of the LMRA that calls into question the decisions of the Board relevant to the issue before us now. The issue after, as well as before, the passage of the LMRA is whether the Board's construction of § 8(a) is sufficiently rational to be acceptable in the courts. We do note that nowhere in the legislative history is reference made to any of the mixed-motive cases decided by the Board or by the courts, see, *e. g.*, *NLRB* v. *Remington Rand, Inc.*, 94 F. 2d 862, 872 (CA2) (L. Hand, J.) ("[S]ince the refusal [to negotiate] was at least one cause of the strike, and was a tort . . . it rested upon the tortfeasor to disentangle the consequences for which it was chargeable from those from which it was immune"), cert. denied, 304 U. S. 576 (1938); *NLRB* v. *Stackpole Carbon Co.*, 105 F. 2d 167, 176 (CA3), cert. denied, 308 U. S. 605 (1939); *Borden Mills, Inc.*, 13 N. L. R. B., at 474–475 (dicta); *Davis Precision Machine Co.*, 64 N. L. R. B. 529, 537 (1945); *Wright-Hibbard Industrial Electric Truck Co.*, 67 N. L. R. B. 897, 908, n. 15 (1946); *Robbins Tire and Rubber Co.*, 69 N. L. R. B., at 454, n. 21.

*Line* decision in 1980 was an attempt to restate its analysis in a way more acceptable to the Courts of Appeals. The Board held that the General Counsel of course had the burden of proving that the employee's conduct protected by § 7 was a substantial or a motivating factor in the discharge.[5] Even if this was the case, and the employer failed to rebut it, the employer could avoid being held in violation of §§ 8(a)(1) and 8(a)(3) by proving by a preponderance of the evidence that the discharge rested on the employee's unprotected conduct as well and that the employee would have lost his job in any event. It thus became clear, if it was not clear before, that proof that the discharge would have occurred in any event and for valid reasons amounted to an affirmative defense on which the employer carried the burden of proof by a preponderance of the evidence. "The shifting burden merely requires the employer to make out what is actually an affirmative defense . . . ." *Wright Line*, 251 N. L. R. B., at 1088, n. 11; see also *id.*, at 1084, n. 5.

The Court of Appeals for the First Circuit refused enforcement of the *Wright Line* decision because in its view it was error to place the burden on the employer to prove that the discharge would have occurred had the forbidden motive not been present. The General Counsel, the Court of Appeals held, had the burden of showing not only that a forbidden

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[5] The Board has not purported to shift the burden of persuasion on the question of whether the employer fired Santillo at least in part because he engaged in protected activities. The General Counsel satisfied his burden in this respect and no one disputes it. Thus, *Texas Department of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981), is inapposite. In that case, which involved a claim of racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. V), the question was who had "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff . . . ." 450 U. S., at 253. The Court discussed only the situation in which the issue is whether either illegal or legal motives, but not both, were the "true" motives behind the decision. It thus addressed the pretext case.

motivation contributed to the discharge but also that the discharge would not have taken place independently of the protected conduct of the employee. The Court of Appeals was quite correct, and the Board does not disagree, that throughout the proceedings, the General Counsel carries the burden of proving the elements of an unfair labor practice. Section 10(c) of the Act, 29 U. S. C. § 160(c), expressly directs that violations may be adjudicated only "upon the preponderance of the testimony" taken by the Board. The Board's rules also state that "[t]he Board's attorney has the burden of pro[ving] violations of Section 8." 29 CFR § 101.10(b) (1982). We are quite sure, however, that the Court of Appeals erred in holding that § 10(c) forbids placing the burden on the employer to prove that absent the improper motivation he would have acted in the same manner for wholly legitimate reasons.

As we understand the Board's decisions, they have consistently held that the unfair labor practice consists of a discharge or other adverse action that is based in whole or in part on antiunion animus—or as the Board now puts it, that the employee's protected conduct was a substantial or motivating factor in the adverse action. The General Counsel has the burden of proving these elements under § 10(c). But the Board's construction of the statute permits an employer to avoid being adjudicated a violator by showing what his actions would have been regardless of his forbidden motivation. It extends to the employer what the Board considers to be an affirmative defense but does not change or add to the elements of the unfair labor practice that the General Counsel has the burden of proving under § 10(c).[6] We assume that

[6] The language of the NLRA requiring that the Board act on a preponderance of the testimony taken was added by the LMRA, 61 Stat. 136, in 1947. A closely related provision directed that no order of the Board reinstate or compensate any employee who was fired for cause. Section 10(c) places the burden on the General Counsel only to prove the unfair labor practice, not to disprove an affirmative defense. Furthermore, it is clear

the Board could reasonably have construed the Act in the manner insisted on by the Court of Appeals. We also assume that the Board might have considered a showing by the employer that the adverse action would have occurred in any event as not obviating a violation adjudication but as going only to the permissible remedy, in which event the burden of proof could surely have been put on the employer. The Board has instead chosen to recognize, as it insists it has done for many years, what it designates as an affirmative defense that the employer has the burden of sustaining. We are unprepared to hold that this is an impermissible construction of the Act. "[T]he Board's construction here, while it may not

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from the legislative history of the LMRA that the drafters of § 10(c) were not thinking of the mixed-motive case. Their discussions reflected the assumption that discharges were either "for cause" or punishment for protected activity. Read fairly, the legislative history does not indicate whether, in mixed-motive cases, the employer or the General Counsel has the burden of proof on the issue of what would have happened if the employer had not been influenced by his unlawful motives; on that point the legislative history is silent.

The "for cause" proviso was not meant to apply to cases in which both legitimate and illegitimate causes contributed to the discharge, see *infra*. The amendment was sparked by a concern over the Board's perceived practice of inferring from the fact that someone was active in a union that he was fired because of antiunion animus even though the worker had been guilty of gross misconduct. The House Report explained the change in the following terms:

"A third change forbids the Board to reinstate an individual unless the weight of the evidence shows that the individual was not suspended or discharged for cause. In the past, the Board, admitting that an employee was guilty of gross misconduct, nevertheless frequently reinstated him, 'inferring' that, because he was a member or an official of a union, this, not his misconduct, was *the* reason for his discharge." H. R. Rep. No. 245, 80th Cong., 1st Sess., 42 (1947) (emphasis added).

The proviso was thus a reaction to the Board's readiness to infer antiunion animus from the fact that the discharged person was active in the union, and thus has little to do with the situation in which the Board has soundly concluded that the employer had an antiunion animus and that such feelings played a role in a worker's discharge.

be required by the Act, is at least permissible under it . . . ," and in these circumstances its position is entitled to deference. *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251, 266–267 (1975); *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 236 (1963).

The Board's allocation of the burden of proof is clearly reasonable in this context, for the reason stated in *NLRB* v. *Remington Rand, Inc.*, 94 F. 2d 862, 872 (CA2), cert. denied, 304 U. S. 576 (1938), a case on which the Board relied when it began taking the position that the burden of persuasion could be shifted. *E. g., Eagle-Picher Mining & Smelting*, 16 N. L. R. B., at 801. The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.

In *Mt. Healthy City Board of Education* v. *Doyle*, 429 U. S. 274 (1977), we found it prudent, albeit in a case implicating the Constitution, to set up an allocation of the burden of proof which the Board heavily relied on and borrowed from in its *Wright Line* decision. There, we held that the plaintiff had to show that the employer's disapproval of his First Amendment protected expression played a role in the employer's decision to discharge him. If that burden of persuasion were carried, the burden would be on the defendant to show by a preponderance of the evidence that he would have reached the same decision even if, hypothetically, he had not been motivated by a desire to punish plaintiff for exercising his First Amendment rights. The analogy to *Mt. Healthy* drawn by the Board was a fair one.[7]

[7] Respondent also argues that placement of the burden of persuasion on the employer contravenes § 10(b) of the Act and § 7(c) of the Administrative Procedure Act, 5 U. S. C. § 556(d). Section 10(b) provides that the Federal Rules of Evidence apply to Board proceedings insofar as practicable. Respondent contends that Federal Rule of Evidence 301 requires

For these reasons, we conclude that the Court of Appeals erred in refusing to enforce the Board's orders, which rested on the Board's *Wright Line* decision.

The Board was justified in this case in concluding that Santillo would not have been discharged had the employer not considered his efforts to establish a union. At least two of the transgressions that purportedly would have in any event prompted Santillo's discharge were commonplace, and yet no transgressor had ever before received any kind of discipline. Moreover, the employer departed from its usual practice in dealing with rules infractions; indeed, not only did the employer not warn Santillo that his actions would result in being subjected to discipline, it also never even expressed its disapproval of his conduct. In addition, Patterson, the person who made the initial decision to discharge Santillo, was obviously upset with Santillo for engaging in such protected

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that the burden of persuasion rest on the General Counsel. Rule 301 provides:

"In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

The Rule merely defines the term "presumption." It in no way restricts the authority of a court or an agency to change the customary burdens of persuasion in a manner that otherwise would be permissible. Indeed, were respondent correct, we could not have assigned to the defendant the burden of persuasion on one issue in *Mt. Healthy City Board of Education* v. *Doyle*, 429 U. S. 274 (1977).

Section 7(c) of the Administrative Procedure Act, 5 U. S. C. § 556(d), provides that the proponent of an order has the burden of proof. Since the General Counsel is the proponent of the order, asserts respondent, the General Counsel must bear the burden of proof. Section 7(c), however, determines only the burden of going forward, not the burden of persuasion. *Environmental Defense Fund, Inc.* v. *EPA*, 179 U. S. App. D. C. 43, 49, 58–60, 548 F. 2d 998, 1004, 1013–1015 (1976), cert. denied *sub nom. Velsicol Chemical Corp.* v. *EPA*, 431 U. S. 925 (1977).

activity. It is thus clear that the Board's finding that Santillo would not have been fired if the employer had not had an antiunion animus was "supported by substantial evidence on the record considered as a whole," 29 U. S. C. § 160(f).

Accordingly, the judgment is

*Reversed.*

# PHILKO AVIATION, INC. *v.* SHACKET ET UX.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 82–342. Argued April 20, 1983—Decided June 15, 1983

A corporation in Illinois, operated by Roger Smith, sold a new airplane to respondents, who paid the sale price in full and took possession of the plane. Smith, however, did not give respondents the original bills of sale reflecting the plane's chain of title, but gave them only photocopies and an assurance that he would "take care of the paperwork." Subsequently, Smith purported to sell the plane to petitioner, giving it the title documents, which petitioner's financing bank later recorded with the Federal Aviation Administration (FAA). Respondents filed an action in Federal District Court to determine title to the plane. Petitioner argued that it had title because respondents never recorded their interest in the plane with the FAA, relying on § 503(c) of the Federal Aviation Act of 1958, which provides that "[n]o conveyance or instrument" affecting title to civil aircraft shall be valid against third parties not having actual notice of the sale, until such conveyance or instrument is recorded with the FAA. But the District Court awarded summary judgment in respondents' favor, and the Court of Appeals affirmed, holding that § 503(c) did not pre-empt Illinois state law under which no documentation for a valid transfer of an aircraft is required and an oral sale is valid against third parties once the buyer takes possession of the aircraft.

*Held:* State laws, such as the Illinois law, allowing undocumented or unrecorded transfers of interests in aircraft to affect innocent third parties are pre-empted by the federal Act. Although if § 503(c) were interpreted literally in accordance with the federal Act's definition of "conveyance"—"a bill of sale, contract of conditional sale, mortgage, assignment of mortgage, or other instrument affecting title to, or interest in, property"—it would invalidate only unrecorded title *instruments* and not unrecorded title *transfers*, thus enabling a claimant to establish title against an innocent third party without relying on an instrument, it is apparent that Congress did not intend § 503(c) to be interpreted in this manner. Rather, § 503(c) means that every aircraft transfer must be evidenced by an instrument, and every such instrument must be recorded before the rights of innocent third parties can be affected. Because of these requirements, state laws permitting undocumented or unrecorded transfers are pre-empted, for there is a direct conflict between § 503(c) and such state laws. These conclusions are dictated by the fed-

eral Act's legislative history. Any other construction would defeat Congress' purpose in enacting § 503(c) of creating a "central clearing house" for recordation of title so that a person could have "ready access" to information about an aircraft's title. Pp. 409–414.

681 F. 2d 506, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 414.

*Leslie R. Bishop* argued the cause for petitioner. With him on the briefs were *Donald B. Garvey* and *John N. Dore.*

*James C. Murray, Jr.*, argued the cause for respondents. With him on the brief was *Lee Ann Watson.**

JUSTICE WHITE delivered the opinion of the Court.

This case presents the question whether the Federal Aviation Act of 1958 (Act), 72 Stat. 737, as amended, 49 U. S. C. § 1301 *et seq.* (1976 ed. and Supp. V), prohibits all transfers of title to aircraft from having validity against innocent third parties unless the transfer has been evidenced by a written instrument, and the instrument has been recorded with the Federal Aviation Administration (FAA). We conclude that the Act does have such effect.

On April 19, 1978, at an airport in Illinois, a corporation operated by Roger Smith sold a new airplane to respondents. Respondents, the Shackets, paid the sale price in full and took possession of the aircraft, and they have been in possession ever since. Smith, however, did not give respondents the original bills of sale reflecting the chain of title to the plane. He instead gave them only photocopies and his assurance that he would "take care of the paperwork," which the Shackets understood to include the recordation of the original bills of sale with the FAA. Insofar as the present record

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**J. Arthur Mozley* and *Donald R. Andersen* filed a brief for the Aircraft Finance Association as *amicus curiae* urging reversal.

reveals, the Shackets never attempted to record their title with the FAA.

Unfortunately for all, Smith did not keep his word but instead commenced a fraudulent scheme. Shortly after the sale to the Shackets, Smith purported to sell the same airplane to petitioner, Philko Aviation. According to Philko, Smith said that the plane was in Michigan having electronic equipment installed. Nevertheless, Philko and its financing bank were satisfied that all was in order, for they had examined the original bills of sale and had checked the aircraft's title against FAA records.[1] At closing, Smith gave Philko the title documents, but, of course, he did not and could not have given Philko possession of the aircraft. Philko's bank subsequently recorded the title documents with the FAA.

After the fraud became apparent, the Shackets filed the present declaratory judgment action to determine title to the plane. Philko argued that it had title because the Shackets had never recorded their interest in the airplane with the FAA. Philko relied on § 503(c) of the Act, 72 Stat. 773, as amended, 49 U. S. C. § 1403(c), which provides that no conveyance or instrument affecting the title to any civil aircraft shall be valid against third parties not having actual notice of the sale, until such conveyance or other instrument is filed for recordation with the FAA. However, the District Court awarded summary judgment in favor of the Shackets, *Shacket* v. *Roger Smith Aircraft Sales, Inc.*, 497 F. Supp. 1262 (ND Ill. 1980), and the Court of Appeals affirmed, reasoning that § 503(c) did not pre-empt substantive state law regarding title transfers, and that, under the Illinois Uniform Commercial Code, Ill. Rev. Stat., ch. 26, ¶ 1–101 *et seq.* (1981), the Shackets had title but Philko did not. 681 F. 2d 506 (1982). We granted certiorari, 459 U. S. 1069 (1982), and we now reverse and remand for further proceedings.

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[1] It is perhaps noteworthy, however, that Philko's title search did not even reveal that the seller, Smith's corporation, owned or ever had owned the subject airplane.

Section 503(a)(1) of the Act, 49 U. S. C. § 1403(a)(1), directs the Secretary of Transportation to establish and maintain a system for the recording of any "conveyance which affects the title to, or any interest in, any civil aircraft of the United States." Section 503(c), 49 U. S. C. § 1403(c), states:

> "No conveyance or instrument the recording of which is provided for by [§ 503(a)(1)] shall be valid in respect of such aircraft . . . against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation."

The statutory definition of "conveyance" defines the term as "a bill of sale, contract of conditional sale, mortgage, assignment of mortgage, or other instrument affecting title to, or interest in, property." 49 U. S. C. § 1301(20) (1976 ed., Supp. V). If § 503(c) were to be interpreted literally in accordance with the statutory definition, that section would not require every transfer to be documented and recorded; it would only invalidate unrecorded title *instruments*, rather than unrecorded title *transfers*. Under this interpretation, a claimant might be able to prevail against an innocent third party by establishing his title without relying on an instrument. In the present case, for example, the Shackets could not prove their title on the basis of an unrecorded bill of sale or other writing purporting to evidence a transfer of title to them, even if state law did not require recordation of such instruments, but they might still prevail, since Illinois law does not require written evidence of a sale "with respect to goods for which payment has been made and accepted or which have been received and accepted." Ill. Rev. Stat., ch. 26, ¶ 2–201(3)(c) (1981).

We are convinced, however, that Congress did not intend § 503(c) to be interpreted in this manner. Rather, § 503(c) means that every aircraft transfer must be evidenced by an

instrument, and every such instrument must be recorded, before the rights of innocent third parties can be affected. Furthermore, because of these federal requirements, state laws permitting undocumented or unrecorded transfers are pre-empted, for there is a direct conflict between § 503(c) and such state laws, and the federal law must prevail.[2]

These conclusions are dictated by the legislative history. The House and House Conference Committee Reports, and the section-by-section analysis of one of the bill's drafters, all expressly declare that the federal statute "requires" the recordation of "every transfer . . . of any interest in a civil aircraft."[3] The House Conference Report explains: "This section requires the recordation with the Authority of every transfer made after the effective date of the section, of any interest in a civil aircraft of the United States. The conveyance evidencing *each such transfer* is to be recorded with an index in a recording system to be established by the Authority."[4] Thus, since Congress intended to require the recordation of a conveyance evidencing *each transfer* of an interest in aircraft, Congress must have intended to pre-empt any state law under which a transfer without a recordable conveyance would be valid against innocent transferees or lienholders who have recorded.

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[2] U. S. Const., Art. VI, cl. 2; *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U. S. 190, 204 (1983); *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 153 (1982); *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525–526 (1977).

[3] H. R. Conf. Rep. No. 2635, 75th Cong., 3d Sess., 74 (1938) (emphasis added); H. R. Rep. No. 2254, 75th Cong., 3d Sess., 9 (1938); Hearings on S. 3760 before the Senate Committee on Commerce, 75th Cong., 3d Sess., 9 (1938) (section-by-section analysis of C. M. Hester, Assistant General Counsel, Treasury Dept.). Section 503(c) of the present Act is derived from § 503(b) of the Civil Aeronautics Act of 1938, 52 Stat. 1006. The only pertinent legislative history that we have found is that relating to the passage of the original 1938 provision.

[4] H. R. Conf. Rep. No. 2635, *supra*, at 74 (emphasis added). The "Authority" mentioned in the quotation is the Civil Aeronautics Authority, the predecessor of the FAA.

Any other construction would defeat the primary congressional purpose for the enactment of § 503(c), which was to create "a central clearing house for recordation of titles so that a person, wherever he may be, will know where he can find ready access to the claims against, or liens, or other legal interests in an aircraft." Hearings on H. R. 9738 before the House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess., 407 (1938) (testimony of F. Fagg, Director of Air Commerce, Dept. of Commerce). Here, state law does not require any documentation whatsoever for a valid transfer of an aircraft to be effected. An oral sale is fully valid against third parties once the buyer takes possession of the plane. If the state law allowing this result were not pre-empted by § 503(c), then any buyer in possession would have absolutely no need or incentive to record his title with the FAA, and he could refuse to do so with impunity, and thereby prevent the "central clearing house" from providing "ready access" to information about his claim. This is not what Congress intended.[5]

In the absence of the statutory definition of conveyance, our reading of § 503(c) would be by far the most natural one, because the term "conveyance" is first defined in the dictionary as "the action of conveying," *i. e.*, "the act by which title to property . . . is transferred." Webster's Third New International Dictionary 499 (P. Gove ed. 1976). Had Congress defined "conveyance" in accordance with this defini-

[5] Although the recording system ideally should allow any transferee who has checked the FAA records to acquire his interest with the certain knowledge that the transferor's title is clear, we recognize that the present system does not allow for such certainty, because there is a substantial lag from the time at which an instrument is mailed to the FAA to the time at which the FAA actually records the instrument. Thus, if the owner of an airplane grants a lien on it to Doe on one day and attempts to sell it to Roe on the following day, Roe might erroneously assume, based on a search of the FAA records, that his vendor has clear title to the plane, even if Doe had promptly mailed the documents evidencing his lien to the FAA for recordation.

tion, then § 503(c) plainly would have required the recordation of every transfer. Congress' failure to adopt this definition is not dispositive, however, since the statutory definition is expressly not applicable if "the context otherwise requires." 49 U. S. C. § 1301 (1976 ed. and Supp. V). Even in the absence of such a caveat, we need not read the statutory definition mechanically into § 503(c), since to do so would render the recording system ineffective and thus would defeat the purpose of the legislation. A statutory definition should not be applied in such a manner. *Lawson* v. *Suwannee Fruit & S.S. Co.*, 336 U. S. 198, 201 (1949). Accordingly, we hold that state laws allowing undocumented or unrecorded transfers of interests in aircraft to affect innocent third parties are pre-empted by the federal Act.

In support of the judgment below, respondents rely on *In re Gary Aircraft Corp.*, 681 F. 2d 365 (CA5 1982), which rejected the contention that § 503 pre-empted all state laws dealing with priority of interests in aircraft. The Court of Appeals held that the first person to record his interest with the FAA is not assured of priority, which is determined by reference to state law.[6] We are inclined to agree with this

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[6] *Gary Aircraft* involved a contest between the holder of a security interest in two airplanes and a subsequent purchaser. Although the security interest holder recorded its interest in the planes prior to the time that the purchaser did so, the Court of Appeals held in favor of the purchaser, because Texas law governed priorities and, under Texas law, the purchaser was a buyer in the ordinary course of business who took free of the security interest. The security interest holder argued that Texas law was pre-empted by § 503(d) of the Act, 49 U. S. C. § 1403(d), which states that all instruments recorded with the FAA shall be "valid" without further recordation, but the court found that "validity" did not mean "priority." Instead, it only meant such "validity" as granted by state law. *Gary Aircraft* thus dealt with the question of the effect of recording under § 503(d), unlike the present case, which concerns the effect of nonrecording under § 503(c).

In support of its decision, the Court of Appeals, 681 F. 2d, at 510, cited *Haynes* v. *General Electric Credit Corp.*, 582 F. 2d 869 (CA4 1978); *Sanders* v. *M. D. Aircraft Sales, Inc.*, 575 F. 2d 1086 (CA3 1978); *State Securities Co.* v. *Aviation Enterprises, Inc.*, 355 F. 2d 225 (CA10 1966); *Northern*

rationale, but it does not help the Shackets. Although state law determines priorities, all interests must be federally recorded before they can obtain whatever priority to which they are entitled under state law. As one commentator has explained: "The only situation in which priority appears to be determined by operation of the [federal] statute is where the security holder has failed to record his interest. Such failure invalidates the conveyance as to innocent third persons. But recordation itself merely validates; it does not grant priority." Scott, Liens in Aircraft: Priorities, 25 J. Air L. & Commerce 193, 203 (1958) (footnote omitted). Accord, Sigman, The Wild Blue Yonder: Interests in Aircraft under Our Federal System, 46 So. Cal. L. Rev. 316, 324–325 (1973) (although recordation does not establish priority, "failure to record . . . serves to subordinate"); Note, 36 Wash. & Lee L. Rev. 205, 212–213 (1979).[7]

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*Illinois Corp.* v. *Bishop Distributing Co.*, 284 F. Supp. 121 (WD Mich. 1968); and *Bitzer-Croft Motors, Inc.* v. *Pioneer Bank & Trust Co.*, 82 Ill. App. 3d 1, 401 N. E. 2d 1340 (1980). All of these cases involved facts similar to those of *Gary Aircraft* and are distinguishable on the same basis.

[7] Nothing in § 506 of the Act, 49 U. S. C. § 1406, provides support for a different conclusion. This provision states:

"The validity of any instrument the recording of which is provided for by [§ 503] shall be governed by the laws of the State, District of Columbia, or territory or possession of the United States in which such instrument is delivered, irrespective of the location or the place of delivery of the property which is the subject of such instrument."

Section 506 was passed in 1964 to rectify the "chaotic situation exist[ing] in the aircraft industry as a result of conflicting State rules relating to the choice of law governing the validity of instruments for the transfer of interests in tangible personal property." H. R. Rep. No. 1033, 88th Cong., 1st Sess., 1 (1963). Although § 506 provided a uniform federal choice-of-law rule for determining which State's laws govern the substantive validity of an instrument, § 506 did not repeal § 503(c)'s requirement that the instrument must be recorded before it obtains whatever validity to which it is entitled under the state law applicable pursuant to § 506. In enacting § 506, the Senate Committee Report observed that, under the § 503 regime, "to determine whether there are any encumbrances on [an] aircraft, it is only necessary to consult the central file," and no disapproval of this regime was expressed. S. Rep. No. 1060, 88th Cong., 2d Sess., 2 (1964).

In view of the foregoing, we find that the courts below erred by granting the Shackets summary judgment on the basis that if an unrecorded transfer of an aircraft is valid under state law, it has validity as against innocent third parties. Of course, it is undisputed that the sale to the Shackets was valid and binding as between the parties. Hence, if Philko had actual notice of the transfer to the Shackets or if, under state law, Philko failed to acquire or perfect the interest that it purports to assert for reasons wholly unrelated to the sale to the Shackets,[8] Philko would not have an enforceable interest, and the Shackets would retain possession of the aircraft. Furthermore, we do not think that the federal law imposes a standard with which it is impossible to comply. There may be situations in which the transferee has used reasonable diligence to file and cannot be faulted for the failure of the crucial documents to be of record.[9] But because of the manner in which this case was disposed of on summary judgment, matters such as these were not considered, and these issues remain open on remand. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*So ordered.*

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

I join the opinion of the Court except to the extent that it might be read to suggest this Court's endorsement of

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[8] For example, if the instrument evidencing the transfer of the aircraft from Smith's corporation to Philko failed to comply with formal requisites of Illinois law, then Philko might have no enforceable interest at all in the plane, in which case the Shackets would retain possession. This does not mean, of course, that Philko can be deemed to have no interest in the plane on the ground that, due to the sale to the Shackets, under Illinois law Smith had no interest to transfer to Philko.

[9] See, *e. g.*, *State Securities Co.* v. *Aviation Enterprises, Inc.*, *supra*, at 228 (buyer mailed its bill of sale to the FAA for recordation, but the FAA refused to record it). There is no indication in the record now before us that the Shackets made a prompt attempt to record.

the view that one who makes a reasonably diligent effort to record will obtain the protections ordinarily reserved for recorded interests. I would express no opinion on that question, for it is not before us and has not been addressed in brief or in argument or, indeed, in the statute.

# CITY OF AKRON *v.* AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 81–746. Argued November 30, 1982—Decided June 15, 1983*

An Akron, Ohio, ordinance, *inter alia*, (1) requires all abortions performed after the first trimester of pregnancy to be performed in a hospital (§ 1870.03); (2) prohibits a physician from performing an abortion on an unmarried minor under the age of 15 unless he obtains the consent of one of her parents or unless the minor obtains an order from a court having jurisdiction over her that the abortion be performed (§ 1870.05(B)); (3) requires that the attending physician inform his patient of the status of her pregnancy, the development of her fetus, the date of possible viability, the physical and emotional complications that may result from an abortion, and the availability of agencies to provide her with assistance and information with respect to birth control, adoption, and childbirth (§ 1870.06(B)), and also inform her of the particular risks associated with her pregnancy and the abortion technique to be employed (§ 1870.06(C)); (4) prohibits a physician from performing an abortion until 24 hours after the pregnant woman signs a consent form (§ 1870.07); and (5) requires physicians performing abortions to ensure that fetal remains are disposed of in a "humane and sanitary manner" (§ 1870.16). A violation of the ordinance is punishable as a misdemeanor. Respondents and cross-petitioners filed an action in Federal District Court against petitioners and cross-respondents, challenging the ordinance. The District Court invalidated §§ 1870.05(B), 1870.06(B), and 1870.16, but upheld §§ 1870.03, 1870.06(C), and 1870.07. The Court of Appeals affirmed as to §§ 1870.-03, 1870.05(B), 1870.06(B), and 1870.16, but reversed as to §§ 1870.06(C) and 1870.07.

*Held:*

1. Section 1870.03 is unconstitutional. Pp. 431–439.

(a) While a State's interest in health regulation becomes compelling at approximately the end of the first trimester, the State's regulation may be upheld only if it is reasonably designed to further that interest. If during a substantial portion of the second trimester the State's regula-

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*Together with No. 81–1172, *Akron Center for Reproductive Health, Inc., et al.* v. *City of Akron et al.*, also on certiorari to the same court.

tion departs from accepted medical practice, it may not be upheld simply because it may be reasonable for the remaining portion of the trimester. Rather, the State is obligated to make a reasonable effort to limit the effect of its regulations to the period in the trimester during which its health interest may be furthered. Pp. 433–434.

(b) It cannot be said that the lines drawn in § 1870.03 are reasonable. By preventing the performance of dilatation-and-evacuation abortions in an appropriate nonhospital setting, Akron has imposed a heavy and unnecessary burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure. Section 1870.03 has the effect of inhibiting the vast majority of abortions after the first trimester and therefore unreasonably infringes upon a woman's constitutional right to obtain an abortion. Pp. 434–439.

2. Section 1870.05(B) is unconstitutional as making a blanket determination that *all* minors under the age of 15 are too immature to make an abortion decision or that an abortion never may be in the minor's best interests without parental approval. Under circumstances where the Ohio statute governing juvenile proceedings does not mention minors' abortions nor suggest that the Ohio Juvenile Court has authority to inquire into a minor's maturity or emancipation, § 1870.05(B), as applied in juvenile proceedings, is not reasonably susceptible of being construed to create an opportunity for case-by-case evaluations of the maturity of pregnant minors. Pp. 439–442.

3. Sections 1870.06(B) and 1870.06(C) are unconstitutional. Pp. 442–449.

(a) The validity of an informed consent requirement rests on the State's interest in protecting the pregnant woman's health. But this does not mean that a State has unreviewable authority to decide what information a woman must be given before she chooses to have an abortion. A State may not adopt regulations designed to influence the woman's informed choice between abortion or childbirth. Pp. 442–444.

(b) Section 1870.06(B) attempts to extend the State's interest in ensuring "informed consent" beyond permissible limits, and intrudes upon the discretion of the pregnant woman's physician. While a State may require a physician to make certain that his patient understands the physical and emotional implications of having an abortion, § 1870.06(B) goes far beyond merely describing the general subject matter relevant to informed consent. By insisting upon recitation of a lengthy and inflexible list of information, the section unreasonably has placed obstacles in the path of the physician. Pp. 444–445.

(c) With respect to § 1870.06(C)'s requirement that the "attending physician" must inform the woman of the specified information, it is unreasonable for a State to insist that only a physician is competent to

provide the information and counseling relevant to informed consent. Pp. 446–449.

4. Section 1870.07 is unconstitutional. Akron has failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible waiting period. There is no evidence that the abortion procedure will be performed more safely. Nor does it appear that the State's legitimate concern that the woman's decision be informed is reasonably served by requiring a 24-hour delay as a matter of course. Pp. 449–451.

5. Section 1870.16 violates the Due Process Clause by failing to give a physician fair notice that his contemplated conduct is forbidden. Pp. 451–452.

651 F. 2d 1198, affirmed in part and reversed in part.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which WHITE and REHNQUIST, JJ., joined, *post*, p. 452.

*Alan G. Segedy* argued the cause for petitioner in No. 81–746 and respondent in No. 81–1172. With him on the briefs was *Robert D. Pritt.* Mr. Segedy and *Robert A. Destro* filed a brief for Seguin et al., respondents under this Court's Rule 19.6, in support of petitioner in No. 81–746 and respondent in No. 81–1172.

*Solicitor General Lee* argued the cause for the United States as *amicus curiae.* With him on the brief were *Assistant Attorney General McGrath* and *Deputy Solicitor General Geller.*

*Stephan Landsman* argued the cause for respondents in No. 81–746 and petitioners in No. 81–1172. With him on the briefs were *Janet Benshoof, Suzanne M. Lynn, Nan D. Hunter, Lois J. Lipton,* and *Gordon Beggs.*†

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†Briefs of *amici curiae* urging reversal were filed by *Delores V. Horan* for Feminists for Life; and by *Lynn D. Wardle* for the United Families Foundation et al.

Briefs of *amici curiae* urging affirmance were filed by *Bruce J. Ennis, Jr.*, and *Donald N. Bersoff* for the American Psychological Association;

JUSTICE POWELL delivered the opinion of the Court.

In this litigation we must decide the constitutionality of several provisions of an ordinance enacted by the city of Akron, Ohio, to regulate the performance of abortions. Today we also review abortion regulations enacted by the State of Missouri, see *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, *post*, p. 476, and by the State of Virginia, see *Simopoulos* v. *Virginia*, *post*, p. 506.

These cases come to us a decade after we held in *Roe* v. *Wade*, 410 U. S. 113 (1973), that the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy. Legislative responses to the Court's decision have required us on several occasions, and again today, to define the limits of a State's authority to regulate the performance of abortions. And arguments continue to be made, in these cases as well, that we erred in interpreting the Constitution. Nonetheless, the doctrine of

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and by *Sylvia A. Law*, *Nadine Taub*, and *Ellen J. Winner* for the Committee for Abortion Rights and Against Sterilization Abuse et al.

Briefs of *amici curiae* were filed by *M. Carolyn Cox* and *Lynn Bregman* for the American College of Obstetricians and Gynecologists et al.; by *David B. Hopkins* for the American Public Health Association; by *Dennis J. Horan*, *Victor G. Rosenblum*, *Patrick A. Trueman*, and *Thomas J. Marzen* for Americans United for Life; for California Women Lawyers et al.; by *Charles E. Rice* for the Catholic League for Religious and Civil Rights; by *Rhonda Copelon* for Certain Religious Organizations; by *Jack R. Bierig* for the College of American Pathologists; by *Ronald J. Suster* for Lawyers for Life; by *Alan Ernest* for the Legal Defense Fund for Unborn Children; by *Judith Levin* for the National Abortion Federation; by *Jack Greenberg*, *James M. Nabrit III*, and *Judith Reed* for the NAACP Legal Defense and Educational Fund, Inc.; by *Phyllis N. Segal*, *Judith I. Avner*, and *Jemera Rone* for the National Organization for Women et al.; by *Eve W. Paul* and *Dara Klassel* for the Planned Parenthood Federation of America, Inc., et al.; by *James Arthur Gleason* for Womankind, Inc.; by *Nancy Reardan* for Women Lawyers of Sacramento et al; and by *Susan Frelich Appleton* and *Paul Brest* for Certain Law Professors.

*stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law.[1] We respect it today, and reaffirm *Roe* v. *Wade*.

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[1] There are especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe* v. *Wade*. That case was considered with special care. It was first argued during the 1971 Term, and reargued—with extensive briefing—the following Term. The decision was joined by THE CHIEF JUSTICE and six other Justices. Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy. See *Connecticut* v. *Menillo*, 423 U. S. 9 (1975); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976); *Bellotti* v. *Baird*, 428 U. S. 132 (1976); *Beal* v. *Doe*, 432 U. S. 438 (1977); *Maher* v. *Roe*, 432 U. S. 464 (1977); *Colautti* v. *Franklin*, 439 U. S. 379 (1979); *Bellotti* v. *Baird*, 443 U. S. 622 (1979); *Harris* v. *McRae*, 448 U. S. 297 (1980); *H. L.* v. *Matheson*, 450 U. S. 398 (1981).

Today, however, the dissenting opinion rejects the basic premise of *Roe* and its progeny. The dissent stops short of arguing flatly that *Roe* should be overruled. Rather, it adopts reasoning that, for all practical purposes, would accomplish precisely that result. The dissent states that "[e]ven assuming that there is a fundamental right to terminate pregnancy in some situations," the State's compelling interests in maternal health and potential human life "are present *throughout* pregnancy." *Post*, at 459 (emphasis in original). The existence of these compelling interests turns out to be largely unnecessary, however, for the dissent does not think that even one of the numerous abortion regulations at issue imposes a sufficient burden on the "limited" fundamental right, *post*, at 465, n. 10, to require heightened scrutiny. Indeed, the dissent asserts that, regardless of cost, "[a] health regulation, such as the hospitalization requirement, simply does not rise to the level of 'official interference' with the abortion decision." *Post*, at 467 (quoting *Harris* v. *McRae*, *supra*, at 328 (WHITE, J., concurring)). The dissent therefore would hold that a requirement that all abortions be performed in an acute-care, general hospital does not impose an unacceptable burden on the abortion decision. It requires no great familiarity with the cost and limited availability of such hospitals to appreciate that the effect of the dissent's views would be to drive the performance of many abortions back underground free of effective regulation and often without the attendance of a physician.

In sum, it appears that the dissent would uphold virtually any abortion regulation under a rational-basis test. It also appears that even where

## I

In February 1978 the City Council of Akron enacted Ordinance No. 160–1978, entitled "Regulation of Abortions."[2]

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heightened scrutiny is deemed appropriate, the dissent would uphold virtually any abortion-inhibiting regulation because of the State's interest in preserving potential human life. See *post*, at 474 (arguing that a 24-hour waiting period is justified in part because the abortion decision "has grave consequences for the fetus"). This analysis is wholly incompatible with the existence of the fundamental right recognized in *Roe* v. *Wade*.

[2] The ordinance was prefaced by several findings:

"WHEREAS, the citizens of Akron are entitled to the highest standard of health care; and

"WHEREAS, abortion is a major surgical procedure which can result in complications, and adequate equipment and personnel should be required for its safe performance in order to insure the highest standards of care for the protection of the life and health of the pregnant woman; and

"WHEREAS, abortion should be performed only in a hospital or in such other special outpatient facility offering the maximum safeguards to the life and health of the pregnant woman; and

"WHEREAS, it is the finding of Council that there is no point in time between the union of sperm and egg, or at least the blastocyst stage and the birth of the infant at which point we can say the unborn child is not a human life, and that the changes occurring between implantation, a six-weeks embryo, a six-month fetus, and a one-week-old child, or a mature adult are merely stages of development and maturation; and

"WHEREAS, traditionally the physician has been responsible for the welfare of both the pregnant woman and her unborn child, and that while situations of conflict may arise between a pregnant woman's health interests and the welfare of her unborn child, the resolution of such conflicts by inducing abortion in no way implies that the physician has an adversary relationship towards the unborn child; and

"WHEREAS, Council therefore wishes to affirm that the destruction of the unborn child is not the primary purpose of abortion and that consequently Council recognizes a continuing obligation on the part of the physician towards the survival of a viable unborn child where this obligation can be discharged without additional hazard to the health of the pregnant woman; and

"WHEREAS, Council, after extensive public hearings and investigations concludes that enactment of this ordinance is a reasonable and prudent action which will significantly contribute to the preservation of the public life, health, safety, morals, and welfare." Akron Ordinance No. 160–1978.

The ordinance sets forth 17 provisions that regulate the performance of abortions, see Akron Codified Ordinances, ch. 1870, 5 of which are at issue in this case:

(i) Section 1870.03 requires that all abortions performed after the first trimester of pregnancy be performed in a hospital.[3]

(ii) Section 1870.05 sets forth requirements for notification of and consent by parents before abortions may be performed on unmarried minors.[4]

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[3] "1870.03 ABORTION IN HOSPITAL

"No person shall perform or induce an abortion upon a pregnant woman subsequent to the end of the first trimester of her pregnancy, unless such abortion is performed in a hospital."

Section 1870.01(B) defines "hospital" as "a general hospital or special hospital devoted to gynecology or obstetrics which is accredited by the Joint Commission on Accreditation of Hospitals or by the American Osteopathic Association."

[4] "1870.05 NOTICE AND CONSENT

"(A) No physician shall perform or induce an abortion upon an unmarried pregnant woman under the age of 18 years without first having given at least twenty-four (24) hours actual notice to one of the parents or the legal guardian of the minor pregnant woman as to the intention to perform such abortion, or if such parent or guardian cannot be reached after a reasonable effort to find him or her, without first having given at least seventy-two (72) hours constructive notice to one of the parents or the legal guardian of the minor pregnant woman by certified mail to the last known address of one of the parents or guardian, computed from the time of mailing, unless the abortion is ordered by a court having jurisdiction over such minor pregnant woman.

"(B) No physician shall perform or induce an abortion upon a minor pregnant woman under the age of fifteen (15) years without first having obtained the informed written consent of the minor pregnant woman in accordance with Section 1870.06 of this Chapter, and

"(1) First having obtained the informed written consent of one of her parents or her legal guardian in accordance with Section 1870.06 of this Chapter, or

"(2) The minor pregnant woman first having obtained an order from a court having jurisdiction over her that the abortion be performed or induced."

(iii) Section 1870.06 requires that the attending physician make certain specified statements to the patient "to insure that the consent for an abortion is truly informed consent."[5]

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[5] "1870.06 INFORMED CONSENT

"(A) An abortion otherwise permitted by law shall be performed or induced only with the informed written consent of the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, given freely and without coercion.

"(B) In order to insure that the consent for an abortion is truly informed consent, an abortion shall be performed or induced upon a pregnant woman only after she, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, have been orally informed by her attending physician of the following facts, and have signed a consent form acknowledging that she, and the parent or legal guardian where applicable, have been informed as follows:

"(1) That according to the best judgment of her attending physician she is pregnant.

"(2) The number of weeks elapsed from the probable time of the conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period or after a history and physical examination and appropriate laboratory tests.

"(3) That the unborn child is a human life from the moment of conception and that there has been described in detail the anatomical and physiological characteristics of the particular unborn child at the gestational point of development at which time the abortion is to be performed, including, but not limited to, appearance, mobility, tactile sensitivity, including pain, perception or response, brain and heart function, the presence of internal organs and the presence of external members.

"(4) That her unborn child may be viable, and thus capable of surviving outside of her womb, if more than twenty-two (22) weeks have elapsed from the time of conception, and that her attending physician has a legal obligation to take all reasonable steps to preserve the life and health of her viable unborn child during the abortion.

"(5) That abortion is a major surgical procedure which can result in serious complications, including hemorrhage, perforated uterus, infection, menstrual disturbances, sterility and miscarriage and prematurity in subsequent pregnancies; and that abortion may leave essentially unaffected or may worsen any existing psychological problems she may have, and can result in severe emotional disturbances.

*[Footnote 5 is continued on p. 424]*

(iv) Section 1870.07 requires a 24-hour waiting period between the time the woman signs a consent form and the time the abortion is performed.[6]

(v) Section 1870.16 requires that fetal remains be "disposed of in a humane and sanitary manner."[7]

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"(6) That numerous public and private agencies and services are available to provide her with birth control information, and that her physician will provide her with a list of such agencies and the services available if she so requests.

"(7) That numerous public and private agencies and services are available to assist her during pregnancy and after the birth of her child, if she chooses not to have the abortion, whether she wishes to keep her child or place him or her for adoption, and that her physician will provide her with a list of such agencies and the services available if she so requests.

"(C) At the same time the attending physician provides the information required by paragraph (B) of this Section, he shall, at least orally, inform the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, of the particular risks associated with her own pregnancy and the abortion technique to be employed including providing her with at least a general description of the medical instructions to be followed subsequent to the abortion in order to insure her safe recovery, and shall in addition provide her with such other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term.

"(D) The attending physician performing or inducing the abortion shall provide the pregnant woman, or one of her parents or legal guardian signing the consent form where applicable, with a duplicate copy of the consent form signed by her, and one of her parents or her legal guardian where applicable, in accordance with paragraph (B) of this Section."

[6] "1870.07 WAITING PERIOD

"No physician shall perform or induce an abortion upon a pregnant woman until twenty-four (24) hours have elapsed from the time the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, have signed the consent form required by Section 1870.06 of this Chapter, and the physician so certifies in writing that such time has elapsed."

[7] "1870.16 DISPOSAL OF REMAINS

"Any physician who shall perform or induce an abortion upon a pregnant woman shall insure that the remains of the unborn child are disposed of in a humane and sanitary manner."

A violation of any section of the ordinance is punishable as a criminal misdemeanor. § 1870.18. If any provision is invalidated, it is to be severed from the remainder of the ordinance.[8] The ordinance became effective on May 1, 1978.

On April 19, 1978, a lawsuit challenging virtually all of the ordinance's provisions was filed in the District Court for the Northern District of Ohio. The plaintiffs, respondents and cross-petitioners in this Court, were three corporations that operate abortion clinics in Akron and a physician who has performed abortions at one of the clinics. The defendants, petitioners and cross-respondents here, were the city of Akron and three city officials (Akron). Two individuals (intervenors) were permitted to intervene as codefendants "in their individual capacity as parents of unmarried minor daughters of childbearing age." 479 F. Supp. 1172, 1181 (1979). On April 27, 1978, the District Court preliminarily enjoined enforcement of the ordinance.

In August 1979, after hearing evidence, the District Court ruled on the merits. It found that plaintiffs lacked standing to challenge seven provisions of the ordinance, none of which is before this Court. The District Court invalidated four provisions, including § 1870.05 (parental notice and consent), § 1870.06(B) (requiring disclosure of facts concerning the woman's pregnancy, fetal development, the complications of abortion, and agencies available to assist the woman), and § 1870.16 (disposal of fetal remains). The court upheld the constitutionality of the remainder of the ordinance, including § 1870.03 (hospitalization for abortions after the first trimester), § 1870.06(C) (requiring disclosure of the particular risks of the woman's pregnancy and the abortion technique to be employed), and § 1870.07 (24-hour waiting period).

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[8] "1870.19 SEVERABILITY

"Should any provision of this Chapter be construed by any court of law to be invalid, illegal, unconstitutional, or otherwise unenforcible, such invalidity, illegality, unconstitutionality, or unenforcibility shall not extend to any other provision or provisions of this Chapter."

All parties appealed some portion of the District Court's judgment. The Court of Appeals for the Sixth Circuit affirmed in part and reversed in part. 651 F. 2d 1198 (1981). It affirmed the District Court's decision that § 1870.03's hospitalization requirement is constitutional. It also affirmed the ruling that §§ 1870.05, 1870.06(B), and 1870.16 are unconstitutional. The Court of Appeals reversed the District Court's decision on §§ 1870.06(C) and 1870.07, finding these provisions to be unconstitutional.

Three separate petitions for certiorari were filed. In light of the importance of the issues presented, and in particular the conflicting decisions as to whether a State may require that all second-trimester abortions be performed in a hospital,[9] we granted both Akron's and the plaintiffs' petitions. 456 U. S. 988 (1982). We denied the intervenors' petition, *Seguin* v. *Akron Center for Reproductive Health, Inc.*, 456 U. S. 989 (1982), but they have participated in this Court as respondents under our Rule 19.6. We now reverse the judgment of the Court of Appeals upholding Akron's hospitalization requirement, but affirm the remainder of the decision invalidating the provisions on parental consent, informed consent, waiting period, and disposal of fetal remains.

## II

In *Roe* v. *Wade*, the Court held that the "right of privacy, . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U. S., at 153. Although the Constitution does not specifically identify this right, the

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[9] Compare *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 655 F. 2d 848 (CA8), supplemented, 664 F. 2d 687 (CA8 1981) (invalidating hospital requirement), with *Simopoulos* v. *Commonwealth*, 221 Va. 1059, 277 S. E. 2d 194 (1981) (upholding hospital requirement). Numerous States require that second-trimester abortions be performed in hospitals. See Brief for Americans United for Life as *Amicus Curiae* in *Simopoulos* v. *Virginia*, O. T. 1982, No. 81–185, p. 4, n. 1 (listing 23 States).

history of this Court's constitutional adjudication leaves no doubt that "the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution." *Poe* v. *Ullman*, 367 U. S. 497, 543 (1961) (Harlan, J., dissenting from dismissal of appeal). Central among these protected liberties is an individual's "freedom of personal choice in matters of marriage and family life." *Roe*, 410 U. S., at 169 (Stewart, J., concurring). See, *e. g.*, *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *Loving* v. *Virginia*, 388 U. S. 1 (1967); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923). The decision in *Roe* was based firmly on this long-recognized and essential element of personal liberty.

The Court also has recognized, because abortion is a medical procedure, that the full vindication of the woman's fundamental right necessarily requires that her physician be given "the room he needs to make his best medical judgment." *Doe* v. *Bolton*, 410 U. S. 179, 192 (1973). See *Whalen* v. *Roe*, 429 U. S. 589, 604–605, n. 33 (1977). The physician's exercise of this medical judgment encompasses both assisting the woman in the decisionmaking process and implementing her decision should she choose abortion. See *Colautti* v. *Franklin*, 439 U. S. 379, 387 (1979).

At the same time, the Court in *Roe* acknowledged that the woman's fundamental right "is not unqualified and must be considered against important state interests in abortion." *Roe*, 410 U. S., at 154. But restrictive state regulation of the right to choose abortion, as with other fundamental rights subject to searching judicial examination, must be supported by a compelling state interest. *Id.*, at 155. We have recognized two such interests that may justify state regulation of abortions.[10]

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[10] In addition, the Court repeatedly has recognized that, in view of the unique status of children under the law, the States have a "significant" in-

First, a State has an "important and legitimate interest in protecting the potentiality of human life." *Id.*, at 162. Although this interest exists "throughout the course of the woman's pregnancy," *Beal* v. *Doe*, 432 U. S. 438, 446 (1977), it becomes compelling only at viability, the point at which the fetus "has the capability of meaningful life outside the mother's womb," *Roe*, *supra*, at 163. See *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 63–65 (1976). At viability this interest in protecting the potential life of the unborn child is so important that the State may proscribe abortions altogether, "except when it is necessary to preserve the life or health of the mother." *Roe*, 410 U. S., at 164.

Second, because a State has a legitimate concern with the health of women who undergo abortions, "a State may properly assert important interests in safeguarding health [and]

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terest in certain abortion regulations aimed at protecting children "that is not present in the case of an adult." *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S., at 75. See *Carey* v. *Population Services International*, 431 U. S. 678, 693, n. 15 (1977) (plurality opinion). The right of privacy includes "independence in making certain kinds of important decisions," *Whalen* v. *Roe*, 429 U. S. 589, 599–600 (1977), but this Court has recognized that many minors are less capable than adults of making such important decisions. See *Bellotti* v. *Baird*, 443 U. S., at 633–635 *(Bellotti II)* (plurality opinion); *Danforth*, *supra*, at 102 (STEVENS, J., concurring in part and dissenting in part). Accordingly, we have held that the States have a legitimate interest in encouraging parental involvement in their minor children's decision to have an abortion. See *H. L.* v. *Matheson*, 450 U. S. 398 (1981) (parental notice); *Bellotti II*, *supra*, at 639, 648 (plurality opinion) (parental consent). A majority of the Court, however, has indicated that these state and parental interests must give way to the constitutional right of a mature minor or of an immature minor whose best interests are contrary to parental involvement. See, *e. g.*, *Matheson*, 450 U. S., at 420 (POWELL, J., concurring); *id.*, at 450–451 (MARSHALL, J., dissenting). The plurality in *Bellotti II* concluded that a State choosing to encourage parental involvement must provide an alternative procedure through which a minor may demonstrate that she is mature enough to make her own decision or that the abortion is in her best interest. See *Bellotti II*, *supra*, at 643–644.

in maintaining medical standards." *Id.*, at 154. We held in *Roe*, however, that this health interest does not become compelling until "approximately the end of the first trimester" of pregnancy.[11] *Id.*, at 163. Until that time, a pregnant woman must be permitted, in consultation with her physi-

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[11] *Roe* identified the end of the first trimester as the compelling point because until that time—according to the medical literature available in 1973—"mortality in abortion may be less than mortality in normal childbirth." 410 U. S., at 163. There is substantial evidence that developments in the past decade, particularly the development of a much safer method for performing second-trimester abortions, see *infra*, at 435–437, have extended the period in which abortions are safer than childbirth. See, *e. g.*, LeBolt, Grimes, & Cates, Mortality From Abortion and Childbirth: Are the Populations Comparable?, 248 J. A. M. A. 188, 191 (1982) (abortion may be safer than childbirth up to gestational ages of 16 weeks).

We think it prudent, however, to retain *Roe*'s identification of the beginning of the second trimester as the approximate time at which the State's interest in maternal health becomes sufficiently compelling to justify significant regulation of abortion. We note that the medical evidence suggests that until approximately the end of the first trimester, the State's interest in maternal health would not be served by regulations that restrict the manner in which abortions are performed by a licensed physician. See, *e. g.*, American College of Obstetricians and Gynecologists (ACOG), Standards for Obstetric-Gynecologic Services 54 (5th ed. 1982) (hereinafter ACOG Standards) (uncomplicated abortions generally may be performed in a physician's office or an outpatient clinic up to 14 weeks from the first day of the last menstrual period); ACOG Technical Bulletin No. 56, Methods of Mid-Trimester Abortion 4 (Dec. 1979) ("Regardless of advances in abortion technology, midtrimester terminations will likely remain more hazardous, expensive, and emotionally disturbing for women than earlier abortions").

The *Roe* trimester standard thus continues to provide a reasonable legal framework for limiting a State's authority to regulate abortions. Where the State adopts a health regulation governing the performance of abortions during the second trimester, the determinative question should be whether there is a reasonable medical basis for the regulation. See *Roe*, 410 U. S., at 163. The comparison between abortion and childbirth mortality rates may be relevant only where the State employs a health rationale as a justification for a complete prohibition on abortions in certain circumstances. See *Danforth*, *supra*, at 78–79 (invalidating state ban on saline abortions, a method that was "safer, with respect to maternal mortality, than even continuation of the pregnancy until normal childbirth").

cian, to decide to have an abortion and to effectuate that decision "free of interference by the State."[12] *Ibid.*

This does not mean that a State never may enact a regulation touching on the woman's abortion right during the first weeks of pregnancy. Certain regulations that have no significant impact on the woman's exercise of her right may be permissible where justified by important state health objectives. In *Danforth*, *supra*, we unanimously upheld two Missouri statutory provisions, applicable to the first trimester, requiring the woman to provide her informed written consent to the abortion and the physician to keep certain records, even though comparable requirements were not imposed on most other medical procedures. See 428 U. S., at 65–67, 79–81. The decisive factor was that the State met its burden of demonstrating that these regulations furthered important health-related state concerns.[13] But even these minor regulations on the abortion procedure during the first trimester may not interfere with physician-patient consultation or with the woman's choice between abortion and childbirth. See *id.*, at 81.

From approximately the end of the first trimester of pregnancy, the State "may regulate the abortion procedure to the extent that the regulation reasonably relates to the preserva-

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[12] Of course, the State retains an interest in ensuring the validity of *Roe*'s factual assumption that "the first trimester abortion [is] as safe for the woman as normal childbirth at term," an assumption that "holds true only if the abortion is performed by medically competent personnel under conditions insuring maximum safety for the woman." *Connecticut* v. *Menillo*, 423 U. S. 9, 11 (1975) *(per curiam)*. On this basis, for example, it is permissible for the States to impose criminal sanctions on the performance of an abortion by a nonphysician. *Ibid.*

[13] For example, we concluded that recordkeeping, "if not abused or overdone, can be useful to the State's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment." 428 U. S., at 81. See *infra*, at 443–445 (discussing the State's interest in requiring informed consent).

tion and protection of maternal health."[14] *Roe*, 410 U. S., at 163. The State's discretion to regulate on this basis does not, however, permit it to adopt abortion regulations that depart from accepted medical practice. We have rejected a State's attempt to ban a particular second-trimester abortion procedure, where the ban would have increased the costs and limited the availability of abortions without promoting important health benefits. See *Danforth*, 428 U. S., at 77–78. If a State requires licensing or undertakes to regulate the performance of abortions during this period, the health standards adopted must be "legitimately related to the objective the State seeks to accomplish." *Doe*, 410 U. S., at 195.

## III

Section 1870.03 of the Akron ordinance requires that any abortion performed "upon a pregnant woman subsequent to the end of the first trimester of her pregnancy"[15] must be

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[14] "Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like." *Roe*, *supra*, at 163–164.

[15] The Akron ordinance does not define "first trimester," but elsewhere suggests that the age of the fetus should be measured from the date of conception. See § 1870.06(B)(2) (physician must inform woman of the number of weeks elapsed since conception); § 1870.06(B)(4) (physician must inform woman that a fetus may be viable after 22 weeks from conception). An average pregnancy lasts approximately 38 weeks from the time of conception or, as more commonly measured, 40 weeks from the beginning of the woman's last menstrual period. Under both methods there may be more than a 2-week deviation either way.

Because of the approximate nature of these measurements, there is no certain method of delineating "trimesters." Frequently, the first trimester is estimated as 12 weeks following conception, or 14 weeks following the last menstrual period. We need not attempt to draw a precise line, as this Court—for purposes of analysis—has identified the "compelling point" for the State's interest in health as "approximately the end of the first tri-

"performed in a hospital." A "hospital" is "a general hospital or special hospital devoted to gynecology or obstetrics which is accredited by the Joint Commission on Accreditation of Hospitals or by the American Osteopathic Association." § 1870.01(B). Accreditation by these organizations requires compliance with comprehensive standards governing a wide variety of health and surgical services.[16] The ordinance thus prevents the performance of abortions in outpatient facilities that are not part of an acute-care, full-service hospital.[17]

In the District Court plaintiffs sought to demonstrate that this hospitalization requirement has a serious detrimental impact on a woman's ability to obtain a second-trimester abortion in Akron and that it is not reasonably related to the State's interest in the health of the pregnant woman. The District Court did not reject this argument, but rather found the evidence "not . . . so convincing that it is willing to discard the Supreme Court's formulation in *Roe*" of a line between impermissible first-trimester regulation and permissible second-trimester regulation. 479 F. Supp., at 1215. The Court of Appeals affirmed on a similar basis. It accepted plaintiffs' argument that Akron's hospitalization requirement did not have a reasonable health justification during at least part of the second trimester, but declined to "retreat from the 'bright line' in *Roe* v. *Wade*." 651 F. 2d, at

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mester." *Roe*, 410 U. S., at 163. Unless otherwise indicated, all references in this opinion to gestational age are based on the time from the beginning of the last menstrual period.

[16] The Joint Commission on Accreditation of Hospitals (JCAH), for example, has established guidelines for the following services: dietetic, emergency, home care, nuclear medicine, pharmaceutical, professional library, rehabilitation, social work, and special care. See generally JCAH, Accreditation Manual for Hospitals, 1983 Edition (1982).

[17] Akron's ordinance distinguishes between "hospitals" and outpatient clinics. Section 1870.02 provides that even first-trimester abortions must be performed in "a hospital or an abortion facility." "Abortion facility" is defined as "a clinic, physician's office, or any other place or facility in which abortions are performed, other than a hospital." § 1870.01(G).

1210.[18] We believe that the courts below misinterpreted this Court's prior decisions, and we now hold that § 1870.03 is unconstitutional.

A

In *Roe* v. *Wade* the Court held that after the end of the first trimester of pregnancy the State's interest becomes compelling, and it may "regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." 410 U. S., at 163. We noted, for example, that States could establish requirements relating "to the facility in which the procedure is to be performed, that is, whether it must be in a hospital or may be a clinic or some other place of less-than-hospital status." *Ibid.* In the companion case of *Doe* v. *Bolton* the Court invalidated a Georgia requirement that all abortions be performed in a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals. See 410 U. S., at 201. We recognized the State's legitimate health interests in establishing, for second-trimester abortions, "standards for licensing all facilities where abortions may be performed." *Id.*, at 195. We found, however, that "the State must show more than [was shown in *Doe*] in order to prove that only the full resources of

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[18] The Court of Appeals believed that it was bound by *Gary-Northwest Indiana Women's Services, Inc.* v. *Bowen*, 496 F. Supp. 894 (ND Ind. 1980) (three-judge court), summarily aff'd *sub nom. Gary-Northwest Indiana Women's Services, Inc.* v. *Orr*, 451 U. S. 934 (1981), in which an Indiana second-trimester hospitalization requirement was upheld. Although the District Court in that case found that "*Roe* does not render the constitutionality of second trimester regulations subject to either the availability of abortions or the improvements in medical techniques and skills," 496 F. Supp., at 901–902, it also rested the decision on the alternative ground that the plaintiffs had failed to provide evidence to support their theory that it was unreasonable to require hospitalization for dilatation and evacuation abortions performed early in the second trimester. See *id.*, at 902–903. Our summary affirmance therefore is not binding precedent on the hospitalization issue. See *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U. S. 173, 180–181, 182–183 (1979).

a licensed hospital, rather than those of some other appropriately licensed institution, satisfy these health interests." *Ibid.*[19]

We reaffirm today, see *supra*, at 429, n. 11, that a State's interest in health regulation becomes compelling at approximately the end of the first trimester. The existence of a compelling state interest in health, however, is only the beginning of the inquiry. The State's regulation may be upheld only if it is reasonably designed to further that state interest. See *Doe*, 410 U. S., at 195. And the Court in *Roe* did not hold that it always is reasonable for a State to adopt an abortion regulation that applies to the entire second trimester. A State necessarily must have latitude in adopting regulations of general applicability in this sensitive area. But if it appears that during a substantial portion of the second trimester the State's regulation "depart[s] from accepted medical practice," *supra*, at 431, the regulation may not be upheld simply because it may be reasonable for the remaining portion of the trimester. Rather, the State is obligated to make a reasonable effort to limit the effect of its regulations to the period in the trimester during which its health interest will be furthered.

B

There can be no doubt that § 1870.03's second-trimester hospitalization requirement places a significant obstacle in the path of women seeking an abortion. A primary burden created by the requirement is additional cost to the woman. The Court of Appeals noted that there was testimony that a second-trimester abortion costs more than twice as much in a

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[19] We also found that the additional requirement that the licensed hospital be accredited by the JCAH was "not 'based on differences that are reasonably related to the purposes of the Act in which it is found.'" *Doe*, 410 U. S., at 194 (quoting *Morey* v. *Doud*, 354 U. S. 457, 465 (1957)). We concluded that, in any event, Georgia's hospital requirement was invalid because it applied to first-trimester abortions.

hospital as in a clinic. See 651 F. 2d, at 1209 (in-hospital abortion costs $850–$900, whereas a dilatation-and-evacuation (D&E) abortion performed in a clinic costs $350–$400).[20] Moreover, the court indicated that second-trimester abortions were rarely performed in Akron hospitals. *Ibid.* (only nine second-trimester abortions performed in Akron hospitals in the year before trial).[21] Thus, a second-trimester hospitalization requirement may force women to travel to find available facilities, resulting in both financial expense and additional health risk. It therefore is apparent that a second-trimester hospitalization requirement may significantly limit a woman's ability to obtain an abortion.

Akron does not contend that § 1870.03 imposes only an insignificant burden on women's access to abortion, but rather defends it as a reasonable health regulation. This position had strong support at the time of *Roe* v. *Wade*, as hospitalization for second-trimester abortions was recommended by the American Public Health Association (APHA), see *Roe*, 410 U. S., at 143–146, and the American College of Obstetricians and Gynecologists (ACOG), see Standards for Obstetric-Gynecologic Services 65 (4th ed. 1974). Since then, however, the safety of second-trimester abortions has increased

[20] National statistics indicate a similar cost difference. In 1978 the average clinic charged $284 for a D&E abortion, whereas the average hospital charge was $435. The hospital charge did not include the physician's fee, which ran as high as $300. See Rosoff, The Availability of Second-Trimester Abortion Services in the United States, published in Second-Trimester Abortion: Perspectives After a Decade of Experience 35 (G. Berger, W. Brenner, & L. Keith eds. 1981) (hereinafter Second-Trimester Abortion).

[21] The Akron situation is not unique. In many areas of this country, few, if any, hospitals perform second-trimester abortions. See, *e. g.*, *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 664 F. 2d, at 689 (second-trimester D&E abortions available at only one hospital in Missouri); *Wolfe* v. *Stumbo*, 519 F. Supp. 22, 23 (WD Ky. 1980) (no elective post-first-trimester abortion performed in Kentucky hospitals); *Margaret S.* v. *Edwards*, 488 F. Supp. 181, 192 (ED La. 1980) (no hospitals in Louisiana perform abortions after first trimester).

dramatically.[22] The principal reason is that the D&E procedure is now widely and successfully used for second-trimester abortions.[23] The Court of Appeals found that there was "an abundance of evidence that D&E is the safest method of performing post-first trimester abortions today." 651 F. 2d, at 1209. The availability of the D&E procedure during the interval between approximately 12 and 16 weeks of pregnancy, a period during which other second-trimester abortion techniques generally cannot be used,[24] has meant that women desiring an early second-trimester abortion no longer are forced to incur the health risks of waiting until at least the 16th week of pregnancy.

For our purposes, an even more significant factor is that experience indicates that D&E may be performed safely on an outpatient basis in appropriate nonhospital facilities. The evidence is strong enough to have convinced the APHA to abandon its prior recommendation of hospitalization for all second-trimester abortions:

> "Current data show that abortions occurring in the second trimester can be safely performed by the Dilatation and Evacuation (D and E) procedure. . . . Requirements that all abortions after 12 weeks of gestation be performed in hospitals increase the expense and inconvenience to the woman without contributing to the safety of the procedure." APHA Recommended Pro-

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[22] The death-to-case ratio for all second-trimester abortions in this country fell from 14.4 deaths per 100,000 abortions in 1972 to 7.6 per 100,000 in 1977. See Tyler, Cates, Schulz, Selik, & Smith, Second-Trimester Induced Abortion in the United States, published in Second-Trimester Abortion 17–20.

[23] At the time *Roe* was decided, the D&E procedure was used only to perform first-trimester abortions.

[24] Instillation procedures, the primary means of performing a second-trimester abortion before the development of D&E, generally cannot be performed until approximately the 16th week of pregnancy because until that time the amniotic sac is too small. See Grimes & Cates, Dilatation and Evacuation, published in Second-Trimester Abortion 121.

gram Guide for Abortion Services (Revised 1979), 70 Am. J. Public Health 652, 654 (1980) (hereinafter APHA Recommended Guide).

Similarly, the ACOG no longer suggests that all second-trimester abortions be performed in a hospital. It recommends that abortions performed in a physician's office or outpatient clinic be limited to 14 weeks of pregnancy, but it indicates that abortions may be performed safely in "a hospital-based or in a free-standing ambulatory surgical facility, or in an outpatient clinic meeting the criteria required for a free-standing surgical facility," until 18 weeks of pregnancy. ACOG, Standards for Obstetric-Gynecologic Services 54 (5th ed. 1982).

These developments, and the professional commentary supporting them, constitute impressive evidence that—at least during the early weeks of the second trimester—D&E abortions may be performed as safely in an outpatient clinic as in a full-service hospital.[25] We conclude, therefore, that "present medical knowledge," *Roe*, *supra*, at 163, convincingly undercuts Akron's justification for requiring that *all* second-trimester abortions be performed in a hospital.[26]

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[25] See also *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, *supra*, at 690, n. 6 (discussing testimony by Dr. Willard Cates, Chief of Federal Abortion Surveillance for the National Centers for Disease Control, that D&E second-trimester abortions are as safely performed outside of hospitals up to the 16th week); APHA Recommended Guide 654 (outpatient D&E is safer than all in-hospital non-D&E abortion procedures during the second trimester).

[26] At trial Akron relied largely on the former position of the various medical organizations concerning hospitalization during the second trimester. See 651 F. 2d, at 1209. The revised position of the ACOG did not occur until after trial.

Akron also argues that the safety of nonhospital D&E abortions depends on adherence to minimum standards such as those adopted by ACOG for free-standing surgical facilities, see ACOG Standards 51–62, and that there is no evidence that plaintiffs' clinics operate in this manner. But the issue in this litigation is not whether these clinics would meet such stand-

Akron nonetheless urges that "[t]he fact that some mid-trimester abortions may be done in a minimally equipped clinic does not invalidate the regulation."[27] Brief for Respondents in No. 81–1172, p. 19. It is true that a state abortion regulation is not unconstitutional simply because it does not correspond perfectly in all cases to the asserted state interest. But the lines drawn in a state regulation must be reasonable, and this cannot be said of § 1870.03. By preventing the performance of D&E abortions in an appropriate nonhospital setting, Akron has imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure.[28] Section 1870.03 has "the effect of inhibiting . . . the vast majority of abortions after the first 12 weeks," *Danforth*, 428 U. S., at 79, and

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ards if they were prescribed by the city. Rather, Akron has gone much further by banning all second-trimester abortions in all clinics, a regulation that does not reasonably further the city's interest in promoting health. We continue to hold, as we did in *Doe* v. *Bolton*, that a State may, "from and after the end of the first trimester, adopt standards for licensing all facilities where abortions may be performed so long as those standards are legitimately related to the objective the State seeks to accomplish." 410 U. S., at 194–195. This includes standards designed to correct any deficiencies that Akron reasonably believes exist in the clinics' present operation.

[27] The city thus implies that its hospital requirement may be sustained because it is reasonable as applied to later D&E abortions or to all second-trimester instillation abortions. We do not hold today that a State in no circumstances may require that some abortions be performed in a full-service hospital. Abortions performed by D&E are much safer, up to a point in the development of the fetus, than those performed by instillation methods. See Cates & Grimes, Morbidity and Mortality, published in Second-Trimester Abortion 166–169. The evidence before us as to the need for hospitalization concerns only the D&E method performed in the early weeks of the second trimester. See 651 F. 2d, at 1208–1210.

[28] In the United States during 1978, 82.1% of all abortions from 13–15 weeks and 24.6% of all abortions from 16–20 weeks were performed by the D&E method. See Department of Health and Human Services, Centers for Disease Control, Abortion Surveillance: Annual Summary 1978, Table 14, p. 43 (1980).

therefore unreasonably infringes upon a woman's constitutional right to obtain an abortion.

## IV

We turn next to § 1870.05(B), the provision prohibiting a physician from performing an abortion on a minor pregnant woman under the age of 15 unless he obtains "the informed written consent of one of her parents or her legal guardian" or unless the minor obtains "an order from a court having jurisdiction over her that the abortion be performed or induced." The District Court invalidated this provision because "[i]t does not establish a procedure by which a minor can avoid a parental veto of her abortion decision by demonstrating that her decision is, in fact, informed. Rather, it requires, in all cases, both the minor's informed consent and either parental consent or a court order." 479 F. Supp., at 1201. The Court of Appeals affirmed on the same basis.[29]

The relevant legal standards are not in dispute. The Court has held that "the State may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor." *Danforth*, *supra*, at 74. In *Bellotti* v. *Baird*, 443 U. S. 622 (1979) *(Bellotti II)*, a majority of the Court indicated that a State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial. See *id.*, at 640–642 (plurality opinion for four Justices); *id.*, at 656–657 (WHITE, J., dissenting) (expressing approval of absolute parental or judicial consent requirement). See also *Danforth*, *supra*, at 102–105 (STEVENS, J., concurring in part and dissenting in part). The *Bellotti II* plurality cautioned, however, that the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision her-

[29] The Court of Appeals upheld § 1870.05(A)'s notification requirement. See 651 F. 2d, at 1206. The validity of this ruling has not been challenged in this Court.

self or that, despite her immaturity, an abortion would be in her best interests. 443 U. S., at 643–644. Under these decisions, it is clear that Akron may not make a blanket determination that *all* minors under the age of 15 are too immature to make this decision or that an abortion never may be in the minor's best interests without parental approval.

Akron's ordinance does not create expressly the alternative procedure required by *Bellotti II*. But Akron contends that the Ohio Juvenile Court will qualify as a "court having jurisdiction" within the meaning of § 1870.05(B), and that "it is not to be assumed that during the course of the juvenile proceedings the Court will not construe the ordinance in a manner consistent with the constitutional requirement of a determination of the minor's ability to make an informed consent." Brief for Petitioner in No. 81–746, p. 28. Akron concludes that the courts below should not have invalidated § 1870.05(B) on its face. The city relies on *Bellotti* v. *Baird*, 428 U. S. 132 (1976) *(Bellotti I)*, in which the Court did not decide whether a State's parental consent provisions were unconstitutional as applied to mature minors, holding instead that "abstention is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.'" *Id.*, at 146–147 (quoting *Harrison* v. *NAACP*, 360 U. S. 167, 177 (1959)). See also *H. L.* v. *Matheson*, 450 U. S. 398 (1981) (refusing to decide whether parental notice statute would be constitutional as applied to mature minors).[30]

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[30] The Court's primary holding in *Matheson* was that the pregnant minor who questioned Utah's abortion consent requirement on the ground that it impermissibly applied to mature or emancipated minors lacked standing to raise that argument since she had not alleged that she or any member of her class was mature or emancipated. 450 U. S., at 406. No such standing problem exists here, however, as the physician plaintiff, who is subject to potential criminal liability for failure to comply with the requirements of § 1870.05(B), has standing to raise the claims of his minor patients. See

We do not think that the abstention principle should have been applied here. It is reasonable to assume, as we did in *Bellotti I*, *supra*, and *Matheson*, *supra*, that a state court presented with a state statute specifically governing abortion consent procedures for pregnant minors will attempt to construe the statute consistently with constitutional requirements. This suit, however, concerns a municipal ordinance that creates no procedures for making the necessary determinations. Akron seeks to invoke the Ohio statute governing juvenile proceedings, but that statute neither mentions minors' abortions nor suggests that the Ohio Juvenile Court has authority to inquire into a minor's maturity or emancipation.[31] In these circumstances, we do not think that the Akron ordinance, as applied in Ohio juvenile proceedings, is reasonably susceptible of being construed to create an "opportunity for case-by-case evaluations of the maturity of pregnant minors." *Bellotti II*, *supra*, at 643, n. 23 (plurality

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*Danforth*, 428 U. S., at 62; *Doe* v. *Bolton*, 410 U. S., at 188–189; *Bellotti II*, 443 U. S., at 627, n. 5 (plurality opinion).

[31] The Ohio Juvenile Court has jurisdiction over any child "alleged to be a juvenile traffic offender, delinquent, unruly, abused, neglected, or dependent." Ohio Rev. Code Ann. § 2151.23 (Supp. 1982). The only category that arguably could encompass a pregnant minor desiring an abortion would be the "neglected" child category. A neglected child is defined as one "[w]hose parents, guardian or custodian neglects or refuses to provide him with proper or necessary subsistence, education, medical or surgical care, or other care necessary for his health, morals, or well being." § 2151.03. Even assuming that the Ohio courts would construe these provisions as permitting a minor to obtain judicial approval for the "proper or necessary . . . medical or surgical care" of an abortion, where her parents had refused to provide that care, the statute makes no provision for a mature or emancipated minor completely to avoid hostile parental involvement by demonstrating to the satisfaction of the court that she is capable of exercising her constitutional right to choose an abortion. On the contrary, the statute requires that the minor's parents be notified once a petition has been filed, § 2151.28, a requirement that in the case of a mature minor seeking an abortion would be unconstitutional. See *H. L.* v. *Matheson*, 450 U. S., at 420 (POWELL, J., concurring); *id.*, at 428, n. 3 (MARSHALL, J., dissenting).

opinion). We therefore affirm the Court of Appeals' judgment that § 1870.05(B) is unconstitutional.

V

The Akron ordinance provides that no abortion shall be performed except "with the informed written consent of the pregnant woman, . . . given freely and without coercion." § 1870.06(A). Furthermore, "in order to insure that the consent for an abortion is truly informed consent," the woman must be "orally informed by her attending physician" of the status of her pregnancy, the development of her fetus, the date of possible viability, the physical and emotional complications that may result from an abortion, and the availability of agencies to provide her with assistance and information with respect to birth control, adoption, and childbirth. § 1870.06(B). In addition, the attending physician must inform her "of the particular risks associated with her own pregnancy and the abortion technique to be employed . . . [and] other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term." § 1870.06(C).

The District Court found that § 1870.06(B) was unconstitutional, but that § 1870.06(C) was related to a valid state interest in maternal health. See 479 F. Supp., at 1203–1204. The Court of Appeals concluded that both provisions were unconstitutional. See 651 F. 2d, at 1207. We affirm.

A

In *Danforth*, we upheld a Missouri law requiring a pregnant woman to "certif[y] in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion." 428 U. S., at 85. We explained:

> "The decision to abort . . . is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and conse-

> quences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent." *Id.*, at 67.

We rejected the view that "informed consent" was too vague a term, construing it to mean "the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession." *Id.*, at 67, n. 8.

The validity of an informed consent requirement thus rests on the State's interest in protecting the health of the pregnant woman. The decision to have an abortion has "implications far broader than those associated with most other kinds of medical treatment," *Bellotti II*, 443 U. S., at 649 (plurality opinion), and thus the State legitimately may seek to ensure that it has been made "in the light of all attendant circumstances—psychological and emotional as well as physical—that might be relevant to the well-being of the patient." *Colautti* v. *Franklin*, 439 U. S., at 394.[32] This does not mean, however, that a State has unreviewable authority to decide what information a woman must be given before she chooses to have an abortion. It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances. *Danforth*'s recognition of the State's interest in ensuring that this information be given

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[32] In particular, we have emphasized that a State's interest in protecting immature minors and in promoting family integrity gives it a special interest in ensuring that the abortion decision is made with understanding and after careful deliberation. See, *e. g.*, *H. L.* v. *Matheson*, 450 U. S., at 411; *id.*, at 419–420 (POWELL, J., concurring); *id.*, at 421–424 (STEVENS, J., concurring in judgment).

will not justify abortion regulations designed to influence the woman's informed choice between abortion or childbirth.[33]

B

Viewing the city's regulations in this light, we believe that § 1870.06(B) attempts to extend the State's interest in ensuring "informed consent" beyond permissible limits. First, it is fair to say that much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether. Subsection (3) requires the physician to inform his patient that "the unborn child is a human life from the moment of conception," a requirement inconsistent with the Court's holding in *Roe* v. *Wade* that a State may not adopt one theory of when life begins to justify its regulation of abortions. See 410 U. S., at 159–162. Moreover, much of the detailed description of "the anatomical and physiological characteristics of the particular unborn child" required by subsection (3) would involve at best speculation by the physician.[34] And subsection (5), that begins with the dubious statement that "abortion is a major surgical procedure"[35] and proceeds to describe numerous possible

[33] A State is not always foreclosed from asserting an interest in whether pregnancies end in abortion or childbirth. In *Maher* v. *Roe*, 432 U. S. 464 (1977), and *Harris* v. *McRae*, 448 U. S. 297 (1980), we upheld governmental spending statutes that reimbursed indigent women for childbirth but not abortion. This legislation to further an interest in preferring childbirth over abortion was permissible, however, only because it did not add any "restriction on access to abortions that was not already there." *Maher*, *supra*, at 474.

[34] This description must include, but not be limited to, "appearance, mobility, tactile sensitivity, including pain, perception or response, brain and heart function, the presence of internal organs and the presence of external members." The District Court found that "there was much evidence that it is impossible to determine many of [these] items, . . . such as the 'unborn child's' sensitivity to pain." 479 F. Supp., at 1203.

[35] The District Court found that "there was much evidence that rather than being 'a major surgical procedure' as the physician is required to state . . . , an abortion generally is considered a 'minor surgical procedure.'" *Ibid.*

physical and psychological complications of abortion,[36] is a "parade of horribles" intended to suggest that abortion is a particularly dangerous procedure.

An additional, and equally decisive, objection to § 1870.06(B) is its intrusion upon the discretion of the pregnant woman's physician. This provision specifies a litany of information that the physician must recite to each woman regardless of whether in his judgment the information is relevant to her personal decision. For example, even if the physician believes that some of the risks outlined in subsection (5) are nonexistent for a particular patient, he remains obligated to describe them to her. In *Danforth* the Court warned against placing the physician in just such an "undesired and uncomfortable straitjacket." 428 U. S., at 67, n. 8. Consistent with its interest in ensuring informed consent, a State may require that a physician make certain that his patient understands the physical and emotional implications of having an abortion. But Akron has gone far beyond merely describing the general subject matter relevant to informed consent. By insisting upon recitation of a lengthy and inflexible list of information, Akron unreasonably has placed "obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision." *Whalen* v. *Roe*, 429 U. S., at 604, n. 33.[37]

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[36] Section 1870.06(B)(5) requires the physician to state

"[t]hat abortion is a major surgical procedure which can result in serious complications, including hemorrhage, perforated uterus, infection, menstrual disturbances, sterility and miscarriage and prematurity in subsequent pregnancies; and that abortion may leave essentially unaffected or may worsen any existing psychological problems she may have, and can result in severe emotional disturbances."

[37] Akron has made little effort to defend the constitutionality of §§ 1870.06(B)(3), (4), and (5), but argues that the remaining four subsections of the provision are valid and severable. These four subsections require that the patient be informed by the attending physician of the fact that she is pregnant, § 1870.06(B)(1), the gestational age of the fetus, § 1870.06(B)(2), the av .ilability of information on birth control and adop-

C

Section 1870.06(C) presents a different question. Under this provision, the "attending physician" must inform the woman

> "of the particular risks associated with her own pregnancy and the abortion technique to be employed including providing her with at least a general description of the medical instructions to be followed subsequent to the abortion in order to insure her safe recovery, and shall in addition provide her with such other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term."

The information required clearly is related to maternal health and to the State's legitimate purpose in requiring informed consent. Nonetheless, the Court of Appeals determined that it interfered with the physician's medical judgment "in exactly the same way as section 1870.06(B). It requires the doctor to make certain disclosures in all cases, regardless of his own professional judgment as to the desirability of doing so." 651 F. 2d, at 1207. This was a misapplication of *Danforth*. There we construed "informed consent" to mean "the giving of information to the patient as to just what would be done and as to its consequences." 428 U. S., at 67, n. 8. We see no significant difference in Akron's requirement that the woman be told of the particular risks of her pregnancy and the abortion technique to be

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tion, § 1870.06(B)(6), and the availability of assistance during pregnancy and after childbirth, § 1870.06(B)(7). This information, to the extent it is accurate, certainly is not objectionable, and probably is routinely made available to the patient. We are not persuaded, however, to sever these provisions from the remainder of § 1870.06(B). They require that all of the information be given orally by the attending physician when much, if not all of it, could be given by a qualified person assisting the physician. See *infra*, at 448–449.

used, and be given general instructions on proper postabortion care. Moreover, in contrast to subsection (B), § 1870.06(C) merely describes in general terms the information to be disclosed. It properly leaves the precise nature and amount of this disclosure to the physician's discretion and "medical judgment."

The Court of Appeals also held, however, that § 1870.06(C) was invalid because it required that the disclosure be made by the "attending physician." The court found that "the practice of all three plaintiff clinics has been for the counseling to be conducted by persons other than the doctor who performs the abortion," 651 F. 2d, at 1207, and determined that Akron had not justified requiring the physician personally to describe the health risks. Akron challenges this holding as contrary to our cases that emphasize the importance of the physician-patient relationship. In Akron's view, as in the view of the dissenting judge below, the "attending physician" requirement "does no more than seek to ensure that there is in fact a true physician-patient relationship even for the woman who goes to an abortion clinic." *Id.*, at 1217 (Kennedy, J., concurring in part and dissenting in part).

Requiring physicians personally to discuss the abortion decision, its health risks, and consequences with each patient may in some cases add to the cost of providing abortions, though the record here does not suggest that ethical physicians will charge more for adhering to this typical element of the physician-patient relationship. Yet in *Roe* and subsequent cases we have "stressed repeatedly the central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out." *Colautti* v. *Franklin*, 439 U. S., at 387. Moreover, we have left no doubt that, to ensure the safety of the abortion procedure, the States may mandate that only physicians perform abortions. See *Connecticut* v. *Menillo*, 423 U. S. 9, 11 (1975); *Roe*, 410 U. S., at 165.

We are not convinced, however, that there is as vital a state need for insisting that the physician performing the abortion, or for that matter any physician, personally counsel the patient in the absence of a request. The State's interest is in ensuring that the woman's consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it.[38] Akron and intervenors strongly urge that the nonphysician counselors at the plaintiff abortion clinics are not trained or qualified to perform this important function. The courts below made no such findings, however, and on the record before us we cannot say that the woman's consent to the abortion will not be informed if a physician delegates the counseling task to another qualified individual.

In so holding, we do not suggest that the State is powerless to vindicate its interest in making certain the "important" and "stressful" decision to abort "[i]s made with full knowledge of its nature and consequences." *Danforth*, 428 U. S., at 67. Nor do we imply that a physician may abdicate his essential role as the person ultimately responsible for the medical aspects of the decision to perform the abortion.[39] A

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[38] We do not suggest that appropriate counseling consists simply of a recital of pertinent medical facts. On the contrary, it is clear that the needs of patients for information and an opportunity to discuss the abortion decision will vary considerably. It is not disputed that individual counseling should be available for those persons who desire or need it. See, *e. g.*, National Abortion Federation Standards 1 (1981) (hereinafter NAF Standards); Planned Parenthood of Metropolitan Washington, D. C., Inc., Guidelines for Operation, Maintenance, and Evaluation of First Trimester Outpatient Abortion Facilities 5 (1980). Such an opportunity may be especially important for minors alienated or separated from their parents. See APHA Recommended Guide 654. Thus, for most patients, mere provision of a printed statement of relevant information is not counseling.

[39] This Court's consistent recognition of the critical role of the physician in the abortion procedure has been based on the model of the competent, conscientious, and ethical physician. See *Doe*, 410 U. S., at 196–197. We have no occasion in this case to consider conduct by physicians that may

State may define the physician's responsibility to include verification that adequate counseling has been provided and that the woman's consent is informed.[40] In addition, the State may establish reasonable minimum qualifications for those people who perform the primary counseling function.[41] See, *e. g.*, *Doe*, 410 U. S., at 195 (State may require a medical facility "to possess all the staffing and services necessary to perform an abortion safely"). In light of these alternatives, we believe that it is unreasonable for a State to insist that only a physician is competent to provide the information and counseling relevant to informed consent. We affirm the judgment of the Court of Appeals that § 1870.06(C) is invalid.

## VI

The Akron ordinance prohibits a physician from performing an abortion until 24 hours after the pregnant woman signs a consent form. § 1870.07.[42] The District Court upheld this provision on the ground that it furthered Akron's interest in ensuring "that a woman's abortion decision is made after careful consideration of all the facts applicable to her particu-

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depart from this model. Cf. *Danforth*, 428 U. S., at 91–92, n. 2 (Stewart, J., concurring).

[40] Cf. ACOG Standards 54 ("If counseling has been provided elsewhere, the physician performing the abortion should verify that the counseling has taken place").

[41] The importance of well-trained and competent counselors is not in dispute. See, *e. g.*, APHA Recommended Guide 654 ("Abortion counselors may be highly skilled physicians as well as trained, sympathetic individuals working under appropriate supervision"); NAF Standards 2 (counselors must be trained initially at least in the following subjects: "sexual and reproductive health; abortion technology; contraceptive technology; short-term counseling skills; community resources and referrals; informed consent; agency policies and practices").

[42] This provision does not apply if the physician certifies in writing that "there is an emergency need for an abortion to be performed or induced such that continuation of the pregnancy poses an immediate threat and grave risk to the life or physical health of the pregnant woman." § 1870.12.

lar situation." 479 F. Supp., at 1204. The Court of Appeals reversed, finding that the inflexible waiting period had "no medical basis," and that careful consideration of the abortion decision by the woman "is beyond the state's power to require." 651 F. 2d, at 1208. We affirm the Court of Appeals' judgment.

The District Court found that the mandatory 24-hour waiting period increases the cost of obtaining an abortion by requiring the woman to make two separate trips to the abortion facility. See 479 F. Supp., at 1204. Plaintiffs also contend that because of scheduling difficulties the effective delay may be longer than 24 hours, and that such a delay in some cases could increase the risk of an abortion. Akron denies that any significant health risk is created by a 24-hour waiting period, and argues that a brief period of delay—with the opportunity for reflection on the counseling received—often will be beneficial to the pregnant woman.

We find that Akron has failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible waiting period. There is no evidence suggesting that the abortion procedure will be performed more safely. Nor are we convinced that the State's legitimate concern that the woman's decision be informed is reasonably served by requiring a 24-hour delay as a matter of course. The decision whether to proceed with an abortion is one as to which it is important to "affor[d] the physician adequate discretion in the exercise of his medical judgment." *Colautti* v. *Franklin*, 439 U. S., at 387. In accordance with the ethical standards of the profession, a physician will advise the patient to defer the abortion when he thinks this will be beneficial to her.[43] But if a woman, after appropriate counseling, is pre-

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[43] The ACOG recommends that a clinic allow "sufficient time for reflection prior to making an informed decision." ACOG Standards 54. In contrast to § 1870.07's mandatory waiting period, this standard recognizes that the time needed for consideration of the decision varies depending on

pared to give her written informed consent and proceed with the abortion, a State may not demand that she delay the effectuation of that decision.

## VII

Section § 1870.16 of the Akron ordinance requires physicians performing abortions to "insure that the remains of the unborn child are disposed of in a humane and sanitary manner." The Court of Appeals found that the word "humane" was impermissibly vague as a definition of conduct subject to criminal prosecution. The court invalidated the entire provision, declining to sever the word "humane" in order to uphold the requirement that disposal be "sanitary." See 651 F. 2d, at 1211. We affirm this judgment.

Akron contends that the purpose of § 1870.16 is simply "'to preclude the mindless dumping of aborted fetuses onto garbage piles.'" *Planned Parenthood Assn.* v. *Fitzpatrick*, 401 F. Supp. 554, 573 (ED Pa. 1975) (three-judge court) (quoting State's characterization of legislative purpose), summarily aff'd *sub nom. Franklin* v. *Fitzpatrick*, 428 U. S. 901 (1976).[44] It is far from clear, however, that this provision has such a limited intent. The phrase "humane and sanitary" does, as the Court of Appeals noted, suggest a possible intent to "mandate some sort of 'decent burial' of an embryo at the earliest stages of formation." 651 F. 2d, at 1211. This level of uncertainty is fatal where criminal liability is imposed. See *Colautti* v. *Franklin*, *supra*, at 396. Because § 1870.16 fails to give a physician "fair notice that his contemplated conduct is forbidden," *United States* v. *Harriss*, 347

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the particular situation of the patient and how much prior counseling she has received.

[44] In *Fitzpatrick* the District Court accepted Pennsylvania's contention that its statute governing the "humane" disposal of fetal remains was designed only to prevent such "mindless dumping." That decision is distinguishable because the statute did not impose criminal liability, but merely provided for the promulgation of regulations to implement the disposal requirement. See 401 F. Supp., at 572–573.

U. S. 612, 617 (1954), we agree that it violates the Due Process Clause.[45]

## VIII

We affirm the judgment of the Court of Appeals invalidating those sections of Akron's "Regulations of Abortions" ordinance that deal with parental consent, informed consent, a 24-hour waiting period, and the disposal of fetal remains. The remaining portion of the judgment, sustaining Akron's requirement that all second-trimester abortions be performed in a hospital, is reversed.

*It is so ordered.*

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

In *Roe* v. *Wade*, 410 U. S. 113 (1973), the Court held that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.*, at 153. The parties in these cases have not asked the Court to re-examine the validity of that holding and the court below did not address it. Accordingly, the Court does not re-examine its previous holding. Nonetheless, it is apparent from the Court's opinion that neither sound constitutional theory nor our need to decide cases based on the application of neutral principles can accommodate an analytical framework that varies according to the "stages" of pregnancy, where those stages, and their concomitant standards of review, differ according to the level of medical technology available when a particular challenge to state regulation occurs. The Court's analysis of the Akron regulations is inconsistent both with

[45] We are not persuaded by Akron's argument that the word "humane" should be severed from the statute. The uncertain meaning of the phrase "humane and sanitary" leaves doubt as to whether the city would have enacted § 1870.16 with the word "sanitary" alone. Akron remains free, of course, to enact more carefully drawn regulations that further its legitimate interest in proper disposal of fetal remains.

the methods of analysis employed in previous cases dealing with abortion, and with the Court's approach to fundamental rights in other areas.

Our recent cases indicate that a regulation imposed on "a lawful abortion 'is not unconstitutional unless it unduly burdens the right to seek an abortion.'" *Maher* v. *Roe*, 432 U. S. 464, 473 (1977) (quoting *Bellotti* v. *Baird*, 428 U. S. 132, 147 (1977) *(Bellotti I)*). See also *Harris* v. *McRae*, 448 U. S. 297, 314 (1980). In my view, this "unduly burdensome" standard should be applied to the challenged regulations throughout the entire pregnancy without reference to the particular "stage" of pregnancy involved. If the particular regulation does not "unduly burde[n]" the fundamental right, *Maher*, *supra*, at 473, then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose. Irrespective of what we may believe is wise or prudent policy in this difficult area, "the Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense.'" *Plyler* v. *Doe*, 457 U. S. 202, 242 (1982) (BURGER, C. J., dissenting).

## I

The trimester or "three-stage" approach adopted by the Court in *Roe*,[1] and, in a modified form, employed by the

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[1] *Roe* recognized that the State possesses important and legitimate interests in protecting maternal health and the potentiality of human life. These "separate and distinct" interests were held to grow "in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'" 410 U. S., at 162–163. The state interest in maternal health was said to become compelling "at approximately the end of the first trimester." *Id.*, at 163. Before that time, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Id.*, at 164. After the end of the first trimester, "a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." *Id.*, at 163. The Court noted that "in the light of present

Court to analyze the regulations in these cases, cannot be supported as a legitimate or useful framework for accommodating the woman's right and the State's interests. The decision of the Court today graphically illustrates why the trimester approach is a completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context.

As the Court indicates today, the State's compelling interest in maternal health changes as medical technology changes, and any health regulation must not "depart from accepted medical practice." *Ante*, at 431.[2] In applying this standard, the Court holds that "the safety of second-trimester abortions has increased dramatically" since 1973, when

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medical knowledge . . . mortality in abortion may be less than mortality in normal childbirth" during the first trimester of pregnancy. *Ibid.*

The state interest in potential human life was held to become compelling at "viability," defined by the Court as that point "at which the fetus . . . [is] potentially able to live outside the mother's womb, albeit with artificial aid." *Roe*, 410 U. S., at 160 (footnote omitted). Based on the Court's review of the contemporary medical literature, it placed viability at about 28 weeks, but acknowledged that this point may occur as early as 24 weeks. After viability is reached, the State may, according to *Roe*, proscribe abortion altogether, except when it is necessary to preserve the life and health of the mother. See *id.*, at 163–164. Since *Roe*, the Court has held that *Roe* "left the point [of viability] flexible for anticipated advancements in medical skill." *Colautti* v. *Franklin*, 439 U. S. 379, 387 (1979).

The Court has also identified a state interest in protection of the young and "familial integrity" in the abortion context. See, *e. g.*, *H. L.* v. *Matheson*, 450 U. S. 398, 411 (1981).

[2] Although the Court purports to retain the trimester approach as "a reasonable legal framework for limiting" state regulatory authority over abortions, *ante* at 429, n. 11, the Court expressly abandons the *Roe* view that the relative rates of childbirth and abortion mortality are relevant for determining whether second-trimester regulations are reasonably related to maternal health. Instead, the Court decides that a health regulation must not "depart from accepted medical practice" if it is to be upheld. *Ante*, at 431. The State must now "make a reasonable effort to limit the effect of its regulations *to the period in the trimester* during which its health interest will be furthered." *Ante*, at 434 (emphasis added).

*Roe* was decided. *Ante*, at 435–436 (footnote omitted). Although a regulation such as one requiring that all second-trimester abortions be performed in hospitals "had strong support" in 1973 "as a reasonable health regulation," *ante*, at 435, this regulation can no longer stand because, according to the Court's diligent research into medical and scientific literature, the dilation and evacuation (D&E) procedure, used in 1973 only for first-trimester abortions, "is now widely and successfully used for second-trimester abortions." *Ante*, at 436 (footnote omitted). Further, the medical literature relied on by the Court indicates that the D&E procedure may be performed in an appropriate nonhospital setting for "at least . . . the early weeks of the second trimester . . . ." *Ante*, at 437. The Court then chooses the period of 16 weeks of gestation as that point at which D&E procedures may be performed safely in a nonhospital setting, and thereby invalidates the Akron hospitalization regulation.

It is not difficult to see that despite the Court's purported adherence to the trimester approach adopted in *Roe*, the lines drawn in that decision have now been "blurred" because of what the Court accepts as technological advancement in the safety of abortion procedure. The State may no longer rely on a "bright line" that separates permissible from impermissible regulation, and it is no longer free to consider the second trimester as a unit and weigh the risks posed by all abortion procedures throughout that trimester.[3] Rather,

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[3] The Court holds that the summary affirmance in *Gary-Northwest Indiana Women's Services, Inc.* v. *Bowen*, 496 F. Supp. 894 (ND Ind. 1980) (three-judge court), aff'd *sub nom. Gary-Northwest Indiana Women's Services, Inc.* v. *Orr*, 451 U. S. 934 (1981), is not, as the court below thought, binding precedent on the hospitalization issue. See *ante*, at 433, n. 18. Although the Court reads *Gary-Northwest* to be decided on the alternative ground that the plaintiffs failed to prove the safety of second-trimester abortions, *ante*, at 433, n. 18, the Court simply ignores the fact that the District Court in *Gary-Northwest* held that "*even if* the plaintiffs could prove birth more dangerous than early second trimester D&E abor-

the State must continuously and conscientiously study contemporary medical and scientific literature in order to determine whether the effect of a particular regulation is to "depart from accepted medical practice" insofar as particular procedures and particular periods within the trimester are concerned. Assuming that legislative bodies are able to engage in this exacting task,[4] it is difficult to believe that our Constitution *requires* that they do it as a prelude to protecting the health of their citizens. It is even more difficult to believe that this Court, without the resources available to those bodies entrusted with making legislative choices, believes itself competent to make these inquiries and to revise these standards every time the American College of Obstetricians and Gynecologists (ACOG) or similar group revises its views about what is and what is not appropriate medical procedure in this area. Indeed, the ACOG Standards on which the Court relies were changed in 1982 after trial in the present cases. Before ACOG changed its Standards in 1982, it recommended that all mid-trimester abortions be performed in a hospital. See 651 F. 2d 1198, 1209 (CA6 1981). As today's decision indicates, medical technology is changing, and this change will necessitate our continued functioning as the Nation's "*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 99 (1976) (WHITE, J., concurring in part and dissenting in part).

Just as improvements in medical technology inevitably will move *forward* the point at which the State may regulate for reasons of maternal health, different technological improvements will move *backward* the point of viability at which the

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tions," that would *not* matter insofar as the constitutionality of the regulations were concerned. See 496 F. Supp., at 903 (emphasis added).

[4] Irrespective of the difficulty of the task, legislatures, with their superior factfinding capabilities, are certainly better able to make the necessary judgments than are courts.

State may proscribe abortions except when necessary to preserve the life and health of the mother.

In 1973, viability before 28 weeks was considered unusual. The 14th edition of L. Hellman & J. Pritchard, Williams Obstetrics (1971), on which the Court relied in *Roe* for its understanding of viability, stated, at 493, that "[a]ttainment of a [fetal] weight of 1,000 g [or a fetal age of approximately 28 weeks' gestation] is . . . widely used as the criterion of viability." However, recent studies have demonstrated increasingly earlier fetal viability.[5] It is certainly reasonable to believe that fetal viability in the first trimester of pregnancy may be possible in the not too distant future. Indeed, the Court has explicitly acknowledged that *Roe* left the point of viability "flexible for anticipated advancements in medical skill." *Colautti* v. *Franklin*, 439 U. S. 379, 387 (1979). "[W]e recognized in *Roe* that viability was a matter of medi-

[5] One study shows that infants born alive with a gestational age of less than 25 weeks and weight between 500 and 1,249 grams have a 20% chance of survival. See Phillip, Little, Polivy, & Lucey, Neonatal Mortality Risk for the Eighties: The Importance of Birth Weight/Gestational Age Groups, 68 Pediatrics 122 (1981). Another recent comparative study shows that preterm infants with a weight of 1,000 grams or less born in one hospital had a 42% rate of survival. Kopelman, The Smallest Preterm Infants: Reasons for Optimism and New Dilemmas, 132 Am. J. Diseases of Children 461 (1978). An infant weighing 484 grams and having a gestational age of 22 weeks at birth is now thriving in a Los Angeles hospital, and the attending physician has stated that the infant has a "95% chance of survival." Washington Post, Mar. 31, 1983, p. A2, col. 2. The aborted fetus in *Simopoulos* v. *Virginia*, *post*, p. 506, weighed 495 grams and had a gestational age of approximately 22 weeks.

Recent developments promise even greater success in overcoming the various respiratory and immunological neonatal complications that stand in the way of increased fetal viability. See, *e. g.*, Beddis, Collins, Levy, Godfrey, & Silverman, New Technique for Servo-Control of Arterial Oxygen Tension in Preterm Infants, 54 Archives of Disease in Childhood 278 (1979). "There is absolutely no question that in the current era there has been a sustained and progressive improvement in the outlook for survival of small premature infants." Stern, Intensive Care of the Pre-Term Infant, 26 Danish Med. Bull. 144 (1979).

cal judgment, skill, and technical ability, and we preserved the flexibility of the term." *Danforth*, *supra*, at 64.

The *Roe* framework, then, is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception. Moreover, it is clear that the trimester approach violates the fundamental aspiration of judicial decisionmaking through the application of neutral principles "sufficiently absolute to give them roots throughout the community and continuity over significant periods of time . . . ." A. Cox, The Role of the Supreme Court in American Government 114 (1976). The *Roe* framework is inherently tied to the state of medical technology that exists whenever particular litigation ensues. Although legislatures are better suited to make the necessary factual judgments in this area, the Court's framework forces legislatures, as a matter of constitutional law, to speculate about what constitutes "accepted medical practice" at any given time. Without the necessary expertise or ability, courts must then pretend to act as science review boards and examine those legislative judgments.

The Court adheres to the *Roe* framework because the doctrine of *stare decisis* "demands respect in a society governed by the rule of law." *Ante*, at 420. Although respect for *stare decisis* cannot be challenged, "this Court's considered practice [is] not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases." *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 543 (1962). Although we must be mindful of the "desirability of continuity of decision in constitutional questions . . . when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history

has freely exercised its power to reexamine the basis of its constitutional decisions." *Smith* v. *Allwright*, 321 U. S. 649, 665 (1944) (footnote omitted).

Even assuming that there is a fundamental right to terminate pregnancy in some situations, there is no justification in law or logic for the trimester framework adopted in *Roe* and employed by the Court today on the basis of *stare decisis*. For the reasons stated above, that framework is clearly an unworkable means of balancing the fundamental right and the compelling state interests that are indisputably implicated.

## II

The Court in *Roe* correctly realized that the State has important interests "in the areas of health and medical standards" and that "[t]he State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." 410 U. S., at 149–150. The Court also recognized that the State has "*another* important and legitimate interest in protecting the potentiality of human life." *Id.*, at 162 (emphasis in original). I agree completely that the State has these interests, but in my view, the point at which these interests become compelling does not depend on the trimester of pregnancy. Rather, these interests are present *throughout* pregnancy.

This Court has never failed to recognize that "a State may properly assert important interests in safeguarding health [and] in maintaining medical standards." *Id.*, at 154. It cannot be doubted that as long as a state statute is within "the bounds of reason and [does not] assum[e] the character of a merely arbitrary fiat . . . [then] [t]he State . . . must decide upon measures that are needful for the protection of its people . . . ." *Purity Extract and Tonic Co.* v. *Lynch*, 226 U. S. 192, 204–205 (1912). "There is nothing in the United States Constitution which limits the State's power to require that medical procedures be done safely . . . ." *Sendak* v.

*Arnold*, 429 U. S. 968, 969 (1976) (WHITE, J., dissenting). "The mode and procedure of medical diagnostic procedures is not the business of judges." *Parham* v. *J. R.*, 442 U. S. 584, 607–608 (1979). Under the *Roe* framework, however, the state interest in maternal health cannot become compelling until the onset of the second trimester of pregnancy because "until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth." 410 U. S., at 163. Before the second trimester, the decision to perform an abortion "must be left to the medical judgment of the pregnant woman's attending physician." *Id.*, at 164.[6]

The fallacy inherent in the *Roe* framework is apparent: just because the State has a compelling interest in ensuring maternal safety once an abortion may be more dangerous than childbirth, it simply does not follow that the State has *no* interest before that point that justifies state regulation to ensure that first-trimester abortions are performed as safely as possible.[7]

The state interest in potential human life is likewise extant throughout pregnancy. In *Roe*, the Court held that

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[6] Interestingly, the Court in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976), upheld a recordkeeping requirement as well as the consent provision even though these requirements were imposed on first-trimester abortions and although the State did not impose comparable requirements on most other medical procedures. See *id.*, at 65–67, 79–81. *Danforth*, then, must be understood as a retreat from the position ostensibly adopted in *Roe* that the State had *no* compelling interest in regulation during the first trimester of pregnancy that would justify restrictions imposed on the abortion decision.

[7] For example, the 1982 ACOG Standards, on which the Court relies so heavily in its analysis, provide that physicians performing first-trimester abortions in their offices should provide for prompt emergency treatment or hospitalization in the event of any complications. See ACOG Standards, at 54. ACOG also prescribes that certain equipment be available for office abortions. See *id.*, at 57. I have no doubt that the State has a compelling interest to ensure that these or other requirements are met, and that this legitimate concern would justify state regulation for health reasons even in the first trimester of pregnancy.

although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until the point at which the fetus was viable. The difficulty with this analysis is clear: *potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the *potential* for human life. Although the Court refused to "resolve the difficult question of when life begins," *id.*, at 159, the Court chose the point of viability—when the fetus is *capable* of life independent of its mother—to permit the complete proscription of abortion. The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward. Accordingly, I believe that the State's interest in protecting potential human life exists throughout the pregnancy.

III

Although the State possesses compelling interests in the protection of potential human life and in maternal health throughout pregnancy, not every regulation that the State imposes must be measured against the State's compelling interests and examined with strict scrutiny. This Court has acknowledged that "the right in *Roe* v. *Wade* can be understood only by considering both the woman's interest and the nature of the State's interference with it. *Roe* did not declare an unqualified 'constitutional right to an abortion' . . . . Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Maher*, 432 U. S., at 473–474. The Court and its individual Justices have repeatedly utilized the "unduly burdensome" standard in abortion cases.[8]

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[8] See *Bellotti* v. *Baird*, 428 U. S. 132, 147 (1976) *(Bellotti I)* (State may not "impose undue burdens upon a minor capable of giving an informed consent." In *Bellotti I*, the Court left open the question whether a judicial hearing would unduly burden the *Roe* right of an adult woman. See 428 U. S., at 147); *Bellotti* v. *Baird*, 443 U. S. 622, 640 (1979) *(Bellotti II)*

The requirement that state interference "infringe substantially" or "heavily burden" a right before heightened scrutiny is applied is not novel in our fundamental-rights jurisprudence, or restricted to the abortion context. In *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 37–38 (1973), we observed that we apply "strict judicial scrutiny" only when legislation may be said to have "'deprived,' 'infringed,' or 'interfered' with the free exercise of some such fundamental personal right or liberty." If the impact of the regulation does not rise to the level appropriate for our strict scrutiny, then our inquiry is limited to whether the state law bears "some rational relationship to legitimate state purposes." *Id.*, at 40. Even in the First Amendment context, we have required in some circumstances that state laws "infringe substantially" on protected conduct, *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539, 545

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(opinion of POWELL, J.) (State may not "unduly burden the right to seek an abortion"); *Harris* v. *McRae*, 448 U. S. 297, 314 (1980) ("The doctrine of *Roe* v. *Wade*, the Court held in *Maher*, 'protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy,' [432 U. S.], at 473–474, such as the severe criminal sanctions at issue in *Roe* v. *Wade*, *supra*, or the absolute requirement of spousal consent for an abortion challenged in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52"); *Beal* v. *Doe*, 432 U. S. 438, 446 (1977) (The state interest in protecting potential human life "does not, at least until approximately the third trimester, become sufficiently compelling to justify unduly burdensome state interference . . ."); *Carey* v. *Population Services International*, 431 U. S. 678, 705 (1977) (POWELL, J., concurring in part and concurring in judgment) ("In my view, [*Roe* and *Griswold* v. *Connecticut*, 381 U. S. 479 (1965),] make clear that the [compelling state interest] standard has been invoked only when the state regulation entirely frustrates or heavily burdens the exercise of constitutional rights in this area. See *Bellotti* v. *Baird*, 428 U. S. 132, 147 (1976)"). Even though the Court did not explicitly use the "unduly burdensome" standard in evaluating the informed-consent requirement in *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, the informed-consent requirement for first-trimester abortions in *Danforth* was upheld because it did not "unduly burde[n] the right to seek an abortion." *Bellotti I*, *supra*, at 147.

(1963), or that there be "a significant encroachment upon personal liberty," *Bates* v. *City of Little Rock*, 361 U. S. 516, 524 (1960).

In *Carey* v. *Population Services International*, 431 U. S. 678 (1977), we eschewed the notion that state law had to meet the exacting "compelling state interest" test "'whenever it implicates sexual freedom.'" *Id.*, at 688, n. 5. Rather, we required that before the "strict scrutiny" standard was employed, it was necessary that the state law "impos[e] a significant burden" on a protected right, *id.*, at 689, or that it "burden an individual's right to decide to prevent conception or terminate pregnancy by *substantially* limiting access to the means of effectuating that decision . . . ." *Id.*, at 688 (emphasis added). The Court stressed that "even a burdensome regulation may be validated by a sufficiently compelling state interest." *Id.*, at 686. Finally, *Griswold* v. *Connecticut*, 381 U. S. 479, 485 (1965), recognized that a law banning the use of contraceptives by married persons had "a maximum destructive impact" on the marital relationship.

Indeed, the Court today follows this approach. Although the Court does not use the expression "undue burden," the Court recognizes that even a "significant obstacle" can be justified by a "reasonable" regulation. See *ante*, at 434, 435, 438.

The "undue burden" required in the abortion cases represents the required threshold inquiry that must be conducted before this Court can require a State to justify its legislative actions under the exacting "compelling state interest" standard. "[A] test so severe that legislation rarely can meet it should be imposed by courts with deliberate restraint in view of the respect that properly should be accorded legislative judgments." *Carey*, *supra*, at 705 (POWELL, J., concurring in part and concurring in judgment).

The "unduly burdensome" standard is particularly appropriate in the abortion context because of the *nature* and *scope* of the right that is involved. The privacy right involved in the abortion context "cannot be said to be absolute." *Roe*,

410 U. S., at 154. "*Roe* did not declare an unqualified 'constitutional right to an abortion.'" *Maher*, 432 U. S., at 473. Rather, the *Roe* right is intended to protect against state action "drastically limiting the availability and safety of the desired service," *id.*, at 472, against the imposition of an "absolute obstacle" on the abortion decision, *Danforth*, 428 U. S., at 70–71, n. 11, or against "official interference" and "coercive restraint" imposed on the abortion decision, *Harris*, 448 U. S., at 328 (WHITE, J., concurring). That a state regulation may "inhibit" abortions to some degree does not require that we find that the regulation is invalid. See *H. L.* v. *Matheson*, 450 U. S. 398, 413 (1981).

The abortion cases demonstrate that an "undue burden" has been found for the most part in situations involving absolute obstacles or severe limitations on the abortion decision. In *Roe*, the Court invalidated a Texas statute that criminalized *all* abortions except those necessary to save the life of the mother. In *Danforth*, the Court invalidated a state prohibition of abortion by saline amniocentesis because the ban had "the effect of inhibiting . . . the vast majority of abortions after the first 12 weeks." 428 U. S., at 79. The Court today acknowledges that the regulation in *Danforth* effectively represented "a *complete* prohibition on abortions in certain circumstances." *Ante*, at 429, n. 11 (emphasis adued). In *Danforth*, the Court also invalidated state regulations requiring parental or spousal consent as a prerequisite to a first-trimester abortion because the consent requirements effectively and impermissibly delegated a "veto power" to parents and spouses during the first trimester of pregnancy. In both *Bellotti I*, 428 U. S. 132 (1977), and *Bellotti* v. *Baird*, 443 U. S. 622 (1979) *(Bellotti II)*, the Court was concerned with effective parental veto over the abortion decision.[9]

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[9] The only case in which the Court invalidated regulations that were not "undue burdens" was *Doe* v. *Bolton*, 410 U. S. 179 (1973), which was decided on the same day as *Roe*. In *Doe*, the Court invalidated a hospitalization requirement because it covered first-trimester abortion. The Court

In determining whether the State imposes an "undue burden," we must keep in mind that when we are concerned with extremely sensitive issues, such as the one involved here, "the appropriate forum for their resolution in a democracy is the legislature. We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' *Missouri, K. & T. R. Co.* v. *May*, 194 U. S. 267, 270 (1904) (Holmes, J.)." *Maher*, 432 U. S., at 479–480 (footnote omitted). This does not mean that in determining whether a regulation imposes an "undue burden" on the *Roe* right we defer to the judgments made by state legislatures. "The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 103 (1973).[10]

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also invalidated a hospital accreditation requirement, a hospital-committee approval requirement, and a two-doctor concurrence requirement. The Court clearly based its disapproval of these requirements on the fact that the State did not impose them on any other medical procedure apart from abortion. But the Court subsequent to *Doe* has expressly rejected the view that differential treatment of abortion requires invalidation of regulations. See *Danforth*, 428 U. S., at 67, 80–81; *Maher* v. *Roe*, 432 U. S. 464, 480 (1977); *Harris*, 448 U. S., at 325. See also *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, *post*, p. 476.

[10] In his *amicus curiae* brief in support of the city of Akron, the Solicitor General of the United States argues that we should adopt the "unduly burdensome" standard and in doing so, we should "accord heavy deference to the legislative judgment" in determining what constitutes an "undue burden." See Brief for the United States as *Amicus Curiae* 10. The "unduly burdensome" standard is appropriate *not* because it incorporates deference to legislative judgment at the threshold stage of analysis, but rather because of the limited *nature* of the fundamental right that has been recognized in the abortion cases. Although our cases do require that we "pay careful attention" to the legislative judgment before we invoke strict scrutiny, see *e. g.*, *Columbia Broadcasting System, Inc.* v. *Democratic Na-*

We must always be mindful that "[t]he Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions. To the contrary, state action 'encouraging childbirth except in the most urgent circumstances' is 'rationally related to the legitimate governmental objective of protecting potential life.' *Harris* v. *McRae*, 448 U. S., at 325. Accord, *Maher* v. *Roe*, *supra*, at 473–474." *H. L.* v. *Matheson*, *supra*, at 413 (footnote omitted).

## IV

### A

Section 1870.03 of the Akron ordinance requires that second-trimester abortions be performed in hospitals. The Court holds that this requirement imposes a "significant obstacle" in the form of increased costs and decreased availability of abortions, *ante*, at 434–435, 435, and the Court rejects the argument offered by the State that the requirement is a reasonable health regulation under *Roe*, 410 U. S., at 163. See *ante*, at 435–436.

For the reasons stated above, I find no justification for the trimester approach used by the Court to analyze this restriction. I would apply the "unduly burdensome" test and find that the hospitalization requirement does not impose an undue burden on that decision.

The Court's reliance on increased abortion costs and decreased availability is misplaced. As the city of Akron points out, there is no evidence in this case to show that the two Akron hospitals that performed second-trimester abortions denied an abortion to any woman, or that they would not permit abortion by the D&E procedure. See Reply Brief for Petitioner in No. 81–746, p. 3. In addition, there was no evidence presented that other hospitals in nearby areas did not provide second-trimester abortions. Further, almost *any* state regulation, including the licensing require-

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*tional Committee*, 412 U. S., at 103, it is not appropriate to *weigh* the state interests at the threshold stage.

ments that the Court *would* allow, see *ante*, at 437–438, n. 26, inevitably and necessarily entails increased costs for *any* abortion. In *Simopoulos* v. *Virginia*, *post*, p. 506, the Court upholds the State's stringent licensing requirements that will clearly involve greater cost because the State's licensing scheme "is not an unreasonable means of furthering the State's compelling interest in" preserving maternal health. *Post*, at 519. Although the Court acknowledges this indisputably correct notion in *Simopoulos*, it inexplicably refuses to apply it in this case. A health regulation, such as the hospitalization requirement, simply does not rise to the level of "official interference" with the abortion decision. See *Harris*, *supra*, at 328 (WHITE, J., concurring).

Health-related factors that may legitimately be considered by the State go well beyond what various medical organizations have to say about the *physical* safety of a particular procedure. Indeed, "all factors—physical, emotional, psychological, familial, and the woman's age—[are] relevant to the well-being of the patient." *Doe* v. *Bolton*, 410 U. S. 179, 192 (1973). The ACOG Standards, upon which the Court relies, state that "[r]egardless of advances in abortion technology, midtrimester terminations will likely remain more hazardous, expensive, and emotionally disturbing for a woman than early abortions." American College of Obstetricians and Gynecologists, Technical Bulletin No. 56: Methods of Midtrimester Abortion 4 (Dec. 1979).

The hospitalization requirement does not impose an undue burden, and it is not necessary to apply an exacting standard of review. Further, the regulation has a "rational relation" to a valid state objective of ensuring the health and welfare of its citizens. See *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 491 (1955).[11]

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[11] The Court has never required that state regulation that burdens the abortion decision be "narrowly drawn" to express only the relevant state interest. In *Roe*, the Court mentioned "narrowly drawn" legislative enactments, 410 U. S., at 155, but the Court never actually adopted this

B

Section 1870.05(B)(2) of the Akron ordinance provides that no physician shall perform an abortion on a minor under 15 years of age unless the minor gives written consent, and the physician first obtains the informed written consent of a parent or guardian, or unless the minor first obtains "an order from a court having jurisdiction over her that the abortion be performed or induced." Despite the fact that this regulation has yet to be construed in the state courts, the Court holds that the regulation is unconstitutional because it is not "reasonably susceptible of being construed to create an 'opportunity for case-by-case evaluations of the maturity of pregnant minors.'" *Ante*, at 441 (quoting *Bellotti II*, 443 U. S., at 643–644, n. 23 (plurality opinion)). I believe that the Court should have abstained from declaring the ordinance unconstitutional.

In *Bellotti I*, the Court abstained from deciding whether a state parental consent provision was unconstitutional as

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standard in the *Roe* analysis. In its decision today, the Court fully endorses the *Roe* requirement that a burdensome health regulation, or as the Court appears to call it, a "significant obstacle," *ante*, at 434, be "reasonably related" to the state compelling interest. See *ante*, at 430–431, 435, 438. The Court recognizes that "[a] State necessarily must have latitude in adopting regulations of general applicability in this sensitive area." *Ante*, at 434. See also *Simopoulos* v. *Virginia*, *post*, at 516. Nevertheless, the Court fails to apply the "reasonably related" standard. The hospitalization requirement "reasonably relates" to its compelling interest in protection and preservation of maternal health under any normal understanding of what "reasonably relates" signifies.

The Court concludes that the regulation must fall because "it appears that during a substantial portion of the second trimester the State's regulation 'depart[s] from accepted medical practice.'" *Ante*, at 434. It is difficult to see how the Court concludes that the regulation "depart[s] from accepted medical practice" during "a substantial portion of the second trimester," *ibid.*, in light of the fact that the Court concludes that D&E abortions may be performed safely in an outpatient clinic through 16 weeks, or 4 weeks into the second trimester. *Ante*, at 436–437. Four weeks is hardly a "substantial portion" of the second trimester.

applied to mature minors. The Court recognized and respected the well-settled rule that abstention is proper "where an unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.'" 428 U. S., at 147 (quoting *Harrison* v. *NAACP*, 360 U. S. 167, 177 (1959)). While acknowledging the force of the abstention doctrine, see *ante*, at 440–441, the Court nevertheless declines to apply it. Instead, it speculates that a state juvenile court *might* inquire into a minor's maturity and ability to decide to have an abortion in deciding whether the minor is being provided "'surgical care . . . necessary for his health, morals, or well being,'" *ante* at 441, n. 31 (quoting Ohio Rev. Code Ann. § 2151.03 (1976)). The Court ultimately rejects this possible interpretation of state law, however, because filing a petition in juvenile court requires parental notification, an unconstitutional condition insofar as mature minors are concerned.

Assuming, *arguendo*, that the Court is correct in holding that a parental notification requirement would be unconstitutional as applied to mature minors,[12] I see no reason to assume that the Akron ordinance and the State Juvenile Court statute compel state judges to notify the parents of a mature minor if such notification was contrary to the minor's best interests. Further, there is no reason to believe that the state

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[12] In my view, no decision of this Court has yet held that parental notification in the case of mature minors is unconstitutional. Although the plurality opinion of JUSTICE POWELL in *Bellotti II* suggested that the state statute in that case was unconstitutional because, *inter alia*, it failed to provide *all* minors with an opportunity "to go directly to a court without first consulting or notifying her parents," 443 U. S., at 647, the Court in *H. L.* v. *Matheson* held that *unemancipated and immature* minors had "no constitutional right to notify a court in lieu of notifying their parents." 450 U. S., at 412, n. 22. Furthermore, the Court in *H. L.* v. *Matheson* expressly did *not* decide that a parental notification requirement would be unconstitutional if the State otherwise permitted *mature* minors to make abortion decisions free of parental or judicial "veto." See *id.*, at 406–407.

courts would construe the consent requirement to impose any type of parental or judicial veto on the abortion decisions of mature minors. In light of the Court's complete lack of knowledge about how the Akron ordinance will operate, and how the Akron ordinance and the State Juvenile Court statute interact, our "'scrupulous regard for the rightful independence of state governments'" counsels against "unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system." *Harrison* v. *NAACP*, *supra*, at 176 (quoting *Matthews* v. *Rodgers*, 284 U. S. 521, 525 (1932)).

C

The Court invalidates the informed-consent provisions of § 1870.06(B) and § 1870.06(C) of the Akron ordinance.[13] Although it finds that subsections (1), (2), (6), and (7) of § 1870.06(B) are "certainly . . . not objectionable," *ante*, at 445–446, n. 37, it refuses to sever those provisions from subsections (3), (4), and (5) because the city requires that the "acceptable" information be provided by the attending physician when "much, if not all of it, could be given by a qualified person assisting the physician," *ibid.* Despite the fact that the Court finds that § 1870.06(C) "properly leaves the precise nature and amount of . . . disclosure to the physician's discre-

[13] Section 1870.06(B) requires that the attending physician orally inform the pregnant woman: (1) that she is pregnant; (2) of the probable number of weeks since conception; (3) that the unborn child is a human being from the moment of conception, and has certain anatomical and physiological characteristics; (4) that the unborn child may be viable and, if so, the physician has a legal responsibility to try to save the child; (5) that abortion is a major surgical procedure that can result in serious physical and psychological complications; (6) that various agencies exist that will provide the pregnant woman with information about birth control; and (7) that various agencies exist that will assist the woman through pregnancy should she decide not to undergo the abortion. Section 1870.06(C) requires the attending physician to inform the woman of risks associated with her particular pregnancy and proposed abortion technique, as well as to furnish information that the physician deems relevant "in his own medical judgment."

tion and 'medical judgment,'" *ante*, at 447, the Court also finds § 1870.06(C) unconstitutional because it requires that the disclosure be made by the attending physician, rather than by other "qualified persons" who work at abortion clinics.

We have approved informed-consent provisions in the past even though the physician was required to deliver certain information to the patient. In *Danforth*, the Court upheld a state informed-consent requirement because "[t]he decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." 428 U. S., at 67.[14] In *H. L.* v. *Matheson*, the Court noted that the state statute in the case required that the patient "be advised at a minimum about available adoption services, about fetal development, and about foreseeable complications and risks of an abortion. See Utah Code Ann. § 76–7–305 (1978). In *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 65–67 (1976), we rejected a constitutional attack on written consent provisions." 450 U. S., at 400–401, n. 1. Indeed, we have held that an informed-consent provision does not "unduly burde[n] the right to seek an abortion." *Bellotti I*, 428 U. S., at 147.[15]

The validity of subsections (3), (4), and (5) is not before the Court because it appears that the city of Akron conceded their unconstitutionality before the court below. See Brief

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[14] The Court in *Danforth* did not even view the informed-consent requirement as having a "legally significant impact" on first-trimester abortions that would trigger the *Roe* and *Doe* proscriptions against state interference in the decision to seek a first-trimester abortion. See 428 U. S., at 81 (recordkeeping requirements).

[15] Assuming, *arguendo*, that the Court now decides that *Danforth*, *Bellotti II*, and *H. L.* v. *Matheson* were incorrect, and that the informed-consent provisions do burden the right to seek an abortion, the Court inexplicably refuses to determine whether this "burden" "reasonably relates" to legitimate state interests. *Ante*, at 430 (quoting *Roe*, 410 U. S., at 163). Rather, the Court now decides that an informed-consent provision must be justified by a "vital state need" before it can be upheld. See *ante*, at 448.

for City of Akron in No. 79–3757 (CA6), p. 35; Reply Brief for City of Akron in No. 79–3757 (CA6), pp. 5–9. In my view, the remaining subsections of § 1870.06(B) are separable from the subsections conceded to be unconstitutional. Section 1870.19 contains a separability clause which creates a "'presumption of divisibility'" and places "the burden . . . on the litigant who would escape its operation." *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 335 (1936) (opinion of Cardozo, J.). Akron Center has failed to show that severance of subsections (3), (4), and (5) would "create a program quite different from the one the legislature actually adopted." *Sloan* v. *Lemon*, 413 U. S. 825, 834 (1973).

The remainder of § 1870.06(B), and § 1870.06(C), impose no undue burden or drastic limitation on the abortion decision. The city of Akron is merely attempting to ensure that the decision to abort is made in light of that knowledge that the city deems relevant to informed choice. As such, these regulations do not impermissibly affect any privacy right under the Fourteenth Amendment.[16]

D

Section 1870.07 of the Akron ordinance requires a 24-hour waiting period between the signing of a consent form and the actual performance of the abortion, except in cases of emergency. See § 1870.12. The court below invalidated this requirement because it affected abortion decisions during the first trimester of pregnancy. The Court affirms the decision below, not on the ground that it affects early abortions, but because "Akron has failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible wait-

[16] This is not to say that the informed-consent provisions may not violate the First Amendment rights of the physician if the State requires him or her to communicate its ideology. See *Wooley* v. *Maynard*, 430 U. S. 705 (1977). However, it does not appear that Akron Center raised any First Amendment argument in the court below. See Brief for Akron Center for Reproductive Health, Inc., in No. 79–3701 (CA6), pp. 18–23; Reply Brief for Akron Center for Reproductive Health, Inc., in No. 79–3701 (CA6), pp. 26–33.

ing period." *Ante*, at 450. The Court accepts the arguments made by Akron Center that the waiting period increases the costs of obtaining an abortion by requiring the pregnant woman to make two trips to the clinic, and increases the risks of abortion through delay and scheduling difficulties. The decision whether to proceed should be left to the physician's "'discretion in the exercise of his medical judgment.'" *Ibid.* (quoting *Colautti*, 439 U. S., at 387).

It is certainly difficult to understand how the Court believes that the physician-patient relationship is able to accommodate any interest that the State has in maternal physical and mental well-being in light of the fact that the record in this case shows that the relationship is nonexistent. See 651 F. 2d, at 1217 (Kennedy, J., concurring in part and dissenting in part). It is also interesting to note that the American College of Obstetricians and Gynecologists recommends that "[p]rior to abortion, the woman should have access to special counseling that explores options for the management of an unwanted pregnancy, examines the risks, and allows sufficient time for reflection prior to making an informed decision." 1982 ACOG Standards for Obstetric-Gynecologic Services, at 54.

The waiting period does not apply in cases of medical emergency. Therefore, should the physician determine that the waiting period would increase risks significantly, he or she need not require the woman to wait. The Court's concern in this respect is simply misplaced. Although the waiting period may impose an additional cost on the abortion decision, this increased cost does not unduly burden the availability of abortions or impose an absolute obstacle to access to abortions. Further, the State is not required to "fine-tune" its abortion statutes so as to minimize the costs of abortions. *H. L.* v. *Matheson*, 450 U. S., at 413.

Assuming, *arguendo*, that any additional costs are such as to impose an undue burden on the abortion decision, the State's compelling interests in maternal physical and mental

health and protection of fetal life clearly justify the waiting period. As we acknowledged in *Danforth*, 428 U. S., at 67, the decision to abort is "a stressful one," and the waiting period reasonably relates to the State's interest in ensuring that a woman does not make this serious decision in undue haste. The decision also has grave consequences for the fetus, whose life the State has a compelling interest to protect and preserve. "[N]o other [medical] procedure involves the purposeful termination of a potential life." *Harris*, 448 U. S., at 325. The waiting period is surely a small cost to impose to ensure that the woman's decision is well considered in light of its certain and irreparable consequences on fetal life, and the possible effects on her own.[17]

E

Finally, § 1870.16 of the Akron ordinance requires that "[a]ny physician who shall perform or induce an abortion upon a pregnant woman shall insure that the remains of the unborn child are disposed of in a humane and sanitary manner." The Court finds this provision void for vagueness. I disagree.

In *Planned Parenthood Assn.* v. *Fitzpatrick*, 401 F. Supp. 554 (ED Pa. 1975) (three-judge court), summarily aff'd *sub nom. Franklin* v. *Fitzpatrick*, 428 U. S. 901 (1976), the District Court upheld a "humane disposal" provision against a vagueness attack in light of the State's representation that the intent of the Act "'is to preclude the mindless dumping of

[17] On the basis of this analysis of the waiting-period requirement, the Court charges that "the dissent would uphold virtually any abortion-inhibiting regulation . . . ." *Ante*, at 421, n. 1. The waiting-period requirement is valid because it imposes a small cost when all relevant factors are taken into consideration. This is precisely the reasoning that JUSTICE POWELL employs in upholding the pathology-report requirement in *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, *post*, p. 476 (report requirement imposes a "comparatively small additional cost," *post*, at 489).

aborted fetuses onto garbage piles.'" 401 F. Supp., at 573. The District Court held that different concerns would be implicated if the statute were, at some point, determined to require "expensive burial." *Ibid.* In the present cases, the city of Akron has informed this Court that the intent of the "humane" portion of its statute, as distinguished from the "sanitary" portion, is merely to ensure that fetuses will not be "'dump[ed] . . . on garbage piles.'" Brief for Petitioner in No. 81–746, p. 48. In light of the fact that the city of Akron indicates no intent to require that physicians provide "decent burials" for fetuses, and that "humane" is no more vague than the term "sanitary," the vagueness of which Akron Center does not question, I cannot conclude that the statute is void for vagueness.

## V

For the reasons set forth above, I dissent from the judgment of the Court in these cases.

# PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., ET AL. *v.* ASHCROFT, ATTORNEY GENERAL OF MISSOURI, ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 81–1255. Argued November 30, 1982—Decided June 15, 1983*

Missouri statutes require abortions after 12 weeks of pregnancy to be performed in a hospital (§ 188.025); require a pathology report for each abortion performed (§ 188.047); require the presence of a second physician during abortions performed after viability (§ 188.030.3); and require minors to secure parental consent or consent from the Juvenile Court for an abortion (§ 188.028). In an action challenging the constitutionality of these provisions, the District Court invalidated all provisions except § 188.047. The Court of Appeals reversed as to §§ 188.028 and 188.047 but affirmed as to §§ 188.030.3 and 188.025.

*Held:* Section 188.025 is unconstitutional, but §§ 188.047, 188.030.3, and 188.028 are constitutional.

664 F. 2d 687, affirmed in part, reversed in part, vacated in part, and remanded.

JUSTICE POWELL delivered the opinion of the Court with respect to Parts I and II, concluding that the second-trimester hospitalization requirement of § 188.025 "unreasonably infringes upon a woman's constitutional right to obtain an abortion." *Akron* v. *Akron Center of Reproductive Health, Inc.*, *ante*, at 439. Pp. 481–482.

JUSTICE POWELL, joined by THE CHIEF JUSTICE, concluded in Parts III, IV, and V that:

1. The second-physician requirement of § 188.030.3 is constitutional as reasonably furthering the State's compelling interest in protecting the lives of viable fetuses. Pp. 482–486.

2. The pathology-report requirement of § 188.047 is constitutional. On its face and in effect, such requirement is reasonably related to generally accepted medical standards and furthers important health-related state concerns. In light of the substantial benefits that a pathologist's examination can have, the small additional cost of such an examination does not significantly burden a pregnant woman's abortion decision. Pp. 486–490.

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*Together with No. 81–1623, *Ashcroft, Attorney General of Missouri, et al.* v. *Planned Parenthood Association of Kansas City, Missouri, Inc., et al.*, also on certiorari to the same court.

3. Section 188.028 is constitutional. A State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial. And as interpreted by the Court of Appeals to mean that the Juvenile Court cannot deny a minor's application for consent to an abortion "for good cause" unless the court first finds that the minor was not mature enough to make her own decision, § 188.028 provides a judicial alternative that is consistent with established legal standards. See *Akron* v. *Akron Center for Reproductive Health, Inc.*, *ante*, at 439–440. Pp. 490–493.

JUSTICE O'CONNOR, joined by JUSTICE WHITE and JUSTICE REHNQUIST, concluded that:

1. The second-physician requirement of § 188.030.3 is constitutional because the State has a compelling interest, extant throughout pregnancy, in protecting and preserving fetal life. P. 505.

2. The pathology-report requirement of § 188.047 is constitutional because it imposes no undue burden on the limited right to undergo an abortion, and its validity is not contingent on the trimester of pregnancy in which it is imposed. P. 505.

3. Assuming, *arguendo*, that the State cannot impose a parental veto on a minor's decision to undergo an abortion, the parental consent provision of § 188.028.2 is constitutional because it imposes no undue burden on any right that a minor may have to undergo an abortion. P. 505.

POWELL, J., announced the judgment of the Court in Part VI and delivered the opinion of the Court with respect to Parts I and II, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined, and an opinion with respect to Parts III, IV, and V, in which BURGER, C. J., joined. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 494. O'CONNOR, J., filed an opinion concurring in the judgment in part and dissenting in part, in which WHITE and REHNQUIST, JJ., joined, *post*, p. 505.

*Frank Susman* argued the cause and filed briefs for petitioners in No. 81–1255 and respondents in No. 81–1623.

*John Ashcroft*, Attorney General of Missouri, *pro se*, argued the cause for respondents in No. 81–1255 and petitioners in No. 81–1623. With him on the briefs was *Michael L. Boicourt*, Assistant Attorney General.†

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†*Dennis J. Horan*, *Victor G. Rosenblum*, *Patrick A. Trueman*, and *Thomas J. Marzen* filed a brief for Americans United for Life as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Sylvia A. Law*, *Nadine Taub*, and *Ellen J. Winner* for the Committee for Abortion Rights

JUSTICE POWELL announced the judgment of the Court in Part VI and delivered the opinion of the Court with respect to Parts I and II and an opinion with respect to Parts III, IV, and V, in which THE CHIEF JUSTICE joins.

These cases, like *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, *ante*, p. 416, and *Simopoulos* v. *Virginia*, *post*, p. 506, present questions as to the validity of state statutes or local ordinances regulating the performance of abortions.

I

Planned Parenthood Association of Kansas City, Missouri, Inc., two physicians who perform abortions, and an abortion clinic (plaintiffs) filed a complaint in the District Court for the Western District of Missouri challenging, as unconstitutional, several sections of the Missouri statutes regulating the performance of abortions. The sections relevant here include Mo. Rev. Stat. § 188.025 (Supp. 1982), requiring that abortions after 12 weeks of pregnancy be performed in a hospital;[1] § 188.047, requiring a pathology report for each abortion performed;[2] § 188.030.3, requiring the presence of a second

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and Against Sterilization Abuse et al.; and by *James Bopp, Jr.*, for the National Right to Life Committee, Inc.

Briefs of *amici curiae* were filed by *Solicitor General Lee*, *Assistant Attorney General McGrath*, and *Deputy Solicitor General Geller* for the United States; by *Alan Ernest* for the Legal Defense Fund for Unborn Children; by *Judith Levin* for the National Abortion Federation; by *Phyllis N. Segal*, *Judith I. Avner*, and *Jemera Rone* for the National Organization for Women; by *Eve W. Paul* and *Dara Klassel* for the Planned Parenthood Federation of America, Inc., et al.; by *Nancy Reardan* for Women Lawyers of Sacramento et al.; and by *Susan Frelich Appleton* and *Paul Brest* for Professor Richard L. Abel et al.

[1] Missouri Rev. Stat. § 188.025 (Supp. 1982) provides: "Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital."

[2] Missouri Rev. Stat. § 188.047 (Supp. 1982) provides:

"A representative sample of tissue removed at the time of abortion shall be submitted to a board eligible or certified pathologist, who shall file a

physician during abortions performed after viability;[3] and § 188.028, requiring minors to secure parental or judicial consent.[4]

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copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record."

[3] Missouri Rev. Stat. § 188.030.3 (Supp. 1982) provides:

"An abortion of a viable unborn child shall be performed or induced only when there is in attendance a physician other than the physician performing or inducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman."

[4] Missouri Rev. Stat. § 188.028 (Supp. 1982) provides:

"1. No person shall knowingly perform an abortion upon a pregnant woman under the age of eighteen years unless:

"(1) The attending physician has secured the informed written consent of the minor and one parent or guardian; or

"(2) The minor is emancipated and the attending physician has received the informed written consent of the minor; or

"(3) The minor has been granted the right to self-consent to the abortion by court order pursuant to subsection 2 of this section, and the attending physician has received the informed written consent of the minor; or

"(4) The minor has been granted consent to the abortion by court order, and the court has given its informed written consent in accordance with subsection 2 of this section, and the minor is having the abortion willingly, in compliance with subsection 3 of this section.

"2. The right of a minor to self-consent to an abortion under subdivision (3) of subsection 1 of this section or court consent under subdivision (4) of subsection 1 of this section may be granted by a court pursuant to the following procedures:

"(1) The minor or next friend shall make an application to the juvenile court which shall assist the minor or next friend in preparing the petition and notices required pursuant to this section. The minor or the next friend of the minor shall thereafter file a petition setting forth the initials of the minor; the age of the minor; the names and addresses of each parent,

After hearing testimony from a number of expert witnesses, the District Court invalidated all of these sections except the pathology requirement. 483 F. Supp. 679, 699–701 (1980).[5] The Court of Appeals for the Eighth Circuit

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guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that, if the court does not grant the minor majority rights for the purpose of consent to the abortion, the court should find that the abortion is in the best interest of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem of the child; and if the minor does not have private counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend;

. . . . . .

"(3) A hearing on the merits of the petition, to be held on the record, shall be held as soon as possible within five days of the filing of the petition. . . . At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor;

"(4) In the decree, the court shall for good cause:

"(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

"(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

"(c) Deny the petition, setting forth the grounds on which the petition is denied;

. . . . . .

"3. If a minor desires an abortion, then she shall be orally informed of and, if possible, sign the written consent required by section 188.039 in the same manner as an adult person. No abortion shall be performed on any minor against her will, except that an abortion may be performed against the will of a minor pursuant to a court order described in subdivision (4) of subsection 1 of this section that the abortion is necessary to preserve the life of the minor."

[5] The District Court also awarded attorney's fees for all hours claimed by the plaintiffs' attorneys. The Court of Appeals affirmed this allocation of

reversed the District Court's judgment with respect to § 188.028, thereby upholding the requirement that a minor secure parental or judicial consent to an abortion. It also held that the District Court erred in sustaining § 188.047, the pathology requirement. The District Court's judgment with respect to the second-physician requirement was affirmed, and the case was remanded for further proceedings and findings relating to the second-trimester hospitalization requirement. 655 F. 2d 848, 872–873 (1981). On remand, the District Court adhered to its holding that the second-trimester hospitalization requirement was unconstitutional. The Court of Appeals affirmed this judgment. 664 F. 2d 687, 691 (1981). We granted certiorari. 456 U. S. 988 (1982).

The Court today in *City of Akron*, *ante*, at 426–431, has stated fully the principles that govern judicial review of state statutes regulating abortions, and these need not be repeated here. With these principles in mind, we turn to the statutes at issue.

II

In *City of Akron*, we invalidated a city ordinance requiring physicians to perform all second-trimester abortions at general or special hospitals accredited by the Joint Commission on Accreditation of Hospitals (JCAH) or by the American Osteopathic Association. *Ante*, at 431–432. Missouri's hospitalization requirements are similar to those enacted by Akron, as all second-trimester abortions must be performed in general, acute-care facilities.[6] For the reasons stated in *City of*

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fees. See 655 F. 2d 848, 872 (CA8 1981). The petition for certiorari raises the issue whether an award of attorney's fees, made pursuant to 42 U. S. C. § 1988 (1976 ed., Supp. V), should be proportioned to reflect the extent to which plaintiffs prevailed.

[6] Missouri does not define the term "hospital" in its statutory provisions regulating abortions. We therefore must assume, as did the courts below, see 483 F. Supp. 679, 686, n. 10 (1980); 664 F. 2d 687, 689–690, and nn. 3, 5, and 6 (1981), that the term has its common meaning of a general, acute-

*Akron*, we held that such a requirement "unreasonably infringes upon a woman's constitutional right to obtain an abortion." *Ante*, at 439. For the same reasons, we affirm the Court of Appeals' judgment that § 188.025 is unconstitutional.

## III

We turn now to the State's second-physician requirement. In *Roe* v. *Wade*, 410 U. S. 113 (1973), the Court recognized that the State has a compelling interest in the life of a viable fetus: "[T]he State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.*, at 164–165. See *Colautti* v. *Franklin*, 439 U. S. 379, 386–387 (1979); *Beal* v. *Doe*, 432 U. S. 438, 445–446 (1977). Several of the Missouri statutes undertake such regulation. Postviability abortions are proscribed except when necessary to preserve the life or the health of the woman. Mo. Rev. Stat. § 188.030.1 (Supp. 1982). The

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care facility. Cf. Mo. Rev. Stat. § 188.015(2) (Supp. 1982) (defining "abortion facility" as "a clinic, physician's office, or any other place or facility in which abortions are performed other than a hospital"). Section 197.020.2 (1978), part of Missouri's hospital licensing laws, reads:

"'Hospital' means a place devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment or care for not less than twenty-four hours in any week of three or more nonrelated individuals suffering from illness, disease, injury, deformity or other abnormal physical conditions; or a place devoted primarily to provide for not less than twenty-four hours in any week medical . . . care for three or more nonrelated individuals. . . ."

Cf. Mo. Rev. Stat. § 197.200(1) (1978) (defining "ambulatory surgical center" to include facilities "with an organized medical staff of physicians" and "with continuous physician services and registered professional nursing services whenever a patient is in the facility"); 13 Mo. Admin. Code § 50–30.010(1)(A) (1977) (same). The regulations for the Department of Social Services establish standards for the construction, physical facilities, and administration of hospitals. §§ 50–20.010 to 50–20.030. These are not unlike those set by JCAH. See *City of Akron*, *ante*, at 432, and n. 16.

State also forbids the use of abortion procedures fatal to the viable fetus unless alternative procedures pose a greater risk to the health of the woman. § 188.030.2.

The statutory provision at issue in this case requires the attendance of a second physician at the abortion of a viable fetus. § 188.030.3. This section requires that the second physician "take all reasonable steps in keeping with good medical practice . . . to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman." See n. 3, *supra*. It also provides that the second physician "shall take control of and provide immediate medical care for a child born as a result of the abortion."

The lower courts invalidated § 188.030.3.[7] The plaintiffs, respondents here on this issue, urge affirmance on the

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[7] The courts below found, and JUSTICE BLACKMUN's partial dissenting opinion agrees, *post*, at 499–500, that there is no possible justification for a second-physician requirement whenever D&E is used because no viable fetus can survive a D&E procedure. 483 F. Supp., at 694; 655 F. 2d, at 865. Accordingly, for them, § 188.030.3 is overbroad. This reasoning rests on two assumptions. First, a fetus cannot survive a D&E abortion, and second, D&E is the method of choice in the third trimester. There is general agreement as to the first proposition, but not as to the second. Indeed, almost all of the authorities disagree with JUSTICE BLACKMUN's critical assumption, and as the Court of Appeals noted, the choice of this procedure after viability is subject to the requirements of § 188.030.2. See *id.*, at 865, and n. 28. Nevertheless, the courts below, in conclusory language, found that D&E is the "method of choice even after viability is possible." *Id.*, at 865. No scholarly writing supporting this view is cited by those courts or by the partial dissent. Reliance apparently is placed solely on the testimony of Dr. Robert Crist, a physician from Kansas, to whom the District Court referred in a footnote. 483 F. Supp., at 694, n. 25. This testimony provides slim support for this holding. Dr. Crist's testimony, if nothing else, is remarkable in its candor. He is a member of the National Abortion Federation, "an organization of abortion providers and people interested in the pro-choice movement." 3 Record 415–416. He supported the use of D&E on 28-week pregnancies, well into the third trimester. In some circumstances, he considered it a better procedure than other methods. See *id.*, at 427–428. His disinterest in protecting fetal life is evidenced by his

grounds that the second-physician requirement distorts the traditional doctor-patient relationship, and is both impractical and costly. They note that Missouri does not require two

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agreement "that the abortion patient has a right not only to be rid of the growth, called a fetus in her body, but also has a right to a dead fetus." *Id.*, at 431. He also agreed that he "[n]ever ha[s] any intention of trying to protect the fetus, if it can be saved," *ibid.*, and finally that "as a general principle" "[t]here should not be a live fetus," *id.*, at 435. Moreover, contrary to every other view, he thought a fetus could survive a D&E abortion. *Id.*, at 433–434. None of the other physicians who testified at the trial, those called both by the plaintiffs and defendants, considered that *any* use of D&E after viability was indicated. See 2 Record 21 (limiting use of D&E to under 18 weeks); 3 Record 381, 410–413 (Dr. Robert Kretzschmar) (D&E up to 17 weeks; would never perform D&E after 26 weeks); 5 Record 787 (almost "inconceivable" to use D&E after viability); 7 Record 52 (D&E safest up to 18 weeks); *id.*, at 110 (doctor not performing D&E past 20 weeks); *id.*, at 111 (risks of doing outpatient D&E equivalent to childbirth at 24 weeks). See also 8 Record 33, 78–81 (deposition of Dr. Willard Cates) (16 weeks latest D&E performed). Apparently Dr. Crist performed abortions only in Kansas, 3 Record 334, 368, 428, a State having no statutes comparable to § 188.030.1 and § 188.030.2. It is not clear whether he was operating under or familiar with the limitations imposed by Missouri law. Nor did he explain the circumstances when there were "contraindications" against the use of any of the procedures that could preserve viability, or whether his conclusory opinion was limited to emergency situations. Indeed, there is no record evidence that D&E ever will be the method that poses the least risk to the woman in those rare situations where there are compelling medical reasons for performing an abortion after viability. If there were such instances, they hardly would justify invalidating § 188.030.3.

In addition to citing Dr. Crist in its footnote, the District Court cited—with no elaboration—Dr. Schmidt. His testimony, reflecting no agreement with Dr. Crist, is enlightening. Although he conceded that the attendance of a second physician for a D&E abortion on a viable fetus was not necessary, he considered the point mostly theoretical, because he "simply [did] not believe that the question of viability comes up when D&E is an elected method of abortion." 5 Record 836. When reminded of Dr. Crist's earlier testimony, he conceded the remote possibility of third-trimester D&E abortions, but stated: "I personally cannot conceive that as a significant practical point. It may be important legally, but [not] from a medical standpoint . . . ." *Ibid.* Given that Dr. Crist's discordant testi-

physicians in attendance for any other medical or surgical procedure, including childbirth or delivery of a premature infant.

The first physician's primary concern will be the life and health of the woman. Many third-trimester abortions in Missouri will be emergency operations,[8] as the State permits these late abortions only when they are necessary to preserve the life or the health of the woman. It is not unreasonable for the State to assume that during the operation the first physician's attention and skills will be directed to preserving the woman's health, and not to protecting the actual life of those fetuses who survive the abortion procedure. Viable fetuses will be in immediate and grave danger because of their premature birth. A second physician, in situations where Missouri permits third-trimester abortions, may be of assistance to the woman's physician in preserving the health and life of the child.

By giving immediate medical attention to a fetus that is delivered alive, the second physician will assure that the State's interests are protected more fully than the first physician alone would be able to do. And given the compelling interest that the State has in preserving life, we cannot say that the Missouri requirement of a second physician in those un-

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mony is wholly unsupported, the State's compelling interest in protecting a viable fetus justifies the second-physician requirement even though there may be the rare case when a physician may think honestly that D&E is required for the mother's health. Legislation need not accommodate every conceivable contingency.

[8] There is no clearly expressed exception on the face of the statute for the performance of an abortion of a viable fetus without the second physician in attendance. There may be emergency situations where, for example, the woman's health may be endangered by delay. Section § 188.030.3 is qualified, at least in part, by the phrase "provided that it does not pose an increased risk to the life or health of the woman." This clause reasonably could be construed to apply to such a situation. Cf. *H. L.* v. *Matheson*, 450 U. S. 398, 407, n. 14 (1981) (rejecting argument that Utah statute might apply to individuals with emergency health care needs).

usual circumstances where Missouri permits a third-trimester abortion is unconstitutional. Preserving the life of a viable fetus that is aborted may not often be possible,[9] but the State legitimately may choose to provide safeguards for the comparatively few instances of live birth that occur. We believe the second-physician requirement reasonably furthers the State's compelling interest in protecting the lives of viable fetuses, and we reverse the judgment of the Court of Appeals holding that § 188.030.3 is unconstitutional.

## IV

In regulating hospital services within the State, Missouri requires that "[a]ll tissue surgically removed with the exception of such tissue as tonsils, adenoids, hernial sacs and prepuces, shall be examined by a pathologist, either on the premises or by arrangement outside of the hospital." 13 Mo. Admin. Code § 50–20.030(3)(A)7 (1977). With respect to abortions, whether performed in hospitals or in some other facility, § 188.047 requires the pathologist to "file a copy of the tissue report with the state division of health . . . ." See n. 2, *supra*. The pathologist also is required to "provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced." Thus, Missouri appears to require that tissue following abortions, as well as from almost all other surgery performed in hospitals, must be submitted to a pathologist, not merely examined by the performing doctor. The narrow question before us is whether the State lawfully also may require the tissue removed fol-

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[9] See American College of Obstetricians and Gynecologists (ACOG) Technical Bulletin No. 56, p. 4 (Dec. 1979) (as high as 7% live-birth rate for intrauterine instillation of uterotonic agents); Stroh & Hinman, Reported Live Births Following Induced Abortion: Two and One-Half Years' Experience in Upstate New York, 126 Am. J. Obstet. Gynecol. 83, 83–84 (1976) (26 live births following saline induced-abortions; 9 following hysterotomy; 1 following oxtyocin-induced abortion) (1 survival out of 38 live births); 5 Record 728 (50–62% mortality rate for fetuses 26 and 27 weeks); *id.*, at 729 (25–92% mortality rate for fetuses 28 and 29 weeks); *id.*, at 837 (50% mortality rate at 34 weeks).

lowing abortions performed in clinics as well as in hospitals to be submitted to a pathologist.

On its face and in effect, § 188.047 is reasonably related to generally accepted medical standards and "further[s] important health-related state concerns." *City of Akron*, *ante*, at 430. As the Court of Appeals recognized, pathology examinations are clearly "useful and even necessary in some cases," because "abnormalities in the tissue may warn of serious, possibly fatal disorders." 655 F. 2d, at 870.[10] As a rule, it is accepted medical practice to submit *all* tissue to the examination of a pathologist.[11] This is particularly important following abortion, because questions remain as to the long-range

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[10] A pathological examination is designed to assist in the detection of fatal ectopic pregnancies, hydatidiform moles or other precancerous growths, and a variety of other problems that can be discovered only through a pathological examination. The general medical utility of pathological examinations is clear. See, *e. g.*, ACOG, Standards for Obstetric-Gynecologic Services 52 (5th ed. 1982) (1982 ACOG Standards); National Abortion Federation (NAF) Standards 6 (1981) (compliance with standards obligatory for NAF member facilities to remain in good standing); Brief for American Public Health Association as *Amicus Curiae*, O. T. 1982, Nos. 81–185, 81–746, 81–1172, p. 29, n. 6 (supporting the NAF standards for nonhospital abortion facilities as constituting "minimum standards").

[11] ACOG's standards at the time of the District Court's trial recommended that a "tissue or operative review committee" should examine "all tissue removed at obstetric-gynecologic operations." ACOG, Standards for Obstetric-Gynecologic Services 13 (4th ed. 1974). The current ACOG Standards also state as a general rule that, for all surgical services performed on an ambulatory basis, "[t]issue removed should be submitted to a pathologist for examination." 1982 ACOG Standards, at 52. JUSTICE BLACKMUN's partial dissent, however, relies on the recent modification of these Standards as they apply to abortions. ACOG now provides an "exception to the practice" of mandatory examination by a pathologist and makes such examination for abortion tissue permissive. *Ibid.* Not surprisingly, this change in policy was controversial within the College. See 5 Record 799–800. ACOG found that "[n]o consensus exists regarding routine microscopic examination of aspirated tissue in every case," though it recognized—on the basis of inquiries made in 29 institutions—that in a majority of them a microscopic examination is performed in all cases. ACOG, Report of Committee on Gynecologic Practice, Item #6.2.1 (June 27–28, 1980).

complications and their effect on subsequent pregnancies. See App. 72–73 (testimony of Dr. Willard Cates, Jr.); Levin, Schoenbaum, Monson, Stubblefield, & Ryan, Association of Induced Abortion with Subsequent Pregnancy Loss, 243 J. A. M. A. 2495, 2499 (1980). Recorded pathology reports, in concert with abortion complication reports, provide a statistical basis for studying those complications. Cf. *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 81 (1976).

Plaintiffs argue that the physician performing the abortion is as qualified as a pathologist to make the examination. This argument disregards the fact that Missouri requires a pathologist—not the performing physician—to examine tissue after almost every type of surgery. Although this requirement is in a provision relating to surgical procedures in hospitals, many of the same procedures included within the Missouri statute customarily are performed also in outpatient clinics. No reason has been suggested why the prudence required in a hospital should not be equally appropriate in such a clinic. Indeed, there may be good reason to impose stricter standards in this respect on clinics performing abortions than on hospitals.[12] As the testimony in the District

[12] The professional views that the plaintiffs find to support their position do not disclose whether consideration was given to the fact that not all abortion clinics, particularly inadequately regulated clinics, conform to ethical or generally accepted medical standards. See *Bellotti* v. *Baird*, 443 U. S. 622, 641, n. 21 (1979) *(Bellotti II)* (minors may resort to "incompetent or unethical" abortion clinics); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 91, n. 2 (1976) (Stewart, J., concurring). The Sun-Times of Chicago, in a series of special reports, disclosed widespread questionable practices in abortion clinics in Chicago, including the failure to obtain proper pathology reports. See The Abortion Profiteers, Chicago Sun-Times 25–26 (Special Reprint 1978). It is clear, therefore, that a State reasonably could conclude that a pathology requirement is necessary in abortion clinics as well as in general hospitals.

In suggesting that we make from a "comfortable perspective" the judgment that a State constitutionally can require the additional cost of a pathology examination, JUSTICE BLACKMUN's partial dissent suggests that we

Court indicates, medical opinion differs widely on this question. See 4 Record 623; 5 Record 749–750, 798–800, 845–847; n. 11, *supra*. There is substantial support for Missouri's requirement. In this case, for example, Dr. Bernard Nathanson, a widely experienced abortion practitioner, testified that he requires a pathologist examination after each of the 60,000 abortions performed under his direction at the New York Center for Reproductive and Sexual Health. He considers it "absolutely necessary to obtain a pathologist's report on each and every specimen of tissue removed from abortion or for that matter from any other surgical procedure which involves the removal of tissue from the human body." App. 143–144. See also *id.*, at 146–147 (testimony of Dr. Keitges); 5 Record 798–799 (testimony of Dr. Schmidt).[13]

In weighing the balance between protection of a woman's health and the comparatively small additional cost of a pathologist's examination, we cannot say that the Constitution requires that a State subordinate its interest in health to minimize to this extent the cost of abortions. Even in the early weeks of pregnancy, "[c]ertain regulations that have no significant impact on the woman's exercise of her right [to

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disregard the interests of the "woman on welfare or the unemployed teenager." *Post*, at 498. But these women may be those most likely to seek the least expensive clinic available. As the standards of medical practice in such clinics may not be the highest, a State may conclude reasonably that a pathologist's examination of tissue is particularly important for their protection.

[13] JUSTICE BLACKMUN's partial dissent appears to suggest that § 188.047 is constitutionally infirm because it does not require microscopic examination, *post*, at 496–497, but that misses the point of the regulation. The need is for someone other than the performing clinic to make an independent medical judgment on the tissue. See n. 12, *supra;* 5 Record 750 (Dr. Pierre Keitges, a pathologist). It is reasonable for the State to assume that an independent pathologist is more likely to perform a microscopic examination than the performing doctor. See H. Cove, Surgical Pathology of the Endometrium 28 (1981) ("To the pathologist, abortions of any sort are evaluated grossly *and* microscopically for the primary purpose of establishing a diagnosis of intrauterine pregnancy") (emphasis added).

decide to have an abortion] may be permissible where justified by important state health objectives." *City of Akron*, *ante*, at 430. See *Danforth*, *supra*, at 80–81. We think the cost of a tissue examination does not significantly burden a pregnant woman's abortion decision. The estimated cost of compliance for plaintiff Reproductive Health Services was $19.40 per abortion performed, 483 F. Supp., at 700, n. 48, and in light of the substantial benefits that a pathologist's examination can have, this small cost clearly is justified. In *Danforth*, this Court unanimously upheld Missouri's record-keeping requirement as "useful to the State's interest in protecting the health of its female citizens, and [as] a resource that is relevant to decisions involving medical experience and judgment," 428 U. S., at 81.[14] We view the requirement for a pathology report as comparable and as a relatively insignificant burden. Accordingly, we reverse the judgment of the Court of Appeals on this issue.

V

As we noted in *City of Akron*, the relevant legal standards with respect to parental-consent requirements are not in dispute. See *ante*, at 439; *Bellotti* v. *Baird*, 443 U. S. 622, 640–642, 643–644 (1979) *(Bellotti II)* (plurality opinion); *id.*, at 656–657 (WHITE, J., dissenting).[15] A State's interest in

[14] The *Danforth* Court also noted that "[t]he added requirements for confidentiality, with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length, assist and persuade us in our determination of the constitutional limits." 428 U. S., at 81. Missouri extends the identical safeguards found reassuring in *Danforth* to the pathology reports at issue here. See Mo. Rev. Stat. §§ 188.055.2, 188.060 (Supp. 1982).

[15] The dissenters apparently believe that the issue here is an open one, and adhere to the views they expressed in *Bellotti II*. *Post*, at 503–504. But those views have never been adopted by a majority of this Court, while a majority have expressed quite differing views. See *H. L.* v. *Matheson*, 450 U. S. 398 (1981); *Bellotti II* (plurality opinion); 443 U. S., at 656–657 (WHITE, J., dissenting).

protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial. It is clear, however, that "the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests."[16] *City of Akron*, *ante*, at 439–440.[17] The issue here is one purely of statutory construction: whether Mis-

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[16] The plurality in *Bellotti II* also required that the alternative to parental consent must "assure" that the resolution of this issue "will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Id.*, at 644. Confidentiality here is assured by the statutory requirement that allows the minor to use her initials on the petition. Mo. Rev. Stat. § 188.028.2(1) (Supp. 1982). As to expedition of appeals, § 188.028.2(6) provides in relevant part:

"The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section."

We believe this section provides the framework for a constitutionally sufficient means of expediting judicial proceedings. Immediately after the effective date of this statutory enactment, the District Court enjoined enforcement. No unemancipated pregnant minor has been required to comply with this section. Thus, to this point in time, there has been no need for the State Supreme Court to promulgate rules concerning appellate review. There is no reason to believe that Missouri will not expedite any appeal consistent with the mandate in our prior opinions.

[17] Cf. *H. L.* v. *Matheson*, *supra*, at 406–407, and n. 14, 411 (upholding a parental notification requirement but not extending the holding to mature or emancipated minors or to immature minors showing such notification detrimental to their best interests). The lower courts found that § 188.028's notice requirement was unconstitutional. 655 F. 2d, at 873; 483 F. Supp., at 701. The State has not sought review of that judgment here. Thus, in the posture in which it appears before this Court for review, § 188.028 contains no requirement for parental notification.

souri provides a judicial alternative that is consistent with these established legal standards.[18]

The Missouri statute, § 188.028.2,[19] in relevant part, provides:

> "(4) In the decree, the court shall for good cause:
>
> "(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or
>
> "(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or
>
> "(c) Deny the petition, setting forth the grounds on which the petition is denied."

On its face, § 188.028.2(4) authorizes Juvenile Courts[20] to choose among any of the alternatives outlined in the section.

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[18] The Missouri statute also exempts "emancipated" women under the age of 18 both from the requirement of parental consent and from the alternative requirement of a judicial proceeding. Plaintiffs argue that the word "emancipated" in this context is void for vagueness, but we disagree. Cf. *H. L.* v. *Matheson*, *supra*, at 407 (using word to describe a minor). Although the question whether a minor is emancipated turns upon the facts and circumstances of each individual case, the Missouri courts have adopted general rules to guide that determination, and the term is one of general usage and understanding in the Missouri common law. See *Black* v. *Cole*, 626 S. W. 2d 397, 398 (Mo. App. 1981) (quoting 67 C. J. S., Parent and Child § 86, p. 811 (1950)); *In re Marriage of Heddy*, 535 S. W. 2d 276, 279 (Mo. App. 1976) (same); *Wurth* v. *Wurth*, 313 S. W. 2d 161, 164 (Mo. App. 1958) (same), rev'd on other grounds, 322 S. W. 2d 745 (Mo. 1959).

[19] See n. 4, *supra*. This Court in *Danforth* held unconstitutional Missouri's parental-consent requirement for all unmarried minors under the age of 18. 428 U. S., at 75. In response to our decision, Missouri enacted the section challenged here. This new statute became effective shortly before our decision in *Bellotti II*.

[20] We have indicated in prior opinions that a minor should have access to an "independent decisionmaker." *H. L.* v. *Matheson*, *supra*, at 420 (POWELL, J., concurring). Missouri has provided for a judicial decisionmaker. We therefore need not consider whether a qualified and independent nonjudicial decisionmaker would be appropriate. Cf. *Bellotti II*, 443 U.S., at 643, n. 22.

The Court of Appeals concluded that a denial of the petition permitted in subsection (c) "would initially require the court to find that the minor was not emancipated and was not mature enough to make her own decision and that an abortion was not in her best interests." 655 F. 2d, at 858. Plaintiffs contend that this interpretation is unreasonable. We do not agree.

Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality. The Court of Appeals was aware, if the statute provides discretion to deny permission to a minor for *any* "good cause," that arguably it would violate the principles that this Court has set forth. *Ibid.* It recognized, however, that before exercising any option, the Juvenile Court must receive evidence on "the emotional development, maturity, intellect and understanding of the minor." Mo. Rev. Stat. § 188.028.2(3) (Supp. 1982). The court then reached the logical conclusion that "findings and the ultimate denial of the petition must be supported by a showing of 'good cause.'" 655 F. 2d, at 858. The Court of Appeals reasonably found that a court could not deny a petition "for good cause" unless it first found—after having received the required evidence—that the minor was not mature enough to make her own decision. See *Bellotti II*, 443 U. S., at 643–644, 647–648 (plurality opinion). We conclude that the Court of Appeals correctly interpreted the statute and that § 188.028, as interpreted, avoids any constitutional infirmities.[21]

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[21] Plaintiffs also argue that, in light of the ambiguity of § 188.028.2(4), as evidenced by the differing interpretations placed upon it, the appropriate course of judicial restraint is abstention. This Court has found such an approach appropriate. See *Bellotti* v. *Baird*, 428 U. S. 132, 146–147 (1976) *(Bellotti I)*. Plaintiffs did not, however, argue in the Court of Appeals that the court should abstain, and Missouri has no certification procedure whereby this Court can refer questions of state statutory construction to the State Supreme Court. See 655 F. 2d, at 861, n. 20; 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4248, p. 525, n. 29 (1978 and Supp. 1982). Such a procedure "greatly simplifie[d]" our

VI

The judgment of the Court of Appeals, insofar as it invalidated Missouri's second-trimester hospitalization requirement and upheld the State's parental- and judicial-consent provision, is affirmed. The judgment invalidating the requirement of a pathology report for all abortions and the requirement that a second physician attend the abortion of any viable fetus is reversed. We vacate the judgment upholding an award of attorney's fees for all hours expended by plaintiffs' attorneys and remand for proceedings consistent with *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983).

*It is so ordered.*

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, concurring in part and dissenting in part.

The Court's decision today in *Akron* v. *Akron Center for Reproductive Health, Inc.*, *ante*, p. 416, invalidates the city of Akron's hospitalization requirement and a host of other provisions that infringe on a woman's decision to terminate her pregnancy through abortion. I agree that Missouri's hospitalization requirement is invalid under the *Akron* analysis, and I join Parts I and II of JUSTICE POWELL's opinion in the present cases. I do not agree, however, that the remaining Missouri statutes challenged in these cases satisfy the constitutional standards set forth in *Akron* and the Court's prior decisions.

I

Missouri law provides that whenever an abortion is performed, a tissue sample must be submitted to a "board eli-

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analysis in *Bellotti I*, *supra*, at 151. Moreover, where, as here, a statute is susceptible to a fair construction that obviates the need to have the state courts render the saving construction, there is no reason for federal courts to abstain.

gible or certified pathologist" for a report. Mo. Rev. Stat. § 188.047 (Supp. 1982). This requirement applies to first-trimester abortions as well as to those performed later in pregnancy. Our past decisions establish that the performance of abortions during the first trimester must be left "'free of interference by the State.'" *Akron*, *ante*, at 430, quoting *Roe* v. *Wade*, 410 U. S. 113, 163 (1973). As we have noted in *Akron*, this does not mean that every regulation touching upon first-trimester abortions is constitutionally impermissible. But to pass constitutional muster, regulations affecting first-trimester abortions must "have no significant impact on the woman's exercise of her right" and must be "justified by important state health objectives." *Akron*, *ante*, at 430; see *ante*, at 489–490.

Missouri's requirement of a pathologist's report is not justified by important health objectives. Although pathology examinations may be "useful and even necessary in some cases," *ante*, at 487, Missouri requires more than a pathology examination and a pathology report; it demands that the examination be performed and the report prepared by a "board eligible or certified pathologist" rather than by the attending physician. Contrary to JUSTICE POWELL's assertion, *ibid.*, this requirement of a report by a pathologist is not in accord with "generally accepted medical standards." The routine and accepted medical practice is for the attending physician to perform a gross (visual) examination of any tissue removed during an abortion. Only if the physician detects abnormalities is there a need to send a tissue sample to a pathologist. The American College of Obstetricians and Gynecologists (ACOG) does not recommend an examination by a pathologist in every case:

> "In the situation of elective termination of pregnancy, the attending physician should record a description of the gross products. Unless definite embryonic or fetal parts can be identified, the products of elective interrup-

tions of pregnancy must be submitted to a pathologist for gross and microscopic examination.

. . . . . .

". . . Aspirated tissue should be examined to ensure the presence of villi or fetal parts prior to the patient's release from the facility. If villi or fetal parts are not identified with certainty, the tissue specimen must be sent for further pathologic examination . . . ." ACOG, Standards for Obstetric-Gynecologic Services 52, 54 (5th ed. 1982).[1]

Nor does the National Abortion Federation believe that such an examination is necessary:

"All tissue must be examined grossly at the time of the abortion procedure by a physician or trained assistant and the results recorded in the chart. In the absence of visible fetal parts or placenta upon gross examination, obtained tissue may be examined under a low power microscope for the detection of villi. If this examination is inconclusive, the tissue should be sent to the nearest suitable pathology laboratory for microscopic examination." National Abortion Federation Standards 6 (1981) (emphasis deleted).

As the Court of Appeals pointed out, there was expert testimony at trial that a nonpathologist physician is as capable of performing an adequate gross examination as is a pathologist, and that the "abnormalities which are of concern" are

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[1] See also ACOG, Standards for Obstetric-Gynecologic Services 66 (1982):

"Tissue removed should be submitted to a pathologist for examination. . . . An exception to the practice may be in elective terminations of pregnancy in which definitive embryonic or fetal parts can be identified. In such instances, the physician should record a description of the gross products. Unless definite embryonic or fetal parts can be identified, the products of elective interruptions of pregnancy must be submitted to a pathologist for gross and microscopic examination."

readily detectable by a physician. 655 F. 2d 848, 871, n. 37 (CA8 1981); see App. 135.[2] While a pathologist may be better able to perform a microscopic examination, Missouri law does not require a microscopic examination unless "fetal parts or placenta are not identified." 13 Mo. Admin. Code § 50–151.030(1) (1981). Thus, the effect of the Missouri statute is to require a pathologist to perform the initial gross examination, which is normally the responsibility of the attending physician and which will often make the pathologist's services unnecessary.

On the record before us, I must conclude that the State has not "met its burden of demonstrating that [the pathologist requirement] further[s] important health-related State concerns." *Akron*, *ante*, at 430.[3] There has been no showing that tissue examinations by a pathologist do more to protect health than examinations by a nonpathologist physician. Missouri does not require pathologists' reports for any other surgical procedures performed in clinics, or for minor surgery performed in hospitals. 13 Mo. Admin. Code § 50–20.030(3)(A)(7) (1977). Moreover, I cannot agree with JUSTICE POWELL that Missouri's pathologist requirement has "no significant impact" *ante*, at 489, on a woman's exercise of her right to an abortion. It is undisputed that this requirement may increase the cost of a first-trimester abortion by as much as $40. See 483 F. Supp. 679, 700, n. 48 (WD Mo. 1980). Although this increase may seem insignificant from the Court's comfortable perspective, I cannot say that it is equally insignificant to every woman seeking an abortion.

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[2] The District Court made no findings on this point, noting only that some witnesses for the State had testified that "pathology should be done" for every abortion. 483 F. Supp. 679, 700, n. 49 (WD Mo. 1980).

[3] JUSTICE POWELL appears to draw support from the facts that "questionable practices" occur at some abortion clinics, while at others "the standards of medical practice . . . may not be the highest." *Ante*, at 489, n. 12. There is no evidence, however, that such questionable practices occur in Missouri.

For the woman on welfare or the unemployed teenager, this additional cost may well put the price of an abortion beyond reach.[4] Cf. *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 668 (1966) ($1.50 poll tax "excludes those unable to pay"); *Burns* v. *Ohio*, 360 U. S. 252, 255, 257 (1959) ($20 docket fee "foreclose[s] access" to appellate review for indigents).

In *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 81 (1976), the Court warned that the minor recordkeeping requirements upheld in that case "perhaps approach[ed] impermissible limits." Today in *Akron*, we have struck down restrictions on first-trimester abortions that "may in some cases add to the cost of providing abortions." *Ante*, at 447–448; see *ante*, at 449–451. Missouri's requirement of a pathologist's report unquestionably adds significantly to the cost of providing abortions, and Missouri has not shown that it serves any substantial health-related purpose. Under these circumstances, I would hold that constitutional limits have been exceeded.

## II

In Missouri, an abortion may be performed after viability only if necessary to preserve the life or health of the woman. Mo. Rev. Stat. § 188.030.1 (Supp. 1982). When a postviability abortion is performed, Missouri law provides that "there [must be] in attendance a [second] physician . . . who

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[4] A $40 pathologist's fee may increase the price of a first-trimester abortion by 20% or more. See 655 F. 2d 848, 869, n. 35 (1981) (cost of first-trimester abortion at Reproductive Health Services is $170); F. Jaffe, B. Lindheim, & P. Lee, Abortion Politics: Private Morality and Public Policy 36 (1981) (cost of first-trimester clinic abortion ranges from approximately $185 to $235); Henshaw, Freestanding Abortion Clinics: Services, Structure, Fees, 14 Family Planning Perspectives 248, 255 (1982) (average cost of first-trimester clinic abortion is $190); National Abortion Federation Membership Directory 18–19 (1982/1983) (NAF clinics in Missouri charge $180 to $225 for first-trimester abortion).

shall take control of and provide immediate medical care for a child born as a result of the abortion." Mo. Rev. Stat. § 188.030.3 (Supp. 1982). The Court recognized in *Roe* v. *Wade*, 410 U. S., at 164–165, that a State's interests in preserving maternal health and protecting the potentiality of human life may justify regulation and even prohibition of postviability abortions, except those necessary to preserve the life and health of the mother. But regulations governing postviability abortions, like those at any other stage of pregnancy, must be "tailored to the recognized state interests." *Id.*, at 165; see *H. L.* v. *Matheson*, 450 U. S. 398, 413 (1981) ("statute plainly serves important state interests, [and] is narrowly drawn to protect only those interests"); *Roe*, 410 U. S., at 155 ("legislative enactments must be narrowly drawn to express only the legitimate state interests at stake").

A

The second-physician requirement is upheld in these cases on the basis that it "reasonably furthers the State's compelling interest in protecting the lives of viable fetuses." *Ante*, at 486. While I agree that a second physician indeed may aid in preserving the life of a fetus born alive, this type of aid is possible only when the abortion method used is one that may result in a live birth. Although Missouri ordinarily requires a physician performing a postviability abortion to use the abortion method most likely to preserve fetal life, this restriction does not apply when this method "would present a greater risk to the life and health of the woman." Mo. Rev. Stat. § 188.030.2 (Supp. 1982).

The District Court found that the dilatation and evacuation (D&E) method of abortion entails no chance of fetal survival, and that it will nevertheless be the method of choice for some women who need postviability abortions. In some cases, in other words, maternal health considerations will preclude the use of procedures that might result in a live birth. 483

F. Supp., at 694.[5] When a D&E abortion is performed, the second physician can do nothing to further the State's compelling interest in protecting potential life. His presence is superfluous. The second-physician requirement thus is overbroad and "imposes a burden on women in cases where the burden is not justified by any possibility of survival of the fetus." 655 F. 2d, at 865–866.

JUSTICE POWELL apparently believes that the State's interest in preserving potential life justifies the State in requiring a second physician at all postviability abortions because some methods other than D&E may result in live births. But this fact cannot justify requiring a second physician to attend an abortion at which the chance of a live birth is nonexistent. The choice of method presumably will be made in advance,[6] and any need for a second physician disappears when

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[5] The District Court relied on the testimony of Doctors Robert Crist and Richard Schmidt. Doctor Crist testified that in some instances abortion methods other than D&E would be "absolutely contraindicated" by the woman's health condition, 3 Record 438–439, giving the example of a recent patient with hemolytic anemia that would have been aggravated by the use of prostaglandins or other labor-inducing abortion methods, *id.*, at 428. Doctor Schmidt testified that "[t]here very well may be" situations in which D&E would be used because other methods were contraindicated. 5 Record 836. Although Doctor Schmidt previously had testified that a postviability D&E abortion was "almost inconceivable," this was in response to a question by the State's attorney regarding whether D&E would be used "[a]bsent the possibility that there is extreme contraindication for the use of prostaglandins or saline, or of hysterotomy." *Id.*, at 787. Any inconsistencies in Doctor Schmidt's testimony apparently were resolved by the District Court in the plaintiffs' favor.

The Court of Appeals upheld the District Court's factual finding that health reasons sometimes would require the use of D&E for postviability abortions. 655 F. 2d, at 865. Absent the most exceptional circumstances, we do not review a District Court's factual findings in which the Court of Appeals has concurred. *Branti* v. *Finkel*, 445 U. S. 507, 512, n. 6 (1980).

[6] In addition to requiring the physician to select the method most likely to preserve fetal life, so long as it presents no greater risk to the pregnant woman, Missouri requires that the physician "certify in writing the avail-

the woman's health requires that the choice be D&E. Because the statute is not tailored to protect the State's legitimate interests, I would hold it invalid.[7]

B

In addition, I would hold that the statute's failure to provide a clear exception for emergency situations renders it unconstitutional. As JUSTICE POWELL recognizes, *ante*, at 485, n. 8, an emergency may arise in which delay could be dangerous to the life or health of the woman. A second physician may not always be available in such a situation; yet the statute appears to require one. It states, in unqualified terms, that a postviability abortion "*shall* be performed . . . *only* when there is in attendance" a second physician who "*shall* take control of" any child born as a result of the abortion, and it imposes certain duties on "the physician *required* by this section to be in attendance." Mo. Rev. Stat. § 188.030.3 (Supp. 1982) (emphasis added). By requiring the attendance of a second physician even when the resulting delay may be harmful to the health of the pregnant woman, the statute impermissibly fails to make clear "that the woman's life and

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able method or techniques considered and the reasons for choosing the method or technique employed." Mo. Rev. Stat. § 188.030.2 (Supp. 1982). This ensures that the choice of method will be a reasoned one.

[7] The State argues that its second-physician requirement is justified even when D&E is used, because "[i]f the statute specifically excepted D&E procedures, abortionists would be encouraged to use it more frequently to avoid the expense of a second physician, to ensure a dead fetus, to prevent the presence of a second professional to observe malpractice or the choice of a questionable procedure from a safety viewpoint, a fetus-destroying procedure, or to avoid their own awakening to concern for the newborn." Brief for Petitioners in No. 81–1623, p. 44. The Court rejected this purported justification for a second physician in *Doe* v. *Bolton*, 410 U. S. 179, 199 (1973): "If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure and deprivation of his license are available remedies. Required acquiescence by co-practitioners has no rational connection with a patient's needs and unduly infringes on the physician's right to practice."

health must always prevail over the fetus' life and health when they conflict." *Colautti* v. *Franklin*, 439 U. S. 379, 400 (1979).

JUSTICE POWELL attempts to cure this defect by asserting that the final clause of the statute, requiring the two physicians to "take all reasonable steps . . . to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman," could be construed to permit emergency postviability abortions without a second physician. *Ante*, at 485, n. 8. This construction is contrary to the plain language of the statute; the clause upon which JUSTICE POWELL relies refers to the duties of both physicians during the performance of the abortion, but it in no way suggests that the second physician may be dispensed with.

Moreover, since JUSTICE POWELL's proposed construction is not binding on the courts of Missouri,[8] a physician performing an emergency postviability abortion cannot rely on it with any degree of confidence. The statute thus remains impermissibly vague; it fails to inform the physician whether he may proceed with a postviability abortion in an emergency, or whether he must wait for a second physician even if the woman's life or health will be further imperiled by the delay. This vagueness may well have a severe chilling effect on the physician who perceives the patient's need for a postviability abortion. In *Colautti* v. *Franklin*, we considered a statute that failed to specify whether it "require[d] the physician to make a 'trade-off' between the woman's health and additional percentage points of fetal survival." 439 U. S., at 400. The Court held there that "where conflicting duties of this magnitude are involved, the State, at the least, must proceed with greater precision before it may subject a physician to possible

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[8] "Only the [Missouri] courts can supply the requisite construction, since of course 'we lack jurisdiction authoritatively to construe state legislation.'" *Gooding* v. *Wilson*, 405 U. S. 518, 520 (1972), quoting *United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 369 (1971).

criminal sanctions." *Id.*, at 400–401.[9] I would apply that reasoning here, and hold Missouri's second-physician requirement invalid on this ground as well.[10]

## III

Missouri law prohibits the performance of an abortion on an unemancipated minor absent parental consent or a court order. Mo. Rev. Stat. § 188.028 (Supp. 1982).

Until today, the Court has never upheld "a requirement of a consent substitute, either parental or judicial," *ante*, at 491. In *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S., at 74, the Court invalidated a parental-consent requirement on the ground that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." In *Bellotti* v. *Baird*, 443 U. S. 622 (1979) *(Bellotti II)*, eight Justices

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[9] A physician who fails to comply with Missouri's second-physician requirement faces criminal penalties and the loss of his license. Mo. Rev. Stat. §§ 188.065, 188.075 (1978 and Supp. 1982).

[10] Because I would hold the statute unconstitutional on these grounds, I do not reach the question whether Missouri's second-physician requirement impermissibly interferes with the doctor-patient relationship. I note, however, that Missouri does not require attendance of a second physician at any other medical procedure, including a premature birth. There was testimony at trial that a newborn infant, whether the product of a normal birth or an abortion, ordinarily remains the responsibility of the woman's physician until he turns its care over to another. App. 133; see ACOG, Standards for Obstetric-Gynecologic Services 31 (5th ed., 1982) ("The individual who delivers the baby is responsible for the immediate post-delivery care of the newborn until another person assumes this duty").

This allocation of responsibility makes sense. Consultation and teamwork are fundamental in medical practice, but in an operating room a patient's life or health may depend on split-second decisions by the physician. If responsibility and control must be shared between two physicians with the lines of authority unclear, precious moments may be lost to the detriment of both woman and child.

agreed that a Massachusetts statute permitting a judicial veto of a mature minor's decision to have an abortion was unconstitutional. See *id.*, at 649–650 (opinion of POWELL, J.); *id.*, at 654–656 (opinion of STEVENS, J.). Although four Justices stated in *Bellotti II* that an appropriately structured judicial-consent requirement would be constitutional, *id.*, at 647–648 (opinion of POWELL, J.), this statement was not necessary to the result of the case and did not command a majority. Four other Justices concluded that any judicial-consent statute would suffer from the same flaw the Court identified in *Danforth:* it would give a third party an absolute veto over the decision of the physician and his patient. 443 U. S., at 655–656 (opinion of STEVENS, J.).

I continue to adhere to the views expressed by JUSTICE STEVENS in *Bellotti II:*

> "It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties. . . . As a practical matter, I would suppose that the need to commence judicial proceedings in order to obtain a legal abortion would impose a burden at least as great as, and probably greater than, that imposed on the minor child by the need to obtain the consent of the parent. Moreover, once this burden is met, the only standard provided for the judge's decision is the best interest of the minor. That standard provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor—particularly when contrary to her own informed and reasonable decision—is fundamentally at odds with privacy interests underlying the constitutional protection afforded to her decision." *Ibid.* (footnote omitted).

Because Mo. Rev. Stat. § 188.028 (Supp. 1982) permits a parental or judicial veto of a minor's decision to obtain an abortion, I would hold it unconstitutional.

JUSTICE O'CONNOR, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, concurring in the judgment in part and dissenting in part.

For reasons stated in my dissent in *Akron* v. *Akron Center for Reproductive Health*, *ante*, p. 416, I believe that the second-trimester hospitalization requirement imposed by § 188.025 does not impose an undue burden on the limited right to undergo an abortion. Assuming, *arguendo*, that the requirement was an undue burden, it would nevertheless "reasonably relat[e] to the preservation and protection of maternal health." *Roe* v. *Wade*, 410 U. S. 113, 163 (1973). I therefore dissent from the Court's judgment that the requirement is unconstitutional.

I agree that the second-physician requirement contained in § 188.030.3 is constitutional because the State possesses a compelling interest in protecting and preserving fetal life, but I believe that this state interest is extant throughout pregnancy. I therefore concur in the judgment of the Court.

I agree that the pathology-report requirement imposed by § 188.047 is constitutional because it imposes no undue burden on the limited right to undergo an abortion. Because I do not believe that the validity of this requirement is contingent in any way on the trimester of pregnancy in which it is imposed, I concur in the judgment of the Court.

Assuming, *arguendo*, that the State cannot impose a parental veto on the decision of a minor to undergo an abortion, I agree that the parental-consent provision contained in § 188.028 is constitutional. However, I believe that the provision is valid because it imposes no undue burden on any right that a minor may have to undergo an abortion. I concur in the judgment of the Court on this issue.

I also concur in the Court's decision to vacate and remand on the issue of attorney's fees in light of *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983).

# SIMOPOULOS *v.* VIRGINIA

## APPEAL FROM THE SUPREME COURT OF VIRGINIA

No. 81–185. Argued November 30, 1982—Decided June 15, 1983

Appellant, an obstetrician-gynecologist, was convicted after a Virginia state-court trial for violating Virginia statutory provisions that make it unlawful to perform an abortion during the second trimester of pregnancy outside of a licensed hospital. "Hospital" is defined to include outpatient hospitals, and State Department of Health regulations define "outpatient hospital" as including institutions that primarily furnish facilities for the performance of surgical procedures on outpatients. The regulations also provide that second-trimester abortions may be performed in an outpatient surgical clinic licensed as a "hospital" by the State. The evidence at appellant's trial established, *inter alia*, that he performed a second-trimester abortion on an unmarried minor by an injection of saline solution at his unlicensed clinic; that the minor understood appellant to agree to her plan to deliver the fetus in a motel and did not recall being advised to go to a hospital when labor began, although such advice was included in an instruction sheet provided her by appellant; and that the minor, alone in a motel, aborted her fetus 48 hours after the saline injection. The Virginia Supreme Court affirmed appellant's conviction.

*Held:*

1. The Virginia abortion statute was not unconstitutionally applied to appellant on the asserted ground that the State failed to allege in the indictment and to prove lack of medical necessity for the abortion. Under the authoritative construction of the statute by the Virginia Supreme Court, the prosecution was not obligated to prove lack of medical necessity beyond a reasonable doubt *until* appellant invoked medical necessity as a defense. Placing upon the defendant the burden of going forward with evidence on an affirmative defense is normally permissible. And appellant's contention that the prosecution failed to prove that his acts in fact caused the fetus' death is meritless, in view of the undisputed facts proved at trial. P. 510.

2. Virginia's requirement that second-trimester abortions be performed in licensed outpatient clinics is not an unreasonable means of furthering the State's important and legitimate interest in protecting the woman's health, which interest becomes "compelling" at approximately the end of the first trimester. In *Akron* v. *Akron Center for Reproduc-*

*tive Health, Inc.*, *ante*, p. 416, and *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, *ante*, p. 476, constitutional challenges were upheld with regard to requirements mandating that all second-trimester abortions be performed in "general, acute-care facilities." In contrast, the Virginia statutes and regulations do not require that such abortions be performed exclusively in full-service hospitals, but permit their performance at licensed outpatient clinics. Thus, the decisions in *Akron* and *Ashcroft* are not controlling here. Although a State's discretion in determining standards for the licensing of medical facilities does not permit it to adopt abortion regulations that depart from accepted medical practice, the Virginia regulations on their face are compatible with accepted medical standards governing outpatient second-trimester abortions. Pp. 510–519.

221 Va. 1059, 277 S. E. 2d 194, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, and in Parts I and II of which WHITE, REHNQUIST, and O'CONNOR, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in which WHITE and REHNQUIST, JJ., joined, *post*, p. 519. STEVENS, J., filed a dissenting opinion, *post*, p. 520.

*Roy Lucas* argued the cause for appellant. With him on the briefs was *William P. Marshall.*

*William G. Broaddus*, Chief Deputy Attorney General of Virginia, argued the cause for appellee. With him on the brief were *Gerald L. Baliles*, Attorney General, and *Thomas D. Bagwell* and *Julia Krebs-Markrich*, Assistant Attorneys General.*

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**Sylvia A. Law*, *Nadine Taub*, and *Ellen J. Winner* filed a brief for the Committee for Abortion Rights and Against Sterilization Abuse et al. as *amici curiae* urging reversal.

*Dennis J. Horan*, *Victor G. Rosenblum*, *Patrick A. Trueman*, and *Thomas J. Marzen* filed a brief for Americans United for Life as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Alan Ernest* for the Legal Defense Fund for Unborn Children; by *Phyllis N. Segal*, *Judith I. Avner*, and *Jemera Rone* for the National Organization for Women et al.; by *David B. Hopkins* for the American Public Health Association; by *Nancy Reardan* for Women Lawyers of Sacramento et al.; and by *Susan Frelich Appleton* and *Paul Brest* for Certain Law Professors.

JUSTICE POWELL delivered the opinion of the Court.

We have considered today mandatory hospitalization requirements for second-trimester abortions in *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, *ante*, p. 416, and *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, *ante*, p. 476. The principal issue here is whether Virginia's mandatory hospitalization requirement is constitutional.

I

Appellant is a practicing obstetrician-gynecologist certified by the American Board of Obstetrics and Gynecology. In November 1979, he practiced at his office in Woodbridge, Va., at four local hospitals, and at his clinic in Falls Church, Va. The Falls Church clinic has an operating room and facilities for resuscitation and emergency treatment of cardiac/respiratory arrest. Replacement and stabilization fluids are on hand. Appellant customarily performs first-trimester abortions at his clinic. During the time relevant to this case, the clinic was not licensed, nor had appellant sought any license for it.

P. M. was a 17-year-old high school student when she went to appellant's clinic on November 8, 1979. She was unmarried, and told appellant that she was approximately 22 weeks pregnant. She requested an abortion but did not want her parents to know. Examination by appellant confirmed that P. M. was five months pregnant, well into the second trimester. Appellant testified that he encouraged her to confer with her parents and discussed with her the alternative of continuing the pregnancy to term. She did return home, but never advised her parents of her decision.

Two days later, P. M. returned to the clinic with her boyfriend. The abortion was performed by an injection of saline solution. P. M. told appellant that she planned to deliver the fetus in a motel, and understood him to agree to this course. Appellant gave P. M. a prescription for an analgesic and a "Post-Injection Information" sheet that stated that she had

undergone "a surgical procedure" and warned of a "wide range of normal reactions." App. 199. The sheet also advised that she call the physician if "heavy" bleeding began. Although P. M. did not recall being advised to go to a hospital when labor began, this was included on the instruction sheet. *Id.*, at 200.

P. M. went to a motel. Alone, she aborted her fetus in the motel bathroom 48 hours after the saline injection. She left the fetus, followup instructions, and pain medication in the wastebasket at the motel. Her boyfriend took her home. Police found the fetus later that day and began an investigation.[1]

Appellant was indicted[2] for unlawfully performing an abortion during the second trimester of pregnancy outside of a licensed hospital and was convicted by the Circuit Court of Fairfax County sitting without a jury. The Supreme Court of Virginia unanimously affirmed the conviction. 221 Va. 1059,

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[1] Except as permitted by statute, persons performing an abortion are guilty of a Class 4 felony under Virginia law and subject to mandatory license revocation. Va. Code §§ 18.2–71, 54–316(3), 54–317(1), 54.321.2 (1982). A Class 4 felony is punishable by a sentence of 2 to 10 years in prison. Va. Code § 18.2–10(d) (1982).

[2] The indictment alleges a violation of Va. Code § 18.2–71 (1982), which provides:

"Except as provided in other sections of this article, if any person administer to, or cause to be taken by a woman, any drug or other thing, or use means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and thereby destroy such child, or produce such abortion or miscarriage, he shall be guilty of a Class 4 felony."

The Virginia Code sets forth four exceptions to this statute: there is no criminal liability if the abortion (i) is performed within the first trimester, § 18.2–72; (ii) is performed in a licensed hospital in the second trimester, § 18.2–73; (iii) is performed during the third trimester under certain circumstances, § 18.2–74; and (iv) is necessary to save the woman's life, § 18.2–74.1. The indictment here alleged a violation of § 18.2–71 and expressly negated any defense of hospitalization under § 18.2–73 and any first-trimester defense under § 18.2–72. The indictment did not, however, rebut the other defenses.

277 S. E. 2d 194 (1981). This appeal followed. We noted probable jurisdiction, 456 U. S. 988, and now affirm.

II

Appellant raises two issues that do not require extended treatment. He first contends that Va. Code § 18.2–71 (1982) was applied unconstitutionally to him, because lack of medical necessity for the abortion was not alleged in the indictment, addressed in the prosecution's case, or mentioned by the trier of fact. Appellant contends that this failure renders his conviction unconstitutional for two reasons: (i) the State failed to meet its burden of alleging necessity in the indictment, as required by *United States* v. *Vuitch*, 402 U. S. 62 (1971); and (ii) the prosecution failed to meet its burden of persuasion, as required by *Patterson* v. *New York*, 432 U. S. 197 (1977).

The authoritative construction of § 18.2–71 by the Supreme Court of Virginia makes it clear that, at least with respect to the defense of medical necessity, the prosecution was not obligated to prove lack of medical necessity beyond a reasonable doubt *until* appellant invoked medical necessity as a defense. See 221 Va., at 1069, 277 S. E. 2d, at 200. Appellant's reliance on *Vuitch* thus is misplaced: the District of Columbia statute in *Vuitch*, as construed by this Court, required the prosecution to make this allegation. See 402 U. S., at 70. Placing upon the defendant the burden of going forward with evidence on an affirmative defense is normally permissible. See *Engle* v. *Isaac*, 456 U. S. 107, 120–121, and n. 20 (1982); *Mullaney* v. *Wilbur*, 421 U. S. 684, 701–703, nn. 28, 30, 31 (1975).

Appellant also contends that the prosecution failed to prove that his acts in fact caused the death of the fetus. In view of the undisputed facts proved at trial, summarized above, this contention is meritless. See 221 Va., at 1069–1070, 277 S. E. 2d, at 200–201.

III

We consistently have recognized and reaffirm today that a State has an "important and legitimate interest in the health

of the mother" that becomes "'compelling' . . . at approximately the end of the first trimester." *Roe* v. *Wade*, 410 U. S. 113, 163 (1973). See *City of Akron*, *ante*, at 428. This interest embraces the facilities and circumstances in which abortions are performed. See 410 U. S., at 150. Appellant argues, however, that Virginia prohibits all nonhospital second-trimester abortions and that such a requirement imposes an unconstitutional burden on the right of privacy. In *City of Akron* and *Ashcroft*, we upheld such a constitutional challenge to the acute-care hospital requirements at issue there. The State of Virginia argues here that its hospitalization requirement differs significantly from the hospitalization requirements considered in *City of Akron* and *Ashcroft* and that it reasonably promotes the State's interests.

A

In furtherance of its compelling interest in maternal health, Virginia has enacted a hospitalization requirement for abortions performed during the second trimester. As a general proposition, physicians' offices are not regulated under Virginia law.[3] Virginia law does not, however, permit a

[3] A physician's office is explicitly excluded from the hospital licensing statutes and regulations unless the office is used principally for performing surgery. Va. Code § 32.1–124(5) (1979). "Surgery" is not defined. Appellant contends that whether his facility principally performs surgery is a question of fact that has not been resolved, and that it is uncertain whether his clinic may be licensed as a "hospital." He notes that *after* he performed the abortion on P. M. he requested a certificate of need, see § 32.1–102.3 (Supp. 1983), but was informed by the Office of the Attorney General that his "clinic-office cannot be licensed as a hospital" and that "if you wish to perform this type of procedure, you must, in essence, build a hospital to do it." App. to Reply Brief for Appellant 3a, 4a. Appellant did not seek a license before he performed the abortion at issue here, nor does he now argue that his clinic would meet the requirements of the Virginia statute and regulations. Rather, he broadly attacks the validity of the state hospitalization requirements as applied to second-trimester abortions. Thus, it is irrelevant to the issue before us whether appellant's clinic and his procedures would have complied with the Virginia regulations.

physician licensed in the practice of medicine and surgery to perform an abortion during the second trimester of pregnancy unless "such procedure is performed in a hospital licensed by the State Department of Health." Va. Code § 18.2–73 (1982). The Virginia abortion statute itself does not define the term "hospital." This definition is found in Va. Code § 32.1–123.1 (1979),[4] that defines "hospital" to include "outpatient . . . hospitals."[5] Section 20.2.11 of the

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[4] The Supreme Court of Virginia views the word "hospital" in § 18.2–73 as referring to the definition of that term in § 32.1–123.1. This is made clear by the court's general reference in its opinion to Title 32.1 of the Virginia Code, the Title of the Code that contains many of Virginia's health laws:

"The state is empowered to license and regulate hospitals, clinics, home health agencies, and other medical care facilities, *see generally*, Title 32.1 of the Code, and to fix and enforce different standards of medical care for different facilities. The General Assembly has decided that medical procedures employed in second-trimester abortions must be performed in hospitals. Based upon the evidence in this record, we are of the opinion that the hospital requirement is reasonably related to the State's compelling interest in preserving and protecting maternal health." 221 Va., at 1075, 277 S. E. 2d, at 204.

There is no basis for assuming that the court interpreted "hospital" in § 18.2–73 any differently from its interpretation in Title 32.1, and specifically in § 32.1–123.1. See n. 5, *infra*.

[5] Section 32.1–123.1 provides:

"'*Hospital*' means any facility in which the primary function is the provision of diagnosis, of treatment, and of medical and nursing services, surgical or nonsurgical, for two or more nonrelated individuals, including hospitals known by varying nomenclature or designation such as sanatoriums, sanitariums and general, acute, short-term, long-term, outpatient and maternity hospitals."

The definition of "hospital" in effect in 1975 when § 18.2–73 was enacted is similar. See Va. Code § 32.298(2) (Supp. 1975) (repealed by 1979 Va. Acts, ch. 711). It specifically included at that time "out-patient surgical hospitals (which term shall not include the office or offices of one or more physicians or surgeons unless such office or offices are used principally for performing surgery)."

Department of Health's Rules and Regulations for the Licensure of Outpatient Hospitals in Virginia (1977) (regulations)[6]

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[6]The regulations were promulgated pursuant to the State Board of Health's general authority to adopt rules and regulations prescribing minimum standards for hospitals. This authority permits it to

"classify hospitals in accordance with the character of treatment, care, or service rendered or offered, and prescribe the minimum standards and requirements for each class in conformity with provisions of this chapter, with the guiding principles expressed or implied herein, and with due regard to and in reasonable conformity to the standards of health, hygiene, sanitation, and safety as established and recognized by the medical profession and by specialists in matters of public health and safety, having due regard to the availability of physicians, surgeons, nurses and other assistants, and the cost and expense to the hospital and the resulting costs to the patients." Va. Code § 32–301 (1973) (repealed by 1979 Va. Acts, ch. 711) (similar rulemaking authority currently is granted in Va. Code §§ 32.1–12 and 32.1–127 (1979)).

The first draft of the regulations differed considerably from the regulations that the Board finally approved. See Department of Health, Draft I, Rules and Regulations for the Licensure of Outpatient Hospitals in Virginia (Oct. 27, 1976). The most important difference was that the requirements now in Part II of the regulations were applicable to all outpatient facilities in which abortions could be performed, regardless of the trimester.

The State Board of Health gave preliminary approval to the proposed regulations on December 1, 1976, and a public hearing was held January 26, 1977. Dr. William R. Hill, a member of the Board, presided at this hearing, and staff present from the Department included two doctors and the Director of the Bureau of Medical and Nursing Facilities Services. Witnesses included the Associate Executive Director of the Virginia Hospital Association; a representative of five outpatient abortion clinics in the State; representatives of two abortion clinics, the Richmond Medical Center and the Hillcrest Clinic; a professor from Eastern Virginia Medical School representing Planned Parenthood of Southside Tidewater and the Tidewater OBGYN Society; the Medical Director of the Ambulatory Surgical Center of Leigh Memorial Hospital; the Administrator of Leigh Memorial Hospital; a representative of the Virginia Society for Human Life; and a representative of the Northern Virginia Medical Center. See Commonwealth of Virginia Department of Health, Public Hearing In Re: Proposed Rules and Regulations for the Licensure of Outpatient Hospitals in Vir-

defines "outpatient hospitals" in pertinent part as "[i]nstitutions . . . which primarily provide facilities for the performance of surgical procedures on outpatients"[7] and provides that second-trimester abortions may be performed in these clinics.[8] Thus, under Virginia law, a second-trimester abor-

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ginia (Jan. 26, 1977). The Executive Director of the Virginia Hospital Association stated that "[i]n general, they are a good set of standards and have our support." *Id.*, at 4. The abortion clinics were concerned, however, about the imposition of the regulations on outpatient abortion clinics then performing first-trimester abortions. The clinics acknowledged that during the second trimester "the State may regulate the [abortion] procedure in the interest of maternal health." *Id.*, at 7. But the clinics specifically "propose[d] that clinics or other facilities that perform abortions during the first trimester be specifically excluded from the Rules and Regulations for the Licensure of Outpatient Hospitals in Virginia." *Id.*, at 26. See also *id.*, at 28. The Medical Director of the Ambulatory Surgical Center of Leigh Memorial Hospital, concerned about the need to set high standards for outpatient surgical hospitals in the State, agreed that the Board should not "compromise" the strict standards needed for outpatient surgical hospitals in order to include these first-trimester outpatient abortion clinics within the same set of regulations. See *id.*, at 30. Following the hearing, the Board added Part III, the regulations of which apply only to clinics doing first-trimester abortions. See nn. 8, 12, *infra*. It therefore is clear that Virginia has recognized the need for discrete and different sets of regulations for the two periods. The Board gave its final approval, and the regulations became effective on June 30, 1977. The abortion for which appellant was prosecuted was performed on November 10, 1979, some two years and five months later.

We note that new but similar regulations now supersede the regulations in effect when appellant performed the abortion for which he was prosecuted. See Department of Health, Rules and Regulations for the Licensure of Hospitals in Virginia, Pt. IV (1982). These new regulations were promulgated pursuant to Va. Code §§ 32.1–12, 32.1–127 (1979), enacted in 1979.

[7] Section 32.1–125 of the Code provides: "No person shall establish, conduct, maintain, or operate in this Commonwealth any hospital . . . unless such hospital . . . is licensed as provided in this article." See also Va. Regs. (Outpatient Hospitals) § 30.1 (1977) (similar provision specifically governing outpatient surgical hospitals).

[8] Part II of the regulations sets minimum standards for outpatient surgical hospitals that may perform second-trimester abortions. This interpre-

tion may be performed in an outpatient surgical hospital provided that facility has been licensed as a "hospital" by the State.

The Virginia regulations applicable to the performance of second-trimester abortions in outpatient surgical hospitals are, with few exceptions, the same regulations applicable to all outpatient surgical hospitals in Virginia, and may be grouped for purposes of discussion into three main categories. The first grouping relates to organization, management, policies, procedures, and staffing. These regulations require personnel and facilities "necessary to meet patient and program needs." Va. Regs. (Outpatient Hospitals) § 40.3 (1977); see also § 40.1. They also require a policy and procedures manual, § 43.2, an administrative officer, § 40.6, a licensed physician who must supervise clinical services and perform surgical procedures, § 42.1, and a registered nurse to be on duty at all times while the facility is in use, § 42.2. The second category of requirements outlines construction standards for outpatient surgical clinics, but also provides that "deviations from the requirements prescribed herein may be approved if it is determined that the purposes of the minimum requirements have been fulfilled," § 50.2.1. There are also construction requirements that set forth standards for the public areas, clinical areas, laboratory and radiology serv-

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tation is confirmed by several sections in Part II, *i. e.*, §§ 43.6.2, 43.6.3, 43.7.3(c), 43.8.4, 43.8.5, 43.9.5, all of which refer to abortion services, and by the history of Part III, see n. 6, *supra*. Moreover, the State's counsel at oral argument represented that facilities licensed pursuant to Part II legally may perform second-trimester abortions. Tr. of Oral Arg. 33.

Virginia uses the term "outpatient abortion clinics" to refer specifically to those facilities meeting the minimum standards of Part III of the regulations. See Va. Regs. (Outpatient Hospitals) i (1977). Facilities meeting these standards are limited to performing abortions only during the first trimester of pregnancy. *Ibid.* See *id.*, § 62.1.2 ("Any procedure performed to terminate a pregnancy [in an outpatient abortion clinic] shall be performed prior to the end of the first trimester (12th week amenorrhea)").

ices, §§ 52.1, 52.2, 52.3, and general building, §§ 50.6.1, 50.7.1, 50.8.1, 52.4. The final group of regulations relates to patient care services. Most of these set the requirements for various services that the facility may offer, such as anesthesia, § 43.1, laboratory, §§ 43.6.1, 64.1.3, 64.1.4, and pathology, §§ 43.6.3, 64.2.4. Some of the requirements relate to sanitation, laundry, and the physical plant. §§ 43.2, 43.10, 43.11, 43.12.6. There are also guidelines on medical records, § 43.7, preoperative admission, § 43.8, and postoperative recovery, § 43.9. Finally, the regulations mandate some emergency services and evacuation planning. §§ 43.4.1, 43.5.

B

It is readily apparent that Virginia's second-trimester hospitalization requirement differs from those at issue in *City of Akron*, *ante*, at 431–432, and *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, *ante*, at 481. In those cases, we recognized the medical fact that, "at least during the early weeks of the second trimester[,] D&E abortions may be performed as safely in an outpatient clinic as in a full-service hospital." *City of Akron*, *ante*, at 437. The requirements at issue, however, mandated that "all second-trimester abortions must be performed in general, acute-care facilities." *Ashcroft*, *ante*, at 481. In contrast, the Virginia statutes and regulations do not require that second-trimester abortions be performed exclusively in full-service hospitals. Under Virginia's hospitalization requirement, outpatient surgical hospitals may qualify for licensing as "hospitals" in which second-trimester abortions lawfully may be performed. Thus, our decisions in *City of Akron* and *Ashcroft* are not controlling here.

In view of its interest in protecting the health of its citizens, the State necessarily has considerable discretion in determining standards for the licensing of medical facilities. Although its discretion does not permit it to adopt abortion regulations that depart from accepted medical practice, it does have a legitimate interest in regulating second-trimester

abortions and setting forth the standards for facilities in which such abortions are performed.

On their face, the Virginia regulations appear to be generally compatible with accepted medical standards governing outpatient second-trimester abortions. The American Public Health Association (APHA) (Resolution No. 7907), although recognizing "that greater use of the Dilatation and Evacuation procedure makes it possible to perform the vast majority of second trimester abortions during or prior to the 16th week after the last menstrual period," still "[u]rges endorsement of the provision of second trimester abortion in free-standing qualified clinics that meet the state standards required for certification." APHA, The Right to Second Trimester Abortion 1, 2 (1979). The medical profession has not thought that a State's standards need be relaxed merely because the facility performs abortions: "Ambulatory care facilities providing abortion services should meet the same standards of care as those recommended for other surgical procedures performed in the physician's office and outpatient clinic or the free-standing and hospital-based ambulatory setting." American College of Obstetricians and Gynecologists (ACOG), Standards for Obstetric-Gynecologic Services 54 (5th ed. 1982). See also *id.*, at 52 ("Free-standing or hospital-based ambulatory surgical facilities should be licensed to conform to requirements of state or federal legislation"). Indeed, the medical profession's standards for outpatient surgical facilities are stringent: "Such facilities should maintain the same surgical, anesthetic, and personnel standards as recommended for hospitals." *Ibid.*

We need not consider whether Virginia's regulations are constitutional in every particular. Despite personal knowledge of the regulations at least by the time of trial, appellant has not attacked them as being insufficiently related to the State's interest in protecting health.[9] His challenge

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[9] See nn. 3, 6, *supra;* 5 Record 55–56 (appellant acknowledging existence of the outpatient hospital license; stating that he was seeking a license; but

throughout this litigation appears to have been limited to an assertion that the State cannot require all second-trimester abortions to be performed in full-service general hospitals. In essence, appellant has argued that Virginia's hospitalization requirements are no different in substance from those reviewed in the *City of Akron* and *Ashcroft* cases.[10] At the same time, however, appellant took the position—both before the Virginia courts and this Court—that a state licensing requirement for outpatient abortion facilities would be constitutional.[11] We can only assume that by continuing to challenge the Virginia hospitalization requirement appellant either views the Virginia regulations in some unspecified way as unconstitutional or challenges a hospitalization requirement that does not exist in Virginia. Yet, not until his reply brief in this Court did he elect to criticize the regulations apart from his broadside attack on the entire Virginia hospitalization requirement.

Given the plain language of the Virginia regulations and the history of their adoption, see n. 6, *supra*, we see no reason to doubt that an adequately equipped clinic could, upon

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denying that he knew of the licensing program when the abortion was performed).

[10] Appellant's reply brief does criticize the Virginia regulations, but not individually or on specific grounds, instead making only facial challenges in the broadest language and in conclusory terms: that the record is silent on the applicability of those regulations to his facility; that the record does not show whether any outpatient surgical hospitals exist in Virginia or whether, if they exist, they allow second-trimester abortions; that the record is silent on the reasonableness of the regulations; that he had no opportunity to defend against the regulations at trial; that it is uncertain whether, if he had applied for an outpatient hospital license, it would have been granted; that obtaining a license is an arduous process; that Virginia courts have had no opportunity to construe the "licensing statutes and regulations"; and that Part II of the regulations does not cover an outpatient surgical hospital where second-trimester abortions are performed. Some of these arguments are simply meritless, see n. 8, *supra*, and others are irrelevant, see n. 3, *supra*, and none has been raised below.

[11] See 8 Record 196a, 214a; Brief for Appellant in No. 801107 (Va. Sup. Ct.), p. 35; Juris. Statement 16; Brief for Appellant 32, 43, n. 75, 46.

proper application, obtain an outpatient hospital license permitting the performance of second-trimester abortions. We conclude that Virginia's requirement that second-trimester abortions be performed in licensed clinics is not an unreasonable means of furthering the State's compelling interest in "protecting the woman's own health and safety." *Roe*, 410 U. S., at 150.[12] As we emphasized in *Roe*, "[t]he State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Ibid.* Unlike the provisions at issue in *City of Akron* and *Ashcroft*, Virginia's statute and regulations do not require that the patient be hospitalized as an inpatient or that the abortion be performed in a full-service, acute-care hospital. Rather, the State's requirement that second-trimester abortions be performed in licensed clinics appears to comport with accepted medical practice, and leaves the method and timing of the abortion precisely where they belong—with the physician and the patient.

## IV

The judgment of the Supreme Court of Virginia is

*Affirmed.*

JUSTICE O'CONNOR, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, concurring in part and concurring in the judgment.

I agree with the Court's treatment of the appellant's arguments based on *United States* v. *Vuitch*, 402 U. S. 62 (1971),

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[12] Appellant argues that Part III of the regulations, covering first-trimester abortion clinics, requires the *same* services and equipment as Part II. In fact, Part III has detailed regulations that do not appear in Part II. See, *e. g.*, Va. Regs. (Outpatient Hospitals) §§ 63.1.1(b), 63.3, 64.2.5(a)–(m) (1977). Appellant contends that, given these extensive regulations for first-trimester abortion clinics, the only way to require *more* technological support for second-trimester abortions would be to restrict them to acute-care, general hospitals. The only issue before us, however, relates to second-trimester abortions.

and *Patterson* v. *New York*, 432 U. S. 197 (1977). Accordingly, I join Parts I and II of the Court's opinion.

I concur in the judgment of the Court insofar as it affirms the conviction. For reasons stated in my dissent in *Akron* v. *Akron Center for Reproductive Health*, *ante*, p. 416, I do not agree that the constitutional validity of the Virginia mandatory hospitalization requirement is contingent in any way on the trimester in which it is imposed. Rather, I believe that the requirement in this case is not an undue burden on the decision to undergo an abortion.

JUSTICE STEVENS, dissenting.

Prior to this Court's decision in *Roe* v. *Wade*, 410 U. S. 113 (1973), it was a felony to perform any abortion in Virginia except in a hospital accredited by the Joint Committee on Accreditation of Hospitals and licensed by the Department of Health, and with the approval of the hospital's Abortion Review Board (a committee of three physicians).* In 1975, the Virginia Code was amended to authorize additional abortions, including any second-trimester abortion performed by a physician "in a hospital licensed by the State Department of Health or under the control of the State Board of Mental Health and Mental Retardation." Va. Code § 18.2–73 (1982).

The amended statute might be interpreted in either of two ways. It might be read to prohibit all second-trimester abortions except those performed in a full-service, acute-care hospital facility. Or it might be read to permit any abortion performed in a facility licensed as a "hospital" in accord with any regulations subsequently adopted by the Department of

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*An in-hospital abortion was also unlawful unless (a) it was necessary to protect the life or health of the mother, (b) the pregnancy was the product of rape or incest, or (c) there was a substantial medical likelihood that the child would be born with an irremediable and incapacitating mental or physical defect. 1970 Va. Acts, ch. 508.

Health. The Court today chooses the latter interpretation. See *ante*, at 512–514.

There is reason to think the Court may be wrong. At the time the statute was enacted, there were no regulations identifying abortion clinics as "hospitals." The structure of the 1975 amendment suggests that the Virginia General Assembly did not want to make any greater change in its law than it believed necessary to comply with *Roe* v. *Wade*, and it may well have thought a full-service, acute-care hospitalization requirement constitutionally acceptable. Moreover, the opinion below does not suggest that the Supreme Court of Virginia believed the term "hospital" to incorporate licensed abortion clinics. It only discussed testimony pertaining to full-service, acute-care hospitals like Fairfax Hospital. See 221 Va. 1059, 1073, 277 S. E. 2d 194, 203. And it stated that "two hospitals in Northern Virginia and 24 hospitals located elsewhere in the State were providing abortion services in 1977," *id.*, at 1075, 277 S. E. 2d, at 204, again referring to acute-care facilities. The opinion refers to "clinics" only once, as part of a general statement concerning the variety of medical care facilities the State licenses and regulates; even there, the term is included in the list as a category that is distinct from "hospitals." *Id.*, at 1074, 277 S. E. 2d, at 204.

On the other hand, the Court may well be correct in its interpretation of the Virginia statute. The word "hospital" in § 18.2–73 could incorporate by reference any institution licensed in accord with Va. Code § 32.1–123.1 (1979) and its implementing regulations. See *ante*, at 512–514. It is not this Court's role, however, to interpret state law. We should not rest our decision on an interpretation of state law that was not endorsed by the court whose judgment we are reviewing. The Virginia Supreme Court's opinion was written on the assumption that the Commonwealth could constitutionally require all second-trimester abortions to be performed in a full-service, acute-care hospital. Our decision today in *City of*

*Akron* v. *Akron Center for Reproductive Health, Inc.*, *ante*, p. 416, proves that assumption to have been incorrect. The proper disposition of this appeal is therefore to vacate the judgment of the Supreme Court of Virginia and to remand the case to that court to reconsider its holding in the light of our opinion in *Akron*.

I respectfully dissent.

Syllabus

# JONES & LAUGHLIN STEEL CORP. *v.* PFEIFER

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

No. 82–131. Argued February 28, 1983—Decided June 15, 1983

Respondent was injured in the course of his employment while employed by petitioner as a loading helper on petitioner's coal barge in Pennsylvania. The injury made respondent permanently unable to return to his job or to perform other than light work. Respondent brought an action in Federal District Court against petitioner, alleging that his injury had been "caused by the negligence of the vessel" within the meaning of § 5(b) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA). The District Court found in respondent's favor and awarded damages of $275,881.31, holding that receipt of compensation from petitioner under § 4 of the LHWCA did not bar a separate recovery of damages for negligence. In calculating the damages, the court did not increase the award to take inflation into account nor did it discount the award to reflect the present value of the future stream of income. Instead, the court followed a decision of the Pennsylvania Supreme Court, which had held "as a matter of law that future inflation shall be presumed equal to future interest rates with these factors offsetting." The Court of Appeals affirmed.

*Held:*

1. A longshoreman may bring a negligence action under § 5(b) against the owner of a vessel who acts as his own stevedore, even though the longshoreman has received compensation from the owner-employer under § 4. The plain language of § 5(a), which provides that the liability of an employer for compensation prescribed in § 4 "shall be exclusive and in place of all other liability of such an employer to the employee," appears to support petitioner's contention that since, as respondent's employer, it had paid compensation to him under § 4, § 5(a) absolves it of all other responsibility to respondent for damages. But such contention is undermined by the plain language of § 5(b), which authorizes a longshoreman whose injury is caused by the negligence of a vessel to bring a separate action against such a vessel as a third party, unless the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If § 5(a) had been intended to bar all negligence suits against owner-employers, there would have been no need to put an additional sentence in § 5(b) barring suits against owner-

employers for injuries caused by fellow servants. And the history of the LHWCA further refutes the contention that § 5(a) bars respondent's suit under § 5(b). Pp. 528–532.

2. The District Court, in performing its damages calculation, erred in applying the theory of the Pennsylvania decision as a mandatory federal rule of decision. Pp. 533–553.

(a) The two elements that determine the calculation of a damages award to a permanently injured employee in an inflation-free economy are the amount that the employee would have earned during each year that he could have been expected to work after the injury, and the appropriate discount rate, reflecting the safest available investment. Pp. 533–538.

(b) In an inflationary economy, inflation should ideally affect both stages of the calculation described above. This Court, however, will not at this time select one of the many rules proposed by the litigants and *amici* in this case and establish it for all time as the exclusive method in all federal courts for calculating an award for lost earnings in an inflationary economy. First, by its very nature the calculation of an award for lost earnings must be a rough approximation. Second, sustained price inflation can make the award substantially less precise. And third, the question of lost earnings can arise in many different contexts. Pp. 538–547.

(c) Respondent's cause of action is rooted in federal maritime law, and thus the fact that Pennsylvania has adopted the total offset rule for all negligence cases in that forum is not of controlling importance in this case. Moreover, the reasons that may support the adoption of the rule for a State's entire judicial system are not necessarily applicable to the special class of workers covered by the LHWCA. P. 547.

(d) In calculating an award for a longshoreman's lost earnings caused by a vessel's negligence, the discount rate should be chosen on the basis of the factors that are used to estimate the lost stream of future earnings. If the trier of fact relies on a specific forecast of the future rate of price inflation, and if the estimated lost stream of future earnings is calculated to include price inflation along with individual factors and other societal factors, then the proper discount rate would be the after-tax market interest rate. But since specific forecasts of future price inflation remain too unreliable to be useful in many cases, it will normally be a costly and ultimately unproductive waste of longshoremen's resources to make such forecasts the centerpiece of litigation under § 5(b). On the other hand, if forecasts of future price inflation are not used, it is necessary to choose an appropriate below-market discount rate. As long as inflation continues, the amount of the "offset" against the market rate should be chosen on the basis of the same factors that are used to

estimate the lost stream of future earnings. If full account is taken of the individual and societal factors (excepting price inflation) that can be expected to have resulted in wage increases, then all that should be set off against the market interest rate is an estimate of future price inflation. Pp. 547–549.

(e) On remand, whatever rate the District Court may choose to discount the estimated stream of future earnings, it must make a deliberate choice, rather than assuming that it is bound by a rule of state law. Pp. 552–553.

678 F. 2d 453, vacated and remanded.

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

*Robert W. Murdoch* argued the cause for petitioner. With him on the brief was *Daniel R. Minnick.*

*Jerome M. Libenson* argued the cause and filed a brief for respondent.*

JUSTICE STEVENS delivered the opinion of the Court.

Respondent was injured in the course of his employment as a loading helper on a coal barge. As his employer, petitioner was required to compensate him for his injury under § 4 of the Longshoremen's and Harbor Workers' Compensation Act (Act). 44 Stat. 1426, 33 U. S. C. § 904. As the owner *pro hac vice* of the barge, petitioner may also be liable for negligence under § 5 of the Act. 86 Stat. 1263, 33 U. S. C. § 905. We granted certiorari to decide whether petitioner may be subject to both forms of liability, and also to consider whether the Court of Appeals correctly upheld the trial court's computation of respondent's damages. 459 U. S. 821 (1982).

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*Briefs of *amici curiae* urging reversal were filed by *Solicitor General Lee, Assistant Attorney General McGrath, Deputy Solicitor General Geller, Richard G. Wilkins,* and *Jeffrey Axelrad* for the United States; by *John T. Biezup, Michael D. Brophy,* and *E. D. Vickery* for Alcoa Steamship Co. et al.; and by *Robert C. Wert* and *Norman Hegge, Jr.,* for the Southeastern Pennsylvania Transportation Authority.

*Raymond J. Conboy* filed a brief for the International Longshoremen's and Warehousemen's Union as *amicus curiae.*

Petitioner owns a fleet of barges that it regularly operates on three navigable rivers in the vicinity of Pittsburgh, Pa. Respondent was employed for 19 years to aid in loading and unloading those barges at one of petitioner's plants located on the shore of the Monongahela River. On January 13, 1978, while carrying a heavy pump, respondent slipped and fell on snow and ice that petitioner had negligently failed to remove from the gunnels of a barge. His injury made him permanently unable to return to his job with the petitioner, or to perform anything other than light work after July 1, 1979.

In November 1979, respondent brought this action against petitioner, alleging that his injury had been "caused by the negligence of the vessel" within the meaning of § 5(b) of the Act. The District Court found in favor of respondent and awarded damages of $275,881.36. The court held that receipt of compensation payments from petitioner under § 4 of the Act did not bar a separate recovery of damages for negligence.

The District Court's calculation of damages was predicated on a few undisputed facts. At the time of his injury respondent was earning an annual wage of $26,025. He had a remaining work expectancy of 12½ years. On the date of trial (October 1, 1980), respondent had received compensation payments of $33,079.14. If he had obtained light work and earned the legal minimum hourly wage from July 1, 1979, until his 65th birthday, he would have earned $66,352.

The District Court arrived at its final award by taking 12½ years of earnings at respondent's wage at the time of injury ($325,312.50), subtracting his projected hypothetical earnings at the minimum wage ($66,352) and the compensation payments he had received under § 4 ($33,079.14), and adding $50,000 for pain and suffering. The court did not increase the award to take inflation into account, and it did not discount the award to reflect the present value of the future stream of income. The court instead decided to follow a decision of the Supreme Court of Pennsylvania, which had held

"as a matter of law that future inflation shall be presumed equal to future interest rates with these factors offsetting." *Kaczkowski* v. *Bolubasz*, 491 Pa. 561, 583, 421 A. 2d 1027, 1038–1039 (1980). Thus, although the District Court did not dispute that respondent could be expected to receive regular cost-of-living wage increases from the date of his injury until his presumed date of retirement, the court refused to include such increases in its calculation, explaining that they would provide respondent "a double consideration for inflation." App. to Pet. for Cert. 41a. For comparable reasons, the court disregarded changes in the legal minimum wage in computing the amount of mitigation attributable to respondent's ability to perform light work.

It does not appear that either party offered any expert testimony concerning predicted future rates of inflation, the interest rate that could be appropriately used to discount future earnings to present value, or the possible connection between inflation rates and interest rates. Respondent did, however, offer an estimate of how his own wages would have increased over time, based upon recent increases in the company's hourly wage scale.

The Court of Appeals affirmed. 678 F. 2d 453 (CA3 1982). It held that a longshoreman may bring a negligence action against the owner of a vessel who acts as its own stevedore, relying on its prior decision in *Griffith* v. *Wheeling Pittsburgh Steel Corp.*, 521 F. 2d 31, 38–44 (1975), cert. denied, 423 U. S. 1054 (1976). On the damages issue, the Court of Appeals first noted that even though the District Court had relied on a Pennsylvania case, federal law controlled. The Court of Appeals next held that in defining the content of that law, inflation must be taken into account:

> "Full compensation for lost prospective earnings is most difficult, if not impossible, to attain if the court is blind to the realities of the consumer price index and the recent historical decline of purchasing power. Thus if we recognize, as we must, that the injured worker is

entitled to reimbursement for his loss of future earnings, an honest and accurate calculation must consider the stark reality of inflationary conditions." 678 F. 2d, at 460–461.[1]

The court understood, however, that the task of predicting future rates of inflation is quite speculative. It concluded that such speculation could properly be avoided in the manner chosen by the District Court—by adopting Pennsylvania's "total offset method" of computing damages. The Court of Appeals approved of the way the total offset method respects the twin goals of considering future inflation and discounting to present value, while eliminating the need to make any calculations about either, "because the inflation and discount rates are legally presumed to be equal and cancel one another." *Id.*, at 461. Accordingly, it affirmed the District Court's judgment.

*The Liability Issue*

Most longshoremen who load and unload ships are employed by independent stevedores, who have contracted with the vessel owners to provide such services. In this case, however, the respondent longshoreman was employed directly by the petitioner vessel owner. Under § 4 of the Act, a longshoreman who is injured in the course of his employment is entitled to a specified amount of compensation from

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[1] The court drew support for that conclusion from the recent Pennsylvania case, *Kaczkowski* v. *Bolubasz*, 491 Pa. 561, 421 A. 2d 1027 (1980), a venerable Vermont case, *Halloran* v. *New England Telephone & Telegraph Co.*, 95 Vt. 273, 274, 115 A. 143, 144 (1921), and a few federal decisions. *McWeeney* v. *New York, N. H. & H. R. Co.*, 282 F. 2d 34, 38 (CA2) (en banc), cert. denied, 364 U. S. 870 (1960); *Yodice* v. *Koninklijke Nederlandsche Stoomboot Maatschappij*, 443 F. 2d 76, 79 (CA2 1971); *Doca* v. *Marina Mercante Nicaraguense, S.A.*, 634 F. 2d 30, 36 (CA2 1980), cert. denied, 451 U. S. 971 (1981); *Steckler* v. *United States*, 549 F. 2d 1372, 1375–1378 (CA10 1977); *Freeport Sulphur Co.* v. *S/S Hermosa*, 526 F. 2d 300, 308–311 (CA5 1976) (Wisdom, J., concurring); *United States* v. *English*, 521 F. 2d 63, 72–76 (CA9 1975).

his employer, whether or not the injury was caused by the employer's negligence.[2] Section 5(a) of the Act appears to make that liability exclusive.[3] It reads: "The liability of an

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[2] Section 4 of the Act provides:

"(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

"(b) Compensation shall be payable irrespective of fault as a cause for the injury." 44 Stat. 1426, 33 U. S. C. § 904.

[3] The full text of § 5 of the Act reads as follows:

"(a) The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

"(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the

employer prescribed in section 4 [of this Act] shall be exclusive and in place of all other liability of such employer to the employee . . . ." 44 Stat. 1426, 33 U. S. C. § 905(a). Since the petitioner was the respondent's employer and paid him benefits pursuant to § 4 of the Act, it contends that § 5(a) absolves it of all other responsibility for damages.

Although petitioner's contention is, indeed, supported by the plain language of § 5(a), it is undermined by the plain language of § 5(b). The first sentence of § 5(b) authorizes a longshoreman whose injury is caused by the negligence of a vessel[4] to bring a separate action against such a vessel as a third party. Thus, in the typical tripartite situation, the longshoreman is not only guaranteed the statutory compensation from his employer; he may also recover tort damages if he can prove negligence by the vessel.[5] The second sentence of § 5(b) makes it clear that such a separate action is authorized against the vessel even when there is no independent stevedore and the longshoreman is employed directly by the vessel owner. That sentence provides: "If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." If § 5(a) had been intended to bar all negligence suits against owner-employers, there would have been no need to put an additional sentence

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vessel except remedies available under this Act." 86 Stat. 1263, 33 U. S. C. § 905.

[4] "The term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member." 86 Stat. 1263, 33 U. S. C. § 902(21).

[5] The longshoreman cannot receive a double recovery, because the stevedore, by paying him statutory compensation, acquires a lien in that amount against any recovery the longshoreman may obtain from the vessel. See *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256, 269–270 (1979).

in § 5(b) barring suits against owner-employers for injuries caused by fellow servants.[6]

The history of the Act further refutes petitioner's contention that § 5(a) of the Act bars respondent's suit under § 5(b). Prior to 1972, this Court had construed the Act to authorize a longshoreman employed directly by the vessel to obtain a recovery from his employer in excess of the statutory schedule, even though § 5 of the Act contained the same exclusive liability language as today. *Reed* v. *The Yaka*, 373 U. S. 410 (1963); *Jackson* v. *Lykes Brothers S.S. Co.*, 386 U. S. 731 (1967). Although the 1972 Amendments changed the character of the longshoreman's action against the vessel by substituting negligence for unseaworthiness as the basis for liability,[7] Congress clearly intended to preserve the rights of longshoremen employed by the vessel to maintain such an action. The House Committee Report is unambiguous:

> "The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or shipbuilder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the

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[6] Of course, § 5(b) does make it clear that a vessel owner acting as its own stevedore is liable only for negligence in its "owner" capacity, not for negligence in its "stevedore" capacity.

[7] Until 1972, a longshoreman could supplement his statutory compensation and obtain a tort recovery from the vessel merely by proving that his injury was caused by an "unseaworthy" condition, *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946), even if the condition was not attributable to negligence by the owner, *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 549–550 (1960). And an owner held liable to the longshoreman in such a situation was permitted to recover from the longshoreman's stevedore-employer if he could prove that the stevedore's negligence caused the injury. *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124 (1956). The net result, in many cases, was to make the stevedore absolutely liable for statutory compensation in all cases and to deny him protection from additional liability in the cases in which his negligence could be established. The 1972 Amendments protect the stevedore from a claim by the vessel and limit the longshoreman's recovery to statutory compensation unless he can prove negligence on the part of the vessel.

> vessel is the employer, the Supreme Court in *Reed* v. *S.S. Yaka*, 373 U. S. 410 (1963) and *Jackson* v. *Lykes Bros. Steamship Co.*, 386 U. S. 371 (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or shipbuilder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. . . . The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or shipbuilders or repairmen as apply when an independent contractor employs such persons." H. R. Rep. No. 92–1441, pp. 7–8 (1972).

In *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256, 266 (1979), we observed that under the post-1972 Act, "all longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner-stevedore and that all stevedores are to be treated the same whether they are independent or an arm of the shipowner itself." If respondent had been employed by an independent stevedore at the time of his injury, he would have had the right to maintain a tort action against the vessel. We hold today that he has the same right even though he was in fact employed by the vessel.

*The Damages Issue*

The District Court found that respondent was permanently disabled as a result of petitioner's negligence. He therefore was entitled to an award of damages to compensate him for his probable pecuniary loss over the duration of his career, reduced to its present value. It is useful at the outset to review the way in which damages should be measured in a hypothetical inflation-free economy. We shall then consider how price inflation alters the analysis. Finally, we shall decide whether the District Court committed reversible error in this case.

## I

In calculating damages, it is assumed that if the injured party had not been disabled, he would have continued to work, and to receive wages at periodic intervals until retirement, disability, or death. An award for impaired earning capacity is intended to compensate the worker for the diminution in that stream of income.[8] The award could in theory take the form of periodic payments, but in this country it has traditionally taken the form of a lump sum, paid at the conclusion of the litigation.[9] The appropriate lump sum cannot be computed without first examining the stream of income it purports to replace.

The lost stream's length cannot be known with certainty; the worker could have been disabled or even killed in a different, non-work-related accident at any time. The probability that he would still be working at a given date is constantly diminishing.[10] Given the complexity of trying to make an

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[8] See generally D. Dobbs, Law of Remedies § 8.1 (1973). It should be noted that in a personal injury action such as this one, damages for impaired earning capacity are awarded to compensate the injured person for his loss. In a wrongful-death action, a similar but not identical item of damages is awarded for the manner in which diminished earning capacity harms either the worker's survivors or his estate. See generally 1 S. Speiser, Recovery for Wrongful Death 2d, ch. 3 (1975) (hereafter Speiser). Since the problem of incorporating inflation into the award is the same in both types of action, we shall make occasional reference to wrongful-death actions in this opinion.

[9] But cf. Uniform Periodic Payment of Judgments Act, 14 U. L. A. 22 (Supp. 1983). See generally Elligett, The Periodic Payment of Judgments, 46 Ins. Counsel J. 130 (1979); Kolbach, Variable Periodic Payments of Damages: An Alternative to Lump Sum Awards, 64 Iowa L. Rev. 138 (1978); Rea, Lump-Sum Versus Periodic Damage Awards, 10 J. Leg. Studies 131 (1981).

[10] For examples of calculations that take this diminishing probability into account, and assume that it would fall to zero when the worker reached age 65 see Fitzpatrick, The Personal Economic Loss Occasioned by the Death of Nancy Hollander Feldman: An Introduction to the Standard Valuation Procedure, 1977 Economic Expert in Litigation, No. 5, pp. 25, 44–46 (De-

exact calculation, litigants frequently follow the relatively simple course of assuming that the worker would have continued to work up until a specific date certain. In this case, for example, both parties agreed that the petitioner would have continued to work until age 65 (12½ more years) if he had not been injured.

Each annual installment [11] in the lost stream comprises several elements. The most significant is, of course, the actual wage. In addition, the worker may have enjoyed certain fringe benefits, which should be included in an ideal evaluation of the worker's loss but are frequently excluded for simplicity's sake.[12] On the other hand, the injured worker's lost wages would have been diminished by state and federal income taxes. Since the damages award is tax-free, the relevant stream is ideally of *after-tax* wages and benefits. See *Norfolk & Western R. Co.* v. *Liepelt*, 444 U. S. 490 (1980). Moreover, workers often incur unreimbursed costs, such as transportation to work and uniforms, that the injured worker will not incur. These costs should also be deducted in estimating the lost stream.

In this case the parties appear to have agreed to simplify the litigation, and to presume that in each installment all the elements in the stream would offset each other, except for gross wages. However, in attempting to estimate even such a stylized stream of annual installments of gross wages, a trier of fact faces a complex task. The most obvious and most appropriate place to begin is with the worker's annual wage at the time of injury. Yet the "estimate of the loss

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fense Research Institute, Inc.) (hereafter Fitzpatrick); Hanke, How To Determine Lost Earning Capacity, 27 Prac. Lawyer 27, 29–33 (July 15, 1981).

[11] Obviously, another distorting simplification is being made here. Although workers generally receive their wages in weekly or biweekly installments, virtually all calculations of lost earnings, including the one made in this case, pretend that the stream would have flowed in large spurts, taking the form of annual installments.

[12] These might include insurance coverage, pension and retirement plans, profit sharing, and in-kind services. Fitzpatrick 27.

from lessened earnings capacity in the future need not be based solely upon the wages which the plaintiff was earning at the time of his injury." C. McCormick, Damages § 86, p. 300 (1935). Even in an inflation-free economy—that is to say one in which the prices of consumer goods remain stable—a worker's wages tend to "inflate." This "real" wage inflation reflects a number of factors, some linked to the specific individual and some linked to broader societal forces.[13]

With the passage of time, an individual worker often becomes more valuable to his employer. His personal work experiences increase his hourly contributions to firm profits. To reflect that heightened value, he will often receive "seniority" or "experience" raises, "merit" raises, or even promotions.[14] Although it may be difficult to prove when, and whether, a particular injured worker might have received such wage increases, see *Feldman* v. *Allegheny Airlines, Inc.*, 524 F. 2d 384, 392–393 (CA2 1975) (Friendly, J., concurring *dubitante*), they may be reliably demonstrated for some workers.[15]

Furthermore, the wages of workers as a class may increase over time. See *Grunenthal* v. *Long Island R. Co.*, 393 U. S. 156, 160 (1968). Through more efficient interaction among labor, capital, and technology, industrial productivity may increase, and workers' wages may enjoy a share of that growth.[16] Such productivity increases—reflected in real in-

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[13] As will become apparent, in speaking of "societal" forces we are primarily concerned with those macroeconomic forces that influence wages in the worker's particular industry. The term will be used to encompass all forces that tend to inflate a worker's wage without regard to the worker's individual characteristics.

[14] It is also possible that a worker could be expected to change occupations completely. See, *e. g.*, *Stearns Coal & Lumber Co.* v. *Williams*, 164 Ky. 618, 176 S. W. 15 (1915).

[15] See, *e. g.*, Fitzpatrick 33–39; Henderson, Income Over the Life Cycle: Some Problems of Estimation and Measurement, 25 Federation Ins. Counsel Q. 15 (1974).

[16] P. Samuelson, Economics 738–756 (10th ed. 1976) (hereafter Samuelson).

creases in the gross national product per worker-hour—have been a permanent feature of the national economy since the conclusion of World War II.[17] Moreover, through collective bargaining, workers may be able to negotiate increases in their "share" of revenues, at the cost of reducing shareholders' rate of return on their investments.[18] Either of these forces could affect the lost stream of income in an inflation-free economy. In this case, the plaintiff's proffered evidence on predictable wage growth may have reflected the influence of either or both of these two factors.

To summarize, the first stage in calculating an appropriate award for lost earnings involves an estimate of what the lost stream of income would have been. The stream may be approximated as a series of after-tax payments, one in each year of the worker's expected remaining career. In estimating what those payments would have been in an inflation-free economy, the trier of fact may begin with the worker's annual wage at the time of injury. If sufficient proof is offered, the trier of fact may increase that figure to reflect the appropriate influence of individualized factors (such as foreseeable promotions) and societal factors (such as foreseeable productivity growth within the worker's industry).[19]

Of course, even in an inflation-free economy the award of damages to replace the lost stream of income cannot be computed simply by totaling up the sum of the periodic payments. For the damages award is paid in a lump sum at the conclusion of the litigation, and when it—or even a part of it—is invested, it will earn additional money. It has been

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[17] See Henderson, The Consideration of Increased Productivity and the Discounting of Future Earnings to Present Value, 20 S. D. L. Rev. 307, 310–320 (1975) (hereafter Henderson).

[18] See Samuelson 584–593, 737; Henderson 315, and n. 15.

[19] If foreseeable real wage growth is shown, it may produce a steadily increasing series of payments, with the first payment showing the least increase from the wage at the time of injury and the last payment showing the most.

settled since our decision in *Chesapeake & Ohio R. Co.* v. *Kelly*, 241 U. S. 485 (1916), that "in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award." *Id.*, at 490.[20]

The discount rate should be based on the rate of interest that would be earned on "the best and safest investments." *Id.*, at 491. Once it is assumed that the injured worker would definitely have worked for a specific term of years, he is entitled to a risk-free stream of future income to replace his lost wages; therefore, the discount rate should not reflect the market's premium for investors who are willing to accept some risk of default. Moreover, since under *Norfolk & Western R. Co.* v. *Liepelt*, 444 U. S. 490 (1980), the lost stream of income should be estimated in after-tax terms, the discount rate should also represent the after-tax rate of return to the injured worker.[21]

Thus, although the notion of a damages award representing the present value of a lost stream of earnings in an inflation-free economy rests on some fairly sophisticated economic concepts, the two elements that determine its calculation can be stated fairly easily. They are: (1) the amount that the employee would have earned during each year that he could have been expected to work after the injury; and (2) the ap-

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[20] Although this rule could be seen as a way of ensuring that the lump-sum award accurately represents the pecuniary injury as of the time of trial, it was explained by reference to the duty to mitigate damages. 241 U. S., at 489–490.

[21] The arithmetic necessary for discounting can be simplified through the use of a so-called "present value table," such as those found in R. Wixon, Accountants' Handbook 29.58–29.59 (4th ed. 1956), or 1 Speiser § 8:4, pp. 713–718. These tables are based on the proposition that if $i$ is the discount rate, then "the present value of $1 due in $n$ periods must be $\frac{1}{(1+i)^n}$." Wixon, *supra*, at 29.57. In this context, the relevant "periods" are years; accordingly, if $i$ is a market interest rate, it should be the effective *annual* yield.

propriate discount rate, reflecting the safest available investment. The trier of fact should apply the discount rate to each of the estimated installments in the lost stream of income, and then add up the discounted installments to determine the total award.[22]

## II

Unfortunately for triers of fact, ours is not an inflation-free economy. Inflation has been a permanent fixture in our economy for many decades, and there can be no doubt that it ideally should affect both stages of the calculation described in the previous section. The difficult problem is how it can do so in the practical context of civil litigation under § 5(b) of the Act.

The first stage of the calculation required an estimate of the shape of the lost stream of future income. For many workers, including respondent, a contractual "cost-of-living adjustment" automatically increases wages each year by the percentage change during the previous year in the consumer price index calculated by the Bureau of Labor Statistics. Such a contract provides a basis for taking into account an additional societal factor—price inflation—in estimating the worker's lost future earnings.

The second stage of the calculation requires the selection of an appropriate discount rate. Price inflation—or more precisely, anticipated price inflation—certainly affects market

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[22] At one time it was thought appropriate to distinguish between compensating a plaintiff "for the loss of time from his work which has actually occurred up to the time of trial" and compensating him "for the time which he will lose in [the] future." C. McCormick, Damages § 86 (1935). This suggested that estimated future earning capacity should be discounted to the date of trial, and a separate calculation should be performed for the estimated loss of earnings between injury and trial. *Id.*, §§ 86, 87. It is both easier and more precise to discount the entire lost stream of earnings back to the date of injury—the moment from which earning capacity was impaired. The plaintiff may then be awarded interest on that discounted sum for the period between injury and judgment, in order to ensure that the award when invested will still be able to replicate the lost stream. See *In re Air Crash Disaster Near Chicago, Illinois, on May 25, 1979*, 644 F. 2d 633, 641–646 (CA7 1981); 1 Speiser § 8:6, p. 723.

rates of return. If a lender knows that his loan is to be repaid a year later with dollars that are less valuable than those he has advanced, he will charge an interest rate that is high enough both to compensate him for the temporary use of the loan proceeds and also to make up for their shrinkage in value.[23]

At one time many courts incorporated inflation into only one stage of the calculation of the award for lost earnings. See, *e. g.*, *Sleeman* v. *Chesapeake and Ohio R. Co.*, 414

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[23] The effect of price inflation on the discount rate may be less speculative than its effect on the lost stream of future income. The latter effect always requires a prediction of the future, for the existence of a contractual cost-of-living adjustment gives no guidance about how big that adjustment will be in some future year. However, whether the discount rate also turns on predictions of the future depends on how it is assumed that the worker will invest his award.

On the one hand, it might be assumed that at the time of the award the worker will invest in a mixture of safe short-term, medium-term, and long-term bonds, with one scheduled to mature each year of his expected work-life. In that event, by purchasing bonds immediately after judgment, the worker can be ensured whatever future stream of nominal income is predicted. Since all relevant effects of inflation on the market interest rate will have occurred at that time, future changes in the rate of price inflation will have no effect on the stream of income he receives. For recent commentaries on how an appropriate discount rate should be chosen under this assumption, see Jarrell & Pulsinelli, Obtaining the Ideal Discount Rate in Wrongful Death and Injury Litigation, 32 Defense L. J. 191 (1983); Fulmer & Geraghty, The Appropriate Discount Rate to Use in Estimating Financial Loss, 32 Federation Ins. Counsel Q. 263 (1982). See also *Doca* v. *Marina Mercante Nicaraguense, S. A.*, 634 F. 2d 30, 37, n. 8 (CA2 1980). On the other hand, it might be assumed that the worker will invest exclusively in safe short-term notes, reinvesting them at the new market rate whenever they mature. Future market rates would be quite important to such a worker. Predictions of what they will be would therefore also be relevant to the choice of an appropriate discount rate, in much the same way that they are always relevant to the first stage of the calculation. For a commentary choosing a discount rate on the basis of this assumption, see Sherman, Projection of Economic Loss: Inflation v. Present Value, 14 Creighton L. Rev. 723 (1981) (hereafter Sherman). We perceive no intrinsic reason to prefer one assumption over the other, but most "offset" analyses seem to adopt the latter. See n. 26, *infra*.

F. 2d 305 (CA6 1969); *Johnson* v. *Penrod Drilling Co.*, 510 F. 2d 234 (CA5 1975) (en banc). In estimating the lost stream of future earnings, they accepted evidence of both individual and societal factors that would tend to lead to wage increases even in an inflation-free economy, but required the plaintiff to prove that those factors were not influenced by predictions of future price inflation. See *Higginbotham* v. *Mobil Oil Corp.*, 545 F. 2d 422, 434–435 (CA5 1977). No increase was allowed for price inflation, on the theory that such predictions were unreliably speculative. See *Sleeman*, *supra*, at 308; *Penrod*, *supra*, at 240–241. In discounting the estimated lost stream of future income to present value, however, they applied the market interest rate. See *Blue* v. *Western R. of Alabama*, 469 F. 2d 487, 496–497 (CA5 1972).

The effect of these holdings was to deny the plaintiff the benefit of the impact of inflation on his future earnings, while giving the defendant the benefit of inflation's impact on the interest rate that is used to discount those earnings to present value. Although the plaintiff in such a situation could invest the proceeds of the litigation at an "inflated" rate of interest, the stream of income that he received provided him with only enough dollars to maintain his existing *nominal* income; it did not provide him with a stream comparable to what his lost wages would have been in an inflationary economy.[24] This inequity was assumed to have been minimal because of the relatively low rates of inflation.

In recent years, of course, inflation rates have not remained low. There is now a consensus among courts that

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[24] As Judge Posner has explained it:

"But if there is inflation it will affect wages as well as prices. Therefore to give Mrs. O'Shea $2318 today because that is the present value of $7200 10 years hence, computed at a discount rate—12 percent—that consists mainly of an allowance for anticipated inflation, is in fact to give her less than she would have been earning then if she was earning $7200 on the date of the accident, even if the only wage increases she would have received would have been those necessary to keep pace with inflation." *O'Shea* v. *Riverway Towing Co.*, 677 F. 2d 1194, 1199 (CA7 1982).

the prior inequity can no longer be tolerated. See, *e. g.*, *United States* v. *English*, 521 F. 2d 63, 75 (CA9 1975) ("While the administrative convenience of ignoring inflation has some appeal when inflation rates are low, to ignore inflation when the rates are high is to ignore economic reality"). There is no consensus at all, however, regarding what form an appropriate response should take. See generally Note, Future Inflation, Prospective Damages, and the Circuit Courts, 63 Va. L. Rev. 105 (1977).

Our sister common-law nations generally continue to adhere to the position that inflation is too speculative to be considered in estimating the lost stream of future earnings; they have sought to counteract the danger of systematically undercompensating plaintiffs by applying a discount rate that is below the current market rate. Nevertheless, they have each chosen different rates, applying slightly different economic theories. In England, Lord Diplock has suggested that it would be appropriate to allow for future inflation "in a rough and ready way" by discounting at a rate of 4¾%. *Cookson* v. *Knowles*, [1979] A. C. 556, 565–573. He accepted that rate as roughly equivalent to the rates available "[i]n times of stable currency." *Id.*, at 571–572. See also *Mallett* v. *McMonagle*, [1970] A. C. 166. The Supreme Court of Canada has recommended discounting at a rate of 7%, a rate equal to market rates on long-term investments minus a government expert's prediction of the long-term rate of price inflation. *Andrews* v. *Grand & Toy Alberta Ltd.*, [1978] 2 S. C. R. 229, 83 D. L. R. 3d 452, 474. And in Australia, the High Court has adopted a 2% rate, on the theory that it represents a good approximation of the long-term "real interest rate." See *Pennant Hills Restaurants Pty. Ltd.* v. *Barrell Insurances Pty. Ltd.*, 55 A. L. J. R. 258 (1981); *id.*, at 260 (Barwick, C. J.); *id.*, at 262 (Gibbs, J.); *id.*, at 277 (Mason, J.); *id.*, at 280 (Wilson, J.).

In this country, some courts have taken the same "real interest rate" approach as Australia. See *Feldman* v. *Alle-*

*gheny Airlines, Inc.*, 524 F. 2d, at 388 (1.5%); *Doca* v. *Marina Mercanti Nicaraguense, S. A.*, 634 F. 2d 30, 39–40 (CA2 1980) (2%, unless litigants prove otherwise). They have endorsed the economic theory suggesting that market interest rates include two components—an estimate of anticipated inflation, and a desired "real" rate of return on investment—and that the latter component is essentially constant over time.[25] They have concluded that the inflationary increase in the estimated lost stream of future earnings will therefore be perfectly "offset" by all but the "real" component of the market interest rate.[26]

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[25] In his dissenting opinion in *Pennant Hills Restaurant Pty. Ltd.* v. *Barrell Insurances Pty. Ltd.*, 55 A. L. J. R. 258, 266–267 (1981), Justice Stephen explained the "real interest rate" approach to discounting future earnings, in part, as follows:

"It rests upon the assumption that interest rates have two principal components: the market's own estimation of likely rates of inflation during the term of a particular fixed interest investment, and a 'real interest' component, being the rate of return which, in the absence of all inflation, a lender will demand and a borrower will be prepared to pay for the use of borrowed funds. It also relies upon the alleged economic fact that this 'real interest' rate, of about two per cent, will always be much the same and that fluctuations in nominal rates of interest are due to the other main component of interest rates, the inflationary expectation."

[26] What is meant by the "real interest rate" depends on how one expects the plaintiff to invest the award, see n. 23, *supra*. If one assumes that the injured worker will immediately invest in bonds having a variety of maturity dates, in order to ensure a particular stream of future payments, then the relevant "real interest rate" must be the difference between (1) an average of short-term, medium-term, and long-term market interest rates in a given year and (2) the average rate of price inflation in *subsequent* years (*i. e.*, during the terms of the investments). The only comprehensive analysis of this difference that has been called to our attention is in *Feldman* v. *Allegheny Airlines, Inc.*, 382 F. Supp. 1271, 1293–1295, 1306–1312 (Conn. 1974).

It appears more common for "real interest rate" approaches to rest on the assumption that the worker will invest in low-risk short-term securities and will reinvest frequently. *E. g.*, *O'Shea* v. *Riverway Towing Co.*, 677

Still other courts have preferred to continue relying on market interest rates. To avoid undercompensation, they have shown at least tentative willingness to permit evidence of what future price inflation will be in estimating the lost stream of future income. *Schmitt* v. *Jenkins Truck Lines, Inc.*, 170 N. W. 2d 632 (Iowa 1969); *Bach* v. *Penn Central Transp. Co.*, 502 F. 2d 1117, 1122 (CA6 1974); *Turcotte* v. *Ford Motor Co.*, 494 F. 2d 173, 186–187 (CA1 1974); *Huddell* v. *Levin*, 537 F. 2d 726 (CA3 1976); *United States* v. *English*, *supra*, at 74–76; *Ott* v. *Frank*, 202 Neb. 820, 277 N. W. 2d 251 (1979); *District of Columbia* v. *Barriteau*, 399 A. 2d 563, 566–569 (D. C. 1979). Cf. *Magill* v. *Westinghouse Electric Corp.*, 464 F. 2d 294, 301 (CA3 1972) (holding open possibility of establishing a factual basis for price inflation testimony); *Resner* v. *Northern Pacific R. Co.*, 161 Mont. 177, 505 P. 2d 86 (1973) (approving estimate of future wage inflation); *Taenzler* v. *Burlington Northern*, 608 F. 2d 796, 801 (CA8 1979) (allowing estimate of future wage inflation, but not of a specific rate of price inflation); *Steckler* v. *United States*, 549 F. 2d 1372 (CA10 1977) (same).

Within the past year, two Federal Courts of Appeals have decided to allow litigants a choice of methods. Sitting en banc, the Court of Appeals for the Fifth Circuit has overruled its prior decision in *Johnson* v. *Penrod Drilling Co.*, 510

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F. 2d, at 1199. Under that assumption, the relevant real interest rate is the difference between the short-term market interest rate in a given year and the average rate of price inflation during that same year. Several studies appear to have been done to measure this difference. See Sherman 731–732; Carlson, Short-Term Interest Rates as Predictors of Inflation: Comment, 67 Am. Econ. Rev. 469 (1977); Gibson, Interest Rates and Inflationary Expectations: New Evidence, 62 Am. Econ. Rev. 854 (1972).

However one interprets the "real interest rate," there is a slight distortion introduced by netting out the two effects and discounting by the difference. See Comments, 49 U. Chi. L. Rev. 1003, 1017–1018, n. 66 (1982); Note, Future Inflation, Prospective Damages, and the Circuit Courts, 63 Va. L. Rev. 105, 111 (1977).

F. 2d 234 (1975), and held it acceptable either to exclude evidence of future price inflation and discount by a "real" interest rate, or to attempt to predict the effects of future price inflation on future wages and then discount by the market interest rate. *Culver* v. *Slater Boat Co.*, 688 F. 2d 280, 308–310 (1982).[27] A panel of the Court of Appeals for the Seventh Circuit has taken a substantially similar position. *O'Shea* v. *Riverway Towing Co.*, 677 F. 2d 1194, 1200 (1982).

Finally, some courts have applied a number of techniques that have loosely been termed "total offset" methods. What these methods have in common is that they presume that the ideal discount rate—the after-tax market interest rate on a safe investment—is (to a legally tolerable degree of precision) completely offset by certain elements in the ideal computation of the estimated lost stream of future income. They all assume that the effects of future price inflation on wages are part of what offsets the market interest rate. The methods differ, however, in their assumptions regarding which if any other elements in the first stage of the damages calculation contribute to the offset.

*Beaulieu* v. *Elliott*, 434 P. 2d 665 (Alaska 1967), is regarded as the seminal "total offset" case. The Supreme Court of Alaska ruled that in calculating an appropriate award for an injured worker's lost wages, no discount was to be applied. It held that the market interest rate was fully offset by two factors: price inflation and real wage inflation.

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[27] The Fifth Circuit recommended replacing the estimated stream of actual installments with a stream of installments representing the "average annual income." See 688 F. 2d, at 309. As we have noted, a worker does not generally receive the same wage each year. If, as an accurate estimate would normally show, the estimated wages increase steadily, then averaging will raise the estimate for the early years and lower it for the later years. Since the early years are discounted less than the later years, this step will necessarily increase the size of the award, providing plaintiffs with an unjustified windfall. Cf. *Turcotte* v. *Ford Motor Co.*, 494 F. 2d 173, 186, n. 20 (CA1 1974).

*Id.*, at 671–672. Significantly, the court did not need to distinguish between the two types of sources of real wage inflation—individual and societal—in order to resolve the case before it.[28] It simply observed:

> "It is a matter of common experience that as one progresses in his chosen occupation or profession he is likely to increase his earnings as the years pass by. In nearly any occupation a wage earner can reasonably expect to receive wage increases from time to time. This factor is generally not taken into account when loss of future wages is determined, because there is no definite way of determining at the time of trial what wage increases the plaintiff may expect to receive in the years to come. However, this factor may be taken into account to some extent when considered to be an offsetting factor to the result reached when future earnings are not reduced to present value." *Id.*, at 672.

Thus, the market interest rate was deemed to be offset by price inflation and all other sources of future wage increases.

In *State* v. *Guinn*, 555 P. 2d 530 (Alaska 1976), the *Beaulieu* approach was refined slightly. In that case, the plaintiff had offered evidence of "small, automatic increases in the wage rate keyed to the employee's length of service with the company," 555 P. 2d, at 545, and the trial court had included those increases in the estimated lost stream of future income but had not discounted. It held that this type of "certain and predictable" individual raise was not the type of wage increase that offsets the failure to discount to present value. Thus, the market interest rate was deemed to be offset by price inflation, societal sources of wage inflation, and individual sources of wage inflation that are not "certain and predictable." *Id.*, at 546–547. See also *Gowdy* v. *United States*, 271 F. Supp. 733 (WD Mich. 1967) (price inflation and

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[28] See *supra*, at 535–536.

societal sources of wage inflation), rev'd on other grounds, 412 F. 2d 525 (CA6 1969); *Pierce* v. *New York Central R. Co.*, 304 F. Supp. 44 (WD Mich. 1969) (same).

*Kaczkowski* v. *Bolubasz*, 491 Pa. 561, 421 A. 2d 1027 (1980), took still a third approach. The Pennsylvania Supreme Court followed the approach of the District Court in *Feldman* v. *Allegheny Airlines, Inc.*, 382 F. Supp. 1271 (Conn. 1974), and the Court of Appeals for the Fifth Circuit in *Higginbotham* v. *Mobil Oil Corp.*, 545 F. 2d 422 (1977), in concluding that the plaintiff could introduce all manner of evidence bearing on likely sources—both individual and societal—of future wage growth, except for predictions of price inflation. 491 Pa., at 579–580, 421 A. 2d, at 1036–1037. However, it rejected those courts' conclusion that the resulting estimated lost stream of future income should be discounted by a "real interest rate." Rather, it deemed the market interest rate to be offset by future price inflation. *Id.*, at 580–582, 421 A. 2d, at 1037–1038. See also *Schnebly* v. *Baker*, 217 N. W. 2d 708, 727 (Iowa 1974); *Freeport Sulphur Co.* v. *S/S Hermosa*, 526 F. 2d 300, 310–312 (CA5 1976) (Wisdom, J., concurring).

The litigants and the *amici* in this case urge us to select one of the many rules that have been proposed and establish it for all time as the exclusive method in all federal trials for calculating an award for lost earnings in an inflationary economy. We are not persuaded, however, that such an approach is warranted. Accord, *Cookson* v. *Knowles*, [1979] A. C., at 574 (Lord Salmon). For our review of the foregoing cases leads us to draw three conclusions. First, by its very nature the calculation of an award for lost earnings must be a rough approximation. Because the lost stream can never be predicted with complete confidence, any lump sum represents only a "rough and ready" effort to put the plaintiff in the position he would have been in had he not been injured. Second, sustained price inflation can make the award substantially less precise. Inflation's current magnitude and

unpredictability create a substantial risk that the damages award will prove to have little relation to the lost wages it purports to replace. Third, the question of lost earnings can arise in many different contexts. In some sectors of the economy, it is far easier to assemble evidence of an individual's most likely career path than in others.

These conclusions all counsel hesitation. Having surveyed the multitude of options available, we will do no more than is necessary to resolve the case before us. We limit our attention to suits under § 5(b) of the Act, noting that Congress has provided generally for an award of damages but has not given specific guidance regarding how they are to be calculated. Within that narrow context, we shall define the general boundaries within which a particular award will be considered legally acceptable.

## III

The Court of Appeals correctly noted that respondent's cause of action "is rooted in federal maritime law." *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 409 (1953). See also H. R. Rep. No. 92–1441 (1972). The fact that Pennsylvania has adopted the total offset rule for all negligence cases in that forum is therefore not of controlling importance in this case. Moreover, the reasons which may support the adoption of the rule for a State's entire judicial system—for a broad class of cases encompassing a variety of claims affecting a number of different industries and occupations—are not necessarily applicable to the special class of workers covered by this Act.

In calculating an award for a longshoreman's lost earnings caused by the negligence of a vessel, the discount rate should be chosen on the basis of the factors that are used to estimate the lost stream of future earnings. If the trier of fact relies on a specific forecast of the future rate of price inflation, and if the estimated lost stream of future earnings is calculated to include price inflation along with individual factors and other

societal factors, then the proper discount rate would be the after-tax market interest rate.[29] But since specific forecasts of future price inflation remain too unreliable to be useful in many cases, it will normally be a costly and ultimately unproductive waste of longshoremen's resources to make such forecasts the centerpiece of litigation under § 5(b). As Judge Newman has warned: "The average accident trial should not be converted into a graduate seminar on economic forecasting." *Doca* v. *Marina Mercante Nicaraguense, S. A.*, 634 F. 2d, at 39. For that reason, both plaintiffs and trial courts should be discouraged from pursuing that approach.

On the other hand, if forecasts of future price inflation are not used, it is necessary to choose an appropriate below-market discount rate. As long as inflation continues, one must ask how much should be "offset" against the market rate. Once again, that amount should be chosen on the basis of the same factors that are used to estimate the lost stream of future earnings. If full account is taken of the individual and societal factors (excepting price inflation) that can be expected to have resulted in wage increases, then all that should be set off against the market interest rate is an estimate of future price inflation. This would result in one of the "real interest rate" approaches described above. Although we find the economic evidence distinctly inconclusive regarding an essential premise of those approaches,[30] we do not be-

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[29] See n. 23, *supra*.

[30] The key premise is that the real interest rate is stable over time. See n. 25, *supra*. It is obviously not perfectly stable, but whether it is even relatively stable is hotly disputed among economists. See the sources cited in *Doca*, 634 F. 2d, at 39, n. 10. In his classic work, Irving Fisher argued that the rate is not stable because changes in expectations of inflation (the factor that influences market interest rates) lag behind changes in inflation itself. I. Fisher, The Theory of Interest 43 (1930). He noted that the "real rate of interest in the United States from March to April, 1917, fell below minus 70 percent!" *Id.*, at 44. Consider also the more recent observations of Justice Stephen of the High Court of Australia:

"Past Australian economic experience appears to provide little support for the concept of a relatively constant rate of 'real interest.' Year by year

lieve a trial court adopting such an approach in a suit under § 5(b) should be reversed if it adopts a rate between 1 and 3% and explains its choice.

There may be a sound economic argument for even further setoffs. In 1976, Professor Carlson of the Purdue University Economics Department wrote an article in the American Bar Association Journal contending that in the long run the societal factors excepting price inflation—largely productivity gains—match (or even slightly exceed) the "real interest rate." Carlson, Economic Analysis v. Courtroom Controversy, 62 A. B. A. J. 628 (1976). He thus recommended that the estimated lost stream of future wages be calculated without considering either price inflation or societal productivity gains. All that would be considered would be individual seniority and promotion gains. If this were done, he concluded that the entire market interest rate, including both inflation

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a figure for 'real interest' can of course be calculated, simply by subtracting from nominal interest rates the rate of inflation. But these figures are no more than a series of numbers bearing no resemblance to any relatively constant rate of interest which lenders are supposed to demand and borrowers to pay after allowing for estimated inflation. If official statistics for the past twelve calendar years are consulted, the Reserve Bank of Australia's Statistical Bulletins supply interest rates on two-year Australian government bonds (non-rebatable) and the O. E. C. D. Economic Outlook—July 1980, p. 105 and p. 143, supplies annual percentage changes in consumer prices, which gives a measure of inflation. The difference figure year by year, which should represent the 'real interest' rate, averages out at a negative average rate of interest of −1.46, the widest fluctuations found in particular years being a positive rate of 2.58 per cent and a negative rate of −6.61 per cent. Nothing resembling a relatively constant positive rate of 2 per cent–3 per cent emerges. An equally random series of numbers, showing no steady rate of 'real interest', appears as Table 9.1 in the recent Interim Report of the Campbell Committee of Inquiry (Australian Government Publication Service—1980). For the period of thirty years which that Table covers, from 1950 to 1979, the average 'implicit real interest rate' is a negative rate of −.7 per cent, with 4 per cent as the greatest positive rate in any year and −20.2 per cent as the greatest negative annual rate." *Pennant Hills Restaurants Pty. Ltd.*, 55 A. L. J. R., at 267.

and the real interest rate, would be more than adequately offset.

Although such an approach has the virtue of simplicity and may even be economically precise,[31] we cannot at this time agree with the Court of Appeals for the Third Circuit that its use is mandatory in the federal courts. Naturally, Congress could require it if it chose to do so. And nothing prevents parties interested in keeping litigation costs under control from stipulating to its use before trial.[32] But we are not pre-

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[31] We note that a substantial body of literature suggests that the Carlson rule might even *under*compensate some plaintiffs. See S. Speiser, Recovery for Wrongful Death, Economic Handbook 36–37 (1970) (average interest rate 1% below average rate of wage growth); Formuzis & O'Donnell, Inflation and the Valuation of Future Economic Losses, 38 Mont. L. Rev. 297, 299 (1977) (interest rate 1.4% below rate of wage growth); Franz, Simplifying Future Lost Earnings, 13 Trial 34 (Aug. 1977) (rate of wage growth exceeds interest rate by over 1% on average); Coyne, Present Value of Future Earnings: A Sensible Alternative to Simplistic Methodologies, 49 Ins. Counsel J. 25, 26 (1982) (noting that Carlson's own data suggest that rate of wage growth exceeds interest rate by over 1.6%, and recommending a more individualized approach). See generally Note, 57 St. John's L. Rev. 316, 342–345 (1983). But see Comments, 49 U. Chi. L. Rev. 1003, 1023, and n. 87 (1982) (noting "apparent congruence" between Government projections of 2% average annual productivity growth and real interest rate, and concluding that total offset is accurate).

It is also interesting that in *O'Shea* v. *Riverway Towing Co.*, 677 F. 2d 1194 (CA7 1982), Judge Posner stated that the real interest rate varies between 1 and 3%, *id.*, at 1199, and that "[i]t would not be outlandish to assume that even if there were no inflation, Mrs. O'Shea's wages would have risen by three percent a year," *id.*, at 1200. Depending on how much of Judge Posner's estimated wage inflation for Mrs. O'Shea was due to individual factors (excluded from a total offset computation), his comments suggest that a total offset approach in that case could have meant overdiscounting by as much as 2%.

[32] If parties agree in advance to use the Carlson method, all that would be needed would be a table of the after-tax values of present salaries and fringe benefits for different positions and levels of seniority ("steps") within an industry. Presumably this would be a matter for stipulation before trial, as well. The trier of fact would be instructed to determine how

pared to impose it on unwilling litigants, for we have not been given sufficient data to judge how closely the national patterns of wage growth are likely to reflect the patterns within any given industry. The Legislative Branch of the Federal Government is far better equipped than we are to perform a comprehensive economic analysis and to fashion the proper general rule.

As a result, the judgment below must be set aside. In performing its damages calculation, the trial court applied the theory of *Kaczkowski* v. *Bolubasz*, 491 Pa. 561, 421 A. 2d 1027 (1980), as a mandatory federal rule of decision, even though the petitioner had insisted that if compensation was to be awarded, it "must be reduced to its present worth." App. 60. Moreover, this approach seems to have colored the trial court's evaluation of the relevant evidence. At one point, the court noted that respondent had offered a computation of his estimated wages from the date of the accident until his presumed date of retirement, including projected cost-of-living adjustments. It stated: "We do not disagree with these projections, but feel they are inappropriate in view of the holding in *Kaczkowski*." *Id.*, at 74. Later in its opinion, however, the court declared: "We do not believe that there was sufficient evidence to establish a basis for estimating increased future productivity for the plaintiff, and therefore we will not inject such a factor in this award." *Id.*, at 76.

On remand, the decision on whether to reopen the record should be left to the sound discretion of the trial court. It bears mention that the present record already gives reason to believe a fair award may be more confidently expected in

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many years the injured worker would have spent at each step. It would multiply the number of years the worker would spend at each step by the current net value of each step (as shown on the table) and then add up the results. The trier of fact would be spared the need to cope with inflation estimates, productivity trends, and present value tables.

this case than in many. The employment practices in the longshoring industry appear relatively stable and predictable. The parties seem to have had no difficulty in arriving at the period of respondent's future work expectancy, or in predicting the character of the work that he would have been performing during that entire period if he had not been injured. Moreover, the record discloses that respondent's wages were determined by a collective-bargaining agreement that explicitly provided for "cost of living" increases, *id.*, at 310, and that recent company history also included a "general" increase and a "job class increment increase." Although the trial court deemed the latter increases irrelevant during its first review because it felt legally compelled to assume they would offset any real interest rate, further study of them on remand will allow the court to determine whether that assumption should be made in this case.

## IV

We do not suggest that the trial judge should embark on a search for "delusive exactness."[33] It is perfectly obvious that the most detailed inquiry can at best produce an approximate result.[34] And one cannot ignore the fact that in many instances the award for impaired earning capacity may be overshadowed by a highly impressionistic award for pain and suffering.[35] But we are satisfied that whatever rate the District Court may choose to discount the estimated stream of

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[33] Judge Friendly perceived the relevance of Justice Holmes' phrase in this context. See *Feldman* v. *Allegheny Airlines, Inc.*, 524 F. 2d 384, 392 (CA2 1975) (Friendly, J., concurring *dubitante*), quoting *Truax* v. *Corrigan*, 257 U. S. 312, 342 (1921) (Holmes, J., dissenting).

[34] Throughout this opinion we have noted the many rough approximations that are essential under any manageable approach to an award for lost earnings. See *supra*, at 533–544, and nn. 11, 25, 26, 30.

[35] It has been estimated that awards for pain and suffering account for 72% of damages in personal injury litigation. 6 Am. Jur. Trials, Predicting Personal Injury Verdicts and Damages § 24 (1967).

future earnings, it must make a deliberate choice, rather than assuming that it is bound by a rule of state law.

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.*

# TEXAS *v.* NEW MEXICO

## ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 65, Orig. Argued March 30, 1983—Decided June 17, 1983

The Pecos River Compact was entered into by Texas and New Mexico (and approved by Congress) to govern allocation of the waters of the Pecos River, which rises in New Mexico and flows into Texas. Article III(a) of the Compact requires that New Mexico "not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition." The Compact establishes the Pecos River Commission (Commission)—consisting of one Commissioner from each State and a nonvoting representative of the United States—and empowers it to make all findings of fact necessary to administer the Compact. The two voting Commissioners were unable to agree when a dispute arose between the States concerning the methods for determining annual shortfalls of state-line water flow with regard to Texas' right to receive as much water as it would have received under the consumption conditions prevailing in New Mexico in 1947. Texas filed this action against New Mexico (the United States intervened to protect its claims on the waters of the river), alleging that New Mexico had breached its obligations under Art. III(a) of the Compact and seeking a decree commanding New Mexico to deliver water in accordance with the Compact. This Court appointed a Special Master, who ultimately filed the report involved here, and the parties filed various exceptions thereto.

*Held:*

1. Exceptions of the Government and New Mexico to the Master's recommendation that either the United States Commissioner or some other third party be given a vote on the Commission and be empowered to participate in all Commission deliberations are sustained. Once congressional consent is given to an interstate compact as required by the Compact Clause, the compact is transformed into a law of the United States, and unless the compact is unconstitutional, no court may order relief inconsistent with its express terms. Here, the Compact provides that the Government Commissioner shall not have the right to vote, and no other third party is given the right to vote on matters before the Commission. This Court cannot rewrite the Compact so as to provide for a third, tie-breaking vote. Moreover, the Court's equitable powers have never been exercised so as to appoint quasi-administrative offi-

cials to control the division of interstate waters on a day-to-day basis. Pp. 564–566.

2. New Mexico's exception to the Master's alternative recommendation to continue the suit as presently postured is overruled, and the recommendation is accepted. There is no merit to New Mexico's contention that this Court may do nothing more than review the Commission's official actions, and that the case should be dismissed if it is found either that there is no Commission action to review or that actions taken by the Commission were not arbitrary or capricious. This Court's original jurisdiction to resolve controversies between two States extends to a suit by one State to enforce its compact with another State or to declare rights under a compact. Here, fundamental structural considerations of the Compact militate against New Mexico's theory, since if all questions under the Compact had to be decided by the Commission in the first instance, New Mexico could indefinitely prevent authoritative Commission action solely by exercising its veto on the Commission. Nor do the Compact's express terms constitute the Commission as the sole arbiter of disputes over New Mexico's Art. III obligations. Moreover, if authorized representatives of the compacting States have reached an agreement on action to be taken by the Commission, this Court will not review the Commission's action at the behest of one of the States absent extraordinary cause or a precise mandate from Congress. Pp. 566–571.

3. Texas' exception to the Master's recommendation against approval of Texas' motion to adopt a so-called "Double Mass Analysis" method for determining when a shortfall in state-line flows has occurred is overruled. The Compact provides that until the Commission adopts a more feasible method, an "inflow-outflow method" shall be used to measure state-line shortfalls. The "Double Mass Analysis" is not close enough to what the Compact terms an "inflow-outflow method, as described in the Report of the Engineering Advisory Committee" to make it acceptable for use in determining New Mexico's compliance with its Art. III obligations. While the Compact leaves the Commission free to adopt the "Double Mass Analysis," this Court may not apply it against New Mexico in the absence of Commission action. Pp. 571–574.

Exceptions to Special Master's report sustained in part and overruled in part.

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

*R. Lambeth Townsend*, Assistant Attorney General of Texas, argued the cause for plaintiff. With him on the briefs were *Mark White*, Attorney General, *John W. Fainter, Jr.*,

First Assistant Attorney General, *Richard E. Gray III*, Executive Assistant Attorney General, and *Frank R. Booth*.

*Charlotte Uram*, Special Assistant Attorney General of New Mexico, argued the cause for defendant. With her on the briefs were *Paul G. Bardacke*, Attorney General, *Jeff Bingaman*, former Attorney General, and *Peter Thomas White*, Special Assistant Attorney General.

*Solicitor General Lee*, *Deputy Solicitor General Claiborne*, and *John H. Garvey* filed a brief for the United States.

JUSTICE BRENNAN delivered the opinion of the Court.

For the second time we consider exceptions to a report of the Special Master in this case. The States of Texas and New Mexico and the United States have filed exceptions to a report submitted by the Special Master on September 10, 1982 (1982 Report). We sustain an exception in which both New Mexico and the United States concur, overrule all other exceptions, and return the case to the Special Master for a final decision on the basic issue in dispute—whether New Mexico is in compliance with obligations imposed by the Pecos River Compact.

I

The Pecos River rises in north-central New Mexico and flows in a southerly direction into Texas until it joins the Rio Grande near Langtry, Tex.[1] It is the principal river in eastern New Mexico, draining roughly one-fifth of the State, and it is a major tributary of the Rio Grande.

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[1] From north to south, the Pecos River flows past Pecos and Santa Rosa, N. M., and then into the Alamogordo Reservoir above Alamogordo (or Sumner) Dam. It then passes Fort Sumner and traverses a relatively desolate region in the central part of the State. From Acme to Artesia, in the area around Roswell, the river is fed by a large, slowly flowing aquifer. Below Artesia, the river passes through a set of deltas and lakes formed by the now-deteriorated McMillan and Avalon Dams, then flows past Carlsbad and into the Red Bluff Reservoir, which straddles the state line and is used to regulate the river in Texas.

Due in large part to many natural difficulties,[2] the Pecos barely supports a level of development reached in the first third of this century. If development in New Mexico were not restricted, especially the groundwater pumping near Roswell, no water at all might reach Texas in many years. As things stand, the amount of water Texas receives in any year varies with a number of factors besides beneficial consumption in New Mexico. These factors include, primarily, precipitation in the Pecos Basin over the preceding several years, evaporation in the McMillan and Alamogordo Reservoirs, and nonbeneficial consumption of water by salt cedars and other riverbed vegetation.

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After 20 years of false starts,[3] in 1945 Texas and New Mexico commenced negotiations on a compact to allocate the

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[2] In its natural state, the Pecos may dry up completely for weeks at a time over fairly long reaches in central New Mexico. Much of its annual flow comes in flash floods, carrying with them great quantities of topsoil that both progressively destroy reservoirs, by silting, and render the river's waters quite saline. The nonflood "base" flow of the Pecos below Alamogordo Dam is supplied to a large part by groundwater aquifers that empty into the river in the reach between Acme and Artesia, N. M. The operation of these aquifers is little understood. They are depleted by pumping from wells in the Roswell area, and there is some suggestion that at times heavy groundwater pumping in the area around Roswell may actually reverse the direction of flow of the underground aquifer, so that water flows away from the river. See Texas' Brief on the 1947 Condition (filed Aug. 21, 1978), p. 34. In addition, a steady stream of underground brine enters the river at Malaga Bend, some 10 miles above the Texas border, severely impairing the quality of water that reaches Texas when the river is low. Salt cedars, which consume large amounts of water, proliferate along its channel and in the silt deposits at the heads of its reservoirs.

[3] In 1925, the States negotiated a compact for regulating the river. It was approved by both state legislatures, but the Governor of New Mexico vetoed its bill. In the early 1930's, the Texas congressional delegation succeeded in holding up federal funding for construction of the Alamogordo Dam until New Mexico agreed to ensure that Texas received the same portion of flood flows originating above Avalon Dam that it had received during the period from 1905 to 1935. This agreement was signed in 1935 by

waters of the Pecos Basin. A Compact Commission was formed, consisting of three Commissioners, representing the two States and the United States. In January 1948, the Compact Commission's engineering advisory committee submitted a lengthy report (1947 Study), the central portion of which was a set of river routing studies describing six "conditions" of the Pecos, one of which consisted of the actual conditions as of the beginning of 1947.[4] Each of the studies was embodied in a 41-column table accounting for all known inflows and outflows of water on the river during each of the years between 1905 and 1946.[5] The engineering advisory committee also drafted a Manual of Inflow-Outflow Methods

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the Secretary of the Interior, the United States Senators from both States, and representatives of the irrigation districts concerned, and it was formally ratified by the Texas Legislature but never by the New Mexico Legislature. New Mexico did, however, sharply restrict groundwater pumping in the Roswell area in 1937, thus restoring to some extent the base flow of the river.

[4] The six "conditions" studied by the engineering committee represented various combinations of historical facts from different periods and hypothetical assumptions about the existence, condition, and operation of the dams and irrigation projects that had been built since 1905. See S. Doc. No. 109, 81st Cong., 1st Sess., 9–11 (1949) (S. Doc. 109). The only one material to the Compact as adopted is the "1947 condition," which assumed actual conditions as of 1947, with some additional use by the Carlsbad and Fort Sumner projects.

[5] For instance, on each table column 14 showed depletion by pumps between Acme and Artesia, column 15 showed inflows from aquifers in the same reach, and column 16 showed depletion by salt cedars. Some of the entries in the tables could be inferred more or less easily from observed data—*e. g.*, the flow of the river past specific gauges, or diversions to irrigation projects. Others, such as the entries for salt-cedar depletions or evaporation from each reservoir, could only be estimated, albeit with some degree of reliability. However, many entries—*e. g.*, the three columns showing "flood inflows" and the two columns entitled "channel losses"—required a great deal of speculation, and to some extent they may have been used as residual categories to "balance the books." See S. Doc. 109, at 41–42; Report of Review of Basic Data to Engineering Advisory Committee, Pecos River Commission 24 (1960) (stipulated exhibit No. 8) (Review of Basic Data).

of Measuring Changes in Stream-Flow Depletion (1948) (Inflow-Outflow Manual), which contained charts and tables, derived from data in the 1947 Study, to be used in determining how much water Texas should expect to receive over any particular period for any particular levels of precipitation, under the consumption conditions prevailing in New Mexico in 1947.

On the basis of the 1947 Study and the Inflow-Outflow Manual, the two States successfully negotiated the Pecos River Compact. It was signed by the Commissioners from both States on December 3, 1948, and thereafter ratified by both state legislatures and—as required under the Compact Clause of the Constitution[6]—approved by Congress. Ch. 184, 63 Stat. 159. The 1947 Study and the Inflow-Outflow Manual were incorporated into S. Doc. 109, and they unquestionably provided the basis upon which Congress approved the Compact, see S. Rep. No. 409, 81st Cong., 1st Sess. (1949).

The crucial substantive provision of the Pecos River Compact is found at Art. III(a): "New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition." The term "1947 condition" was expressly defined as "that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee." Art. II(g). In turn, the Report was defined to include "basic data, processes, and analyses utilized in preparing that report," Art. II(f), and "deplete by man's activities" was defined to include any "beneficial consumptive uses of water within the Pecos River Basin," but to exclude diminutions of flow due to "encroachment of

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[6] "No State shall, without the Consent of Congress, . . . Compact with another State, or with a foreign Power . . . ." U. S. Const., Art. I, § 10, cl. 3.

salt cedars" or "deterioration of the channel of the stream," Art. II(e).

The Compact also established the Pecos River Commission as a permanent body, in more or less the same form that it had during the negotiations on the Compact. It was to have three Commissioners, one from each State and one representing the United States, but the United States representative could not vote. Art. V(a). Accordingly, the Commission could take official action only with the concurrence of both state Commissioners. The Commission was given broad powers to make all findings of fact necessary to administer the Compact, Arts. V(d)(5)–(10), as well as to "[e]ngage in studies of water supplies of the Pecos River" and to "[c]ollect, analyze, correlate, preserve and report on data as to the stream flows, storage, diversions, salvage, and use of the waters of the Pecos River and its tributaries," Arts. V(d)(3), (4).[7]

For roughly 15 years, the Pecos River Commission functioned more or less as had been contemplated in the Compact. It met regularly, passed resolutions, and undertook studies of various questions of importance to those who use the waters of the Pecos. The apparent harmony that characterized the Commission in those years, however, seems largely to have been the result of a tacit agreement to defer disagreement on a problem of serious magnitude. For it became clear soon after the Compact went into effect that the 1947 Study and, more importantly, the tables in the Inflow-Outflow Manual did not describe the actual state of the river. In almost every year following adoption of the Compact, state-line flows were significantly below the amount that one would have predicted on the basis of the Inflow-Outflow Manual, with no obvious change either in natural conditions along the river or in "man's activities."

The initial response of the Commission to this problem was to authorize, in 1957, an ambitious "Review of Basic Data,"

[7] Further relevant provisions in Arts. V and VI are discussed *infra*, at 568, n. 14, 571–572.

which would essentially retrace the steps of the engineering committee's 1947 Study to provide a more accurate description of the "1947 condition." The Review of Basic Data was presented to the Commission in 1960; it essentially duplicated the 1947 Study, but using different periods of time, revised records, a number of different assumptions, and different hydrological and mathematical procedures. The Commission took no action on the Review of Basic Data until two years later, when it directed the engineering committee to proceed with a draft of a new Inflow-Outflow Manual, and adopted as findings of fact a set of figures derived from the new study showing that the cumulative shortfall of state-line flows for the years 1950–1961 was approximately 53,000 acre-feet.[8]

This was essentially the Commission's last action with respect to the all-important question of Texas' right under the Compact to receive as much water as it would have received under the "1947 condition."[9] Disputes that had been deferred and avoided in the past now surfaced. They came to a head at a special meeting of the Commission in July 1970, at which the Texas Commissioner stated his position that, calculated according to the original Inflow-Outflow Manual, there had been a cumulative shortfall in state-line flows of 1.1 mil-

[8] This figure was far less than the shortfall that would have been found had the tables in the original Inflow-Outflow Manual been used. The Commission did not determine whether any difference between expected flows and actual flows was due to "man's activities" in New Mexico, and later engineering committee reports indicated that adjustments to the 1950–1961 figures were contemplated.

[9] The Commission did not meet at all between January 1967 and November 1968, during which period the identities of four key persons changed. Both the Texas Commissioner (first appointed immediately after the Compact was ratified) and the Engineering Advisor to the United States Commissioner (also chairman of the engineering committee and principal author of the 1947 Study and Inflow-Outflow Manual) died. The New Mexico and United States Commissioners (the latter an important force in the original compact negotiations) retired. Thus, by late 1968, administration of the Compact was largely in the hands of people with no personal connection to the Commission's early work.

lion acre-feet for the years 1950–1969, that the Review of Basic Data was "incomplete and replete with errors," and that Texas had a right to an annual determination of departures in state-line flows under the original assumptions of the 1947 Study until the Commission adopted a different method. Thereafter, the Texas and New Mexico staffs prepared different reports in 1971 and 1974 on cumulative shortfalls under the "1947 condition," with Texas relying on the original Inflow-Outflow Manual and New Mexico on the Review of Basic Data. Attempts to mediate between the two positions failed, and the Commission took no action for lack of agreement between the two voting Commissioners.

B

In June 1974, Texas invoked the original jurisdiction of this Court under Art. III, § 2, cl. 2, of the United States Constitution and 28 U. S. C. § 1251. Its bill of complaint alleged that New Mexico had breached its obligations under Art. III(a) of the Compact "by countenancing and permitting depletions by man's activities within New Mexico to the extent that from 1950 through 1972 there has occurred a cumulative departure of the quantity of water available from the flow of the Pecos River at the Texas-New Mexico State Line in excess of 1,200,000 acre-feet from the equivalent available under the 1947 condition . . . ." Texas sought a decree commanding New Mexico to deliver water in accordance with the Compact. The United States intervened to protect its own claims on the waters of the Pecos River, which had been preserved in Arts. XI–XII of the Compact. We granted leave to file the complaint, 421 U. S. 927 (1975), and appointed a Special Master, 423 U. S. 942 (1975).

In 1979, the Special Master made his first report to this Court. In that report, he recommended that we reject Texas' position that the phrase "1947 condition" in Art. III(a) of the Compact should be taken to mean an artificial condition

as described by the 1947 Study embodied in S. Doc. 109, however erroneous the data in that study might have been. Instead, he concluded that "[t]he 1947 condition is that situation in the Pecos River Basin which produced in New Mexico the man-made depletions resulting from the stage of development existing at the beginning of the year 1947 . . . ," and that a new Inflow-Outflow Manual was required. 1979 Report 41. We approved the report in full. 446 U. S. 540 (1980).

Over the following two years, the Special Master received evidence on the question of what corrections to the 1947 Study and the Inflow-Outflow Manual were required to produce an accurate description of the 1947 condition, and thus of New Mexico's obligations under Art. III(a) of the Compact. In his 1982 Report, however, he concluded that resolution of these issues would require that we "exercise administrative powers delegated to the [Pecos River Commission]" and that "such exercise of administrative power is beyond the judicial function." 1982 Report 27. Recognizing that the Commission would be unlikely to act by unanimous vote of both State Commissioners, and that continued impasse favored the upstream State, the Special Master recommended:

> "[T]he equity powers of the Court are adequate to provide a remedy. If within a reasonable time . . . the States do not agree on a tie-breaking procedure, the Court would be justified in ordering . . . that either the representative of the United States, or some other third-party, be designated and empowered to participate in all Commission deliberations and act decisively when the States are not in agreement. The order should provide that the decision of the tie-breaker is final, subject only to appropriate review by the Court. Upon the selection of a tie-breaker, the States should be ordered to return to the Commission for determination of this long-standing controversy." *Id.*, at 26.

At the same time, the Special Master rejected two pending motions, one by New Mexico for dismissal of the case altogether, and one by Texas to adopt a simpler method than the Inflow-Outflow Manual provides for determining the extent of shortfalls in state-line water deliveries.

## II

Both the United States and New Mexico have filed exceptions to the Special Master's key recommendation—that either the United States Commissioner or some other third party be given a vote on the Pecos River Commission and empowered to participate in all Commission deliberations. We sustain their exceptions.

Under the Compact Clause, two States may not conclude an agreement such as the Pecos River Compact without the consent of the United States Congress. However, once given, "congressional consent transforms an interstate compact within this Clause into a law of the United States." *Cuyler* v. *Adams*, 449 U. S. 433, 438 (1981); see *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518, 566 (1852). One consequence of this metamorphosis is that, unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms. Yet that is precisely what the Special Master has recommended. The Pecos River Compact clearly delimits the role of the United State Commissioner. Although the United States Commissioner must be present at a Commission meeting in order to provide a quorum and serves as its presiding officer, and although the engineering advisers to the United States Commissioner have consistently participated fully in the work of the various engineering committees and subcommittees, Art. V(a) of the Compact specifies that "the Commissioner representing the United States . . . shall not have the right to vote in any of the deliberations of the Commission." No other third party is given the right to vote on matters before the Commission. To

provide a third, tie-breaking vote on regular Commission business would be to alter fundamentally the structure of the Commission.

Congress may vest a federal official with the responsibility to administer the division of interstate streams. See *Arizona* v. *California*, 373 U. S. 546, 564–567 (1963). Other interstate compacts, approved by Congress contemporaneously with the Pecos River Compact, allow federal representatives a vote on compact-created commissions, or expressly provide for arbitration by federal officials of commission disputes. *E. g.*, Upper Colorado Basin Compact, 63 Stat. 31, 35–37; Arkansas River Compact, 63 Stat. 145, 149–151; Yellowstone River Compact, 65 Stat. 663, 665–666. The Pecos River Compact clearly lacks the features of these other compacts, and we are not free to rewrite it.

Without doubt, the structural likelihood of impasse on the Pecos River Commission is a serious matter. In light of other States' experience, Texas and New Mexico might well consider amending their Compact to provide for some mutually acceptable method for resolving paralyzing impasses such as the one that gave rise to this suit. Nevertheless, the States' failure to agree on one issue, however important, does not render the Compact void, nor does it provide a justification for altering its structure by judicial decree. The Commission *has* acted on many matters by unanimous vote.[10] We cannot say whether unanimity would have been achieved had a tie breaker stood ready to endorse one State's position over the other's. Under the Compact as it now stands, the solution for impasse is judicial resolution of such disputes as are amenable to judicial resolution, and further negotiation for those disputes that are not. See *infra*, at 569–571.

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[10] For instance, the Commission has taken a number of concrete actions with regard to salt-cedar eradication and salinity alleviation, especially at Malaga Bend. Furthermore, it has participated in and coordinated studies of various features of the river, and it has maintained the numerous gauges and other equipment used in such studies.

Texas, in support of the Special Master's recommendation, argues that reformation of the Compact is within this Court's equitable powers. Indeed, in its complaint Texas specifically requested that we appoint a Master "to control the diversion, storage and use of [the] Pecos River Basin waters within the State of New Mexico"; given the scope of the Commission's mandate, a tie breaker on the Commission would be the functional equivalent of such a Master. Texas has not, however, identified a single instance where we have granted similar relief.[11] We have expressly refused to make indefinite appointments of quasi-administrative officials to control the division of interstate waters on a day-to-day basis, even with the consent of the States involved. *E. g.*, *Vermont* v. *New York*, 417 U. S. 270 (1974); *Wisconsin* v. *Illinois*, 289 U. S. 710, 711 (1933). Continuing supervision by this Court of water decrees would test the limits of proper judicial functions, and we have thought it wise not to undertake such a project. *Vermont* v. *New York*, *supra*, at 277.

## III

In the alternative, the Special Master recommends "continuance of [this] suit as presently postured." 1982 Report 28. New Mexico excepts to this recommendation insofar as it embodies a certain conception of this Court's role in resolving the present dispute. It contends that this Court may do nothing more than review official actions of the Pecos River Commission, on the deferential model of judicial review of administrative action by a federal agency, and that this case

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[11] On occasion in the past, before the device of appointing special masters in original jurisdiction cases became common, we have gone so far as to appoint a commission with broad powers to resolve factual questions in a controversy between two States, see *Iowa* v. *Illinois*, 147 U. S. 1 (1893), but even then we declined to accept the commission's decisions without providing the States an opportunity to challenge them, see *Iowa* v. *Illinois*, 151 U. S. 238 (1894). We have, however, been willing to appoint a River Master solely to perform ministerial tasks. *New Jersey* v. *New York*, 347 U. S. 995, 1002–1004 (1954).

should be dismissed if we find either that there is no Commission action to review or that the actions the Commission has taken were not arbitrary or capricious. Thus, in New Mexico's view, this suit may be maintained only as one for judicial review of the Commission's quantification of the 1950–1961 shortfall, and the implied acceptance of the Review of Basic Data which, New Mexico argues, that entailed.[12] According to New Mexico, "[this] Court has no authority to act *de novo* or assume the powers of the Pecos River Commission." Motion of New Mexico to Recommend Final Decree (filed Feb. 19, 1982), p. 2. We disagree.

There is no doubt that this Court's jurisdiction to resolve controversies between two States, U. S. Const., Art. III, § 2, cl. 1; 28 U. S. C. § 1251(a)(1), extends to a properly framed suit to apportion the waters of an interstate stream between States through which it flows, *e. g.*, *Kansas* v. *Colorado*, 185 U. S. 125, 145 (1902), or to a suit to enforce a prior apportionment, *e. g.*, *Wyoming* v. *Colorado*, 298 U. S. 573 (1936).[13] It also extends to a suit by one State to enforce its compact with another State or to declare rights under a compact. *Virginia* v. *West Virginia*, 206 U. S. 290, 317–319 (1907); cf. *West Virginia ex rel. Dyer* v. *Sims*, 341 U. S. 22, 30 (1951) (jurisdiction to interpret a compact on writ of certiorari); *Green* v. *Biddle*, 8 Wheat. 1, 91 (1823). If there is a compact, it is a law of the United States, see *supra*, at 564, and our first and last order of business is interpreting the

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[12] We note that the Special Master's 1979 Report, which we approved, decisively rejected New Mexico's argument that the Pecos River Commission in fact adopted the Review of Basic Data, but that same report did not suggest that we dismiss this action. See 1979 Report 40–41, 44. Thus, at least by implication, the argument New Mexico now advances was also rejected. New Mexico did not object to those portions of the Special Master's Report, although it did object to others. New Mexico's Objections to the Report of the Special Master and Brief (filed Nov. 29, 1979).

[13] That jurisdiction exists even though litigation of such disputes is obviously a poor alternative to negotiation between the interested States. See *Vermont* v. *New York*, 417 U. S. 270, 277–278 (1974); *infra*, at 575–576.

compact. "Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress." *Arizona* v. *California*, 373 U. S., at 565–566. Nevertheless, as *Virginia* v. *West Virginia* proves, the mere existence of a compact does not foreclose the possibility that we will be required to resolve a dispute between the compacting States.

The question for decision, therefore, is what role the Pecos River Compact leaves to this Court. The Compact itself does not expressly address the rights of the States to seek relief in the Supreme Court, although it clearly contemplates some independent exercise of judicial authority.[14] Fundamental structural considerations, however, militate against New Mexico's theory. First, if all questions under the Compact had to be decided by the Commission in the first instance, New Mexico could indefinitely prevent authoritative Commission action solely by exercising its veto on the Commission. As New Mexico is the upstream State, with effec-

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[14] Article V(f) provides: "Findings of fact made by the Commission shall not be conclusive in any court, or before any agency or tribunal, but shall constitute prima facie evidence of the facts found." That language is ambiguous as to the role of the Supreme Court, but an earlier version of Art. V(f)—one that was proposed by New Mexico—sheds further light: "The findings of the Commission shall not be conclusive in any court or tribunal which may be called upon to interpret or enforce this Compact." Minutes of Meeting of the Pecos River Compact Commission, Sept. 28, 1943, p. 11 (proposed Art. XII, ¶ 4). Since the only parties with rights and duties to be enforced under any draft of the Compact were the United States and the two signatory States, it is clear that the New Mexico draft reflected the assumption that this Court might be called upon to enforce the Compact. Article V(f) assumed its present form at a late stage in the negotiations and with no discussion on the record; its change was most likely due to the efforts of a federal drafting expert brought in after all significant disputes had been resolved, see Pecos River Compact Commission Meeting, Nov. 8–13, 1948, p. 61, reprinted in S. Doc. 109, at 101. In the light of the other factors discussed in text, we need not consider whether, standing alone, this history would be dispositive.

tive power to deny water altogether to Texas except under extreme flood conditions, the Commission's failure to take action to enforce New Mexico's obligations under Art. III(a) would invariably work to New Mexico's benefit.[15] Under New Mexico's interpretation, this Court would be powerless to grant Texas relief on its claim under the Compact.

If it were clear that the Pecos River Commission was intended to be the exclusive forum for disputes between the States, then we would withdraw. But the express terms of the Pecos River Compact do not constitute the Commission as the sole arbiter of disputes between the States over New Mexico's Art. III obligations. Our equitable power to apportion interstate streams and the power of the States and Congress acting in concert to accomplish the same result are to a large extent complementary. See Frankfurter & Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 Yale L. J. 685, 705–708 (1925). Texas' right to invoke the original jurisdiction of this Court was an important part of the context in which the Compact was framed; indeed, the threat of such litigation undoubtedly contributed to New Mexico's willingness to enter into a compact. It is difficult to conceive that Texas would trade away its right to seek an equitable apportionment of the river in return for a promise that New Mexico could, for all practical purposes, avoid at will.[16] In the absence of an explicit provision or other clear indications that a bargain to that effect was made, we shall not construe a compact to preclude a

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[15] Cf. *Kansas* v. *Colorado*, 206 U. S. 46, 117 (1907). See also Frankfurter & Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 Yale L. J. 685, 701 (1925) ("[O]ne answer is clear: no one State can control the power to feed or to starve, possessed by a river flowing through several States"); Bannister, Interstate Rights in Interstate Streams in the Arid West, 36 Harv. L. Rev. 960, 979–980 (1923) (describing practice in international law).

[16] Note that under Art. XIV of the Compact Texas may withdraw from the Compact only with the concurrence of the New Mexico State Legislature.

State from seeking judicial relief when the compact does not provide an equivalent method of vindicating the State's rights. Cf. *Green* v. *Biddle*, 8 Wheat., at 91.[17]

Considerations outside the Compact itself also render New Mexico's theory of the role of this Court untenable. According to New Mexico, Texas *may* seek judicial review in this Court of decisions actually made by the Commission—presumably on the votes of both States' Commissioners. That is not the proper function of our original jurisdiction to decide controversies between two States. In recent years, we have consistently interpreted 28 U. S. C. § 1251(a) as providing us with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within our constitutional original jurisdiction. See *Maryland* v. *Louisiana*, 451 U. S. 725, 743 (1981); *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493, 499 (1971). We exercise that discretion with an eye to promoting the most effective functioning of this Court within the overall federal system. See *ibid.* If authorized representatives of the compacting States have reached an agreement

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[17] In *Green* v. *Biddle*, the owners of certain lands in Kentucky sued their tenant to recover the lands. The tenant relied on two Kentucky statutes which gave him a good defense to the action, and the owners responded that the statutes were invalid as violations of a compact between Kentucky and Virginia, ratified by Congress, which provided that "all private rights, and interests of lands within [Kentucky] derived from the laws of Virginia prior to [the separation of Kentucky from Virginia], shall remain valid and secure under the laws of [Kentucky], and shall be determined by the laws now existing in [Virginia]." 8 Wheat., at 3. An argument was made—similar to New Mexico's argument in this case—that disputes concerning the compact could only be resolved by a commission to be appointed under the terms of the agreement, and not by the courts that would ordinarily resolve questions of title to land. We rejected the argument because the possibility that one State could defeat the rights of the other's citizens or allow the occupants of the land to enrich themselves without title simply by refusing to appoint commissioners "is too monstrous to be for a moment entertained. The best feelings of our nature revolt against a construction which leads to it." *Id.*, at 91.

within the scope of their congressionally ratified powers, recourse to this Court when one State has second thoughts is hardly "necessary for the State's protection," *Massachusetts* v. *Missouri*, 308 U. S. 1, 18 (1939).[18] Absent extraordinary cause, we shall not review the Pecos River Commission's actions without a more precise mandate from Congress than either the Compact or 28 U. S. C. § 1251 provides.

Therefore, we accept the Special Master's alternative recommendation that this suit continue as presently framed.

## IV

The Special Master also recommends that we deny a motion made by Texas—apparently at the Special Master's invitation—to adopt what it calls a "Double Mass Analysis" as the method for determining when a shortfall in state-line flows has occurred. 1982 Report 21. Texas excepts to that recommendation. We overrule the exception.

Once again, we turn to the provisions of the Compact. Article VI provides:

> "The following principles shall govern in regard to the apportionment made by Article III of this Compact:
>
> . . . . .
>
> "(c) Unless and until a more feasible method is devised and adopted by the Commission the inflow-outflow method, as described in the Report of the Engineering Advisory Committee, shall be used to:

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[18] Cf. *Illinois* v. *Milwaukee*, 406 U. S. 91, 93 (1972) (original jurisdiction will not be taken where there is an adequate alternative forum for resolution of the dispute). The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign. *North Dakota* v. *Minnesota*, 263 U. S. 365, 372–374 (1923); *Missouri* v. *Illinois*, 200 U. S. 496, 519–521 (1906). When it is able to act, the Commission is a completely adequate means for vindicating either State's interests. The need for burdensome original jurisdiction litigation, which prevents this Court from attending to its appellate docket, would seem slight.

"(i) Determine the effect on the state-line flow of any change in depletions by man's activities or otherwise, of the waters of the Pecos River in New Mexico."

It is clear that the Commission has not adopted "a more feasible method," so the question is whether Texas' "Double Mass Analysis" fairly comes within the Compact phrase "inflow-outflow method, as described in the Report of the Engineering Advisory Committee." If it does not, then we may not use it to measure state-line shortfalls in enforcing the Compact.

As an illustration of the method,[19] and to permit administration of the Compact to begin, the Inflow-Outflow Manual provides a correlation curve and set of tables for the critical reach of the river between Alamogordo Dam and the state line. See Appendix to this opinion. Plotted along the horizontal axis are overlapping 3-year averages of the sums of four "index inflows"—the actual, measured flow into Alamogordo Reservoir, and unmeasured estimates of "flood inflows," see n. 5, *supra*, in three sub-reaches between Ala-

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[19] The Inflow-Outflow Manual appended to the engineering committee's 1947 Study describes the inflow-outflow method as follows:

"The inflow-outflow method involves the determination of the correlation between an index of the inflow to a basin as measured at certain gaging stations and the outflow from the basin. It is obviously impossible to measure all of the inflow. The gaging stations which are utilized to measure a part of the inflow are termed index inflow stations because the amount of water measured at those stations is an acceptable index of the inflow to the basin. From the plotting by years of the sum of the index inflows against the outflow there is developed a correlation curve showing the relationship between inflow and outflow. Any changes thereafter in the basin which occur between the points of inflow and the point of outflow and which affect the water supply of the basin can be measured by the change in correlation between the inflow and outflow from that indicated by the correlation curve previously developed. For example, if over a period of years additional depletions occur between the inflow points and the outflow point, the correlation between the inflow and the outflow will change: With a given inflow into the basin there will be less outflow." S. Doc. 109, at 149.

mogordo Dam and the state line. The vertical axis measures corresponding 3-year averages of the measured "outflow" at the state line. The data points form a smooth curve that, according to the Manual, "fairly accurately cover[s] the entire range of expected water supply so far as such a supply is affected by meteorological factors" under the "1947 condition" as described in the 1947 Study. S. Doc. 109, at 149.

At this point in the litigation, it has been decided that the actual curve provided by the original Inflow-Outflow Manual does not accurately describe the correlation between inflows and the state-line outflow under the 1947 condition. The parties' evidence now must be directed to drawing a new curve, like the old one but using more accurate data, and the disputes between them involve questions of which inflows should be "index inflows" and how the historic values of those inflows should be deduced and incorporated into the curve. See n. 21, *infra*. Texas' motion to substitute its "Double Mass Analysis" represents a bold effort to simplify this initial process by reducing the number of index inflows to one, directly measurable value—the measured flow past Alamogordo Dam. In essence, Texas' position is that this single inflow provides an adequate index for all the inflows into the river that are more difficult (if not impossible) to measure. If so, the correlation curve described by plotting 3-year averages of the single inflow against the state-line outflow would furnish an adequate benchmark to which post-Compact flows could be compared to determine whether Texas is receiving the water it may expect to receive under the Compact.[20]

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[20] It deserves emphasis that neither the Inflow-Outflow Manual in any of its past or projected versions nor the Texas "Double Mass Analysis" has anything to say about whether a particular shortfall in state-line water deliveries is due to "man's activities," a critical qualification on New Mexico's obligation to deliver water under Art. III(a) of the Compact. At best, correlation curves for sub-reaches of the river can be helpful in identifying *where* a shortfall seems to originate.

Although simplification would be desirable, and the question is a close one, on balance we conclude that the "Double Mass Analysis" is not close enough to what the Compact terms an "inflow-outflow method, as described in the Report of the Engineering Advisory Committee" to make it acceptable for use in determining New Mexico's compliance with its Art. III obligations. The flows past Alamogordo Dam do not always bear a physical relationship to the state-line outflow. In its natural state, the Pecos actually dries up for long periods of time between Alamogordo and the state line, so the water that crosses the state line is not the same water that passes the dam, except in periods of extreme flood. The Compact, by reference to the 1947 Study, clearly contemplates that the adequacy of state-line flows can be determined without taking into account *all* inflows into the Pecos, but the intent of the Compact's framers was clearly to use as much information as possible rather than relying on a single index inflow, even if that inflow reflects the same meteorological factors that produce the other inflows. The Inflow-Outflow Manual expressly indicates that the engineering committee intended to develop more precise correlation curves for smaller sub-reaches of the river, taking into account inflows not incorporated into the curve it provided. See S. Doc. 109, at 150–151. The "Double Mass Analysis" represents a sharply different approach to how to go about measuring shortfalls at the state line, an approach which the Compact leaves the Commission free to adopt, but which this Court may not apply against New Mexico in the absence of Commission action.

V

In a pretrial order dated October 31, 1977, the Special Master identified four broad questions to be resolved. The first was settled by our approval of his 1979 Report, 446 U. S. 540 (1980). See *supra*, at 563. The crucial question that remains to be decided is the fourth: "[H]as New Mexico fulfilled her obligations under Article III(a) of the Pecos River Com-

pact?" Pretrial Order 6. That question necessarily involves two subsidiary questions. First, under the proper definition of the "1947 condition," see *supra*, at 563, what is the difference between the quantity of water Texas could have expected to receive in each year and the quantity it actually received? For the 1950–1961 period, that difference has been determined by unanimous vote of the Commission; for 1962 to the present, determining the extent of the shortfall will require adjudicating disputes between the States as to specific issues raised by the 1947 Study, the Review of Basic Data, and the Inflow-Outflow Manual. The States have fully briefed their positions, however, and the Special Master has already heard extensive evidence on these questions.[21] Second, to what extent were the shortfalls due to "man's activities in New Mexico"?

Time and again we have counseled States engaged in litigation with one another before this Court that their dispute "is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted." *New York* v. *New Jersey*, 256 U. S. 296, 313 (1921); cf. *Vermont* v. *New York*, 417 U. S., at 277–278; *Minnesota* v. *Wisconsin*, 252 U. S. 273, 283 (1920); *Washington* v. *Oregon*, 214 U. S. 205, 218 (1909). It is within this Court's power to determine whether New Mexico is in compliance with Art. III(a) of the

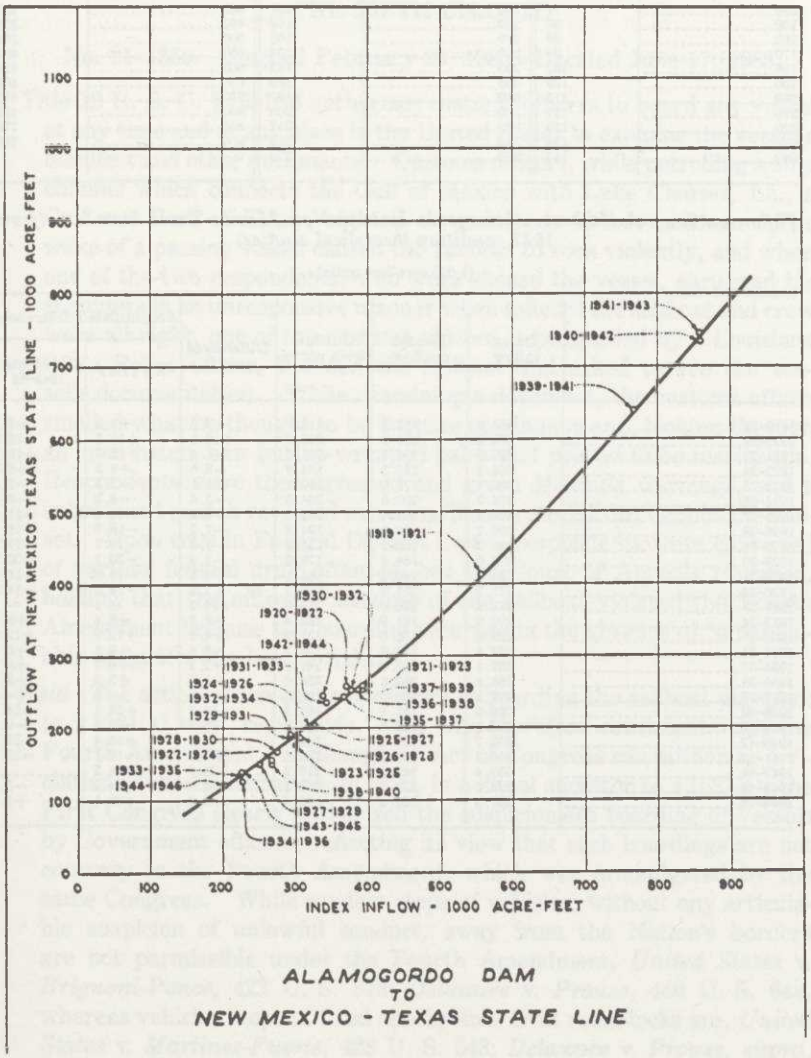
[21] New Mexico has generally relied on the Review of Basic Data. Texas has submitted a document entitled "Texas 'Workability' Statement," filed Nov. 18, 1981, which identifies nine "[q]uestions which must be resolved in connection with the flood inflow computation." *Id.*, at 4–5. Not all of them involve large quantities of water. At this stage of the litigation, there seems to be no more than three or four issues upon which the Special Master will have to resolve difficult questions of fact or of hydrological method. We leave to the Special Master's discretion whether these issues should be considered as framed in § 4(b) of his original pretrial order or whether a revised formulation would be more appropriate. See Order of Dec. 29, 1981, pp. 5–7; 1982 Report 10–11.

Pecos River Compact, but it is difficult to believe that the bona fide differences in the two States' views of how much water Texas is entitled to receive justify the expense and time necessary to obtain a judicial resolution of this controversy. With that observation, we return this case to the Special Master for determination of the unresolved issues framed in his pretrial order, in a manner consistent with this opinion.

*It is so ordered.*

# APPENDIX TO OPINION OF THE COURT

## Inflow-Outflow Manual Plate No. 2 and tables S. Doc. 109, at 154–155



*Inflow-outflow relationships, Alamogordo Dam to New Mexico-Texas State line*

[1,000 acre-feet units]

| Index inflow | Outflow relationship | Index inflow | Outflow relationship | Index inflow | Outflow relationship |
|---|---|---|---|---|---|
| 140 | 77 | 250 | 151 | 400 | 267 |
| 150 | 83 | 260 | 159 | 450 | 307 |
| 160 | 89 | 270 | 166 | 500 | 352 |
| 170 | 96 | 280 | 174 | 550 | 402 |
| 180 | 102 | 290 | 182 | 600 | 454 |
| 190 | 109 | 300 | 189 | 650 | 506 |
| 200 | 115 | 310 | 197 | 750 | 615 |
| 210 | 122 | 320 | 205 | 800 | 671 |
| 220 | 129 | 330 | 212 | 850 | 728 |
| 230 | 136 | 340 | 220 | 900 | 786 |
| 240 | 143 | 350 | 228 | | |

*Inflow-outflow calculations, Alamogordo Dam to New Mexico-Texas State line (from 1947 condition theoretical studies)*

[1,000 acre-feet units]

| | Index inflow | Routed outflow | Outflow from curve | Differences | Accumulated differences | |
|---|---|---|---|---|---|---|
| | | | | | All years | Omitting 1942–44 |
| 1919–21 | 557.8 | 412.3 | 410.1 | +2.2 | +2.2 | +2.2 |
| 1920–22 | 370.3 | 259.9 | 243.8 | +16.1 | +18.3 | +18.3 |
| 1921–23 | 392.3 | 259.6 | 261.0 | −1.4 | +16.9 | +16.9 |
| 1922–24 | 268.4 | 156.3 | 164.9 | −8.6 | +8.3 | +8.3 |
| 1923–25 | 300.1 | 178.0 | 189.1 | −11.1 | −2.8 | −2.8 |
| 1924–26 | 318.7 | 200.6 | 204.0 | −3.4 | −6.2 | −6.2 |
| 1925–27 | 325.9 | 203.9 | 209.1 | −5.2 | −11.4 | −11.4 |
| 1926–28 | 307.2 | 187.5 | 194.8 | −7.3 | −18.7 | −18.7 |
| 1927–29 | 260.2 | 150.2 | 151.2 | −1.0 | −19.7 | −19.7 |
| 1928–30 | 275.0 | 168.8 | 170.0 | −1.2 | −20.7 | −20.7 |
| 1929–31 | 294.4 | 189.2 | 185.1 | +4.1 | −16.8 | −16.8 |
| 1930–32 | 377.2 | 251.7 | 249.2 | +2.5 | −14.3 | −14.3 |
| 1931–33 | 342.2 | 236.0 | 221.8 | +14.2 | −.1 | −.1 |
| 1932–34 | 292.0 | 191.9 | 183.4 | +8.5 | +8.4 | +8.4 |
| 1933–35 | 223.6 | 136.0 | 131.5 | +4.5 | +12.9 | +12.9 |
| 1934–36 | 227.4 | 127.8 | 134.2 | −6.4 | +6.5 | +6.5 |
| 1935–37 | 367.1 | 243.5 | 241.3 | +2.2 | +8.7 | +8.7 |
| 1936–38 | 388.5 | 253.1 | 258.0 | −4.9 | +3.8 | +3.8 |
| 1937–39 | 392.2 | 256.3 | 161.0 | −4.7 | −.9 | −.9 |
| 1938–40 | 269.0 | 151.1 | 165.3 | −14.2 | −15.1 | −15.1 |
| 1939–41 | 267.1 | 639.8 | 634.2 | +5.6 | −9.5 | −9.5 |
| 1940–42 | 859.7 | 732.3 | 739.2 | −6.9 | −16.4 | −16.4 |
| 1941–43 | 859.3 | 746.2 | 738.8 | +6.4 | −10.1 | −10.0 |
| 1942–44 | 337.4 | 246.2 | 217.9 | +28.3 | +18.3 | |
| 1943–45 | 224.8 | 139.0 | 132.4 | +6.6 | +24.9 | −3.4 |
| 1944–46 | 201.2 | 121.0 | 115.8 | +5.2 | +30.1 | +1.8 |

# UNITED STATES *v.* VILLAMONTE-MARQUEZ ET AL.

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

No. 81–1350. Argued February 23, 1983—Decided June 17, 1983

Title 19 U. S. C. § 1581(a) authorizes customs officers to board any vessel at any time and at any place in the United States to examine the vessel's manifest and other documents. Customs officers, while patrolling a ship channel which connects the Gulf of Mexico with Lake Charles, La., a Customs Port of Entry, sighted an anchored, 40-foot sailboat. The wake of a passing vessel caused the sailboat to rock violently, and when one of the two respondents, who were aboard the vessel, shrugged his shoulders in an unresponsive manner when asked if the sailboat and crew were all right, one of the customs officers, accompanied by a Louisiana State Police officer, boarded the sailboat and asked to see the vessel's documentation. While examining a document, the customs officer smelled what he thought to be burning marihuana and, looking through an open hatch, saw burlap-wrapped bales that proved to be marihauna. Respondents were then arrested and given *Miranda* warnings, and a subsequent search revealed more marihuana stored throughout the vessel. Upon trial in Federal District Court, respondents were convicted of various federal drug offenses, but the Court of Appeals reversed, holding that the officers' boarding of the sailboat violated the Fourth Amendment because the boarding occurred in the absence of "a reasonable suspicion of a law violation."

*Held:* The action of the customs officers in boarding the sailboat pursuant to § 1581(a) was "reasonable," and was therefore consistent with the Fourth Amendment. Although no Act of Congress can authorize a violation of the Constitution, in 1790, in a lineal ancestor to § 1581(a), the First Congress clearly authorized the suspicionless boarding of vessels by Government officers, reflecting its view that such boardings are not contrary to the Fourth Amendment, which was promulgated by the same Congress. While random stops of vehicles, without any articulable suspicion of unlawful conduct, away from the Nation's borders are not permissible under the Fourth Amendment, *United States* v. *Brignoni-Ponce*, 422 U. S. 873; *Delaware* v. *Prouse*, 440 U. S. 648, whereas vehicles stops at fixed checkpoints or at roadblocks are, *United States* v. *Martinez-Fuerte*, 428 U. S. 543; *Delaware* v. *Prouse*, *supra*, the nature of waterborne commerce in waters providing ready access to

the open sea is sufficiently different from the nature of vehicular traffic on highways as to make possible alternatives to the sort of "stop" made in this case less likely to accomplish the obviously essential governmental purposes involved. The system of prescribed outward markings used by States for vehicle registration is also significantly different than the system of external markings on vessels, and the extent and type of vessel documentation required by federal law is a good deal more variable and complex than are the state vehicle registration laws. Moreover, governmental interests in assuring compliance with vessel documentation requirements, particularly in waters where the need to deter or apprehend smugglers is great, are substantial, whereas the type of intrusion made in this case, while not minimal, is limited. Pp. 584–593.

652 F. 2d 481, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, and in Part I of which STEVENS, J., joined, *post*, p. 593.

*Samuel A. Alito, Jr.*, argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Jensen*, *Deputy Solicitor General Frey*, *Louis M. Fischer*, and *Stuart P. Seidel*.

*Richard P. Ieyoub* argued the cause and filed a brief for respondents.

JUSTICE REHNQUIST delivered the opinion of the Court.

Congress has provided that "[a]ny officer of the customs may at any time go on board of any vessel . . . at any place in the United States . . . and examine the manifest and other documents and papers . . . and to this end may hail and stop such vessel . . . and use all necessary force to compel compliance." 46 Stat. 747, as amended, 19 U. S. C. § 1581(a).[1] We are asked to decide whether the Fourth Amendment is offended when customs officials, acting pursuant to this

[1] See also 46 U. S. C. § 277 (provides similar authority for "[a]ny officer concerned in the collection of the revenue"). Cf. 14 U. S. C. § 89(a); 19 U. S. C. § 1581(b).

statute and without any suspicion of wrongdoing, board for inspection of documents a vessel that is located in waters providing ready access to the open sea.[2]

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[2] Section 1581(a) provides customs officials with authority beyond boarding for document inspections. In this case, however, we are concerned only with the more narrow issue.

Respondents briefly argue that we should not reach even this question. Relying on *United States* v. *Sarmiento-Rozo*, 592 F. 2d 1318 (CA5 1979), respondents contend that this case is moot because they have been deported and, subsequent to the issuance of the mandate by the Court of Appeals reversing their convictions, the indictments against them were dismissed. *Sarmiento-Rozo* provides some authority for respondents' argument; nevertheless, we reject the contention.

The Government has sought review of the Court of Appeals' decision reversing respondents' convictions. Ordinarily our reversal of that decision would reinstate the judgment of conviction and the sentence entered by the District Court. See *United States* v. *Morrison*, 429 U. S. 1, 3 (1976) *(per curiam)*. The fact that the Government did not obtain a stay, thus permitting issuance of the mandate of the Court of Appeals, would not change the effect of our reversal. See *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U. S. 464, 467 (1947); *Carr* v. *Zaja*, 283 U. S. 52 (1931). Under our reasoning in *Mancusi* v. *Stubbs*, 408 U. S. 204, 205–207 (1972), the absence of an indictment does not require a contrary conclusion. Further, it is settled law that the preliminary steps in a criminal proceeding are "merged" into a sentence once the defendant is convicted and sentenced. See *Parr* v. *United States*, 351 U. S. 513, 518–519 (1956); *Berman* v. *United States*, 302 U. S. 211 (1937). Upon respondents' conviction and sentence, the indictment that was returned against them was merged into their convictions and sentences, thus making unnecessary a separate reinstatement of the original indictment.

That respondents have been deported likewise does not remove the controversy involved. Following a reversal of the Court of Appeals, there would be a possibility that respondents could be extradited and imprisoned for their crimes, or if respondents manage to re-enter this country on their own they would be subject to arrest and imprisonment for these convictions. See *United States* v. *Campos-Serrano*, 404 U. S. 293, 294, n. 2 (1971). In addition, as a collateral consequence of the convictions, the Government could bar any attempt by respondents to voluntarily re-enter this country. 8 U. S. C. § 1182(a)(9). See *Pennsylvania* v. *Mimms*, 434 U. S. 106, 108, n. 3 (1977) *(per curiam)*; *Sibron* v. *New York*, 392 U. S. 40, 53–57 (1968).

*[Footnote 2 is continued on p. 582]*

Near midday on March 6, 1980, customs officers, accompanied by Louisiana state policemen, were patrolling the Calcasieu River Ship Channel, some 18 miles inland from the gulf coast, when they sighted the *Henry Morgan II*, a 40-foot sailboat, anchored facing east on the west side of the channel. The Calcasieu River Ship Channel is a north-south waterway connecting the Gulf of Mexico with Lake Charles, Louisiana. Lake Charles, located in the southwestern corner of Louisiana, is a designated Customs Port of Entry in the Houston, Texas Region. While there is access to the channel from Louisiana's Calcasieu Lake, the channel is a separate thoroughfare to the west of the lake which all vessels moving between Lake Charles and the open sea of the Gulf must traverse.

Shortly after sighting the sailboat, the officers also observed a large freighter moving north in the channel. The freighter was creating a huge wake and as it passed the *Henry Morgan II* the wake caused the smaller vessel to rock violently from side to side. The patrol boat then approached the sailboat from the port side and passed behind its stern.

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The dissent's discussion of mootness places heavy reliance on this Court's decision in *Ex parte Bain*, 121 U. S. 1 (1887), and a hypothetical example in a civil proceeding between Peter and David. *Post*, at 594–598, and n. 1. *Ex parte Bain* was long ago limited to its facts by *Salinger* v. *United States*, 272 U. S. 542 (1926), where the Court said:

"In the case of *Ex parte Bain*, 121 U. S. 1, on which the accused relies, there was an actual amendment or alteration of the indictment to avoid an adverse ruling on demurrer, and the trial was on the amended charge without a resubmission to a grand jury. *The principle on which the decision proceeded is not broader than the situation to which it was applied.*" *Id.*, at 549 (emphasis added).

In the present case, there is no doubt whatever that a valid indictment was returned by the grand jury, the case was tried on that indictment, and, unlike the dissent's hypothetical civil analogy, a judgment pursuant to Federal Rule of Criminal Procedure 32 was entered on the jury verdict of guilty. At this juncture, for reasons explained above, the indictment was merged into the judgment, and a successful effort on the part of the Government to reverse the judgment of the Court of Appeals would have the effect of reinstating the judgment of conviction.

On the stern the name of the vessel, the "*Henry Morgan II*," was displayed along with its home port, "Basilea." The officers sighted one man, respondent Hamparian, on deck. Officer Wilkins twice asked if the sailboat and crew were all right. Hamparian shrugged his shoulders in an unresponsive manner.

Officer Wilkins, accompanied by Officer Dougherty of the Louisiana State Police, then boarded the *Henry Morgan II* and asked to see the vessel's documentation. Hamparian handed Officer Wilkins what appeared to be a request to change the registration of a ship from Swiss registry to French registry, written in French and dated February 6, 1980. It subsequently was discovered that the home port designation of "Basilea" was Latin for Basel, Switzerland; the vessel was, however, of French registry.

While examining the document, Officer Wilkins smelled what he thought to be burning marihuana. Looking through an open hatch, Wilkins observed burlap-wrapped bales that proved to be marihuana. Respondent Villamonte-Marquez was on a sleeping bag atop of the bales. Wilkins arrested both Hamparian and Villamonte-Marquez and gave them *Miranda* warnings. A subsequent search revealed some 5,800 pounds of marihuana on the *Henry Morgan II*, stored in almost every conceivable place including the forward, mid, and aft cabins, and under the seats in the open part of the vessel.

A jury found respondents guilty of conspiring to import marihuana in violation of 21 U. S. C. § 963, importing marihuana in violation of 21 U. S. C. § 952(a), conspiring to possess marihuana with intent to distribute in violation of 21 U. S. C. § 846, and possessing marihuana with intent to distribute in violation of 21 U. S. C. § 841(a)(1). The Court of Appeals for the Fifth Circuit reversed the judgment of conviction, finding that the officers' boarding of the *Henry Morgan II* "was not reasonable under the fourth amendment" because the boarding occurred in the absence of "a reasonable

suspicion of a law violation." 652 F. 2d 481, 488 (1981). Because of a conflict among the Circuits and the importance of the question presented as it affects the enforcement of customs laws, we granted certiorari. 457 U. S. 1104 (1982).[3] We now reverse.

In 1790 the First Congress enacted a comprehensive statute "to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported into the United States, and on the tonnage of ships or vessels." Act of Aug. 4, 1790, 1 Stat. 145. Section 31 of that Act provided in pertinent part as follows:

> "That it shall be lawful for all collectors, naval officers, surveyors, inspectors, and the officers of the revenue cutters herein after mentioned, to go on board of ships or vessels in any part of the United States, or within four leagues of the coast thereof, if bound to the United States, whether in or out of their respective districts, for the purposes of demanding the manifests aforesaid, and of examining and searching the said ships or vessels . . . ." 1 Stat. 164.

This statute appears to be the lineal ancestor of the provision of present law upon which the Government relies to sustain

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[3] There is no issue in this case concerning the activities of the officers once they boarded the *Henry Morgan II*. The only question presented to this Court concerns the validity of the suspicionless boarding of the vessel for a document inspection.

Respondents, however, contend in the alternative that because the customs officers were accompanied by a Louisiana state policeman, and were following an informant's tip that a vessel in the ship channel was thought to be carrying marihuana, they may not rely on the statute authorizing boarding for inspection of the vessel's documentation. This line of reasoning was rejected in a similar situation in *Scott* v. *United States*, 436 U. S. 128, 135–139 (1978), and we again reject it. Acceptance of respondents' argument would lead to the incongruous result criticized by Judge Campbell in his opinion in *United States* v. *Arra*, 630 F. 2d 836, 846 (CA1 1980): "We would see little logic in sanctioning such examinations of ordinary, unsuspect vessels but forbidding them in the case of suspected smugglers."

the boarding of the vessel in this case. Title 19 U. S. C. § 1581(a) provides that "[a]ny officer of the customs may at any time go on board of any vessel . . . at any place in the United States or within the customs waters . . . and examine the manifest and other documents and papers . . . ."

The Government insists that the language of the statute clearly authorized the boarding of the vessel in this case. The respondents do not seriously dispute this contention, but contend that even though authorized by statute the boarding here violated the prohibition against unreasonable searches and seizures contained in the Fourth Amendment to the United States Constitution. We of course agree with respondents' argument that "no Act of Congress can authorize a violation of the Constitution." *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 272 (1973). But we also agree with the Government's contention that the enactment of this statute by the same Congress that promulgated the constitutional Amendments that ultimately became the Bill of Rights gives the statute an impressive historical pedigree.[4] *United*

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[4] Relying on the words "bound to the United States" in the 1790 statute and this Court's decision in *Maul* v. *United States*, 274 U. S. 501 (1927), the dissent contends that the Act of Aug. 4, 1790, § 31, 1 Stat. 164, did not grant any authority to board a vessel found in domestic waters. *Post*, at 600–601, n. 7. The dissent misreads the statute and the *Maul* decision. As noted, § 31 of the 1790 Act provides for the boarding of vessels found "*in any part of the United States*, or within four leagues of the coast thereof, if bound to the United States." (Emphasis supplied.) The dissent completely ignores that part of the statute which reads "in any part of the United States." Furthermore, the phrase "if bound to the United States" obviously qualifies only the phrase "within four leagues of the coast." It would make no sense whatsoever to say that the statute authorizes the boarding of vessels found in "any part of the United States" only so long as such vessels are "bound to the United States." The dissent also says that because § 48 of the Act of Aug. 4, 1790, authorized some searches without regard to location, it must be read as the only provision in the Act that allows boardings in domestic waters. *Post*, at 600–601, n. 7. Again the dissent misreads the statutory scheme. Section 48 expressly applies only to seizures of "goods, wares or merchandise subject to duty" and

*States* v. *Ramsey*, 431 U. S. 606 (1977). As long ago as the decision in *Boyd* v. *United States*, 116 U. S. 616 (1886), this Court said:

> "The seizure of stolen goods is authorized by the common law . . . and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection of duties, the act of July 31, 1789, 1 Stat. 29, 43, contains provisions to this effect. *As this*

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thought to be concealed on "any ship or vessel" or "any particular dwelling-house, store, building or other place." Unlike § 31, § 48 does not purport to deal with boardings for inspection of documents. In short, the two sections are concerned with different matters and nothing in one can be read to limit the other.

The dissent's reliance on the concurring opinion of Justice Brandeis in *Maul* seriously misreads that concurrence. Where the dissent says that the concurrence "recognized" that it was only in 1922 that Congress purported to authorize suspicionless boardings of vessels not "bound to the United States," the dissent's reading of Justice Brandeis' language is imprecise, to say the least. Observing that the 1922 amendments made two changes in the statutory law, he described one of them in these terms: "Unlike the earlier statutes, it did not limit to inbound vessels the right to board and search." 274 U. S., at 529. Thus Congress in 1922 allowed searches to be made within four leagues of the coast of *any vessel*, whether inbound or not. But this change in no way altered the separate provision in the same sentence of the 1922 statute retaining the authority to "go on board of any vessel or vehicle at any place in the United States . . . ."

Nor is anything in the Court's opinion in *Maul* to the contrary. The Court was asked to decide whether the Coast Guard was authorized to seize an American vessel "on the high seas more than twelve miles from the coast." *Id.*, at 503. In tracing the history of statutory authorization for "seizures made on the high seas," *id.*, at 504, the Court properly noted that when acting pursuant to the Act of Aug. 4, 1790, and its pre-1922 descendants, such seizures were authorized only for inbound vessels within the 12-mile limit, *id.*, at 505–506. The Court determined, however, that the Act of Mar. 2, 1799, § 70, 1 Stat. 678, authorized the seizure of American vessels beyond the 12-mile limit where the Coast Guard was acting pursuant to "any [law] respecting the revenue." Nothing in the *Maul* decision even remotely purported to apply to the boarding of vessels in domestic waters.

> *Act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment.*" *Id.*, at 623 (emphasis supplied; footnote omitted).

In holding that the boarding of the vessel without articulable suspicion violated the Fourth Amendment, the Court of Appeals relied on several of its own decisions and on our decision in *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975), where we said:

> "Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." *Id.*, at 884.

We think that two later decisions also bear on the question before us.

In *United States* v. *Martinez-Fuerte*, 428 U. S. 543 (1976), we upheld the authority of the Border Patrol to maintain permanent checkpoints at or near intersections of important roads leading away from the border at which a vehicle would be stopped for brief questioning of its occupants "even though there is no reason to believe the particular vehicle contains illegal aliens." *Id.*, at 545. Distinguishing our holding in *United States* v. *Brignoni-Ponce*, *supra*, we said:

> "A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens. In particular, such a requirement would largely eliminate any deterrent to the conduct of

well-disguised smuggling operations, even though smugglers are known to use these highways regularly." 428 U. S., at 557.

Three Terms later we held in *Delaware* v. *Prouse*, 440 U. S. 648 (1979), that "persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers." *Id.*, at 663. We added that alternative methods, such as spot checks that involve less intrusion, or questioning of all oncoming traffic at roadblock-type stops, would just as readily accomplish the State's objectives in furthering compliance with auto registration and safety laws.

Our focus in this area of Fourth Amendment law has been on the question of the "reasonableness" of the type of governmental intrusion involved. "Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware* v. *Prouse*, *supra*, at 654. See also *Camara* v. *Municipal Court*, 387 U. S. 523 (1967); *Terry* v. *Ohio*, 392 U. S. 1 (1968); *Cady* v. *Dombrowski*, 413 U. S. 433 (1973); *United States* v. *Brignoni-Ponce*, *supra*; *United States* v. *Martinez-Fuerte*, *supra*. It seems clear that if the customs officers in this case had stopped an automobile on a public highway near the border, rather than a vessel in a ship channel, the stop would have run afoul of the Fourth Amendment because of the absence of articulable suspicion. See *United States* v. *Brignoni-Ponce*, *supra*. But under the overarching principle of "reasonableness" embodied in the Fourth Amendment, we think that the important factual differences between vessels located in waters offering ready access to the open sea and automobiles on principal thoroughfares in the border area are sufficient to require a different result here.

The difference in outcome between the roving patrol stop in *Brignoni-Ponce*, *supra*, and the fixed checkpoint stop in

*Martinez-Fuerte*, *supra*, was due in part to what the Court deemed the less intrusive and less awesome nature of fixed checkpoint stops when compared to roving patrol stops. And the preference for roadblocks as opposed to random spot checks expressed in *Delaware* v. *Prouse*, *supra*, reflects a like concern. But no reasonable claim can be made that permanent checkpoints would be practical on waters such as these where vessels can move in any direction at any time and need not follow established "avenues" as automobiles must do. Customs officials do not have as a practical alternative the option of spotting all vessels which might have come from the open sea and herding them into one or more canals or straits in order to make fixed checkpoint stops. Smuggling and illegal importation of aliens by land may, and undoubtedly usually does, take place away from fixed checkpoints or ports of entry, but much of it is at least along a finite number of identifiable roads. But while eventually maritime commerce on the inland waters of the United States may funnel into rivers, canals, and the like, which are more analogous to roads and make a "roadblock" approach more feasible, such is not the case in waters providing ready access to the seaward border, beyond which is only the open sea.

Respondents have asserted that permanent checkpoints could be established at various ports. But vessels having ready access to the open sea need never come to harbor. Should the captain want to avoid the authorities at port, he could carry on his activity by anchoring at some obscure location on the shoreline, or, as may have been planned in this case, the captain could transfer his cargo from one vessel to another. In cases involving such endeavors as fishing or water exploration, the crew of the vessel can complete its mission without any assistance.

Quite apart from the aforementioned differences between waterborne vessels and automobiles traveling on highways, the documentation requirements with respect to vessels are significantly different from the system of vehicle licensing

that prevails generally throughout the United States. A police officer patrolling a highway can often tell merely by observing a vehicle's license plate and other outward markings whether the vehicle is currently in compliance with the requirements of state law. See *Delaware* v. *Prouse*, *supra*, at 660–661. No comparable "license plates" or "stickers" are issued by the United States or by States to vessels. Both of the required exterior markings on documented vessels—the name and hailing port—as well as the numerals displayed by undocumented American boats, are marked on the vessel at the instance of the owner. Furthermore, in cases like this one where the vessel is of foreign registry it carries only the markings required by its home port. Here those markings indicated that the vessel was of Swiss registry, while in actuality it carried French documentation papers.

The panoply of statutes and regulations governing maritime documentation are likewise more extensive and more complex than the typical state requirements for vehicle licensing; only some of the papers required need explicit mention here to illustrate the point. All American vessels of at least five tons and used for commercial purposes must have a "certificate of documentation." In addition, vessels engaged in certain trades must obtain special licenses. While pleasure vessels of this size are not required to be documented, they are eligible for federal registration. See 46 U. S. C. § 65 *et seq.* (1976 ed., Supp. V). Many of these vessels must also submit to periodic inspection by the Coast Guard and a "certificate of inspection" must be kept on the vessel at all times. 46 U. S. C. §§ 399, 400. Smaller American vessels cannot be issued federal documentation papers, but under federal law each such vessel with propulsion machinery must have a state-issued number displayed on a "certificate of number" that must be available for inspection at all times. 46 U. S. C. § 1470. Vessels not required to carry federal documentation papers also may be required to carry a state-issued safety certificate. 46 U. S. C. § 1471.

While foreign vessels are not required to carry federal documentation papers, they are required to have a "manifest," which must be delivered to customs officials immediately upon arrival in this country. 19 U. S. C. § 1439. If a foreign vessel wants to visit more than one customs district, it must obtain a "permit to proceed" at its first port of call, with the exception that a foreign yacht need not obtain such a permit if it has been issued a "cruising license." 46 U. S. C. § 313; 19 U. S. C. § 1435. Any vessel departing American waters for a foreign port must deliver its "manifest" to Customs and obtain clearance. 46 U. S. C. § 91.

These documentation laws serve the public interest in many obvious ways and respondents do not suggest that the public interest is less than substantially furthered by enforcement of these laws. They are the linchpin for regulation of participation in certain trades, such as fishing, salvaging, towing, and dredging, as well as areas in which trade is sanctioned, and for enforcement of various environmental laws. The documentation laws play a vital role in the collection of customs duties and tonnage duties. They allow for regulation of imports and exports assisting, for example, Government officials in the prevention of entry into this country of controlled substances, illegal aliens, prohibited medicines, adulterated foods, dangerous chemicals, prohibited agricultural products, diseased or prohibited animals, and illegal weapons and explosives. These interests are, of course, most substantial in areas such as the ship channel in this case, which connects the open sea with a Customs Port of Entry. Cf. *United States* v. *Ramsey*, 431 U. S. 606 (1977). Requests to check certificates of inspection play an obvious role in ensuring safety on American waterways. While inspection of a vessel's documents might not always conclusively establish compliance with United States shipping laws, more often than not it will.[5]

[5] The dissent maintains that in lieu of the type of stop made in this case, it would be possible to enforce documentation laws by requiring vessels to

While the need to make document checks is great,[6] the resultant intrusion on Fourth Amendment interests is quite limited. While it does intrude on one's ability to make "'free passage without interruption,'" *United States* v. *Martinez-Fuerte*, 428 U. S., at 557–558 (quoting *Carroll* v. *United States*, 267 U. S. 132, 154 (1925)), it involves only a brief detention where officials come on board, visit public areas of the vessel, and inspect documents. Cf. *United States* v. *Brignoni-Ponce*, 422 U. S., at 880. "Neither the [vessel] nor its occupants are searched, and visual inspection of the [vessel] is limited to what can be seen without a search." *United States* v. *Martinez-Fuerte*, *supra*, at 558. Any interference with interests protected by the Fourth Amendment is, of course, intrusive to some degree. But in this case, the interference created only a modest intrusion.

We briefly recapitulate the reasons, set forth above in greater detail, which lead us to conclude that the Government's boarding of the *Henry Morgan II* did not violate the Fourth Amendment. In a lineal ancestor to the statute at issue here the First Congress clearly authorized the suspicionless boarding of vessels, reflecting its view that such boardings are not contrary to the Fourth Amendment; this gives the statute before us an impressive historical pedigree. Random stops without any articulable suspicion of vehicles away from the border are not permissible under the Fourth Amendment, *United States* v. *Brignoni-Ponce*, *supra*; *Dela-*

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display identification markings more similar to automobile "license plates" and for the Coast Guard to maintain extensive records on shore that can be referred to by radio. Even assuming that these alternatives are feasible, Congress has chosen a different method. So long as the method chosen by Congress is constitutional, then it matters not that alternative methods exist. Cf. *Cady* v. *Dombrowski*, 413 U. S. 433, 447 (1973).

[6] Respondents suggest that even if the public interest is great in stopping commercial vessels, it is not so with "pleasure boats." The difficulties with such line-drawing are exemplified by this case. Respondents assert that they were in a "pleasure boat," yet they proved to be involved in a highly lucrative commercial trade.

*ware* v. *Prouse*, 440 U. S. 648 (1979), but stops at fixed checkpoints or at roadblocks are. *Ibid.* The nature of waterborne commerce in waters providing ready access to the open sea is sufficiently different from the nature of vehicular traffic on highways as to make possible alternatives to the sort of "stop" made in this case less likely to accomplish the obviously essential governmental purposes involved. The system of prescribed outward markings used by States for vehicle registration is also significantly different from the system of external markings on vessels, and the extent and type of documentation required by federal law is a good deal more variable and more complex than are the state vehicle registration laws. The nature of the governmental interest in assuring compliance with documentation requirements, particularly in waters where the need to deter or apprehend smugglers is great, is substantial; the type of intrusion made in this case, while not minimal, is limited.

All of these factors lead us to conclude that the action of the customs officers in stopping and boarding the *Henry Morgan II* was "reasonable," and was therefore consistent with the Fourth Amendment. The judgment of the Court of Appeals is

*Reversed.*

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, and with whom JUSTICE STEVENS joins as to Part I, dissenting.

The Court today holds that this case is not moot despite the voluntary dismissal of the prosecution by the Government. It also holds that police on a roving, random patrol may stop and board any vessel, at any time, on any navigable waters accessible to the open sea, with no probable cause or reasonable suspicion to believe that there has been a crime or a border crossing, and without any limits whatever on their discretion to impose this invasion of privacy. Because I cannot agree with either holding, I dissent.

I

It is long settled that a party may not seek appellate review when it has itself sought and obtained entry of a judgment against it, unless it does so solely as a device by which to obtain immediate appellate review of an interlocutory order. *E. g.*, *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 680–681 (1958); *United States* v. *Babbitt*, 104 U. S. 767 (1882); *Evans* v. *Phillips*, 4 Wheat. 73 (1819).

Yet that is precisely what the Court permits the Government to do in this case.[1] Respondents were convicted of drug violations and sentenced to prison. The Court of Appeals reversed the judgment on August 3, 1981, holding that the convictions rested on illegally obtained evidence. Rehearing was denied on October 19, and the mandate issued on October 29. On November 20, the Court of Appeals granted the Government's motion to recall the mandate and stay its reissuance until December 7, pending a petition for writ of certiorari in this Court. The Government, however, permitted that stay to expire without filing the petition, and the

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[1] Consider this hypothetical: Peter brings a diversity suit against David, seeking damages for trespass and an injunction against further trespass. The jury awards damages to Peter. On post-trial motions, however, the district judge refuses to enter judgment on the verdict for damages or an injunction; instead, he orders a new trial because he concludes that the verdict rested on improper hearsay evidence. Peter's lawyer advises him that his chances on retrial are slim; without the supposed hearsay, he has virtually no evidence to support a key element of his case. He advises Peter to pursue an interlocutory appeal under 28 U. S. C. § 1292(a). But Peter decides not to bother further with the case; he files a stipulated dismissal of the complaint under Federal Rule of Civil Procedure 41(a)(1). Thereafter, however, Peter files a notice of appeal, contending that the district judge should have entered judgment on the jury verdict. When the court of appeals asks him about mootness, he asserts that the court should proceed to decide the hearsay issue, because if it holds for Peter it may vacate the dismissal of the complaint and reinstate the jury verdict.

Can there be any doubt that, in this hypothetical case, the court of appeals would throw Peter out on his ear? Yet there is no significant difference between Peter's conduct and that of the Government in this case.

mandate issued on December 8. On December 21, the Government moved voluntarily in the District Court for dismissal of the indictment under Federal Rule of Criminal Procedure 48(a), and the motion was granted the same day. Not until January 18, 1982, did the Government file its petition for certiorari in this Court.[2]

Rule 48(a) provides that the Government "may by leave of court file a dismissal of an indictment, information or complaint *and the prosecution shall thereupon terminate*" (emphasis added). No one has ever challenged the effectiveness of the District Court's order of dismissal, or sought to set it aside, either by a request for rehearing in that court or by direct review on appeal. Yet the Government, having itself permanently terminated this prosecution, now asks this Court to reinstate respondents' convictions—convictions for which there is no pending indictment and no extant criminal action. Neither the Government nor the Court provides any adequate explanation of how this is possible.

The Court relies primarily on cases holding that issuance of the mandate of a court of appeals does not necessarily moot a case. *Ante*, at 581–582, n. 2. That is ordinarily true enough, but it is quite beside the point. The act that terminated this case was not the issuance of the mandate (or the Government's failure to seek a further stay), but the dismissal of the indictment at the Government's request. The Court cites *Mancusi* v. *Stubbs*, 408 U. S. 204, 205–207 (1972), as support for the proposition that the Court may reinstate respondents' convictions despite the dismissal. Presumably the Court refers to our holding in *Mancusi* that "[p]etitioner's obedience to the mandate of the Court of Appeals and the judgment of the District Court does not moot this case." *Id.*, at 206 (footnote omitted).[3] The unspoken but necessary step in the

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[2] The time for filing was extended by JUSTICE WHITE.

[3] The facts of *Mancusi* illuminate why that case does not control this one. There, New York had sentenced Stubbs as a second offender, based on an allegedly infirm prior Tennessee conviction. On appeal from a denial

Court's logic is the Government's assertion that "the indictment in this case was dismissed solely in order to comply with the court of appeals' mandate." Supplemental Brief for United States 3. That assertion, however, is patently false. Not one syllable of the Court of Appeals' mandate or opinion purported to require the District Court to dismiss the indictment, or to require the Government to move for dismissal. The Court of Appeals held only that respondents' convictions were infirm because based on inadmissible evidence; it remained open for the Government to retry them on proper evidence, or to seek further review in this Court. The Government points out that it had no other sufficient evidence, and hence as a practical matter it could not have retried respondents. In that circumstance a dismissal of the indictment was indeed a sensible response to the Court of Appeals' decision, *if the Government did not intend to proceed further in seeking to impose criminal liability on respondents.* But if, on the contrary, the Government intended to seek a reversal in this Court of the Court of Appeals' judgment, then there was no reason why it would or should terminate the prosecution by moving under Rule 48(a) for dismissal. Instead, it could, should, and would have proceeded in this Court, allowing the indictment to stand pending our disposition. Neither the

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of federal habeas, the Court of Appeals held that the Tennessee conviction, and hence the New York sentence, were invalid; accordingly, acting on the Court of Appeals' mandate, the District Court granted a writ of habeas corpus, ordering that Stubbs be resentenced or released. Before our decision issued, the New York state court complied by resentencing Stubbs. We held that the case was not moot because, if we reversed, the State would be free to reimpose its earlier sentence on Stubbs. (As it happened, the second sentence was the same as the first, but it was still under appeal when our decision was rendered; thus, it was possible that the second sentence would be reversed, leaving the original sentence as the only basis on which New York could impose that punishment.) The key fact in *Mancusi* was that the State was absolutely required by the District Court's writ either to resentence Stubbs or to release him; it did not have the option, as the Government did in this case, of simply letting the matter rest pending decision by this Court.

Government nor the Court draws my attention to anything that would have foreclosed this course of action.[4] Plainly, the Government's motion was based on a decision (presumably later changed) to let the case drop, contenting itself with deportation.

The Court points out that preliminary steps in a prosecution are merged into a conviction and sentence. *Ante*, at 581–582, n. 2. Again, this is true enough as a general rule, but it is hard to see how it provides any support for the Court's position. The rule means simply that interlocutory steps are subject to attack on appeal from the final judgment; it has never been meant or taken to undermine the fundamental principle that an indictment is the necessary foundation of and predicate for a felony prosecution, conviction, or sentence. On the contrary, it means just the opposite—that the indictment can be attacked on appeal from the conviction, and if it is defective, the entire conviction and sentence falls. Likewise, if the indictment is dismissed, everything that has been "merged" with it is necessarily included in the dismissal. Where there is no valid indictment pending, "[i]t is of no avail . . . to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offence is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment." *Ex parte Bain*, 121 U. S. 1, 13 (1887).[5] Rule 48(a) is but a

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[4] The Government suggests that the Speedy Trial Act, 18 U. S. C. § 3161(e) (1976 ed., Supp. V), somehow foreclosed this. Supplemental Brief for United States 2, n. 1. It is doubtful, however, that a judgment on which certiorari has been granted is "final" within § 3161(d)(2); alternatively, action on the petition for certiorari would likely constitute "other proceedings concerning the defendant" under § 3161(h)(1). In any event, § 3161(e) applies only "[i]f the defendant is to be tried again." The Government has disclaimed any intention of retrying respondents.

[5] *Salinger* v. *United States*, 272 U. S. 542, 549 (1926), hardly limits *Bain* to its facts, as the Court contends, *ante*, at 581–582, n. 2; even less does it

recognition of this principle: Once the indictment is dismissed, "the prosecution shall thereupon terminate." This prosecution has terminated, and this Court is entirely without power to revive it, or the convictions or sentences that arose out of it and died with it. Hence, because there is no nonadvisory relief that we may grant to the Government, the case should be vacated and remanded with instructions to dismiss as moot.

II

Today, for the first time in the nearly 200-year history of the Fourth Amendment, the Court approves a completely random seizure and detention of persons and an entry onto private, noncommercial premises by police officers, without any limitations whatever on the officers' discretion or any safeguards against abuse. The Court makes no pretense that its issuance of this maritime writ of assistance is supported by any precedent approving such extraordinary and unregulated powers.[6] Instead, it correctly recognizes that

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undermine the principle for which I cite the case. *Bain* held that the Fifth Amendment does not permit amendment of an indictment other than by a grand jury; *Salinger* held simply that a trial judge may "amend" an indictment by omitting a charge not supported by the evidence at trial. This unsurprising rule is entirely consistent with anything in either *Bain* or this dissent. It certainly does not in any way contradict *Bain*'s statement that a live, valid indictment is the *sine qua non* of any felony prosecution or sentence.

[6] The closest this Court has ever come to granting such unlimited police discretion is in one narrowly limited situation—that of border searches:

"Travellers may be . . . stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Carroll* v. *United States*, 267 U. S. 132, 154 (1925).

Yet at the same time, we have always stressed the uniqueness of the border-search rule, and have repeatedly pointed out that its rationale cannot acceptably be applied to any other situation:

"It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus

the relevant precedents are those governing searches or stops of vehicles by police on random patrol or at fixed checkpoints. *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973); *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975); *United States* v. *Ortiz*, 422 U. S. 891 (1975); *United States* v. *Martinez-Fuerte*, 428 U. S. 543 (1976); *Delaware* v. *Prouse*, 440 U. S. 648 (1979). But those precedents cannot be read to support or permit today's holding, for not one of them holds or even hints that a police officer on roving patrol may stop, seize, enter, or search any vehicle, vessel, or person at the whim of the officer. Instead, the cases uniformly hold that any stop or search requires probable cause, reasonable suspicion, or another discretion-limiting feature such as the use of fixed checkpoints instead of roving patrols. If we

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subject all persons lawfully using the highways to the inconvenience and indignity of such a search. [T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." *Id.*, at 153–154.

See also, *e. g.*, *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 272–274 (1973).

The Government does not contend that the boarding in this case can be justified as a border search. Accordingly, the Court—correctly—does not argue that either the rule or the rationale of the border-search cases has any bearing on this case. In any event, a border search is, in most instances, a fixed-checkpoint stop, sharing the discretion-limiting features of all such stops. See *United States* v. *Ortiz*, 422 U. S. 891, 894–895 (1975); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 558–559 (1976); *Delaware* v. *Prouse*, 440 U. S. 648, 656–657 (1979); *infra*, at 603–605. When a border search does not occur at a regular port of entry, it can be made only if it is known that there has in fact been a border crossing. See 3 W. LaFave, Search and Seizure §§ 10.5(d), (e) (1978); cf. *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 884 (1975) (Government's power, if any, freely to stop and question aliens cannot affect Fourth Amendment rights of citizens mistaken for aliens). Hence, the border-search rule does not represent any exception to our uniform insistence under the Fourth Amendment that the police may not be loosed upon the populace with no limits on their ability to stop, seize, or search.

are to reach the merits, therefore, our precedents compel an affirmance.

The Court freely admits that the limitations we have imposed on police discretion were necessary to our holdings in the vehicle-stop cases, *ante*, at 588, and that the seizure and boarding at issue in this case cannot pass muster under those precedents, *ibid.* Yet it upholds this seizure, concluding that there are differences between boats and cars sufficient to justify such a blatant departure from solid and recent constitutional precedent.[7] There are three basic flaws in the

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[7] The Court also rests on its assertion that "[i]n a lineal ancestor to the statute at issue here the First Congress clearly authorized the suspicionless boarding of vessels, reflecting its view that such boardings are not contrary to the Fourth Amendment; this gives the statute before us an impressive historical pedigree." *Ante*, at 592; see *ante*, at 584–587. I cannot agree that every statute enacted by the First Congress must be presumed to be constitutional. See *Marsh* v. *Chambers*, 463 U. S. 783, 795 (1983) (BRENNAN, J., dissenting). Even granting this theory of constitutional adjudication, however, the Court's historical analysis is self-refuting. The 1790 statute on which it relies, quoted *ante*, at 584, is by its own terms limited to boardings and searches of ships "*if bound to the United States.*" 1 Stat. 164 (emphasis added). By contrast, § 48 of the Act, which did authorize customs officers to board and search any vessel without regard to location or entry into the country, was expressly limited to vessels in which customs officers had "*reason to suspect* any goods, wares, or merchandise subject to duty shall be concealed." § 48, 1 Stat. 170 (emphasis added); cf. *Carroll*, *supra*, at 150–151. The Court attempts to explain away § 48, reasoning that § 48 authorized searches, whereas § 31 authorized only boardings for document checks. *Ante*, at 585–586, n. 4. Section 31, however, also authorized officers to *search* an inbound ship, with "free access to the cabin, and every other part of a ship or vessel." Unless § 48 (with its express requirement of reasonable suspicion for searches) is to be read out of the Act, § 31's broad grant of authority to board and search without suspicion must be read as applying only to ships entering the country—as the language "if bound to the United States" indicates. The section's further authorization to board and search vessels without suspicion "in any part of the United States" meant merely that customs officials could wait to search a ship until it reached port. In short, § 31 was a *border-search* statute, applicable only to vessels entering the country. See also n. 6, *supra*. Thus, as we recognized in *Maul* v. *United*

Court's reasoning. First, the Court's exclusive focus on available tools of investigation puts the cart before the horse; it completely overlooks the primary and overarching concern that has guided our previous decisions—our unqualified and consistent rejection of any "standardless and unconstrained discretion," *Prouse*, *supra*, at 661, that would subject our liberties to the whim of an individual police officer in the field. Second, the supposed factual differences are either insubstantial or of the Government's own making. And third, it is a non sequitur to reason that because the police in a given situation claim to need more intrusive and arbitrary enforcement tools than the Fourth Amendment has been held to permit, we may therefore dispense with the Fourth Amendment's protections.

A

In *Almeida-Sanchez*, we held that police officers on a roving patrol must have probable cause to suspect that a vehicle contains illegal aliens or contraband before they may search it. In *Ortiz*, we held that the same rule governs searches of vehicles at fixed checkpoints. In either case, the severity of the intrusion and the selective discretion necessarily exercised by police in the field require that that discretion be limited by a requirement of probable cause:

> "This degree of discretion to search private automobiles is not consistent with the Fourth Amendment. A search, even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court has always regarded probable cause as the minimum requirement for a lawful search." *Ortiz*, *supra*, at 896 (footnote omitted).

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*States*, 274 U. S. 501 (1927), it was not until the enactment of the present statute *in 1922* that Congress purported to authorize suspicionless boardings of vessels without regard to whether there had been any border crossing. *Id.*, at 505; see *id.*, at 521, 528–529 (Brandeis, J., concurring). Where, then, is the "impressive historical pedigree"?

In *Brignoni-Ponce* and *Martinez-Fuerte*, the Court addressed the limits on police officers' power to stop vehicles and question the occupants, without searching either vehicles or occupants. These cases were not governed by the probable-cause requirement of *Almeida-Sanchez* and *Ortiz* because the police procedures in question were considerably less intrusive than full vehicle searches. Nevertheless, we continued to insist, as we have always done, that there must be some meaningful check on the arbitrary discretion of the police.

In *Brignoni-Ponce*, the stop in question was made by Border Patrol officers on a roving patrol. We held that such stops are permitted only if the police have a reasonable suspicion that the vehicle contains illegal aliens. As in the vehicle-search cases, we rested primarily on the Fourth Amendment's command that police discretion be limited by independent constitutional constraints:

> "We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops. [T]he reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government. . . . To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. [I]f we approved the Government's position in this case, Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law." 422 U. S., at 882–883 (footnote omitted).

In *Martinez-Fuerte*, we held that Border Patrol officers may stop vehicles and question their occupants at fixed checkpoints without probable cause or reasonable suspicion. As the Court recognizes, *ante*, at 588–589, the reason why reasonable suspicion was required in *Brignoni-Ponce* but not in *Martinez-Fuerte* was the additional feature in the latter case that the stops took place at fixed checkpoints rather than on roving patrols. Fixed checkpoints have two major advantages, for Fourth Amendment purposes, over roving patrols: They decrease somewhat the intrusiveness of the stop, and they significantly channel and limit the discretion of the officers and the consequent potential for abuse.

> "[W]e view checkpoint stops in a different light because the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop. . . .
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> . . . . . .
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> "[C]heckpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops." 428 U. S., at 558–559.

See also *Ortiz*, 422 U. S., at 894–895.

In *Prouse*, we reaffirmed our holdings in *Brignoni-Ponce* and *Martinez-Fuerte* that stops of vehicles are permissible

*only* if made either at fixed checkpoints or on reasonable suspicion. *Prouse* involved a random, roving-patrol stop of a vehicle for a spot license-and-registration check. As in the prior cases, we relied on the more intrusive nature of random patrols as compared with fixed-checkpoint stops, 440 U. S., at 657, and on the ever-present danger of arbitrariness and abuse posed by the completely discretionary nature of random roving-patrol stops:

> "The marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure—limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable—at the unbridled discretion of law enforcement officials. To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion 'would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . .' *Terry* v. *Ohio*, 392 U. S. [1,] 22 [(1968)]. When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations—or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered—we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver. This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Id.*, at 661 (footnote omitted).

In short, every one of the vehicle-stop precedents on which the Court relies, from *Almeida-Sanchez* to *Prouse*, requires

that a stop or search be supported by either probable cause, reasonable suspicion, or another discretion-limiting feature such as use of fixed checkpoints. But the Court purports to draw from these cases a rule that the police may board any boat, at any time, on any "waters offering ready access to the open sea," *ante*, at 588,[8] with nothing more to guide them than their unsupported hunch, whim, or even their desire to harass or to flaunt their authority. The boarding at issue here was made by officers on a roving patrol, concededly without any reasonable suspicion of criminal activity. To uphold it is flatly contrary to the square holdings of our cases.

Nor can this departure from *Brignoni-Ponce* and *Prouse* be justified by a difference in degree of intrusiveness. The Court asserts that its rule involves "only a modest intrusion," *ante*, at 592 (although, the Court admits, not a "minimal" one, *ante*, at 593). The intrusion is modest, if the comparison is made to a full, detailed search of a vessel and its occupants, which could only be made on probable cause. But the Court's bland assertion masks the fact that the intrusion at issue here is significantly more severe than those in *Brignoni-Ponce* and *Prouse*, which we held permissible only on reasonable suspicion. As in those cases, the stop is made on a roving patrol, so that it cannot claim the more limited intrusiveness of fixed checkpoints. Also as in those cases, there is a large noncriminal maritime traffic that may henceforth be stopped and boarded at random in nearly any waters, at any time, without any reason to suspect that there has been any violation of law. Unlike the earlier cases, however, it does not involve a mere stopping and questioning, cf. *infra*, at 608, but an actual boarding of a private vessel—more similar to entry of a private house than to the

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[8] Since the Court's holding rests primarily on the need to suppress maritime smuggling, it is necessarily limited geographically to waters accessible to the open sea. The same reasoning requires that today's rule be limited to such vessels as are capable of having entered the country from the open sea.

stops in *Brignoni-Ponce* and *Prouse*. Further, despite the Court's enthusiasm for identifying differences between boats and cars, it overlooks one obvious difference—the greater expectation of privacy that persons enjoy on boats. A boat, unlike a car, quite often serves as an actual dwelling for its owners, as was apparently true in this case. Even where the owners do not live aboard full-time, a boat may serve essentially the same function as a summer vacation cottage—a residence, albeit a temporary one. In either instance, the occupant would quite reasonably suppose that he was entitled to remain undisturbed by arbitrary government authority. The Court, however, sweeps this expectation aside without a thought.[9]

Today's holding thus runs roughshod over the previously well-established principle that the police may not be issued a free commission to invade any private premises without a requirement of probable cause, reasonable suspicion, or some other limit on their discretion or abuse thereof. Here, as in

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[9] The Court points to the system of safety and documentation regulation that vessels must obey. As we pointed out in *Prouse*, however, the same is true of automobiles, but that does not justify random stops of cars without reasonable suspicion.

"The 'grave danger' of abuse of discretion does not disappear simply because the automobile is subject to state regulation resulting in numerous instances of police-citizen contact. '[I]f the government intrudes . . . the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards.'" 440 U. S., at 662 (citations omitted), quoting *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 312–313 (1978).

The Court also disparages the significance of the privacy interest in boats by pointing out that, in this case, a private pleasure boat turned out to be engaged in the business of smuggling. *Ante*, at 592, n. 6. This is precisely the sort of *post hoc* reasoning, justifying a Fourth Amendment violation by its results, against which we have warned. *E. g.*, *Martinez-Fuerte*, 428 U. S., at 565. Presumably the Court would not assert that a random, warrantless entry of a private residence on land would be upheld because it turned out that the residence was also being used for some criminal enterprise.

*Prouse*, "[I] cannot conceive of any legitimate basis upon which [a customs officer] could decide that [boarding] a particular [vessel] for a spot check would be more productive than [boarding] any other [vessel]. This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." 440 U. S., at 661.

B

The Court attempts to justify its departure from *Brignoni-Ponce* and *Prouse* by pointing to supposed special law enforcement problems in the maritime setting. I do not accept the premise that such problems permit us to dispense with the Fourth Amendment's protections against arbitrary police intrusion, see Part II–C, *infra*. In any event, I am unpersuaded that any sufficiently severe problems have been demonstrated here.

The Court asserts that it is not practicable on water for the police to set up fixed checkpoints such as we approved in *Martinez-Fuerte* and *Prouse*. The boarding in this case, however, took place in the Calcasieu Ship Channel, "a separate thoroughfare . . . which all vessels moving between Lake Charles and the open sea of the Gulf must traverse." *Ante*, at 582. The Channel bears a strong functional resemblance to the limited-access interstate highways on which the Border Patrol sets up its fixed checkpoints, located so as to funnel most of the relevant traffic through the checkpoints. See *Martinez-Fuerte*, 428 U. S., at 553. As an opportunity for effective fixed-point inspection, it compares quite favorably to anything likely to have been available to the New Castle County, Delaware, patrolman who made the illegal random stop in *Prouse*. Yet, despite the predictable difficulty of setting up effective checkpoints or even temporary roadblocks in an ordinary urban or suburban network of highways and streets, we held in *Prouse* that random, roving-

patrol traffic stops of vehicles are unconstitutional in any setting. There is no justification for departing from that rule in our considerably less extensive system of inland navigable waterways.[10]

Checkpoints aside, there is no apparent reason why random stops are really necessary for adequate law enforcement. In *Prouse*, we noted that many, if not all, safety defects are readily detectable by visual means, without any necessity for random stops. 440 U. S., at 660. The same is true of vessels. We also noted that the law enforcement interests at stake could be substantially vindicated by stopping drivers who commit traffic violations. *Id.*, at 659–660. Again, the same is true of vessels. "Smuggling is commonly attended by violation of the navigation laws." *Maul* v. *United States*, 274 U. S. 501, 525 (1927) (Brandeis, J., concurring). Similarly, as we noted in *Brignoni-Ponce:* "[T]he nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators. Consequently, a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference." 422 U. S., at 883. The case law shows that the same is true of the maritime smuggling trade.[11]

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[10] The Court argues that fixed checkpoints are impossible on the open sea. *Ante*, at 589. Assuming this is true, however, it cannot provide any explanation of why random, suspicionless stops are necessary or permissible on inland waterways such as the Calcasieu Ship Channel. Nor does it explain why, if random stops by roving patrols are necessary, they could not be subjected to some sort of neutral selection system that would decrease the opportunity for arbitrariness or harassment. See *Prouse*, 440 U. S., at 663–664 (BLACKMUN, J., concurring).

[11] *E. g.*, *United States* v. *Glen-Archila*, 677 F. 2d 809, 813–814 (CA11 1982); *United States* v. *Green*, 671 F. 2d 46, 53–54 (CA1 1982); *Blair* v. *United States*, 665 F. 2d 500, 505 (CA4 1981); *United States* v. *Streifel*, 665 F. 2d 414, 424 (CA2 1981); *United States* v. *D'Antignac*, 628 F. 2d 428, 434 (CA5 1980); *United States* v. *Williams*, 617 F. 2d 1063, 1077, 1085 (CA5

The Court further rests on the fact that vessels, unlike cars, do not carry uniform license plates giving visible evidence of compliance with registration laws. It identifies no reason, however, why that is a necessary or permanent state of affairs. It would be manifestly easy and comparatively inexpensive to provide boats with such means of identification. It is unseemly at best for the Government to refrain from implementing a simple, effective, and unintrusive law enforcement device, and then to argue to this Court that the absence of such a device justifies an unprecedented invasion of constitutionally guaranteed liberties. Moreover, assuming that some check of documents is necessary, the Court does not explain why that need invariably requires the police to board a vessel, rather than to come alongside or to request that someone from the vessel come on board the police vessel. Use of ship-to-shore radio, too, contributes considerably to the Government's ability to keep track of documentation and registration matters. Cf. *Florida* v. *Royer*, 460 U. S. 491, 504–506 (1983) (plurality opinion); *id.*, at 511–512, and n. (BRENNAN, J., concurring in result).

C

Even if the Court could make a more persuasive showing that there are important differences between vehicles and vessels as to the difficulty of law enforcement, I would not agree with its holding. It simply does not follow that, because the police in particular situations dislike limitations placed on their powers of search and seizure, we may therefore sanction an unprecedented invasion of constitutionally protected liberties.

> "The needs of law enforcement stand in constant tension with the Constitution's protection of the individual

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1980); *United States* v. *Zurosky*, 614 F. 2d 779, 790 (CA1 1979); *United States* v. *Serrano*, 607 F. 2d 1145, 1149 (CA5 1979); *United States* v. *Castro*, 596 F. 2d 674, 675–676 (CA5 1979); *United States* v. *Whitmire*, 595 F. 2d 1303, 1306 (CA5 1979).

against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards. It is well to recall the words of Mr. Justice Jackson, soon after his return from the Nuremberg trials:

"'These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.' *Brinegar* v. *United States*, 338 U. S. 160, 180 [(1949)] (Jackson, J., dissenting)." *Almeida-Sanchez*, 413 U. S., at 273–274.

## III

In dissent in *Martinez-Fuerte*, I expressed my fear that the Court's decision was part of a "continuing evisceration of Fourth Amendment protections against unreasonable searches and seizures." 428 U. S., at 567. The majority chided me for my rhetoric and my "unwarranted concern," pointing out that its holding was expressly and narrowly limited: "Our holding today, approving routine stops for brief questioning . . . is confined to permanent checkpoints." *Id.*, at 566, n. 19. Today the Court breaks that promise. I dissent.

# FIRST NATIONAL CITY BANK *v.* BANCO PARA EL COMERCIO EXTERIOR DE CUBA

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

No. 81-984. Argued March 28, 1983—Decided June 17, 1983

In 1960, the Cuban Government established respondent to serve as an official autonomous credit institution for foreign trade with full juridical capacity of its own. Respondent sought to collect on a letter of credit issued by petitioner bank in respondent's favor in support of a contract for delivery of Cuban sugar to a buyer in the United States. Shortly thereafter, all of petitioner's assets in Cuba were seized and nationalized by the Cuban Government. When respondent brought suit on the letter of credit in Federal District Court, petitioner counterclaimed, asserting a right to set off the value of its seized Cuban assets. After the suit was brought but before petitioner filed its counterclaim, respondent was dissolved and its capital was split between Banco Nacional, Cuba's central bank, and certain foreign trade enterprises or houses of the Cuban Ministry of Foreign Trade. Rejecting respondent's contention that its separate juridical status shielded it from liability for the acts of the Cuban Government, the District Court held that since the value of petitioner's Cuban assets exceeded respondent's claim, the setoff could be granted in petitioner's favor, and therefore dismissed the complaint. The Court of Appeals reversed, holding that respondent was not an alter ego of the Cuban Government for the purpose of petitioner's counterclaim.

*Held:* Under principles of equity common to international law and federal common law, petitioner may apply the claimed setoff, notwithstanding the fact that respondent was established as a separate juridical entity. Pp. 619–633.

(a) The Foreign Sovereign Immunities Act of 1976 does not control the determination of whether petitioner may apply the setoff. That Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among such instrumentalities. Pp. 619–621.

(b) Duly created instrumentalities of a foreign state are to be accorded a presumption of independent status. This presumption may be overcome, however, where giving effect to the corporate form would permit a foreign state to be the sole beneficiary of a claim pursued in United States courts while escaping liability to the opposing party imposed by international law. Pp. 623–630.

(c) Thus, here, giving effect to respondent's juridical status, even though it has long been dissolved, would permit the real beneficiary of such an action, the Cuban Government, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of petitioner's assets in violation of international law. The corporate form will not be blindly adhered to where doing so would cause such an injustice. Having dissolved respondent and transferred its assets to entities that may be held liable on petitioner's counterclaim, Cuba cannot escape liability for acts in violation of international law simply by retransferring assets to separate juridical entities. To hold otherwise would permit governments to avoid the requirements of international law simply by creating juridical entities whenever the need arises. Pp. 630–633.

658 F. 2d 913, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined, and in Parts I, II, III–A, and III–B of which BRENNAN, BLACKMUN, and STEVENS, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, and BLACKMUN, JJ., joined, *post*, p. 634.

*Henry Harfield* argued the cause for petitioner. With him on the briefs were *John E. Hoffman, Jr.*, and *Charles B. Manuel, Jr.*

*Richard G. Wilkins* argued the cause *pro hac vice* for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee, Assistant Attorney General McGrath, Deputy Solicitor General Geller, Geoffrey S. Stewart, Davis R. Robinson, Fred L. Morrison,* and *Ronald W. Kleinman.*

*Michael Krinsky* argued the cause for respondent. With him on the brief were *Victor Rabinowitz, Judith Levin,* and *Jules Lobel.**

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**John J. McGrath, Jr.*, filed a brief for Kalamazoo Spice Extraction Co. as *amicus curiae* urging reversal.

*Richard F. Bellman* filed a brief for the International Center for Law in Development as *amicus curiae* urging affirmance.

JUSTICE O'CONNOR delivered the opinion of the Court.

In 1960 the Government of the Republic of Cuba established respondent Banco Para el Comercio Exterior de Cuba (Bancec) to serve as "[a]n official autonomous credit institution for foreign trade . . . with full juridical capacity . . . of its own . . . ." Law No. 793, Art. 1 (1960), App. to Pet. for Cert. 2d. In September 1960 Bancec sought to collect on a letter of credit issued by petitioner First National City Bank (now Citibank) in its favor in support of a contract for delivery of Cuban sugar to a buyer in the United States. Within days after Citibank received the request for collection, all of its assets in Cuba were seized and nationalized by the Cuban Government. When Bancec brought suit on the letter of credit in United States District Court, Citibank counterclaimed, asserting a right to set off the value of its seized Cuban assets. The question before us is whether Citibank may obtain such a setoff, notwithstanding the fact that Bancec was established as a separate juridical entity. Applying principles of equity common to international law and federal common law, we conclude that Citibank may apply a setoff.

I

Resolution of the question presented by this case requires us to describe in some detail the events giving rise to the current controversy.

Bancec was established by Law No. 793, of April 25, 1960, as the legal successor to the Banco Cubano del Comercio Exterior (Cuban Foreign Trade Bank), a trading bank established by the Cuban Government in 1954 and jointly owned by the Government and private banks. Law No. 793 contains detailed "By-laws" specifying Bancec's purpose, structure, and administration. Bancec's stated purpose was "to contribute to, and collaborate with, the international trade policy of the Government and the application of the measures concerning foreign trade adopted by the 'Banco Nacional de Cuba,'" Cuba's central bank (Banco Nacional). Art. 1,

No. VIII, App. to Pet. for Cert. 4d. Bancec was empowered to act as the Cuban Government's exclusive agent in foreign trade. The Government supplied all of its capital and owned all of its stock. The General Treasury of the Republic received all of Bancec's profits, after deduction of amounts for capital reserves. A Governing Board consisting of delegates from Cuban governmental ministries governed and managed Bancec. Its president was Ernesto Che Guevara, who also was Minister of State and president of Banco Nacional. A General Manager appointed by the Governing Board was charged with directing Bancec's day-to-day operations in a manner consistent with its enabling statute.

In contracts signed on August 12, 1960, Bancec agreed to purchase a quantity of sugar from El Institutio Nacional de Reforma Agraria (INRA), an instrumentality of the Cuban Government which owned and operated Cuba's nationalized sugar industry, and to sell it to the Cuban Canadian Sugar Company. The latter sale agreement was supported by an irrevocable letter of credit in favor of Bancec issued by Citibank on August 18, 1960, which Bancec assigned to Banco Nacional for collection.

Meanwhile, in July 1960 the Cuban Government enacted Law No. 851, which provided for the nationalization of the Cuban properties of United States citizens. By Resolution No. 2 of September 17, 1960, the Government ordered that all of the Cuban property of three United States banks, including Citibank, be nationalized through forced expropriation. The "Bank Nationalization Law," Law No. 891, of October 13, 1960, declared that the banking function could be carried on only by instrumentalities created by the State, and ordered Banco Nacional to effect the nationalization.

On or about September 15, 1960, before the banks were nationalized, Bancec's draft was presented to Citibank for payment by Banco Nacional. The amount sought was $193,280.30 for sugar delivered at Pascagoula, Miss. On September 20, 1960, after its branches were nationalized,

Citibank credited the requested amount to Banco Nacional's account and applied the balance in Banco Nacional's account as a setoff against the value of its Cuban branches.

On February 1, 1961, Bancec brought this diversity action to recover on the letter of credit in the United States District Court for the Southern District of New York.

On February 23, 1961, by Law No. 930, Bancec was dissolved and its capital was split between Banco Nacional and "the foreign trade enterprises or houses of the Ministry of Foreign Trade," which were established by Law No. 934 the same day.[1] App. to Pet. for Cert. 16d. All of Bancec's rights, claims, and assets "peculiar to the banking business" were vested in Banco Nacional, which also succeeded to its banking obligations. *Ibid.* All of Bancec's "trading functions" were to be assumed by "the foreign trade enterprises or houses of the Ministry of Foreign Trade." By Resolution No. 1, dated March 1, 1961, the Ministry of Foreign Trade created Empresa Cubana de Exportaciones (Cuban Enterprise for Exports) (Empresa), which was empowered to conduct all commercial export transactions formerly conducted by Bancec "remaining subrogated in the rights and obligations of said bank [Bancec] as regards the commercial export activities." App. to Pet. for Cert. 26d. Three hundred thousand of the two million pesos distributed to the Ministry of Foreign Trade when Bancec was dissolved were assigned to Empresa. *Id.*, at 27d. By Resolution No. 102, dated December 31, 1961, and Resolution No. 1, dated January 1, 1962, Empresa was dissolved and Bancec's rights relating to foreign commerce in sugar were assigned to Empresa Cu-

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[1] Law No. 934 provides that "[a]ll the functions of a mercantile character heretofore assigned to [Bancec] are hereby transferred and vested in the foreign trade enterprises or houses set up hereunder, which are subrogated to the rights and obligations of said former Bank in pursuance of the assignment of those functions ordered by the Minister." App. to Pet. for Cert. 24d.

bana Exportadora de Azucar y sus Derivados (Cubazucar), a state trading company, which is apparently still in existence.

On March 8, 1961, after Bancec had been dissolved, Citibank filed its answer, which sought a setoff for the value of its seized branches, not an affirmative recovery of damages.[2] On July 7, 1961, Bancec filed a stipulation signed by the parties stating that Bancec had been dissolved and that its claim had been transferred to the Ministry of Foreign Trade, and agreeing that the Republic of Cuba may be substituted as plaintiff. The District Court approved the stipulation, but no amended complaint was filed.

Apparently the case lay dormant until May 1975, when respondent filed a motion seeking an order substituting Cubazucar as plaintiff. The motion was supported by an affidavit by counsel stating that Bancec's claim had passed through the Ministry of Foreign Trade and Empresa to Cubazucar, all by operation of the laws and resolutions cited above. Counsel for petitioner opposed the motion, and the District Court denied it in August 1975, stating that "to permit such a substitution . . . would only multiply complications in this already complicated litigation." App. 160.

A bench trial was held in 1977,[3] after which the District

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[2] Citibank's answer alleged that the suit was "brought by and for the benefit of the Republic of Cuba by and through its agent and wholly-owned instrumentality, . . . which is in fact and law and in form and function an integral part of and indistinguishable from the Republic of Cuba." App. 113.

[3] The bulk of the evidence at trial was directed to the question whether the value of Citibank's confiscated branches exceeded the amount Citibank had already recovered from Cuba, including a setoff it had successfully asserted in *Banco Nacional de Cuba* v. *First National City Bank*, 478 F. 2d 191 (CA2 1973) *(Banco I)*, the decision on remand from this Court's decision in *First National City Bank* v. *Banco Nacional de Cuba*, 406 U. S. 759 (1972). Only one witness, Raul Lopez, testified on matters touching upon the question presented. (A second witness, Juan Sanchez, described the operations of Bancec's predecessor. App. 185–186.) Lopez, who was called by Bancec, served as a lawyer for Banco Nacional from 1953 to 1965, when he went to work for the Foreign Trade Ministry. He testified that

Court[4] granted judgment in favor of Citibank. 505 F. Supp. 412 (1980). The court rejected Bancec's contention that its separate juridical status shielded it from liability for the acts of the Cuban Government.

> "Under all of the relevant circumstances shown in this record, . . . it is clear that Bancec lacked an independent existence, and was a mere arm of the Cuban Government, performing a purely governmental function. The control of Bancec was exclusively in the hands of the Government, and Bancec was established solely to further Governmental purposes. Moreover, Bancec was totally dependent on the Government for financing and required to remit all of its profits to the Government.
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> . . . . . .
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> "Bancec is not a mere private corporation, the stock of which is owned by the Cuban Government, but an agency of the Cuban Government in the conduct of the sort of matters which even in a country characterized by private capitalism, tend to be supervised and managed by Government. Where the equities are so strong in

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"Bancec was an autonomous organization that was supervised by the Cuban Government but not controlled by it." *Id.*, at 197. According to Lopez, under Cuban law Bancec had independent legal status, and could sue and be sued. Lopez stated that Bancec's capital was supplied by the Cuban Government and that its net profits, after reserves, were paid to Cuba's Treasury, but that Bancec did not pay taxes to the Government. *Id.*, at 196.

The District Court also took into evidence translations of the Cuban statutes and resolutions, as well as the July 1961 stipulation for leave to file a motion to file an amended complaint substituting the Republic of Cuba as plaintiff. The court stated that the stipulation would be taken "for what it is worth," and acknowledged respondent's representation that it was based on an "erroneous" interpretation of Cuba's law. *Id.*, at 207–209.

[4] Judge van Pelt Bryan, before whom the case was tried, died before issuing a decision. With the parties' consent, Judge Brieant decided the case based on the record of the earlier proceedings. 505 F. Supp. 412, 418 (1980).

favor of the counter-claiming defendants, as they are in this case, the Court should recognize the practicalities of the transactions. . . . The Court concludes that Bancec is an *alter ego* of the Cuban Government." *Id.*, at 427–428.

Without determining the exact value of Citibank's assets seized by Cuba, the court held that "the value of the confiscated branches . . . substantially exceeds the sums already recovered, and therefore the set-off pleaded here may be granted in full in favor of Citibank." *Id.*, at 467. It therefore entered judgment dismissing the complaint.[5]

The United States Court of Appeals for the Second Circuit reversed. 658 F. 2d 913 (1981). While expressing agreement with the District Court's "descriptions of Bancec's functions and its status as a wholly-owned instrumentality of the Cuban government," the court concluded that "Bancec was

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[5] The District Court stated that the events surrounding Bancec's dissolution "naturally inject a question of 'real party in interest' into the discussion of Bancec's claim," but it attached "no significance or validity to arguments based on that concept." *Id.*, at 425. It indicated that when Bancec was dissolved, the claim on the letter of credit was "the sort of asset, right and claim peculiar to the banking business, and accordingly, probably should be regarded as vested in Banco Nacional . . . ." *Id.*, at 424. Noting that the Court of Appeals, in *Banco I*, had affirmed a ruling that Banco Nacional could be held liable by way of setoff for the value of Citibank's seized Cuban assets, the court concluded:

"[T]he devolution of [Bancec's] claim, however viewed, brings it into the hands of the Ministry, or Banco Nacional, each an *alter ego* of the Cuban Government. . . . [W]e accept the present contention of plaintiff's counsel that the order of this Court of July 6th [1961] permitting, but apparently not requiring, the service of an amended complaint in which the Republic of Cuba itself would appear as a party plaintiff in lieu of Bancec was based on counsel's erroneous assumption, or an erroneous interpretation of the laws and resolutions providing for the devolution of the assets of Bancec. Assuming this to be true, it is of no moment. The Ministry of Foreign Trade is no different than the Government of which its minister is a member." 505 F. Supp., at 425 (emphasis in original).

not an alter ego of the Cuban government for the purpose of [Citibank's] counterclaims." *Id.*, at 917. It stated that, as a general matter, courts would respect the independent identity of a governmental instrumentality created as "a separate and distinct juridical entity under the laws of the state that owns it"—except "when the subject matter of the counterclaim assertible against the state is state conduct in which the instrumentality had a key role." *Id.*, at 918. As an example of such a situation the Court of Appeals cited *Banco Nacional de Cuba* v. *First National City Bank*, 478 F. 2d 191 (CA2 1973), in which it had ruled that Banco Nacional could be held liable by way of setoff for the value of Citibank's seized Cuban assets because of the role *it* played in the expropriations. But the court declined to hold that "a trading corporation wholly owned by a foreign government, but created and operating as a separate juridical entity, is an alter ego of that government for the purpose of recovery for wrongs of the government totally unrelated to the operations, conduct or authority of the instrumentality." 658 F. 2d, at 920.[6]

Citibank moved for rehearing, arguing, *inter alia*, that the panel had ignored the fact that Bancec had been dissolved in February 1961. The motion, and a suggestion of rehearing en banc, were denied. This Court granted certiorari. 459 U. S. 942 (1982). We reverse, and remand the case for further proceedings.

## II

### A

As an initial matter, Bancec contends that the Foreign Sovereign Immunities Act of 1976, 28 U. S. C. §§ 1602–1611 (FSIA), immunizes an instrumentality owned by a foreign government from suit on a counterclaim based on actions

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[6] In a footnote, the Court of Appeals referred to Bancec's dissolution and listed its successors, but its opinion attached no significance to that event. 658 F. 2d, at 916, n. 4.

taken by that government. Bancec correctly concedes that, under 28 U. S. C. § 1607(c),[7] an instrumentality of a foreign state bringing suit in a United States court is not entitled to immunity "with respect to any counterclaim . . . to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the [instrumentality]." It contends, however, that as a substantive matter the FSIA prohibits holding a foreign instrumentality owned and controlled by a foreign government responsible for actions taken by that government.

We disagree. The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state. Section 1606 of the FSIA provides in relevant part that "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity . . . , the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances . . . ." The House Report on the FSIA states:

> "The bill is not intended to affect the substantive law of liability. Nor is it intended to affect . . . the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is

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[7] In relevant part, 28 U. S. C. § 1607 provides:

"In any action brought by a foreign state . . . in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

. . . . . .

"(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state."

As used in 28 U. S. C. § 1607, a "foreign state" includes an "agency or instrumentality of a foreign state . . . ." 28 U. S. C. § 1603(a).

Section 1607(c) codifies our decision in *National City Bank* v. *Republic of China*, 348 U. S. 356 (1955). See H. R. Rep. No. 94–1487, p. 23 (1976).

liable in whole or in part for the claimed wrong." H. R. Rep. No. 94–1487, p. 12 (1976).[8]

Thus, we conclude that the FSIA does not control the determination of whether Citibank may set off the value of its seized Cuban assets against Bancec's claim. Nevertheless, our resolution of that question is guided by the policies articulated by Congress in enacting the FSIA. See *infra*, at 627–628.

B

We must next decide which body of law determines the effect to be given to Bancec's separate juridical status. Bancec contends that internationally recognized conflict-of-law principles require the application of the law of the state that establishes a government instrumentality—here Cuba—to determine whether the instrumentality may be held liable for actions taken by the sovereign.

We cannot agree. As a general matter, the law of the state of incorporation normally determines issues relating to the *internal* affairs of a corporation. Application of that body of law achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation. See Restatement (Second) of Conflict of Laws § 302, Comments *a* and *e* (1971). Cf. *Cort* v. *Ash*, 422 U. S. 66, 84 (1975). Different conflicts principles apply, however, where the rights of third parties *external* to the corporation are at issue. See Restatement (Second) of Conflict of Laws, *supra*, § 301.[9] To

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[8] See also *id.*, at 28 (in deciding whether property in the United States of a foreign state is immune from attachment and execution under 28 U. S. C. § 1610(a)(2), "[t]he courts will have to determine whether property 'in the custody of' an agency or instrumentality is property 'of' the agency or instrumentality, whether property held by one agency should be deemed to be property of another, [and] whether property held by an agency is property of the foreign state").

[9] See also Hadari, The Choice of National Law Applicable to the Multinational Enterprise and the Nationality of Such Enterprises, 1974 Duke L. J. 1, 15–19.

give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts.[10] We decline to permit such a result.[11]

Bancec contends in the alternative that international law must determine the resolution of the question presented. Citibank, on the other hand, suggests that federal common law governs. The expropriation claim against which Bancec

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[10] Cf. *Anderson* v. *Abbott*, 321 U. S. 349, 365 (1944) (declining to apply the law of the State of incorporation to determine whether a banking corporation complied with the requirements of federal banking laws because "no State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the federal policy concerning national banks which Congress has announced").

[11] Pointing out that 28 U. S. C. § 1606, see *supra*, at 620, contains language identical to the Federal Tort Claims Act (FTCA), 28 U. S. C. § 2674, Bancec also contends alternatively that the FSIA, like the FTCA, requires application of the law of the forum State—here New York—including its conflicts principles. We disagree. Section 1606 provides that "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity . . . , the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." Thus, where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances. The statute is silent, however, concerning the rule governing the attribution of liability *among* entities of a foreign state. In *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 425 (1964), this Court declined to apply the State of New York's act of state doctrine in a diversity action between a United States national and an instrumentality of a foreign state, concluding that matters bearing on the Nation's foreign relations "should not be left to divergent and perhaps parochial state interpretations." When it enacted the FSIA, Congress expressly acknowledged "the importance of developing a uniform body of law" concerning the amenability of a foreign sovereign to suit in United States courts. H. R. Rep. No. 94–1487, p. 32 (1976). See *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 489 (1983). In our view, these same considerations preclude the application of New York law here.

seeks to interpose its separate juridical status arises under international law, which, as we have frequently reiterated, "is part of our law . . . ." *The Paquete Habana*, 175 U. S. 677, 700 (1900). As we set forth below, see *infra*, at 624–630, and nn. 19, 20, the principles governing this case are common to both international law and federal common law, which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies.

## III

### A

Before examining the controlling principles, a preliminary observation is appropriate. The parties and *amici* have repeatedly referred to the phrases that have tended to dominate discussion about the independent status of separately constituted juridical entities, debating whether "to pierce the corporate veil," and whether Bancec is an "alter ego" or a "mere instrumentality" of the Cuban Government. In *Berkey* v. *Third Avenue R. Co.*, 244 N. Y. 84, 155 N. E. 58 (1926), Justice (then Judge) Cardozo warned in circumstances similar to those presented here against permitting worn epithets to substitute for rigorous analysis.

> "The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Id.*, at 94, 155 N. E., at 61.

With this in mind, we examine briefly the nature of government instrumentalities.[12]

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[12] Although this Court has never been required to consider the separate status of a foreign instrumentality, it has considered the legal status under federal law of United States Government instrumentalities in a number of contexts, none of which are relevant here. See, *e. g.*, *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381 (1939) (determining that

Increasingly during this century, governments throughout the world have established separately constituted legal entities to perform a variety of tasks.[13] The organization and control of these entities vary considerably, but many possess a number of common features. A typical government instrumentality, if one can be said to exist, is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law. The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances. The instrumentality is run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirements with which government agencies must comply.[14]

These distinctive features permit government instrumentalities to manage their operations on an enterprise basis while granting them a greater degree of flexibility and independence from close political control than is generally en-

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Congress did not intend to endow corporations chartered by the Reconstruction Finance Corporation with immunity from suit).

[13] Friedmann, Government Enterprise: A Comparative Analysis, in Government Enterprise: A Comparative Study 303, 306–307 (W. Friedmann & J. Garner eds. 1970). See D. Coombes, State Enterprise: Business or Politics? (1971) (United Kingdom); Dallmayr, Public and Semi-Public Corporations in France, 26 Law & Contemp. Prob. 755 (1961); J. Quigley, The Soviet Foreign Trade Monopoly 48–49, 119–120 (1974); Seidman, Government-sponsored Enterprise in the United States, in The New Political Economy 83, 85 (B. Smith ed. 1975); Supranowitz, The Law of State-Owned Enterprises in a Socialist State, 26 Law & Contemp. Prob. 794 (1961); United Nations, Department of Economic and Social Affairs, Organization, Management and Supervision of Public Enterprises in Developing Countries 63–69 (1974) (hereinafter United Nations Study); A. Walsh, The Public's Business: The Politics and Practices of Government Corporations 313–321 (1978) (Europe).

[14] Friedmann, *supra*, at 334; United Nations Study 63–65.

joyed by government agencies.[15] These same features frequently prompt governments in developing countries to establish separate juridical entities as the vehicles through which to obtain the financial resources needed to make large-scale national investments.

> "[P]ublic enterprise, largely in the form of development corporations, has become an essential instrument of economic development in the economically backward countries which have insufficient private venture capital to develop the utilities and industries which are given priority in the national development plan. Not infrequently, these public development corporations . . . directly or through subsidiaries, enter into partnerships with national or foreign private enterprises, or they offer shares to the public." Friedmann, Government Enterprise: A Comparative Analysis, in Government Enterprise: A Comparative Study 303, 333–334 (W. Friedmann & J. Garner eds. 1970).

Separate legal personality has been described as "an almost indispensable aspect of the public corporation." *Id.*, at 314. Provisions in the corporate charter stating that the instrumentality may sue and be sued have been construed to waive the sovereign immunity accorded to many governmental activities, thereby enabling third parties to deal with the instrumentality knowing that they may seek relief in the courts.[16] Similarly, the instrumentality's assets and liabilities must be treated as distinct from those of its sovereign in

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[15] President Franklin D. Roosevelt described the Tennessee Valley Authority, perhaps the best known of the American public corporations, as "a corporation clothed with the power of Government but possessed of the flexibility and initiative of a private enterprise." 77 Cong. Rec. 1423 (1933). See also J. Thurston, Government Proprietary Corporations in the English-Speaking Countries 7 (1937).

[16] *Id.*, at 43–44. This principle has long been recognized in courts in common-law nations. See *Bank of United States* v. *Planters' Bank of Georgia*, 9 Wheat. 904 (1824); *Tamlin* v. *Hannaford*, [1950] 1 K. B. 18, 24 (C. A.).

order to facilitate credit transactions with third parties. *Id.*, at 315. Thus what the Court stated with respect to private corporations in *Anderson* v. *Abbott*, 321 U. S. 349 (1944), is true also for governmental corporations:

> "Limited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." *Id.*, at 362.

Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee.[17] As a result, the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration would surely be frustrated. Due respect for the actions taken by foreign sovereigns and for principles of comity between nations, see *Hilton* v. *Guyot*, 159 U. S. 113, 163–164 (1895), leads us to conclude—as the courts of Great Britain have concluded in other circumstances[18]—that government

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[17] See Posner, The Rights of Creditors of Affiliated Corporations, 43 U. Chi. L. Rev. 499, 516–517 (1976) (discussing private corporations).

[18] The British courts, applying principles we have not embraced as universally acceptable, have shown marked reluctance to attribute the acts of a foreign government to an instrumentality owned by that government. In *I Congreso del Partido*, [1983] A. C. 244, a decision discussing the so-called "restrictive" doctrine of sovereign immunity and its application to three Cuban state-owned enterprises, including Cubazucar, Lord Wilberforce described the legal status of government instrumentalities:

"State-controlled enterprises, with legal personality, ability to trade and to enter into contracts of private law, though wholly subject to the control of their state, are a well-known feature of the modern commercial scene. The distinction between them, and their governing state, may appear artificial: but it is an accepted distinction in the law of England and other

instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.

We find support for this conclusion in the legislative history of the FSIA. During its deliberations, Congress clearly expressed its intention that duly created instrumentalities of a foreign state are to be accorded a presumption of independent status. In its discussion of FSIA § 1610(b), the provision dealing with the circumstances under which a judgment creditor may execute upon the assets of an instrumentality of a foreign government, the House Report states:

> "Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a

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states. Quite different considerations apply to a state-controlled enterprise acting on government directions on the one hand, and a state, exercising sovereign functions, on the other." *Id.*, at 258 (citation omitted).

Later in his opinion, Lord Wilberforce rejected the contention that commercial transactions entered into by state-owned organizations could be attributed to the Cuban Government. "The status of these organisations is familiar in our courts, and it has never been held that the relevant state is in law answerable for their actions." *Id.*, at 271. See also *Trendtex Trading Corp.* v. *Central Bank of Nigeria*, [1977] Q. B. 529, in which the Court of Appeal ruled that the Central Bank of Nigeria was not an "alter ego or organ" of the Nigerian Government for the purpose of determining whether it could assert sovereign immunity. *Id.*, at 559.

In *C. Czarnikow Ltd.* v. *Rolimpex*, [1979] A. C. 351, the House of Lords affirmed a decision holding that Rolimpex, a Polish state trading enterprise that sold Polish sugar overseas, could successfully assert a defense of *force majeure* in an action for breach of a contract to sell sugar. Rolimpex had defended on the ground that the Polish Government had instituted a ban on the foreign sale of Polish sugar. Lord Wilberforce agreed with the conclusion of the court below that, in the absence of "clear evidence and definite findings" that the foreign government took the action "purely in order to extricate a state enterprise from contractual liability," the enterprise cannot be regarded as an organ of the state. Rolimpex, he concluded, "is not so closely connected with the government of Poland that it is precluded from relying on the ban [on foreign sales] as government intervention. . . ." *Id.*, at 364.

judgment against another, unrelated agency or instrumentality. There are compelling reasons for this. If U. S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U. S. corporations or between a U. S. corporation and its independent subsidiary. However, a court might find that property held by one agency is really the property of another." H. R. Rep. No. 94–1487, pp. 29–30 (1976) (citation omitted).

Thus, the presumption that a foreign government's determination that its instrumentality is to be accorded separate legal status is buttressed by this congressional determination. We next examine whether this presumption may be overcome in certain circumstances.

B

In discussing the legal status of *private* corporations, courts in the United States[19] and abroad,[20] have recognized

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[19] See 1 W. Fletcher, Cyclopedia of the Law of Private Corporations § 41 (rev. perm. ed. 1983):

"[A] corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons." *Id.*, at 389 (footnote omitted).

See generally H. Henn, Handbook of the Law of Corporations § 146 (2d ed. 1970); I. Wormser, Disregard of the Corporate Fiction and Allied Corporation Problems 42–85 (1927).

[20] In *Case Concerning The Barcelona Traction, Light & Power Co.*, 1970 I. C. J. 3, the International Court of Justice acknowledged that, as a matter of international law, the separate status of an incorporated entity may be disregarded in certain exceptional circumstances:

"Forms of incorporation and their legal personality have sometimes not been employed for the sole purposes they were originally intended to serve; sometimes the corporate entity has been unable to protect the rights

that an incorporated entity—described by Chief Justice Marshall as "an artificial being, invisible, intangible, and existing only in contemplation of law"[21]—is not to be regarded as legally separate from its owners in all circumstances. Thus, where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be held liable for the actions of the other. See *NLRB* v. *Deena Artware, Inc.*, 361 U. S. 398, 402–404 (1960). In addition, our cases have long recognized "the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." *Taylor* v. *Standard Gas Co.*, 306 U. S. 307, 322 (1939). See *Pepper* v. *Litton*, 308 U. S. 295, 310 (1939). In

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of those who entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of 'lifting the corporate veil' or 'disregarding the legal entity' has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.

. . . . . .

"In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. . . ." *Id.*, at 38–39.

On the application of these principles by European courts, see Cohn & Simitis, "Lifting the Veil" in the Company Laws of the European Continent, 12 Int'l & Comp. L. Q. 189 (1963); Hadari, The Structure of the Private Multinational Enterprise, 71 Mich. L. Rev. 729, 771, n. 260 (1973).

[21] *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 636 (1819).

particular, the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies. *E. g.*, *Anderson* v. *Abbott*, 321 U. S., at 362–363. And in *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R. Co.*, 417 U. S. 703 (1974), we concluded:

> "Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy. . . . [W]here equity would preclude the shareholders from maintaining an action in their own right, the corporation would also be precluded. . . . [T]he principal beneficiary of any recovery and itself estopped from complaining of petitioners' alleged wrongs, cannot avoid the command of equity through the guise of proceeding in the name of . . . corporations which it owns and controls." *Id.*, at 713 (citations omitted).

C

We conclude today that similar equitable principles must be applied here. In *National City Bank* v. *Republic of China*, 348 U. S. 356 (1955), the Court ruled that when a foreign sovereign asserts a claim in a United States court, "the consideration of fair dealing" bars the state from asserting a defense of sovereign immunity to defeat a setoff or counterclaim. *Id.*, at 365. See 28 U. S. C. § 1607(c). As a general matter, therefore, the Cuban Government could not bring suit in a United States court without also subjecting itself to its adversary's counterclaim. Here there is apparently no dispute that, as the District Court found, and the Court of Appeals apparently agreed, see 658 F. 2d, at 916, n. 4, "the devolution of [Bancec's] claim, however viewed, brings it into the hands of the Ministry [of Foreign Trade], or Banco Nacional," each a party that may be held liable for the expro-

priation of Citibank's assets. 505 F. Supp., at 425.[22] See *Banco Nacional de Cuba* v. *First National City Bank*, 478 F. 2d, at 194. Bancec was dissolved even before Citibank filed its answer in this case, apparently in order to effect "the consolidation and operation of the economic and social conquests of the Revolution," particularly the nationalization of the banks ordered by Law No. 891.[23] Thus, the Cuban Government and Banco Nacional, not any third parties that may

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[22] Pointing to the parties' failure to seek findings of fact in the District Court concerning Bancec's dissolution and its aftermath, Bancec contends that the District Court's order denying its motion to substitute Cubazucar as plaintiff precludes further consideration of the effect of the dissolution. While it is true that the District Court did not hear evidence concerning *which* agency or instrumentality of the Cuban Government, under Cuban law, succeeded to Bancec's claim against Citibank on the letter of credit, resolution of that question has no bearing on our inquiry. We rely only on the fact that Bancec was dissolved by the Cuban Government and its assets transferred to entities that may be held liable on Citibank's counterclaim—undisputed facts readily ascertainable from the statutes and orders offered in the District Court by Bancec in support of its motion to substitute Cubazucar.

[23] Law No. 930, the law dissolving Bancec, contains the following recitations:

"WHEREAS, the measures adopted by the Revolutionary Government in pursuance of the Program of the Revolution have resulted, within a short time, in profound social changes and considerable institutional transformations of the national economy.

"WHEREAS, among these institutional transformations there is one which is specially significant due to its transcendence in the economic and financial fields, which is the nationalization of the banks ordered by Law No. 891, of October 13, 1960, by virtue of which the banking functions will hereafter be the exclusive province of the Cuban Government.

"WHEREAS, the consolidation and the operation of the economic and social conquests of the Revolution require the restructuration into a sole and centralized banking system, operated by the State, constituted by the [Banco Nacional], which will foster the development and stimulation of all productive activities of the Nation through the accumulation of the financial resources thereof, and their most economic and reasonable utilization." App. to Pet. for Cert. 14d–15d.

have relied on Bancec's separate juridical identity, would be the only beneficiaries of any recovery.[24]

In our view, this situation is similar to that in the *Republic of China* case.

> "We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice." 348 U. S., at 361–362 (footnote omitted).[25]

Giving effect to Bancec's separate juridical status in these circumstances, even though it has long been dissolved, would permit the real beneficiary of such an action, the Government of the Republic of Cuba, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of Citibank's assets—a seizure previously held by the Court of Appeals to have violated international law.[26] We decline to adhere blindly to the corporate form where doing so would cause such an injustice. See *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R. Co.*, *supra*, at 713.

Respondent contends, however, that the transfer of Bancec's assets from the Ministry of Foreign Trade or Banco Nacional to Empresa and Cubazucar effectively insulates it

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[24] The parties agree that, under the Cuban Assets Control Regulations, 31 CFR pt. 515 (1982), any judgment entered in favor of an instrumentality of the Cuban Government would be frozen pending settlement of claims between the United States and Cuba.

[25] See also *First National City Bank* v. *Banco Nacional de Cuba*, 406 U. S., at 770–773 (Douglas, J., concurring in result); *Federal Republic of Germany* v. *Elicofon*, 358 F. Supp. 747 (EDNY 1972), aff'd, 478 F. 2d 231 (CA2 1973), cert. denied, 415 U. S. 931 (1974). In *Elicofon*, the District Court held that a separate juridical entity of a foreign state not recognized by the United States may not appear in a United States court. A contrary holding, the court reasoned, "would permit non-recognized governments to use our courts at will by creating 'juridical entities' whenever the need arises." 358 F. Supp., at 757.

[26] See *Banco I*, 478 F. 2d, at 194.

from Citibank's counterclaim. We disagree. Having dissolved Bancec and transferred its assets to entities that may be held liable on Citibank's counterclaim, Cuba cannot escape liability for acts in violation of international law simply by retransferring the assets to separate juridical entities. To hold otherwise would permit governments to avoid the requirements of international law simply by creating juridical entities whenever the need arises. Cf. *Federal Republic of Germany* v. *Elicofon*, 358 F. Supp. 747, 757 (EDNY 1972), aff'd, 478 F. 2d 231 (CA2 1973), cert. denied, 415 U. S. 931 (1974). See n. 25, *supra*. We therefore hold that Citibank may set off the value of its assets seized by the Cuban Government against the amount sought by Bancec.

## IV

Our decision today announces no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded.[27] Instead, it is the product of the application of internationally recognized equitable principles to avoid the injustice that would result from permitting a

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[27] The District Court adopted, and both Citibank and the Solicitor General urge upon the Court, a standard in which the determination whether or not to give effect to the separate juridical status of a government instrumentality turns in part on whether the instrumentality in question performed a "governmental function." We decline to adopt such a standard in this case, as our decision is based on other grounds. We do observe that the concept of a "usual" or a "proper" governmental function changes over time and varies from nation to nation. Cf. *New York* v. *United States*, 326 U. S. 572, 580 (1946) (opinion of Frankfurter, J.) ("To rest the federal taxing power on what is 'normally' conducted by private enterprise in contradiction to the 'usual' governmental functions is too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion"); *id.*, at 586 (Stone, C. J., concurring); *id.*, at 591 (Douglas, J., dissenting). See also Friedmann, The Legal Status and Organization of the Public Corporation, 16 Law & Contemp. Prob. 576, 589–591 (1951).

foreign state to reap the benefits of our courts while avoiding the obligations of international law.[28]

The District Court determined that the value of Citibank's Cuban assets exceeded Bancec's claim. Bancec challenged this determination on appeal, but the Court of Appeals did not reach the question. It therefore remains open on remand. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, concurring in part and dissenting in part.

Today the Court correctly rejects the contention that American courts should readily "pierce the corporate veils" of separate juridical entities established by foreign governments to perform governmental functions. Accordingly, I join Parts I, II, III–A, and III–B of the Court's opinion. But I respectfully dissent from Part III–C, in which the Court endeavors to apply the general principles it has enunciated. Instead I would vacate the judgment and remand the case to the Court of Appeals for further proceedings.

As the Court acknowledges, the evidence presented to the District Court did not focus on the factual issue that the Court now determines to be dispositive. Only a single witness testified on matters relating to Bancec's legal status and operational autonomy. The record before the District Court also included English translations of various Cuban statutes and resolutions, but there was no expert testimony on the

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[28] Bancec does not suggest, and we do not believe, that the act of state doctrine, see, *e. g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398 (1964), precludes this Court from determining whether Citibank may set off the value of its seized Cuban assets against Bancec's claim. Bancec does contend that the doctrine prohibits this Court from inquiring into the motives of the Cuban Government for incorporating Bancec. Brief for Respondent 16–18. We need not reach this contention, however, because our conclusion does not rest on any such assessment.

significance of those foreign legal documents. Finally, as the Court notes, the record includes a July 1961 stipulation of the parties and a May 1975 affidavit by counsel for respondent. *Ante*, at 616–617, n. 3. It is clear to me that the materials of record that have been made available to this Court are not sufficient to enable us to determine the rights of the parties.

The Court relies heavily on the District Court's statement that "the devolution of [Bancec's] claim, however viewed, brings it into the hands of the Ministry [of Foreign Trade], or Banco Nacional." But that statement should not be given dispositive significance, for the District Court made no inquiry into the capacity in which either entity might have taken Bancec's claim. If the Ministry of Foreign Trade held the claim on its own account, arguably the Cuban Government could be subject to Citibank's setoff. But it is clear that the Ministry held the claim for six days at most, during the interval between the promulgation of Laws No. 930 and No. 934 on February 23, 1961, and the issuance of Resolution No. 1 on March 1. It is thus possible that these legal documents reflected a single, integrated plan of corporate reorganization carried out over a 6-day period, which resulted in the vesting of specified assets of Bancec in a new, juridically autonomous corporation, Empresa.[1] Respondent argues

[1] Law No. 930 provided, in part, that Bancec's "trade functions will be assumed by the foreign trade enterprises or houses of the Ministry of Foreign Trade," App. to Pet. for Cert. 16d; App. 104. Law No. 934, correspondingly, stated: "All the functions of a mercantile character heretofore assigned to said Foreign Trade Bank of Cuba are hereby transferred and vested in the foreign trade enterprises or houses set up hereunder, which are subrogated to the rights and obligations of said former Bank in pursuance of the assignment of those functions ordered by the Minister." App. to Pet. for Cert. 24d. The preamble of Resolution No. 1 of 1961, issued on March 1, 1961, explained that Law No. 934 had provided "that all functions of a commercial nature that were assigned to the former Cuban Bank for Foreign Trade are attributed to the enterprises or foreign trade houses which are subrogated in the rights and obligations of said Bank." Nothing in the affidavit filed by respondent in May 1975 elucidates the precise nature of these transactions, or explains how Bancec's former trading functions were exercised during the 6-day interval. App. 132–137.

that the Ministry played the role of a trustee, "entrusted and legally bound to transfer Bancec's assets to the new *empresa* [foreign trade enterprise]. . . . The Republic having acted as a trustee, there could be no counterclaim based upon its acts in an individual capacity." Brief for Respondent 57.

Of course, the Court may have reached a correct assessment of the transactions at issue. But I continue to believe that the Court should not decide factual issues that can be resolved more accurately and effectively by other federal judges, particularly when the record presented to this Court is so sparse and uninformative.[2]

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[2] Nor do I agree that a contrary result "would cause such an injustice." *Ante*, at 632. Petitioner is only one of many American citizens whose property was nationalized by the Cuban Government. It seeks to minimize its losses by retaining $193,280.30 that a purchaser of Cuban sugar had deposited with it for the purpose of paying for the merchandise, which was delivered in due course. Having won this lawsuit, petitioner will simply retain that money. If petitioner's contentions in this case had been rejected, the money would be placed in a fund comprised of frozen Cuban assets, to be distributed equitably among all the American victims of Cuban nationalizations. *Ante*, at 632, n. 24. Even though petitioner has suffered a serious injustice at the hands of the Cuban Government, no special equities militate in favor of giving this petitioner a preference over all other victims simply because of its participation in a discrete, completed, commercial transaction involving the sale of a load of Cuban sugar.

# FLORIDA *v.* CASAL ET AL.

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 81–2318. Argued February 23, 1983—Decided June 17, 1983

Certiorari dismissed. Reported below: 410 So. 2d 152.

*Carolyn M. Snurkowski*, Assistant Attorney General of Florida, argued the cause for petitioner. With her on the briefs was *Jim Smith*, Attorney General.

*Arthur F. McCormick* argued the cause and filed a brief for respondents.

PER CURIAM.

The writ is dismissed as improvidently granted, it appearing that the judgment of the court below rested on independent and adequate state grounds.

CHIEF JUSTICE BURGER, concurring.

The Court today concludes that the Florida Supreme Court relied on independent and adequate state grounds when it affirmed the suppression of over 100 pounds of marihuana discovered aboard a fishing vessel—the evidence upon which respondents' convictions for possession and importation of marihuana were based. The Florida Supreme Court did not expressly declare that its holding rested on state grounds, and the principal state case cited for the probable-cause standard, *Florida* v. *Smith*, 233 So. 2d 396 (1970), is based entirely upon this Court's interpretation of the Fourth Amendment of the Federal Constitution. I write not to challenge today's determination that the state court relied on independent and adequate state grounds, however, but rather to emphasize that this Court has decided that Florida law, and not federal law or any decision of this Court, is responsible for the untoward result in this case.

The two bases of state law upon which the Florida Supreme Court appears to have relied are Art. I, § 12, of the State Constitution and Fla. Stat. § 371.58 (1977), currently codified at Fla. Stat. § 327.56 (1981). Article I, § 12, of the Florida Constitution is similar to the Fourth Amendment of the Federal Constitution. I question that anything in the language of either the Fourth Amendment of the United States Constitution or Art. I, § 12, of the Florida Constitution required suppression of the drugs as evidence. However, the Florida Supreme Court apparently concluded that state law required suppression of the evidence, independent of the Fourth Amendment of the United States Constitution.

The people of Florida have since shown acute awareness of the means to prevent such inconsistent interpretations of the two constitutional provisions. In the general election of November 2, 1982, the people of Florida amended Art. I, § 12, of the State Constitution. That section now provides:

> "This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution."

As amended, that section ensures that the Florida courts will no longer be able to rely on the State Constitution to suppress evidence that would be admissible under the decisions of the Supreme Court of the United States.

In requiring suppression of the evidence, the Florida Supreme Court also may have been relying upon Fla. Stat. § 371.58 (1977), currently codified at Fla. Stat. § 327.56 (1981). That statute permits a state marine patrol officer to board a vessel for a safety inspection only if there is consent

or probable cause to believe a crime is being committed.* The Florida Legislature enacted that statute, and the people of Florida and their representatives have full responsibility for the burden it places on the State's law enforcement officers.

With our dual system of state and federal laws, administered by parallel state and federal courts, different standards may arise in various areas. But when state courts interpret state law to require *more* than the Federal Constitution requires, the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement. The people of Florida have now done so with respect to Art. I, § 12, of the State Constitution; they have it within their power to do so with respect to Fla. Stat. § 327.56 (1981).

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*In contrast, 19 U. S. C. § 1581(a) provides: "Any officer of the customs may at any time go on board of any vessel . . . at any place in the United States or within the customs waters . . . and examine, inspect, and search the vessel . . . and every part thereof. . . ." See *United States* v. *Villamonte-Marquez*, *ante*, p. 579.

# ILLINOIS *v.* LAFAYETTE

## CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

No. 81–1859. Argued April 20, 1983—Decided June 20, 1983

After respondent was arrested for disturbing the peace, he was taken to the police station. There, without obtaining a warrant and in the process of booking him and inventorying his possessions, the police removed the contents of a shoulder bag respondent had been carrying and found amphetamine pills. Respondent was subsequently charged with violating the Illinois Controlled Substances Act, and at a pretrial hearing the trial court ordered suppression of the pills. The Illinois Appellate Court affirmed, holding that the shoulder bag search did not constitute a valid search incident to a lawful arrest or a valid inventory search of respondent's belongings.

*Held:* The search of respondent's shoulder bag was a valid inventory search. Pp. 643–648.

(a) Consistent with the Fourth Amendment, it is reasonable for police to search the personal effects of a person under lawful arrest as part of the routine administrative procedure at a police station incident to booking and jailing the suspect. The justification for such searches does not rest on probable cause, and hence the absence of a warrant is immaterial to the reasonableness of the search. Here, every consideration of orderly police administration—protection of a suspect's property, deterrence of false claims of theft against the police, security, and identification of the suspect—benefiting both the police and the public points toward the appropriateness of the examination of respondent's shoulder bag. Pp. 643–647.

(b) The fact that the protection of the public and of respondent's property might have been achieved by less intrusive means does not, in itself, render the search unreasonable. Even if some less intrusive means existed, it would be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which containers or items may be searched, and which must be sealed without examination as a unit. Pp. 647–648.

99 Ill. App. 3d 830, 425 N. E. 2d 1383, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN, J., joined, *post*, p. 649.

*Michael A. Ficaro*, Assistant Attorney General of Illinois, argued the cause for petitioner. With him on the briefs were *Neil F. Hartigan*, Attorney General, *Tyrone C. Fahner*, former Attorney General, *Paul P. Biebel, Jr.*, First Assistant Attorney General, and *Steven F. Molo*, Assistant Attorney General.

*Peter A. Carusona* argued the cause for respondent. With him on the brief were *Robert Agostinelli* and *Frank W. Ralph.**

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented is whether, at the time an arrested person arrives at a police station, the police may, without obtaining a warrant, search a shoulder bag carried by that person.

I

On September 1, 1980, at about 10 p. m., Officer Maurice Mietzner of the Kankakee City Police arrived at the Town Cinema in Kankakee, Ill., in response to a call about a disturbance. There he found respondent involved in an altercation with the theater manager. He arrested respondent for disturbing the peace, handcuffed him, and took him to the police station. Respondent carried a purse-type shoulder bag on the trip to the station.

At the police station respondent was taken to the booking room; there, Officer Mietzner removed the handcuffs from respondent and ordered him to empty his pockets and place

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*Briefs of *amici curiae* urging reversal were filed by *Solicitor General Lee*, *Assistant Attorney General Jensen*, *Deputy Solicitor General Frey*, and *Elliott Schulder* for the United States; and by *Fred E. Inbau*, *Wayne W. Schmidt*, *James P. Manak*, *Howard G. Berringer*, *Richard J. Brzeczek*, *David Crump*, *Courtney A. Evans*, *Daniel B. Hales*, *James A. Murphy*, and *Evelle J. Younger* for the Chicago Police Department et al.

*Quin Denvir* and *George L. Schraer* filed a brief for the California State Public Defender as *amicus curiae* urging affirmance.

the contents on the counter. After doing so, respondent took a package of cigarettes from his shoulder bag and placed the bag on the counter. Mietzner then removed the contents of the bag, and found 10 amphetamine pills inside the plastic wrap of a cigarette package.

Respondent was subsequently charged with violating § 402(b) of the Illinois Controlled Substances Act, Ill. Rev. Stat., ch. 56½, ¶ 1402(b) (1981), on the basis of the controlled substances found in his shoulder bag. A pretrial suppression hearing was held at which the State argued that the search of the shoulder bag was a valid inventory search under *South Dakota* v. *Opperman*, 428 U. S. 364 (1976). Officer Mietzner testified that he examined the bag's contents because it was standard procedure to inventory "everything" in the possession of an arrested person. App. 15, 16. He testified that he was not seeking and did not expect to find drugs or weapons when he searched the bag, and he conceded that the shoulder bag was small enough that it could have been placed and sealed in a bag, container, or locker for protective purposes. *Id.*, at 15. After the hearing, but before any ruling, the State submitted a brief in which it argued for the first time that the search was valid as a delayed search incident to arrest. Thereafter, the trial court ordered the suppression of the amphetamine pills. *Id.*, at 22.

On appeal, the Illinois Appellate Court affirmed. 99 Ill. App. 3d 830, 425 N. E. 2d 1383 (3d Dist. 1981). It first held that the State had waived the argument that the search was incident to a valid arrest by failing to raise that argument at the suppression hearing. *Id.*, at 832, 425 N. E. 2d, at 1385. However, the court went on to discuss and reject the State's argument: "[E]ven assuming, *arguendo*, that the State has not waived this argument, the stationhouse search of the shoulder bag did not constitute a valid search incident to a lawful arrest." *Id.*, at 833, 425 N. E. 2d, at 1385.

The state court also held that the search was not a valid inventory of respondent's belongings. It purported to dis-

tinguish *South Dakota* v. *Opperman*, *supra*, on the basis that there is a greater privacy interest in a purse-type shoulder bag than in an automobile, and that the State's legitimate interests could have been met in a less intrusive manner, by "sealing [the shoulder bag] within a plastic bag or box and placing it in a secured locker." 99 Ill. App. 3d, at 834–835, 425 N. E. 2d, at 1386. The Illinois court concluded:

> "Therefore, the postponed warrantless search of the [respondent's] shoulder bag was neither incident to his lawful arrest nor a valid inventory of his belongings, and thus, violated the fourth amendment." *Id.*, at 835, 425 N. E. 2d, at 1386.

The Illinois Supreme Court denied discretionary review. App. to Pet. for Cert. 1b. We granted certiorari, 459 U. S. 986 (1982), because of the frequency with which this question confronts police and courts, and we reverse.

## II

The question here is whether, consistent with the Fourth Amendment, it is reasonable for police to search the personal effects of a person under lawful arrest as part of the routine administrative procedure at a police station house incident to booking and jailing the suspect. The justification for such searches does not rest on probable cause, and hence the absence of a warrant is immaterial to the reasonableness of the search. Indeed, we have previously established that the inventory search constitutes a well-defined exception to the warrant requirement. See *South Dakota* v. *Opperman*, *supra*. The Illinois court and respondent rely on *United States* v. *Chadwick*, 433 U. S. 1 (1977), and *Arkansas* v. *Sanders*, 442 U. S. 753 (1979); in the former, we noted that "probable cause to search is irrelevant" in inventory searches and went on to state:

> "This is so because the salutary functions of a warrant simply have no application in that context; the constitu-

tional reasonableness of inventory searches must be determined on other bases." 433 U. S., at 10, n. 5.[1]

A so-called inventory search is not an independent legal concept but rather an incidental administrative step following arrest and preceding incarceration. To determine whether the search of respondent's shoulder bag was unreasonable we must "balanc[e] its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware* v. *Prouse*, 440 U. S. 648, 654 (1979).

In order to see an inventory search in proper perspective, it is necessary to study the evolution of interests along the continuum from arrest to incarceration. We have held that immediately upon arrest an officer may lawfully search the person of an arrestee, *United States* v. *Robinson*, 414 U. S. 218 (1973); he may also search the area within the arrestee's immediate control, *Chimel* v. *California*, 395 U. S. 752 (1969). We explained the basis for this doctrine in *United States* v. *Robinson*, *supra*, where we said:

> "A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest

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[1] See also *United States* v. *Edwards*, 415 U. S. 800 (1974). In that case we addressed *Cooper* v. *California*, 386 U. S. 58 (1967), where the Court sustained a warrantless search of an automobile that occurred a week after its owner had been arrested. We explained *Cooper* in the following manner: "It was no answer to say that the police could have obtained a search warrant, for the Court held the test to be, not whether it was reasonable to procure a search warrant, *but whether the search itself was reasonable*, which it was." 415 U. S., at 807 (emphasis added).

> situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. *It is the fact of the lawful arrest which establishes the authority to search*, and we hold that in the case of a lawful custodial arrest *a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.*" 414 U. S., at 235 (emphasis added).

An arrested person is not invariably taken to a police station or confined; if an arrestee is taken to the police station, that is no more than a continuation of the custody inherent in the arrest status. Nonetheless, the factors justifying a search of the person and personal effects of an arrestee upon reaching a police station but prior to being placed in confinement are somewhat different from the factors justifying an immediate search at the time and place of arrest.

The governmental interests underlying a station-house search of the arrestee's person and possessions may in some circumstances be even greater than those supporting a search immediately following arrest. Consequently, the scope of a station-house search will often vary from that made at the time of arrest. Police conduct that would be impractical or unreasonable—or embarrassingly intrusive—on the street can more readily—and privately—be performed at the station. For example, the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street, but the practical necessities of routine jail administration may even justify taking a prisoner's clothes before confining him, although that step would be rare. This was made clear in *United States* v. *Edwards*, 415 U. S. 800, 804 (1974): "With or without probable cause, the authorities were entitled [at the station house] not only to search [the

arrestee's] clothing but also to take it from him and keep it in official custody."[2]

At the station house, it is entirely proper for police to remove and list or inventory property found on the person or in the possession of an arrested person who is to be jailed. A range of governmental interests supports an inventory process. It is not unheard of for persons employed in police activities to steal property taken from arrested persons; similarly, arrested persons have been known to make false claims regarding what was taken from their possession at the station house. A standardized procedure for making a list or inventory as soon as reasonable after reaching the station house not only deters false claims but also inhibits theft or careless handling of articles taken from the arrested person. Arrested persons have also been known to injure themselves—or others—with belts, knives, drugs, or other items on their person while being detained. Dangerous instrumentalities—such as razor blades, bombs, or weapons—can be concealed in innocent-looking articles taken from the arrestee's possession. The bare recital of these mundane realities justifies reasonable measures by police to limit these risks—either while the items are in police possession or at the time they are returned to the arrestee upon his release. Examining all the items removed from the arrestee's person or possession and listing or inventorying them is an entirely reasonable administrative procedure. It is immaterial whether the police actually fear any particular package or container; the need to protect against such risks arises independently of a particular officer's subjective concerns. See *United States* v. *Robinson*, *supra*, at 235. Finally, inspection of an arrestee's personal property may assist the police in ascertaining or verifying his identity. See 2 W. LaFave, Search and Seizure § 5.3, pp. 306–307 (1978). In short,

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[2] We were not addressing in *Edwards*, and do not discuss here, the circumstances in which a strip search of an arrestee may or may not be appropriate.

every consideration of orderly police administration benefiting both police and the public points toward the appropriateness of the examination of respondent's shoulder bag prior to his incarceration.

Our prior cases amply support this conclusion. In *South Dakota* v. *Opperman*, 428 U. S. 364 (1976), we upheld a search of the contents of the glove compartment of an abandoned automobile lawfully impounded by the police. We held that the search was reasonable because it served legitimate governmental interests that outweighed the individual's privacy interests in the contents of his car. Those measures protected the owner's property while it was in the custody of the police and protected police against possible false claims of theft. We found no need to consider the existence of less intrusive means of protecting the police and the property in their custody—such as locking the car and impounding it in safe storage under guard. Similarly, standardized inventory procedures are appropriate to serve legitimate governmental interests at stake here.

The Illinois court held that the search of respondent's shoulder bag was unreasonable because "preservation of the defendant's property and protection of police from claims of lost or stolen property, 'could have been achieved in a less intrusive manner.' For example, . . . the defendant's shoulder bag could easily have been secured by sealing it within a plastic bag or box and placing it in a secured locker." 99 Ill. App. 3d, at 835, 425 N. E. 2d, at 1386 (citation omitted). Perhaps so, but the real question is not what "could have been achieved," but whether the Fourth Amendment *requires* such steps; it is not our function to write a manual on administering routine, neutral procedures of the station house. Our role is to assure against violations of the Constitution.

The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative "less intrusive" means. In *Cady* v. *Dombrowski*, 413 U. S. 433 (1973), for example, we upheld the search of

the trunk of a car to find a revolver suspected of being there. We rejected the contention that the public could equally well have been protected by the posting of a guard over the automobile. In language equally applicable to this case, we held, "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable." *Id.*, at 447. See also *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 557, n. 12 (1976). We are hardly in a position to second-guess police departments as to what practical administrative method will best deter theft by and false claims against its employees and preserve the security of the station house. It is evident that a station-house search of every item carried on or by a person who has lawfully been taken into custody by the police will amply serve the important and legitimate governmental interests involved.

Even if less intrusive means existed of protecting some particular types of property, it would be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit. Only recently in *New York* v. *Belton*, 453 U. S. 454 (1981), we stated that "'[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" *Id.*, at 458, quoting *Dunaway* v. *New York*, 442 U. S. 200, 213–214 (1979). See also *United States* v. *Ross*, 456 U. S. 798, 821 (1982).

Applying these principles, we hold that it is not "unreasonable" for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures.[3]

[3] The record is unclear as to whether respondent was to have been incarcerated after being booked for disturbing the peace. That is an appropriate inquiry on remand.

The judgment of the Illinois Appellate Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

*It is so ordered.*

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, concurring in the judgment.

I agree that the police do not need a warrant or probable cause to conduct an inventory search prior to incarcerating a suspect, and I therefore concur in the judgment. The practical necessities of securing persons and property in a jailhouse setting justify an inventory search as part of the standard procedure incident to incarceration.

A very different case would be presented if the State had relied solely on the fact of arrest to justify the search of respondent's shoulder bag. A warrantless search incident to arrest must be justified by a need to remove weapons or prevent the destruction of evidence. See *United States* v. *Robinson*, 414 U. S. 218, 251 (1973) (MARSHALL, J., dissenting); *Chimel* v. *California*, 395 U. S. 752, 763 (1969); *United States* v. *Rabinowitz*, 339 U. S. 56, 72 (1950) (Frankfurter, J., dissenting). Officer Mietzner did not in fact deem it necessary to search the bag when he arrested respondent, and I seriously doubt that such a search would have been lawful. A search at the time of respondent's arrest could not have been justified by a need to prevent the destruction of evidence, for there is no evidence or fruits of the offense—disturbing the peace—of which respondent was suspected. Moreover, although a concern about weapons might have justified seizure of the bag, such a concern could not have justified the further step of searching the bag following its seizure. Cf. *United States* v. *Chadwick*, 433 U. S. 1, 15 (1977); *id.*, at 17, and n. 2 (BRENNAN, J., concurring).

# CHARDON ET AL. *v.* FUMERO SOTO ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 82–271. Argued March 23, 1983—Decided June 20, 1983

After petitioner Puerto Rican educational officials had demoted respondent school employees and shortly before Puerto Rico's 1-year statute of limitations would have expired, a class action was filed in Federal District Court against petitioners on behalf of respondents, asserting claims under 42 U. S. C. § 1983 arising out of the demotions. Subsequently, the District Court denied class certification on the ground that the class was insufficiently numerous. Respondents then filed individual actions under § 1983 asserting the same claims that had been asserted on their behalf in the class action. Each of the individual actions was filed more than one year after the claims accrued, even excluding the period during which the class action was pending, but less than one year after the denial of class certification. The individual actions were consolidated, and the District Court entered judgment on the merits for respondents. The Court of Appeals, while modifying the remedy in some respects, rejected petitioners' argument that respondents' claims were barred by the statute of limitations. Because there was no federal statute of limitations applicable to § 1983 claims, the court looked to Puerto Rican law to determine what the limitations period was, whether that period was tolled, and the effect of the tolling. The court concluded that, as a matter of Puerto Rican law, the statute of limitations was tolled as to the unnamed plaintiffs during the pendency of the class action, and that the statute of limitations began to run anew when the tolling ceased upon the denial of class certification.

*Held:* Respondents' individual actions were timely. The parties agree that the limitations period was tolled during the pendency of the class action. The Court of Appeals correctly held that the limitations period began to run anew after the denial of class certification, as provided by Puerto Rican law. *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538—which held that certain federal antitrust treble damages claims were not time-barred under the statute of limitations prescribed in the Clayton Act because the statute had been suspended during the pendency of a related class action—did not establish a uniform federal rule of decision that mandates suspension rather than renewal whenever a federal class action tolls a statute of limitations. In that case, a particular federal statute provided the basis for deciding that the tolling had

the effect of suspending the limitations period. No question of state law was presented. In a § 1983 action, however, Congress in 42 U. S. C. § 1988 has specifically directed the courts, in the absence of controlling federal law, to apply state statutes of limitations and state tolling rules unless they are "inconsistent with the Constitution and laws of the United States." Here, the Court of Appeals turned to Puerto Rican law to determine the tolling effect of the class action. Its decision on this issue is consistent with the rationale of both *American Pipe* and *Board of Regents* v. *Tomanio*, 446 U. S. 478, where it was held that a § 1983 claim was barred by New York's statute of limitations, because New York law did not provide for tolling of the statute during the pendency of a related, but independent, cause of action. Since the application of the Puerto Rican rule gave unnamed class members the same protection as if they had filed actions in their own names which were subsequently dismissed, the federal interest, set forth in *American Pipe*, in assuring the efficiency and economy of the class-action procedure is fully protected. Until Congress enacts a federal statute of limitations to govern § 1983 litigation, federal courts must continue the practice of "limitations borrowing" outlined in *Tomanio*. Pp. 655–662.

681 F. 2d 42, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which WHITE and POWELL, JJ., joined, *post*, p. 663.

*John G. DeGooyer* argued the cause for petitioners. With him on the briefs were *K. Martin Worthy*, *Stephen L. Humphrey*, *Hector Reichard De Cardona*, and *Eduardo Castillo Blanco*.

*Sheldon H. Nahmod* argued the cause for respondents. With him on the brief was *Jaime R. Nadal Arcelay*.

JUSTICE STEVENS delivered the opinion of the Court.

Petitioners, Puerto Rican educational officials, demoted respondents from nontenured supervisory positions to teaching or lower-level administrative posts in the public school system because of respondents' political affiliations. Shortly before Puerto Rico's 1-year statute of limitations would have expired, a class action was filed against petitioners on re-

spondents' behalf under 42 U. S. C. § 1983. Subsequently class certification was denied because the class was not sufficiently numerous. The parties agree that the statute of limitations was tolled during the pendency of the § 1983 class action, but they disagree as to the effect of the tolling.[1] Did the 1-year period begin to run anew when class certification was denied, or was it merely suspended during the pendency of the class action? We must decide whether the answer is provided by Puerto Rican law or by federal law.

On or after June 17, 1977, each of the 36 respondents[2] received a written notice of demotion. On Monday, June 19, 1978, Jose Ortiz Rivera, suing on behalf of respondents and various other demoted and discharged employees, filed a class action against petitioners asserting claims under 42 U. S. C. § 1983 and under certain Puerto Rican statutes. On August 21, 1978, the District Court denied class certification on the ground that the membership of the class was not so numerous that joinder was impracticable. App. 16a–17a. In January 1979, the respondents and a number of other unnamed class members filed individual actions under § 1983

[1] This opinion uses the word "tolling" to mean that, during the relevant period, the statute of limitations ceases to run. "Tolling effect" refers to the method of calculating the amount of time available to file suit after tolling has ended. The statute of limitations might merely be suspended; if so, the plaintiff must file within the amount of time left in the limitations period. If the limitations period is renewed, then the plaintiff has the benefit of a new period as long as the original. It is also possible to establish a fixed period such as six months or one year during which the plaintiff may file suit, without regard to the length of the original limitations period or the amount of time left when tolling began.

[2] Thirty-seven respondents were named in the petition for writ of certiorari. Questions 1 and 2 dealt with the status of 36 persons who had been unnamed plaintiffs in the class action filed by Jose Ortiz Rivera. Question 3 addressed the timeliness of Ortiz Rivera's filing. This Court limited its grant to Questions 1 and 2, 459 U. S. 987 (1982), which have no bearing on Ortiz Rivera's subsequent individual action. Since the petition was denied as to Question 3, Ortiz Rivera is not a respondent at this stage of the case, Brief for Petitioners 4, n. 2; the Court of Appeals has issued its mandate with respect to his case.

asserting the same constitutional claim that Ortiz Rivera had previously advanced on their behalf. App. 2a–4a.[3] Each of respondents' individual actions was filed more than one year after the claims accrued, even excluding the period during which the class action was pending, but less than one year after the denial of class certification. Thus, if the running of the limitations period was merely suspended by the class action, then respondents' actions are time-barred. If it began to run anew, these actions are timely.

Fifty-five individual actions were consolidated for trial on the liability issue in January 1981. The jury found against petitioners, and the District Court entered judgment ordering reinstatement with backpay. 514 F. Supp. 339 (PR 1981); App. 108a–111a, 114a–116a, 121a–124a. On appeal, the Court of Appeals modified the remedy in some respects, reversing the award of backpay on Eleventh Amendment grounds and ordering some of the individual cases dismissed as time-barred. It rejected petitioners' argument that the claims of the 36 respondents were barred by the statute of limitations. *Rivera Fernandez* v. *Chardon*, 681 F. 2d 42 (CA1 1982); App. 158a.[4]

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[3] A number of companion cases, all involving plaintiffs who had received notices of demotion or discharge prior to June 19, 1977, were also filed in January 1979. The District Court dismissed this group of complaints as untimely, but the Court of Appeals reversed on the ground that their causes of action had not accrued when they received notice, only when their demotions or discharges became effective. *Rivera Fernandez* v. *Chardon*, 648 F. 2d 765 (CA1 1981). That holding was, in turn, reversed by this Court after the decision in *Delaware State College* v. *Ricks*, 449 U. S. 250 (1980). See *Chardon* v. *Fernandez*, 454 U. S. 6 (1981).

[4] For 28 of the respondents, who received notice on or after June 19, 1977, there is no dispute that the 1-year limitations period had not yet expired when the class action was filed on Monday, June 19, 1978. The other eight respondents received notice on June 17, 1977, a date more than a calendar year prior to June 19, 1978. In its initial judgment, the Court of Appeals ordered dismissal of these eight cases. App. 156a–157a. On petition for modification of judgment, the respondents argued that, because Saturday, June 17, and Sunday, June 18, 1978, are excluded from computa-

Because there is no federal statute of limitations applicable to § 1983 claims, the Court of Appeals looked to Puerto Rican law to determine what the limitations period is, whether that period was tolled, and the effect of the tolling. The parties do not dispute the court's conclusion that civil rights actions are governed by the 1-year period specified in P. R. Laws Ann., Tit. 31, § 5298(2) (1968). Nor do petitioners challenge the court's conclusion that the statute was tolled during the pendency of the *Rivera* class action, although they do disagree with the court's reasons.

The Court of Appeals noted that in Puerto Rico it is well settled that the filing of an action on behalf of a party tolls the statute with regard to that party's identical causes of action. P. R. Laws Ann., Tit. 31, § 5303 (1968). It recognized, however, that the Supreme Court of Puerto Rico had not ruled on the question whether a class action would toll the statute for identical claims of the unnamed plaintiffs. It noted that Puerto Rico had modeled its class-action procedures after the federal practice, and that in *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538 (1974), this Court had interpreted the Federal Rules of Civil Procedure to permit a federal statute of limitations to be tolled between the filing of an asserted class action and the denial of class certification. It concluded that, as a matter of Puerto Rican law, the Puerto Rican Supreme Court would also hold that the statute of limitations was tolled as to unnamed plaintiffs during the pendency of a class action. 681 F. 2d, at 50.[5]

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tion under Puerto Rican law, the filing of the class action on Monday, June 19, was timely for those eight respondents. *Id.*, at 158a. The Court of Appeals modified its judgment accordingly, and explained its denial of rehearing on that issue by referring to Rule 6(a) of the Federal Rules of Civil Procedure. App. 161a. Neither the source of applicable law nor the merits of the issue is before us for decision. Tr. of Oral Arg. 4.

[5] The correctness of this interpretation of Puerto Rican law is not before us. *Id.*, at 18. In any event, in "dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their

In deciding what effect the tolling would have, however, the court did not apply the same rule as this Court had applied in *American Pipe*. In that case the controlling limitations period was established by a federal statute, the Clayton Act, that expressly provided for suspension when the period was tolled, 414 U. S., at 560–561. In this § 1983 case, however, the Court of Appeals concluded that Puerto Rican law determined the length of the applicable statute of limitations, governed whether the limitations period would be tolled during the pendency of the class action, and established the effect of the tolling. Under the law of Puerto Rico the statute of limitations begins to run anew when tolling ceases; the plaintiff benefits from the full length of the applicable limitations period. See *Feliciano* v. *Puerto Rico Aqueduct & Sewer Auth.*, 93 P. R. R. 638, 644 (1966); *Heirs of Gorbea* v. *Portilla*, 46 P. R. R. 279, 284 (1934).[6] Recognizing the difference between the common-law rule of suspension and the Puerto Rican "running-anew rule," the Court of Appeals concluded that applying the local rule would not violate any federal policy. The court further reasoned that its conclusion was consistent with the policies of repose and federalism that this Court had identified in its decisions addressing statute of limitations questions. 681 F. 2d, at 50. We granted certiorari. 459 U. S. 987 (1982).

## I

The federal civil rights statutes do not provide for a specific statute of limitations, establish rules regarding the tolling of the limitations period, or prescribe the effect of tolling. Under 42 U. S. C. § 1988, the federal cause of action is governed by appropriate "laws of the United States," but if such laws are unsuitable or inadequate, state-law rules are bor-

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conclusions are shown to be unreasonable." *Propper* v. *Clark*, 337 U. S. 472, 486–487 (1949), quoted in *Bishop* v. *Wood*, 426 U. S. 341, 346, n. 10 (1976).

[6] Petitioners do not question this proposition of Puerto Rican law. Tr. of Oral Arg. 10.

rowed unless a particular state rule is "inconsistent with the Constitution and laws of the United States."[7] Petitioners argue that *American Pipe & Construction Co.* v. *Utah*, *supra*, established a federal rule of decision that requires suspension rather than renewal whenever a class action in federal court tolls the statute of limitations. Accordingly, they contend that neither § 1988 nor our recent decision in *Board of Regents* v. *Tomanio*, 446 U. S. 478 (1980), justified the Court of Appeals' application of the Puerto Rican renewal rule. This argument, by reading more into our decision in *American Pipe* than the Court actually decided, fails to give full effect to *Tomanio*.

We begin by restating briefly the principles set forth in *Board of Regents* v. *Tomanio*. In that case the Court held that the plaintiff's § 1983 claim was barred by New York's 3-year statute of limitations, because New York law did not provide for tolling of the statute during the pendency of a related, but independent cause of action. Indeed, "resolution of that issue [was] virtually foreordained in favor of petitioners by our prior cases." 446 U. S., at 480. Under the reasoning of *Robertson* v. *Wegmann*, 436 U. S. 584 (1978); *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454 (1975); and *Monroe* v. *Pape*, 365 U. S. 167 (1961), the Court explained, federal courts were "obligated not only to apply the analogous New York statute of limitations to respondent's federal constitutional claims, but also to apply the New York

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[7] Title 42 U. S. C. § 1988 provides:

"[The federal civil rights statutes] shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . ."

rule for tolling that statute of limitations." 446 U. S., at 483.

We noted that in 42 U. S. C. § 1988 Congress had plainly instructed the federal courts to refer to state law when federal law provides no rule of decision for actions brought under § 1983, *id.*, at 484. Because the "chronological length of the limitation period is interrelated with provisions regarding tolling," we reasoned that the practice of "borrowing" state statutes of limitations "logically include[s] rules of tolling." *Id.*, at 485.[8] Finally, we concluded that no federal policy—deterrence, compensation, uniformity, or federalism—was offended by the application of state tolling rules. In light of Congress' willingness to rely on state statutes of limitations in civil rights actions, we specifically rejected the argument that the federal interest in uniformity justified displacement of state tolling rules.[9]

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[8] We quoted the following passage from *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 463–464 (1975):

"Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim." 446 U. S., at 485–486; see also *id.*, at 487–488.

[9] We quoted the following passage from *Robertson* v. *Wegmann*, 436 U. S. 584, 594, n. 11 (1978):

"[W]hatever the value of nationwide uniformity in areas of civil rights enforcement where Congress has not spoken, in the areas to which § 1988 is applicable Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. This statutory reliance on state law obviously means that there will not be nationwide uniformity on these issues." 446 U. S., at 489.

## II

It is true, as petitioners argue, that *Tomanio* did not involve a class action, nor did it present any claim that an established federal rule of decision governed the tolling of the statute of limitations, making resort to state law unnecessary. Petitioners contend that in *American Pipe* this Court "established a uniform federal procedural rule applicable to class actions brought in the federal courts." Brief for Petitioners 13. In petitioners' view, that federal rule encompasses two requirements: (1) the statute of limitations is tolled by the filing of an asserted class action, and (2) if class certification is subsequently denied because the asserted class is insufficiently numerous, then the limitations period has merely been suspended; it does not begin to run anew. Petitioners, respondents, and the Court of Appeals all agree that the statute of limitations was tolled during the period between the filing of Jose Ortiz Rivera's action on behalf of the class on June 19, 1978, and the District Court's denial of class certification on August 21, 1978.[10] We must examine the reasoning of *American Pipe*, however, to determine whether that decision embodies the second requirement that petitioners urge us to recognize.

In *American Pipe* the Court held that the antitrust treble-damages claims asserted by a group of municipalities and other public agencies in Utah were not time-barred. Although the claims had arisen in the early 1960's, they were not foreclosed by the 4-year period of limitations prescribed in § 4B of the Clayton Act[11] because the statute had been tolled on three successive occasions: from March 10, 1964, to June 19, 1964, while federal criminal charges were pending

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[10] Brief for Petitioners 12–15; Reply Brief for Petitioners 1–2; Brief for Respondents 6–9, 17; 681 F. 2d, at 49; see *supra*, at 654.

[11] Section 4B of the Clayton Act, 69 Stat. 283, as amended, 15 U. S. C. § 15b, provides in pertinent part as follows:

"Any action to enforce any cause of action [under the antitrust laws] shall be forever barred unless commenced within four years after the cause of action accrued."

against the defendants; from June 23, 1964, until May 24, 1968, while a civil injunctive proceeding filed by the Federal Government was pending; and from May 13, 1969, until December 4, 1969, while a class action brought by the State of Utah was pending. During the two earlier periods when Federal Government litigation was pending, and for one year thereafter, the Clayton Act expressly provided for tolling of the uniform federal statute of limitations.[12] The Court held that the subsequent class action had also tolled the statute for the claims of the unnamed plaintiffs until class certification was denied.

The Court reasoned that, under the circumstances, the unnamed plaintiffs should be treated as though they had been named plaintiffs during the pendency of the class action. Otherwise, members of a class would have an incentive to protect their interests by intervening in the class action as named plaintiffs prior to the decision on class certification—a "needless duplication of motions" that would "deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." 414 U. S., at 553–554; see *id.*, at 555–556. The Court explained that tolling the limitations period during the pendency of an antitrust class action did not impair the policies underlying statutes of limitations. *Id.*, at 554–555.

In order to determine "the precise effect the commencement of the class action had on the relevant limitation period," the Court referred to the terms of the underlying statute of limitations. It stated that § 5(b) of the Clayton Act suspends the statute of limitations during the pendency of Federal Government antitrust litigation based on the same subject matter. By analogy, the Court concluded that sus-

[12] Section 5(b) of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 16(i), provides:

"Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, . . . the running of the statute of limitations in respect to every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter . . . ."

pension would also be appropriate during the pendency of an asserted federal class action prior to denial of certification. *Id.*, at 560–561. Since suspension was adequate to preserve all of the plaintiffs' claims—they were filed only eight days after the denial of class certification—there was no need to consider whether any different rule might have been appropriate.[13]

In *American Pipe*, federal law defined the basic limitations period, federal procedural policies supported the tolling of

[13] Although some federal statutes provide for suspension, see *post*, at 666, and n. 2, other statutes establish a variety of different tolling effects. See, *e. g.*, 12 U. S. C. § 1728(c) (actions against Federal Savings and Loan Insurance Corporation for payment of insurance claims; 3-year limitations period from date of default, unless conservator of the insured institution first recognizes and then denies the validity of a claim, in which event the action may be brought within two years of denial); 15 U. S. C. § 16(i), see n. 12, *supra* (private actions under antitrust laws); 15 U. S. C. § 714b(c)(2) (actions against Commodity Credit Corporation; 6-year limitations period, unless the plaintiff has been under legal disability or beyond the seas at the time the right accrued, in which case the suit must be brought within three years after the disability ceases or within six years after the accrual of the cause of action, whichever is longer); 15 U. S. C. § 1691e(f) (actions under Equal Credit Opportunity Act; 2-year limitations period, except that if an agency enforcement action or suit by the Attorney General is filed during that period, any applicant who has been a victim of the alleged discrimination may bring suit not later than one year after the commencement of that action); 28 U. S. C. § 2415(e) (various limitations periods for actions for money damages and recovery of debts brought by the United States; if any such action is timely filed and dismissed without prejudice, the action may be recommenced within one year after such dismissal, regardless of whether the action would otherwise then be time-barred); 46 U. S. C. § 1292 (suits on claims for war risk insurance; 2-year limitations period, but if an administrative claim is filed, the period is suspended until the claim is administratively denied *and* for 60 days thereafter); 49 U. S. C. §§ 16(3)(c), (d) (actions against railroads for overcharges; 3-year limitations period, but if claim for the overcharge has been presented in writing to the carrier within the limitations period, the period for bringing suit is extended to include six months from the time the carrier gives notice in writing to the claimant disallowing the claim, and if the carrier brings suit to recover charges in respect of the same transportation service during the limitations period, the limitations period is extended to include 90 days from the time such action is begun); 49 U. S. C. §§ 908(f)(1)(C), (D) (same provision with regard to common carriers by water).

the statute during the pendency of the class action, and a particular federal statute provided the basis for deciding that the tolling had the effect of suspending the limitations period. No question of state law was presented. In a § 1983 action, however, Congress has specifically directed the courts, in the absence of controlling federal law, to apply state statutes of limitations and state tolling rules unless they are "inconsistent with the Constitution and laws of the United States." 42 U. S. C. § 1988. *American Pipe* does not answer the question whether, in a § 1983 case in which the filing of a class action has tolled the statute of limitations until class certification is denied, the tolling effect is suspension rather than renewal or extension of the period. *American Pipe* simply asserts a federal interest in assuring the efficiency and economy of the class-action procedure. After class certification is denied, that federal interest is vindicated as long as each unnamed plaintiff is given as much time to intervene or file a separate action [14] as he would have under a state savings statute applicable to a party whose action has been dismissed for reasons unrelated to the merits, or, in the absence of a statute, the time provided under the most closely analogous state tolling statute.

The reasoning of *American Pipe* is thus compatible with the rationale of *Tomanio*, and the Court of Appeals' decision on the tolling effect of the class action in this case is consistent with both. The Court of Appeals applied the Puerto Rican rule that, after tolling comes to an end, the statute of limitations begins to run anew. Since the application of this state-law rule gives unnamed class members the same protection as if they had filed actions in their own names which were subsequently dismissed, the federal interest set forth in *American Pipe* is fully protected.[15]

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[14] The benefit of tolling applies whether an unnamed plaintiff intervenes in the named plaintiff's suit after denial of class certification or files his or her own separate action. *Crown, Cork & Seal Co.* v. *Parker*, *ante*, p. 345.

[15] On the other hand, if a party received the benefit of Puerto Rico's renewal rule only by intervening as a named plaintiff in the class action

The Court of Appeals correctly rejected the argument that *American Pipe* establishes a uniform federal rule of decision that mandates suspension rather than renewal whenever a federal class action tolls a statute of limitations. As we wrote in *Robertson* v. *Wegmann*, "§ 1988 quite clearly instructs us to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby." 436 U. S., at 593. Congress has decided that § 1983 class actions brought in different States, like individual actions under § 1983, will be governed by differing statutes of limitations and differing rules regarding tolling and tolling effect unless those state rules are inconsistent with federal law. Until Congress enacts a federal statute of limitations to govern § 1983 litigation, comparable to the statute it ultimately enacted to solve the analogous problems presented by borrowing state law in federal antitrust litigation,[16] federal courts must continue the practice of "limitations borrowing" outlined in *Tomanio*.

The judgment of the Court of Appeals is

*Affirmed.*

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before the court's decision whether to certify the class, but was limited to suspension if he remained an unnamed class member, he would have an incentive to protect his interests by creating the very multiplicity and needless duplication against which the Court warned in *American Pipe*.

[16] Act of July 7, 1955, ch. 283, §§ 1 and 2, 69 Stat. 283. See H. R. Rep. No. 422, 84th Cong., 1st Sess., 1 (1955) ("Heretofore, such actions have been controlled by State law on the subject, leading to widespread variations from jurisdiction to jurisdiction as to the time within which an injured party may institute such a suit, as well as considerable confusion in ascertaining the applicable State law"); S. Rep. No. 619, 84th Cong., 1st Sess., 5 (1955) ("It is one of the primary purposes of this bill to put an end to the confusion and discrimination present under existing law where local statutes of limitations are made applicable to rights granted under our Federal laws"); *id.*, at 7 (letter from Attorney General) ("Currently, private antitrust action is needlessly complicated by issues such as which State's statute of limitations apply, the events from which such statute run[s], and the circumstances under which it may be [tolled]. Finally, varying periods of limitation encourage 'forum-shopping' and seem ill-suited for enforcement of a uniform Federal policy").

JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE POWELL join, dissenting.

Title 42 U. S. C. § 1988 embodies a congressional determination that the laws of the several States provide the most suitable procedural and remedial rules for application in actions brought under the federal civil rights laws. In the words of the statute, "in all cases [brought under the federal civil rights laws] where [federal laws] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held . . . shall be extended to and govern the said courts in the trial and disposition of the cause . . . ."

We frequently have recognized "the generally interstitial character of federal law," *Richards* v. *United States*, 369 U. S. 1, 7 (1962). Because of this, federal courts frequently must look to "the common law, as modified and changed by the constitution and statutes of the State wherein the court" is situated. If, however, there is federal law "adapted to the object" of the civil rights laws, § 1988 commands that federal courts apply that law in § 1983 actions.

The question in this case is whether there is any federal rule of law applicable to the tolling of limitations periods during the pendency of a class action brought under Federal Rule of Civil Procedure 23. If there is, then we must depart from the general rule of reference to state law in actions brought under the civil rights laws. This inquiry turns principally on the meaning of our decision in *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538 (1974). While the Court adopts a plausible, albeit narrow, reading of the opinion in that case, I believe the opinion is more fairly read in a somewhat broader manner. Adopting this construction, I conclude that the decision recognizes a federal rule of tolling applicable to class actions brought under Federal Rule of

Civil Procedure 23, and that this rule is made applicable by § 1988 to claims brought under § 1983.

In *American Pipe* the Court rejected the claim that antitrust claims brought by various Utah public agencies and municipalities was barred by the 4-year limitations period of § 4B of the Clayton Act, reasoning that the running of this period had been tolled on three occasions. As to two of these occasions, involving periods during which federal litigation was pending, the Court's reasoning simply applied § 5(b) of the Clayton Act. Section 5(b) explicitly addressed the effect of pending federal litigation, stating unambiguously that "[w]henever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, . . . the running of the statute of limitations in respect to every private right of action arising under said laws . . . shall be suspended during the pendency thereof and for one year thereafter." 38 Stat. 731, as amended, 15 U. S. C. § 16(i). The first two periods in which *American Pipe* held that § 4B had been tolled followed simply from a straightforward application of § 5(b).

As to the third period in which the limitations period was found to be tolled, however, the Clayton Act was utterly silent. The period in question was one in which a class action brought by the State of Utah had been pending. The question in *American Pipe* was whether the pendency of this class action warranted tolling of the Clayton Act's limitations period as to unnamed plaintiffs in the class. As noted previously, the Clayton Act provided not the slightest guidance on the question whether the pendency of the class action should have had a tolling effect.

Despite the silence of the Clayton Act, the Court concluded that § 4B had been tolled. Since the Clayton Act plainly did not address the question before it, and since the Court made no reference at all to state law, the source of the tolling rule applied by the Court was *necessarily* Rule 23. Any doubt as to this fact is removed by the Court's lengthy discussion of

the history, purposes, and intent of the Rule. Likewise, our subsequent decisions have reflected this understanding of the basis for the Court's decision in *American Pipe*. See, *e. g.*, *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 467, n. 12 (1975) ("In the light of the history of Fed. Rule Civ. Proc. 23 and the purposes of litigatory efficiency served by class actions, we concluded that the prior filing had a tolling effect").

In interpreting Rule 23 to contain a rule that, during the pendency of a class action, underlying statutes of limitations would be tolled as to individual class members, the Court also addressed the more general question of what effect a decision that the class action could not properly be maintained would have on the tolling of the limitations period. Again, reflecting the fact that it was fashioning a general federal tolling rule grounded on Rule 23, the Court stated:

> "We are convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action *suspends* the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U. S., at 554 (emphasis added).

There can be little question but that the Court fashioned a rule "consistent with federal class action procedure" requiring suspension of periods of limitation during the pendency of class actions. To be sure, the Court alluded to the fact that § 5(b) of the Clayton Act provided for "suspension" of the tolling period, rather than some other effect, but the Court rightly did not rely solely on this provision—which admittedly was entirely inapplicable in the case before it—in fashioning its general rule of tolling under Rule 23. Rather, it spoke more broadly, stating that the "concept" in § 5(b) requires the conclusion that a pending class action "*suspend[s]* the running of the limitation period." *Id.*, at 561 (emphasis

added). Since there is a federal rule of tolling in the special area of class actions, this rule should be applied.

The Court today studiously ignores the foregoing statements from *American Pipe*, as well as the clear inapplicability of § 5(b) to the question decided in *American Pipe*. Instead, it offers the argument that "[s]ince suspension was adequate [in *American Pipe*] to preserve all of the plaintiffs' claims . . . there was no need to consider whether any different rule might have been appropriate." *Ante*, at 660. The more orthodox inquiry, however, would seem to be what the Court actually decided then, not what we now think it needed to decide. And, as the discussion above plainly demonstrates, *American Pipe* concluded that Rule 23 contains a tolling rule that suspends (but does nothing more) the running of limitations periods during the pendency of class actions.[1]

This determination that the federal rule under Rule 23 is that the pendency of a class action simply *suspends* the running of a statute of limitations is not the least bit unusual. Indeed, in many areas of federal law mere suspension is the rule.[2] Moreover, in areas aside from class actions, the

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[1] The Court correctly recognizes that *Board of Regents* v. *Tomanio*, 446 U. S. 478 (1980), is distinguishable. That case did not involve a class action, and thus the Court had no occasion to consider whether Rule 23 creates a federal tolling rule, or the character of that rule. Hence, there was "a void . . . in federal statutory law," *id.*, at 483, and state law was called upon to fill the void. Owing to *American Pipe* and its interpretation of Rule 23, there is no comparable void in this case, and federal law is therefore applicable.

[2] See, *e. g.*, 5 U. S. C. § 8122(d) (limitations period does not "run against an incompetent individual while he is incompetent"); 19 U. S. C. § 1621 (time in which violator is outside Nation "shall not be reckoned within this period of limitation"); 22 U. S. C. § 817(c) (suspension of limitations periods in malpractice actions by certain federal employees during pendency of specified suits); 28 U. S. C. § 1498 (copyright claims by Government employees suspended during certain periods); 29 U. S. C. § 255(d) (limitations period of Portal-to-Portal Pay Act "shall be deemed suspended" in certain instances); 45 U. S. C. § 56 (period of limitations under Federal Employ-

Court has recognized that federal tolling rules apply to state statutes of limitations. See, *e. g.*, *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946) (general federal principles of equity must be applied by federal courts in actions involving federal claims, even where state statutes of limitations are borrowed).

The Court is apparently well aware that by rejecting the claim that Rule 23 reflects a uniform federal tolling rule it encourages needless litigation regarding what state tolling rule applies. Indeed, in this case the Court of Appeals frankly admitted that "there is no discernible state rule" to be applied. *Fernandez* v. *Chardon*, 681 F. 2d 42, 50 (CA1 1982). In other situations, more than one state rule may seem applicable. It is scarcely a desirable state of affairs for federal courts to spend their time deciding how state courts might decide state tolling rules operate. These concerns are particularly acute owing to the fact that the question at issue is what statute of limitations ought to be applied. Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations. A single, uniform federal rule of tolling would provide desirable certainty to both plaintiffs and defendants in § 1983 class actions.

Finally, it is useful to consider the application of the Court's analysis in a situation not far removed from the present case. If the law of a particular State was that the pendency of a class action did not toll the statute of limitations as to unnamed class members, there seems little question but that the federal rule of *American Pipe* would nonetheless be applicable. Having tolled the running of the

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ers' Liability Act; *Burnett* v. *New York Central R. Co.*, 380 U. S. 424 (1965)); 46 U. S. C. § 745 (limitations period suspended during pendency of administrative actions; see *Northern Metal Co.* v. *United States*, 350 F. 2d 833 (CA3 1965); *Kinman* v. *United States*, 139 F. Supp. 925 (ND Cal. 1956)); 50 U. S. C. App. § 33 (in computing expired time "there shall be excluded" time when specified actions were pending). Cf. *Hanger* v. *Abbott*, 6 Wall. 532 (1868) (suspension of state statute of limitations).

applicable state statute of limitations, the federal court would be required to decide what effect denial of class certification would have. The logical source of law, of course, would be the general federal rule, expressed in *American Pipe* and applied to toll the running of the period in the first place. The Court, however, would apparently have the trial judge look to state law. Such a course would obviously be more than a little ironic—the inquiry would appear to be, if state law *did* have a class-action tolling rule, which it *does not*, what would state law say with respect to one aspect of that rule's effect? Such an inquiry would be more appropriate in *Alice in Wonderland* than as a serious judicial undertaking.

Because the Court partially rejects a rule of law that *American Pipe* plainly set forth, because it reaches a result that can only encourage needless litigation and uncertainty, and because its analysis leads to anomalous results, I respectfully dissent.

Syllabus

# NEWPORT NEWS SHIPBUILDING & DRY DOCK CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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

No. 82–411. Argued April 27, 1983—Decided June 20, 1983

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment, because of the employee's race, color, religion, sex, or national origin. Title VII was amended in 1978 by the Pregnancy Discrimination Act to prohibit discrimination on the basis of pregnancy. Petitioner employer then amended its health insurance plan to provide its female employees with hospitalization benefits for pregnancy-related conditions to the same extent as for other medical conditions, but the plan provided less extensive pregnancy benefits for spouses of male employees. Petitioner filed an action in Federal District Court challenging the EEOC's guidelines which indicated that the amended plan was unlawful, and the EEOC in turn filed an action against petitioner alleging discrimination on the basis of sex against male employees in petitioner's provision of hospitalization benefits. The District Court upheld the lawfulness of petitioner's amended plan and dismissed the EEOC's complaint. On a consolidated appeal, the Court of Appeals reversed.

*Held:* The pregnancy limitation in petitioner's amended health plan discriminates against male employees in violation of § 703(a)(1). Pp. 676–685.

(a) Congress, by enacting the Pregnancy Discrimination Act, not only overturned the holding of *General Electric Co.* v. *Gilbert*, 429 U. S. 125, that the exclusion of disabilities caused by pregnancy from an employer's disability plan providing general coverage did not constitute discrimination based on sex, but also rejected the reasoning employed in that case that differential treatment of pregnancy is not gender-based discrimination because only women can become pregnant. Pp. 676–682.

(b) The Pregnancy Discrimination Act makes it clear that it is discriminatory to exclude pregnancy coverage from an otherwise inclusive benefits plan. Thus, petitioner's health plan unlawfully gives married male employees a benefit package for their dependents that is less inclusive than the dependency coverage provided to married female employees. Pp. 682–684.

(c) There is no merit to petitioner's argument that the prohibitions of Title VII do not extend to pregnant spouses because the statute applies only to discrimination in employment. Since the Pregnancy Discrimina-

tion Act makes it clear that discrimination based on pregnancy is, on its face, discrimination based on sex, and since the spouse's sex is always the opposite of the employee's sex, discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees. Pp. 684–685.

682 F. 2d 113, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which POWELL, J., joined, *post*, p. 685.

*Andrew M. Kramer* argued the cause for petitioner. With him on the briefs were *Gerald D. Skoning* and *Deborah Crandall.*

*Harriet S. Shapiro* argued the cause for respondent. With her on the brief were *Solicitor General Lee*, *Deputy Solicitor General Wallace*, *Philip B. Sklover*, and *Vella M. Fink.**

JUSTICE STEVENS delivered the opinion of the Court.

In 1978 Congress decided to overrule our decision in *General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976), by amending Title VII of the Civil Rights Act of 1964 "to prohibit sex discrimination on the basis of pregnancy."[1] On the effective

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*Briefs of *amici curiae* urging reversal were filed by *Stephen A. Bokat* and *Cynthia Wicker* for the Chamber of Commerce of the United States; by *Frederick T. Shea*, *Robert H. McRoberts, Sr.*, *John F. Gibbons*, and *Thomas C. Walsh* for Emerson Electric Co.; by *Benjamin W. Boley* and *Michael S. Giannotto* for the National Railway Labor Conference; and by *Robert E. Williams*, *Douglas S. McDowell*, and *Lorence L. Kessler* for the Equal Employment Advisory Council.

Briefs of *amici curiae* urging affirmance were filed by *Lawrence B. Trygstad* and *Richard J. Schwab* for the United Teachers-Los Angeles; by *Judith L. Lichtman* and *Judith E. Schaeffer* for the American Association of University Women et al.; and by *J. Albert Woll*, *Marsha S. Berzon*, *Laurence Gold*, *Bernard Kleiman*, *Carl Frankel*, *Carole W. Wilson*, and *Winn Newman* for the American Federation of Labor and Congress of Industrial Organizations et al.

[1] Pub. L. 95–555, 92 Stat. 2076 (quoting title of 1978 Act). The new statute (the Pregnancy Discrimination Act) amended the "Definitions" sec-

date of the Act, petitioner amended its health insurance plan to provide its female employees with hospitalization benefits for pregnancy-related conditions to the same extent as for other medical conditions.[2] The plan continued, however, to provide less favorable pregnancy benefits for spouses of male employees. The question presented is whether the amended plan complies with the amended statute.

Petitioner's plan provides hospitalization and medical-surgical coverage for a defined category of employees[3] and a defined category of dependents. Dependents covered by the plan include employees' spouses, unmarried children between 14 days and 19 years of age, and some older dependent children.[4] Prior to April 29, 1979, the scope of the plan's coverage for eligible dependents was identical to its coverage for employees.[5] All covered males, whether employees or

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tion of Title VII, 42 U. S. C. § 2000e, to add a new subsection (k) reading in pertinent part as follows:

"The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e–2(h) of this title shall be interpreted to permit otherwise. . . ." § 2000e(k) (1976 ed., Supp. V).

[2] The amendment to Title VII became effective on the date of its enactment, October 31, 1978, but its requirements did not apply to any then-existing fringe benefit program until 180 days after enactment—April 29, 1979. 92 Stat. 2076. The amendment to petitioner's plan became effective on April 29, 1979.

[3] On the first day following three months of continuous service, every active, full-time, production, maintenance, technical, and clerical area bargaining unit employee becomes a plan participant. App. to Pet. for Cert. 29a.

[4] For example, unmarried children up to age 23 who are full-time college students solely dependent on an employee and certain mentally or physically handicapped children are also covered. *Id.*, at 30a.

[5] An amount payable under the plan for medical expenses incurred by a dependent does, however, take into account any amounts payable for those expenses by other group insurance plans. An employee's personal cover-

dependents, were treated alike for purposes of hospitalization coverage. All covered females, whether employees or dependents, also were treated alike. Moreover, with one relevant exception, the coverage for males and females was identical. The exception was a limitation on hospital coverage for pregnancy that did not apply to any other hospital confinement.[6]

After the plan was amended in 1979, it provided the same hospitalization coverage for male and female employees themselves for all medical conditions, but it differentiated between female employees and spouses of male employees in its provision of pregnancy-related benefits.[7] In a booklet describing the plan, petitioner explained the amendment that gave rise to this litigation in this way:

> "B. Effective April 29, 1979, maternity benefits for female employees will be paid the same as any other hospital confinement as described in question 16. This applies only to deliveries beginning on April 29, 1979 and thereafter.
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> "C. Maternity benefits for the wife of a male employee will continue to be paid as described in part 'A' of this question." App. to Pet. for Cert. 37a.

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age is not affected by his or her spouse's participation in a group health plan. *Id.*, at 34a–36a.

[6] For hospitalization caused by uncomplicated pregnancy, petitioner's plan paid 100% of the reasonable and customary physicians' charges for delivery and anesthesiology, and up to $500 of other hospital charges. For all other hospital confinement, the plan paid in full for a semiprivate room for up to 120 days and for surgical procedures; covered the first $750 of reasonable and customary charges for hospital services (including general nursing care, X-ray examinations, and drugs) and other necessary services during hospitalization; and paid 80% of the charges exceeding $750 for such services up to a maximum of 120 days. *Id.*, at 31a–32a (question 16); see *id.*, at 44a–45a (same differentiation for coverage after the employee's termination).

[7] Thus, as the Equal Employment Opportunity Commission found after its investigation, "the record reveals that the present disparate impact on male employees had its genesis in the gender-based distinction accorded to female employees in the past." App. 37.

In turn, Part A stated: "The Basic Plan pays up to $500 of the hospital charges and 100% of reasonable and customary for delivery and anesthesiologist charges." *Ibid.* As the Court of Appeals observed: "To the extent that the hospital charges in connection with an uncomplicated delivery may exceed $500, therefore, a male employee receives less complete coverage of spousal disabilities than does a female employee." 667 F. 2d 448, 449 (CA4 1982).

After the passage of the Pregnancy Discrimination Act, and before the amendment to petitioner's plan became effective, the Equal Employment Opportunity Commission issued "interpretive guidelines" in the form of questions and answers.[8] Two of those questions, numbers 21 and 22, made it clear that the EEOC would consider petitioner's amended plan unlawful. Number 21 read as follows:

> "21. Q. Must an employer provide health insurance coverage for the medical expenses of pregnancy-related conditions of the spouses of male employees? Of the dependents of all employees?
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> "A. Where an employer provides no coverage for dependents, the employer is not required to institute such coverage. However, if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions.
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> "But the insurance does not have to cover the pregnancy-related conditions of non-spouse dependents as long as it excludes the pregnancy-related conditions of

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[8] Interim interpretive guidelines were published for comment in the Federal Register on March 9, 1979. 44 Fed. Reg. 13278–13281. Final guidelines were published in the Federal Register on April 20, 1979. *Id.*, at 23804–23808. The EEOC explained: "It is the Commission's desire . . . that all interested parties be made aware of EEOC's view of their rights and obligations in advance of April 29, 1979, so that they may be in compliance by that date." *Id.*, at 23804. The questions and answers are reprinted as an appendix to 29 CFR § 1604 (1982).

such non-spouse dependents of male and female employees equally." 44 Fed. Reg. 23807 (Apr. 20, 1979).[9]

On September 20, 1979, one of petitioner's male employees filed a charge with the EEOC alleging that petitioner had unlawfully refused to provide full insurance coverage for his wife's hospitalization caused by pregnancy; a month later the United Steelworkers filed a similar charge on behalf of other individuals. App. 15–18. Petitioner then commenced an action in the United States District Court for the Eastern District of Virginia, challenging the Commission's guidelines and seeking both declaratory and injunctive relief. The complaint named the EEOC, the male employee, and the United Steelworkers of America as defendants. *Id.*, at 5–14. Later the EEOC filed a civil action against petitioner alleging discrimination on the basis of sex against male employees in the company's provision of hospitalization benefits. *Id.*, at 28–31. Concluding that the benefits of the new Act extended only to female employees, and not to spouses of male employees, the District Court held that petitioner's plan was lawful and enjoined enforcement of the EEOC guidelines relating to pregnancy benefits for employees' spouses. 510

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[9] Question 22 is equally clear. It reads:

"22. Q. Must an employer provide the same level of health insurance coverage for the pregnancy-related medical conditions of the spouses of male employees as it provides for its female employees?

"A. No. It is not necessary to provide the same level of coverage for the pregnancy-related medical conditions of spouses of male employees as for female employees. However, where the employer provides coverage for the medical conditions of the spouses of its employees, then the level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. For example, if the employer covers employees for 100 percent of reasonable and customary expenses sustained for a medical condition, but only covers dependent spouses for 50 percent of reasonable and customary expenses for their medical conditions, the pregnancy-related expenses of the male employee's spouse must be covered at the 50 percent level." 44 Fed. Reg., at 23807–23808.

F. Supp. 66 (1981). It also dismissed the EEOC's complaint. App. to Pet. for Cert. 21a. The two cases were consolidated on appeal.

A divided panel of the United States Court of Appeals for the Fourth Circuit reversed, reasoning that since "the company's health insurance plan contains a distinction based on pregnancy that results in less complete medical coverage for male employees with spouses than for female employees with spouses, it is impermissible under the statute." 667 F. 2d, at 451. After rehearing the case en banc, the court reaffirmed the conclusion of the panel over the dissent of three judges who believed the statute was intended to protect female employees "in their ability or inability to work," and not to protect spouses of male employees. 682 F. 2d 113 (1982). Because the important question presented by the case had been decided differently by the United States Court of Appeals for the Ninth Circuit, *EEOC* v. *Lockheed Missiles & Space Co.*, 680 F. 2d 1243 (1982), we granted certiorari. 459 U. S. 1069 (1982).[10]

Ultimately the question we must decide is whether petitioner has discriminated against its male employees with respect to their compensation, terms, conditions, or privileges of employment because of their sex within the meaning of § 703(a)(1) of Title VII.[11] Although the Pregnancy Dis-

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[10] Subsequently the Court of Appeals for the Seventh Circuit agreed with the Ninth Circuit. *EEOC* v. *Joslyn Mfg. & Supply Co.*, 706 F. 2d 1469 (1983).

[11] Section 703(a), 42 U. S. C. § 2000e–2(a), provides in pertinent part: "It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."

Although the 1978 Act makes clear that this language should be construed to prohibit discrimination against a female employee on the basis of her own pregnancy, it did not remove or limit Title VII's prohibition of discrimination on the basis of the sex of the employee—male or female—which

crimination Act has clarified the meaning of certain terms in this section, neither that Act nor the underlying statute contains a definition of the word "discriminate." In order to decide whether petitioner's plan discriminates against male employees because of *their* sex, we must therefore go beyond the bare statutory language. Accordingly, we shall consider whether Congress, by enacting the Pregnancy Discrimination Act, not only overturned the specific holding in *General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976), but also rejected the test of discrimination employed by the Court in that case. We believe it did. Under the proper test petitioner's plan is unlawful, because the protection it affords to married male employees is less comprehensive than the protection it affords to married female employees.

## I

At issue in *General Electric Co.* v. *Gilbert* was the legality of a disability plan that provided the company's employees with weekly compensation during periods of disability resulting from nonoccupational causes. Because the plan excluded disabilities arising from pregnancy, the District Court and the Court of Appeals concluded that it discriminated against female employees because of their sex. This Court reversed.

After noting that Title VII does not define the term "discrimination," the Court applied an analysis derived from cases construing the Equal Protection Clause of the Fourteenth Amendment to the Constitution. *Id.*, at 133. The *Gilbert* opinion quoted at length from a footnote in *Geduldig* v. *Aiello*, 417 U. S. 484 (1974), a case which had upheld the constitutionality of excluding pregnancy coverage under California's disability insurance plan.[12] "Since it is a finding of

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was already present in the Act. As we explain *infra*, at 682–685, petitioner's plan discriminates against male employees on the basis of their sex.

[12] "'While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* [v. *Reed*, 404 U. S. 71

sex-based discrimination that must trigger, in a case such as this, the finding of an unlawful employment practice under § 703(a)(1)," the Court added, "*Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." 429 U. S., at 136.

The dissenters in *Gilbert* took issue with the majority's assumption "that the Fourteenth Amendment standard of discrimination is coterminous with that applicable to Title VII." *Id.*, at 154, n. 6 (BRENNAN, J., dissenting); *id.*, at 160–161 (STEVENS, J., dissenting).[13] As a matter of statutory interpretation, the dissenters rejected the Court's holding that the plan's exclusion of disabilities caused by pregnancy did not constitute discrimination based on sex. As JUSTICE BRENNAN explained, it was facially discriminatory for the company to devise "a policy that, but for pregnancy, offers protection for all risks, even those that are 'unique to' men or

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(1971)], and *Frontiero* [v. *Richardson*, 411 U. S. 677 (1973)]. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

" 'The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.' [417 U. S.], at 496–497, n. 20." 429 U. S., at 134–135.

The principal emphasis in the text of the *Geduldig* opinion, unlike the quoted footnote, was on the reasonableness of the State's cost justifications for the classification in its insurance program. See n. 13, *infra*.

[13] As the text of the *Geduldig* opinion makes clear, in evaluating the constitutionality of California's insurance program, the Court focused on the "non-invidious" character of the State's legitimate fiscal interest in excluding pregnancy coverage. 417 U. S., at 496. This justification was not relevant to the statutory issue presented in *Gilbert*. See n. 25, *infra*.

heavily male dominated." *Id.*, at 160. It was inaccurate to describe the program as dividing potential recipients into two groups, pregnant women and nonpregnant persons, because insurance programs "deal with future *risks* rather than historic facts." Rather, the appropriate classification was "between persons who face a risk of pregnancy and those who do not." *Id.*, at 161–162, n. 5 (STEVENS, J., dissenting). The company's plan, which was intended to provide employees with protection against the risk of uncompensated unemployment caused by physical disability, discriminated on the basis of sex by giving men protection for all categories of risk but giving women only partial protection. Thus, the dissenters asserted that the statute had been violated because conditions of employment for females were less favorable than for similarly situated males.

When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision. It incorporated a new subsection in the "definitions" applicable "[f]or the purposes of this subchapter." 42 U. S. C. § 2000e (1976 ed., Supp. V). The first clause of the Act states, quite simply: "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." § 2000e–(k).[14] The House Report stated: "It is the Committee's view that the dissenting Justices correctly interpreted the Act."[15] Similarly, the Senate Report quoted passages from the two dissenting opinions, stating that they "correctly express both the principle and the meaning of title VII."[16]

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[14] The meaning of the first clause is not limited by the specific language in the second clause, which explains the application of the general principle to women employees.

[15] H. R. Rep. No. 95–948, p. 2 (1978), Legislative History of the Pregnancy Discrimination Act of 1978 (Committee Print prepared for the Senate Committee on Labor and Human Resources), p. 148 (1979) (hereinafter Leg. Hist.).

[16] S. Rep. No. 95–331, pp. 2–3 (1977), Leg. Hist., at 39–40.

Proponents of the bill repeatedly emphasized that the Supreme Court had erroneously interpreted congressional intent and that amending legislation was necessary to reestablish the principles of Title VII law as they had been understood prior to the *Gilbert* decision. Many of them expressly agreed with the views of the dissenting Justices.[17]

As petitioner argues, congressional discussion focused on the needs of female members of the work force rather than spouses of male employees. This does not create a "negative inference" limiting the scope of the Act to the specific problem that motivated its enactment. See *United States* v.

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[17] *Id.*, at 7–8 ("the bill is merely reestablishing the law as it was understood prior to *Gilbert* by the EEOC and by the lower courts"); H. R. Rep. No. 95–948, *supra*, at 8 (same); 123 Cong. Rec. 10581 (1977) (remarks of Rep. Hawkins) ("H. R. 5055 does not really add anything to title VII as I and, I believe, most of my colleagues in Congress when title VII was enacted in 1964 and amended in 1972, understood the prohibition against sex discrimination in employment. For, it seems only commonsense, that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women, and that forbidding discrimination based on sex therefore clearly forbids discrimination based on pregnancy"); *id.*, at 29387 (remarks of Sen. Javits) ("this bill is simply corrective legislation, designed to restore the law with respect to pregnant women employees to the point where it was last year, before the Supreme Court's decision in *Gilbert* . . ."); *id.*, at 29647; *id.*, at 29655 (remarks of Sen. Javits) ("What we are doing is leaving the situation the way it was before the Supreme Court decided the Gilbert case last year"); 124 Cong. Rec. 21436 (1978) (remarks of Rep. Sarasin) ("This bill would restore the interpretation of title VII prior to that decision").

For statements expressly approving the views of the dissenting Justices that pregnancy discrimination is discrimination on the basis of sex, see Leg. Hist., at 18 (remarks of Sen. Bayh, Mar. 18, 1977, 123 Cong. Rec. 8144); 24 (remarks of Rep. Hawkins, Apr. 5, 1977, 123 Cong. Rec. 10582); 67 (remarks of Sen. Javits, Sept. 15, 1977, 123 Cong. Rec. 29387); 73 (remarks of Sen. Bayh, Sept. 16, 1977, 123 Cong. Rec. 29641); 134 (remarks of Sen. Mathias, Sept. 16, 1977, 123 Cong. Rec. 29663–29664); 168 (remarks of Rep. Sarasin, July 18, 1978, 124 Cong. Rec. 21436). See also Discrimination on the Basis of Pregnancy, 1977, Hearings on S. 995 before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess., 13 (1977) (statement of Sen. Bayh); *id.*, at 37, 51 (statement of Assistant Attorney General for Civil Rights Drew S. Days).

*Turkette*, 452 U. S. 576, 591 (1981). Cf. *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273, 285–296 (1976).[18] Congress apparently assumed that existing plans that included benefits for dependents typically provided no less pregnancy-related coverage for the wives of male employees than they did for female employees.[19] When the question of differential coverage for dependents was addressed in the Senate Report, the Committee indicated that it should be resolved "on the basis of existing title VII principles."[20] The legislative

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[18] In *McDonald*, the Court held that 42 U. S. C. § 1981, which gives "[a]ll persons within the jurisdiction of the United States . . . the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens," protects whites against discrimination on the basis of race even though the "immediate impetus for the bill was the necessity for further relief of the constitutionally emancipated former Negro slaves." 427 U. S., at 289.

[19] This, of course, was true of petitioner's plan prior to the enactment of the statute. See *supra*, at 672. See S. Rep. No. 95–331, *supra* n. 16, at 6, Leg. Hist., at 43 ("Presumably because plans which provide comprehensive medical coverage for spouses of women employees but not spouses of male employees are rare, we are not aware of any Title VII litigation concerning such plans. It is certainly not this committee's desire to encourage the institution of such plans"); 123 Cong. Rec. 29663 (1977) (remarks of Sen. Cranston); Brief for Respondent 31–33, n. 31.

[20] "Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependents of employees, as opposed to employees themselves. In this context it must be remembered that the basic purpose of this bill is to protect women employees, it does not alter the basic principles of title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for title VII purposes. Therefore the question in regard to dependents' benefits would be determined on the basis of existing title VII principles." S. Rep. No. 95–331, *supra* n. 16, at 5–6, Leg. Hist., at 42–43.

This statement does not imply that the new statutory definition has no applicability; it merely acknowledges that the new definition does not itself resolve the question.

The dissent quotes extensive excerpts from an exchange on the Senate floor between Senators Hatch and Williams. *Post*, at 692–693. Taken in context, this colloquy clearly deals only with the second clause of the bill, see n. 14, *supra*, and Senator Williams, the principal sponsor of the legislation, addressed only the bill's effect on income maintenance plans. Leg. Hist.,

context makes it clear that Congress was not thereby referring to the view of Title VII reflected in this Court's *Gilbert* opinion. Proponents of the legislation stressed throughout the debates that Congress had always intended to protect *all* individuals from sex discrimination in employment—including but not limited to pregnant women workers.[21] Against

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at 80. Senator Williams first stated, in response to Senator Hatch: "With regard to more maintenance plans for pregnancy-related disabilities, I do not see how this language could be misunderstood." Upon further inquiry from Senator Hatch, he replied: "If there is any ambiguity, with regard to income maintenance plans, I cannot see it." At the end of the same response, he stated: "It is narrowly drawn and would not give any employee the right to obtain income maintenance as a result of the pregnancy of someone who is not an employee." *Ibid.* These comments, which clearly limited the scope of Senator Williams' responses, are omitted from the dissent's lengthy quotation, *post*, at 692–693.

Other omitted portions of the colloquy make clear that it was logical to discuss the pregnancies of employees' spouses in connection with income maintenance plans. Senator Hatch asked, "what about the status of a woman coworker who is not pregnant but rides with a pregnant woman and cannot get to work once the pregnant female commences her maternity leave or the employed mother who stays home to nurse her pregnant daughter?" Leg. Hist., at 80. The reference to spouses of male employees must be understood in light of these hypothetical questions; it seems to address the situation in which a male employee wishes to take time off from work because his wife is pregnant.

[21] See, *e. g.*, 123 Cong. Rec. 7539 (1977) (remarks of Sen. Williams) ("the Court has ignored the congressional intent in enacting title VII of the Civil Rights Act—that intent was to protect all individuals from unjust employment discrimination, including pregnant workers"); *id.*, at 29385, 29652. In light of statements such as these, it would be anomalous to hold that Congress provided that an employee's pregnancy is sex-based, while a spouse's pregnancy is gender-neutral.

During the course of the Senate debate on the Pregnancy Discrimination Act, Senator Bayh and Senator Cranston both expressed the belief that the new Act would prohibit the exclusion of pregnancy coverage for spouses if spouses were otherwise fully covered by an insurance plan. See *id.*, at 29642, 29663. Because our holding relies on the 1978 legislation only to the extent that it unequivocally rejected the *Gilbert* decision, and ultimately we rely on our understanding of general Title VII principles, we attach no more significance to these two statements than to the many other

this background we review the terms of the amended statute to decide whether petitioner has unlawfully discriminated against its male employees.

## II

Section 703(a) makes it an unlawful employment practice for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U. S. C. § 2000e–2(a)(1). Health insurance and other fringe benefits are "compensation, terms, conditions, or privileges of employment." Male as well as female employees are protected against discrimination. Thus, if a private employer were to provide complete health insurance coverage for the dependents of its female employees, and no coverage at all for the dependents of its male employees, it would violate Title VII.[22] Such a

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comments by both Senators and Congressmen disapproving the Court's reasoning and conclusion in *Gilbert*. See n. 17, *supra*.

[22] Consistently since 1970 the EEOC has considered it unlawful under Title VII for an employer to provide different insurance coverage for spouses of male and female employees. See Guidelines On Discrimination Because of Sex, 29 CFR § 1604.9(d) (1982); Commission Decision No. 70–510, CCH EEOC Decisions (1973) ¶ 6132 (1970) (accident and sickness insurance); Commission Decision No. 70–513, CCH EEOC Decisions (1973) ¶ 6114 (1970) (death benefits to surviving spouse); Commission Decision No. 70–660, CCH EEOC Decisions (1973) ¶ 6133 (1970) (health insurance); Commission Decision No. 71–1100, CCH EEOC Decisions (1973) ¶ 6197 (1970) (group insurance).

Similarly, in our Equal Protection Clause cases we have repeatedly held that, if the spouses of female employees receive less favorable treatment in the provision of benefits, the practice discriminates not only against the spouses but also against the female employees on the basis of sex. *Frontiero* v. *Richardson*, 411 U. S. 677, 688 (1973) (opinion of BRENNAN, J.) (increased quarters allowances and medical and dental benefits); *id.*, at 691 (POWELL, J., concurring in judgment); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 645 (1975) (Social Security benefits for surviving spouses); see also *id.*, at 654–655 (POWELL, J., concurring); *Califano* v. *Goldfarb*, 430

practice would not pass the simple test of Title VII discrimination that we enunciated in *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702, 711 (1978), for it would treat a male employee with dependents "'in a manner which but for that person's sex would be different.'"[23] The same result would be reached even if the magnitude of the discrimination were smaller. For example, a plan that provided complete hospitalization coverage for the spouses of female employees but did not cover spouses of male employees when they had broken bones would violate Title VII by discriminating against male employees.

Petitioner's practice is just as unlawful. Its plan provides limited pregnancy-related benefits for employees' wives, and affords more extensive coverage for employees' spouses for all other medical conditions requiring hospitalization. Thus

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U. S. 199, 207–208 (1977) (opinion of BRENNAN, J.) (Social Security benefits for surviving spouses); *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U. S. 142, 147 (1980) (workers' compensation death benefits for surviving spouses).

[23] The *Manhart* case was decided several months before the Pregnancy Discrimination Act was passed. Although it was not expressly discussed in the legislative history, it set forth some of the "existing title VII principles" on which Congress relied. Cf. *Cannon* v. *University of Chicago*, 441 U. S. 677, 696–698 (1979). In *Manhart* the Court struck down the employer's policy of requiring female employees to make larger contributions to its pension fund than male employees, because women as a class tend to live longer than men.

"An employment practice that requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of the Act. Such a practice does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.' It constitutes discrimination and is unlawful unless exempted by the Equal Pay Act of 1963 or some other affirmative justification." 435 U. S., at 711.

The internal quotation was from Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1170 (1971).

the husbands of female employees receive a specified level of hospitalization coverage for all conditions; the wives of male employees receive such coverage except for pregnancy-related conditions.[24] Although *Gilbert* concluded that an otherwise inclusive plan that singled out pregnancy-related benefits for exclusion was nondiscriminatory on its face, because only women can become pregnant, Congress has unequivocally rejected that reasoning. The 1978 Act makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions. Thus petitioner's plan unlawfully gives married male employees a benefit package for their dependents that is less inclusive than the dependency coverage provided to married female employees.

There is no merit to petitioner's argument that the prohibitions of Title VII do not extend to discrimination against pregnant spouses because the statute applies only to discrimination in employment. A two-step analysis demonstrates the fallacy in this contention. The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex. And since the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees. Cf. *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U. S. 142, 147 (1980).[25] By

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[24] This policy is analogous to the exclusion of broken bones for the wives of male employees, except that both employees' wives and employees' husbands may suffer broken bones, but only employees' wives can become pregnant.

[25] See n. 22, *supra*. This reasoning does not require that a medical insurance plan treat the pregnancies of employees' wives the same as the pregnancies of female employees. For example, as the EEOC recognizes, see n. 9, *supra* (Question 22), an employer might provide full coverage for employees and no coverage at all for dependents. Similarly, a disability plan covering employees' children may exclude or limit maternity benefits. Although the distinction between pregnancy and other conditions is, ac-

making clear that an employer could not discriminate on the basis of an employee's pregnancy, Congress did not erase the original prohibition against discrimination on the basis of an employee's sex.

In short, Congress' rejection of the premises of *General Electric Co.* v. *Gilbert* forecloses any claim that an insurance program excluding pregnancy coverage for female beneficiaries and providing complete coverage to similarly situated male beneficiaries does not discriminate on the basis of sex. Petitioner's plan is the mirror image of the plan at issue in *Gilbert*. The pregnancy limitation in this case violates Title VII by discriminating against male employees.[26]

The judgment of the Court of Appeals is

*Affirmed.*

JUSTICE REHNQUIST, with whom JUSTICE POWELL joins, dissenting.

In *General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976), we held that an exclusion of pregnancy from a disability-benefits

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cording to the 1978 Act, discrimination "on the basis of sex," the exclusion affects male and female *employees* equally since both may have pregnant dependent daughters. The EEOC's guidelines permit differential treatment of the pregnancies of dependents who are not spouses. See 44 Fed. Reg. 23804, 23805, 23807 (1979).

[26] Because the 1978 Act expressly states that exclusion of pregnancy coverage is gender-based discrimination on its face, it eliminates any need to consider the average monetary value of the plan's coverage to male and female employees. Cf. *Gilbert*, 429 U. S., at 137–140.

The cost of providing complete health insurance coverage for the dependents of male employees, including pregnant wives, might exceed the cost of providing such coverage for the dependents of female employees. But although that type of cost differential may properly be analyzed in passing on the constitutionality of a State's health insurance plan, see *Geduldig* v. *Aiello*, 417 U. S. 484 (1974), no such justification is recognized under Title VII once discrimination has been shown. *Manhart*, 435 U. S., at 716–717; 29 CFR § 1604.9(e) (1982) ("It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other").

plan is not discrimination "because of [an] individual's . . . sex" within the meaning of Title VII of the Civil Rights Act of 1964, § 703(a)(1), 78 Stat. 255, 42 U. S. C. § 2000e-2(a)(1).[1] In our view, therefore, Title VII was not violated by an employer's disability plan that provided all employees with nonoccupational sickness and accident benefits, but excluded from the plan's coverage disabilities arising from pregnancy. Under our decision in *Gilbert*, petitioner's otherwise inclusive benefits plan that excludes pregnancy benefits for a male employee's spouse clearly would not violate Title VII. For a different result to obtain, *Gilbert* would have to be judicially overruled by this Court or Congress would have to legislatively overrule our decision in its entirety by amending Title VII.

Today, the Court purports to find the latter by relying on the Pregnancy Discrimination Act of 1978, Pub. L. 95–555, 92 Stat. 2076, 42 U. S. C. § 2000e(k) (1976 ed., Supp. V), a statute that plainly speaks only of female employees affected by pregnancy and says nothing about spouses of male employees.[2] Congress, of course, was free to legislatively overrule *Gilbert* in whole or in part, and there is no question but what the Pregnancy Discrimination Act manifests congressional dissatisfaction with the result we reached in *Gilbert*. But I think the Court reads far more into the Pregnancy Discrimination Act than Congress put there, and that therefore it is the Court, and not Congress, which is now overruling *Gilbert*.

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[1] In *Gilbert* the Court did leave open the possibility of a violation where there is a showing that "'distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other.'" 429 U. S., at 135 (quoting *Geduldig* v. *Aiello*, 417 U. S. 484, 496–497, n. 20 (1974)).

[2] By referring to "female employees," I do not intend to imply that the Pregnancy Discrimination Act does not also apply to "female applicants for employment." I simply use the former reference as a matter of convenience.

In a case presenting a relatively simple question of statutory construction, the Court pays virtually no attention to the language of the Pregnancy Discrimination Act or the legislative history pertaining to that language. The Act provides in relevant part:

> "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . ." 42 U. S. C. § 2000e(k) (1976 ed., Supp. V).

The Court recognizes that this provision is merely definitional and that "[u]ltimately the question we must decide is whether petitioner has discriminated against its male employees . . . because of their sex within the meaning of § 703(a)(1)" of Title VII. *Ante*, at 675. Section 703(a)(1) provides in part:

> "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U. S. C. § 2000e–2(a)(1).

It is undisputed that in § 703(a)(1) the word "individual" refers to an employee or applicant for employment. As modified by the first clause of the definitional provision of the Pregnancy Discrimination Act, the proscription in § 703(a)(1) is for discrimination "against any individual . . . *because of such individual's . . . pregnancy*, childbirth, or related medi-

cal conditions." This can only be read as referring to the pregnancy of an *employee*.

That this result was not inadvertent on the part of Congress is made very evident by the second clause of the Act, language that the Court essentially ignores in its opinion. When Congress in this clause further explained the proscription it was creating by saying that "women affected by pregnancy . . . shall be treated the same . . . as other persons not so affected but *similar in their ability or inability to work*" it could only have been referring to *female employees*. The Court of Appeals below stands alone in thinking otherwise.[3]

The Court concedes that this is a correct reading of the second clause. *Ante*, at 678, n. 14. Then in an apparent effort to escape the impact of this provision, the Court asserts that "[t]he meaning of the first clause is not limited by the specific language in the second clause." *Ibid.* I do not disagree. But this conclusion does not help the Court, for as explained above, when the definitional provision of the first clause is inserted in § 703(a)(1), it says the very same thing: the proscription added to Title VII applies only to female employees.

The plain language of the Pregnancy Discrimination Act leaves little room for the Court's conclusion that the Act was

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[3] See *EEOC* v. *Joslyn Mfg. & Supply Co.*, 706 F. 2d 1469, 1476–1477 (CA7 1983); *EEOC* v. *Lockheed Missiles & Space Co.*, 680 F. 2d 1243, 1245 (CA9 1982).

The Court of Appeals' majority, responding to the dissent's reliance on this language, excused the import of the language by saying: "The statutory reference to 'ability or inability to work' denotes disability and does not suggest that the spouse must be an employee of the employer providing the coverage. In fact, the statute says 'as other persons not so affected'; it does not say 'as other *employees* not so affected.'" 667 F. 2d 448, 450–451 (CA4 1982). This conclusion obviously does not comport with a common-sense understanding of the language. The logical explanation for Congress' reference to "persons" rather than "employees" is that Congress intended that the amendment should also apply to applicants for employment.

intended to extend beyond female employees. The Court concedes that "congressional discussion focused on the needs of female members of the work force rather than spouses of male employees." *Ante*, at 679. In fact, the singular focus of discussion on the problems of the *pregnant worker* is striking.

When introducing the Senate Report on the bill that later became the Pregnancy Discrimination Act, its principal sponsor, Senator Williams, explained:

> "Because of the Supreme Court's decision in the *Gilbert* case, this legislation is necessary to provide fundamental protection against sex discrimination for our Nation's 42 million *working women*. This protection will go a long way toward insuring that American women are permitted to assume their rightful place in our Nation's economy.
>
> "In addition to providing protection to *working women* with regard to fringe benefit programs, such as health and disability insurance programs, this legislation will prohibit other employment policies which adversely affect *pregnant workers*." 124 Cong. Rec. 36817 (1978) (emphasis added).[4]

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[4] Reprinted in a Committee Print prepared for the Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978, pp. 200–201 (1979) (hereinafter referred to as Leg. Hist.). In the foreword to the official printing of the Act's legislative history, Senator Williams further described the purpose of the Act, saying:

"The Act provides an essential protection for working women. The number of women in the labor force has increased dramatically in recent years. Most of these women are working or seeking work because of the economic need to support themselves or their families. It is expected that this trend of increasing participation by women in the workforce will continue in the future and that an increasing proportion of working women will be those who are mothers. It is essential that these women and their children be fully protected against the harmful effects of unjust employment discrimination on the basis of pregnancy." *Id.*, at III.

As indicated by the examples in the margin,[5] the Congressional Record is overflowing with similar statements by individual Members of Congress expressing their intention to ensure with the Pregnancy Discrimination Act that working women are not treated differently because of pregnancy. Consistent with these views, all three Committee Reports on the bills that led to the Pregnancy Discrimination Act ex-

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[5] See 123 Cong. Rec. 8145 (1977), Leg. Hist., at 21 (remarks of Sen. Bayh) (bill will "help provide true equality for working women of this Nation"); 123 Cong. Rec. 29385 (1977), Leg. Hist., at 62–63 (remarks of Sen. Williams) ("central purpose of the bill is to require that women workers be treated equally with other employees on the basis of their ability or inability to work"); 124 Cong. Rec. 36818 (1978), Leg. Hist., at 203 (remarks of Sen. Javits) ("bill represents only basic fairness for women employees"); 124 Cong. Rec. 36819 (1978), Leg. Hist., at 204 (remarks of Sen. Stafford) (bill will end "major source of discrimination unjustly afflicting working women in America"); 124 Cong. Rec. 21437 (1978), Leg. Hist., at 172 (remarks of Rep. Green) (bill "will provide rights workingwomen should have had years ago"); 124 Cong. Rec. 21439 (1978), Leg. Hist., at 177 (remarks of Rep. Quie) (bill is "necessary in order for women employees to enjoy equal treatment in fringe benefit programs"); 124 Cong. Rec. 21439 (1978), Leg. Hist., at 178 (remarks of Rep. Akaka) ("bill simply requires that pregnant workers be fairly and equally treated").

See also 123 Cong. Rec. 7541 (1977), Leg. Hist., at 7 (remarks of Sen. Brooke); 123 Cong. Rec. 7541, 29663 (1977), Leg. Hist., at 8, 134 (remarks of Sen. Mathias); 123 Cong. Rec. 29388 (1977), Leg. Hist., at 71 (remarks of Sen. Kennedy); 123 Cong. Rec. 29661 (1977), Leg. Hist., at 126 (remarks of Sen. Biden); 123 Cong. Rec. 29663 (1977), Leg. Hist., at 132 (remarks of Sen. Cranston); 123 Cong. Rec. 29663 (1977), Leg. Hist., at 132 (remarks of Sen. Culver); 124 Cong. Rec. 21439 (1978), Leg. Hist., at 178 (remarks of Rep. Corrada); 124 Cong. Rec. 21435, 38573 (1978), Leg. Hist., at 168, 207 (remarks of Rep. Hawkins); 124 Cong. Rec. 38574 (1978), Leg. Hist., at 208–209 (remarks of Rep. Sarasin); 124 Cong. Rec. 21440 (1978), Leg. Hist., at 180 (remarks of Rep. Chisholm); 124 Cong. Rec. 21440 (1978), Leg. Hist., at 181 (remarks of Rep. LaFalce); 124 Cong. Rec. 21441 (1978), Leg. Hist., at 182 (remarks of Rep. Collins); 124 Cong. Rec. 21441 (1978), Leg. Hist., at 184 (remarks of Rep. Whalen); 124 Cong. Rec. 21442 (1978), Leg. Hist., at 185 (remarks of Rep. Burke); 124 Cong. Rec. 21442 (1978), Leg. Hist., at 185 (remarks of Rep. Tsongas).

pressly state that the Act would require employers to treat pregnant employees the same as "other employees."[6]

The Court trys to avoid the impact of this legislative history by saying that it "does not create a 'negative inference' limiting the scope of the Act to the specific problem that motivated its enactment." *Ante*, at 679. This reasoning might have some force if the legislative history was silent on an arguably related issue. But the legislative history is not silent. The Senate Report provides:

> "Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependents of employees, as opposed to employees themselves. In this context it must be remembered that the basic purpose of this bill is to protect women employees, it does not alter the basic principles of title VII law as regards sex discrimination. . . . [T]he question in regard to dependents' benefits would be determined on the basis of existing title VII principles. . . . *[T]he question of whether an employer who does cover dependents, either with or without additional cost to the employee, may exclude conditions related to pregnancy from that coverage is a different matter.* Presumably because plans which provide comprehensive medical coverage for spouses of women employees but not spouses of male employees are rare, we are not aware of any title VII litigation concerning such plans. It is certainly not this committee's desire to encourage the institution of such plans. If such plans should be instituted in the future, the question would remain whether, under title VII, the affected employees were discriminated against on the

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[6] See Report of the Senate Committee on Human Resources, S. Rep. No. 95–331 (1977), Leg. Hist., at 38–53; Report of the House Committee on Education and Labor, H. R. Rep. No. 95–948 (1978), Leg. Hist., at 147–164; Report of the Committee of Conference, H. R. Conf. Rep. No. 95–1786 (1978), Leg. Hist., at 194–198.

basis of their sex as regards the extent of coverage for their dependents." S. Rep. No. 95–331, pp. 5–6 (1977), Leg. Hist., at 42–43 (emphasis added).

This plainly disclaims any intention to deal with the issue presented in this case. Where Congress says that it would not want "to encourage" plans such as petitioner's, it cannot plausibly be argued that Congress has intended "to prohibit" such plans. Senator Williams was questioned on this point by Senator Hatch during discussions on the floor and his answers are to the same effect.

"MR. HATCH: . . . The phrase 'women affected by pregnancy, childbirth or related medical conditions,' . . . appears to be overly broad, and is not limited in terms of employment. It does not even require that the person so affected be pregnant.

"*Indeed under the present language of the bill, it is arguable that spouses of male employees are covered by this civil rights amendment.* . . .

"Could the sponsors clarify exactly whom that phrase intends to cover?

. . . . . .

"MR. WILLIAMS: . . . I do not see how one can read into this any pregnancy other than that pregnancy that relates to the employee, and if there is any ambiguity, *let it be clear here now that this is very precise. It deals with a woman, a woman who is an employee*, an employee in a work situation where all disabilities are covered under a company plan that provides income maintenance in the event of medical disability; that her particular period of disability, when she cannot work because of childbirth or anything related to childbirth is excluded. . . .

. . . . . .

"MR. HATCH: So the Senator is satisfied that, though the committee language I brought up, 'woman

> affected by pregnancy' seems to be ambiguous, what it means is that *this act only applies to the particular woman who is actually pregnant, who is an employee and has become pregnant after her employment*?
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> . . . . .
>
> "MR. WILLIAMS: *Exactly.*" 123 Cong. Rec. 29643–29644 (1977), Leg. Hist., at 80 (emphasis added).[7]

It seems to me that analysis of this case should end here. Under our decision in *General Electric Co.* v. *Gilbert* petitioner's exclusion of pregnancy benefits for male employee's spouses would not offend Title VII. Nothing in the Pregnancy Discrimination Act was intended to reach beyond female employees. Thus, *Gilbert* controls and requires that we reverse the Court of Appeals. But it is here, at what

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[7] The Court suggests that in this exchange Senator Williams is explaining only that spouses of male employees will not be put on "income maintenance plans" while pregnant. *Ante*, at 680, n. 20. This is utterly illogical. Spouses of employees have no income from the relevant employer to be maintained. Senator Williams clearly says that the Act is limited to female employees and as to such employees it will ensure income maintenance where male employees would receive similar disability benefits. Senator Hatch's final question and Senator Williams' response could not be clearer. The Act was intended to affect *only* pregnant workers. This is exactly what the Senate Report said and Senator Williams confirmed that this is exactly what Congress intended.

The only indications arguably contrary to the views reflected in the Senate Report and the exchange between Senators Hatch and Williams are found in two isolated remarks by Senators Bayh and Cranston. 123 Cong. Rec. 29642, 29663 (1977), Leg. Hist., at 75, 131. These statements, however, concern these two Senators' views concerning Title VII sex discrimination as it existed prior to the Pregnancy Discrimination Act. Their conclusions are completely at odds with our decision in *General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976), and are not entitled to deference here. We have consistently said: "The views of members of a later Congress, concerning different [unamended] sections of Title VII . . . are entitled to little if any weight. It is the intent of the Congress that enacted [Title VII] in 1964 . . . that controls." *Teamsters* v. *United States*, 431 U. S. 324, 354, n. 39 (1977). See also *Southeastern Community College* v. *Davis*, 442 U. S. 397, 411, n. 11 (1979).

should be the stopping place, that the Court begins. The Court says:

> "Although the Pregnancy Discrimination Act has clarified the meaning of certain terms in this section, neither that Act nor the underlying statute contains a definition of the word 'discriminate.' In order to decide whether petitioner's plan discriminates against male employees because of *their* sex, we must therefore go beyond the bare statutory language. Accordingly, we shall consider whether Congress, by enacting the Pregnancy Discrimination Act, not only overturned the specific holding in *General Electric* v. *Gilbert*, *supra*, but also rejected the test of discrimination employed by the Court in that case. We believe it did." *Ante*, at 675–676.

It would seem that the Court has refuted its own argument by recognizing that the Pregnancy Discrimination Act only clarifies the meaning of the phrases "because of sex" and "on the basis of sex," and says nothing concerning the definition of the word "discriminate."[8] Instead the Court proceeds to try to explain that while Congress said one thing, it did another.

The crux of the Court's reasoning is that even though the Pregnancy Discrimination Act redefines the phrases "because of sex" and "on the basis of sex" only to include discrimination against female employees affected by pregnancy, Congress also expressed its view that in *Gilbert* "the Supreme Court . . . erroneously interpreted congressional intent." *Ante*, at 679. See also *ante*, at 684. Somehow the Court then concludes that this renders all of *Gilbert* obsolete.

In support of its argument, the Court points to a few passages in congressional Reports and several statements by

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[8] The Court also concedes at one point that the Senate Report on the Pregnancy Discrimination Act "acknowledges that the new definition [in the Act] does not itself resolve the question" presented in this case. *Ante*, at 680, n. 20.

various Members of the 95th Congress to the effect that the Court in *Gilbert* had, when it construed Title VII, misperceived the intent of the 88th Congress. *Ante*, at 679, n. 17. The Court also points out that "[m]any of [the Members of the 95th Congress] expressly agreed with the views of the dissenting Justices." *Ante*, at 679. Certainly *various Members of Congress* said as much. But the fact remains that *Congress as a body* has not expressed these sweeping views in the Pregnancy Discrimination Act.

Under our decision in *General Electric Co.* v. *Gilbert*, petitioner's exclusion of pregnancy benefits for male employees' spouses would not violate Title VII. Since nothing in the Pregnancy Discrimination Act even arguably reaches beyond female employees affected by pregnancy, *Gilbert* requires that we reverse the Court of Appeals. Because the Court concludes otherwise, I dissent.

# UNITED STATES *v.* PLACE

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

No. 81–1617. Argued March 2, 1983—Decided June 20, 1983

When respondent's behavior aroused the suspicion of law enforcement officers as he waited in line at the Miami International Airport to purchase a ticket to New York's La Guardia Airport, the officers approached respondent and requested and received identification. Respondent consented to a search of the two suitcases he had checked, but because his flight was about to depart the officers decided not to search the luggage. The officers then found some discrepancies in the address tags on the luggage and called Drug Enforcement Administration (DEA) authorities in New York to relay this information. Upon respondent's arrival at La Guardia Airport, two DEA agents approached him, said that they believed he might be carrying narcotics, and asked for and received identification. When respondent refused to consent to a search of his luggage, one of the agents told him that they were going to take it to a federal judge to obtain a search warrant. The agents then took the luggage to Kennedy Airport where it was subjected to a "sniff test" by a trained narcotics detection dog which reacted positively to one of the suitcases. At this point, 90 minutes had elapsed since the seizure of the luggage. Thereafter, the agents obtained a search warrant for that suitcase and upon opening it discovered cocaine. Respondent was indicted for possession of cocaine with intent to distribute, and the District Court denied his motion to suppress the contents of the suitcase. He pleaded guilty to the charge and was convicted, but reserved the right to appeal the denial of his motion to suppress. The Court of Appeals reversed, holding that the prolonged seizure of respondent's luggage exceeded the limits of the type of investigative stop permitted by *Terry* v. *Ohio*, 392 U. S. 1, and hence amounted to a seizure without probable cause in violation of the Fourth Amendment.

*Held:* Under the circumstances, the seizure of respondent's luggage violated the Fourth Amendment. Accordingly, the evidence obtained from the subsequent search of the luggage was inadmissible, and respondent's conviction must be reversed. Pp. 700–710.

(a) When an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny permit the officer to detain the luggage temporarily to investigate the circumstances that aroused the officer's suspicion,

provided that the investigative detention is properly limited in scope. Pp. 700–706.

(b) The investigative procedure of subjecting luggage to a "sniff test" by a well-trained narcotics detection dog does not constitute a "search" within the meaning of the Fourth Amendment. Pp. 706–707.

(c) When the police seize luggage from the suspect's custody, the limitations applicable to investigative detentions of the person should define the permissible scope of an investigative detention of the luggage on less than probable cause. Under this standard, the police conduct here exceeded the permissible limits of a *Terry*-type investigative stop. The length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause. This Fourth Amendment violation was exacerbated by the DEA agents' failure to inform respondent accurately of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and of what arrangements would be made for return of the luggage if the investigation dispelled the suspicion. Pp. 707–710.

660 F. 2d 44, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in the result, in which MARSHALL, J., joined, *post*, p. 710. BLACKMUN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 720.

*Alan I. Horowitz* argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Jensen*, *Deputy Solicitor General Frey*, and *John Fichter De Pue*.

*James D. Clark* argued the cause and filed a brief for respondent.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the issue whether the Fourth Amendment prohibits law enforcement authorities from temporarily

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**Fred E. Inbau*, *Wayne W. Schmidt*, *James P. Manak*, *Evelle J. Younger*, and *Howard G. Berringer* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging reversal.

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

detaining personal luggage for exposure to a trained narcotics detection dog on the basis of reasonable suspicion that the luggage contains narcotics. Given the enforcement problems associated with the detection of narcotics trafficking and the minimal intrusion that a properly limited detention would entail, we conclude that the Fourth Amendment does not prohibit such a detention. On the facts of this case, however, we hold that the police conduct exceeded the bounds of a permissible investigative detention of the luggage.

## I

Respondent Raymond J. Place's behavior aroused the suspicions of law enforcement officers as he waited in line at the Miami International Airport to purchase a ticket to New York's La Guardia Airport. As Place proceeded to the gate for his flight, the agents approached him and requested his airline ticket and some identification. Place complied with the request and consented to a search of the two suitcases he had checked. Because his flight was about to depart, however, the agents decided not to search the luggage.

Prompted by Place's parting remark that he had recognized that they were police, the agents inspected the address tags on the checked luggage and noted discrepancies in the two street addresses. Further investigation revealed that neither address existed and that the telephone number Place had given the airline belonged to a third address on the same street. On the basis of their encounter with Place and this information, the Miami agents called Drug Enforcement Administration (DEA) authorities in New York to relay their information about Place.

Two DEA agents waited for Place at the arrival gate at La Guardia Airport in New York. There again, his behavior aroused the suspicion of the agents. After he had claimed his two bags and called a limousine, the agents decided to approach him. They identified themselves as federal narcotics agents, to which Place responded that he knew they were "cops" and had spotted them as soon as he had deplaned.

One of the agents informed Place that, based on their own observations and information obtained from the Miami authorities, they believed that he might be carrying narcotics. After identifying the bags as belonging to him, Place stated that a number of police at the Miami Airport had surrounded him and searched his baggage. The agents responded that their information was to the contrary. The agents requested and received identification from Place—a New Jersey driver's license, on which the agents later ran a computer check that disclosed no offenses, and his airline ticket receipt. When Place refused to consent to a search of his luggage, one of the agents told him that they were going to take the luggage to a federal judge to try to obtain a search warrant and that Place was free to accompany them. Place declined, but obtained from one of the agents telephone numbers at which the agents could be reached.

The agents then took the bags to Kennedy Airport, where they subjected the bags to a "sniff test" by a trained narcotics detection dog. The dog reacted positively to the smaller of the two bags but ambiguously to the larger bag. Approximately 90 minutes had elapsed since the seizure of respondent's luggage. Because it was late on a Friday afternoon, the agents retained the luggage until Monday morning, when they secured a search warrant from a Magistrate for the smaller bag. Upon opening that bag, the agents discovered 1,125 grams of cocaine.

Place was indicted for possession of cocaine with intent to distribute in violation of 21 U. S. C. § 841(a)(1). In the District Court, Place moved to suppress the contents of the luggage seized from him at La Guardia Airport, claiming that the warrantless seizure of the luggage violated his Fourth Amendment rights.[1] The District Court denied the motion.

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[1] In support of his motion, respondent also contended that the detention of his person at both the Miami and La Guardia Airports was not based on reasonable suspicion and that the "sniff test" of his luggage was conducted in a manner that tainted the dog's reaction. 498 F. Supp. 1217, 1221, 1228

Applying the standard of *Terry* v. *Ohio*, 392 U. S. 1 (1968), to the detention of personal property, it concluded that detention of the bags could be justified if based on reasonable suspicion to believe that the bags contained narcotics. Finding reasonable suspicion, the District Court held that Place's Fourth Amendment rights were not violated by seizure of the bags by the DEA agents. 498 F. Supp. 1217, 1228 (EDNY 1980). Place pleaded guilty to the possession charge, reserving the right to appeal the denial of his motion to suppress.

On appeal of the conviction, the United States Court of Appeals for the Second Circuit reversed. 660 F. 2d 44 (1981). The majority assumed both that *Terry* principles could be applied to justify a warrantless seizure of baggage on less than probable cause and that reasonable suspicion existed to justify the investigatory stop of Place. The majority concluded, however, that the prolonged seizure of Place's baggage exceeded the permissible limits of a *Terry*-type investigative stop and consequently amounted to a seizure without probable cause in violation of the Fourth Amendment.

We granted certiorari, 457 U. S. 1104 (1982), and now affirm.

## II

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, *and effects*, against unreasonable searches and seizures." (Emphasis added.) Although in the context of personal property, and particularly containers, the Fourth Amendment challenge is

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(EDNY 1980). The District Court rejected both contentions. As to the former, it concluded that the agents had reasonable suspicion to believe that Place was engaged in criminal activity when he was detained at the two airports and that the stops were therefore lawful. *Id.*, at 1225, 1226. On appeal, the Court of Appeals did not reach this issue, assuming the existence of reasonable suspicion. Respondent Place cross-petitioned in this Court on the issue of reasonable suspicion, and we denied certiorari. *Place* v. *United States*, 457 U. S. 1106 (1982). We therefore have no occasion to address the issue here.

typically to the subsequent search of the container rather than to its initial seizure by the authorities, our cases reveal some general principles regarding seizures. In the ordinary case, the Court has viewed a seizure of personal property as *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized.[2] See, *e. g.*, *Marron* v. *United States*, 275 U. S. 192, 196 (1927). Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present. See, *e. g.*, *Arkansas* v. *Sanders*, 442 U. S. 753, 761 (1979); *United States* v. *Chadwick*, 433 U. S. 1 (1977); *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971).[3] For example, "objects such as weapons or contraband found in a public place may be seized by the police without a warrant," *Payton* v. *New York*, 445 U. S. 573, 587 (1980), because, under these circumstances, the risk of the item's disappearance or use for its intended purpose before a

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[2] The Warrant Clause of the Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[3] In *Sanders*, the Court explained:

"The police acted properly—indeed commendably—in apprehending respondent and his luggage. They had ample probable cause to believe that respondent's green suitcase contained marihuana. . . . Having probable cause to believe that contraband was being driven away in the taxi, the police were justified in stopping the vehicle . . . and seizing the suitcase they suspected contained contraband." 442 U. S., at 761.

The Court went on to hold that the police violated the Fourth Amendment in immediately searching the luggage rather than first obtaining a warrant authorizing the search. *Id.*, at 766. That holding was not affected by our recent decision in *United States* v. *Ross*, 456 U. S. 798, 824 (1982).

warrant may be obtained outweighs the interest in possession. See also *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 354 (1977).

In this case, the Government asks us to recognize the reasonableness under the Fourth Amendment of warrantless seizures of personal luggage from the custody of the owner on the basis of less than probable cause, for the purpose of pursuing a limited course of investigation, short of opening the luggage, that would quickly confirm or dispel the authorities' suspicion. Specifically, we are asked to apply the principles of *Terry* v. *Ohio*, *supra*, to permit such seizures on the basis of reasonable, articulable suspicion, premised on objective facts, that the luggage contains contraband or evidence of a crime. In our view, such application is appropriate.

In *Terry* the Court first recognized "the narrow authority of police officers who suspect criminal activity to make limited intrusions on an individual's personal security based on less than probable cause." *Michigan* v. *Summers*, 452 U. S. 692, 698 (1981). In approving the limited search for weapons, or "frisk," of an individual the police reasonably believed to be armed and dangerous, the Court implicitly acknowledged the authority of the police to make a *forcible stop* of a person when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity. 392 U. S., at 22.[4] That implicit proposition was embraced openly in *Adams* v. *Williams*, 407 U. S. 143, 146 (1972), where the Court relied on *Terry* to hold that the police officer lawfully made a forcible stop of the suspect to investigate an informant's tip that the suspect was carry-

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[4] In his concurring opinion in *Terry*, Justice Harlan made this logical underpinning of the Court's Fourth Amendment holding clear:

"In the first place, if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop. . . . I would make it perfectly clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime." 392 U. S., at 32–33.

ing narcotics and a concealed weapon. See also *Michigan* v. *Summers*, *supra* (limited detention of occupants while authorities search premises pursuant to valid search warrant); *United States* v. *Cortez*, 449 U. S. 411 (1981) (stop near border of vehicle suspected of transporting illegal aliens); *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975) (brief investigative stop near border for questioning about citizenship and immigration status).

The exception to the probable-cause requirement for limited seizures of the person recognized in *Terry* and its progeny rests on a balancing of the competing interests to determine the reasonableness of the type of seizure involved within the meaning of "the Fourth Amendment's general proscription against unreasonable searches and seizures." 392 U. S., at 20. We must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause.

We examine first the governmental interest offered as a justification for a brief seizure of luggage from the suspect's custody for the purpose of pursuing a limited course of investigation. The Government contends that, where the authorities possess specific and articulable facts warranting a reasonable belief that a traveler's luggage contains narcotics, the governmental interest in seizing the luggage briefly to pursue further investigation is substantial. We agree. As observed in *United States* v. *Mendenhall*, 446 U. S. 544, 561 (1980) (opinion of POWELL, J.), "[t]he public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit."

Respondent suggests that, absent some special law enforcement interest such as officer safety, a generalized interest in law enforcement cannot justify an intrusion on an individual's Fourth Amendment interests in the absence of

probable cause. Our prior cases, however, do not support this proposition. In *Terry*, we described the governmental interests supporting the initial seizure of the person as "effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." 392 U. S., at 22. Similarly, in *Michigan* v. *Summers* we identified three law enforcement interests that justified limited detention of the occupants of the premises during execution of a valid search warrant: "preventing flight in the event that incriminating evidence is found," "minimizing the risk of harm" both to the officers and the occupants, and "orderly completion of the search." 452 U. S., at 702–703. Cf. *Florida* v. *Royer*, 460 U. S. 491, 500 (1983) (plurality opinion) ("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 test is whether those interests are sufficiently "substantial," 452 U. S., at 699, not whether they are independent of the interest in investigating crimes effectively and apprehending suspects. The context of a particular law enforcement practice, of course, may affect the determination whether a brief intrusion on Fourth Amendment interests on less than probable cause is essential to effective criminal investigation. Because of the inherently transient nature of drug courier activity at airports, allowing police to make brief investigative stops of persons at airports on reasonable suspicion of drug-trafficking substantially enhances the likelihood that police will be able to prevent the flow of narcotics into distribution channels.[5]

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[5] Referring to the problem of intercepting drug couriers in the Nation's airports, JUSTICE POWELL has observed:

"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

Against this strong governmental interest, we must weigh the nature and extent of the intrusion upon the individual's Fourth Amendment rights when the police briefly detain luggage for limited investigative purposes. On this point, respondent Place urges that the rationale for a *Terry* stop of the person is wholly inapplicable to investigative detentions of personalty. Specifically, the *Terry* exception to the probable-cause requirement is premised on the notion that a *Terry*-type stop of the person is substantially less intrusive of a person's liberty interests than a formal arrest. In the property context, however, Place urges, there are no degrees of intrusion. Once the owner's property is seized, the dispossession is absolute.

We disagree. The intrusion on possessory interests occasioned by a seizure of one's personal effects can vary both in its nature and extent. The seizure may be made after the owner has relinquished control of the property to a third party or, as here, from the immediate custody and control of the owner.[6] Moreover, the police may confine their investi-

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illegal conduct may be unmatched in any other area of law enforcement." *United States* v. *Mendenhall*, 446 U. S. 544, 561–562 (1980).

See *Florida* v. *Royer*, 460 U. S. 491, 519 (1983) (BLACKMUN, J., dissenting) ("The special need for flexibility in uncovering illicit drug couriers is hardly debatable") (airport context).

[6] One need only compare the facts of this case with those in *United States* v. *Van Leeuwen*, 397 U. S. 249 (1970). There the defendant had voluntarily relinquished two packages of coins to the postal authorities. Several facts aroused the suspicion of the postal officials, who detained the packages, without searching them, for about 29 hours while certain lines of inquiry were pursued. The information obtained during this time was sufficient to give the authorities probable cause to believe that the packages contained counterfeit coins. After obtaining a warrant, the authorities opened the packages, found counterfeit coins therein, resealed the packages, and sent them on their way. Expressly limiting its holding to the facts of the case, the Court concluded that the 29-hour detention of the packages on reasonable suspicion that they contained contraband did not violate the Fourth Amendment. *Id.*, at 253.

As one commentator has noted, "*Van Leeuwen* was an easy case for the Court because the defendant was unable to show that the invasion intruded

gation to an on-the-spot inquiry—for example, immediate exposure of the luggage to a trained narcotics detection dog[7]—or transport the property to another location. Given the fact that seizures of property can vary in intrusiveness, some brief detentions of personal effects may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime.

In sum, we conclude that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope.

The purpose for which respondent's luggage was seized, of course, was to arrange its exposure to a narcotics detection dog. Obviously, if this investigative procedure is itself a search requiring probable cause, the initial seizure of respondent's luggage for the purpose of subjecting it to the sniff test—no matter how brief—could not be justified on less than probable cause. See *Terry* v. *Ohio*, 392 U. S., at 20; *United States* v. *Cortez*, 449 U. S., at 421; *United States* v. *Brignoni-Ponce*, 422 U. S., at 881–882; *Adams* v. *Williams*, 407 U. S., at 146.

The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations

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upon either a privacy interest in the contents of the packages or a possessory interest in the packages themselves." 3 W. LaFave, Search and Seizure § 9.6, p. 71 (Supp. 1982).

[7] Cf. *Florida* v. *Royer*, *supra*, at 502 (plurality opinion) ("We agree with the State that [the officers had] 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") (emphasis added).

of privacy." *United States* v. *Chadwick*, 433 U. S., at 7. We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. *Id.*, at 13. A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a "search" within the meaning of the Fourth Amendment.

## III

There is no doubt that the agents made a "seizure" of Place's luggage for purposes of the Fourth Amendment when, following his refusal to consent to a search, the agent told Place that he was going to take the luggage to a federal judge to secure issuance of a warrant. As we observed in *Terry*, "[t]he manner in which the seizure . . . [was] con-

ducted is, of course, as vital a part of the inquiry as whether [it was] warranted at all." 392 U. S., at 28. We therefore examine whether the agents' conduct in this case was such as to place the seizure within the general rule requiring probable cause for a seizure or within *Terry*'s exception to that rule.

At the outset, we must reject the Government's suggestion that the point at which probable cause for seizure of luggage from the person's presence becomes necessary is more distant than in the case of a *Terry* stop of the person himself. The premise of the Government's argument is that seizures of property are generally less intrusive than seizures of the person. While true in some circumstances, that premise is faulty on the facts we address in this case. The precise type of detention we confront here is seizure of personal luggage from the immediate possession of the suspect for the purpose of arranging exposure to a narcotics detection dog. Particularly in the case of detention of luggage within the traveler's immediate possession, the police conduct intrudes on both the suspect's possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary. The person whose luggage is detained is technically still free to continue his travels or carry out other personal activities pending release of the luggage. Moreover, he is not subjected to the coercive atmosphere of a custodial confinement or to the public indignity of being personally detained. Nevertheless, such a seizure can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return.[8] Therefore, when the police seize luggage from the

[8] "At least when the authorities do not make it absolutely clear how they plan to reunite the suspect and his possessions at some future time and place, seizure of the object is tantamount to seizure of the person. This is because that person must either remain on the scene or else seemingly surrender his effects permanently to the police." 3 W. LaFave, Search and Seizure § 9.6, p. 72 (Supp. 1982).

suspect's custody, we think the limitations applicable to investigative detentions of the person should define the permissible scope of an investigative detention of the person's luggage on less than probable cause. Under this standard, it is clear that the police conduct here exceeded the permissible limits of a *Terry*-type investigative stop.

The length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause. Although we have recognized the reasonableness of seizures longer than the momentary ones involved in *Terry*, *Adams*, and *Brignoni-Ponce*, see *Michigan* v. *Summers*, 452 U. S. 692 (1981), the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. Moreover, in assessing the effect of the length of the detention, we take into account whether the police diligently pursue their investigation. We note that here the New York agents knew the time of Place's scheduled arrival at La Guardia, had ample time to arrange for their additional investigation at that location, and thereby could have minimized the intrusion on respondent's Fourth Amendment interests.[9] Thus, although we decline to adopt any outside time limitation for a permissible *Terry* stop,[10] we have never

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[9] Cf. *Florida* v. *Royer*, 460 U. S., at 506 (plurality opinion) ("If [trained narcotics detection dogs] had been used, Royer and his luggage could have been momentarily detained while this investigative procedure was carried out"). This course of conduct also would have avoided the further substantial intrusion on respondent's possessory interests caused by the removal of his luggage to another location.

[10] Cf. ALI, Model Code of Pre-Arraignment Procedure § 110.2(1) (1975) (recommending a maximum of 20 minutes for a *Terry* stop). We understand the desirability of providing law enforcement authorities with a clear rule to guide their conduct. Nevertheless, we question the wisdom of a rigid time limitation. Such a limit would undermine the equally important need to allow authorities to graduate their responses to the demands of any particular situation.

approved a seizure of the person for the prolonged 90-minute period involved here and cannot do so on the facts presented by this case. See *Dunaway* v. *New York*, 442 U. S. 200 (1979).

Although the 90-minute detention of respondent's luggage is sufficient to render the seizure unreasonable, the violation was exacerbated by the failure of the agents to accurately inform respondent of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and of what arrangements would be made for return of the luggage if the investigation dispelled the suspicion. In short, we hold that the detention of respondent's luggage in this case went beyond the narrow authority possessed by police to detain briefly luggage reasonably suspected to contain narcotics.

## IV

We conclude that, under all of the circumstances of this case, the seizure of respondent's luggage was unreasonable under the Fourth Amendment. Consequently, the evidence obtained from the subsequent search of his luggage was inadmissible, and Place's conviction must be reversed. The judgment of the Court of Appeals, accordingly, is affirmed.

*It is so ordered.*

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in the result.

In this case, the Court of Appeals assumed both that the officers had the "reasonable suspicion" necessary to justify an "investigative" stop of respondent under *Terry* v. *Ohio*, 392 U. S. 1 (1968), and its progeny, and that the principles of *Terry* apply to seizures of property. See 660 F. 2d 44, 50 (CA2 1981); *ante*, at 700. The court held simply that "the prolonged seizure of [respondent's] baggage went far beyond a mere investigative stop and amounted to a violation of his Fourth Amendment rights." 660 F. 2d, at 50. See also *id.*,

at 52, 53. I would affirm the Court of Appeals' judgment on this ground.

Instead of simply affirming on this ground and putting an end to the matter, the Court decides to reach, and purportedly to resolve, the constitutionality of the seizure of respondent's luggage on less than probable cause and the exposure of that luggage to a narcotics detection dog. See *ante*, at 706–707. Apparently, the Court finds itself unable to "resist the pull to decide the constitutional issues involved in this case on a broader basis than the record before [it] imperatively requires." *Street* v. *New York*, 394 U. S. 576, 581 (1969). Because the Court reaches issues unnecessary to its judgment and because I cannot subscribe to the Court's analysis of those issues, I concur only in the result.

## I

I have had occasion twice in recent months to discuss the limited scope of the exception to the Fourth Amendment's probable-cause requirement created by *Terry* and its progeny. See *Florida* v. *Royer*, 460 U. S. 491, 509 (1983) (BRENNAN, J., concurring in result); *Kolender* v. *Lawson*, 461 U. S. 352, 362 (1983) (BRENNAN, J., concurring). Unfortunately, the unwarranted expansion of that exception which the Court endorses today forces me to elaborate on my previously expressed views.

In *Terry* the Court expressly declined to address "the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation." 392 U. S., at 19, n. 16.[1] The Court was con-

[1] The "seizure" at issue in *Terry* v. *Ohio* was the actual physical restraint imposed on the suspect. 392 U. S., at 19. The Court assumed that the officer's initial approach and questioning of the suspect did not amount to a "seizure." *Id.*, at 19, n. 16. The Court acknowledged, however, that "seizures" may occur irrespective of the imposition of actual physical restraint. The Court stated that "[i]t must be recognized that whenever a police officer accosts an individual and restrains his freedom to

fronted with "the quite narrow question" of "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest." *Id.*, at 15. In addressing this question, the Court noted that it was dealing "with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure." *Id.*, at 20. As a result, the conduct involved in the case had to be "tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Ibid.* (footnote omitted). The Court's inquiry into the "reasonableness" of the conduct at issue was based on a "'balancing [of] the need to search [or seize] against the invasion which the search [or seizure] entails.'" *Id.*, at 21, quoting *Camara* v. *Municipal Court*, 387 U. S. 523, 537 (1967). The Court concluded that the officer's conduct was reasonable and stated its holding as follows:

> "We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of

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walk away, he has 'seized' that person." *Id.*, at 16. See also *id.*, at 19, n. 16. This standard, however, is easier to state than it is to apply. Compare *United States* v. *Mendenhall*, 446 U. S. 544, 550–557 (1980) (opinion of Stewart, J.), with *Florida* v. *Royer*, 460 U. S. 491, 511–512 (1983) (BRENNAN, J., concurring in result).

the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." 392 U. S., at 30.

In *Adams* v. *Williams*, 407 U. S. 143 (1972), the Court relied on *Terry* to endorse "brief" investigative stops based on reasonable suspicion. 407 U. S., at 145–146. In this regard, the Court stated that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.*, at 146. The weapons search upheld in *Adams* was very limited and was based on *Terry*'s safety rationale. 407 U. S., at 146. The Court stated that the purpose of a "limited" weapons search "is 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), the Court relied on *Terry* and *Adams* in holding 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." 422 U. S., at 881.[2] The Court based this relaxation of the traditional probable-cause requirement 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.* The Court 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," the Court expressly stated that "any further detention or search must be based on consent or probable cause." 422 U. S., at 881–882. See also

[2] The stops "'usually consume[d] no more than a minute.'" *United States* v. *Brignoni-Ponce*, 422 U. S., at 880.

*Ybarra* v. *Illinois*, 444 U. S. 85, 93 (1979) ("The *Terry* case created an exception to the requirement of probable cause, an exception whose 'narrow scope' this Court 'has been careful to maintain'" (footnote omitted)); *Dunaway* v. *New York*, 442 U. S. 200, 209–212 (1979) (discussing the narrow scope of *Terry* and its progeny).[3]

It is clear that *Terry*, and the cases that followed it, permit only brief investigative stops and extremely limited searches based on reasonable suspicion. They do not provide the police with a commission to employ whatever investigative techniques they deem appropriate. As I stated in *Florida* v. *Royer*, "[t]he 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.'" 460 U. S., at 510 (concurring in result), quoting *Dunaway* v. *New York*, *supra*, at 213.

## II

In some respects the Court's opinion in this case can be seen as the logical successor of the plurality opinion in *Florida* v. *Royer*, *supra*. The plurality opinion in *Royer* contained considerable language which was unnecessary to the judgment, *id.*, at 509 (BRENNAN, J., concurring in result), regarding the permissible scope of *Terry* investigative stops. See 460 U. S., at 501–507, and n. 10. Even assuming, however, that the Court finds some support in *Royer* for its discussion of the scope of *Terry* stops, the Court today goes

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[3] In *Michigan* v. *Summers*, 452 U. S. 692 (1981), the Court relied on *Terry* and its progeny to hold that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." 452 U. S., at 705 (footnotes omitted). The Court also relied on *Terry* in *Pennsylvania* v. *Mimms*, 434 U. S. 106 (1977), to uphold an officer's order to an individual to get out of his car following a lawful stop of the vehicle. Both *Summers* and *Mimms* focused on seizures of people.

well beyond *Royer* in endorsing the notion that the principles of *Terry* permit "warrantless seizures of personal luggage from the custody of the owner on the basis of less than probable cause, for the purpose of pursuing a limited course of investigation, short of opening the luggage, that would quickly confirm or dispel the authorities' suspicion." *Ante*, at 702. See also *ante*, at 706. In addition to being unnecessary to the Court's judgment, see *supra*, at 711, this suggestion finds no support in *Terry* or its progeny and significantly dilutes the Fourth Amendment's protections against government interference with personal property. In short, it represents a radical departure from settled Fourth Amendment principles.

As noted *supra*, at 711–712, *Terry* and the cases that followed it authorize a brief "investigative" stop of an individual based on reasonable suspicion and a limited search for weapons if the officer reasonably suspects that the individual is armed and presently dangerous. The purpose of this brief stop is "to determine [the individual's] identity or to maintain the status quo momentarily while obtaining more information. . . ." *Adams* v. *Williams*, 407 U. S., at 146. Anything more than a brief stop "must be based on consent or probable cause." *United States* v. *Brignoni-Ponce*, *supra*, at 882. During the course of this stop, "the suspect must not be moved or asked to move more than a short distance; physical searches are permitted only to the extent necessary to protect the police officers involved during the encounter; and, most importantly, the suspect must be free to leave after a short time and to decline to answer the questions put to him." *Kolender* v. *Lawson*, 461 U. S., at 365 (BRENNAN, J., concurring). It is true that *Terry* stops may involve seizures of personal effects incidental to the seizure of the person involved. Obviously, an officer cannot seize a person without also seizing the personal effects that the individual has in his possession at the time. But there is a difference between

incidental seizures of personal effects and seizures of property independent of the seizure of the person.

The Fourth Amendment protects "effects" as well as people from unreasonable searches and seizures. In this regard, JUSTICE STEVENS pointed out in *Texas* v. *Brown*, 460 U. S. 730 (1983), that "[t]he [Fourth] Amendment protects two different interests of the citizen—the interest in retaining possession of property and the interest in maintaining personal privacy." *Id.*, at 747 (opinion concurring in judgment). "A seizure threatens the former, a search the latter." *Ibid.* Even if an item is not searched, therefore, its seizure implicates a protected Fourth Amendment interest. For this reason, seizures of property must be based on probable cause. See *Colorado* v. *Bannister*, 449 U. S. 1, 3 (1980); *Payton* v. *New York*, 445 U. S. 573, 587 (1980); *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 351 (1977); *Chambers* v. *Maroney*, 399 U. S. 42, 51–52 (1970); *Warden* v. *Hayden*, 387 U. S. 294, 309–310 (1967). See also *Texas* v. *Brown*, *supra*, at 747–748 (STEVENS, J., concurring in judgment). Neither *Terry* nor its progeny changed this rule.

In this case, the officers' seizure of respondent and their later independent seizure of his luggage implicated separate Fourth Amendment interests. First, respondent had a protected interest in maintaining his personal security and privacy. *Terry* allows this interest to be overcome, and authorizes a limited intrusion, if the officers have reason to suspect that criminal activity is afoot. Second, respondent had a protected interest in retaining possession of his personal effects. While *Terry* may authorize seizures of personal effects incident to a lawful seizure of the person, nothing in the *Terry* line of cases authorizes the police to seize personal property, such as luggage, independent of the seizure of the person. Such seizures significantly expand the scope of a *Terry* stop and may not be effected on less than probable

cause.[4] Obviously, they also significantly expand the scope of the intrusion.

The officers did not develop probable cause to arrest respondent during their encounter with him. See 660 F. 2d, at 50. Therefore, they had to let him go. But despite the absence of probable cause to arrest respondent, the officers seized his luggage and deprived him of possession. Respondent, therefore, was subjected not only to an invasion of his personal security and privacy, but also to an independent dispossession of his personal effects based simply on reasonable suspicion. It is difficult to understand how this intrusion is not more severe than a brief stop for questioning or even a limited, on-the-spot patdown search for weapons.

In my view, as soon as the officers seized respondent's luggage, independent of their seizure of him, they exceeded the scope of a permissible *Terry* stop and violated respondent's Fourth Amendment rights. In addition, the officers' seizure of respondent's luggage violated the established rule that seizures of personal effects must be based on probable cause. Their actions, therefore, should not be upheld.

The Court acknowledges that seizures of personal property must be based on probable cause. See *ante*, at 700–702. Despite this recognition, the Court employs a balancing test drawn from *Terry* to conclude that personal effects may be seized based on reasonable suspicion. See *ante*, at 703–706.[5]

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[4] Putting aside the legality of the independent seizure of the luggage, the Court correctly points out that the seizure of luggage "can effectively restrain the person" beyond the initial stop "since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return." *Ante*, at 708 (footnote omitted).

[5] To the extent that the Court relies on *United States* v. *Van Leeuwen*, 397 U. S. 249 (1970), as support for its conclusion, see *ante*, at 705–706, n. 6, such reliance is misplaced. As the Court itself points out, the holding in *Van Leeuwen* was expressly limited to the facts of that case. *Ante*, at 705, n. 6. Moreover, the Court of Appeals more than adequately distin-

In *Dunaway* v. *New York*, 442 U. S. 200 (1979), the Court stated that "[t]he narrow intrusions involved in [*Terry* and its progeny] were judged by a balancing test rather than by the general principle that Fourth Amendment seizures must be supported by the 'long-prevailing standards' of probable cause . . . only because these intrusions fell far short of the kind of intrusion associated with an arrest." *Id.*, at 212. As *Dunaway* suggests, the use of a balancing test in this case is inappropriate. First, the intrusion involved in this case is no longer the "narrow" one contemplated by the *Terry* line of cases. See *supra*, at 717. In addition, the intrusion involved in this case involves not only the seizure of a person, but also the seizure of property. As noted, *supra*, at 711–712, *Terry* and its progeny did not address seizures of property. Those cases left unchanged the rule that seizures of property must be based on probable cause. See *supra*, at 716–717. The *Terry* balancing test should not be wrenched from its factual and conceptual moorings.

There are important reasons why balancing inquiries should not be conducted except in the most limited circumstances. *Terry* and the cases that followed it established "isolated exceptions to the general rule that the Fourth Amendment itself has already performed the constitutional balance between police objectives and personal privacy." *Michigan* v. *Summers*, 452 U. S. 692, 706 (1981) (Stewart, J., dissenting). "[T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the 'often competitive enterprise of ferreting out crime.'" *Dunaway* v. *New York*,

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guished *Van Leeuwen*. See 660 F. 2d 44, 52–53 (CA2 1981). As the court stated: "Unlike the dispossession of hand baggage in a passenger's custody, which constitutes a substantial intrusion, the mere detention of mail not in his custody or control amounts to at most a minimal or technical interference with his person or effects, resulting in no personal deprivation at all." *Ibid.*

*supra*, at 213, quoting *Johnson* v. *United States*, 333 U. S. 10, 14 (1948). The truth of this proposition is apparent when one considers that the Court today has employed a balancing test "to swallow the general rule that [seizures of property] are 'reasonable' only if based on probable cause." 442 U. S., at 213. JUSTICE BLACKMUN's concern over "an emerging tendency on the part of the Court to convert the *Terry* decision into a general statement that the Fourth Amendment requires only that any seizure be reasonable," *post*, at 721 (BLACKMUN, J., concurring in judgment) (footnote omitted), is certainly justified.

III

The Court also suggests today, in a discussion unnecessary to the judgment, that exposure of respondent's luggage to a narcotics detection dog "did not constitute a 'search' within the meaning of the Fourth Amendment." *Ante*, at 707. In the District Court, respondent did "not contest the validity of sniff searches *per se*. . . ." 498 F. Supp. 1217, 1228 (EDNY 1980). The Court of Appeals did not reach or discuss the issue. It was not briefed or argued in this Court. In short, I agree with JUSTICE BLACKMUN that the Court should not address the issue. See *post*, at 723–724 (BLACKMUN, J., concurring in judgment).

I also agree with JUSTICE BLACKMUN's suggestion, *ibid.*, that the issue is more complex than the Court's discussion would lead one to believe. As JUSTICE STEVENS suggested in objecting to "unnecessarily broad dicta" in *United States* v. *Knotts*, 460 U. S. 276 (1983), the use of electronic detection techniques that enhance human perception implicates "especially sensitive concerns." *Id.*, at 288 (opinion concurring in judgment). Obviously, a narcotics detection dog is not an electronic detection device. Unlike the electronic "beeper" in *Knotts*, however, a dog does more than merely allow the police to do more efficiently what they could do using only their own senses. A dog adds a new and previously unobtainable dimension to human perception. The use of dogs, therefore, represents a greater intrusion into an individual's

privacy. Such use implicates concerns that are at least as sensitive as those implicated by the use of certain electronic detection devices. Cf. *Katz* v. *United States*, 389 U. S. 347 (1967).

I have expressed the view that dog sniffs of people constitute searches. See *Doe* v. *Renfrow*, 451 U. S. 1022, 1025–1026 (1981) (BRENNAN, J., dissenting from denial of certiorari). In *Doe*, I suggested that sniffs of inanimate objects might present a different case. *Id.*, at 1026, n. 4. In any event, I would leave the determination of whether dog sniffs of luggage amount to searches, and the subsidiary question of what standards should govern such intrusions, to a future case providing an appropriate, and more informed, basis for deciding these questions.

IV

Justice Douglas was the only dissenter in *Terry*. He stated that "[t]here have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand." 392 U. S., at 39 (dissenting opinion). Today, the Court uses *Terry* as a justification for submitting to these pressures. Their strength is apparent, for even when the Court finds that an individual's Fourth Amendment rights have been violated it cannot resist the temptation to weaken the protections the Amendment affords.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL joins, concurring in the judgment.

For me, the Court's analysis in Part III of its opinion is quite sufficient to support its judgment. I agree that on the facts of this case, the detention of Place's luggage amounted to, and was functionally identical with, a seizure of his person. My concern with the Court's opinion has to do (a) with its general discussion in Part II of seizures of luggage under the *Terry* v. *Ohio*, 392 U. S. 1 (1968), exception to the war-

rant and probable-cause requirements, and (b) with the Court's haste to resolve the dog-sniff issue.

## I

In providing guidance to other courts, we often include in our opinions material that, technically, constitutes dictum. I cannot fault the Court's desire to set guidelines for *Terry* seizures of luggage based on reasonable suspicion. I am concerned, however, with what appears to me to be an emerging tendency on the part of the Court to convert the *Terry* decision into a general statement that the Fourth Amendment requires only that any seizure be reasonable.[1]

I pointed out in dissent in *Florida* v. *Royer*, 460 U. S. 491, 513 (1983), that our prior cases suggest a two-step evaluation of seizures under the Fourth Amendment. The Amendment generally prohibits a seizure unless it is pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized. See *ante*, at 701; *Florida* v. *Royer*, 460 U. S., at 514 (dissenting opinion). The Court correctly observes that a warrant may be dispensed with if the officer has probable cause and if some exception to the warrant requirement, such as exigent cir-

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[1] The Court states that the applicability of the *Terry* exception "rests on a balancing of the competing interests to determine the reasonableness of the type of seizure involved within the meaning of 'the Fourth Amendment's general proscription against unreasonable searches and seizures.'" *Ante*, at 703, quoting *Terry*, 392 U. S., at 20. As the context of the quotation from *Terry* makes clear, however, this balancing to determine reasonableness occurs only under the exceptional circumstances that justify the *Terry* exception:

"But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Ibid.*

cumstances, is applicable. *Ante*, at 701. While the Fourth Amendment speaks in terms of freedom from unreasonable seizures, the Amendment does not leave the reasonableness of most seizures to the judgment of courts or government officers: the Framers of the Amendment balanced the interests involved and decided that a seizure is reasonable only if supported by a judicial warrant based on probable cause. See *Texas* v. *Brown*, 460 U. S. 730, 744–745 (1983) (POWELL, J., concurring); *United States* v. *Rabinowitz*, 339 U. S. 56, 70 (1950) (Frankfurter, J., dissenting).

*Terry* v. *Ohio*, however, teaches that in some circumstances a limited seizure that is less restrictive than a formal arrest may constitutionally occur upon mere reasonable suspicion, if "supported by a special law enforcement need for greater flexibility." *Florida* v. *Royer*, 460 U. S., at 514 (dissenting opinion). See *Michigan* v. *Summers*, 452 U. S. 692, 700 (1981). When this exception to the Fourth Amendment's warrant and probable-cause requirements is applicable, a reviewing court must balance the individual's interest in privacy against the government's law enforcement interest and determine whether the seizure was reasonable under the circumstances. *Id.*, at 699–701. Only in this limited context is a court entitled to engage in any balancing of interests in determining the validity of a seizure.

Because I agree with the Court that there is a significant law enforcement interest in interdicting illegal drug traffic in the Nation's airports, *ante*, at 704; see *Florida* v. *Royer*, 460 U. S., at 513, 519 (dissenting opinion), a limited intrusion caused by a temporary seizure of luggage for investigative purposes could fall within the *Terry* exception. The critical threshold issue is the intrusiveness of the seizure.[2] In this

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[2] I cannot agree with the Court's assertion that the diligence of the police in acting on their suspicion is relevant to the extent of the intrusion on Fourth Amendment interests. See *ante*, at 709–710. It makes little difference to a traveler whose luggage is seized whether the police conscientiously followed a lead or bungled the investigation. The duration and intrusiveness of the seizure is not altered by the diligence the police ex-

case, the seizure went well beyond a minimal intrusion and therefore cannot fall within the *Terry* exception.

## II

The Court's resolution of the status of dog sniffs under the Fourth Amendment is troubling for a different reason. The District Court expressly observed that Place "does not contest the validity of sniff searches *per se*." 498 F. Supp. 1217, 1228 (EDNY 1980).[3] While Place may have possessed such a claim, he chose not to raise it in that court. The issue also was not presented to or decided by the Court of Appeals. Moreover, contrary to the Court's apparent intimation, *ante*, at 706, an answer to the question is not necessary to the decision. For the purposes of this case, the precise nature of the legitimate investigative activity is irrelevant. Regardless of the validity of a dog sniff under the Fourth Amendment, the seizure was too intrusive. The Court has no need to decide the issue here.

As a matter of prudence, decision of the issue is also unwise. While the Court has adopted one plausible analysis of the issue, there are others. For example, a dog sniff may be a search, but a minimally intrusive one that could be justified in this situation under *Terry* upon mere reasonable suspicion. Neither party has had an opportunity to brief the issue, and the Court grasps for the appropriate analysis of the problem. Although it is not essential that the Court ever adopt the views of one of the parties, it should not decide an issue on which neither party has expressed any opinion at all. The Court is certainly in no position to consider all the ramifica-

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ercise. Of course, diligence may be relevant to a court's determination of the reasonableness of the seizure once it is determined that the seizure is sufficiently nonintrusive as to be eligible for the *Terry* exception.

[3] The District Court did hold that the dog sniff was not conducted in a fashion that under the circumstances was "reasonably calculated to achieve a tainted reaction from the dog." 498 F. Supp., at 1228. This, however, is a due process claim, not one under the Fourth Amendment. Place apparently did not raise this issue before the Court of Appeals.

tions of this important issue. Certiorari is currently pending in two cases that present the issue directly. *United States* v. *Beale*, No. 82–674; *Waltzer* v. *United States*, No. 82–5491. There is no reason to avoid a full airing of the issue in a proper case.

For the foregoing reasons, I concur only in the judgment of the Court.

Syllabus

# KARCHER, SPEAKER, NEW JERSEY ASSEMBLY, ET AL. *v.* DAGGETT ET AL.

## APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

No. 81–2057. Argued March 2, 1983—Decided June 22, 1983

As a result of the 1980 census, the New Jersey Legislature reapportioned the State's congressional districts. The reapportionment plan contained 14 districts, with an average population per district of 526,059, each district, on the average, differing from the "ideal" figure by 0.1384%. The largest district (Fourth District) had a population of 527,472, and the smallest (Sixth District) had a population of 523,798, the difference between them being 0.6984% of the average district. In a suit by a group of individuals challenging the plan's validity, the District Court held that the plan violated Art. I, § 2, of the Constitution because the population deviations among districts, although small, were not the result of a good-faith effort to achieve population equality.

*Held:*

1. The "equal representation" standard of Art. I, § 2, requires that congressional districts be apportioned to achieve population equality as nearly as is practicable. Parties challenging apportionment legislation bear the burden of proving that population differences among districts could have been reduced or eliminated by a good-faith effort to draw districts of equal population. If the plaintiffs carry their burden, the State must then bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal. Cf. *Kirkpatrick* v. *Preisler*, 394 U. S. 526; *White* v. *Weiser*, 412 U. S. 783. Pp. 730–731.

2. New Jersey's plan may not be regarded *per se* as the product of a good-faith effort to achieve population equality merely because the maximum population deviation among districts is smaller than the predictable undercount in available census data. Pp. 731–740.

(a) The "as nearly as practicable" standard for apportioning congressional districts "is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case." *Kirkpatrick*, *supra*, at 530. Only the principle of population equality as developed in *Kirkpatrick*, *supra*, and *Wesberry* v. *Sanders*, 376 U. S. 1, reflects the aspirations of Art. I, § 2. There are no *de minimis* population variations, which could practi-

cably be avoided, that may be considered as meeting the standard of Art. I, § 2, without justification. Pp. 731–734.

(b) There is no merit to the contention that population deviation from ideal district size should be considered to be the functional equivalent of zero as a matter of law where that deviation is less than the predictable undercount in census figures. Even assuming that the extent to which the census system systematically undercounts actual population can be precisely determined, it would not be relevant. The census count provides the only reliable—albeit less than perfect—indication of the districts' "real" relative population levels, and furnishes the only basis for good-faith attempts to achieve population equality. Pp. 735–738.

(c) The population differences involved here could have been avoided or significantly reduced with a good-faith effort to achieve population equality. Resort to the simple device of transferring entire political subdivisions of known population between contiguous districts would have produced districts much closer to numerical equality. Thus the District Court did not err in finding that the plaintiffs met their burden of showing that the plan did not come as nearly as practicable to population equality. Pp. 738–740.

3. The District Court properly found that the defendants did not meet their burden of proving that the population deviations in the plan were necessary to achieve a consistent, nondiscriminatory legislative policy. The State must show with specificity that a particular objective required the specific deviations in its plan. The primary justification asserted was that of preserving the voting strength of racial minority groups, but appellants failed to show that the specific population disparities were necessary to preserve minority voting strength. Pp. 740–744.

535 F. Supp. 978, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 744. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, *post*, p. 765. POWELL, J., filed a dissenting opinion, *post*, p. 784.

*Kenneth J. Guido, Jr.*, argued the cause for appellants. With him on the briefs were *Harry R. Sachse*, *Loftus E. Becker, Jr.*, *Donald J. Simon*, *Clive S. Cummis*, *Charles J. Walsh*, *Jerald D. Baranoff*, *Leon J. Sokol*, *Michael D. Solomon*, *Lawrence T. Marinari*, and *Robert A. Farkas*.

*Bernard Hellring* argued the cause for appellees. With him on the brief were *Jonathan L. Goldstein*, *Robert S. Raymar*, and *Stephen L. Dreyfuss.**

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by this appeal is whether an apportionment plan for congressional districts satisfies Art. I, § 2, of the Constitution without need for further justification if the population of the largest district is less than one percent greater than the population of the smallest district. A three-judge District Court declared New Jersey's 1982 reapportionment plan unconstitutional on the authority of *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969), and *White* v. *Weiser*, 412 U. S. 783 (1973), because the population deviations among districts, although small, were not the result of a good-faith effort to achieve population equality. We affirm.

I

After the results of the 1980 decennial census had been tabulated, the Clerk of the United States House of Representatives notified the Governor of New Jersey that the number of Representatives to which the State was entitled had decreased from 15 to 14. Accordingly, the New Jersey Legislature was required to reapportion the State's congressional districts. The State's 199th Legislature passed two reapportionment bills. One was vetoed by the Governor, and the second, although signed into law, occasioned significant dissatisfaction among those who felt it diluted minority voting strength in the city of Newark. See App. 83–84, 86–90. In response, the 200th Legislature returned to the problem of apportioning congressional districts when it convened in January 1982, and it swiftly passed a bill (S–711) introduced by Senator Feldman, President *pro tem* of the State Senate,

**Roger Allan Moore*, *Richard P. Foelber*, and *Michael A. Hess* filed a brief for the Republican National Committee as *amicus curiae* urging affirmance.

which created the apportionment plan at issue in this case. The bill was signed by the Governor on January 19, 1982, becoming Pub. L. 1982, ch. 1 (hereinafter Feldman Plan). A map of the resulting apportionment is appended *infra*.

Like every plan considered by the legislature, the Feldman Plan contained 14 districts, with an average population per district (as determined by the 1980 census) of 526,059.[1] Each district did not have the same population. On the average, each district differed from the "ideal" figure by 0.1384%, or about 726 people. The largest district, the Fourth District, which includes Trenton, had a population of 527,472, and the smallest, the Sixth District, embracing most of Middlesex County, a population of 523,798. The difference between them was 3,674 people, or 0.6984% of the average district. The populations of the other districts also varied. The Ninth District, including most of Bergen County, in the northeastern corner of the State, had a population of 527,349, while the population of the Third District, along the Atlantic shore, was only 524,825. App. 124.

The legislature had before it other plans with appreciably smaller population deviations between the largest and smallest districts. The one receiving the most attention in the District Court was designed by Dr. Ernest Reock, Jr., a political science professor at Rutgers University and Director of the Bureau of Government Research. A version of the Reock

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[1] Three sets of census data are relevant to this case. In early 1981, the Bureau of the Census released preliminary figures showing that the total population of New Jersey was 7,364,158. In October 1981 it released corrected data, which increased the population of East Orange (and the State as a whole) by 665 people. Brief for Appellants 3, n. 1. All calculations in this opinion refer to the data available to the legislature—that is, the October 1981 figures. After the proceedings below had concluded, the Bureau of the Census made an additional correction in the population of East Orange, adding another 188 people, and bringing the total population of the State to 7,365,011. *Ibid.* Because this last correction was not available to the legislature at the time it enacted the plan at issue, we need not consider it.

Plan introduced in the 200th Legislature by Assemblyman Hardwick had a maximum population difference of 2,375, or 0.4514% of the average figure. *Id.*, at 133.

Almost immediately after the Feldman Plan became law, a group of individuals with varying interests, including all incumbent Republican Members of Congress from New Jersey, sought a declaration that the apportionment plan violated Art. I, § 2, of the Constitution[2] and an injunction against proceeding with the primary election for United States Representatives under the plan. A three-judge District Court was convened pursuant to 28 U. S. C. § 2284(a). The District Court held a hearing on February 26, 1982, at which the parties submitted a number of depositions and affidavits, moved for summary judgment, and waived their right to introduce further evidence in the event the motions for summary judgment were denied.

Shortly thereafter, the District Court issued an opinion and order declaring the Feldman Plan unconstitutional. Denying the motions for summary judgment and resolving the case on the record as a whole, the District Court held that the population variances in the Feldman Plan were not "unavoidable despite a good-faith effort to achieve absolute equality," see *Kirkpatrick*, *supra*, at 531. The court rejected appellants' argument that a deviation lower than the statistical imprecision of the decennial census was "the functional equivalent of mathematical equality." *Daggett* v. *Kimmelman*, 535 F. Supp. 978, 982–983 (NJ 1982). It also held that appellants had failed to show that the population variances were justified by the legislature's purported goals of preserving minor-

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[2] In relevant part: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .

. . . . . .

"Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . ."

ity voting strength and anticipating shifts in population. *Ibid.* The District Court enjoined appellants from conducting primary or general elections under the Feldman Plan, but that order was stayed pending appeal to this Court, 455 U. S. 1303 (1982) (BRENNAN, J., in chambers), and we noted probable jurisdiction, 457 U. S. 1131 (1982).

## II

Article I, § 2, establishes a "high standard of justice and common sense" for the apportionment of congressional districts: "equal representation for equal numbers of people." *Wesberry* v. *Sanders*, 376 U. S. 1, 18 (1964). Precise mathematical equality, however, may be impossible to achieve in an imperfect world; therefore the "equal representation" standard is enforced only to the extent of requiring that districts be apportioned to achieve population equality "as nearly as is practicable." See *id.*, at 7–8, 18. As we explained further in *Kirkpatrick* v. *Preisler:*

> "[T]he 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. See *Reynolds* v. *Sims*, 377 U. S. 533, 577 (1964). Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." 394 U. S., at 530–531.

Article I, § 2, therefore, "permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Id.*, at 531. Accord, *White* v. *Weiser*, 412 U. S., at 790.

Thus two basic questions shape litigation over population deviations in state legislation apportioning congressional districts. First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population. Parties challenging apportionment leg-

islation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. If, however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal. *Kirkpatrick*, 394 U. S., at 532; cf. *Swann* v. *Adams*, 385 U. S. 440, 443–444 (1967).

## III

Appellants' principal argument in this case is addressed to the first question described above. They contend that the Feldman Plan should be regarded *per se* as the product of a good-faith effort to achieve population equality because the maximum population deviation among districts is smaller than the predictable undercount in available census data.

### A

*Kirkpatrick* squarely rejected a nearly identical argument. "The whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case." 394 U. S., at 530; see *White* v. *Weiser*, *supra*, at 790, n. 8, and 792–793. Adopting any standard other than population equality, using the best census data available, see 394 U. S., at 532, would subtly erode the Constitution's ideal of equal representation. If state legislators knew that a certain *de minimis* level of population differences was acceptable, they would doubtless strive to achieve that level rather than equality.[3] *Id.*, at

[3] There is some evidence in the record from which one could infer that this is precisely what happened in New Jersey. Alan Karcher, Speaker of the Assembly, testified that he had set one-percent maximum deviation as the upper limit for any plans to be considered seriously by the legislature, Record Doc. No. 41, pp. 56–58 (Karcher deposition), but there is no evi-

531. Furthermore, choosing a different standard would import a high degree of arbitrariness into the process of reviewing apportionment plans. *Ibid.* In this case, appellants argue that a maximum deviation of approximately 0.7% should be considered *de minimis*. If we accept that argument, how are we to regard deviations of 0.8%, 0.95%, 1%, or 1.1%?

Any standard, including absolute equality, involves a certain artificiality. As appellants point out, even the census data are not perfect, and the well-known restlessness of the American people means that population counts for particular localities are outdated long before they are completed. Yet problems with the data at hand apply equally to any population-based standard we could choose.[4] As between two standards—equality or something less than equality—only the former reflects the aspirations of Art. I, § 2.

To accept the legitimacy of unjustified, though small population deviations in this case would mean to reject the basic premise of *Kirkpatrick* and *Wesberry*. We decline appellants' invitation to go that far. The unusual rigor of their standard has been noted several times. Because of that rigor, we have required that absolute population equality be the paramount objective of apportionment only in the case of

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dence of any serious attempt to seek improvements below the one-percent level.

[4] Such problems certainly apply to JUSTICE WHITE's concededly arbitrary five-percent solution, see *post*, at 782, apparently selected solely to avoid the embarrassment of discarding the actual result in *Kirkpatrick* along with its reasoning. No *de minimis* line tied to actual population in any way mitigates differences identified *post*, at 771–772, between the number of adults or eligible, registered, or actual voters in any two districts. As discussed below, see *infra*, at 736–738, unless some systematic effort is made to correct the distortions inherent in census counts of total population, deviations from the norm of population equality are far more likely to exacerbate the differences between districts. If a State does attempt to use a measure other than total population or to "correct" the census figures, it may not do so in a haphazard, inconsistent, or conjectural manner. *Kirkpatrick*, 394 U. S., at 534–535; see *infra*, at 740–741.

congressional districts, for which the command of Art. I, § 2, as regards the National Legislature outweighs the local interests that a State may deem relevant in apportioning districts for representatives to state and local legislatures, but we have not questioned the population equality standard for congressional districts. See, *e. g.*, *White* v. *Weiser*, 412 U. S., at 793; *White* v. *Regester*, 412 U. S. 755, 763 (1973); *Mahan* v. *Howell*, 410 U. S. 315, 321–323 (1973). The principle of population equality for congressional districts has not proved unjust or socially or economically harmful in experience. Cf. *Washington* v. *Dawson & Co.*, 264 U. S. 219, 237 (1924) (Brandeis, J., dissenting); B. Cardozo, The Nature of the Judicial Process 150 (1921). If anything, this standard should cause less difficulty now for state legislatures than it did when we adopted it in *Wesberry*. The rapid advances in computer technology and education during the last two decades make it relatively simple to draw contiguous districts of equal population and at the same time to further whatever secondary goals the State has.[5] Finally, to abandon unnecessarily a clear and oft-confirmed constitutional interpretation would impair our authority in other cases, *Florida Dept. of Health* v. *Florida Nursing Home Assn.*, 450 U. S. 147, 153–154 (1981) (STEVENS, J., concurring); *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 652 (1895) (White, J., dissenting), would implicitly open the door to a plethora of requests that we reexamine other rules that some may consider

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[5] Note that many of the problems that the New Jersey Legislature encountered in drawing districts with equal population stemmed from the decision, which appellees never challenged, not to divide any municipalities between two congressional districts. The entire State of New Jersey is divided into 567 municipalities, with populations ranging from 329,248 (Newark) to 9 (Tavistock Borough). See Brief for Appellants 36, n. 38. Preserving political subdivisions intact, however, while perfectly permissible as a secondary goal, is not a sufficient excuse for failing to achieve population equality without the specific showing described *infra*, at 740–741. See *Kirkpatrick* v. *Preisler*, *supra*, at 533–534; *White* v. *Weiser*, 412 U. S. 783, 791 (1973).

burdensome, Cardozo, *supra*, at 149–150, and would prejudice those who have relied upon the rule of law in seeking an equipopulous congressional apportionment in New Jersey, see *Florida Nursing Home Assn.*, *supra*, at 154 (STEVENS, J., concurring). We thus reaffirm that there are no *de minimis* population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2, without justification.[6]

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[6] JUSTICE WHITE objects that "the rule of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort," *Wells* v. *Rockefeller*, 394 U. S. 542, 551 (1969) (Harlan, J., dissenting). *Post*, at 776. That may certainly be true to some extent: beyond requiring States to justify population deviations with explicit, precise reasons, which might be expected to have some inhibitory effect, *Kirkpatrick* does little to prevent what is known as gerrymandering. See generally Backstrom, Robins, & Eller, Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota, 62 Minn. L. Rev. 1121, 1144–1159 (1978); cf. 394 U. S., at 534, n. 4. *Kirkpatrick*'s object, achieving population equality, is far less ambitious than what would be required to address gerrymandering on a constitutional level.

In any event, the additional claim that *Kirkpatrick* actually promotes gerrymandering (as opposed to merely failing to stop it) is completely empty. A federal principle of population equality does not prevent any State from taking steps to inhibit gerrymandering, so long as a good-faith effort is made to achieve population equality as well. See, *e. g.*, Colo. Const. Art. V, § 47 (guidelines as to compactness, contiguity, boundaries of political subdivisions, and communities of interest); Mass. Const., Amended Art. CI, § 1 (boundaries); N. Y. Elec. Law § 4–100(2) (McKinney 1978) (compactness and boundaries).

JUSTICE WHITE further argues that the lack of a *de minimis* rule encourages litigation and intrusion by federal courts into state affairs. *Post*, at 777–778. It cannot be gainsaid that the *de minimis* rule he proposes would have made litigation in this case unattractive. But experience proves that cases in which a federal court is called upon to invalidate an existing apportionment, and sometimes to substitute a court-ordered plan in its stead, frequently arise not because a newly enacted apportionment plan fails to meet the test of *Kirkpatrick*, but because partisan politics frustrate the efforts of a state legislature to enact a new plan after a recent census has shown that the existing plan is grossly malapportioned. See, *e. g.*, *Carstens* v. *Lamm*, 543 F. Supp. 68 (Colo. 1982); *Shayer* v. *Kirkpatrick*,

B

The sole difference between appellants' theory and the argument we rejected in *Kirkpatrick* is that appellants have proposed a *de minimis* line that gives the illusion of rationality and predictability: the "inevitable statistical imprecision of the census." They argue: "Where, as here, the deviation from ideal district size is less than the known imprecision of the census figures, that variation is the functional equivalent of zero." Brief for Appellants 18. There are two problems with this approach. First, appellants concentrate on the extent to which the census systematically undercounts actual population—a figure which is not known precisely and which, even if it were known, would not be relevant to this case. Second, the mere existence of statistical imprecision does not make small deviations among districts the functional equivalent of equality.

In the District Court and before this Court, appellants rely exclusively on an affidavit of Dr. James Trussell, a Princeton University demographer. See App. 97–104. Dr. Trussell's carefully worded statement reviews various studies of the undercounts in the 1950, 1960, and 1970 decennial censuses, and it draws three important conclusions: (1) "the undercount in the 1980 census is likely to be above one percent"; (2) "all the evidence to date indicates that all places are not undercounted to the same extent, since the undercount rate has been shown to depend on race, sex, age, income, and education"; and (3) "[t]he distribution of the undercount in New Jersey is . . . unknown, and I see no reason to believe that it would be uniformly spread over all municipalities." *Id.*, at 103–104. Assuming for purposes of argument that each of

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541 F. Supp. 922 (WD Mo.), summarily aff'd, 456 U. S. 966 (1982); *O'Sullivan* v. *Brier*, 540 F. Supp. 1200 (Kan. 1982); *Donnelly* v. *Meskill*, 345 F. Supp. 962 (Conn. 1972); *David* v. *Cahill*, 342 F. Supp. 463 (NJ 1972); *Skolnick* v. *State Electoral Board of Illinois*, 336 F. Supp. 839 (ND Ill. 1971).

these statements is correct, they do not support appellants' argument.

In essence, appellants' one-percent benchmark is little more than an attempt to present an attractive *de minimis* line with a patina of scientific authority. Neither Dr. Trussell's statement nor any of appellants' other evidence specifies a precise level for the undercount in New Jersey, and Dr. Trussell's discussion of the census makes clear that it is impossible to develop reliable estimates of the undercount on anything but a nationwide scale. See *id.*, at 98–101. His conclusion that the 1980 undercount is "likely to be above one percent" seems to be based on the undercounts in previous censuses and a guess as to how well new procedures adopted in 1980 to reduce the undercount would work. Therefore, if we accepted appellants' theory that the national undercount level sets a limit on our ability to use census data to tell the difference between the populations of congressional districts, we might well be forced to set that level far above one percent when final analyses of the 1980 census are completed.[7]

As Dr. Trussell admits, *id.*, at 103, the existence of a one-percent undercount would be irrelevant to population deviations among districts if the undercount were distributed evenly among districts. The undercount in the census affects the accuracy of the *deviations* between districts only to the extent that the undercount varies from district to district. For a one-percent undercount to explain a one-percent deviation between the census populations of two districts, the undercount in the smaller district would have to be approximately three times as large as the undercount in the larger

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[7] See generally J. Passel, J. Siegel, & J. Robinson, Coverage of the National Population in the 1980 Census, by Age, Sex, and Race: Preliminary Estimates by Demographic Analysis (Nov. 1981) (Record Doc. No. 31) (hereinafter Passel). Estimates for the national undercount in previous censuses range from 2.5% to 3.3%. See, *e. g.*, Panel on Decennial Census Plans, Counting the People in 1980: An Appraisal of Census Plans 2 (Nat. Acad. Sciences 1978).

district.[8] It is highly unlikely, of course, that this condition holds true, especially since appellants have utterly failed to introduce evidence showing that the districts were designed to compensate for the probable undercount. Dr. Trussell's affidavit states that the rate of undercounting may vary from municipality to municipality, but it does not discuss by how much it may vary, or to what extent those variations would be reflected at the district level, with many municipalities combined. Nor does the affidavit indicate that the factors associated with the rate of undercounting—race, sex, age, etc.—vary from district to district, or (more importantly) that the populations in the smaller districts reflect the relevant factors more than the populations in the larger districts.[9] As Dr. Trussell admits, the distribution of the undercount in New Jersey is completely unknown. Only by bizarre coincidence could the systematic undercount in the

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[8] As an example, assume that in a hypothetical State with two congressional districts District A has a population of 502,500, and District B has a population of 497,500. The deviation between them is 5,000, or one percent of the mean. If the statewide undercount is also one percent, and it is distributed evenly between the two districts, District A will have a "real" population of 507,525, and District B will have a "real" population of 502,475. The deviation between them will remain one percent. Only if three-fourths of the uncounted people in the State live in District B will the two districts have equal populations. If three-fourths of the uncounted people happen to live in District A, the deviation between the two districts will increase to 1.98%.

[9] For instance, it is accepted that the rate of undercount in the census for black population on a nationwide basis is significantly higher than the rate of undercount for white population. See generally Passel 9–20. Yet the census population of the districts in the Feldman Plan is unrelated to the percentage of blacks in each district. The Fourth District, for instance, is the largest district in terms of population, 0.268% above the mean; it has a 17.3% black population, App. 94. The First District is 14.6% black, *id.*, at 96, and it is almost exactly average in overall population. The undercount in any particular district cannot be predicted only from the percentage of blacks in the district, but to the extent that blacks are not counted, the undercount would be more severe in the Fourth District than in the relatively less populous First District.

census bear some statistical relationship to the districts drawn by the Feldman Plan.

The census may systematically undercount population, and the rate of undercounting may vary from place to place. Those facts, however, do not render meaningless the differences in population between congressional districts, as determined by uncorrected census counts. To the contrary, the census data provide the only reliable—albeit less than perfect—indication of the districts' "real" relative population levels. Even if one cannot say with certainty that one district is larger than another merely because it has a higher census count, one *can* say with certainty that the district with a larger census count is more likely to be larger than the other district than it is to be smaller or the same size. That certainty is sufficient for decisionmaking. Cf. *City of Newark* v. *Blumenthal*, 457 F. Supp. 30, 34 (DC 1978). Furthermore, because the census count represents the "best population data available," see *Kirkpatrick*, 394 U. S., at 528, it is the only basis for good-faith attempts to achieve population equality. Attempts to explain population deviations on the basis of flaws in census data must be supported with a precision not achieved here. See *id.*, at 535.

C

Given that the census-based population deviations in the Feldman Plan reflect real differences among the districts, it is clear that they could have been avoided or significantly reduced with a good-faith effort to achieve population equality. For that reason alone, it would be inappropriate to accept the Feldman Plan as "functionally equivalent" to a plan with districts of equal population.

The District Court found that several other plans introduced in the 200th Legislature had smaller maximum deviations than the Feldman Plan. 535 F. Supp., at 982. Cf. *White* v. *Weiser*, 412 U. S., at 790, and n. 9. Appellants object that the alternative plans considered by the District Court were not comparable to the Feldman Plan because

their political characters differed profoundly. See, *e. g.*, App. 93–96 (affidavit of S. H. Woodson, Jr.) (arguing that alternative plans failed to protect the interests of black voters in the Trenton and Camden areas). We have never denied that apportionment is a political process, or that state legislatures could pursue legitimate secondary objectives as long as those objectives were consistent with a good-faith effort to achieve population equality at the same time. Nevertheless, the claim that political considerations require population differences among congressional districts belongs more properly to the second level of judicial inquiry in these cases, see *infra*, at 740–741, in which the State bears the burden of justifying the differences with particularity.

In any event, it was unnecessary for the District Court to rest its finding on the existence of alternative plans with radically different political effects. As in *Kirkpatrick*, "resort to the simple device of transferring entire political subdivisions of known population between contiguous districts would have produced districts much closer to numerical equality." 394 U. S., at 532. Starting with the Feldman Plan itself and the census data available to the legislature at the time it was enacted, see App. 23–34, one can reduce the maximum population deviation of the plan merely by shifting a handful of municipalities from one district to another.[10]

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[10] According to the population figures used by Dr. Reock, the following adjustments to the Feldman Plan as enacted in Pub. L. 1982, ch. 1, would reduce its maximum population variance to 0.449%, somewhat lower than the version of the Reock Plan introduced in the legislature: To the Fifth District, add Oakland and Franklin Lakes (from the Eighth District), and Hillsdale, Woodcliff Lake, and Norwood (from the Ninth District). To the Sixth District, add North Brunswick (from the Seventh District). To the Seventh District, add Roosevelt (from the Fourth District), and South Plainfield and Helmetta (from the Sixth District). To the Eighth District, add Montville and Boonton Town (from the Fifth District). To the Ninth District, add River Edge and Oradell (from the Fifth District).

Some of these changes are particularly obvious. Shifting the small town of Roosevelt from the Fourth to the Seventh District brings both appreciably closer to the mean, and the town is already nearly surrounded by the

See also *Swann* v. *Adams*, 385 U. S., at 445–446; n. 4, *supra*. Thus the District Court did not err in finding that the plaintiffs had met their burden of showing that the Feldman Plan did not come as nearly as practicable to population equality.

## IV

By itself, the foregoing discussion does not establish that the Feldman Plan is unconstitutional. Rather, appellees' success in proving that the Feldman Plan was not the product of a good-faith effort to achieve population equality means only that the burden shifted to the State to prove that the population deviations in its plan were necessary to achieve some legitimate state objective. *White* v. *Weiser* demonstrates that we are willing to defer to state legislative policies, so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts. See 412 U. S., at 795–797; cf. *Upham* v. *Seamon*, 456 U. S. 37 (1982); *Connor* v. *Finch*, 431 U. S. 407, 414–415 (1977). Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives. As long as the criteria are nondiscriminatory, see *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), these are all legitimate objectives that on a proper showing could justify minor population deviations. See, *e. g.*, *West Virginia Civil Liberties Union* v.

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Seventh District. Similarly, River Edge, Oradell, Norwood, and Montville are barely contiguous with their present districts and almost completely surrounded by the new districts suggested above. Further improvement could doubtless be accomplished with the aid of a computer and detailed census data. See also n. 5, *supra*.

We do not, of course, prejudge the validity of a plan incorporating these changes, nor do we indicate that a plan cannot represent a good-faith effort whenever a court can conceive of minor improvements. We point them out only to illustrate that further reductions could have been achieved within the basic framework of the Feldman Plan.

*Rockefeller*, 336 F. Supp. 395, 398–400 (SD W. Va. 1972) (approving plan with 0.78% maximum deviation as justified by compactness provision in State Constitution); cf. *Reynolds* v. *Sims*, 377 U. S. 533, 579 (1964); *Burns* v. *Richardson*, 384 U. S. 73, 89, and n. 16 (1966). The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions. The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to these factors.

The possibility that a State could justify small variations in the census-based population of its congressional districts on the basis of some legitimate, consistently applied policy was recognized in *Kirkpatrick* itself. In that case, Missouri advanced the theory, echoed by JUSTICE WHITE in dissent, see *post*, at 771–772, that district-to-district differences in the number of eligible voters, or projected population shifts, justified the population deviations in that case. 394 U. S., at 534–535. We rejected its arguments not because those factors were impermissible considerations in the apportionment process, but rather because of the size of the resulting deviations and because Missouri "[a]t best . . . made haphazard adjustments to a scheme based on total population," made "no attempt" to account for the same factors in all districts, and generally failed to document its findings thoroughly and apply them "throughout the State in a systematic, not an *ad hoc*, manner." *Id.*, at 535.[11]

[11] The very cases on which *Kirkpatrick* relied made clear that the principle of population equality did not entirely preclude small deviations caused by adherence to consistent state policies. See *Swann* v. *Adams*, 385 U. S.

The District Court properly found that appellants did not justify the population deviations in this case. At argument before the District Court and on appeal in this Court, appellants emphasized only one justification for the Feldman Plan's population deviations—preserving the voting strength of racial minority groups.[12] They submitted affidavits from

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440, 444 (1967); *Reynolds* v. *Sims*, 377 U. S. 533, 579 (1964). District Courts applying the *Kirkpatrick* standard have consistently recognized that small deviations could be justified. See, *e. g.*, *Doulin* v. *White*, 528 F. Supp. 1323, 1330 (ED Ark. 1982) (rejecting projected population shifts as justification for plan with 1.87% maximum deviation because largest district also had largest projected growth); *West Virginia Civil Liberties Union* v. *Rockefeller*, 336 F. Supp. 395, 398–400 (SD W. Va. 1972). Furthermore, courts using the *Kirkpatrick* standard to evaluate proposed remedies for unconstitutional apportionments have often, as in *White* v. *Weiser*, rejected the plan with the lowest population deviation in favor of plans with slightly higher deviations that reflected consistent state policies. See, *e. g.*, *David* v. *Cahill*, 342 F. Supp. 463 (NJ 1972); *Skolnick* v. *State Electoral Board of Illinois*, 336 F. Supp., at 842–846. A number of District Courts applying the *Kirkpatrick* test to apportionments of state legislatures, before this Court disapproved the practice in *Mahan* v. *Howell*, 410 U. S. 315 (1973), also understood that justification of small deviations was a very real possibility. *E. g.*, *Kelly* v. *Bumpers*, 340 F. Supp. 568, 571 (ED Ark. 1972), summarily aff'd, 413 U. S. 901 (1973); *Ferrell* v. *Oklahoma ex rel. Hall*, 339 F. Supp. 73, 84–85 (WD Okla.), summarily aff'd, 406 U. S. 939 (1972); *Sewell* v. *St. Tammany Parish Police Jury*, 338 F. Supp. 252, 255 (ED La. 1971). The court in *Graves* v. *Barnes*, 343 F. Supp. 704 (WD Tex. 1972)—later reversed by this Court for applying *Kirkpatrick* at all, *White* v. *Regester*, 412 U. S. 755 (1973)—characterized the inquiry required by *Kirkpatrick* as follows: "The critical issue remains the same: Has the State justified any and all variances, however small, on the basis of a consistent, rational State policy." 343 F. Supp., at 713; see *id.*, at 713–716.

[12] At oral argument in this Court, appellants stated that the drafters of the Feldman Plan were concerned with a number of other objectives as well, namely "to preserve the cores of existing districts" and "to preserve municipal boundaries." Tr. of Oral Arg. 4, 14. See also Answer and Counterclaim on Behalf of Alan J. Karcher ¶ 10 (Record Doc. No. 17). Similarly, Speaker Karcher's affidavit suggests that the legislature was concerned that the Ninth District should lie entirely within Bergen County. App. 84. None of these justifications was presented to the District Court or this Court in any but the most general way, however, and

Mayors Kenneth Gibson of Newark and Thomas Cooke of East Orange, discussing the importance of having a large majority of black voters in Newark's Tenth District, App. 86–92, as well as an affidavit from S. Howard Woodson, Jr., a candidate for Mayor of Trenton, comparing the Feldman Plan's treatment of black voters in the Trenton and Camden areas with that of the Reock Plan, *id.*, at 93–96. See also *id.*, at 82–83 (affidavit of A. Karcher). The District Court found, however:

> "[Appellants] have not attempted to demonstrate, nor can they demonstrate, any causal relationship between the goal of preserving minority voting strength in the Tenth District and the population variances in the other districts. . . . We find that the goal of preserving minority voting strength in the Tenth District is not related in any way to the population deviations in the Fourth and Sixth Districts." 535 F. Supp., at 982.

Under the Feldman Plan, the largest districts are the Fourth and Ninth Districts, and the smallest are the Third and Sixth. See *supra*, at 728. None of these districts borders on the Tenth, and only one—the Fourth—is even mentioned in appellants' discussions of preserving minority voting strength. Nowhere do appellants suggest that the large population of the Fourth District was necessary to preserve minority voting strength; in fact, the deviation between the Fourth District and other districts has the effect of diluting the votes of all residents of that district, including members of racial minorities, as compared with other districts with fewer minority voters. The record is completely silent on the relationship between preserving minority voting

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the relevant question presented by appellants to this Court excludes them: "Whether the legislative policy of preserving minority voting strength justifies small deviations from census population equality in a congressional reapportionment plan." Brief for Appellants i. Furthermore, several plans before the legislature with significantly lower population deviations kept municipalities intact and had an all-Bergen County Ninth District. See App. 66–74.

strength and the small populations of the Third and Sixth Districts. Therefore, the District Court's findings easily pass the "clearly erroneous" test.

V

The District Court properly applied the two-part test of *Kirkpatrick* v. *Preisler* to New Jersey's 1982 apportionment of districts for the United States House of Representatives. It correctly held that the population deviations in the plan were not functionally equal as a matter of law, and it found that the plan was not a good-faith effort to achieve population equality using the best available census data. It also correctly rejected appellants' attempt to justify the population deviations as not supported by the evidence. The judgment of the District Court, therefore, is

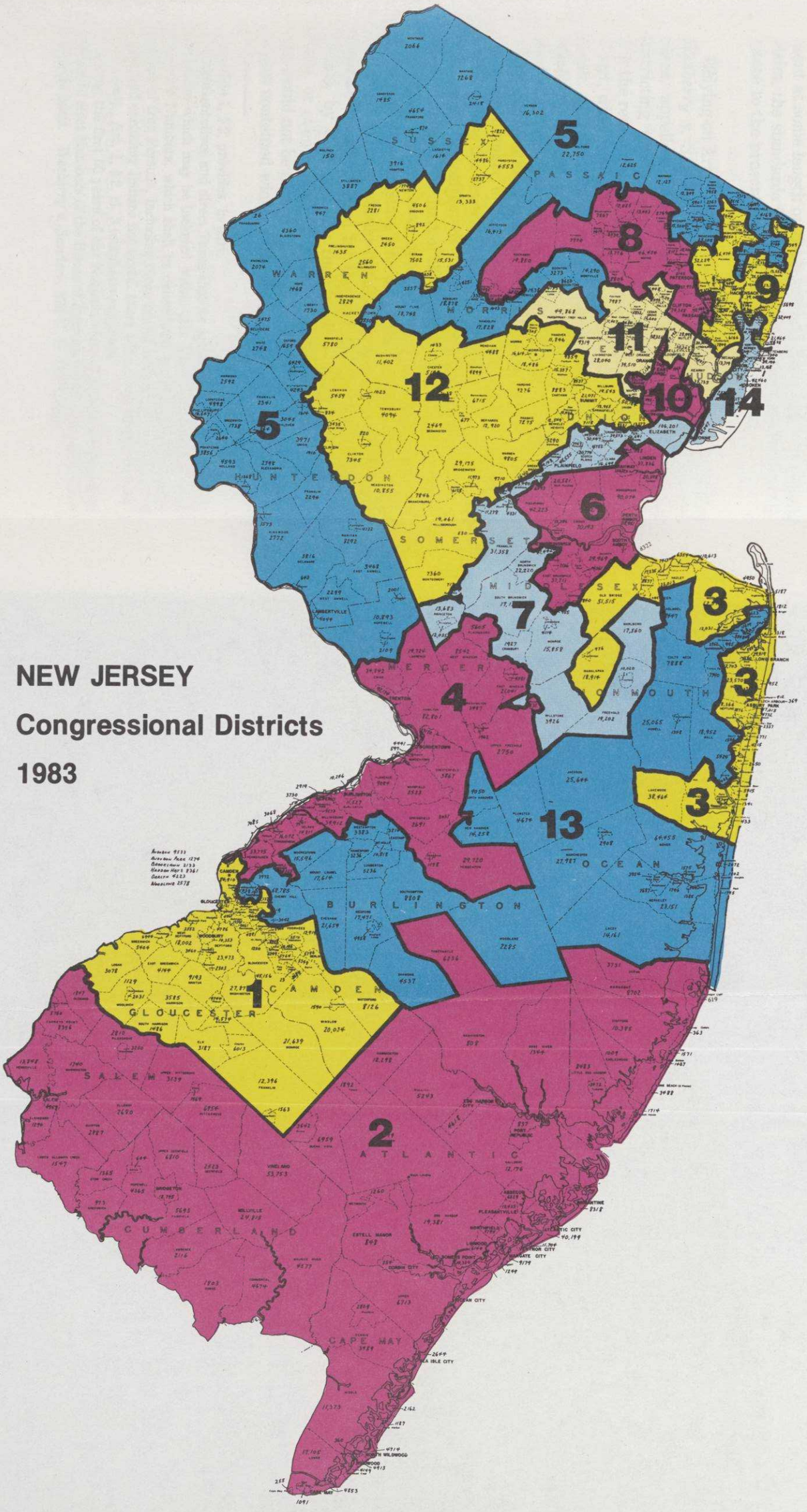
*Affirmed.*

[Map of New Jersey Congressional Districts follows this page.]

JUSTICE STEVENS, concurring.

As an alternative ground for affirmance, the appellees contended at oral argument that the bizarre configuration of New Jersey's congressional districts is sufficient to demonstrate that the plan was not adopted in "good faith." This argument, as I understand it, is a claim that the district boundaries are unconstitutional because they are the product of political gerrymandering. Since my vote is decisive in this case, it seems appropriate to explain how this argument influences my analysis of the question that divides the Court. As I have previously pointed out, political gerrymandering is one species of "vote dilution" that is proscribed by the Equal Protection Clause.[1] Because an adequate judicial analysis of

[1] See *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 848–853 (CA7) (Stevens, J., dissenting), cert. denied, 409 U. S. 893 (1972); *Mobile* v. *Bolden*, 446 U. S. 55, 86–89 (1980) (STEVENS, J., concurring in judgment); *Rogers* v. *Lodge*, 458 U. S. 613, 652 (1982) (STEVENS, J., dissenting).


NEW JERSEY
Congressional Districts
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14
SUSSEX
WARREN
MORRIS
PASSAIC
BERGEN
HUNTERDON
SOMERSET
MIDDLESEX
UNION
ESSEX
HUDSON
MERCER
MONMOUTH
OCEAN
BURLINGTON
CAMDEN
GLOUCESTER
SALEM
CUMBERLAND
ATLANTIC
CAPE MAY

a gerrymandering claim raises special problems, I shall comment at some length on the legal basis for a gerrymandering claim, the standards for judging such a claim, and their relevance to the present case.

I

Relying on Art. I, § 2, of the Constitution, as interpreted in *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), and subsequent cases, appellees successfully challenged the congressional districting plan adopted by the New Jersey Legislature. For the reasons stated in JUSTICE BRENNAN's opinion for the Court, which I join, the doctrine of *stare decisis* requires that result. It can be demonstrated, however, that the holding in *Wesberry*, as well as our holding today, has firmer roots in the Constitution than those provided by Art. I, § 2.

The constitutional mandate contained in Art. I, § 2, concerns the number of Representatives that shall be "apportioned *among* the several States."[2] The section says nothing about the composition of congressional districts *within* a State.[3] Indeed, the text of that section places no restriction whatsoever on the power of any State to define the group of persons within the State who may vote for particular candidates. If a State should divide its registered voters into separate classes defined by the alphabetical order of their initials, by their age, by their period of residence in the State, or even by their political affiliation, such a classification would not be barred by the text of Art. I, § 2, even if the classes contained widely different numbers of voters.

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[2] Article I, § 2, provides, in part:

"Representatives and direct Taxes shall be apportioned *among* the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." U. S. Const., Art. I, § 2, cl. 3 (emphasis supplied).

[3] During the first 50 years of our Nation's history, it was a widespread practice to elect Members of the House of Representatives as a group on a statewide basis. *Wesberry* v. *Sanders*, 376 U. S. 1, 8 (1964).

As Justice Harlan pointed out in his dissenting opinion in *Wesberry*, prior to the Civil War the principle of numerical equality of representation was actually contradicted by the text of Art. I, § 2, which provided that the "whole Number of free Persons" should be counted, that certain Indians should be excluded, and that only "three-fifths of all other Persons" should be added to the total.[4] In analyzing the Constitution, we cannot ignore the regrettable fact that, as originally framed, it expressly tolerated the institution of slavery. On the other hand, neither can we ignore the basic changes caused by the Civil War Amendments. They planted the roots that firmly support today's holding.

The abolition of slavery and the guarantees of citizenship and voting rights contained in the Thirteenth, Fourteenth, and Fifteenth Amendments effectively repealed Art. I, § 2's requirement that some votes be given greater weight than others. It remains true, however, that Art. I, § 2, does not itself contain any guarantee of equality of representation. The source of that guarantee must be found elsewhere. But as Justice Clark perceptively noted in his partial concurrence

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[4] "Representatives were to be apportioned among the States on the basis of free population plus three-fifths of the slave population. Since no slave voted, the inclusion of three-fifths of their number in the basis of apportionment gave the favored States representation far in excess of their voting population. If, then, slaves were intended to be without representation, Article I did exactly what the Court now says it prohibited: it 'weighted' the vote of voters in the slave States. Alternatively, it might have been thought that Representatives elected by free men of a State would speak also for the slaves. But since the slaves added to the representation only of their own State, Representatives from the slave States could have been thought to speak only for the slaves of their own States, indicating both that the Convention believed it possible for a Representative elected by one group to speak for another nonvoting group and that Representatives were in large degree still thought of as speaking for the whole population *of a State*." *Id.*, at 27–28.

Reading a "one person, one vote" requirement into Art. I, § 2, is historically as well as textually unsound. See Kelly, Clio and the Court: An Illicit Love Affair, 1965 S. Ct. Rev. 119, 135–136.

in *Wesberry*—and as Justice Black had written earlier in his dissent in *Colegrove* v. *Green*, 328 U. S. 549, 569 (1946)—that guarantee is firmly grounded in the Equal Protection Clause of the Fourteenth Amendment.[5] Even Justice Harlan's powerful dissent in *Wesberry* could find no flaw in that analysis.

In its review of state laws redefining congressional districts subsequent to *Wesberry* v. *Sanders*, the Court has not found it necessary to rely on the Equal Protection Clause. That Clause has, however, provided the basis for applying the "one person, one vote" standard to other electoral districts. See, *e. g.*, *Baker* v. *Carr*, 369 U. S. 186 (1962); *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *Avery* v. *Midland County*, 390 U. S. 474 (1968). Even if Art. I, §2, were wholly disregarded, the "one person, one vote" rule would unquestionably apply to action by state officials defining congressional districts just as it does to state action defining state legislative districts.[6]

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[5] That Clause "does not permit the States to pick out certain qualified citizens or groups of citizens and deny them the right to vote at all . . . . No one would deny that the equal protection clause would also prohibit a law that would expressly give certain citizens a half-vote and others a full vote. The probable effect of the 1901 State Apportionment Act in the coming election will be that certain citizens, and among them the appellants, will in some instances have votes only one-ninth as effective in choosing representatives to Congress as the votes of other citizens. Such discriminatory legislation seems to me exactly the kind that the equal protection clause was intended to prohibit." *Colegrove* v. *Green*, 328 U. S., at 569 (Black, J., dissenting), quoted in part in *Wesberry* v. *Sanders*, *supra*, at 19 (Clark, J., concurring in part and dissenting in part).

[6] The "one person, one vote" rule, like the Equal Protection Clause in which it is firmly grounded, provides protection against more than one form of discrimination. In the cases in which the rule was first developed, district boundaries accorded significantly less weight to individual votes in the most populous districts. But it was also clear that those boundaries maximized the political strength of rural voters and diluted the political power of urban voters. See A. Hacker, Congressional Districting: The Issue of Equal Representation 20–26 (1963); see generally Standards for Congressional Districts (Apportionment), Hearings before Subcommittee No. 2 of the House Committee on the Judiciary on H. R. 73, H. R. 575,

The Equal Protection Clause requires every State to govern impartially. When a State adopts rules governing its election machinery or defining electoral boundaries, those rules must serve the interests of the entire community. See *Reynolds* v. *Sims*, *supra*, at 565–566. If they serve no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community, they violate the constitutional guarantee of equal protection.

In *Gomillion* v. *Lightfoot*, 364 U. S. 339, 340 (1960), the Court invalidated a change in the city boundaries of Tuskegee, Alabama, "from a square to an uncouth twenty-eight-sided figure" excluding virtually all of the city's black voters. The Court's opinion identified the right that had been violated as a group right:

> "When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment. In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial lines whereby approval was given to unequivocal withdrawal of the vote solely from colored citizens." *Id.*, at 346.

Although the Court explicitly rested its decision on the Fifteenth Amendment, the analysis in Justice Whittaker's concurring opinion—like Justice Clark's in *Wesberry*—is equally coherent, see 364 U. S., at 349. Moreover, the Court has subsequently treated *Gomillion* as though it had been decided on equal protection grounds. See *Whitcomb* v. *Chavis*, 403 U. S. 124, 149 (1971).

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H. R. 8266, and H. R. 8473, 86th Cong., 1st Sess., 65–90 (1959). The primary consequence of the rule has been its protection of the individual voter, but it has also provided one mechanism for identifying and curtailing discrimination against cognizable groups of voters.

*Gomillion* involved complete geographical exclusion of a racially identified group. But in case after case arising under the Equal Protection Clause the Court has suggested that "dilution" of the voting strength of cognizable *political* as well as racial groups may be unconstitutional. Thus, the question reserved in *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (1965), related to an apportionment scheme that might "operate to minimize or cancel out the voting strength of racial or political elements of the voting population." See also *Gaffney* v. *Cummings*, 412 U. S. 735, 751, 754 (1973); *White* v. *Regester*, 412 U. S. 755, 765–770 (1973); *Whitcomb* v. *Chavis*, *supra*, at 143–144; *Burns* v. *Richardson*, 384 U. S. 73, 88–89 (1966). In his separate opinion in *Williams* v. *Rhodes*, 393 U. S. 23, 39 (1968), Justice Douglas pointed out that the Equal Protection Clause protects "voting rights and political groups . . . as well as economic units, racial communities, and other entities." And in *Abate* v. *Mundt*, 403 U. S. 182, 187 (1971), the Court noted the absence of any "built-in bias tending to favor particular political interests or geographic areas." In his dissenting opinion today, JUSTICE WHITE seems to agree that New Jersey's plan would violate the Equal Protection Clause if it "invidiously discriminated against a racial or political group." *Post*, at 783.

There is only one Equal Protection Clause. Since the Clause does not make some groups of citizens more equal than others, see *Zobel* v. *Williams*, 457 U. S. 55, 71 (1982) (BRENNAN, J., concurring), its protection against vote dilution cannot be confined to racial groups. As long as it proscribes gerrymandering against such groups, its proscription must provide comparable protection for other cognizable groups of voters as well. As I have previously written:

> "In the line-drawing process, racial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders.
>
> "From the standpoint of the groups of voters that are affected by the line-drawing process, it is also important

to recognize that it is the group's interest in gaining or maintaining political power that is at stake. The mere fact that a number of citizens share a common ethnic, racial, or religious background does not create the need for protection against gerrymandering. It is only when their common interests are strong enough to be manifested in political action that the need arises. For the political strength of a group is not a function of its ethnic, racial, or religious composition; rather it is a function of numbers—specifically the number of persons who will vote in the same way." *Mobile* v. *Bolden*, 446 U. S. 55, 88 (1980) (concurring in judgment).

See *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 851–852 (CA7) (Stevens, J., dissenting), cert. denied, 409 U. S. 893 (1972).[7]

II

Like JUSTICE WHITE, I am convinced that judicial preoccupation with the goal of perfect population equality is an inadequate method of judging the constitutionality of an apportionment plan. I would not hold that an obvious gerrymander is wholly immune from attack simply because it comes closer to perfect population equality than every competing plan. On the other hand, I do not find any virtue in the proposal to relax the standard set forth in *Wesberry* and subsequent cases, and to ignore population disparities after some arbitrarily defined threshold has been crossed.[8] As one com-

[7] Similarly, the motivation for the gerrymander turns on the political strength of members of the group, derived from cohesive voting patterns, rather than on the source of their common interests. 466 F. 2d, at 852.

[8] The former would appear to be consistent with what the Court has written in this case, *ante*, at 734–735, n. 6; the latter would be consistent with what JUSTICE WHITE has written in dissent, *post*, at 780–783. Either of these approaches would leave the door to unrestricted gerrymandering wide open. See Engstrom, The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation, 1976 Ariz. State L. J. 277, 285–286, 296; Baker, Quantita-

mentator has written: "Logic, as well as experience, tells us . . . that there can be no total sanctuaries in the political thicket, else unfairness will simply shift from one form to another."[9] Rather, we should supplement the population equality standard with additional criteria that are no less "judicially manageable." In evaluating equal protection challenges to districting plans, just as in resolving such attacks on other forms of discriminatory action, I would consider whether the plan has a significant adverse impact on an identifiable political group, whether the plan has objective indicia of irregularity, and then, whether the State is able to produce convincing evidence that the plan nevertheless serves neutral, legitimate interests of the community as a whole.

Until two decades ago, constrained by its fear of entering a standardless political thicket, the Court simply abstained from any attempt to judge the constitutionality of legislative apportionment plans, even when the districts varied in population from 914,053 to 112,116. See *Colegrove* v. *Green*, 328 U. S., at 557. In *Baker* v. *Carr*, 369 U. S. 186 (1962), and *Reynolds* v. *Sims*, 377 U. S. 533 (1964), the Court abandoned that extreme form of judicial restraint and enunciated the "one person, one vote" principle. That standard is "judicially manageable" because census data are concrete and reasonably reliable and because judges can multiply and divide.

Even as a basis for protecting voters in their individual capacity, the "one person, one vote" approach has its shortcomings. Although population disparities are easily quantified, the standard provides no measure of the significance of any numerical difference. It is easy to recognize the element of

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tive and Descriptive Guidelines to Minimize Gerrymandering, 219 Annals N. Y. Acad. Sci. 200, 208 (1973) ("If more specific guidelines to minimize gerrymandering are not forthcoming, then a great democratic principle—one man, one vote—will have degenerated into a simplistic arithmetical facade for discriminatory cartography on an extensive scale").

[9] Dixon, The Court, the People, and "One Man, One Vote," in Reapportionment in the 1970s, p. 32 (N. Polsby ed. 1971).

unfairness in allowing 112,116 voters to elect one Congressman while another is elected by 914,053. But how significant is the difference between census counts of 527,472 and 523,798? Given the birth rate, the mortality rate, the transient character of modern society, and the acknowledged errors in the census, we all know that such differences may vanish between the date of the census and the date of the next election. Absolute population equality is impossible to achieve.

More important, mere numerical equality is not a sufficient guarantee of equal representation. Although it directly protects individuals, it protects groups only indirectly at best. See *Reynolds* v. *Sims*, *supra*, at 561. A voter may challenge an apportionment scheme on the ground that it gives his vote less weight than that of other voters; for that purpose it does not matter whether the plaintiff is combined with or separated from others who might share his group affiliation. It is plainly unrealistic to assume that a smaller numerical disparity will *always* produce a fairer districting plan. Indeed, as Justice Harlan correctly observed in *Wells* v. *Rockefeller*, 394 U. S. 542, 551 (1969), a standard "of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort. A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues." Since Justice Harlan wrote, developments in computer technology have made the task of the gerrymanderer even easier. See *post*, at 776 (WHITE, J., dissenting).[10]

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[10] Computers now make it possible to generate a large number of alternative plans, consistent with equal population guidelines and various other criteria, in a relatively short period of time, and to analyze the political characteristics of each one in considerable detail. In contrast, "[i]n the 1970's round of reapportionment, some states were barely able to generate a single reapportionment plan in the time allotted to the task." National Conference of State Legislatures, Reapportionment: Law and Technology 55 (June 1980); see also Engstrom, *supra* n. 8, at 281–282.

The imperfections in the numerical standard do not, of course, render it useless. It provides one neutral criterion for evaluating a districting plan. Numerical disparities may provide sufficient basis for shifting the burden of justification to the State. Moreover, if all other factors were in equipoise, it would be proper to conclude that the plan that most nearly attains the goal of complete equality would be the fairest plan. The major shortcoming of the numerical standard is its failure to take account of other relevant—indeed, more important—criteria relating to the fairness of group participation in the political process. To that extent, it may indeed be counterproductive. See *Gaffney* v. *Cummings*, 412 U. S., at 748–749.[11]

To a limited extent the Court has taken cognizance of discriminatory treatment of groups of voters. The path the Court has sometimes used to enter this political thicket is marked by the label "intent." A finding that the majority deliberately sought to make it difficult for a minority group to elect representatives may provide a sufficient basis for holding that an objectively neutral electoral plan is unconstitutional. See *Rogers* v. *Lodge*, 458 U. S. 613, 616–617 (1982). For reasons that I have already set forth at length, this standard is inadequate. See *id.*, at 642–650 (STEVENS, J., dissenting); *Mobile* v. *Bolden*, 446 U. S., at 83 (STEVENS, J., concurring in judgment). I would not condemn a legislature's districting plan in the absence of discriminatory impact simply because its proponents were motivated, in part, by partisanship or group animus. Legislators are, after all, politicians; it is unrealistic to attempt to proscribe all political considerations in the essentially political process of redistricting. In the long run, constitutional adjudication that is premised on a case-by-case appraisal of the subjective intent of local decisionmakers

[11] See Edwards, The Gerrymander and "One Man, One Vote," 46 N. Y. U. L. Rev. 879 (1971); Elliott, Prometheus, Proteus, Pandora, and Procrustes Unbound: The Political Consequences of Reapportionment, 37 U. Chi. L. Rev. 474, 483–488 (1970); Engstrom, *supra* n. 8.

cannot possibly satisfy the requirement of impartial administration of the law that is embodied in the Equal Protection Clause of the Fourteenth Amendment. On the other hand, if a plan has a significant adverse impact upon a defined political group, an additional showing that it departs dramatically from neutral criteria should suffice to shift the task of justification to the state defendants.

For a number of reasons, this is a burden that plaintiffs can meet in relatively few cases. As a threshold matter, plaintiffs must show that they are members of an identifiable political group whose voting strength has been diluted. They must first prove that they belong to a politically salient class, see *supra*, at 749–750, one whose geographical distribution is sufficiently ascertainable that it could have been taken into account in drawing district boundaries.[12] Second, they must prove that in the relevant district or districts or in the State as a whole, their proportionate voting influence has been adversely affected by the challenged scheme.[13] Third, plain-

[12] Identifiable groups will generally be based on political affiliation, race, ethnic group, national origin, religion, or economic status, but other characteristics may become politically significant in a particular context. See Clinton, Further Explorations in the Political Thicket: The Gerrymander and the Constitution, 59 Iowa L. Rev. 1, 38–39 (1973) (cognizable interest group with coherent and identifiable legislative policy); Comment, Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence, 41 U. Chi. L. Rev. 398, 407–408 (1974) (clearly identifiable and stable group).

[13] The difficulty in making this showing stems from the existence of alternative strategies of vote dilution. Depending on the circumstances, vote dilution may be demonstrated if a population concentration of group members has been fragmented among districts, or if members of the group have been overconcentrated in a single district greatly in excess of the percentage needed to elect a candidate of their choice. See *Mobile* v. *Bolden*, 446 U. S., at 91, and n. 13 (STEVENS, J., concurring in judgment); Hacker, *supra* n. 6, at 46–50; cf. Note, Compensatory Racial Reapportionment, 25 Stan. L. Rev. 84, 97–100 (1972) (pointing to the shortcomings of several tests of political strength, including opportunity to cast swing votes and opportunity to elect a representative of their own group).

In litigation under the Voting Rights Act, federal courts have developed some familiarity with the problems of identifying and measuring dilution of

tiffs must make a prima facie showing that raises a rebuttable presumption of discrimination.

One standard method by which members of a disadvantaged political group may establish a dilution of their voting rights is by reliance on the "one person, one vote" principle, which depends on a statewide statistical analysis. But prima facie evidence of gerrymandering can surely be presented in other ways. One obvious type of evidence is the shape of the district configurations themselves. One need not use Justice Stewart's classic definition of obscenity—"I know it when I see it"[14]—as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation.[15]

Substantial divergences from a mathematical standard of compactness may be symptoms of illegitimate gerrymandering. As Dr. Ernest Reock, Jr., of Rutgers University has written: "Without some requirement of compactness, the boundaries of a district may twist and wind their way across the map in fantastic fashion in order to absorb scattered

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racial group voting strength. Some of the concepts developed for statutory purposes might be applied in adjudicating constitutional claims by other types of political groups. The threshold showing of harm may be more difficult for adherents of a political party than for members of a racial group, however, because there are a number of possible base-line measures for a party's strength, including voter registration and past vote-getting performance in one or more election contests. See generally Backstrom, Robins, & Eller, Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota, 62 Minn. L. Rev. 1121, 1131–1139 (1978).

[14] *Jacobellis* v. *Ohio*, 378 U. S. 184, 197 (1964).

[15] Professor Dixon quite properly warns against *defining* gerrymandering in terms of odd shapes. See R. Dixon, Democratic Representation: Reapportionment in Law and Politics 459–460 (1968). At the same time, however, he recognizes that a rule of compactness and contiguity, "if used merely to force an explanation for odd-shaped districts, can have much merit." *Id.*, at 460. See L. Tribe, American Constitutional Law 760 (1978) (oddity of district's shape, coupled with racial distribution of the population, should shift the burden of justification to the State).

pockets of partisan support."[16] To some extent, geographical compactness serves independent values; it facilitates political organization, electoral campaigning, and constituent representation.[17] A number of state statutes and Constitutions require districts to be compact and contiguous. These standards have been of limited utility because they have not been defined and applied with rigor and precision.[18] Yet Professor Reock and other scholars have set forth a number of methods of measuring compactness that can be computed with virtually the same degree of precision as a population count.[19] It is true, of course, that the significance of a par-

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[16] Reock, Measuring Compactness as a Requirement of Legislative Apportionment, 5 Midwest J. Pol. Sci. 70, 71 (1961). Cf. Backstrom, Robins, & Eller, *supra* n. 13, at 1126, 1137 (compactness standard cannot eliminate gerrymandering but may reduce the band of discretion available to those drawing district boundaries). It is of course possible to dilute a group's voting strength even if all districts are relatively compact. Engstrom, *supra* n. 8, at 280.

[17] See Taylor, A New Shape Measure for Evaluating Electoral District Patterns, 67 Am. Pol. Sci. Rev. 947, 948 (1973). Compactness is not to be confused with physical area. As we stated in *Reynolds* v. *Sims*, 377 U. S. 533, 580 (1964): "Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing." Nevertheless, although low population density may require geographically extensive districts, different questions are presented by the creation of districts with distorted shapes and irregular, indented boundaries.

[18] One state statute and 21 State Constitutions explicitly require that districts be compact; two state statutes and 27 Constitutions explicitly provide that districts be formed of contiguous territory. See Congressional Research Service, State Constitutional and Statutory Provisions Concerning Congressional and State Legislative Redistricting (June 1981). But see Clinton, *supra* n. 12, at 2 (ineffective enforcement); Comment, *supra* n. 12, at 412–413.

[19] The scholarly literature suggests a number of different mathematical measures of compactness, each focusing on different variables. One rela-

ticular compactness measure may be difficult to evaluate, but as the figures in this case demonstrate, the same may be said of population disparities. In addition, although some deviations from compactness may be inescapable because of the geographical configuration or uneven population density of a particular State,[20] the relative degrees of compactness of dif-

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tively simple method is to measure the relationship between the area of the district and the area of the smallest possible circumscribing circle. See Reock, *supra* n. 16, at 71. This calculation is particularly sensitive to the degree of elongation of a given shape. Another simple method is to determine the ratio of a figure's perimeter to the circumference of the smallest possible circumscribing circle, a measurement that is well suited to measuring the degree of indentation. See Schwartzberg, Reapportionment, Gerrymanders, and the Notion of "Compactness," 50 Minn. L. Rev. 443–452 (1966). Other measures of compactness are based on the aggregate of the distances from the district's geometrical or population-weighted center of gravity to each of its points, see Kaiser, An Objective Method for Establishing Legislative Districts, 10 Midwest J. Pol. Sci. 200–223 (1966); Weaver & Hess, A Procedure for Nonpartisan Districting: Development of Computer Techniques, 73 Yale L. J. 288, 296–300 (1963); the degree of indentation of the boundaries of a nonconvex district, see Taylor, *supra* n. 17; the aggregate length of district boundaries, see Common Cause, Toward a System of "Fair and Effective Representation" 54–55 (1977); Adams, Statute: A Model State Apportionment Process: The Continuing Quest for "Fair and Effective Representation," 14 Harv. J. Legis. 825, 875–876, and n. 184 (1977); Edwards, *supra* n. 11, at 894; Walker, One Man-One Vote: In Pursuit Of an Elusive Ideal, 3 Hastings Const. L. Q. 453, 475 (1976); and the ratio of the maximum to the minimum diameters in a district, R. Morrill, Political Redistricting and Geographic Theory 22 (1981). In each case, the smaller the measurement, the more compact the district or districts. See also 1980 Iowa Acts, ch. 1021, § 4b(3)c (setting forth alternative geometrical tests for determining relative compactness of alternative districting plans: the absolute value of the difference between the length and width of the district, and the "ratio of the dispersion of population about the population center of the district to the dispersion of population about the geographic center of the district").

[20] If a State's political subdivisions have oddly shaped boundaries, adhering to these boundaries may detract from geographical compactness. See Colo. Rev. Stat. §§ 2–2–105, 2–2–203 (1980) (legislative explanations that variations from compactness were caused by "the shape of county boundary lines, census enumeration lines, natural boundaries, population den-

ferent district maps can always be compared. As with the numerical standard, it seems fair to conclude that drastic departures from compactness are a signal that something may be amiss.

Extensive deviation from established political boundaries is another possible basis for a prima facie showing of gerrymandering. As we wrote in *Reynolds* v. *Sims:* "Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." 377 U. S., at 578–579.[21] Subdivision boundaries tend to remain stable over time. Residents of political units such as townships, cities, and counties often develop a community of interest, particularly when the subdivision plays an important role in the provision of governmental services. In addition, legislative districts that do not cross subdivision boundaries are administratively convenient and less likely to confuse the voters.[22] Although the significance of deviations from sub-

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sity, and the need to retain compactness of adjacent districts"); Adams, *supra* n. 19, at 875–876, n. 184.

In addition, geographic compactness may differ from sociopolitical compactness. Baker, *supra* n. 8, at 205. As one geographer has noted:

"In many regions, the population is uneven, perhaps strung out along roads or railroads. Travel may be easier and cheaper in some directions than in others, such that an elongated district astride a major transport corridor might in fact be the most compact in the sense of minimum travel time for a representative to travel around the district. If so, then a modified criterion, the ratio of the maximum to the minimum travel time, would be a preferred measure." Morrill, *supra* n. 19, at 22.

[21] In *Kirkpatrick* v. *Preisler*, 394 U. S. 526, 534, n. 4 (1969), the Court correctly noted that adherence to subdivision boundaries could not *prevent* gerrymandering. But there it was concerned with the State's attempt to justify population disparities by a policy of adhering to existing subdivision boundaries. My discussion here is directed toward partisan gerrymandering in a scheme with relatively equipopulous districts. To the extent that dicta in *Kirkpatrick* reject the notion that respecting subdivision boundaries will not inhibit gerrymandering, I respectfully disagree. See n. 26, *infra*.

[22] Morrill, *supra* n. 19, at 25.

division boundaries will vary with the number of legislative seats and the number, size, and shape of the State's subdivisions, the number can be counted[23] and alternative plans can be compared.

A procedural standard, although obviously less precise, may also be enlightening. If the process for formulating and adopting a plan excluded divergent viewpoints, openly reflected the use of partisan criteria, and provided no explanation of the reasons for selecting one plan over another, it would seem appropriate to conclude that an adversely affected plaintiff group is entitled to have the majority explain its action.[24] On the other hand, if neutral decisionmakers developed the plan on the basis of neutral criteria, if there was an adequate opportunity for the presentation and consideration of differing points of view, and if the guidelines used in selecting a plan were explained, a strong presumption of validity should attach to whatever plan such a process produced.

Although a scheme in fact worsens the voting position of a particular group,[25] and though its geographic configuration or

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[23] See, *e. g.*, *Mahan* v. *Howell*, 410 U. S. 315, 319, 323 (1973); Backstrom, Robins, & Eller, *supra* n. 13, at 1145, n. 71; Morrill, *supra* n. 19, at 25. The smaller the population of a subdivision relative to the average district population, the more dubious it is to divide it among two or more districts. It is also particularly suspect to divide a particular political subdivision among more than two districts which also contain territory in other subdivisions.

[24] See, *e. g.*, *Wright* v. *Rockefeller*, 376 U. S. 52, 73–74 (1964) (Goldberg, J., dissenting); Edwards, *supra* n. 11, at 881 (the 1961 New York congressional redistricting plan was drawn up by majority party members of a legislative committee and staff without participation by any member of the opposition party; no public hearings were held; the plan was released to the public the day before its adoption; it was approved by a straight party-line vote in a single afternoon at an extraordinary session of the legislature; and the Governor signed the bill the same day).

[25] The State may defend on the grounds that this element has not been adequately shown. For example, if the plaintiffs' challenge is based on a particular district or districts, the State may be able to show that the

genesis is sufficiently irregular to violate one or more of the criteria just discussed, it will nevertheless be constitutionally valid if the State can demonstrate that the plan as a whole embodies acceptable, neutral objectives. The same kinds of justification that the Court accepts as legitimate in the context of population disparities would also be available whenever the criteria of shape, compactness, political boundaries, or decisionmaking procedures have sent up warning flags. In order to overcome a prima facie case of invalidity, the State may adduce "legitimate considerations incident to the effectuation of a rational state policy," *Reynolds* v. *Sims*, 377 U. S., at 579, and may also

> "show with some specificity that a particular objective requires the specific deviations in its plan, rather than simply relying on general assertions. The showing . . . is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely." *Ante*, at 741.[26]

If a State is unable to respond to a plaintiff's prima facie case by showing that its plan is supported by adequate neutral criteria, I believe a court could properly conclude that the challenged scheme is either totally irrational or entirely

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group's voting strength is not diluted in the State as a whole. Even if the group's voting strength has in fact been reduced, the previous plan may have been gerrymandered in its favor. See generally Backstrom, Robins, & Eller, *supra* n. 13, at 1134–1137 (discussing possible standards of "fair representation").

[26] In determining whether the State has carried its burden of justification, I would give greater weight to the importance of the State's interests and the consistency with which those interests are served than to the size of the deviations. Thus I do not share the perspective implied in the Court's discussion of purported justifications in *Kirkpatrick* v. *Preisler*, 394 U. S., at 533–536.

motivated by a desire to curtail the political strength of the affected political group. This does not mean that federal courts should invalidate or even review every apportionment plan that may have been affected to some extent by partisan legislative maneuvering.[27] But I am convinced that the Judiciary is not powerless to provide a constitutional remedy in egregious cases.[28]

## III

In this case it is not necessary to go beyond the reasoning in the Court's opinions in *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969), and

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[27] Given the large number of potentially affected political groups, even a neutral, justifiable plan may well change the position of some groups for the worse. In addition, some "vote dilution" will inevitably result from residential patterns; see Backstrom, Robins, & Eller, *supra* n. 13, at 1127. Although the State may of course adduce this factor in defense of its plan, the criteria for a prima facie case should be demanding enough that they are not satisfied in the case of every apportionment plan. See *Mobile* v. *Bolden*, 446 U. S., at 90 (STEVENS, J., concurring in judgment) ("the standard cannot condemn every adverse impact on one or more political groups without spawning more dilution litigation than the judiciary can manage"); *id.*, at 93, n. 15 (quoting opinion of Justice Frankfurter in *Baker* v. *Carr*, 369 U. S. 186, 267 (1962)).

[28] See *Gomillion* v. *Lightfoot*, 364 U. S. 339, 341 (1960) (noting that allegations would "abundantly establish that Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering"). If the Tuskegee map in *Gomillion* had excluded virtually all Republicans rather than blacks from the city limits, the Constitution would also have been violated. Professor Tribe gives a comparably egregious numerical hypothetical:

"For example, if a jurisdiction consisting of 540 Republicans and 460 Democrats were subdivided randomly into 10 districts, Republicans would probably be elected in six or more districts. However, if malevolent Democrats could draw district lines with precision, they might be able to isolate 100 Republicans in one district and win all the other district elections by a margin of one or two votes, thus capturing 90% of the state legislature while commanding only 46% of the popular vote." Tribe, *supra* n. 15, at 756, n. 2.

See Hacker, *supra* n. 6, at 47–50.

*White* v. *Weiser*, 412 U. S. 783 (1973), to reach the correct result. None of the additional criteria that I have mentioned would cast any doubt on the propriety of the Court's holding in this case. Although I need not decide whether the plan's shortcomings regarding shape and compactness, subdivision boundaries, and neutral decisionmaking would establish a prima facie case, these factors certainly strengthen my conclusion that the New Jersey plan violates the Equal Protection Clause.

A glance at the map, *ante*, following p. 744, shows district configurations well deserving the kind of descriptive adjectives—"uncouth"[29] and "bizarre"[30]—that have traditionally been used to describe acknowledged gerrymanders. I have not applied the mathematical measures of compactness to the New Jersey map, but I think it likely that the plan would not fare well. In addition, while disregarding geographical compactness, the redistricting scheme wantonly disregards county boundaries. For example, in the words of a commentator: "In a flight of cartographic fancy, the Legislature packed North Jersey Republicans into a new district many call 'the Swan.' Its long neck and twisted body stretch from the New York suburbs to the rural upper reaches of the Delaware River." That district, the Fifth, contains segments of at least seven counties. The same commentator described the Seventh District, comprised of parts of five counties, as tracing "a curving partisan path through industrial Elizabeth, liberal, academic Princeton and largely Jewish Marl-

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[29] *Gomillion* v. *Lightfoot*, *supra*, at 339.

[30] Indeed, this very map was so described in a recent article entitled New Jersey Map Imaginative Gerrymander, appearing in the Congressional Quarterly: "New Jersey's new congressional map is a four-star gerrymander that boasts some of the most bizarrely shaped districts to be found in the nation." 40 Congressional Quarterly 1190 (1982). A quick glance at congressional districting maps for the other 49 States lends credence to this conclusion. See 1983–1984 Official Congressional Directory 989–1039 (1983).

boro in Monmouth County. The resulting monstrosity was called 'the Fishhook' by detractors." 40 Congressional Quarterly 1193–1195 (1982).[31]

Such a map prompts an inquiry into the process that led to its adoption. The plan was sponsored by the leadership in the Democratic Party, which controlled both houses of the state legislature as well as the Governor's office, and was signed into law the day before the inauguration of a Republican Governor. The legislators never formally explained the guidelines used in formulating their plan or in selecting it over other available plans. Several of the rejected plans contained districts that were more nearly equal in population, more compact, and more consistent with subdivision boundaries, including one submitted by a recognized expert, Dr. Ernest Reock, Jr., whose impartiality and academic credentials were not challenged. The District Court found that the Reock Plan "was rejected because it did not reflect the leadership's partisan concerns." *Daggett* v. *Kimmelman*, 535 F. Supp. 978, 982 (NJ 1982). This conclusion, which arises naturally from the absence of persuasive justifications for the rejection of the Reock Plan, is buttressed by a letter written to Dr. Reock by the Democratic Speaker of the New Jersey General Assembly. This letter frankly explained the importance to the Democrats of taking advantage of their opportunity to control redistricting after the 1980 census. The Speaker justified his own overt partisanship by describing the political considerations that had motivated the Republican majority in the adoption of district plans in New

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[31] The same commentator described the Thirteenth District in this manner: "In an effort to create a 'dumping ground' for Republican votes troubling to Democrats Hughes and Howard, the Legislature established a 13th District that stretches all over the map, from the Philadelphia suburbs in Camden County to the New York suburbs in Monmouth County." 40 Congressional Quarterly, at 1198. At oral argument, we observed the likeness between the boundaries of yet another district—the Fourth—and the shape of a running back. Tr. of Oral Arg. 21.

Jersey in the past—and in other States at the present.[32] In sum, the record indicates that the decisionmaking process leading to adoption of the challenged plan was far from neutral. It was designed to increase the number of Democrats, and to decrease the number of Republicans, that New Jersey's voters would send to Congress in future years.[33] Finally, the record does not show any legitimate justifications for the irregularities in the New Jersey plan, although concededly the case was tried on a different theory in the District Court.

Because I have not made a comparative study of other districting plans, and because the State has not had the opportu-

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[32] "Congressional redistricting in New Jersey must also be viewed from the more broad-based national perspective. The Republican party is only 27 votes short of absolute control of Congress. With a shift of population and consequently Congressional seats from the traditionally Democratic urban industrial states to the more Republican dominated sun-belt states the redistricting process is viewed by Republicans as an opportunity to close that 27 vote margin, or perhaps even overcome it entirely." 535 F. Supp., at 991.

Copies of the letter were sent to all Democratic legislators.

[33] Although Circuit Judge Gibbons disagreed with the holding of the District Court in this case, the concluding paragraphs of his dissenting opinion unambiguously imply that he would have no difficulty identifying this as a case in which the district lines were drawn in order to disadvantage an identifiable political group. He wrote:

"The apportionment map produced by P. L. 1982, c.1 leaves me, as a citizen of New Jersey, disturbed. It creates several districts which are anything but compact, and at least one district which is contiguous only for yachtsmen. While municipal boundaries have been maintained, there has been little effort to create districts having a community of interests. In some districts, for example, different television and radio stations, different newspapers, and different transportation systems serve the northern and southern localities. Moreover the harshly partisan tone of Speaker Christopher Jackman's letter to Ernest C. Reock, Jr. is disedifying, to say the least. It is plain, as well, that partisanship produced artificial bulges or appendages of two districts so as to place the residences of Congressmen Smith and Courter in districts where they would be running against incumbents." *Id.*, at 984.

nity to offer justifications specifically directed toward the additional concerns I have discussed, I cannot conclude with absolute certainty that the New Jersey plan was an unconstitutional partisan gerrymander. But I am in full agreement with the Court's holding that, because the plan embodies deviations from population equality that have not been justified by any neutral state objective, it cannot stand. Further, if population equality provides the only check on political gerrymandering, it would be virtually impossible to fashion a fair and effective remedy in a case like this. For if the shape of legislative districts is entirely unconstrained, the dominant majority could no doubt respond to an unfavorable judgment by providing an even more grotesque-appearing map that reflects acceptable numerical equality with even greater political inequality. If federal judges can prevent that consequence by taking a hard look at the shape of things to come in the remedy hearing, I believe they can also scrutinize the original map with sufficient care to determine whether distortions have any rational basis in neutral criteria. Otherwise, the promise of *Baker* v. *Carr* and *Reynolds* v. *Sims*—that judicially manageable standards can assure "[f]ull and effective participation by all citizens," 377 U. S., at 565—may never be fulfilled.

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

This case concerns the congressional reapportionment of New Jersey. The districting plan enacted by the New Jersey Legislature and signed into law by the Governor on January 19, 1982, Pub. L. 1982, ch. 1, reduced the number of congressional districts in the State from 15 to 14 as required by the 1980 census figures. The 14 congressional districts created by the legislature have an average deviation of 0.1384% and a maximum deviation between the largest and smallest districts of 0.6984%. In other words, this case concerns a

maximum difference of 3,674 individuals in districts encompassing more than a half million people. The New Jersey plan was invalidated by a divided District Court because these population variances were not "'unavoidable despite a good-faith effort to achieve absolute equality.'" *Daggett* v. *Kimmelman*, 535 F. Supp. 978, 982 (NJ 1982), quoting *Kirkpatrick* v. *Preisler*, 394 U. S. 526, 531 (1969). Today, the Court affirms the District Court's decision thereby striking for the first time in the Court's experience a legislative or congressional districting plan with an average and maximum population variance of under 1%.

I respectfully dissent from the Court's unreasonable insistence on an unattainable perfection in the equalizing of congressional districts. The Court's decision today is not compelled by *Kirkpatrick* v. *Preisler*, *supra*, and *White* v. *Weiser*, 412 U. S. 783 (1973), see Part I, *infra*, and if the Court is convinced that our cases demand the result reached today, the time has arrived to reconsider these precedents. In any event, an affirmance of the decision below is inconsistent with the majority's own "modifications" of *Kirkpatrick* and *White* which require, at a minimum, further consideration of this case by the District Court. See Part IV, *infra*.

I

"[T]he achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment." *Reynolds* v. *Sims*, 377 U. S. 533, 565–566 (1964). One must suspend credulity to believe that the Court's draconian response to a trifling 0.6984% maximum deviation promotes "fair and effective representation" for the people of New Jersey. The requirement that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's," *Wesberry* v. *Sanders*, 376 U. S. 1, 7–8 (1964), must be understood in light of the malapportionment in the States at the time *Wesberry* was decided. The plaintiffs in *Wesberry* were voters in a congressional district (population 823,680) encompassing Atlanta that was three

times larger than Georgia's smallest district (272,154) and more than double the size of an average district. Because the State had not reapportioned for 30 years, the Atlanta District possessing one-fifth of Georgia's population had only one-tenth of the Congressmen. Georgia was not atypical; congressional districts throughout the country had not been redrawn for decades and deviations of over 50% were the rule.[1] These substantial differences in district size diminished, in a real sense, the representativeness of congressional elections. The Court's invalidation of these profoundly unequal districts should not be read as a demand for precise mathematical equality between the districts. Indeed, the Court sensibly observed that "it may not be possible [for the States] to draw congressional districts with mathematical precision." *Id.*, at 18. In *Reynolds* v. *Sims*, *supra*, at 577, decided the same Term, the Court disavowed a requirement of mathematical exactness for legislative districts in even more explicit terms:

> "We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement."

The States responded to *Wesberry* by eliminating gross disparities between congressional districts. Nevertheless, redistricting plans with far smaller variations were struck by the Court five years later in *Kirkpatrick* v. *Preisler*, *supra*, and its companion, *Wells* v. *Rockefeller*, 394 U. S. 542 (1969). The redistricting statutes before the Court contained total percentage deviations of 5.97% and 13.1%, respectively.

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[1] By 1962, 35 out of 42 States had variances among their districts of over 100,000. *Wesberry* v. *Sanders*, 376 U. S. 1, 20–21 (1964) (Harlan, J. dissenting). The Court has recognized the significance of the fact that "enormous variations" in district size were at issue in the early legislative apportionment cases. *Gaffney* v. *Cummings*, 412 U. S. 735, 744, and n. 9 (1973).

But *Wesberry*'s "as nearly as practicable" standard was read to require "a good-faith effort to achieve precise numerical equality." 394 U. S., at 530–531. Over the objections of four Justices, see *id.*, at 536 (Fortas, J., concurring); *id.*, at 549 (Harlan, J., joined by Stewart, J., dissenting); *id.*, at 553 (WHITE, J., dissenting), *Kirkpatrick* rejected the argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy the "as nearly as practicable" standard. *Kirkpatrick*'s rule was applied by the Court in *White* v. *Weiser*, *supra*, to invalidate Texas' redistricting scheme which had a maximum population variance of 4.13%.

Just as *Wesberry* did not require *Kirkpatrick*, *Kirkpatrick* does not ineluctably lead to the Court's decision today. Although the Court stated that it could see "no nonarbitrary way" to pick a *de minimis* point, the maximum deviation in *Kirkpatrick*, while small, was more than eight times as large as that posed here. Moreover, the deviation in *Kirkpatrick* was not argued to fall within the officially accepted range of statistical imprecision of the census. Interestingly enough, the Missouri redistricting plan approved after *Kirkpatrick* contained a deviation of 0.629%—virtually the same deviation declared unconstitutional in this case. *Preisler* v. *Secretary of State of Missouri*, 341 F. Supp. 1158, 1162 (WD Mo.), summarily aff'd *sub nom. Danforth* v. *Preisler*, 407 U. S. 901 (1972).[2] Accordingly, I do not view the Court's decision today as foreordained by *Kirkpatrick* and *Weiser*. Apparently neither did JUSTICE BRENNAN who, in staying the District Court's order, wrote:

> "The appeal would thus appear to present the important question whether *Kirkpatrick* v. *Preisler* requires adoption of the plan that achieves the most precise math-

[2] District Courts have upheld or selected plans with similar deviations. See, *e. g.*, *Doulin* v. *White*, 535 F. Supp. 450, 451 (ED Ark. 1982) (court ordered implementation of plan with 0.78% deviation despite alternative plan with deviation of 0.13%).

> ematical exactitude, or whether *Kirkpatrick* left some latitude for the New Jersey Legislature to recognize the considerations taken into account by it as a basis for choosing among several plans, each with arguably 'statistically insignificant' variances from the constitutional ideal of absolute precision." 455 U. S. 1303, 1305 (1982).

There can be little question but that the variances in the New Jersey plan are "statistically insignificant." Although the Government strives to make the decennial census as accurate as humanly possible, the Census Bureau has never intimated that the results are a perfect count of the American population. The Bureau itself estimates the inexactitude in the taking of the 1970 census at 2.3%,[3] a figure which is considerably larger than the 0.6984% maximum variance in the New Jersey plan, and which dwarfs the 0.2470% difference between the maximum deviations of the selected plan and the leading alternative plan, that suggested by Professor Reock. Because the amount of undercounting differs from district to district, there is no point for a court of law to act under an unproved assumption that such tiny differences between redistricting plans reflect actual differences in population. As Dr. James Trussel, an expert in these matters, and whose testimony the Court purports to accept, *ante*, at 735–736, explained:

> "The distribution of the undercount in New Jersey is obviously also unknown, and I see no reason to believe that

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[3] U. S. Bureau of the Census, Users' Guide, 1980 Census of Population and Housing 100 (Mar. 1982). The National Academy of Sciences has estimated that the national undercount in the 1970 census was 2.5%. Panel on Decennial Census Plans, Counting the People in 1980: An Appraisal of Census Plans 2 (1978). One estimate is that the undercount error in the 1980 census is likely to be more than 2 million people nationwide, App. 103 (Dr. Trussel), and may be as high as 5 million. J. Passel, J. Siegel, & J. Robinson, Coverage of the National Population in the 1980 Census, by Age, Sex, and Race: Preliminary Estimates by Demographic Analysis (Nov. 1981) (Record Doc. No. 31).

it would be uniformly spread over all municipalities. For these reasons, one cannot make congressional districts of truly equal size if one relies on census counts. Nor is it meaningful to rank one redistricting plan as superior to another when differences in district size are small. In my professional opinion, districts whose enumerated populations differ one from another by less than one percent should be considered to be equal in size. To push for numerical equality beyond this point is an exercise in illusion." App. 103–104.[4]

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[4] The Court, after professing to "[a]ssum[e] for purposes of argument that each of [Dr. Trussel's] statements is correct," *ante*, at 735–736, proceeds in the following paragraph to denigrate his calculation as guesswork because the margin of statistical imprecision, *i. e.*, the undercounting of persons, cannot be known precisely. The failure to quantify uncertainty exactly does not excuse pretending that it does not exist. When the question is whether the range of error is 1% or 2% or 2.5% and the deviation at hand is no larger than 0.6984%, the question is more academic than practical. Moreover, if a fixed benchmark were required, the margin of error officially recognized by the Census Bureau—last estimated at 2.3%—could easily be selected.

The Court also makes much of the fact that the precise amount of variation in undercounting among districts cannot be known with certainty. The relevant point, however, is that these district-to-district variances make it impossible to determine with statistical confidence whether opting for the plan with the smallest maximum deviation is ameliorating or aggravating actual equality of population among the districts. In addition, the count of individuals per district depends upon the Census Bureau's selection of geographic boundaries by which to group data. "Data from the 1980 census have been compiled for congressional districts by equating component census geographic areas to each district and summing all data for areas coded to the district. Where the smallest census geographic area was split by a congressional district boundary, the census maps for the area were reviewed to determine in which district the majority of the population fell, and the entire area was coded to that district." U. S. Bureau of Census, Congressional Districts of the 98th Congress A–1 (1983) (preliminary draft). Thus, completely aside from undercounting effects, it is obvious that even absolute numerical equality between the census figures for congressional districts does not reflect districts of equal size.

Even if the 0.6984% deviation here is not encompassed within the scope of the statistical imprecision of the census, it is miniscule when compared with other variations among the districts inherent in translating census numbers into citizens' votes. First, the census "is more of an event than a process." *Gaffney* v. *Cummings*, 412 U. S. 735, 746 (1973). "It measures population at only a single instant in time. District populations are constantly changing, often at different rates in either direction, up or down." *Ibid.* As the Court admits, "the well-known restlessness of the American people means that population counts for particular localities are outdated long before they are completed." *Ante*, at 732.[5] Second, far larger differences among districts are introduced because a substantial percentage of the total population is too

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Finally, the Court dismisses the entire concept of statistical error with the sophistic comment that "[e]ven if one cannot say with certainty that one district is larger than another merely because it has a higher census count, one *can* say with certainty that the district with a larger census count is more likely to be larger than the other district than it is to be smaller or the same size." *Ante*, at 738. The degree of that certainty, however, is speculative. The relevant consideration is not whether District Four is larger than District Six, but how much larger, and, how much less larger under the selected plan vis-à-vis an alternative plan. Moreover, variable undercounting and differences between census units and district lines may result in other districts having higher maximum deviations.

The general point is that when the numbers become so small, it makes no sense to concentrate on ever finer gradations when one cannot even be certain whether doing so increases or decreases actual population variances.

[5] In New Jersey, for example, population growth during the 1970's enlarged some districts by up to 26%, while other congressional districts lost up to 8.7% of their 1970 population. U. S. Bureau of Census, Congressional Districts of the 98th Congress 32–3 (1983). See also *Gaffney* v. *Cummings*, 412 U. S., at 746, n. 11.

JUSTICE STEVENS makes the same point.

"Given the birth rate, the mortality rate, the transient character of modern society, and the acknowledged errors in the census, we all know that such differences may vanish between the date of the census and the date of the next election. Absolute population equality is impossible to achieve." *Ante*, at 752 (concurring opinion).

young to register or is disqualified by alienage.[6] Third, census figures cannot account for the proportion of all those otherwise eligible individuals who fail to register.[7] The differences in the number of eligible voters per district for these reasons overwhelm the minimal variations attributable to the districting plan itself.[8]

Accepting that the census, and the districting plans which are based upon it, cannot be perfect represents no backsliding in our commitment to assuring fair and equal representation in the election of Congress. I agree with the views of Judge Gibbons, who dissented in the District Court, that *Kirkpatrick* should not be read as a "prohibition against toleration of *de minimis* population variances which have no statistically relevant effect on relative representation." *Daggett* v. *Kimmelman*, 535 F. Supp., at 984. A plus-minus deviation of 0.6984% surely falls within this category.

If today's decision simply produced an unjustified standard with little practical import, it would be bad enough. Unfortunately, I fear that the Court's insistence that "there are no *de minimis* population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2, without justification," *ante*, at 734, invites further litigation of virtually every congressional redistricting plan in

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[6] In New Jersey, for example, the population 18 years old and over differs significantly among the congressional districts. In 1978, District 10 had but 282,000 such individuals, while District 2 had 429,000. U. S. Bureau of Census, State and Metropolitan Area Data Book 549 (1979). See also *Gaffney* v. *Cummings*, *supra*, at 747, n. 13.

[7] Throughout the Nation, approximately 71% of the voting age population registers to vote. U. S. Bureau of Census, State and Metropolitan Area Data Book 567 (1982).

[8] As a result of all these factors, as well as the failure of many registered voters to cast ballots, the weight of a citizen's vote in one district is inevitably different from that in others. For example, the total number of votes cast in the 1982 New Jersey congressional races differed significantly between districts, ranging from 92,852 in District 10 to 186,879 in District 9. 41 Congressional Quarterly 391 (1983).

the Nation. At least 12 States which have completed redistricting on the basis of the 1980 census have adopted plans with a higher deviation than that presented here, and 4 others have deviations quite similar to New Jersey's.[9] Of course, under the Court's rationale, even Rhode Island's plan—whose two districts have a deviation of 0.02% or about 95 people—would be subject to constitutional attack.

In all such cases, state legislatures will be hard pressed to justify their preference for the selected plan. A good-faith effort to achieve population equality is not enough if the population variances are not "unavoidable." The court must consider whether the population differences could have been further "reduced or eliminated altogether." *Ante*, at 730. With the assistance of computers, there will generally be a plan with an even more minimal deviation from the mathematical ideal. Then, "the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal." *Ante*, at 731. As this case illustrates, literally any variance between districts will be considered "significant."[10] The State's burden will not be easily met: "the State bears the burden of justifying

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[9] States with larger deviations are Indiana (2.96%); Alabama (2.45%); Tennessee (2.40%); Georgia (2.00%); Virginia (1.81%); North Carolina (1.76%); New York (1.64%); Kentucky (1.39%); Washington (1.30%); Massachusetts (1.09%); New Mexico (0.87%); Arkansas (0.78%). States with similar maximum deviations are Ohio (0.68%); Nevada (0.60%); Oklahoma (0.58%); West Virginia (0.49%). Council of State Governments & National Conference of State Legislatures, 1 Reapportionment Information Update 6–7 (Nov. 12, 1982).

[10] The Court's language suggests that not only must the maximum variance in a plan be supported, but that also every deviation from absolute equality must be so justified. *Ante*, at 740. Consider the staggering nature of the burden imposed: Each population difference between any two districts in a State must be justified, apparently even if none of the plans before the legislature or commission would have reduced the difference. See n. 11, *infra*.

the differences with particularity." *Ante*, at 739. When the State fails to sustain its burden, the result will generally be that a court must select an alternative plan. The choice will often be disputed until the very eve of an election, see, *e. g.*, *Upham* v. *Seamon*, 456 U. S. 37, 44 (1982) *(per curiam)*, leaving candidates and voters in a state of confusion.

The only way a legislature or bipartisan commission can hope to avoid litigation will be to dismiss all other legitimate concerns and opt automatically for the districting plan with the smallest deviation.[11] Yet no one can seriously contend that such an inflexible insistence upon mathematical exactness will serve to promote "fair and effective representation." The more likely result of today's extension of *Kirkpatrick* is to move closer to fulfilling Justice Fortas' prophecy that "a legislature might have to ignore the boundaries of common sense, running the congressional district line down the middle of the corridor of an apartment house or even dividing the residents of a single-family house between two districts." 394 U. S., at 538. Such sterile and mechanistic application only brings the principle of "one man, one vote" into disrepute.

## II

One might expect the Court had strong reasons to force this Sisyphean task upon the States. Yet the Court offers

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[11] Even by choosing the plan with the smallest deviation, a legislature or commission cannot be assured of avoiding constitutional challenge. In this case the Court does not find that the 0.6984% deviation was avoidable because there were other plans before the New Jersey Legislature with smaller maximum variations. Nor does the Court counter appellants' position, supported by evidence in the record, that these alternative plans had other disqualifying faults. Instead, the Court tries its own hand at redistricting New Jersey and concludes that by moving around 13 New Jersey subdivisions, the maximum deviation could be reduced to 0.449%. *Ante*, at 739–740, n. 10. The message for state legislatures is clear: it is not enough that the chosen plan be superior to any actual plans introduced as alternatives, the plan must also be better than any conceivable alternative a federal judge can devise.

no positive virtues that will follow from its decision. No pretense is made that this case follows in the path of *Reynolds* and *Wesberry* in insuring the "fair and effective representation" of citizens. No effort is expended to show that Art. I, § 2's requirement that Congressmen be elected "by the people," *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), demands the invalidation of population deviations at this level. Any such absolute requirement, if it did exist, would be irreconcilable with the Court's recognition of certain justifications for population variances. See *ante*, at 740. Given no express constitutional basis for the Court's holding, and no showing that the objectives of fair representation are compromised by these minimal disparities, the normal course would be to uphold the actions of the legislature in fulfilling its constitutionally delegated responsibility to prescribe the manner of holding elections for Senators and Representatives. Art. I, § 4. Doing so would be in keeping with the Court's oft-expressed recognition that apportionment is primarily a matter for legislative judgment. *Upham* v. *Seamon*, *supra*, at 41; *White* v. *Weiser*, 412 U. S., at 795; *Reynolds* v. *Sims*, 377 U. S., at 586. "[A] state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework . . . ." *Connor* v. *Finch*, 431 U. S. 407, 414–415 (1977).

Instead the Court is purely defensive in support of its decision. The Court refuses to adopt any fixed numerical standard, below which the federal courts would not intervene, asserting that "[t]he principle of population equality for congressional districts has not proved unjust or socially or economically harmful in experience." *Ante*, at 733. Of course, the *principle* of population equality is not unjust; the unreasonable *application* of this principle is the rub. Leaving aside that the principle has never been applied with the vengeance witnessed today, there are many, including myself, who take issue with the Court's self-congratulatory assumption that *Kirkpatrick* has been a success. First, a

decade of experience with *Kirkpatrick* has shown that "the rule of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort." *Wells* v. *Rockefeller*, 394 U. S., at 551 (Harlan, J., dissenting). With ever more sophisticated computers, legislators can draw countless plans for absolute population equality, but each having its own political ramifications. Although neither a rule of absolute equality nor one of substantial equality can alone prevent deliberate partisan gerrymandering, the former offers legislators a ready justification for disregarding geographical and political boundaries. I remain convinced of what I said in dissent in *Kirkpatrick* and *Wells:* "[Those] decisions . . . downgrade a restraint on a far greater potential threat to equality of representation, the gerrymander. Legislatures intent on minimizing the representation of selected political or racial groups are invited to ignore political boundaries and compact districts so long as they adhere to population equality among districts using standards which we know and they know are sometimes quite incorrect." 349 U. S., at 555. There is now evidence that Justice Harlan was correct to predict that "[e]ven more than in the past, district lines are likely to be drawn to maximize the political advantage of the party temporarily dominant in public affairs." *Id.*, at 552.[12]

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[12] Unlike population deviations, political gerrymandering does not lend itself to arithmetic proof. Nevertheless, after reviewing the recent redistricting throughout the country, one commentator offered the following assessment:

"The nobly aimed 'one-man, one-vote' principle is coming into increasing use as a weapon for state legislators bent on partisan gerrymandering. From California to New Jersey and points in between, Republicans and Democrats alike are justifying highly partisan remaps by demonstrating respect for the 1964 Supreme Court mandate that population of congressional districts within states must be made as equal as possible. Meanwhile, other interests at stake in redistricting—such as the preservation of community boundaries and the grouping of constituencies with similar concerns—are being brushed aside . . . . The emphasis on one-man, one-vote not only permits gerrymandering, it encourages it. In many states it is

In addition to providing a patina of respectability for the equipopulous gerrymander, *Kirkpatrick*'s regime assured extensive intrusion of the judiciary into legislative business.

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impossible to approach population equality without crossing city, county and township lines. Once the legislature recognizes that move must be made, it is only a short step further to the drawing of a line that dances jaggedly through every region of the state. Local interests, informed that it is no longer legally permissible to draw a whole-county congressional map in most states, are far less likely to object than they were in the past . . . . The court's decision to reject a tiny deviation in favor of an even smaller one may further encourage the hairsplitting numbers game that has given rise to partisan gerrymanders all over the country." Congressional Quarterly, Inc., State Politics and Redistricting 1–2 (1982).

See also Engstrom, The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation, 1976 Ariz. State L. J. 277, 278 ("Not only has the Court failed to develop effective checks on the practice of gerrymandering, but in pursuing the goal of population equality to a point of satiety it has actually facilitated that practice"); Baker, One Man, One Vote, and "Political Fairness," 23 Emory L. J. 701, 710 (1974) (hereafter Baker) ("Priority was typically given to miniscule population variations at the expense of any recognition of political subdivisions. Charges of partisan gerrymandering were more widespread than in past decades for two major reasons: the extent of redistricting activity among all fifty states, and the lack of emphasis on former norms of compactness and adherence to local boundary lines").

In the eyes of some commentators, the experience of New York in the aftermath of *Wells* v. *Rockefeller* is instructive.

"Subsequent congressional districting in New York became a possible prototype for the 'equal-population gerrymander.' Whereas the former district pattern nullified by the Supreme Court had been the result of bipartisan compromise with each major party controlling one house, by 1970 the Republicans held both legislative houses as well as the governorship. The assistant counsel to the senate majority leader (and chief coordinator of the redistricting) candidly remarked: 'The Supreme Court is just making gerrymandering easier than it used to be.' Not only was New York City subjected to major cartographic surgery, but upstate cities were also fragmented, with portions being joined to suburban and rural areas in an attempt to dilute concentrations of Democrats." Baker, at 712–713.

Yet, under the new plan, no district deviated by more than than 490 persons from the average, and the configuration of district boundaries revealed generally compact and contiguous contours. Baker, Gerrymander-

"[T]he [re]apportionment task, dealing as it must with fundamental 'choices about the nature of representation,' *Burns* v. *Richardson*, 384 U. S., at 92, is primarily a political and legislative process." *Gaffney* v. *Cummings*, 412 U. S., at 749. What we said in *Gaffney* with respect to legislative reapportionment is apropos here:

> "[T]he goal of fair and effective representation [is not] furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts which themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan." *Ibid.*

More than a decade's experience with *Kirkpatrick* demonstrates that insistence on precise numerical equality only invites those who lost in the political arena to refight their battles in federal court. Consequently, "[m]ost estimates are that between 25 percent and 35 percent of current house district lines were drawn by the Courts." American Bar Association, Congressional Redistricting 20 (1981). As I have already noted, by extending *Kirkpatrick* to deviations below even the 1% level, the redistricting plan in every State with more than a single Representative is rendered vulnerable to after-the-fact attack by anyone with a complaint and a calculator.

The Court ultimately seeks refuge in *stare decisis*. I do not slight the respect that doctrine is due, see, *e. g.*, *White* v.

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ing: Privileged Sanctuary or Next Judicial Target?, in Reapportionment in the 1970s, p. 138 (N. Polsby ed. 1971). Ironically, David Wells, the plaintiff who successfully challenged the former district pattern, returned to federal court in February 1970 to ask if the old plan could be restored. See Dixon, "One Man, One Vote—What Happens Next?," 60 Nat. Civic Rev. 259, 265 (1971).

*Weiser*, 412 U. S. 783 (1973), but is it not at least ironic to find *stare decisis* invoked to protect *Kirkpatrick* as the Court itself proceeds to overrule other holdings in that very decision? In *Kirkpatrick*, the Court squarely rejected the argument that slight variances in district size were proper in order to avoid fragmenting political subdivisions:

> "[W]e do not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries." 394 U. S., at 533–534.[13]

Several pages later, the Court rejected in equally uncategorical terms the idea that variances may be justified in order to make districts more compact. *Id.*, at 535–536. "A State's preference for pleasingly shaped districts," the Court concluded, "can hardly justify population variances." *Id.*, at 536. In Justice Fortas' words, the *Kirkpatrick* Court "reject[s], *seriatim*, every type of justification that has been—possibly, every one that could be—advanced." *Id.*, at 537.

Yet today the Court—with no mention of the contrary holdings in *Kirkpatrick*—opines: "Any number of consistently applied legislative policies might justify some variance, including for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives."

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[13] See also *Mahan* v. *Howell*, 410 U. S. 315, 341 (1973) (BRENNAN, J., concurring in part and dissenting in part) ("What our decisions have made clear is that certain state interests that are pertinent to legislative reapportionment can have no possible relevance to congressional districting. Thus, the need to preserve the integrity of political subdivisions as political subdivisions may, in some instances, justify small variations in the population of districts from which state legislators are elected. But that interest can hardly be asserted in justification of malapportioned congressional districts. *Kirkpatrick* v. *Preisler*, *supra*").

*Ante*, at 740. I, of course, welcome the Court's overruling of these ill-considered holdings of *Kirkpatrick*. There should be no question but that state legislatures may account for political and geographic boundaries in order to preserve traditional subdivisions and achieve compact and contiguous districts. JUSTICE STEVENS recognizes that courts should "give greater weight to the importance of the State's interests and the consistency with which those interests are served than to the size of the deviations." *Ante*, at 760, n. 26. Thus, a majority of the Court appears ready to apply this new standard "with a strong measure of deference to the legitimate concerns of the State." *Post*, at 785, n. 1 (POWELL, J., dissenting).

In order that legislatures have room to accommodate these legitimate noncensus factors, a range of *de minimis* population deviation, like that permitted in the legislative reapportionment cases, is required. The Court's insistence that every deviation, no matter how small, be justified with specificity discourages legislatures from considering these "legitimate" factors in making their plans, lest the justification be found wanting, the plan invalidated, and a judicially drawn substitute put in its place. Moreover, the requirement of precise mathematical equality continues to invite those who would bury their political opposition to employ equipopulous gerrymanders. A *de minimis* range would not preclude such gerrymanders but would at least force the political cartographer to justify his work on its own terms.

## III

Our cases dealing with state legislative apportionment have taken a more sensible approach. We have recognized that certain small deviations do not, in themselves, ordinarily constitute a prima facie constitutional violation. *Gaffney* v. *Cummings*, 412 U. S. 735 (1973); *White* v. *Regester*, 412 U. S. 755 (1973). Moreover, we have upheld plans with reasonable variances that were necessary to account for political

subdivisions, *Mahan* v. *Howell*, 410 U. S. 315 (1973), to preserve the voting strength of minority groups, and to insure political fairness, *Gaffney* v. *Cummings*, *supra*. What we held in *Gaffney* v. *Cummings* for legislative apportionment is fully applicable to congressional redistricting:

> "'[T]he achieving of fair and effective representation for all citizens is' . . . a vital and worthy goal, but surely its attainment does not in any commonsense way depend upon eliminating the insignificant population variations involved in this case. Fair and effective representation may be destroyed by gross population variations among districts, but it is apparent that such representation does not depend solely on mathematical equality among district populations . . . . An unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement." 412 U.S., at 748–749.

Bringing together our state legislative and congressional cases does not imply overlooking relevant differences between the two. States normally draw a larger number of legislative districts, which accordingly require a greater margin to account for geographical and political boundaries. "[C]ongressional districts are not so intertwined and freighted with strictly local interests as are state legislative districts." *White* v. *Weiser*, 412 U. S., at 793. Furthermore, because congressional districts are generally much larger than state legislative districts, each percentage point of variation represents a commensurately greater number of people. But these are differences of degree. They suggest that the level at which courts should entertain challenges to districting plans, absent unusual circumstances, should be lower in the

congressional cases, but not altogether nonexistent.[14] Although I am not wedded to a precise figure, in light of the current range of population deviations, a 5% cutoff appears reasonable. I would not entertain judicial challenges, absent extraordinary circumstances, where the maximum deviation is less than 5%. Somewhat greater deviations, if rationally related to an important state interest, may also be permissible.[15] Certainly, the maintaining of compact, contiguous districts, the respecting of political subdivisions, and efforts to assure political fairness, *e. g.*, *Gaffney* v. *Cummings*, *supra*, constitute such interests.

I would not hold up New Jersey's plan as a model reflection of such interests. Nevertheless, the deviation involved here is *de minimis*, and, regardless of what other infirmities the

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[14] As the law has developed, our congressional cases are rooted in Art I, § 2, of the Constitution while our legislative cases rely upon the Equal Protection Clause of the Fourteenth Amendment. I am not aware, however, of anything in the respective provisions which justifies, let alone requires, the difference in treatment that has emerged between the two lines of decisions. Our early cases were frequently cross-cited, and the formulation "as nearly of equal population as is practicable" appears in *Reynolds* v. *Sims*, 377 U. S., at 589, as well as in *Wesberry* v. *Sanders*, 376 U. S., at 7–8. The differing paths the cases have taken since *Kirkpatrick* must result from that decision's rejection of the legitimacy of considering nonpopulation factors in congressional redistricting. See *Mahan* v. *Howell*, 410 U. S., at 341 (BRENNAN, J., concurring in part and dissenting in part). With today's long-awaited overruling of that holding in *Kirkpatrick*, any remaining justification disappears for such a marked difference in our approach to congressional and legislative reapportionment.

[15] Experience in the legislative apportionment field following our allowance of a range of *de minimis* variance is convincing proof that we need not fear that the goal of equal population in the districts will receive less than its due. JUSTICE BRENNAN's prediction that tolerating *de minimis* population variances would "jeopardize the very substantial gains" made in equalizing legislative districts, *White* v. *Regester*, 412 U. S. 755, 781 (1973) (concurring in part and dissenting in part), has not been proved, and, indeed, the prediction is refuted by an analysis of the legislative redistricting undertaken after the 1980 census. See Council of State Governments & National Conference of State Legislatures, 1 Reapportionment Information Update 6 (Nov. 12, 1982).

plan may have, constitutional or otherwise, there is no violation of Art. I, § 2—the sole issue before us. It would, of course, be a different matter if appellees could demonstrate that New Jersey's plan invidiously discriminated against a racial or political group. See *White* v. *Regester*, *supra*; *Gaffney* v. *Cummings*, *supra*, at 751–754; *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971); *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960).

## IV

Even if the Court's view of the law were correct, its disposition of the case is not. At a minimum, the Court should vacate the decision of the District Court and remand for further consideration. As previously indicated, the Court finally recognizes today that considerations such as respecting political subdivisions and avoiding contests between incumbent Representatives might justify small population variances. Indeed, the Court indicates that "any number of consistently applied legislative policies" might do so. *Ante*, at 740. There is evidence in the record to suggest that the New Jersey Legislature was concerned with such considerations.[16] The Court itself notes: "many of the problems that the New Jersey Legislature encountered in drawing districts with equal population stemmed from the decision . . . not to divide any municipalities between two congressional districts." *Ante*, at 733, n. 5. But even if there were no evidence in the record, the State should be given a chance to defend its plan on this basis. Surely, the Court cannot rely on the fact that appellants have advanced only one justification for the plan's population deviations—preserving the voting strength of racial minority groups. Relying on *Kirkpatrick* and *White* v. *Weiser*, *supra*, appellants no doubt concluded that other justifications were foreclosed and that the introduction of such proof would be futile.

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[16] See, *e. g.*, Feldman Deposition, at 91–94 (Record Doc. No. 39) (concern with fairness to incumbents); Jackman Deposition, at 91–92 (Record Doc. No. 40) (concern with preserving political subdivisions).

JUSTICE POWELL, dissenting.

I join JUSTICE WHITE's excellent dissenting opinion, and reaffirm my previously expressed doubt that "the Constitution—a vital and living charter after nearly two centuries because of the wise flexibility of its key provisions—could be read to require a rule of mathematical exactitude in legislative reapportionment." *White* v. *Weiser*, 412 U. S. 783, 798 (1973) (concurring opinion). I write separately to express some additional thoughts on gerrymandering and its relation to apportionment factors that presumably were not thought relevant under *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969).

I

The Court, following *Kirkpatrick*, today invalidates New Jersey's redistricting plan solely because various alternative plans, principally the one proposed by Professor Reock, had what the Court views as "appreciably smaller population deviations between the largest and smallest districts." *Ante*, at 728. Under all of the plans, the maximum population variances were under 1%. I view these differences as neither "appreciable" nor constitutionally significant. As JUSTICE WHITE demonstrates, *ante*, at 769–772 (dissenting opinion), the Court's insistence on precise mathematical equality is self-deluding, given the inherent inaccuracies of the census data and the other difficulties in measuring the voting population of a district that will exist for a period of 10 years. See *Kirkpatrick*, *supra*, at 538 (Fortas, J., concurring) (pursuit of precise equality "is a search for a will-o'-the-wisp"). Moreover, it has become clear that *Kirkpatrick* leaves no room for proper legislative consideration of other factors, such as preservation of political and geographic boundaries, that plainly are relevant to rational reapportionment decisions,[1] see *Gaffney*

[1] The Court holds that "[a]ny number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of

v. *Cummings*, 412 U. S. 735, 749 (1973); *Mahan* v. *Howell*, 410 U. S. 315, 329 (1973). As JUSTICE WHITE correctly observes, *ante*, at 775–776, a decade of experience has confirmed the fears of the *Kirkpatrick* dissenters that an uncompromising emphasis on numerical equality would serve to encourage and legitimate even the most outrageously partisan gerrymandering, see 394 U. S., at 551–552 (Harlan, J., dissenting); *id.*, at 555 (WHITE, J., dissenting). The plain fact is that in the computer age, this type of political and discriminatory gerrymandering can be accomplished entirely consistently with districts of equal population.[2]

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prior districts, and avoiding contests between incumbent Representatives." *Ante*, at 740. Although it is remarkable that the Court thus silently discards important features of *Kirkpatrick* while simultaneously invoking *stare decisis* to defend the remainder of that decision, see *ante*, at 778–780 (WHITE, J., dissenting), I welcome this change in the law. It is to be hoped that this new standard will be applied with a strong measure of deference to the legitimate concerns of the State. See *ante*, at 760, n. 26 (STEVENS, J., concurring) (recognizing that courts should "give greater weight to the importance of the State's interests and the consistency with which those interests are served than to the size of the deviations").

[2] An illustration is the recent congressional redistricting in Illinois. After the Illinois Legislature had failed to enact a reapportionment plan, a three-judge District Court chose among four plans varying from 0.02851% to 0.14797% in *maximum* deviation. Following *Kirkpatrick*, the majority of the court chose the plan with the smallest deviation, one that was a "Democratic plan" designed to maximize Democratic voting strength at the expense of Republicans. See *In re Illinois Congressional Districts Reapportionment Cases*, No. 81–C–3915 (ND Ill. 1981), summarily aff'd *sub nom. Ryan* v. *Otto*, 454 U. S. 1130 (1982). A commentator noted:

"The Democratic victory was due in part to a sophisticated computer program that made possible the creation of districts having almost exactly equal population. The most populous district has only 171 more people than the least populous one. That accuracy seemed to impress the court, which expressed no concern that the new district lines divided cities and carved up counties all over the state." Illinois Map is Unpleasant Surprise for the GOP, 40 Congressional Quarterly 573 (1982).

See also *Carstens* v. *Lamm*, 543 F. Supp. 68, 73–74, and 84, n. 39 (Colo. 1982) (three-judge District Court reviewed five major redistricting plans,

I therefore continue to believe that the Constitution permits variations from "theoretical 'exactitude' in recognition of the impracticality of applying the *Kirkpatrick* rule as well as in deference to legitimate state interests." *White* v. *Weiser*, *supra*, at 798 (POWELL, J., concurring). Certainly when a State has adopted a districting plan with an average population deviation of 0.1384%, and a maximum deviation of 0.6984%, it has complied with the Constitution's mandate that population be apportioned equally among districts.

II

The extraordinary map of the New Jersey congressional districts, see *ante*, following p. 744, prompts me to comment on the separate question of gerrymandering—"the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes," *Kirkpatrick*, *supra*, at 538 (Fortas, J., concurring). I am in full agreement with JUSTICE WHITE's observation more than a decade ago that gerrymandering presents "a far greater potential threat to equality of representation" than a State's failure to achieve

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including the Republican legislature's plan with a difference between largest and smallest districts of seven persons, *i. e.*, a maximum deviation of 0.0015%, and the Democratic Governor's plan with a 15-person difference, *i. e.*, a maximum deviation of 0.0031%); *O'Sullivan* v. *Brier*, 540 F. Supp. 1200, 1202 (Kan. 1982) (three-judge District Court asked to choose between a Democratic plan with a 0.11% maximum deviation and a Republican plan with a 0.09% maximum deviation).

These cases also illustrate an additional unfortunate side effect of *Kirkpatrick:* the increasing tendency of state legislators and Governors—who have learned that any redistricting plan is "vulnerable to after-the-fact attack by anyone with a complaint and a calculator," *ante*, at 778 (WHITE, J., dissenting)—to spurn compromise in favor of simply drawing up the most partisan plan that appears consistent with the population equality criterion. No longer do federal district courts merely review the constitutionality of a State's redistricting plan. Rather, in many cases they are placed in the position of choosing a redistricting plan in the first instance.

"precise adherence to admittedly inexact census figures." *Wells* v. *Rockefeller*, 394 U. S. 542, 555 (1969) (dissenting opinion). I also believe that the injuries that result from gerrymandering may rise to constitutional dimensions. As JUSTICE STEVENS observes, if a State's electoral rules "serve no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community, they violate the constitutional guarantee of equal protection." *Ante*, at 748 (concurring opinion). Moreover, most gerrymandering produces districts "without any regard for political subdivision or natural or historical boundary lines," *Reynolds* v. *Sims*, 377 U. S. 533, 578–579 (1964), a result that is profoundly destructive of the apportionment goal of "fair and effective representation," *id.*, at 565. A legislator cannot represent his constituents properly—nor can voters from a fragmented district exercise the ballot intelligently—when a voting district is nothing more than an artificial unit divorced from, and indeed often in conflict with, the various communities established in the State.[3] The map attached to the Court's opinion illustrates this far better than words can describe.

I therefore am prepared to entertain constitutional challenges to partisan gerrymandering that reaches the level of discrimination described by JUSTICE STEVENS. See *ante*, at 748 (concurring opinion). I do not suggest that the shape of a

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[3] In *Carstens* v. *Lamm*, *supra*, the three-judge District Court noted that preserving an entire city as one voting district facilitated "voter identity": "Most voters know what city and county they live in, but fewer are likely to know what congressional district they live in if the districts split counties and cities. If a voter knows his congressional district, he is more likely to know who his representative is. This presumably would lead to more informed voting." 543 F. Supp., at 98, n. 78. It also is likely to lead to a Representative who knows the needs of his district and is more responsive to them.

districting map itself invariably is dispositive. Some irregularity in shape is inevitable, with the degree of irregularity depending primarily on the geographic and political boundaries within the State, as well as the distribution of its population. Moreover, political considerations, even partisan ones, are inherent in a democratic system. A court, therefore, should not "attemp[t] the impossible task of extirpating politics from what are the essentially political processes of the sovereign States." *Gaffney*, 412 U. S., at 754. Finally, I do not suggest that a legislative reapportionment plan is invalid whenever an alternative plan might be viewed as less partisan or more in accord with various apportionment criteria. The state legislature necessarily must have discretion to accommodate competing considerations.

I do believe, however, that the constitutional mandate of "fair and effective representation," *Reynolds*, *supra*, at 565, proscribes apportionment plans that have the purpose and effect of substantially disenfranchising identifiable groups of voters. Generally, the presumptive existence of such unconstitutional discrimination will be indicated by a districting plan the boundaries of which appear on their face to bear little or no relationship to any legitimate state purpose. As JUSTICE STEVENS states, "dramatically irregular shapes may have sufficient probative force to call for an explanation," *ante*, at 755 (concurring opinion); "drastic departures from compactness are a signal that something may be amiss," *ante*, at 758; and "[e]xtensive deviation from established political boundaries is another possible basis for a prima facie showing of gerrymandering," *ibid.* In such circumstances, a State should be required to provide a legitimate and nondiscriminatory explanation for the districting lines it has drawn. See *Reynolds*, *supra*, at 568 (the apportionment "presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone").

In this case, one cannot rationally believe that the New Jersey Legislature considered factors other than the most

partisan political goals and population equality. It hardly could be suggested, for example, that the contorted Districts 3, 5, and 7 reflect any attempt to follow natural, historical, or local political boundaries.[4] Nor do these district lines reflect any consideration of the likely effect on the quality of representation when the boundaries are so artificial that they are likely to confound the Congressmen themselves. As Judge Gibbons stated eloquently in his dissent below:

> "The apportionment map produced by P. L. 1982, c. 1 leaves me, as a citizen of New Jersey, disturbed. It creates several districts which are anything but compact, and at least one district which is contiguous only for yachtsmen. While municipal boundaries have been maintained, there has been little effort to create districts having a community of interests. In some districts, for example, different television and radio stations, different newspapers, and different transportation systems serve the northern and southern localities. Moreover the harshly partisan tone of Speaker Christopher Jackman's letter to Ernest C. Reock, Jr. is disedifying, to say the least. It is plain, as well, that partisanship produced artificial bulges or appendages of two districts so as to place the residences of Congressmen Smith and Courter in districts where they would be running against incumbents." *Daggett* v. *Kimmelman*, 535 F. Supp. 978, 984 (NJ 1982).

This summary statement by Judge Gibbons, a resident of New Jersey, is powerful and persuasive support for a con-

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[4] It may be noted, for example, that the plan adopted by New Jersey (the Feldman Plan) divided the State's 21 counties into 55 fragments. The plan proposed by Professor Reock, introduced by Assemblyman Hardwick, created 45 county fragments, and the existing congressional districts divided the counties into 42 fragments. See App. 123 (Appendix A to Affidavit of Samuel A. Alito, Executive Director of the Office of Legislative Services of the New Jersey Legislature).

clusion that the New Jersey Legislature's redistricting plan is an unconstitutional gerrymander. Cf. *ante*, at 764, n. 33 (STEVENS, J., concurring). Because this precise issue was not addressed by the District Court, however, it need not be reached here. As to the issue of population equality, I dissent for the reasons set forth above and in JUSTICE WHITE's dissenting opinion.

# MENNONITE BOARD OF MISSIONS *v.* ADAMS

## APPEAL FROM INDIANA COURT OF APPEALS

No. 82–11. Argued March 30, 1983—Decided June 22, 1983

An Indiana statute requires the county auditor to post notice in the county courthouse of the sale of real property for nonpayment of property taxes and to publish notice once each week for three consecutive weeks. Notice by certified mail must be given to the property owner, but at the time in question in this case there was no provision for notice by mail or personal service to mortgagees of the property. The purchaser at a tax sale acquires a certificate of sale that constitutes a lien against the property for the amount paid and is superior to all prior liens. The tax sale is followed by a 2-year period during which the owner or mortgagee may redeem the property. If no one redeems the property during this period, the tax sale purchaser may apply for a deed to the property, but before the deed is executed the county auditor must notify the former owner that he is entitled to redeem the property. If the property is not redeemed within 30 days, the county auditor may then execute a deed to the purchaser who then acquires an estate in fee simple, free and clear of all liens, and may bring an action to quiet title. Property on which appellant held a mortgage was sold to appellee for nonpayment of taxes. Appellant was not notified of the pending sale and did not learn of the sale until more than two years later, by which time the redemption period had run and the mortgagor still owed appellant money on the mortgage. Appellee then filed suit in state court seeking to quiet title to the property. The court upheld the tax sale statute against appellant's contention that it had not received constitutionally adequate notice of the pending tax sale and of its opportunity to redeem the property after the sale. The Indiana Court of Appeals affirmed.

*Held:* The manner of notice provided to appellant did not meet the requirements of the Due Process Clause of the Fourteenth Amendment. Pp. 795–800.

(a) Prior to an action that will affect an interest in life, liberty, or property protected by the Due Process Clause, a State must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314. Notice by publication is not reasonably calculated to inform interested parties who can be notified by more effective means such as personal service or mailed notice. Pp. 795–797.

(b) Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale. Constructive notice to a mortgagee who is identified in the public record does not satisfy the due process requirement of *Mullane*. Neither notice by publication and posting nor mailed notice to the property owner are means "such as one desirous of actually informing the [mortgagee] might reasonably adopt to accomplish it." *Mullane*, *supra*, at 315. Personal service or notice by mail is required even though sophisticated creditors have means at their disposal to discover whether property taxes have not been paid and whether tax sale proceedings are therefore likely to be initiated. Pp. 798–800.

427 N. E. 2d 686, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which POWELL and REHNQUIST, JJ., joined, *post*, p. 800.

*William J. Cohen* argued the cause for appellant. With him on the brief was *C. Whitney Slabaugh*.

*Robert W. Miller* argued the cause and filed a brief for appellee.

JUSTICE MARSHALL delivered the opinion of the Court.

This appeal raises the question whether notice by publication and posting provides a mortgagee of real property with adequate notice of a proceeding to sell the mortgaged property for nonpayment of taxes.

## I

To secure an obligation to pay $14,000, Alfred Jean Moore executed a mortgage in favor of appellant Mennonite Board of Missions (MBM) on property in Elkhart, Ind., that Moore had purchased from MBM. The mortgage was recorded in the Elkhart County Recorder's Office on March 1, 1973. Under the terms of the agreement, Moore was responsible for paying all of the property taxes. Without MBM's knowledge, however, she failed to pay taxes on the property.

Indiana law provides for the annual sale of real property on which payments of property taxes have been delinquent for

15 months or longer. Ind. Code § 6–1.1–24–1 *et seq.* (1982). Prior to the sale, the county auditor must post notice in the county courthouse and publish notice once each week for three consecutive weeks. § 6–1.1–24–3. The owner of the property is entitled to notice by certified mail to his last known address. § 6–1.1–24–4.[1] Until 1980, however, Indiana law did not provide for notice by mail or personal service to mortgagees of property that was to be sold for nonpayment of taxes.[2]

After the required notice is provided, the county treasurer holds a public auction at which the real property is sold to the highest bidder. § 6–1.1–24–5. The purchaser acquires a certificate of sale which constitutes a lien against the real property for the entire amount paid. § 6–1.1–24–9. This lien is superior to all other liens against the property which existed at the time the certificate was issued. *Ibid.*

The tax sale is followed by a 2-year redemption period during which the "owner, occupant, lienholder, or other person who has an interest in" the property may redeem the property. § 6–1.1–25–1. To redeem the property an individual must pay the county treasurer a sum sufficient to cover the purchase price of the property at the tax sale and the amount of taxes and special assessments paid by the purchaser following the sale, plus an additional percentage specified in the statute. § 6–1.1–25–2. The county in turn remits the payment to the purchaser of the property at the tax sale. § 6–1.1–25–3.

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[1] Because a mortgagee has no title to the mortgaged property under Indiana law, the mortgagee is not considered an "owner" for purposes of § 6–1.1–24–4. *First Savings & Loan Assn. of Central Indiana* v. *Furnish*, 174 Ind. App. 265, 272, n. 14, 367 N. E. 2d 596, 600, n. 14 (1977).

[2] Indiana Code § 6–1.1–24–4.2 (1982), added in 1980, provides for notice by certified mail to any mortgagee of real property which is subject to tax sale proceedings, if the mortgagee has annually requested such notice and has agreed to pay a fee, not to exceed $10, to cover the cost of sending notice. Because the events in question in this case occurred before the 1980 amendment, the constitutionality of the amendment is not before us.

If no one redeems the property during the statutory redemption period, the purchaser may apply to the county auditor for a deed to the property. Before executing and delivering the deed, the county auditor must notify the former owner that he is still entitled to redeem the property. § 6–1.1–25–6. No notice to the mortgagee is required. If the property is not redeemed within 30 days, the county auditor may then execute and deliver a deed for the property to the purchaser, § 6–1.1–25–4, who thereby acquires "an estate in fee simple absolute, free and clear of all liens and encumbrances." § 6–1.1–25–4(d).

After obtaining a deed, the purchaser may initiate an action to quiet his title to the property. § 6–1.1–25–14. The previous owner, lienholders, and others who claim to have an interest in the property may no longer redeem the property. They may defeat the title conveyed by the tax deed only by proving, *inter alia*, that the property had not been subject to, or assessed for, the taxes for which it was sold, that the taxes had been paid before the sale, or that the property was properly redeemed before the deed was executed. § 6–1.1–25–16.

In 1977, Elkhart County initiated proceedings to sell Moore's property for nonpayment of taxes. The county provided notice as required under the statute: it posted and published an announcement of the tax sale and mailed notice to Moore by certified mail. MBM was not informed of the pending tax sale either by the County Auditor or by Moore. The property was sold for $1,167.75 to appellee Richard Adams on August 8, 1977. Neither Moore nor MBM appeared at the sale or took steps thereafter to redeem the property. Following the sale of her property, Moore continued to make payments each month to MBM, and as a result MBM did not realize that the property had been sold. On August 16, 1979, MBM first learned of the tax sale. By then the redemption period had run and Moore still owed appellant $8,237.19.

In November 1979, Adams filed a suit in state court seeking to quiet title to the property. In opposition to Adams' motion for summary judgment, MBM contended that it had not received constitutionally adequate notice of the pending tax sale and of the opportunity to redeem the property following the tax sale. The trial court upheld the Indiana tax sale statute against this constitutional challenge. The Indiana Court of Appeals affirmed. 427 N. E. 2d 686 (1981). We noted probable jurisdiction, 459 U. S. 903 (1982), and we now reverse.

## II

In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950), this Court recognized that prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment, a State must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Invoking this "elementary and fundamental requirement of due process," *ibid.*, the Court held that published notice of an action to settle the accounts of a common trust fund was not sufficient to inform beneficiaries of the trust whose names and addresses were known. The Court explained that notice by publication was not reasonably calculated to provide actual notice of the pending proceeding and was therefore inadequate to inform those who could be notified by more effective means such as personal service or mailed notice:

> "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name

those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint." *Id.*, at 315.[3]

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[3] The decision in *Mullane* rejected one of the premises underlying this Court's previous decisions concerning the requirements of notice in judicial proceedings: that due process rights may vary depending on whether actions are *in rem* or *in personam*. 339 U. S., at 312. See *Shaffer* v. *Heitner*, 433 U. S. 186, 206 (1977). Traditionally, when a state court based its jurisdiction upon its authority over the defendant's person, personal service was considered essential for the court to bind individuals who did not submit to its jurisdiction. See, *e. g.*, *Hamilton* v. *Brown*, 161 U. S. 256, 275 (1896); *Arndt* v. *Griggs*, 134 U. S. 316, 320 (1890); *Pennoyer* v. *Neff*, 95 U. S. 714, 726, 733–734 (1878) ("[D]ue process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered"). In *Hess* v. *Pawloski*, 274 U. S. 352 (1927), the Court recognized for the first time that service by registered mail, in place of personal service, may satisfy the requirements of due process. Constructive notice was never deemed sufficient to bind an individual in an action *in personam*.

In contrast, in *in rem* or *quasi in rem* proceedings in which jurisdiction was based on the court's power over property within its territory, see generally *Shaffer* v. *Heitner*, *supra*, at 196-205, constructive notice to nonresidents was traditionally understood to satisfy the requirements of due process. In order to settle questions of title to property within its territory, a state court was generally required to proceed by an *in rem* action since the court could not otherwise bind nonresidents. At one time constructive service was considered the only means of notifying nonresidents since it was believed that "[p]rocess from the tribunals of one State cannot run into another State." *Pennoyer* v. *Neff*, *supra*, at 727. See *Ballard* v. *Hunter*, 204 U. S. 241, 255 (1907). As a result, the nonresident acquired the duty "to take measures that in some way he shall be represented when his property is called into requisition." *Id.*, at 262. If he "fail[ed] to get notice by the ordinary publications which have been usually required in such cases, it [was] his misfortune." *Ibid.*

Rarely was a corresponding duty imposed on interested parties who resided within the State and whose identities were reasonably ascertainable. Even in actions *in rem*, such individuals were generally provided personal service. See, *e. g.*, *Arndt* v. *Griggs*, *supra*, at 326–327. Where the iden-

In subsequent cases, this Court has adhered unwaveringly to the principle announced in *Mullane*. In *Walker* v. *City of Hutchinson*, 352 U. S. 112 (1956), for example, the Court held that notice of condemnation proceedings published in a local newspaper was an inadequate means of informing a landowner whose name was known to the city and was on the official records. Similarly, in *Schroeder* v. *New York City*, 371 U. S. 208 (1962), the Court concluded that publication in a newspaper and posted notices were inadequate to apprise a property owner of condemnation proceedings when his name and address were readily ascertainable from both deed records and tax rolls. Most recently, in *Greene* v. *Lindsey*, 456 U. S. 444 (1982), we held that posting a summons on the door of a tenant's apartment was an inadequate means of providing notice of forcible entry and detainer actions. See also *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 13–15 (1978); *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 174–175 (1974); *Bank of Marin* v. *England*, 385 U. S. 99, 102 (1966); *Covey* v. *Town of Somers*, 351 U. S. 141, 146–147 (1956); *New York City* v. *New York, N. H. & H. R. Co.*, 344 U. S. 293, 296–297 (1953).

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tity of interested residents could not be ascertained after a reasonably diligent inquiry, however, their interests in property could be affected by a proceeding *in rem* as long as constructive notice was provided. See *Hamilton* v. *Brown*, *supra*, at 275; *American Land Co.* v. *Zeiss*, 219 U. S. 47, 61–62, 65–66 (1911).

Beginning with *Mullane*, this Court has recognized, contrary to the earlier line of cases, that "an adverse judgment *in rem* directly affects the property owner by divesting him of his rights in the property before the court." *Shaffer* v. *Heitner*, *supra*, at 206. In rejecting the traditional justification for distinguishing between residents and nonresidents and between *in rem* and *in personam* actions, the Court has not left all interested claimants to the vagaries of indirect notice. Our cases have required the State to make efforts to provide actual notice to all interested parties comparable to the efforts that were previously required only in *in personam* actions. See *infra*, this page.

This case is controlled by the analysis in *Mullane*. To begin with, a mortgagee possesses a substantial property interest that is significantly affected by a tax sale. Under Indiana law, a mortgagee acquires a lien on the owner's property which may be conveyed together with the mortgagor's personal obligation to repay the debt secured by the mortgage. Ind. Code § 32–8–11–7 (1982). A mortgagee's security interest generally has priority over subsequent claims or liens attaching to the property, and a purchase-money mortgage takes precedence over virtually all other claims or liens including those which antedate the execution of the mortgage. § 32–8–11–4. The tax sale immediately and drastically diminishes the value of this security interest by granting the tax-sale purchaser a lien with priority over that of all other creditors. Ultimately, the tax sale may result in the complete nullification of the mortgagee's interest, since the purchaser acquires title free of all liens and other encumbrances at the conclusion of the redemption period.

Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale. Cf. *Wiswall* v. *Sampson*, 14 How. 52, 67 (1853). When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. But unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane*.[4]

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[4] In this case, the mortgage on file with the County Recorder identified the mortgagee only as "MENNONITE BOARD OF MISSIONS a corporation, of Wayne County, in the State of Ohio." We assume that the mortgagee's address could have been ascertained by reasonably diligent efforts. See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S., at 317. Simply mailing a letter to "Mennonite Board of Missions, Wayne County, Ohio," quite likely would have provided actual notice, given "the well-known skill of postal officials and employés in making proper delivery of letters defectively addressed." *Grannis* v. *Ordean*, 234 U. S. 385, 397–398 (1914). We do not suggest, however, that a governmental body is

Neither notice by publication and posting, nor mailed notice to the property owner, are means "such as one desirous of actually informing the [mortgagee] might reasonably adopt to accomplish it." *Mullane*, 339 U. S., at 315. Because they are designed primarily to attract prospective purchasers to the tax sale, publication and posting are unlikely to reach those who, although they have an interest in the property, do not make special efforts to keep abreast of such notices. *Walker* v. *City of Hutchinson*, *supra*, at 116; *New York City* v. *New York, N. H. & H. R. Co.*, *supra*, at 296; *Mullane*, *supra*, at 315. Notice to the property owner, who is not in privity with his creditor and who has failed to take steps necessary to preserve his own property interest, also cannot be expected to lead to actual notice to the mortgagee. Cf. *Nelson* v. *New York City*, 352 U. S. 103, 107–109 (1956). The county's use of these less reliable forms of notice is not reasonable where, as here, "an inexpensive and efficient mechanism such as mail service is available." *Greene* v. *Lindsey*, *supra*, at 455.

Personal service or mailed notice is required even though sophisticated creditors have means at their disposal to discover whether property taxes have not been paid and whether tax-sale proceedings are therefore likely to be initiated. In the first place, a mortgage need not involve a complex commercial transaction among knowledgeable parties, and it may well be the least sophisticated creditor whose security interest is threatened by a tax sale. More importantly, a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation. It is true that particularly extensive efforts to provide notice may often be required when the State is aware of a party's inexperience or incompetence. See, *e. g.*, *Memphis Light, Gas & Water Div.* v. *Craft*, *supra*, at 13–15; *Covey* v. *Town of Somers*, *supra*. But it does not follow that the State may

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required to undertake extraordinary efforts to discover the identity and whereabouts of a mortgagee whose identity is not in the public record.

forgo even the relatively modest administrative burden of providing notice by mail to parties who are particularly resourceful.[5] Cf. *New York City* v. *New York, N. H. & H. R. Co.*, 344 U. S., at 297. Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable. Furthermore, a mortgagee's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending. The latter "was the information which the [county] was constitutionally obliged . . . to give personally to the appellant—an obligation which the mailing of a single letter would have discharged." *Schroeder* v. *New York City*, 371 U. S., at 214.

We therefore conclude that the manner of notice provided to appellant did not meet the requirements of the Due Process Clause of the Fourteenth Amendment.[6] Accordingly, the judgment of the Indiana Court of Appeals is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

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

Today, the Court departs significantly from its prior decisions and holds that before the State conducts *any* proceeding that will affect the legally protected property interests of

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[5] Indeed, notice by mail to the mortgagee may ultimately relieve the county of a more substantial administrative burden if the mortgagee arranges for payment of the delinquent taxes prior to the tax sale.

[6] This appeal also presents the question whether, before the County Auditor executes and delivers a deed to the tax-sale purchaser, the mortgagee is constitutionally entitled to notice of its right to redeem the property. Cf. *Griffin* v. *Griffin*, 327 U. S. 220, 229 (1946). Because we conclude that the failure to give adequate notice of the tax-sale proceeding deprived appellant of due process of law, we need not reach this question.

*any* party, the State must provide notice to that party by means certain to ensure actual notice as long as the party's identity and location are "reasonably ascertainable." *Ante*, at 800. Applying this novel and unjustified principle to the present case, the Court decides that the mortgagee involved deserved more than the notice by publication and posting that were provided. I dissent because the Court's approach is unwarranted both as a general rule and as the rule of this case.

I

In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950), the Court established that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." We emphasized that notice is constitutionally adequate when "the practicalities and peculiarities of the case . . . are reasonably met," *id.*, at 314–315. See also *Walker* v. *City of Hutchinson*, 352 U. S. 112, 115 (1956); *Schroeder* v. *New York City*, 371 U. S. 208, 211–212 (1962); *Greene* v. *Lindsey*, 456 U. S. 444, 449–450 (1982). The key focus is the "reasonableness" of the means chosen by the State. *Mullane*, 339 U. S., at 315. Whether a particular method of notice is reasonable depends on the outcome of the balance between the "interest of the State" and "the individual interest sought to be protected by the Fourteenth Amendment." *Id.*, at 314. Of course, "[i]t is not our responsibility to prescribe the form of service that the [State] should adopt." *Greene*, *supra*, at 455, n. 9. It is the primary responsibility of the State to strike this balance, and we will upset this process only when the State strikes the balance in an irrational manner.

From *Mullane* on, the Court has adamantly refused to commit "itself to any formula achieving a balance between these interests in a particular proceeding or determining

when constructive notice may be utilized or what test it must meet." 339 U. S., at 314. Indeed, we have recognized "the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will *vary* with circumstances and conditions." *Walker*, *supra*, at 115 (emphasis added). Our approach in these cases has always reflected the general principle that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 895 (1961). See also *Mathews* v. *Eldridge*, 424 U. S. 319, 334–335 (1976).

A

Although the Court purports to apply these settled principles in this case, its decision today is squarely at odds with the balancing approach that we have developed. The Court now holds that *whenever* a party has a legally protected property interest, "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests . . . if [the party's] name and address are reasonably ascertainable." *Ante*, at 800. Without knowing what state and individual interests will be at stake in future cases, the Court espouses a general principle ostensibly applicable whenever *any* legally protected property interest may be adversely affected. This is a flat rejection of the view that no "formula" can be devised that adequately evaluates the constitutionality of a procedure created by a State to provide notice in a certain class of cases. Despite the fact that *Mullane* itself accepted that constructive notice satisfied the dictates of due process in certain circumstances,[1] the

[1] In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S., at 314, we held that "[p]ersonal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents."

Court, citing *Mullane*, now holds that constructive notice can *never* suffice whenever there is a legally protected property interest at stake.

In seeking to justify this broad rule, the Court holds that although a party's inability to safeguard its interests may result in imposing greater notice burdens on the State, the fact that a party may be more able "to safeguard its interests does not relieve the State of its constitutional obligation." *Ante*, at 799. Apart from ignoring the fact that it is the totality of circumstances that determines the sufficiency of notice, the Court also neglects to consider that the constitutional obligation imposed upon the State may itself be defined by the party's ability to protect its interest. As recently as last Term, the Court held that the focus of the due process inquiry has always been the effect of a notice procedure on "a particular *class* of cases." *Greene*, *supra*, at 451 (emphasis added). In fashioning a broad rule for "the least sophisticated creditor," *ante*, at 799, the Court ignores the well-settled principle that "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." *Mathews* v. *Eldridge*, *supra*, at 344; see also *Califano* v. *Yamasaki*, 442 U. S. 682, 696 (1979). If the members of a particular class generally possess the ability to safeguard their interests, then this fact must be taken into account when we consider the "totality of circumstances," as required by *Mullane*. Indeed, the criterion established by *Mullane* "'is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.'" 339 U. S., at 315 (quoting *American Land Co.* v. *Zeiss*, 219 U. S. 47, 67 (1911)).

The Court also suggests that its broad rule has really been the law ever since *Mullane*. See *ante*, at 796–797, n. 3. The Court reasons that before *Mullane*, the characterization of proceedings as *in personam* or *in rem* was relevant to

determining whether the notice given was constitutionally sufficient,[2] and that once *Mullane* held that the "power of the State to resort to constructive service" no longer depended upon the "historic antithesis" of *in rem* and *in personam* proceedings, 339 U. S., at 312–313, constructive notice became insufficient as to *all* proceedings.

The plain language of *Mullane* is clear that the Court expressly refused to reject constructive notice as *per se* insufficient. See *id.*, at 312–314. Moreover, the Court errs in thinking that the only justification for constructive notice is the distinction between types of proceedings. See *ante*, at 796–797, n. 3. The historical justification for constructive notice was that those with an interest in property were under an obligation to act reasonably in keeping themselves informed of proceedings that affected that property. See, *e. g.*, *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 283 (1925); *Ballard* v. *Hunter*, 204 U. S. 241, 262 (1907). As discussed in Part II of this dissent, *Mullane* expressly acknowledged, and did not reject, the continued vitality of the notion that property owners had some burden to protect their property. See 339 U. S., at 316.

B

The Court also holds that the condition for receiving notice under its new approach is that the name and address of the party must be "reasonably ascertainable." In applying this requirement to the mortgagee in this case, the Court holds that the State must exercise "reasonably diligent efforts" in determining the address of the mortgagee, *ante*, at 798, n. 4,

[2] The Court is simply incorrect in asserting that before *Mullane*, constructive notice was rarely deemed sufficient even as to *in rem* proceedings when residents of the State were involved, *ante*, at 796–797, n. 3. See, *e. g.*, *Longyear* v. *Toolan*, 209 U.S. 414, 417–418 (1908). See also Note, The Constitutionality of Notice by Publication in Tax Sale Proceedings, 84 Yale L. J. 1505, 1507 (1975) ("This rule [permitting constructive notice] was . . . extended to all in rem proceedings, whether involving property owned by nonresidents or residents").

and suggests that the State is required to make some effort "to discover the identity and whereabouts of a mortgagee whose identity is not in the public record." *Ante*, at 799, n. 4. Again, the Court departs from our prior cases. In *all* of the cases relied on by the Court in its analysis, the State either actually knew the identity or incapacity of the party seeking notice, or that identity was "very easily ascertainable." *Schroeder*, 371 U. S., at 212–213. See also *Mullane*, 339 U. S., at 318; *Covey* v. *Town of Somers*, 351 U. S. 141, 146 (1956); *Walker*, 352 U. S., at 116; *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 175 (1974).[3] Under the Court's decision today, it is not clear how far the State must go in providing for reasonable efforts to ascertain the name and address of an affected party. Indeed, despite the fact that the recorded mortgage failed to include the appellant's address, see *ante*, at 798–799, n. 4, the Court concludes that its whereabouts were "reasonably identifiable." *Ante*, at 798. This uncertainty becomes particularly ominous in the light of the fact that the duty to ascertain identity and location, and to notify by mail or other similar means, exists whenever any legally protected interest is implicated.

## II

Once the Court effectively rejects *Mullane* and its progeny by accepting a *per se* rule against constructive notice, it applies its rule and holds that the mortgagee in this case must receive personal service or mailed notice because it has a legally protected interest at stake, and because the mortgage was publicly recorded. See *ante*, at 798. If the Court had

[3] In *Mullane*, the Court contrasted those parties whose identity and whereabouts are known or "at hand" with those "whose interests or whereabouts could not with due diligence be ascertained." 339 U. S., at 318, 317. This language must be read in the light of the facts of *Mullane*, in which the identity and location of certain beneficiaries were actually known. In addition, the Court in *Mullane* expressly rejected the view that a search "under ordinary standards of diligence" was required in that case. *Id.*, at 317.

observed its prior decisions and engaged in the balancing required by *Mullane*, it would have reached the opposite result.

It cannot be doubted that the State has a vital interest in the collection of its tax revenues in whatever reasonable manner that it chooses: "In authorizing the proceedings to enforce the payment of the taxes upon lands sold to a purchaser at tax sale, the State is in exercise of its sovereign power to raise revenue essential to carry on the affairs of state and the due administration of the laws. . . . 'The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain.'" *Leigh* v. *Green*, 193 U. S. 79, 89 (1904) (quoting *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 239 (1890)). The State has decided to accommodate its vital interest in this respect through the sale of real property on which payments of property taxes have been delinquent for a certain period of time.[4]

The State has an equally strong interest in avoiding the burden imposed by the requirement that it must exercise "reasonable" efforts to ascertain the identity and location of any party with a legally protected interest. In the instant case, that burden is not limited to mailing notice. Rather, the State must have someone check the records and ascertain with respect to each delinquent taxpayer whether there is a mortgagee, perhaps whether the mortgage has been paid off, and whether there is a dependable address.

Against these vital interests of the State, we must weigh the interest possessed by the relevant class—in this case,

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[4] The Court suggests that the notice that it requires "may ultimately relieve the county of a more substantial administrative burden if the mortgagee arranges for payment of the delinquent taxes prior to the tax sale." *Ante*, at 800, n. 5. The Court neglects the fact that the State is a better judge of how it wants to settle its tax debts than is this Court.

mortgagees.[5] Contrary to the Court's approach today, this interest may not be evaluated simply by reference to the fact that we have frequently found constructive notice to be inadequate since *Mullane*. Rather, such interest "must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted." *North Laramie Land Co.*, 268 U. S., at 283.

Chief Justice Marshall wrote long ago that "it is the part of common prudence for all those who have any interest in [property], to guard that interest by persons who are in a situation to protect it." *The Mary*, 9 Cranch 126, 144 (1815). We have never rejected this principle, and, indeed, we held in *Mullane* that "[a] state may indulge" the assumption that a property owner "usually arranges means to learn of any direct attack upon his possessory or proprietary rights." 339 U. S., at 316. When we have found constructive notice to be inadequate, it has always been where an owner of property is, for all purposes, *unable* to protect his interest because there is no practical way for him to learn of state action that threatens to affect his property interest. In each case, the adverse action was one that was completely unexpected by the owner, and the owner would become aware of the action only by the fortuitous occasion of reading "an advertisement in small type inserted in the back pages of a newspaper [that may] not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention." *Mullane*, *supra*, at 315. In each case, the individuals had no reason to expect that their property interests were being affected.

This is not the case as far as tax sales and mortgagees are concerned. Unlike condemnation or an unexpected account-

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[5] This is not to say that the rule espoused must cover all conceivable mortgagees in all conceivable circumstances. The flexibility of due process is sufficient to accommodate those atypical members of the class of mortgagees.

ing, the assessment of taxes occurs with regularity and predictability, and the state action in this case cannot reasonably be characterized as unexpected in any sense. Unlike the parties in our other cases, the Mennonite Board had a regular event, the assessment of taxes, upon which to focus, in its effort to protect its interest. Further, approximately 95% of the mortgage debt outstanding in the United States is held by private institutional lenders and federally supported agencies. U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States: 1982–1983, p. 511 (103d ed.).[6] It is highly unlikely, if likely at all, that a significant number of mortgagees are unaware of the consequences that ensue when their mortgagors fail to pay taxes assessed on the mortgaged property. Indeed, in this case, the Board itself required that Moore pay all property taxes.

There is no doubt that the Board could have safeguarded its interest with a minimum amount of effort. The county auctions of property commence by statute on the second Monday of each year. Ind. Code § 6–1.1–24–2(5) (1982). The county auditor is required to post notice in the county courthouse at least three weeks before the date of sale. § 6–1.1–24–3(a). The auditor is also required to publish notice in two different newspapers once each week for three weeks before the sale. §§ 6–1.1–24–3(a), 6–1.1–22–4(b). The Board could have supplemented the protection offered by the State with the additional measures suggested by the court below: The Board could have required that Moore provide it with copies of paid tax assessments, or could have re-

[6] The Court holds that "a mortgage need not involve a complex commercial transaction among knowledgeable parties . . . ." *Ante*, at 799. This is certainly true; however, that does not change the fact that even if the Board is not a professional moneylender, it voluntarily entered into a fairly sophisticated transaction with Moore. As the court below observed: "The State cannot reasonably be expected to assume the risk of its citizens' business ventures." 427 N. E. 2d 686, 690, n. 9 (1981).

quired that Moore deposit the tax moneys in an escrow account, or could have itself checked the public records to determine whether the tax assessment had been paid. 427 N. E. 2d 686, 690, n. 9 (1981).

When a party is unreasonable in failing to protect its interest despite its ability to do so, due process does not require that the State save the party from its own lack of care. The balance required by *Mullane* clearly weighs in favor of finding that the Indiana statutes satisfied the requirements of due process. Accordingly, I dissent.

# NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS *v.* UNITED STATES POSTAL SERVICE ET AL.

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

No. 81–1304. Argued December 1, 1982—Decided June 22, 1983*

Section 3622(b) of the Postal Reorganization Act (Act) provides that the Postal Rate Commission shall recommend rates for the classes of mail in accordance with nine factors, the third of which (§ 3622(b)(3)) is "the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type." In reviewing the ratemaking proceedings involved here, the Court of Appeals for the Second Circuit—contrary to earlier decisions of the Court of Appeals for the District of Columbia Circuit in reviewing prior ratemaking proceedings—held that the Act does not require the maximum possible use of cost-of-service principles, including allocation of costs on unverified inferences of causation, but permits use of other approaches, including the Rate Commission's original two-tier approach under which the rate floor for each class of mail was established by first determining the portion of the Postal Service's total costs verifiably caused by ("attributable to") that class of mail, and then "reasonably assigning" remaining costs to the various classes of mail on the basis of the other noncost, discretionary factors set forth in § 3622(b).

*Held:*

1. Although the Act divides ratemaking responsibility between the Rate Commission and the Postal Service, the legislative history and the Act's structure demonstrate that ratemaking authority was vested primarily in the Rate Commission. Thus, its interpretation of § 3622(b) is due deference. Pp. 820–821.

2. In enacting the Act to divest itself of its previous control over setting postal rates, Congress was concerned about the influence of lobbyists and resulting discrimination in rates among classes of postal service, but it did not intend to require maximum use of cost-of-service principles or to eliminate the ratesetter's discretion as to the methods for assigning

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*Together with No. 81–1381, *United Parcel Service of America, Inc.* v. *United States Postal Service et al.*, also on certiorari to the same court.

costs; it simply removed the ratesetting function from the political arena. The legislative history does not suggest that Congress viewed the exercise of discretion as an evil in itself. Pp. 821–823.

3. The Rate Commission's two-tier approach is a reasonable construction of § 3622(b)(3). The two-tier approach—one tier based on causation and the second tier based on other factors—is consistent with the statutory language and is supported by the legislative history. Pp. 823–825.

4. The statute requires attribution of any costs for which the source can be identified, but leaves it to the Rate Commission, in the first instance, to decide which methods provide reasonable assurance that costs are the result of providing one class of service. Pp. 825–833.

(a) The Act does not dictate a specific method for identifying causal relationships between costs and classes of mail, but envisions consideration of all appropriate costing approaches. Pp. 825–826.

(b) The Rate Commission acted consistently with the statutory mandate and Congress' policy objectives in refusing to use accounting principles lacking an established causal basis. On its face, § 3622(b)(3) does not deny to the expert ratesetting agency the authority to decide which methods sufficiently identify the requisite causal connection between particular services and particular costs. The legislative history supports the Rate Commission's view that when causal analysis is limited by insufficient data, the statute envisions that the Rate Commission will press for better data, rather than construct an "attribution" based on unsupported inferences of causation. Pp. 826–829.

(c) Because the Rate Commission has decided that methods involving attribution of long-term and short-term variable costs reliably indicate causal connections between classes and postal rates, the Act requires that they be employed. But the Act's language and legislative history support the Rate Commission's position that Congress did not intend to bar the use of any reliable method of attributing costs. Pp. 829–832.

(d) A statement in the legislative history indicating that the rate floor for each class of mail should consist of short-term variable costs does not demonstrate that the Rate Commission's inclusion of long-term variable costs, and consideration of other methods of identifying causation, are inconsistent with the statutory mandate or frustrate Congress' policy. The statute's plain language and prior legislative history indicate that Congress' broad policy was to mandate a rate floor consisting of all costs that could be identified, in the Rate Commission's view, as causally linked to a class of postal service. Pp. 832–833.

663 F. 2d 1186, affirmed and remanded.

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

*Matthew S. Perlman* argued the cause for petitioner in No. 81–1304. With him on the briefs was *Richard J. Webber*. *Bernard G. Segal* argued the cause for petitioner in No. 81–1381. With him on the briefs were *Robert L. Kendall, Jr.*, *James D. Crawford*, and *John E. McKeever*.

*John H. Garvey* argued the cause for respondents in both cases. With him on the brief for the United States Postal Service were *Solicitor General Lee* and *Deputy Solicitor General Geller*. *Robert A. Saltzstein*, *Stephen M. Feldman*, and *Joseph J. Saunders* filed a brief for respondent American Business Press. *Dana T. Ackerly* and *Charles Lister* filed briefs for respondent Direct Mail/Marketing Association, Inc. *Raymond N. Shibley*, *Michael F. McBride*, and *W. Gilbert Faulk, Jr.*, filed a brief for respondent Dow Jones & Co., Inc. *David C. Todd* and *Timothy J. May* filed a brief for respondents Mail Order Association of America et al. *David Minton* filed a brief for respondent Magazine Publishers Association, Inc. *Alan R. Swendiman* and *William J. Olson* filed a brief for respondents March of Dimes Birth Defects Foundation et al. *Toni K. Allen*, *Robert M. Lichtman*, and *John M. Burzio* filed a brief for respondents Newsweek, Inc., et al. *Ian D. Volner*, *Richard M. Schmidt, Jr.*, and *Mark L. Pelesh* filed a brief for respondents Recording Industry Association of America et al.†

JUSTICE BLACKMUN delivered the opinion of the Court.

These cases arise out of the most recent general postal ratemaking proceeding, the fifth under the Postal Reorganization Act. At issue is the extent to which the Act requires the responsible federal agencies to base postal rates on cost-of-service principles.

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†*W. Terry Maguire*, *Pamela Riley*, and *Arthur B. Sackler* filed a brief for the American Newspaper Publishers Association et al. as *amici curiae* urging affirmance.

## I

### A

When, in 1970, Congress enacted the Postal Reorganization Act (Act), 39 U. S. C. § 101 *et seq.*, it divested itself of the control it theretofore had exercised over the setting of postal rates and fees. The Act abolished the Post Office Department, which since 1789 had administered the Nation's mails. See Act of Sept. 22, 1789, ch. 16, 1 Stat. 70. In its place, the Act established the United States Postal Service as an independent agency under the direction of an 11-member Board of Governors. 39 U. S. C. §§ 201, 202.[1] The Act also established a five-member Postal Rate Commission (Rate Commission) as an agency independent of the Postal Service. § 3601.

Basic to the Act is the principle that, to the extent "practicable," the Postal Service's total revenue must equal its costs. § 3621. Guided by this principle, the Board of Governors, when it deems it in the public interest, may request the Rate Commission to recommend a new rate schedule. § 3622. After receiving the request, the Rate Commission holds hearings, § 3624(a), and formulates a schedule, § 3624 (d). Section 3622(b) provides that the Rate Commission shall recommend rates for the classes of mail[2] in accordance with nine factors, the third of which is "the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service rea-

[1] All citations to statutes herein refer to provisions of Title 39 of the United States Code.

[2] The Postal Service and Rate Commission classify the various types of mail through a process similar to that governing ratesetting. See §§ 3623, 3625. Presently, the four broad classes of mail are first class (letters, post cards, and small sealed parcels), second class (newspapers, magazines, and other periodicals), third class (single piece service for small parcels, catalogues, and other items, and certain bulk mail services), and fourth class (primarily parcel post). See Brief for United States Postal Service 4, n. 4.

sonably assignable to such class or type."[3] The Governors may approve the recommended rate schedule, may allow it under protest, may reject it, or, in limited circumstances, may modify it. § 3625. The Governors' decision to order new rates into effect may be appealed to any United States court of appeals. § 3628.

Questions confronting us in these cases are whether the Rate Commission must follow a two-tier or a three-tier process in setting rates, and the extent to which the Rate Commission must base rates on estimates of the costs caused by providing each class of mail service.

B

In its first two ratemaking proceedings under the Act, the Rate Commission determined that § 3622(b) establishes a

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[3] Section 3622(b) provides in relevant part:

"(b) Upon receiving a request [from the Postal Service], the [Rate] Commission shall make a recommended decision . . . in accordance with the policies of this title and the following factors:

"(1) the establishment and maintenance of a fair and equitable schedule;

"(2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;

"(3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;

"(4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

"(5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

"(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

"(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;

"(8) the educational, cultural, scientific, and informational value to the recipient of mail matter; and

"(9) such other factors as the Commission deems appropriate."

two-tier approach to allocating the Postal Service's total revenue requirement. See Postal Rate Commission, Opinion and Recommended Decision, Docket No. R74–1, pp. 4, 91–93 (1975);[4] PRC Op. R71–1, pp. 39–41 (1972). Under this approach, the Rate Commission first must determine the costs caused by ("attributable to") each class of mail, § 3622(b)(3), and on that basis establish a rate floor for each class. PRC Op. R74–1, pp. 92, 93, 110. The Rate Commission then must "reasonably assign," see § 3622(b)(3), the remaining costs to the various classes of mail on the basis of the other factors set forth in § 3622(b). See PRC Op. R74–1, pp. 91–94.

In the first proceeding, the Rate Commission concluded that the Act does not dictate the use of any particular method of identifying the costs caused by each class. PRC Op. R71–1, pp. 42–47. Without committing itself to any theory for the future, it chose to attribute those costs shown to vary with the volume of mail in each class over the "short term"—the period of a single year.[5] Although it considered other methods, it found the short-term approach to be the only feasible one, given the limited data developed by the Postal Service. *Id.*, at 47–62.

In the second proceeding, the Rate Commission again viewed the choice of a costing system as within its discretion. PRC Op. R74–1, pp. 92–93, 127. Although the Postal Service contended that short-term costs should again control attribution, the Rate Commission determined that it could reliably attribute more costs through a long-term variable costing analysis. That method attributes costs by identifying cost variations associated with shifts in mail volume and with shifts in the Postal Service's capacity to handle mail

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[4] Opinions and Recommended Decisions of the Rate Commission are cited herein as "PRC Op.," followed by the docket number.

[5] In addition to variable costs, the Rate Commission consistently has attributed fixed costs incurred for the benefit of a single class. See PRC Op. R74–1, p. 76; PRC Op. R80–1, App. B, p. 52 (1981). These "specific fixed costs" constitute a small percentage of all costs. See Brief for United States Postal Service 6, n. 9.

over periods of time longer than one year. *Id.*, at 111–112, 126–127. The Rate Commission did not go beyond attributing long-run variable costs, because the statute forbids attribution based on guesswork, see *id.*, at 110–111, and because the Rate Commission was unable to find "any other reliable principle of causality on [the] record," *id.*, at 94. The Rate Commission urged the development of improved data for future proceedings, so that it could identify more causal relationships, and thereby attribute more costs. *Id.*, at 110–111.[6]

C

Reviewing the second proceeding, the United States Court of Appeals for the District of Columbia Circuit rejected the Rate Commission's approach. *National Assn. of Greeting Card Publishers* v. *USPS*, 186 U. S. App. D. C. 331, 569 F. 2d 570 (1976) *(NAGCP I)*, vacated on other grounds, 434 U. S. 884 (1977). The court held that the Act's principal goals of eliminating price discrimination among classes of mail and curtailing discretion in ratesetting, 186 U. S. App. D. C., at 348–350, 569 F. 2d, at 587–589, require the Rate Commission "to employ cost-of-service principles to the fullest extent possible." *Id.* at 354, 569 F. 2d, at 593; see *id.*, at 348, 569 F. 2d, at 587. Therefore, the court stated, the Act mandates not only attribution of variable costs, but also "extended attribution" of costs that, "although not measurably variable," can reasonably be determined to result from handling each class of mail. *Id.*, at 347, 569 F. 2d, at 586. The court required the Rate Commission to allocate some costs on the basis of "cost accounting principles." *Id.*, at 344, 569 F. 2d, at 583; see *id.*, at 347, 352, 569 F. 2d, at 586, 591. This involves apportioning costs on the basis of "distri-

[6] The Rate Commission attributed 50% of the Postal Service's total revenue requirement in the first proceeding, see App. 239a, and in the second the data provided by the Postal Service had improved enough to support a rate floor consisting of 52.5% of total postal costs. See PRC Op. R80–1, App. B, p. 28.

bution keys," such as the weight or cubic volume of mail, notwithstanding the lack of proof that such factors play a causative role. *Id.*, at 344, 352, 569 F. 2d, at 583, 591.[7]

The Court of Appeals, citing the language and purposes of the statute, also required the Rate Commission to follow a three-tier, rather than a two-tier, procedure in setting rates. In the court's view, the first two tiers—attribution and assignment—are to proceed on a cost-of-service basis.[8] *Id.*, at 347, and n. 59, 353–354, 569 F. 2d, at 586, and n. 59, 592–593. Only those "residual costs" that cannot be attributed or assigned on the basis of reasonable inferences of causation may be distributed, in the third tier, among the classes of mail on the basis of § 3622(b)'s noncost, discretionary factors. *Id.*, at 348, 569 F. 2d, at 587.

Despite its doubts about *NAGCP I*, PRC Op. R77–1, p. 9 (1978), the Rate Commission attempted to comply in the fourth ratemaking proceeding.[9] It adhered to its view that variability is the key to attribution, because only with "some showing of volume variability over the long run" could it have reasonable confidence that particular costs were the consequence of providing the service. *Id.*, at 84. Because the data on long-run costs had improved, the Rate Commission

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[7] Such accounting principles are used in utility ratemaking proceedings that employ "fully allocated costing" systems. Under such systems, a specific cause is assigned to every cost incurred by a utility. The Post Office employed such a system prior to the Act. See *infra*, at 827, and n. 22.

[8] The court said that attributable and assignable costs are distinguishable in that "the latter concept permits a greater degree of estimation and connotes somewhat more judgment and discretion than the former." 186 U. S. App. D. C., at 348, n. 59, 569 F. 2d, at 588, n. 59.

[9] Challenges to the third ratemaking proceeding, Docket No. R76–1, which was completed prior to the Court of Appeals' decision in *NAGCP I*, see 186 U. S. App. D. C., at 339, n. 21, 569 F. 2d, at 578, n. 21, were dismissed as moot because they still were pending when the administrative decisions in the fourth ratemaking proceeding were complete. *National Assn. of Greeting Card Publishers* v. *USPS*, No. 76–1611 (CADC June 27, 1978) *(NAGCP II)* (order).

found that its long-run analysis satisfied *NAGCP I*'s requirement of "extended attribution" without resort to mere "inferences of causation." PRC Op. R77–1, at 10, 85.[10]

Turning to the intermediate assignment tier created by *NAGCP I*, the Rate Commission found a group of nonvariable "Service Related Costs" to be reasonably assignable to first-class and certain categories of second-class mail. Service Related Costs were defined as the fixed delivery costs incurred in maintaining the current 6-day-a-week delivery schedule for those classes, rather than a hypothetical 3-day-a-week schedule.[11] See PRC Op. R77–1, at 87–124.

D

The current controversy began on April 21, 1980, when the Postal Service requested from the Rate Commission a fifth increase in postal rates. Following extensive hearings, the Rate Commission recommended continued assignment of Service Related Costs in order to comply with the Court of Appeals' three-tier approach, see PRC Op. R80–1, pp. 145–156, despite the Postal Service's rejection of the concept, see Decision of the Governors of the United States Postal Service on Rates of Postage and Fees for Postal Services, March 10, 1981, App. to Pet. for Cert. 13b–14b (Decision of the Governors). The Rate Commission also made clear that while it did not consider variability analysis to be the sole

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[10] By this method, the Rate Commission attributed almost 65% of total costs. PRC Op. R77–1, p. 156 (table).

[11] The Rate Commission concluded that these nonvariable costs constituted slightly over 7% of the Postal Service's total revenue requirement.

On the assumption that the Postal Service and the Rate Commission would continue to improve and extend their attribution and assignment techniques, the District of Columbia Circuit affirmed the Governors' decision to put into effect the Rate Commission's recommendations. See *National Assn. of Greeting Card Publishers* v. *USPS*, 197 U. S. App. D. C. 78, 82–104, 607 F. 2d 392, 396–418 (1979) (opinion of Leventhal, J.) *(NAGCP III)*, cert. denied, 444 U. S. 1025 (1980).

statutory basis for attribution, only long-run variability analysis had been shown to be accurate enough to permit attribution. PRC Op. R80–1, pp. 129–131, 140, and n. 2.[12] The Governors, under protest, permitted these rates to go into effect.[13]

On petitions for review, the United States Court of Appeals for the Second Circuit held that Congress had not intended to require the maximum possible use of cost-of-service principles in postal ratesetting. *Newsweek, Inc.* v. *USPS*, 663 F. 2d 1186 (1981). The Second Circuit stated that although the Rate Commission is free to use the approach the District of Columbia Circuit had required, the Act permits the use of other approaches as well, including the Rate Commission's original two-tier approach to ratesetting. Under the Second Circuit's construction, § 3622(b)(3) requires that the rate floor for each class consist of attributable costs based, at a minimum, on short-term variability; reasonable assignment may proceed on the basis of the other factors set forth in § 3622(b). The court remanded to the agencies for reconsideration.

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[12] More than 64% of total costs were attributed by this method. PRC Op. R80–1, p. 222 (table).

[13] Decision of the Governors, App. to Pet. for Cert. 1b. The Governors also returned the matter to the Rate Commission for reconsideration. After the Rate Commission twice substantially reaffirmed its recommendations, the Governors exercised their statutory authority to modify the decision, § 3625(d), by, among other changes, abandoning the Service Related Costs concept. See Decision of the Governors Under 39 U. S. C. Section 3625 in the Matter of Proposed Changes in Postal Rates and Fees, Docket No. R80–1 Before the Postal Rate Commission (Sept. 29, 1981). This modification was appealed to the United States Court of Appeals for the Second Circuit, which remanded to the Governors for further explanation of their reasoning. *Time, Inc.* v. *USPS*, 685 F. 2d 760 (1982). The Governors complied with the remand, Further Explanation and Justification Supporting the September 29, 1981 Decision of the Governors of the United States Postal Service on Rates of Postage and Fees for Postal Services (Dec. 20, 1982), and the Second Circuit recently denied petitions for review. *Time, Inc.* v. *USPS*, Nos. 81–4183, 81–4185, 81–4203, 81–4205, and 81–6216 (June 8, 1983). These matters are not before us.

Because of the inconsistencies in the holdings of the Second and District of Columbia Circuits, we granted certiorari. 456 U. S. 925 (1982).[14]

## II

As a threshold matter, it is useful to set forth what is, and what is not, at issue in this litigation. Of the factors set forth in § 3622(b), only subsection (b)(3) is styled a "requirement." With the approval of both Courts of Appeals, the Rate Commission has concluded that notwithstanding its placement as the third of nine factors, this distinction dictates that "attribution" and "assignment" define the framework for ratesetting. In addition, the Rate Commission takes the view that "causation is both the statutory and the logical basis for attribution." PRC Op. R74–1, p. 110. The parties do not dispute these premises, and we see no reason to question them.

At issue is the Rate Commission's consistent position that the Act establishes a two-tier structure for ratesetting, and that the Act does not dictate or exclude the use of any method of attributing costs, but requires that all costs reliably identifiable with a given class, by whatever method, be attributed to that class.[15] An agency's interpretation of its

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[14] The Governors' subsequent decision to modify the rates at issue, see n. 13, *supra*, has not mooted the controversy. Postal rates frequently are in effect too briefly for litigation concerning them to be completed before they are superseded. See *Reeves, Inc.* v. *Stake*, 447 U. S. 429, 434, n. 5 (1980). Before judicial review of the second and third ratemaking proceedings could be concluded, for example, new rates resulting from the third and fourth ratemaking proceedings had gone into effect. See *NAGCP I*, 186 U. S. App. D. C., at 339, n. 21, 569 F. 2d, at 578, n. 21; *NAGCP III*, 197 U. S. App. D. C., at 82, n. 3, 607 F. 2d, at 396, n. 3. The questions before the Court are certain to be central to future proceedings, and there is more than a "reasonable expectation" that petitioners, who have taken part in most or all of the challenges to prior rate schedules, will be affected by these future proceedings. See *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975); *Reeves, Inc.* v. *Stake*, 447 U. S., at 434, n. 5; *Murphy* v. *Hunt*, 455 U. S. 478, 482 (1982).

[15] The Rate Commission is not a party to this action. We are informed that the Rate Commission agrees with the Postal Service that the decision

enabling statute must be upheld unless the interpretation is contrary to the statutory mandate or frustrates Congress' policy objectives. *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U. S. 27, 32 (1981). Although the Postal Reorganization Act divides ratemaking responsibility between two agencies, the legislative history demonstrates "that ratemaking . . . authority [was] vested primarily in [the] Postal Rate Commission." S. Rep. No. 91–912, p. 4 (1970) (Senate Report); see *Time, Inc.* v. *USPS*, 685 F. 2d 760, 771 (CA2 1982); *Newsweek, Inc.* v. *USPS*, 663 F. 2d, at 1200–1201; *NAGCP III*, 197 U. S. App. D. C., at 87, 607 F. 2d, at 401. The structure of the Act supports this view.[16] While the Postal Service has final responsibility for guaranteeing that total revenues equal total costs, the Rate Commission determines the proportion of the revenue that should be raised by each class of mail. In so doing, the Rate Commission applies the factors listed in § 3622(b). Its interpretation of that statute is due deference. See *Time, Inc.* v. *USPS*, 685 F. 2d, at 771; *United Parcel Service, Inc.* v. *USPS*, 604 F. 2d 1370, 1381 (CA3 1979), cert. denied, 446 U. S. 957 (1980).

## III

In *NAGCP I*, the Court of Appeals for the District of Columbia Circuit discerned in the Act an overriding purpose to minimize the Rate Commission's discretion by maximizing the use of cost-of-service principles. According to the Court of Appeals, the Rate Commission's failure to use "cost ac-

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of the Second Circuit is correct and should be affirmed. Brief for United States Postal Service 49, n. 46. We do not understand this statement to indicate that the Rate Commission agrees with all the reasoning in the Postal Service's brief, or that it has abandoned the consistent reading it has given the Act in the first five ratemaking proceedings.

[16] It is the Rate Commission, not the Postal Service, that conducts extensive hearings, § 3624, and applies the ratemaking factors enumerated in § 3622(b). The Postal Service may modify a Rate Commission recommendation only if the recommended rates will not produce revenues equal to the Postal Service's estimated costs. § 3625(d)(2).

counting principles" to attribute costs, and its failure to "assign" costs on the basis of extended inferences of causation as a middle ratesetting tier, frustrated these congressional goals. Animating the court's view was the fact that Congress, in passing the Act, was disturbed about the influence of lobbyists on Congress' discretionary ratemaking and the resulting discrimination in rates among classes of postal service; in the Act, Congress sought to "get 'politics out of the Post Office.'" 186 U. S. App. D. C., at 349, 569 F. 2d, at 588 (quoting H. R. Rep. No. 91–1104, p. 6 (1970) (House Report)).

Without doubt, Congress did have these problems in mind, but we agree with the Second Circuit that the District of Columbia Circuit misunderstood Congress' solution. See 663 F. 2d, at 1198. Congress did not eliminate the ratesetter's discretion; it simply removed the ratesetting function from the political arena by removing postal funding from the budgetary process, see § 3621 (Postal Service is to be self-supporting), and by removing the Postal Service's principal officers from the President's direct control. House Report, at 6, 12, 13, 18–19; Senate Report, at 8. In addition, Congress recognized that the increasing economic, accounting, and engineering complexity of ratemaking issues had caused Members of Congress, "lacking the time, training, and staff support for thorough analysis," to place too much reliance on lobbyists. House Report, at 18. Consequently, it attempted to remove undue price discrimination and political influence by placing ratesetting in the hands of a Rate Commission, composed of "professional economists, trained rate analysts, and the like," *id.*, at 5, independent of Postal Service management, *id.*, at 13, and subject only to Congress' "broad policy guidelines," *id.*, at 12. Congress sought to ensure that the Postal Service would be managed "in a businesslike way." *Id.*, at 5; see *id.*, at 11–12. There is no suggestion in the legislative history that Congress viewed the exercise of discretion as an evil in itself. Congress simply

wished to substitute the educated and politically insulated discretion of experts for its own.

## IV

We turn now to the narrower contentions about the meaning of § 3622(b)(3). In determining whether the Rate Commission's two-tier approach to ratesetting is contrary to the mandate of the Act or frustrates its policies, we begin with the statute's language. See *North Dakota* v. *United States*, 460 U. S. 300, 312 (1983); *Dickerson* v. *New Banner Institute, Inc.*, 460 U. S. 103, 110 (1983). Once the Rate Commission has allocated all attributable costs, § 3622(b)(3) directs that each class must bear, in addition, "that portion of all other costs . . . reasonably assignable" to it. While the verb "attribute" primarily connotes causation, the verb "assign" connotes distribution on any basis. On its face, therefore, the section suggests one ratemaking tier based on causation, and a second based on other factors. We see no justification for the interposition of an intermediate causation-based assignment tier.[17] The Rate Commission's two-tier approach is consistent with the statutory language.

Moreover, the legislative history supports the Rate Commission's approach. The report of the President's Commission on Postal Organization (Kappel Commission) found that

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[17] The District of Columbia Circuit read the statute to require an intermediate "assignment" tier that, like attribution, must be based on causation principles. The court believed that "Congress did not intend that *all* postal costs be either attributed or assigned," because some unattributable postal costs "will exist but will not be 'reasonably assignable' to any particular class or type." *NAGCP I*, 186 U. S. App. D. C., at 348, 569 F. 2d, at 587 (emphasis in original). This followed, the court believed, from the section's requirement that each class bear "only 'that portion of all other costs . . . reasonably assignable.'" *Ibid.*, quoting § 3622(b)(3) (the District of Columbia Circuit's emphasis deleted). But § 3622(b)(3) does not provide that only a portion of all other costs is to be assigned. It says, instead, that through the process of assignment each class of service will receive its reasonable portion of all other costs.

it would be unfair to require the users of one class of service to pay for expenditures demonstrably related to another class. See Kappel Commission, Towards Postal Excellence: The Report of the President's Commission on Postal Organization 130 (1968) (Kappel Commission Report). But, on the basis of detailed studies of the Post Office, the report concluded that "[a] large segment of postal costs . . . does not result from handling a particular class of mail but is the cost of maintaining the postal system itself." *Id.*, at 30. The Kappel Commission proposed a two-tier ratemaking process, very similar to the Rate Commission's approach,[18] to allocate among the classes of mail these two groups of costs.

The House version of § 3622(b)(3) closely followed the Kappel Commission's proposal, see House Report, at 6, directing the establishment of rates "so that at least those costs demonstrably related to the class of service in question will be borne by each such class and not by other classes of users of postal services or by the mails generally." H. R. 17070, 91st Cong., 2d Sess., § 1201(c) (1970). Although the House bill did not address the criteria that would govern distribution of the remaining costs among the various classes of mail, there was no suggestion of a second, more attenuated, causation-based tier as required by the District of Columbia Circuit.

The Senate bill, although not expressly calling for a rate floor for each class, required the Rate Commission to consider among other factors "operating costs, the amount of overhead, and other institutional costs of the Postal Service properly assignable to each class of mail." S. 3842, 91st Cong., 2d Sess., § 3704(g)(3) (1970). The Senate bill's use of the word "assignable," which the District of Columbia Circuit believed mandated a causation-based "assignment" tier, see *NAGCP I*, 186 U. S. App. D. C., at 347, n. 59, 569 F. 2d, at

[18] First, rates for each class of mail "would cover the costs demonstrably related to that class of service." Second, "[r]emaining institutional costs" would be apportioned to the various classes on the basis of market factors, not causation. Kappel Commission Report, at 61–62; see *id.*, at 130–132.

586, n. 59, does not undercut the reasonableness of the Rate Commission's construction. There is no suggestion either in this language or elsewhere in the legislative history that the Senate envisioned a three-tier approach. In fact, the Senate Report accompanying the bill suggested a two-tier approach, allocating some costs on cost-of-service principles, and allocating other costs through consideration of the overall value of the service provided and other factors. See Senate Report, at 11.

As discussed above, the language of the compromise bill enacted into law is fully consistent with a two-tier structure, and there is no legislative history to the contrary. We conclude that the Rate Commission's two-tier approach is a reasonable construction of § 3622(b)(3).[19]

V

We now turn to the nature of the first tier, the statutory requirement of attribution.

A

The Court has observed: "Allocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science." *Colorado Interstate Co.* v. *FPC*, 324 U. S. 581, 589 (1945). Generally,

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[19] Petitioner National Association of Greeting Card Publishers and intervenor Direct Mail/Marketing Association question the legality of assigning—or attributing—Service Related Costs. We do not rule on this issue. The Rate Commission developed the concept of Service Related Costs only to conform to the District of Columbia Circuit's erroneous view that "assignment" is an intermediate tier requiring attenuated inferences of causation. "When an administrative agency has made an error of law, the duty of the Court is to 'correct the error . . . , and after doing so to remand the case to the [agency] so as to afford it the opportunity of examining the evidence and finding the facts as required by law.'" *NLRB* v. *Pipefitters*, 429 U. S. 507, 522, n. 9 (1977), quoting *ICC* v. *Clyde S.S. Co.*, 181 U. S. 29, 32–33 (1901). The Rate Commission also should assess the impact on the Service Related Costs concept of Congress' recent prohibition of any deviation from the present 6-day delivery schedule. See Omnibus Budget Reconciliation Act of 1981, § 1722, 95 Stat. 759.

the legislature leaves to the ratesetting agency the choice of methods by which to perform this allocation, see, *e. g.*, *American Commercial Lines, Inc.* v. *Louisville & N. R. Co.*, 392 U. S. 571, 590–593 (1968); *Colorado Interstate Co.*, 324 U. S., at 589, although if the statute provides a formula, the agency is bound to follow it. *Ibid.*

We agree with the Rate Commission's consistent position that Congress did not dictate a specific method for identifying causal relationships between costs and classes of mail, but that the Act "envisions consideration of all appropriate costing approaches." PRC Op. R71–1, p. 46; see PRC Op. R74–1, pp. 92, 127; PRC Op. R80–1, pp. 129–133. The Rate Commission has held that, regardless of method, the Act requires the establishment of a sufficient causal nexus before costs may be attributed. The Rate Commission has variously described that requirement as demanding a "reliable principle of causality," PRC Op. R74–1, p. 94, or "reasonable confidence" that costs are the consequence of providing a particular service, PRC Op. 77–1, p. 84, or a "reasoned analysis of cost causation." PRC Op. R80–1, p. 131. Accordingly, despite the District of Columbia Circuit's interpretation, the Rate Commission has refused to use general "accounting principles" based on distribution keys without an established causal basis. But the Rate Commission has gone beyond short-term costs in each rate proceeding since the first.[20]

B

Section 3622(b)(3) requires that all "attributable costs" be borne by the responsible class. In determining what costs are "attributable," the Rate Commission is directed to look

[20] In the first ratemaking proceeding, the Rate Commission used short-run variable costs "because that approach [was] the only viable costing presentation before us." PRC Op. R71–1, p. 56. It stated that "long-run incremental costing (for example) 'remains theoretical and is unproven' on this record." *Id.*, at 56–57. Once long-run costing became feasible, the Rate Commission adopted it.

to all costs of the Postal Service, both "direct" and "indirect."[21] In selecting the phrase "attributable costs," Congress avoided the use of any term of art in law or accounting. In the normal sense of the word, an "attributable" cost is a cost that may be considered to result from providing a particular class of service. On its face, there is no reason to suppose that § 3622(b)(3) denies to the expert ratesetting agency, exercising its reasonable judgment, the authority to decide which methods sufficiently identify the requisite causal connection between particular services and particular costs.

The legislative history supports the Rate Commission's view that when causal analysis is limited by insufficient data, the statute envisions that the Rate Commission will "press for . . . better data," rather than "construct an 'attribution'" based on unsupported inferences of causation. PRC Op. R74–1, pp. 110–111. Before passage of the Act, Congress had set rates based on the Post Office's ungainly "Cost Ascertainment System," which allocated—on the basis of "distribution keys" like those advocated by the District of Columbia Circuit—all postal expenses to one or another class of mail.[22] The Kappel Commission determined that this approach was "arbitrary [and] uninformative." Kappel Commission Report, at 30; see *id.*, at 131. Many costs are institutional, and the inferences of causation supporting the Post

[21] The study of postal ratesetting on which the Kappel Commission based its recommendations defined direct costs as "[t]hose elements of cost which can be unequivocally related to a particular product or output," and indirect costs as "[t]hose elements of cost which cannot unequivocally be associated with a particular output or product." Foster Associates, Inc., Rates and Rate-making: A Report to the President's Commission on Postal Organization, App. A, pp. iii, iv, reprinted in Kappel Commission Report Annex (1968) (Foster Associates Study).

[22] See generally *id.*, at 1–8 to 1–11, 2–8 to 2–12, 4–8 to 4–24; *id.*, at App. B; Report on Post Office Department Relating to Survey of Postal Rates Structure, Letter from Postmaster General Transmitting a Report on his Survey of Postal Rates, H. R. Doc. No. 91–97 (1969).

Office's allocation of costs to the different classes were simply unsupported by the data. *Id.*, at 29–31, 132–135. In proposing the two-tier approach, therefore, the Kappel Commission stated that each class of service would recover all costs "demonstrably related" to it in order to avoid the inequity of users of one class subsidizing users of another class; however, the "[r]emaining institutional costs would not be apportioned to the several classes of mail by rigid accounting formulas." *Id.*, at 61–62.

The House bill tracked these recommendations, see generally House Report, at 6, and adopted a rate floor consisting of "demonstrably related" costs, H. R. 17070, 91st Cong., 2d Sess., § 1201(c) (1970), which it described as "identifiable costs." House Report, at 10.[23] The Senate bill did not explicitly include a causally based rate floor. See 116 Cong. Rec. 22053 (1970) (remarks of Sen. Fannin). But the Senate plainly rejected the notion of binding ratesetters to "accounting principles" akin to those used in the Cost Ascertainment System. The Senate Report stated that "no particular cost accounting system is recommended and no particular classification of mail is required to recover a designated portion of its cost beyond its incremental cost." Senate Report, at 17.

The conference bill enacted into law incorporated the rate floor contained in the House version, but replaced the phrase "demonstrably related" costs with "attributable" costs. Debate on the ratemaking aspects of the conference bill was

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[23] The House was aware of the deficiencies of the Cost Ascertainment System since it had held hearings on the subject. See Hearings on Post Office Cost Ascertainment System before the Subcommittee on Postal Rates of the House Committee on Post Office and Civil Service, 91st Cong., 1st Sess., 72 (1969) (testimony of James W. Hargrove, Assistant Postmaster General). The following year, the Subcommittee, through its Chairman, expressed its approval of the Post Office's recent decision "to abolish the cost ascertainment system and supply postal figures based on demonstrably related costs." Hearings on Postal Rates and Revenue and Cost Analysis before the Subcommittee on Postal Rates of the House Committee on Post Office and Civil Service, 91st Cong., 2d Sess., 1 (1970) (remarks of Rep. Olsen).

sparse. On the floor of the House, one conferee defined "attributable" costs as "capable of objective determination and proof either by empirical observation or deductive analysis." 116 Cong. Rec. 27606 (1970) (remarks of Rep. Udall). On the Senate floor, the Act's sponsor explained that attributable costs were "actual postal costs." *Id.*, at 26954 (remarks of Sen. McGee). Neither explanation suggests that the conference bill resurrected accounting principles like those used in the discredited Cost Ascertainment System. The Rate Commission, therefore, acted consistently with the statutory mandate and Congress' policy objectives in refusing to use distribution keys or other accounting principles lacking an established causal basis.[24]

C

The Postal Service contends that Congress intended long-term and short-term variable costs to be attributed, but that

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[24] Petitioner United Parcel Service argues that extended use of cost-of-service principles is necessary to avoid subsidization of those classes of mail for which the Postal Service has competition, such as parcel post, by other classes of mail for which the Postal Service enjoys a statutory monopoly, such as first class. Brief for Petitioner United Parcel Service of America, Inc., 39–42. Congress' concern about such cross-subsidies, of course, was one motive for including the rate floor established in § 3622(b)(3). But Congress adopted the Kappel Commission's conclusion that, unless a reliable connection is established between a class of service and a cost, allocation of costs on cost-of-service principles is entirely arbitrary. Beyond requiring the attribution of all costs for which a reliable connection can be established, Congress intended to prevent undue imposition on users of monopolized classes, and to prevent unfair competition, in two ways. First, by making the Rate Commission independent of operating management, Congress meant to minimize the temptation to solve fiscal problems by concentrating rate increases on first-class mail, which is by far the major source of postal revenue. Senate Report, at 13. Second, § 3622(b) requires the Rate Commission to consider, in "assigning" costs remaining above the rate floor, "the effect of rate increases upon the general public . . . and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters," § 3622(b)(4), and "the available alternative means of sending and receiving letters and other mail matter at reasonable costs," § 3622(b)(5).

Congress did not direct attribution of costs, apart from fixed costs incurred by a particular class, that do not vary directly or indirectly with volume. We agree that, because the Rate Commission has decided that these methods reliably indicate causal connections between classes of mail and postal rates, the Act requires that they be employed. But the Act's language and legislative history support the Rate Commission's position that Congress did not intend to bar the use of any reliable method of attributing costs. See PRC Op. R71–1, pp. 42–46.

The record before Congress in 1970 indicated that identifying which classes cause specific costs was a "most difficult" task, Foster Associates Study, at 1–5, and that a long-run variable cost approach was "the best available measure" of cost causation. *Id.*, at 1–6. The Kappel Commission consequently recommended that each class bear, "as a minimum," all "demonstrably related" capital and operating costs—"[i]n economic terms . . . the long-run variable costs ascribable to it." Kappel Commission Report, at 131.[25] Although the House bill adopted the Kappel Commission's requirement that each class bear its "demonstrably related costs," we do not believe that in so doing it intended to limit attribution to the long-run variable approach. The Kappel Commission did not emphasize technical matters, focusing instead on the need for nonarbitrary demonstrations of causation.[26] Postmaster

[25] The study underlying the Kappel Commission Report rejected a short-term approach as likely to generate widely fluctuating rates. Foster Associates Study, at 1–5 to 1–6. It recommended measuring variability not just with respect to units of output, but with respect to other variables as well, such as the capacity necessary to produce that output. *Id.*, at 3–33 to 3–34.

[26] The Kappel Commission explained the rate floor in these terms:

"[T]o avoid undue discrimination every class of service should, as a minimum, pay for all of those costs which it alone causes. Thus . . . each . . . class of mail should pay for those *added* costs of processing and delivery which it causes the Post Office to incur. It makes no difference whether these costs are capital costs or operating costs, nor should the inquiry be confined to what costs the class has generated historically, but should ex-

General Blount informed the House that the phrase "demonstrably related costs" was employed to avoid the confusion generated by the use of terms of art such as "marginal" or "incremental" costs. "Demonstrably related costs," he explained, "are those costs which can be traced directly to the class of service in question . . . . [W]e believe that the legislative history has made amply clear what the term means, without shackling future generations to any particular economic theory." Hearings on Post Office Reorganization before the House Committee on Post Office and Civil Service, 91st Cong., 1st Sess., 1273 (1969) (Post Office Response to Memoranda Submitted by J. Edward Day).

The House Report did not mention any particular costing technique. In defining the rate floor established by the House bill, it explained only that each class would be required to bear "at least its own identifiable costs." House Report, at 10. Given the House Report's repeated statements that Members of Congress are ill-equipped to deal with the highly technical economic, accounting, and engineering questions lying at the heart of the ratemaking process, it is implausible to suppose that the House intended to prescribe for the experts appointed to resolve this problem a formula for identifying causal relationships. It is also unlikely that the House intended to limit the Postal Service forever to accounting methods current at the time the bill was enacted.[27]

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tend to include what costs it will cause in the foreseeable future." Kappel Commission Report, at 131 (emphasis in original); see *id.*, at 61–62.

[27] At one point, the Senate Report states, without elaboration, that "no particular cost accounting system is recommended and no particular classification of mail is required to recover a designated portion of its cost beyond its incremental cost." Senate Report, at 17. Arguably, this statement suggests, as a minimum, the use of some form of variability analysis. As the Foster Associates Study explained, "incremental costs" may mean short-run costs, excluding overhead, or may mean long-run costs, including capacity costs and other overhead. Foster Associates Study, App. A, at iv, and n. 1. Whatever the Senate Report meant by "incremental costs," the quoted passage itself leaves open the possibility that the Rate Commission may find that other "accounting methods" are appropriate. Like the

The Conference Committee abandoned the phrase "demonstrably related costs" in favor of "attributable" costs, a phrase that connotes the use of judgment and has no technical meaning or significant antecedent legislative history. It also retained the House bill's explicit requirement of a rate floor. In so doing, the conferees ensured that identification of causal relationships would not be limited to those methods discussed in the Kappel Commission Report, but would encompass all postal costs, whether "direct or indirect," that the experts, on whatever reasoned basis, found to be attributable to a particular class of mail.

D

The Second Circuit found controlling the definition of "attributable" costs contained in the Statement of the Managers on the Part of the House, appended to the Conference Report on the Act, H. R. Conf. Rep. No. 91–1363, pp. 79–90 (1970). *Newsweek, Inc.* v. *USPS*, 663 F. 2d, at 1199–1200.[28] The House Managers stated that the conference substitute established a rate floor for each class of mail "equal to costs . . . *that vary over the short term* in response to changes in

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House, the Senate believed that Congress should be taken out of the ratemaking process and the task put in the hands of an "expert commission," which would allocate costs "on a scientific or quasi-scientific basis." Senate Report, at 11. The bill initially passed by the Senate spoke of assigning any type of postal cost, including overhead costs, wherever proper. S. 3842, 91st Cong., 2d Sess., § 3704(g)(3) (1970).

[28] The Second Circuit apparently believed that the Managers' Statement was the Report of the entire Conference Committee. 663 F. 2d, at 1200. Were this the case, its definition would be due great weight. The Conference Report, however, contained only the text of the Act. There is no dispute that the House Managers' Statement became available only after the Senate had completed its consideration of the Conference Report. See PRC Op. R80–1, App. B, p. 11. Thus, while certainly significant, this statement does not have the status of a conference report, or even a report of a single House available to both Houses. See *Vaughn* v. *Rosen*, 173 U. S. App. D. C. 187, 193, 523 F. 2d 1136, 1142 (1975); K. Davis, Administrative Law Treatise § 3A.31, p. 175 (1970 Supp.).

volume of a particular class or, even though fixed rather than variable, are the consequence of providing the specific service involved." H. R. Conf. Rep. No. 91–1363, at 87 (emphasis supplied). The Rate Commission specifically addressed and rejected this argument when it was advanced by the Postal Service in the first two ratemaking proceedings, see PRC Op. R74–1, pp. 101–102, 126–127; PRC Op. R71–1, pp. 42–46, and even the Postal Service since has abandoned it. The statute's plain language and prior legislative history, discussed above, indicate that Congress' broad policy was to mandate a rate floor consisting of all costs that could be identified, in the view of the expert Rate Commission, as causally linked to a class of postal service. We cannot say that the House Managers' Statement alone demonstrates that the Rate Commission's view is "inconsistent with the statutory mandate or . . . frustrate[s] the policy that Congress sought to implement." *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U. S., at 32.

## VI

We hold that the Rate Commission has reasonably construed the Act as establishing a two-tier ratesetting structure. First, all costs that in the judgment of the Rate Commission are the consequence of providing a particular class of service must be borne by that class. The statute requires attribution of any cost for which the source can be identified, but leaves it to the Commissioners, in the first instance, to decide which methods provide reasonable assurance that costs are the result of providing one class of service.

For this function to be performed, the Postal Service must seek to improve the data on which causal relationships may be identified[29] as the Rate Commission remains open to the

[29] The Rate Commission constantly has stressed the importance to its ratesetting function of receiving more comprehensive and more detailed data from the Postal Service. See PRC Op. R80–1, pp. 107, 111–112, 209–211; PRC Op. R77–1, pp. 85–87; PRC Op. R76–1, pp. 83–87, and App.

use of any method that reliably identifies causal relationships. In our view, the Rate Commission conscientiously has attempted to find causal connections between classes of service and all postal costs—both operating costs and "overhead" or "capacity" costs—where the data are sufficient. PRC Op. R74–1, pp. 126–127; see PRC Op. R80–1, pp. 129–131. The Rate Commission is to assign remaining costs reasonably on the basis of the other eight factors set forth by § 3622(b).

Inasmuch as the rates at issue were established according to the District of Columbia Circuit's erroneous view of the Act, we agree with the Second Circuit that this matter must be remanded to the agencies. While we do not agree with all that the Second Circuit said in its opinion, we affirm its judgment in remanding the cases. The remand will be for further proceedings consistent with this opinion.

*It is so ordered.*

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E; PRC Op. R74–1, pp. 110–111, 123–127; PRC Op. R71–1, pp. 48–57. The importance of a detailed data base was emphasized in the Foster Associates Study, at 5–21, and in the Kappel Commission Report, at 62. The Senate Report recognized that achievement of the Act's ambitious goals would depend on cooperation between the two agencies. Senate Report, at 13. The Postal Service, which "alone takes in the full scope of Postal Service operations . . . [and] alone is in a position to influence the Postal Service's day-to-day accounting procedures and record keeping," *Association of American Publishers, Inc.* v. *Governors of United States Postal Service*, 157 U. S. App. D. C. 397, 408, 485 F. 2d 768, 779 (1973) (concurring opinion), must constantly seek to aid the Commission in fulfilling § 3622(b)'s requirement that all costs capable of being considered the result of providing a particular class of service are identified, and borne by that class.

# BROWN ET AL. *v.* THOMSON, SECRETARY OF STATE OF WYOMING, ET AL.

## APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

No. 82–65. Argued March 21, 1983—Decided June 22, 1983

The Wyoming Legislature consists of a Senate and a House of Representatives. The State Constitution provides that each of the State's 23 counties shall constitute a senatorial and representative district and shall have at least one senator and one representative, and requires the senators and representatives to be apportioned among the counties "as nearly as may be according to the number of their inhabitants." A 1981 Wyoming statute reapportioned the House of Representatives and provided for 64 representatives. Based on the 1980 census placing Wyoming's population at 469,557, the ideal apportionment would have been 7,337 persons per representative. But the reapportionment resulted in an average deviation from population equality of 16% and a maximum deviation of 89%. Niobrara County, the State's least populous county, was given one representative, even though its population was only 2,924, the legislature having provided that a county would have a representative even if the statutory formula rounded the county's population to zero. The legislature also provided that if Niobrara County's representation were held unconstitutional, it would be combined with a neighboring county in a single district so that the House would consist of 63 representatives. Appellants (members of the League of Women Voters and residents of seven counties in which the population per representative is greater than the state average) filed an action in Federal District Court, alleging that granting Niobrara County a representative diluted the voting privileges of appellants and other voters similarly situated in violation of the Fourteenth Amendment, and seeking declaratory and injunctive relief. The District Court upheld the constitutionality of the reapportionment statute.

*Held:* Wyoming has not violated the Equal Protection Clause of the Fourteenth Amendment by permitting Niobrara County to have its own representative. Pp. 842–848.

(a) Some deviations from population equality may be necessary to permit the States to pursue other legitimate objectives such as "maintain[ing] the integrity of various political subdivisions" and "provid[ing] for compact districts of contiguous territory." *Reynolds* v. *Sims*, 377 U. S. 533, 578. But an apportionment plan with population disparities larger

than 10% creates a prima facie case of discrimination and therefore must be justified by the State, the ultimate inquiry being whether the plan may reasonably be said to advance a rational state policy and, if so, whether the population disparities resulting from the plan exceed constitutional limits. Pp. 842–843.

(b) This case presents an unusually strong example of an apportionment plan the population variations of which are entirely the result of the consistent and nondiscriminatory application of a legitimate state policy. Wyoming, since statehood, has followed a constitutional policy of using counties as representative districts and ensuring that each county has one representative. Moreover, Wyoming has applied the factor of preserving political subdivisions free from any taint of arbitrariness or discrimination. Pp. 843–846.

(c) Wyoming's policy of preserving county boundaries justifies the additional deviations from population equality resulting from the provision of representation for Niobrara County. Considerable population variations would remain even if Niobrara County's representative were eliminated. Under the 63-member plan, the average deviation per representative would be 13% and the maximum deviation would be 66%. These statistics make it clear that the grant of a representative to Niobrara County is not a significant cause of the population deviations in Wyoming. Moreover, the differences between the two plans are justified on the basis of the above policy of preserving county boundaries. By enacting the 64-member plan, the State ensured that this policy applies nondiscriminatorily, whereas the effect of the 63-member plan would be to deprive Niobrara County voters of their own representative. Pp. 846–848.

536 F. Supp. 780, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which STEVENS, J., joined, *post*, p. 848. BRENNAN, J., filed a dissenting opinion, in which WHITE, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 850.

*Sue Davidson* argued the cause and filed a brief for appellants.

*Randall T. Cox*, Assistant Attorney General of Wyoming, argued the cause *pro hac vice* for appellees Thyra Thomson et al. With him on the brief were *A. G. McClintock*, Attorney General, and *Peter J. Mulvaney*, Deputy Attorney General. *Richard Barrett* filed a brief for appellees James L. Thomson et al.

JUSTICE POWELL delivered the opinion of the Court.

The issue is whether the State of Wyoming violated the Equal Protection Clause by allocating one of the 64 seats in its House of Representatives to a county the population of which is considerably lower than the average population per state representative.

I

Since Wyoming became a State in 1890, its legislature has consisted of a Senate and a House of Representatives. The State's Constitution provides that each of the State's counties "shall constitute a senatorial and representative district" and that "[e]ach county shall have at least one senator and one representative." The senators and representatives are required to be "apportioned among the said counties as nearly as may be according to the number of their inhabitants." Wyo. Const., Art. 3, § 3.[1] The State has had 23 counties since 1922. Because the apportionment of the Wyoming House has been challenged three times in the past 20 years, some background is helpful.

In 1963 voters from the six most populous counties filed suit in the District Court for the District of Wyoming challenging the apportionment of the State's 25 senators and 61 representatives. The three-judge District Court held that the apportionment of the Senate—one senator allocated to each of the State's 23 counties, with the two largest counties having two senators—so far departed from the principle of population equality that it was unconstitutional. *Schaefer* v. *Thomson*, 240 F. Supp. 247, 251–252 (Wyo. 1964), supple-

[1] Article 3, § 3, of the Wyoming Constitution provides in relevant part: "Each county shall constitute a senatorial and representative district; the senate and house of representatives shall be composed of members elected by the legal voters of the counties respectively, every two (2) years. They shall be apportioned among the said counties as nearly as may be according to the number of their inhabitants. Each county shall have at least one senator and one representative; but at no time shall the number of members of the house of representatives be less than twice nor greater than three times the number of members of the senate."

mented, 251 F. Supp. 450 (1965), aff'd *sub nom. Harrison* v. *Schaefer*, 383 U. S. 269 (1966).[2] But the court upheld the apportionment of the State House of Representatives. The State's constitutional requirement that each county shall have at least one representative had produced deviations from population equality: the average deviation from the ideal number of residents per representative was 16%, while the maximum percentage deviation between largest and smallest number of residents per representative was 90%. See 1 App. Exhibits 16. The District Court held that these population disparities were justifiable as "the result of an honest attempt, based on legitimate considerations, to effectuate a rational and practical policy for the house of representatives under conditions as they exist in Wyoming." 240 F. Supp., at 251.

The 1971 reapportionment of the House was similar to that in 1963, with an average deviation of 15% and a maximum deviation of 86%. 1 App. Exhibits 18. Another constitutional challenge was brought in the District Court. The three-judge court again upheld the apportionment of the House, observing that only "five minimal adjustments" had been made since 1963, with three districts gaining a representative and two districts losing a representative because of population shifts. *Thompson* v. *Thomson*, 344 F. Supp. 1378, 1380 (Wyo. 1972).

The present case is a challenge to Wyoming's 1981 statute reapportioning its House of Representatives in accordance with the requirements of Art. 3, § 3, of the State Constitution. Wyo. Stat. § 28–2–109 (Supp. 1983).[3] The 1980 census

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[2] An example of the disparity in population was that Laramie County, the most populous county in the State, had two senators for its 60,149 people, whereas Teton County, the least populous county in the State, had one senator for its 3,062 people. See *Schaefer* v. *Thomson*, 240 F. Supp., at 250, n. 3.

[3] Wyoming Stat. § 28–2–109 (Supp. 1982) provides in relevant part: "(a) The ratios for the apportionment of senators and representatives are fixed as follows:

. . . . . .

placed Wyoming's population at 469,557. The statute provided for 64 representatives, meaning that the ideal apportionment would be 7,337 persons per representative. Each county was given one representative, including the six counties the population of which fell below 7,337. The deviations from population equality were similar to those in prior decades, with an average deviation of 16% and a maximum deviation of 89%. See 1 App. Exhibits 19–20.

The issue in this case concerns only Niobrara County, the State's least populous county. Its population of 2,924 is less than half of the ideal district of 7,337. Accordingly, the general statutory formula would have dictated that its population for purposes of representation be rounded down to zero. See § 28–2–109(a)(ii). This would have deprived Niobrara County of its own representative for the first time since it became a county in 1913. The state legislature found, however, that "the opportunity for oppression of the people of this state or any of them is greater if any county is deprived a representative in the legislature than if each is guaranteed at least one (1) representative."[4] It therefore followed the

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"(ii) The ratio for the apportionment of the representatives is the smallest number of people per representative which when divided into the population in each representative district as shown by the official results of the 1980 federal decennial census with fractions rounded to the nearest whole number results in a house with sixty-three (63) representatives;

"(iii) If the number of representatives for any county is rounded to zero (0) under the formula in paragraph (a)(ii) of this section, that county shall be given one (1) representative which is in addition to the sixty-three (63) representatives provided by paragraph (a)(ii) of this section;

"(iv) If the provisions of paragraph (a)(iii) of this section are found to be unconstitutional or have an unconstitutional result, then Niobrara county shall be joined to Goshen county in a single representative district and the house of representatives shall be apportioned as provided by paragraph (a)(ii) of this section."

[4] The legislature made the following findings:

"It is hereby declared the policy of this state is to preserve the integrity of county boundaries as election districts for the house of representatives. The legislature has considered the present population, needs, and other

State Constitution's requirement and expressly provided that a county would receive a representative even if the statutory formula rounded the county's population to zero. § 28–2–109(a)(iii). Niobrara County thus was given one seat in a 64-seat House. The legislature also provided that if this representation for Niobrara County were held unconstitutional, it would be combined with a neighboring county in a single representative district. The House then would consist of 63 representatives. § 28–2–109(a)(iv).

Appellants, members of the state League of Women Voters and residents of seven counties in which the population per representative is greater than the state average, filed this lawsuit in the District Court for the District of Wyoming. They alleged that "[b]y granting Niobrara County a representative to which it is not statutorily entitled, the voting privileges of Plaintiffs and other citizens and electors of Wyoming similarly situated have been improperly and illegally diluted in violation of the 14th Amendment . . . ." App. 3–4. They sought declaratory and injunctive relief that would prevent the State from giving a separate representative to Nio-

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characteristics of each county. The legislature finds that the needs of each county are unique and the interests of each county must be guaranteed a voice in the legislature. The legislature therefore, will utilize the provisions of article 3, section 3, of the Wyoming constitution as the determining standard in the reapportionment of the Wyoming house of representatives which guarantees each county at least one (1) representative. The legislature finds that the opportunity for oppression of the people of this state or any of them is greater if any county is deprived a representative in the legislature than if each is guaranteed at least one (1) representative. The legislature finds that the dilution of the power of counties which join together in making these declarations is trivial when weighed against the need to maintain the integrity of county boundaries. The legislature also finds that it is not practical or necessary to increase the size of the legislature beyond the provisions of this act in order to meet its obligations to apportion in accordance with constitutional requirements consistent with this declaration." 1981 Wyo. Sess. Laws, ch. 76, § 3.

brara County, thus implementing the alternative plan calling for 63 representatives.

The three-judge District Court upheld the constitutionality of the statute. 536 F. Supp. 780 (1982). The court noted that the narrow issue presented was the alleged discriminatory effect of a single county's representative, and concluded, citing expert testimony, that "the 'dilution' of the plaintiffs' votes is de minimis when Niobrara County has its own representative." *Id.*, at 783. The court also found that Wyoming's policy of granting a representative to each county was rational and, indeed, particularly well suited to the special needs of Wyoming. *Id.*, at 784.[5]

We noted probable jurisdiction, 459 U. S. 819 (1982), and now affirm.

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[5] The District Court stated:

"Wyoming as a state is unique among her sister states. A small population is encompassed by a large area. Counties have always been a major form of government in the State. Each county has its own special economic and social needs. The needs of the people are different and distinctive. Given the fact that the representatives from the combined counties of Niobrara and Goshen would probably come from the larger county, i. e., Goshen, the interests of the people of Niobrara County would be virtually unprotected.

"The people within each county have many interests in common such as public facilities, government administration, and work and personal problems. Under the facts of this action, to deny these people their own representative borders on abridging their right to be represented in the determination of their futures.

"In Wyoming, the counties are the primary administrative agencies of the State government. It has historically been the policy of the State that counties remain in this position.

"The taxing powers of counties are limited by the Constitution and some State statutes. Supplemental monies are distributed to the counties in accordance with appropriations designated by the State Legislature. It comes as no surprise that the financial requirements of each county are different. Without representation of their own in the State House of Representatives, the people of Niobrara County could well be forgotten." 536 F. Supp., at 784.

## II

### A

In *Reynolds* v. *Sims*, 377 U. S. 533, 568 (1964), the Court held that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." This holding requires only "that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable," for "it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters." *Id.*, at 577. See *Gaffney* v. *Cummings*, 412 U. S. 735, 745–748 (1973) (describing various difficulties in measurement of population).

We have recognized that some deviations from population equality may be necessary to permit the States to pursue other legitimate objectives such as "maintain[ing] the integrity of various political subdivisions" and "provid[ing] for compact districts of contiguous territory." *Reynolds*, *supra*, at 578. As the Court stated in *Gaffney*, "[a]n unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement." 412 U. S., at 749.

In view of these considerations, we have held that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." *Id.*, at 745. Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. See, *e. g.*, *Connor* v. *Finch*, 431 U. S. 407, 418 (1977); *White* v. *Regester*, 412 U. S. 755, 764 (1973). A plan with larger

disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State. See *Swann* v. *Adams*, 385 U. S. 440, 444 (1967) ("*De minimis* deviations are unavoidable, but variations of 30% among senate districts and 40% among house districts can hardly be deemed *de minimis* and none of our cases suggests that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy"). The ultimate inquiry, therefore, is whether the legislature's plan "may reasonably be said to advance [a] rational state policy" and, if so, "whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits." *Mahan* v. *Howell*, 410 U. S. 315, 328 (1973).

B

In this case there is no question that Niobrara County's deviation from population equality—60% below the mean—is more than minor. There also can be no question that Wyoming's constitutional policy—followed since statehood—of using counties as representative districts and ensuring that each county has one representative is supported by substantial and legitimate state concerns. In *Abate* v. *Mundt*, 403 U. S. 182, 185 (1971), the Court held that "a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality." See *Mahan* v. *Howell*, *supra*, at 329. Indeed, the Court in *Reynolds* v. *Sims*, *supra*, singled out preservation of political subdivisions as a clearly legitimate policy. See 377 U. S., at 580–581.

Moreover, it is undisputed that Wyoming has applied this factor in a manner "free from any taint of arbitrariness or discrimination." *Roman* v. *Sincock*, 377 U. S. 695, 710 (1964). The State's policy of preserving county boundaries is based on the State Constitution, has been followed for decades, and has been applied consistently throughout the State. As the

District Court found, this policy has particular force, given the peculiar size and population of the State and the nature of its governmental structure. See n. 5, *supra;* 536 F. Supp., at 784. In addition, population equality is the sole other criterion used, and the State's apportionment formula ensures that population deviations are no greater than necessary to preserve counties as representative districts. See *Mahan* v. *Howell*, *supra*, at 326 (evidence is clear that the plan "'produces the minimum deviation above and below the norm, keeping intact political boundaries'"). Finally, there is no evidence of "a built-in bias tending to favor particular political interests or geographic areas." *Abate* v. *Mundt*, *supra*, at 187. As Judge Doyle stated below:

> "[T]here is not the slightest sign of any group of people being discriminated against here. There is no indication that the larger cities or towns are being discriminated against; on the contrary, Cheyenne, Laramie, Casper, Sheridan, are not shown to have suffered in the slightest . . . degree. There has been no preference for the cattle-raising or agricultural areas as such." 536 F. Supp., at 788 (specially concurring).

In short, this case presents an unusually strong example of an apportionment plan the population variations of which are entirely the result of the consistent and nondiscriminatory application of a legitimate state policy.[6] This does not mean

[6] In contrast, many of our prior decisions invalidating state apportionment plans were based on the lack of proof that deviations from population equality were the result of a good-faith application of legitimate districting criteria. See, *e. g.*, *Chapman* v. *Meier*, 420 U. S. 1, 25 (1975) ("It is far from apparent that North Dakota policy currently requires or favors strict adherence to political lines. . . . Furthermore, a plan devised by [the Special Master] demonstrates that . . . the policy of maintaining township lines [does not] preven[t] attaining a significantly lower population variance"); *Kilgarlin* v. *Hill*, 386 U. S. 120, 124 (1967) *(per curiam)* (District Court did not "demonstrate why or how respect for the integrity of county lines required the particular deviations" or "articulate any satisfactory grounds for rejecting at least two other plans presented to the court, which re-

that population deviations of any magnitude necessarily are acceptable. Even a neutral and consistently applied criterion such as use of counties as representative districts can frustrate *Reynolds*' mandate of fair and effective representation if the population disparities are excessively high.[7] "[A] State's policy urged in justification of disparity in district population, however rational, cannot constitutionally be permitted to emasculate the goal of substantial equality." *Mahan* v. *Howell*, *supra*, at 326. It remains true, however, as the Court in *Reynolds* noted, that consideration must be given "to the character as well as the degree of deviations from a strict population basis." 377 U. S., at 581. The consistency of application and the neutrality of effect of the

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spected county lines but which produced substantially smaller deviations"); *Swann* v. *Adams*, 385 U. S. 440, 445–446 (1967) (no evidence presented that would justify the population disparities).

[7] As the *Reynolds* Court explained:

"Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-protection principle in that legislative body. This would be especially true in a State where the number of counties is large and many of them are sparsely populated, and the number of seats in the legislative body being apportioned does not significantly exceed the number of counties." 377 U. S., at 581.

See also *Connor* v. *Finch*, 431 U. S. 407, 419 (1977) ("[T]he policy against breaking county boundary lines is virtually impossible of accomplishment in a State where population is unevenly distributed among 82 counties, from which 52 Senators and 122 House members are to be elected").

This discussion in *Reynolds* is illustrated by the senatorial districts in Wyoming that were invalidated in 1963. Each county in the State had one senator, while the two largest counties had two. Because county population varied substantially, extremely large disparities in population per senator resulted. The six most populous counties, with approximately 65% of the State's population, had eight senators, whereas the six least populous counties, with approximately 8% of the population, had six senators. See *Schaefer* v. *Thomson*, 240 F. Supp., at 251, n. 5. The Wyoming House of Representatives presents a different case because the number of representatives is substantially larger than the number of counties.

nonpopulation criteria must be considered along with the size of the population disparities in determining whether a state legislative apportionment plan contravenes the Equal Protection Clause.

C

Here we are not required to decide whether Wyoming's nondiscriminatory adherence to county boundaries justifies the population deviations that exist throughout Wyoming's representative districts. Appellants deliberately have limited their challenge to the alleged dilution of their voting power resulting from the one representative given to Niobrara County.[8] The issue therefore is not whether a 16% average deviation and an 89% maximum deviation, considering the state apportionment plan as a whole, are constitutionally permissible. Rather, the issue is whether Wyoming's policy of preserving county boundaries justifies the additional deviations from population equality resulting from the provision of representation to Niobrara County.[9]

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[8] Counsel for appellants, who represent the state League of Women Voters, explained at oral argument: "[A] referendum had been passed by the League of Women Voters which authorized the attack of only that one portion of the reapportionment plan. It was felt by the membership or by the leadership of that group that no broader authority would ever be given because of the political ramifications and arguments that would be presented by the membership in attacking or considering . . . that broader authority." Tr. of Oral Arg. 8.

[9] The dissent suggests that we are required to pass upon the constitutionality of the apportionment of the entire Wyoming House of Representatives. See *post*, at 857–859 (BRENNAN, J., dissenting). Although in some prior cases challenging the apportionment of one legislative house the Court has addressed the constitutionality of the other house's apportionment as well, we never have held that a court is required to do so. For example, in *Gaffney* v. *Cummings*, 412 U. S. 735 (1973), we considered only the apportionment of the Connecticut General Assembly, noting expressly that the "Senate plan was not challenged in the District Court" and that "[a]ppellees do not challenge the Senate districts on the ground of their population deviations." *Id.*, at 739, n. 5. In this case, we see no reason why appellants should not be bound by the choices they made when filing this lawsuit.

It scarcely can be denied that in terms of actual effect on appellants' voting power, it matters little whether the 63-member or 64-member House is used. The District Court noted, for example, that the seven counties in which appellants reside will elect 28 representatives under either plan. The only difference, therefore, is whether they elect 43.75% of the legislature (28 of 64 members) or 44.44% of the legislature (28 of 63 members). 536 F. Supp., at 783.[10] The District Court aptly described this difference as "de minimis." *Ibid.*

We do not suggest that a State is free to create and allocate an additional representative seat in any way it chooses simply because that additional seat will have little or no effect on the remainder of the State's voters. The allocation of a representative to a particular political subdivision still may violate the Equal Protection Clause if it greatly exceeds the population variations existing in the rest of the State and if the State provides no legitimate justifications for the creation of that seat. Here, however, considerable population variations will remain even if Niobrara County's representative is eliminated. Under the 63-member plan, the average deviation per representative would be 13% and the maximum deviation would be 66%. See 1 App. Exhibits 22. These statistics make clear that the grant of a representative to Niobrara County is not a significant cause of the population deviations that exist in Wyoming.

Moreover, we believe that the differences between the two plans are justified on the basis of Wyoming's longstanding and legitimate policy of preserving county boundaries. See *supra*, at 841, n. 5, and 843–844. Particularly where there is no "taint of arbitrariness or discrimination," *Roman* v. *Sincock*, 377 U. S., at 710, substantial deference is to be accorded the political decisions of the people of a State acting

[10] Similarly, appellees note that under the 64-member plan, 46.65% of the State's voters theoretically could elect 51.56% of the representatives. Under the 63-member plan, 46.65% of the population could elect 50.79% of the representatives. See 1 App. Exhibits 32–33.

through their elected representatives. Here it is noteworthy that by enacting the 64-member plan the State ensured that its policy of preserving county boundaries applies nondiscriminatorily. The effect of the 63-member plan would be to deprive the voters of Niobrara County of their own representative, even though the remainder of the House of Representatives would be constituted so as to facilitate representation of the interests of each county. See 536 F. Supp., at 784; *id.*, at 786 (Doyle, J., specially concurring). In these circumstances, we are not persuaded that Wyoming has violated the Fourteenth Amendment by permitting Niobrara County to have its own representative.

The judgment of the District Court is

*Affirmed.*

JUSTICE O'CONNOR, with whom JUSTICE STEVENS joins, concurring.

By its decisions today in this case and in *Karcher* v. *Daggett*, *ante*, p. 725, the Court upholds, in the former, the allocation of one representative to a county in a state legislative plan with an 89% maximum deviation from population equality and strikes down, in the latter, a congressional reapportionment plan for the State of New Jersey where the maximum deviation is 0.6984%. As a Member of the majority in both cases, I feel compelled to explain the reasons for my joinder in these apparently divergent decisions.

In my view, the "one-person, one-vote" principle is the guiding ideal in evaluating both congressional and legislative redistricting schemes. In both situations, however, ensuring equal representation is not simply a matter of numbers. There must be flexibility in assessing the size of the deviation against the importance, consistency, and neutrality of the state policies alleged to require the population disparities.

Both opinions recognize this need for flexibility in examining the asserted state policies.[1] In *Karcher*, New Jersey

[1] As the Court notes in this case: "[C]onsideration must be given 'to the character as well as the degree of deviations from a strict population

has not demonstrated that the population variances in congressional districts were necessary to preserve minority voting strength—the only justification offered by the State. *Ante*, at 742–744. Here, by contrast, there can be no doubt that the population deviation resulting from the provision of one representative to Niobrara County is the product of the consistent and nondiscriminatory application of Wyoming's longstanding policy of preserving county boundaries.

In addition, as the Court emphasizes, in this case we are not required to decide whether, and do not suggest that, "Wyoming's nondiscriminatory adherence to county boundaries justifies the population deviations that exist throughout Wyoming's representative districts." *Ante*, at 846. Thus, the relevant percentage in this case is not the 89% maximum deviation when the State of Wyoming is viewed as a whole, but the additional deviation from equality produced by the allocation of one representative to Niobrara County. *Ibid.*

In this regard, I would emphasize a point acknowledged by the majority. See *ante*, at 844–845. Although the maximum deviation figure is not the controlling element in an apportionment challenge, even the consistent and nondiscriminatory application of a legitimate state policy cannot justify substantial population deviations throughout the State where the effect would be to eviscerate the one-person, one-vote principle. In short, as the Court observes, *ibid.*, there is clearly

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basis.'. . . The consistency of application and the neutrality of effect of the nonpopulation criteria must be considered along with the size of the population disparities in determining whether a state legislative apportionment plan contravenes the Equal Protection Clause." *Ante*, at 845–846. Similarly, in *Karcher*, the Court observes:

"The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to these factors." *Ante*, at 741.

some outer limit to the magnitude of the deviation that is constitutionally permissible even in the face of the strongest justifications.

In the past, this Court has recognized that a state legislative apportionment scheme with a maximum population deviation exceeding 10% creates a prima facie case of discrimination. See, *e. g.*, *Connor* v. *Finch*, 431 U. S. 407, 418 (1977). Moreover, in *Mahan* v. *Howell*, 410 U. S. 315, 329 (1973), we suggested that a 16.4% maximum deviation "may well approach tolerable limits."[2] I have the gravest doubts that a statewide legislative plan with an 89% maximum deviation could survive constitutional scrutiny despite the presence of the State's strong interest in preserving county boundaries. I join the Court's opinion on the understanding that nothing in it suggests that this Court would uphold such a scheme.

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

The Court today upholds a reapportionment scheme for a state legislature featuring an 89% maximum deviation and a 16% average deviation from population equality. I cannot agree.

I

Although I disagree with today's holding, it is worth stressing how extraordinarily narrow it is, and how empty of likely precedential value. The Court goes out of its way to make clear that because appellants have chosen to attack only one small feature of Wyoming's reapportionment scheme, the Court weighs only the *marginal* unequalizing effect of that one feature, and not the overall constitutionality of the entire scheme. *Ante*, at 846, and nn. 8, 9; see *ante*,

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[2] The Court has recognized that States enjoy a somewhat greater degree of latitude as to population disparities in a state legislative apportionment scheme, which is tested under Equal Protection Clause standards, than in a congressional redistricting scheme, for which the Court has held that Art. I, § 2, of the Constitution provides the governing standard. *White* v. *Regester*, 412 U. S. 755, 763 (1973).

at 849 (O'CONNOR, J., concurring). Hence, although in my view the Court reaches the wrong result in the case at hand, it is unlikely that any future plaintiffs challenging a state reapportionment scheme as unconstitutional will be so unwise as to limit their challenge to the scheme's single most objectionable feature. Whether this will be a good thing for the speed and cost of constitutional litigation remains to be seen. But at least plaintiffs henceforth will know better than to exercise moderation or restraint in mounting constitutional attacks on state apportionment statutes, lest they forfeit their small claim by omitting to assert a big one.

## II

## A

The Equal Protection Clause of the Fourteenth Amendment requires that a State, in apportioning its legislature, "make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Reynolds* v. *Sims*, 377 U. S. 533, 577 (1964). Under certain conditions the Constitution permits small deviations from absolute equality in state legislative districts,[1] but we have carefully circumscribed the range of permissible deviations as to both degree and kind. What is required is "a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." *Roman* v. *Sincock*, 377 U. S. 695, 710 (1964). "[T]he overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Reynolds*, *supra*, at 579.

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[1] As the Court notes, of course, we have been substantially more demanding with respect to apportionment of federal congressional districts. *Mahan* v. *Howell*, 410 U. S. 315, 320–325 (1973). See generally *Karcher* v. *Daggett*, *ante*, p. 725; *White* v. *Weiser*, 412 U. S. 783 (1973); *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969).

Our cases since *Reynolds* have clarified the structure of constitutional inquiry into state legislative apportionments, setting up what amounts to a four-step test. First, a plaintiff must show that the deviations at issue are sufficiently large to make out a prima facie case of discrimination. We have come to establish a rough threshold of 10% maximum deviation from equality (adding together the deviations from average district size of the most underrepresented and most overrepresented districts); below that level, deviations will ordinarily be considered *de minimis*. *Ante*, at 842–843; *Connor* v. *Finch*, 431 U. S. 407, 418 (1977); *White* v. *Regester*, 412 U. S. 755, 763–764 (1973). Second, a court must consider the quality of the reasons advanced by the State to explain the deviations. Acceptable reasons must be "legitimate considerations incident to the effectuation of a rational state policy," *Reynolds*, *supra*, at 579, and must be "free from any taint of arbitrariness or discrimination," *Roman*, *supra*, at 710. See *Mahan* v. *Howell*, 410 U. S. 315, 325–326 (1973). Third, the State must show that "the state policy urged . . . to justify the divergences . . . is, indeed, furthered by the plan," *id.*, at 326. This necessarily requires a showing that any deviations from equality are not significantly greater than is necessary to serve the State's asserted policy; if another plan could serve that policy substantially as well while providing smaller deviations from equality, it can hardly be said that the larger deviations advance the policy. See, *e. g.*, *Kilgarlin* v. *Hill*, 386 U. S. 120, 123–124 (1967); *Mahan*, *supra*, at 319–320, 326; *Connor*, *supra*, at 420–421. Fourth, even if the State succeeds in showing that the deviations in its plan are justified by their furtherance of a rational state policy, the court must nevertheless consider whether they are small enough to be constitutionally tolerable. "For a State's policy urged in justification of disparity in district population, however rational, cannot constitutionally be permitted to emasculate the goal of substantial population equality." *Mahan*, *supra*, at 326.

B

It takes little effort to show that Wyoming's 1981 House of Representatives apportionment is manifestly unconstitutional under the test established by our cases, whether one considers the instance of Niobrara County alone or in combination with the large deviations present in the rest of the scheme.

It is conceded all around, of course, that appellants have shown a prima facie case of discrimination. Wyoming's 89% maximum deviation greatly exceeds our "under 10%" threshold; indeed, so great is the inequality in this plan that even its 16% *average* deviation from ideal district size exceeds the threshold we have set for maximum deviations. On the other hand, one might reasonably concede that the State has met the second and third steps. Wyoming's longstanding policy of using counties as the basic units of representation is a rational one, found by the District Court to be untainted by arbitrariness or discrimination. It appears as well that the deviations at issue could not be reduced (at least not without substantially increasing the size of the House of Representatives) consistently with Wyoming's goals of using county lines and assuring each county at least one representative. It cannot plausibly be argued, however, that Wyoming's plan passes the fourth test—that its deviations, even if justified by state policy, be within the constitutionally tolerable range of size.

We have warned that although maintenance of county or other political boundaries can justify small deviations, it cannot be allowed to negate the fundamental principle of one person, one vote. *E. g.*, *Connor*, *supra*, at 419. Likewise, we have recognized that it may not always be feasible, within constitutional constraints, to guarantee each county or subdivision a representative of its own. "Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-

population principle in that legislative body." *Reynolds*, 377 U. S., at 581 (footnote omitted); see *Mahan*, *supra*, at 349, n. 11 (BRENNAN, J., concurring in part and dissenting in part). And we have unambiguously rejected reliance on the very factor the State urges as the reason for its plan, stating that sparseness of population, far from excusing deviations from equality, actually *increases* the need for equality among districts:

> "[S]parse population is not a legitimate basis for a departure from the goal of equality. A State with a sparse population may face problems different from those faced by one with a concentrated population, but that, without more, does not permit a substantial deviation from the average. Indeed, in a State with a small population, each individual vote may be more important to the result of an election than in a highly populated State. Thus, *particular emphasis should be placed on establishing districts with as exact population equality as possible.*" *Chapman* v. *Meier*, 420 U. S. 1, 24–25 (1975) (emphasis added).

Accord, *Connor*, *supra*, at 418–419, n. 18; see *Reynolds*, *supra*, at 580.

As the Court implicitly acknowledges, *ante*, at 843, Niobrara County's overrepresentation—60% compared to the ideal district size—cannot be considered "the kind of 'minor' variatio[n] which *Reynolds* v. *Sims* indicated might be justified by local policies counseling the maintenance of established political subdivisions in apportionment plans." *Kilgarlin*, 386 U. S., at 123. In *Kilgarlin*, we expressed strong doubt that the 26% maximum deviation there could ever be permitted, *ibid.* In *Mahan*, we warned that a 16.4% maximum deviation, even though fully justified by state policy, "may well approach tolerable limits." 410 U. S., at 329. See also *Abate* v. *Mundt*, 403 U. S. 182, 187 (1971). Here, by contrast, Niobrara County voters are given more than two and a half times the voting strength of the average Wyoming voter,

and more than triple the voting strength of voters in some counties.[2] "[I]f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted." *Reynolds*, *supra*, at 562. The creation of this district represents not a deviation from the principle of population equality, but an absolute disregard of it. Niobrara County, alone in the State, has been allocated a seat "on a basis wholly unrelated to population." *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633, 645 (1964). This hardly constitutes "a faithful adherence to a plan of population-based representation." *Roman*, 377 U. S., at 710.

If the rest of the State is considered as well, the picture becomes even worse. The scheme's treatment of Niobrara County is not a single, isolated abuse, but merely the worst of many objectionable features. Of Wyoming's 23 counties, only 9 are within as much as 10% of population proportionality. The populations per representative of Sublette and Crook Counties are, respectively, 38% and 28% below the statewide average; those of Washakie and Teton Counties are 29% and 28%, respectively, above that figure. The average deviation from ideal district size is 16%. The figures could be spun out further, but it is unnecessary. It is not surprising, then, that the Court makes no effort to uphold the plan as a whole. On the contrary, at least two Members of the majority express their "gravest doubts that a statewide legislative plan with an 89% maximum deviation could survive

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[2] The ideal district size—statewide population divided by number of seats—is 7,337; Niobrara County's population is 2,924. Thus, the average representative represents 2.59 times as many constituents as Niobrara County's representative. Similarly, the populations of Washakie and Teton Counties are, respectively, 3.25 and 3.19 times as large as the population of Niobrara County, yet all three counties are given one representative each. 1 App. Exhibits 19–20.

constitutional scrutiny despite the presence of the State's strong interest in preserving county boundaries." *Ante*, at 850 (O'CONNOR, J., joined by STEVENS, J., concurring).

C

The Court attempts to escape these stark facts through two lines of reasoning, each relying on an unspoken legal premise. Neither withstands examination.

First, the Court apparently assumes that the only aspect of unequal representation that matters is the degree of vote dilution suffered by any one individual voter. See *ante*, at 847. The Court is mistaken. Severe dilution of the votes of a relatively small number of voters is perhaps the most disturbing result that may attend invalid apportionments, because those unfortunate victims may be virtually disfranchised. It is not the sole evil to be combated, however. It is equally illegal to enact a scheme under which a small group is greatly *over*represented, at the expense of all other voters in the State. Such a "rotten borough"[3] plan does tend to yield small figures supposedly measuring the harm to single individuals, as the Court's opinion illustrates; but that analysis overlooks the fact that very large numbers of persons are adversely affected.[4] It is the *principle* of equal representation, as well as the votes of individual plaintiffs, that a State may not dilute. *Reynolds*, *supra*, at 578. Just as the Equal Protection Clause does not permit a small class of voters to be deprived of fair and equal voting power, so does it forbid the elevation of a small class of "supervoters" granted an extraordinarily powerful franchise. We would not permit Wyoming, in its legislative elections, to grant a double- or triple-counted vote to 2,924 voters because they were named Jones, or because they were licensed to practice law—even though such an enactment would, by the Court's reasoning, have

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[3] See generally *Reynolds* v. *Sims*, 377 U. S. 533, 567–568, n. 44 (1964); *Baker* v. *Carr*, 369 U. S. 186, 302–307 (1962) (Frankfurter, J., dissenting).

[4] Cf. *Swann* v. *Adams*, 385 U. S. 440, 443 (1967).

only a *de minimis* effect on the rights of the rest of Wyoming's voters. Why, then, is it permissible to create such an exalted class based on location of residence?

The Court relies more directly on its unspoken assumption that we may judge the constitutionality of Niobrara County's representation by first severing that feature from the rest of the scheme, and then weighing it only by its incremental effect in increasing the degree of inequality present in the system as a whole.

> "Appellants deliberately have limited their challenge to the alleged dilution of their voting power resulting from the one representative given to Niobrara County. The issue therefore is not whether a 16% average deviation and an 89% maximum deviation, considering the state apportionment plan as a whole, are constitutionally permissible. Rather, the issue is whether Wyoming's policy of preserving county boundaries justifies the additional deviations from population equality resulting from the provision of representation to Niobrara County." *Ante*, at 846 (footnotes omitted).

The first leg of this logic—that the Niobrara problem is legally severable from the rest of the plan—is contradicted by our prior decisions. The second leg—that we should examine only the marginal unequalizing effect—leads to exceptionally perverse results.

We confronted an analogous situation in *Maryland Committee for Fair Representation* v. *Tawes*, 377 U. S. 656 (1964). The State argued in *Tawes* that since the plaintiffs had allegedly conceded that one house of the Maryland Legislature was constitutionally apportioned, and the courts below had passed only on the apportionment of the other house, this Court was required to limit its consideration to the apportionment of the challenged house. We flatly rejected the argument:

> "Regardless of possible concessions made by the parties and the scope of the consideration of the courts

> below, in reviewing a state legislative apportionment case this Court must of necessity consider the challenged scheme as a whole in determining whether the particular State's apportionment plan, in its entirety, meets federal constitutional requisites. It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house. Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the State's voters, in both houses of a bicameral state legislature. We therefore reject [the State's] contention that the Court is precluded from considering the validity of the apportionment of the Maryland House of Delegates." *Id.*, at 673.

Accord, *Lucas* v. *Colorado General Assembly*, 377 U. S. 713, 735, n. 27 (1964).[5]

Although we have not invariably adhered to this rule with regard to the two *houses* of a legislature, the concerns that led us in *Tawes* to examine both houses, despite the scope of the plaintiffs' complaint, forbid us to consider the allocation of one *seat* without also examining the remainder of Wyoming's apportionment of its House of Representatives. A plan with only a single deviation—a good deal smaller than this one,

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[5] "[In] *Maryland Committee for Fair Representation* v. *Tawes*, . . . we discussed the need for considering the apportionment of seats in both houses of a bicameral state legislature in evaluating the constitutionality of a state legislative apportionment scheme, *regardless of what matters were raised by the parties and decided by the court below.* Consistent with this approach, in determining whether a good faith effort to establish districts substantially equal in population has been made, a court must necessarily consider a State's legislative apportionment scheme as a whole. *Only after evaluation of an apportionment plan in its totality can a court determine whether there has been sufficient compliance with the requisites of the Equal Protection Clause.*" 377 U. S., at 735, n. 27 (emphasis added). See also *Burns* v. *Richardson*, 384 U. S. 73, 83 (1966).

and necessary to carry out a rational state policy—might well be tolerated, even though in the same situation a greater number of substantial deviations would be unacceptable as too much of a departure from the goal of equality. See *Lucas*, *supra*, at 735, n. 27. Where that greater number of deviations is present, as in this case, common sense as well as *Tawes* and *Lucas* require us to consider the plan as a whole. The inequality created by Niobrara County's representation—a 23% increase in the maximum deviation from equality—is necessarily cumulative with the inequality imposed in the rest of the system. It is playing artificial tricks to assert that the fairness of the allocation of one seat in a legislative body can or should be considered as though it had no connection to the other seats, or to the fairness of their allocation. Indeed, the Court's own method contradicts its suggestion that the Niobrara problem is severable. The Court is fully willing to *consider* the system's other inequalities in this case, and even to give them controlling weight—only it wishes to consider those inequalities as weighing *in favor of* the plan. See *infra*, this page and 860. I agree with the Court that we may not consider Niobrara County in a vacuum; it seems to me, however, that the existence of numerous instances of inequality ought to be considered an *undesirable* feature in an apportionment plan, not a saving one. Only by examining the plan "in its totality," *Lucas*, *supra*, at 735, n. 27, may we judge whether the allocation of any seat in the House is constitutional. This Court is not bound by a referendum of the League of Women Voters. See *ante*, at 846, n. 8.

Here, Wyoming's error in granting Niobrara County voters a vote worth double or triple the votes of other Wyoming voters is compounded by the impermissibly large disparities in voting power existing in the rest of the apportionment plan. *Supra*, at 855. Yet, astonishingly, the Court manages to turn that damning fact to the State's *favor:*

> "The allocation of a representative to a particular political subdivision still may violate the Equal Protection Clause if it greatly exceeds the population variations ex-

> isting in the rest of the State and if the State provides no legitimate justifications for the creation of that seat. Here, however, considerable population variations will remain even if Niobrara County's representative is eliminated. . . . These statistics make clear that the grant of a representative to Niobrara County is not a significant cause of the population deviations that exist in Wyoming." *Ante*, at 847.

Under this reasoning, the further Wyoming's apportionment plan departs from substantial equality, the more likely it is to withstand constitutional attack. It is senseless to create a rule whereby a single instance of gross inequality is unconstitutional if it occurs in a plan otherwise letter-perfect, but constitutional if it occurs in a plan that, even without that feature, flagrantly violates the Constitution. That, however, is precisely what the Court does today.[6]

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[6] This case also presents an issue as to what relief should be accorded. At an absolute minimum, the District Court should have granted the relief requested by appellants—the combination of Niobrara and Goshen Counties into one district, as provided by the Wyoming Legislature in case its first plan was found unconstitutional. See *ante*, at 840. That would have yielded a combined district of virtually perfect size, and would have reduced the plan's maximum deviation from 89% to 66%. This improvement alone—23%—is larger than any maximum deviation we have ever approved, with or without justification. See *supra*, at 854.

In my view, however, the District Court should have required Wyoming to devise an apportionment plan constitutional in its entirety. In *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971), the plaintiffs' complaint attacked Indiana's apportionment statute only as to one county. *Id.*, at 137. We reversed the District Court's judgment that that county was unconstitutionally apportioned. Nevertheless, we expressly approved the District Court's decision to expand the relief granted to include reapportionment of the entire State. "After determining that Marion County required reapportionment, the court concluded that 'it becomes clear beyond question that the evidence adduced in this case and the additional apportionment requirements set forth by the Supreme Court call for a redistricting of the entire state as to both houses of the General

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JUSTICE O'CONNOR, joined by JUSTICE STEVENS, states that she has "the gravest doubts that a statewide legislative plan with an 89% maximum deviation could survive constitutional scrutiny . . . ." *Ante*, at 850 (concurring opinion). But the Court today holds that just such a plan does survive constitutional scrutiny. I dissent.

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Assembly.'" *Id.*, at 161 (plurality opinion), quoting 305 F. Supp. 1364, 1391 (SD Ind. 1969); see 403 U. S., at 172–173, 179–180 (Douglas, J., concurring in result in part). See also *supra*, at 857–859, and n. 5; Fed. Rule Civ. Proc. 54(c).

# ZANT, WARDEN *v.* STEPHENS

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

No. 81–89. Argued February 24, 1982—Question certified May 3, 1982—Decided June 22, 1983

In a bifurcated trial in a Georgia state court, a jury found respondent guilty of murder and imposed the death penalty. At the sentencing phase of the trial, the judge instructed the jury that it was authorized to consider all of the evidence received during the guilt phase of the trial as well as all facts and circumstances presented in mitigation or aggravation during the sentencing proceeding, and that it must find and designate in writing the existence of one or more specified statutory aggravating circumstances in order to impose the death penalty. The jury stated in writing that it found the statutory aggravating circumstances that respondent had a prior conviction of a capital felony, that he had "a substantial history of serious assaultive criminal convictions," and that the murder was committed by an escapee. While respondent's appeal was pending, the Georgia Supreme Court held in another case that one of the aggravating circumstances—"substantial history of serious assaultive criminal convictions"—was unconstitutionally vague. In respondent's case, the Georgia Supreme Court held that the two other aggravating circumstances adequately supported the sentence. After the Federal District Court denied respondent's petition for habeas corpus, the Court of Appeals held that respondent's death penalty was invalid. In response to this Court's certified question, *Zant* v. *Stephens*, 456 U. S. 410, the Georgia Supreme Court explained the state-law premises for its view that the failure of one aggravating circumstance does not invalidate a death sentence that is otherwise adequately supported by other aggravating circumstances. Under Georgia law the finding of a statutory aggravating circumstance serves a limited purpose—it identifies those members of the class of persons convicted of murder who are eligible for the death penalty, without furnishing any further guidance to the jury in the exercise of its discretion in determining whether the death penalty should be imposed.

*Held:*

1. The limited function served by the jury's finding of a statutory aggravating circumstance does not render Georgia's statutory scheme invalid under the holding in *Furman* v. *Georgia*, 408 U. S. 238. Under Georgia's scheme, the jury is required to find and identify in writing at least one valid statutory aggravating circumstance, an individualized

determination must be made on the basis of the defendant's character and the circumstances of the crime, and the State Supreme Court reviews the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate. The narrowing function of statutory aggravating circumstances was properly achieved in this case by the two valid aggravating circumstances upheld by the Georgia Supreme Court, because these two findings adequately differentiate this case in an objective, evenhanded, and substantively rational way from the many Georgia murder cases in which the death penalty may not be imposed. Moreover, the Georgia Supreme Court reviewed respondent's death sentence to determine whether it was arbitrary, excessive, or disproportionate. Thus the Georgia capital sentencing statute is not invalid as applied here. Pp. 873–880.

2. *Stromberg* v. *California*, 283 U. S. 359, does not require that respondent's death sentence be vacated. *Stromberg* requires that a general guilty verdict be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground. In this case, however, the jury did not merely return a general verdict stating that it had found at least one aggravating circumstance, but instead expressly found two aggravating circumstances that were valid and legally sufficient to support the death penalty. Nor is a second rule derived from *Stromberg*—requiring that a general guilty verdict on a single-count indictment or information be set aside where it rests on both a constitutional and an unconstitutional ground—applicable here. There is no suggestion that any of the aggravating circumstances involved any conduct protected by the Constitution. Pp. 880–884.

3. Respondent's death sentence was not impaired on the asserted ground that the jury instruction with regard to the invalid statutory aggravating circumstance may have unduly affected the jury's deliberations. Although the aggravating circumstance was struck down by the Georgia Supreme Court because it failed to provide an adequate basis for distinguishing a murder case in which the death penalty may be imposed from those cases in which such a penalty may not be imposed, the underlying evidence as to respondent's history of serious assaultive criminal convictions was fully admissible under Georgia law at the sentencing phase of the trial. Pp. 884–891.

631 F. 2d 397 and 648 F. 2d 446, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in part and concurring in the judgment,

*post*, p. 891. REHNQUIST, J., filed an opinion concurring in the judgment, *post*, p. 893. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 904.

After the Georgia Supreme Court's response to the certified question, supplemental briefs were filed by *Michael J. Bowers*, Attorney General of Georgia, *William B. Hill, Jr.*, Senior Assistant Attorney General, *Robert S. Stubbs II*, Executive Assistant Attorney General, and *Marion O. Gordon*, First Assistant Attorney General, for petitioner, and by *James C. Bonner, Jr.*, *Jack Greenberg*, *James M. Nabrit III*, *Joel Berger*, *John Charles Boger*, *Deborah Fins*, and *Anthony G. Amsterdam* for respondent.

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether respondent's death penalty must be vacated because one of the three statutory aggravating circumstances found by the jury was subsequently held to be invalid by the Supreme Court of Georgia, although the other two aggravating circumstances were specifically upheld. The answer depends on the function of the jury's finding of an aggravating circumstance under Georgia's capital sentencing statute, and on the reasons that the aggravating circumstance at issue in this particular case was found to be invalid.

In January 1975 a jury in Bleckley County, Georgia, convicted respondent of the murder of Roy Asbell and sentenced him to death. The evidence received at the guilt phase of his trial, which included his confessions and the testimony of a number of witnesses, described these events: On August 19, 1974, while respondent was serving sentences for several burglary convictions and was also awaiting trial for escape, he again escaped from the Houston County Jail. In the next two days he committed two auto thefts, an armed robbery, and several burglaries. On August 21st, Roy Asbell interrupted respondent and an accomplice in the course of burglarizing the home of Asbell's son in Twiggs County. Re-

spondent beat Asbell, robbed him, and, with the aid of the accomplice, drove him in his own vehicle a short distance into Bleckley County. There they killed Asbell by shooting him twice through the ear at point blank range.

At the sentencing phase of the trial the State relied on the evidence adduced at the guilt phase and also established that respondent's prior criminal record included convictions on two counts of armed robbery, five counts of burglary, and one count of murder. Respondent testified that he was "sorry" and knew he deserved to be punished, that his accomplice actually shot Asbell, and that they had both been "pretty high" on drugs. The State requested the jury to impose the death penalty and argued that the evidence established the aggravating circumstances identified in subparagraphs (b)(1), (b)(7), and (b)(9) of the Georgia capital sentencing statute.[1]

The trial judge instructed the jury that under the law of Georgia "every person [found] guilty of Murder shall be punished by death or by imprisonment for life, the sentence to be fixed by the jury trying the case." App. 18. He explained that the jury was authorized to consider all of the evidence

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[1] Georgia Code § 27–2534.1(b) (1978) provided, in part:

"In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

"(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

. . . . . .

"(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

. . . . . .

"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement."

received during the trial as well as all facts and circumstances presented in extenuation, mitigation, or aggravation during the sentencing proceeding. He then stated:

> "You may consider any of the following statutory aggravating circumstances which you find are supported by the evidence. One, the offense of Murder was committed by a person with a prior record of conviction for a Capital felony, or the offense of Murder was committed by a person who has a substantial history of serious assaultive criminal convictions. Two, the offense of Murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim. Three, the offense of Murder was committed by a person who has escaped from the lawful custody of a peace officer or place of lawful confinement. These possible statutory circumstances are stated in writing and will be out with you during your deliberations on the sentencing phase of this case. They are in writing here, and I shall send this out with you. If the jury verdict on sentencing fixes punishment at death by electrocution you shall designate in writing, signed by the foreman, the aggravating circumstances or circumstance which you found to have been proven beyond a reasonable doubt. Unless one or more of these statutory aggravating circumstances are proven beyond a reasonable doubt you will not be authorized to fix punishment at death."[2]

The jury followed the court's instruction and imposed the death penalty. It designated in writing that it had found the aggravating circumstances described as "One" and "Three" in the judge's instruction.[3] It made no such finding with re-

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[2] The instruction to the sentencing jury, App. 18–19, is quoted in full in our opinion in *Zant* v. *Stephens*, 456 U. S. 410, 412–413, n. 1 (1982).

[3] The jury made the following special findings:

"(1) The offense of Murder was committed by a person with a prior record of conviction for a capital felony. The offense of Murder was committed by

spect to "Two."[4] It should be noted that the jury's finding under "One" encompassed both alternatives identified in the judge's instructions and in subsection (b)(1) of the statute—that respondent had a prior conviction of a capital felony and that he had a substantial history of serious assaultive convictions. These two alternatives and the finding that the murder was committed by an escapee are described by the parties as the three aggravating circumstances found by the jury, but they may also be viewed as two statutory aggravating circumstances, one of which rested on two grounds.

In his direct appeal to the Supreme Court of Georgia respondent did not challenge the sufficiency of the evidence supporting the aggravating circumstances found by the jury. Nor did he argue that there was any infirmity in the statutory definition of those circumstances. While his appeal was pending, however, the Georgia Supreme Court held in *Arnold* v. *State*, 236 Ga. 534, 539–542, 224 S. E. 2d 386, 391–392 (1976), that the aggravating circumstance described in the second clause of (b)(1)—"a substantial history of serious assaultive criminal convictions"—was unconstitutionally vague.[5] Because such a finding had been made by the jury in this case, the Georgia Supreme Court, on its own motion,

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a person who has a substantial history of serious assaultive criminal convictions. (2) The offense of Murder was committed by a person who has escaped from the lawful custody of a peace officer and place of lawful confinement." App. 23.

[4] Thus, this case does not implicate our holding in *Godfrey* v. *Georgia*, 446 U. S. 420 (1980), that the (b)(7) aggravating circumstance as construed by the Georgia Supreme Court was unconstitutionally broad and vague.

[5] The defendant in *Arnold* had been sentenced to death by a jury which found no other aggravating circumstance. On appeal, he contended that the language of the clause "does not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. *Coley* v. *State*, [231 Ga. 829, 834, 204 S. E. 2d 612, 615 (1974)]; Furman v. Georgia, 408 U. S. 238 (1971)." The Georgia Supreme Court agreed that the statutory language was too vague and nonspecific to be applied evenhandedly by a jury. 236 Ga., at 540–542, 224 S. E. 2d, at 391–392.

considered whether it impaired respondent's death sentence. It concluded that the two other aggravating circumstances adequately supported the sentence. *Stephens* v. *State*, 237 Ga. 259, 261–262, 227 S. E. 2d 261, 263, cert. denied, 429 U. S. 986 (1976). The state court reaffirmed this conclusion in a subsequent appeal from the denial of state habeas corpus relief. *Stephens* v. *Hopper*, 241 Ga. 596, 603–604, 247 S. E. 2d 92, 97–98, cert. denied, 439 U. S. 991 (1978).[6]

After the Federal District Court had denied a petition for habeas corpus, the United States Court of Appeals for the Fifth Circuit considered two constitutional challenges to respondent's death sentence. 631 F. 2d 397 (1980). That court first rejected his contention that the jury was not adequately instructed that it was permitted to impose life imprisonment rather than the death penalty even if it found an aggravating circumstance.[7] The court then held, however, that the death penalty was invalid because one of the aggravating circumstances found by the jury was later held unconstitutional.

The Court of Appeals gave two reasons for that conclusion. First, it read *Stromberg* v. *California*, 283 U. S. 359 (1931), as requiring that a jury verdict based on multiple grounds be set aside if the reviewing court cannot ascertain

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[6] In his state habeas petition, respondent unsuccessfully challenged the aggravating circumstance that he had a prior conviction for a capital felony. He was admittedly under such a conviction at the time of his trial in this case, but not at the time of the murder. The Supreme Court of Georgia interpreted the statute, Ga. Code § 27–2534.1(b)(1) (1978), as referring to the defendant's record at the time of sentencing. Accordingly, respondent's contention was rejected. 241 Ga., at 602–603, 247 S. E. 2d, at 96–97. Respondent renewed his challenge to that aggravating circumstance in his federal habeas petition, but the Court of Appeals correctly recognized that it had no authority to question the Georgia Supreme Court's interpretation of state law. 631 F. 2d 397, 405 (CA5 1980). The contention is not renewed here.

[7] *Id.*, at 404–405. This aspect of the Court of Appeals' decision is not before us.

whether the jury relied on an unconstitutional ground. The court concluded:

> "It is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance. The jury had the authority to return a life sentence even if it found statutory aggravating circumstances. It is possible that even if the jurors believed that the other aggravating circumstances were established, they would not have recommended the death penalty but for the decision that the offense was committed by one having a substantial history of serious assaultive criminal convictions, an invalid ground." 631 F. 2d, at 406.

Second, it believed that the presence of the invalid circumstance "made it possible for the jury to consider several prior convictions of [respondent] which otherwise would not have been before it." *Ibid.*

In a petition for rehearing, the State pointed out that the evidence of respondent's prior convictions would have been admissible at the sentencing hearing even if it had not relied on the invalid circumstance.[8] The Court of Appeals then modified its opinion by deleting its reference to the possibility that the jury had relied on inadmissible evidence. 648 F. 2d 446 (1981). It maintained, however, that the reference in the instructions to the invalid circumstance "may have unduly directed the jury's attention to his prior convictions." *Ibid.* The court concluded: "It cannot be determined with the degree of certainty required in capital cases that the instruction did not make a critical difference in the jury's decision to impose the death penalty." *Ibid.*

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[8] Ga. Code § 27–2503(a) (1978); 241 Ga., at 603–604, 247 S. E. 2d, at 97–98; see *infra*, at 886–887.

We granted Warden Zant's petition for certiorari, 454 U. S. 814 (1981). The briefs on the merits revealed that different state appellate courts have reached varying conclusions concerning the significance of the invalidation of one of multiple aggravating circumstances considered by a jury in a capital case.[9] Although the Georgia Supreme Court had consistently stated that the failure of one aggravating circumstance does not invalidate a death sentence that is otherwise adequately supported,[10] we concluded that an exposition of the state-law premises for that view would assist in framing the precise federal constitutional issues presented by the Court of Appeals' holding. We therefore sought guidance from the Georgia Supreme Court pursuant to Georgia's statutory certification procedure. Ga. Code § 24–4536 (Supp. 1980). *Zant* v. *Stephens*, 456 U. S. 410 (1982).[11]

In its response to our certified question, the Georgia Supreme Court first distinguished *Stromberg* as a case in which the jury might have relied exclusively on a single invalid ground, noting that the jury in this case had expressly relied on valid and sufficient grounds for its verdict. The court then explained the state-law premises for its treatment of aggravating circumstances by analogizing the entire body of Georgia law governing homicides to a pyramid. It explained:

> "All cases of homicide of every category are contained within the pyramid. The consequences flowing to the

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[9] Brief for Respondent 40–45; Brief for State of Alabama et al. as *Amici Curiae* 13–15.

[10] 456 U. S., at 414; cf. *Gregg* v. *Georgia*, 428 U. S. 153, 201, n. 53 (1976) (noting cases in which the Georgia Supreme Court had not explicitly relied on one of several aggravating circumstances when it upheld the death sentence).

[11] We certified the following question:

"What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?" 456 U. S., at 416–417.

perpetrator increase in severity as the cases proceed from the base to the apex, with the death penalty applying only to those few cases which are contained in the space just beneath the apex. To reach that category a case must pass through three planes of division between the base and the apex.

"The first plane of division above the base separates from all homicide cases those which fall into the category of murder. This plane is established by the legislature in statutes defining terms such as murder, voluntary manslaughter, involuntary manslaughter, and justifiable homicide. In deciding whether a given case falls above or below this plane, the function of the trier of facts is limited to finding facts. The plane remains fixed unless moved by legislative act.

"The second plane separates from all murder cases those in which the penalty of death is a possible punishment. This plane is established by statutory definitions of aggravating circumstances. The function of the factfinder is again limited to making a determination of whether certain facts have been established. Except where there is treason or aircraft hijacking, a given case may not move above this second plane unless at least one statutory aggravating circumstance exists. Code Ann. § 27–2534.1(c).

"The third plane separates, from all cases in which a penalty of death may be imposed, those cases in which it shall be imposed. There is an absolute discretion in the factfinder to place any given case below the plane and not impose death. The plane itself is established by the factfinder. In establishing the plane, the factfinder considers all evidence in extenuation, mitigation and aggravation of punishment. Code Ann. § 27–2503 and § 27–2534.1. There is a final limitation on the imposition of the death penalty resting in the automatic appeal procedure: This court determines whether the penalty of death was imposed under the influence of passion, preju-

dice, or any other arbitrary factor; whether the statutory aggravating circumstances are supported by the evidence; and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. Code Ann. § 27–2537. Performance of this function may cause this court to remove a case from the death penalty category but can never have the opposite result.

"The purpose of the statutory aggravating circumstances is to limit to a large degree, but not completely, the factfinder's discretion. Unless at least one of the ten statutory aggravating circumstances exists, the death penalty may not be imposed in any event. If there exists at least one statutory aggravating circumstance, the death penalty may be imposed but the factfinder has a discretion to decline to do so without giving any reason. *Waters* v. *State*, 248 Ga. 355, 369, 283 S. E. 2d 238 (1981); *Hawes* v. *State*, 240 Ga. 327, 334, 240 S. E. 2d 833 (1977); *Fleming* v. *State*, 240 Ga. 142, 240 S. E. 2d 37 1977). In making the decision as to the penalty, the factfinder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phases of the trial. These circumstances relate both to the offense and the defendant.

"A case may not pass the second plane into that area in which the death penalty is authorized unless at least one statutory aggravating circumstance is found. However, this plane is passed regardless of the number of statutory aggravating circumstances found, so long as there is at least one. Once beyond this plane, the case enters the area of the factfinder's discretion, in which all the facts and circumstances of the case determine, in terms of our metaphor, whether or not the case passes the third plane and into the area in which the death penalty is imposed." 250 Ga. 97, 99–100, 297 S. E. 2d 1, 3–4 (1982).

The Georgia Supreme Court then explained why the failure of the second ground of the (b)(1) statutory aggravating circumstance did not invalidate respondent's death sentence. It first noted that the evidence of respondent's prior convictions had been properly received and could properly have been considered by the jury. The court expressed the opinion that the mere fact that such evidence was improperly designated "statutory" had an "inconsequential impact" on the jury's death penalty decision. Finally, the court noted that a different result might be reached if the failed circumstance had been supported by evidence not otherwise admissible or if there was reason to believe that, because of the failure, the sentence was imposed under the influence of an arbitrary factor. *Id.*, at 100, 297 S. E. 2d, at 4.

We are indebted to the Georgia Supreme Court for its helpful response to our certified question. That response makes it clear that we must confront three separate issues in order to decide this case. First, does the limited purpose served by the finding of a statutory aggravating circumstance in Georgia allow the jury a measure of discretion that is forbidden by *Furman* v. *Georgia*, 408 U. S. 238 (1972), and subsequent cases? Second, has the rule of *Stromberg* v. *California*, 283 U. S. 359 (1931), been violated? Third, in this case, even though respondent's prior criminal record was properly admitted, does the possibility that the reference to the invalid statutory aggravating circumstance in the judge's instruction affected the jury's deliberations require that the death sentence be set aside? We discuss these issues in turn.

## I

In Georgia, unlike some other States,[12] the jury is not instructed to give any special weight to any aggravating cir-

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[12] See, *e. g.*, *Williams* v. *State*, 274 Ark. 9, 10, 621 S. W. 2d 686, 687 (1981); *State* v. *Irwin*, 304 N. C. 93, 107–108, 282 S. E. 2d 439, 448–449

cumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard. Thus, in Georgia, the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty. For this reason, respondent argues that Georgia's statutory scheme is invalid under the holding in *Furman* v. *Georgia*.

A fair statement of the consensus expressed by the Court in *Furman* is that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). After thus summarizing the central mandate of *Furman*, the joint opinion in *Gregg* set forth a general exposition of sentencing procedures that would satisfy the concerns of *Furman*. 428 U. S., at 189–195. But it expressly stated: "We do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system constructed along these

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(1981); *State* v. *Moore*, 614 S. W. 2d 348, 351–352 (Tenn. 1981); *Hopkinson* v. *State*, 632 P. 2d 79, 90, n. 1, 171–172 (Wyo. 1981). In each of these cases, the State Supreme Court set aside a death sentence based on both valid and invalid aggravating circumstances. Respondent advances these cases in support of his contention that a similar result is required here. However, examination of the relevant state statutes shows that in each of these States, not only must the jury find at least one aggravating circumstance in order to have the power to impose the death sentence; in addition, the law requires the jury to weigh the aggravating circumstances against the mitigating circumstances when it decides whether or not the death penalty should be imposed. See Ark. Stat. Ann. § 41–1302(1) (1977); N. C. Gen. Stat. § 15A–2000(b) (1978); Tenn. Code Ann. § 39–2–203(g) (1982); Wyo. Stat. § 6–2–102(d)(i) (1983).

general lines would inevitably satisfy the concerns of *Furman*, for each distinct system must be examined on an individual basis." *Id.*, at 195. The opinion then turned to specific consideration of the constitutionality of Georgia's capital sentencing procedures. *Id.*, at 196–207.

Georgia's scheme includes two important features which the joint opinion described in its general discussion of sentencing procedures that would guide and channel the exercise of discretion. Georgia has a bifurcated procedure, see *id.*, at 190–191, and its statute also mandates meaningful appellate review of every death sentence, see *id.*, at 195. The statute does not, however, follow the Model Penal Code's recommendation that the jury's discretion in weighing aggravating and mitigating circumstances against each other should be governed by specific standards. See *id.*, at 193. Instead, as the Georgia Supreme Court has unambiguously advised us, the aggravating circumstance merely performs the function of narrowing the category of persons convicted of murder who are eligible for the death penalty.

Respondent argues that the mandate of *Furman* is violated by a scheme that permits the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute. But that argument could not be accepted without overruling our specific holding in *Gregg*. For the Court approved Georgia's capital sentencing statute even though it clearly did not channel the jury's discretion by enunciating specific standards to guide the jury's consideration of aggravating and mitigating circumstances.[13]

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[13] The joint opinion specifically described the Georgia scheme in these terms:

"Georgia did act, however, to narrow the class of murderers subject to capital punishment by specifying 10 statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed. In addition, the jury is au-

The approval of Georgia's capital sentencing procedure rested primarily on two features of the scheme: that the jury was required to find at least one valid statutory aggravating circumstance and to identify it in writing, and that the State Supreme Court reviewed the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate. These elements, the opinion concluded, adequately protected against the wanton and freakish imposition of the death penalty.[14] This conclusion rested, of course, on the fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of *Furman* itself. For a sys-

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thorized to consider any other appropriate aggravating or mitigating circumstances. § 27–2534.1(b) (Supp. 1975). The jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court, see § 27–2302 (Supp. 1975), but it must find a *statutory* aggravating circumstance before recommending a sentence of death." 428 U. S., at 196–197; see also *id.*, at 161, 165, 206–207. Cf. *id.*, at 208, 218, 222 (opinion of WHITE, J., concurring in judgment).

The joint opinion issued the same day in *Jurek* v. *Texas*, 428 U. S. 262 (1976), makes clear that specific standards for balancing aggravating against mitigating circumstances are not constitutionally required. In *Jurek* we held that the State's action in "narrowing the categories of murders for which a death sentence may ever be imposed" served much the same purpose as the lists of statutory aggravating circumstances that Georgia and Florida had adopted. *Id.*, at 270. We also held that one of the three questions presented to the sentencing jury permitted the defendant to bring mitigating circumstances to the jury's attention. *Id.*, at 273–274. Thus, in Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution and certainly were not explicitly balanced against each other.

[14] "While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here." 428 U. S., at 206–207.

tem "could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." 428 U. S., at 195, n. 46. To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.[15]

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[15] These standards for statutory aggravating circumstances address the concerns voiced by several of the opinions in *Furman* v. *Georgia*. See 408 U. S., at 248, n. 11 (Douglas, J., concurring); *id.*, at 294 (BRENNAN, J., concurring) ("it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment"); *id.*, at 309–310 (Stewart, J., concurring) ("of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed"); *id.*, at 313 (WHITE, J., concurring) ("there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not").

In *Gregg*, the joint opinion again recognized the need for legislative criteria to limit the death penalty to certain crimes: "[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." 428 U. S., at 184. The opinion also noted with approval the efforts of legislatures to "define those crimes and those criminals for which capital punishment is most probably an effective deterrent." *Id.*, at 186. The opinion of JUSTICE WHITE concurring in the judgment in *Gregg* asserted that, over time, as the aggravating circumstance requirement was applied, "the types of murders for which the death penalty may be imposed [would] become more narrowly defined and [would be] limited to those which are particularly serious or for which the death penalty is peculiarly appropriate." *Id.*, at 222. Cf. *Roberts (Harry)* v. *Louisiana*, 431 U. S. 633, 636 (1977) (the State may consider as an aggravating circumstance the fact that the murder victim was a peace officer performing his regular duties, because there is "a special interest in affording protection to those public servants who regularly must risk their lives in order to guard the safety of other persons and property").

Thus in *Godfrey* v. *Georgia*, 446 U. S. 420 (1980), the Court struck down an aggravating circumstance that failed to narrow the class of persons eligible for the death penalty. Justice Stewart's opinion for the plurality concluded that the aggravating circumstance described in subsection (b)(7) of the Georgia statute, as construed by the Georgia Supreme Court, failed to create any "inherent restraint on the arbitrary and capricious infliction of the death sentence," because a person of ordinary sensibility could find that almost every murder fit the stated criteria. *Id.*, at 428–429.[16] Moreover, the facts of the case itself did not distinguish the murder from any other murder. The plurality concluded that there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many in which it was not." *Id.*, at 433.

Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death.[17]

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[16] This Court's conclusion in *Godfrey* was analogous to the Georgia Supreme Court's holding in *Arnold* v. *State* that the second clause of the (b)(1) aggravating circumstance, which is at issue in this case, was "too vague and nonspecific to be applied evenhandedly by a jury." 236 Ga., at 541, 224 S. E. 2d, at 391. The defendant in that case, who had two prior convictions, had been sentenced to death by the jury solely on a finding that he had a "'substantial history' of 'serious assaultive criminal convictions.'" The court concluded that the words "substantial history" were so highly subjective as to be unconstitutional. *Id.*, at 542, 224 S. E. 2d, at 392; see n. 5, *supra*. That aggravating circumstance, in the view of the Georgia Supreme Court, did not provide a principled basis for distinguishing Arnold's case from the many other murder cases in which the death penalty was not imposed under the statute.

[17] See *Gregg*, 428 U. S., at 164, 196–197, 206; *Proffitt* v. *Florida*, 428 U. S. 242, 256–257, n. 14 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). Similarly, the Model Penal Code draft discussed in *Gregg*,

What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime. See *Eddings* v. *Oklahoma*, 455 U. S. 104, 110–112 (1982); *Lockett* v. *Ohio*, 438 U. S. 586, 601–605 (1978) (plurality opinion); *Roberts (Harry)* v. *Louisiana*, 431 U. S. 633, 636–637 (1977); *Gregg*, 428 U. S., at 197 (opinion of Stewart, POWELL, and STEVENS, JJ.); *Proffitt* v. *Florida*, 428 U. S., at 251–252 (opinion of Stewart, POWELL, and STEVENS, JJ.); *Woodson* v. *North Carolina*, 428 U. S. 280, 303–304 (1976) (plurality opinion).[18]

The Georgia scheme provides for categorical narrowing at the definition stage, and for individualized determination and appellate review at the selection stage. We therefore remain convinced, as we were in 1976, that the structure of the statute is constitutional. Moreover, the narrowing function has been properly achieved in this case by the two valid aggravating circumstances upheld by the Georgia Supreme Court—that respondent had escaped from lawful confinement, and that he had a prior record of conviction for a capital felony. These two findings adequately differentiate this case in an objective, evenhanded, and substantively rational way from the many Georgia murder cases in which the death penalty may not be imposed. Moreover, the Georgia Supreme Court in this case reviewed the death sentence to determine whether it was arbitrary, excessive, or dispropor-

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*supra*, at 192–195, sets forth lists of aggravating and mitigating circumstances but also provides that the sentencer "shall take into account . . . any other facts that it deems relevant . . . ." ALI, Model Penal Code § 201.6 (Prop. Off. Draft, 1962).

A State is, of course, free to decide as a matter of state law to limit the evidence of aggravating factors that the prosecution may offer at the sentencing hearing. A number of States do not permit the sentencer to consider aggravating circumstances other than those enumerated in the statute. See Gillers, Deciding Who Dies, 129 U. Pa. L. Rev. 1, 101–119 (1980); see, *e. g.*, Ark. Stat. Ann. § 41–1301(4) (1977); 42 Pa. Cons. Stat. § 9711(a)(2) (1980).

[18] See Gillers, *supra* n. 17, at 26–27.

tionate.[19] Thus the absence of legislative or court-imposed standards to govern the jury in weighing the significance of either or both of those aggravating circumstances does not render the Georgia capital sentencing statute invalid as applied in this case.

II

Respondent contends that under the rule of *Stromberg* v. *California*, 283 U. S. 359 (1931), and subsequent cases, the invalidity of one of the statutory aggravating circumstances underlying the jury's sentencing verdict requires that its entire death sentence be set aside. In order to evaluate this contention, it is necessary to identify two related but different rules that have their source in the *Stromberg* case.

In *Stromberg*, a member of the Communist Party was convicted of displaying a red flag in violation of the California Penal Code. The California statute prohibited such a display (1) as a "sign, symbol or emblem" of opposition to organized government; (2) as an invitation or stimulus to anarchistic action; or (3) as an aid to seditious propaganda. This Court held that the first clause of the statute was repugnant to the Federal Constitution and found it unnecessary to pass on the validity of the other two clauses because the jury's guilty verdict might have rested exclusively on a conclusion that Stromberg had violated the first. The Court explained:

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[19] The Georgia Supreme Court conducts an independent review of the propriety of the sentence even when the defendant has not specifically raised objections at trial. See *Stephens* v. *State*, 237 Ga. 259, 260, 227 S. E. 2d 261, 262, cert. denied, 429 U. S. 986 (1976). In this case, the Georgia Supreme Court explained:

"In performing the sentence comparison required by Code Ann. § 27–2537(c)(3), this court uses for comparison purposes not only similar cases in which death was imposed, but similar cases in which death was not imposed." 237 Ga., at 262, 227 S. E. 2d, at 263.

As an appendix to the opinion it provided a list of the similar cases it had considered, as the statute requires. *Id.*, at 263, 227 S. E. 2d, at 264. See also *Ross* v. *State*, 233 Ga. 361, 364–367, 211 S. E. 2d 356, 358–360 (1974); *Tucker* v. *State*, 245 Ga. 68, 74, 263 S. E. 2d 109, 113 (1980).

> "The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury were instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause." *Id.*, at 367–368.
>
> "The first clause of the statute being invalid upon its face, the conviction of the appellant, which so far as the record discloses may have rested upon that clause exclusively, must be set aside." *Id.*, at 369–370.

One rule derived from the *Stromberg* case is that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground. The cases in which this rule has been applied all involved general verdicts based on a record that left the reviewing court uncertain as to the actual ground on which the jury's decision rested. See, *e. g.*, *Williams* v. *North Carolina*, 317 U. S. 287, 292 (1942); *Cramer* v. *United States*, 325 U. S. 1, 36, n. 45 (1945); *Terminiello* v. *Chicago*, 337 U. S. 1, 5–6 (1949); *Yates* v. *United States*, 354 U. S. 298, 311–312 (1957). This rule does not require that respondent's death sentence be vacated, because the jury did not merely return a general verdict stating that it had found at least one aggravating circumstance. The jury expressly found aggravating circumstances that were valid and legally sufficient to support the death penalty.

The second rule derived from the *Stromberg* case is illustrated by *Thomas* v. *Collins*, 323 U. S. 516, 528–529 (1945), and *Street* v. *New York*, 394 U. S. 576, 586–590 (1969). In

those cases we made clear that the reasoning of *Stromberg* encompasses a situation in which the general verdict on a single-count indictment or information rested on *both* a constitutional and an unconstitutional ground. In *Thomas* v. *Collins*, a labor organizer's contempt citation was predicated both upon a speech expressing a general invitation to a group of nonunion workers, which the Court held to be constitutionally protected speech, and upon solicitation of a single individual. The Court declined to consider the State's contention that the judgment could be sustained on the basis of the individual solicitation alone,[20] for the record showed that the penalty had been imposed on account of both solicitations. "The judgment therefore must be affirmed as to both or as to neither." 323 U. S., at 529. Similarly, in *Street*, the record indicated that petitioner's conviction on a single-count indictment could have been based on his protected words as well as on his arguably unprotected conduct, flag burning. We stated that, "unless the record negates the possibility that the conviction was based on both alleged violations," the judgment could not be affirmed unless both were valid. 394 U. S., at 588.

The Court's opinion in *Street* explained:

> "We take the rationale of *Thomas* to be that when a single-count indictment or information charges the commission of a crime by virtue of the defendant's having done both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together. See 323 U. S., at 528–529, 540–541. There is no com-

[20] The State neither conceded nor unequivocally denied that the sentence was imposed on account of both acts. "Nevertheless the State maintains that the invitation to O'Sullivan in itself is sufficient to sustain the judgment and sentence and that nothing more need be considered to support them." 323 U. S., at 528, n. 14.

parable hazard when the indictment or information is in several counts and the conviction is explicitly declared to rest on findings of guilt on certain of these counts, for in such instances there is positive evidence that the trier of fact considered each count on its own merits and separately from the others." *Ibid.* (footnote omitted).

The rationale of *Thomas* and *Street* applies to cases in which there is no uncertainty about the multiple grounds on which a general verdict rests. If, under the instructions to the jury, one way of committing the offense charged is to perform an act protected by the Constitution, the rule of these cases requires that a general verdict of guilt be set aside even if the defendant's unprotected conduct, considered separately, would support the verdict. It is a difficult theoretical question whether the rule of *Thomas* and *Street* applies to the Georgia death penalty scheme. The jury's imposition of the death sentence after finding more than one aggravating circumstance is not precisely the same as the jury's verdict of guilty on a single-count indictment after finding that the defendant has engaged in more than one type of conduct encompassed by the same criminal charge, because a wider range of considerations enters into the former determination. On the other hand, it is also not precisely the same as the imposition of a single sentence of imprisonment after guilty verdicts on each of several separate counts in a multiple-count indictment,[21] because the qualitatively different sentence of death is imposed only after a channeled sentencing procedure. We need not answer this question here. The second rule derived from *Stromberg*, embodied in *Thomas* and *Street*, applies only in cases in which the State has based its prosecu-

[21] In this situation the Court has held that the single sentence may stand, even if one or more of the counts is invalid, as long as one of the counts is valid and the sentence is within the range authorized by law. See *Claassen* v. *United States*, 142 U. S. 140 (1891); *Pinkerton* v. *United States*, 328 U. S. 640 (1946); *Barenblatt* v. *United States*, 360 U. S. 109 (1959).

tion, at least in part, on a charge that constitutionally protected activity is unlawful. No such charge was made in respondent's sentencing proceeding.

In *Stromberg*, *Thomas*, and *Street*, the trial courts' judgments rested, in part, on the fact that the defendant had been found guilty of expressive activity protected by the First Amendment. In contrast, in this case there is no suggestion that any of the aggravating circumstances involved any conduct protected by the First Amendment or by any other provision of the Constitution. Accordingly, even if the *Stromberg* rules may sometimes apply in the sentencing context, a death sentence supported by at least one valid aggravating circumstance need not be set aside under the second *Stromberg* rule simply because another aggravating circumstance is "invalid" in the sense that it is insufficient by itself to support the death penalty. In this case, the jury's finding that respondent was a person who has a "substantial history of serious assaultive criminal convictions" did not provide a sufficient basis for imposing the death sentence. But it raised none of the concerns underlying the holdings in *Stromberg*, *Thomas*, and *Street*, for it did not treat constitutionally protected conduct as an aggravating circumstance.

## III

Two themes have been reiterated in our opinions discussing the procedures required by the Constitution in capital sentencing determinations. On the one hand, as the general comments in the *Gregg* joint opinion indicated, 428 U. S., at 192–195, and as THE CHIEF JUSTICE explicitly noted in *Lockett* v. *Ohio*, 438 U. S., at 605 (plurality opinion), there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death." See also *Beck* v. *Alabama*, 447 U. S. 625, 638, n. 13 (1980). On the other hand, because there is a qualitative difference between death and any other permissible form of punishment, "there is a corresponding difference in the need for reliability

in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U. S., at 305. "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner* v. *Florida*, 430 U. S. 349, 358 (1977). Thus, although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error.

Respondent contends that the death sentence was impaired because the judge instructed the jury with regard to an invalid statutory aggravating circumstance, a "substantial history of serious assaultive criminal convictions," for these instructions may have affected the jury's deliberations. In analyzing this contention it is essential to keep in mind the sense in which that aggravating circumstance is "invalid." It is not invalid because it authorizes a jury to draw adverse inferences from conduct that is constitutionally protected. Georgia has not, for example, sought to characterize the display of a red flag, cf. *Stromberg* v. *California*, the expression of unpopular political views, cf. *Terminiello* v. *Chicago*, 337 U. S. 1 (1949), or the request for trial by jury, cf. *United States* v. *Jackson*, 390 U. S. 570 (1968), as an aggravating circumstance. Nor has Georgia attached the "aggravating" label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant, cf. *Herndon* v. *Lowry*, 301 U. S. 242 (1937), or to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness. Cf. *Miller* v. *Florida*, 373 So. 2d 882, 885–886 (Fla. 1979). If the aggravating circumstance at issue in this case had been invalid for reasons such as these, due process of law would require that the jury's decision to impose death be set aside.

But the invalid aggravating circumstance found by the jury in this case was struck down in *Arnold* because the Georgia Supreme Court concluded that it fails to provide an adequate basis for distinguishing a murder case in which the death penalty may be imposed from those cases in which such a penalty may not be imposed. See nn. 5 and 16, *supra*. The underlying evidence is nevertheless fully admissible at the sentencing phase. As we noted in *Gregg*, 428 U. S., at 163, the Georgia statute provides that, at the sentencing hearing, the judge or jury

> "'shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, *including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant*, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible.'" Ga. Code § 27–2503 (1975) (emphasis supplied).[22]

We expressly rejected petitioner's objection to the wide scope of evidence and argument allowed at presentence hearings.

> "We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument . . . . So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible

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[22] See *Fair* v. *State*, 245 Ga. 868, 873, 268 S. E. 2d 316, 321 (1980) ("Any lawful evidence which tends to show the motive of the defendant, his lack of remorse, his general moral character, and his predisposition to commit other crimes is admissible in aggravation, subject to the notice provisions of the statute").

> when it makes the sentencing decision." 428 U. S., at 203–204.

See *id.*, at 206–207; see also n. 17, *supra.*

Thus, any evidence on which the jury might have relied in this case to find that respondent had previously been convicted of a substantial number of serious assaultive offenses, as he concedes he had been, was properly adduced at the sentencing hearing and was fully subject to explanation by the defendant.[23] Cf. *Gardner* v. *Florida*, *supra* (requiring that the defendant have the opportunity to rebut evidence and State's theory in sentencing proceeding); *Presnell* v. *Georgia*, 439 U. S. 14, 16, n. 3 (1978) (same).[24] This case involves a statutory aggravating circumstance, invalidated by the State Supreme Court on grounds of vagueness, whose terms plausibly described aspects of the defendant's background that were properly before the jury and whose accuracy was unchallenged. Hence the erroneous instruction does not im-

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[23] "The purpose of Code Ann. § 27–2503(a) is to allow a defendant to examine his record to determine if the convictions are in fact his, if he was represented by counsel, and any other defect which would render such documents inadmissible during the pre-sentencing phase of the trial." *Herring* v. *State*, 238 Ga. 288, 290, 232 S. E. 2d 826, 828 (1977). See *Franklin* v. *State*, 245 Ga. 141, 149–150, 263 S. E. 2d 666, 671–672 (1980). As we held in *United States* v. *Tucker*, 404 U. S. 443, 447–449 (1972), even in a noncapital sentencing proceeding, the sentence must be set aside if the trial court relied at least in part on "misinformation of constitutional magnitude" such as prior uncounseled convictions that were unconstitutionally imposed. See *Townsend* v. *Burke*, 334 U. S. 736, 740–741 (1948) (reversing a sentence imposed on uncounseled defendant because it was based on "extensively and materially false" assumptions concerning the defendant's prior criminal record).

[24] Petitioner acknowledges that, if an invalid statutory aggravating circumstance were supported by material evidence not properly before the jury, a different case would be presented. Brief for Petitioner 13; Supplemental Memorandum for Petitioner 18; Tr. of Oral Arg. 14, 18–20. We need not decide in this case whether the death sentence would be impaired in other circumstances, for example, if the jury's finding of an aggravating circumstance relied on materially inaccurate or misleading information.

plicate our repeated recognition that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett* v. *Ohio*, 438 U. S., at 604 (opinion of BURGER, C. J.).

Although the Court of Appeals acknowledged on rehearing that the evidence was admissible, it expressed the concern that the trial court's instructions "may have unduly directed the jury's attention to his prior conviction." 648 F. 2d, at 446. But, assuming that the instruction did induce the jury to place greater emphasis upon the respondent's prior criminal record than it would otherwise have done, the question remains whether that emphasis violated any constitutional right. In answering this question, it is appropriate to compare the instruction that was actually given, see *supra*, at 866, with an instruction on the same subject that would have been unobjectionable. Cf. *Henderson* v. *Kibbe*, 431 U. S. 145, 154–157 (1977). Nothing in the United States Constitution prohibits a trial judge from instructing a jury that it would be appropriate to take account of a defendant's prior criminal record in making its sentencing determination, see n. 17, *supra*, even though the defendant's prior history of noncapital convictions could not *by itself* provide sufficient justification for imposing the death sentence. There would have been no constitutional infirmity in an instruction stating, in substance: "If you find beyond a reasonable doubt that the defendant is a person who has previously been convicted of a capital felony, or that he has escaped from lawful confinement, you will be authorized to impose the death sentence, and in deciding whether or not that sentence is appropriate you may consider the remainder of his prior criminal record."

The effect the erroneous instruction may have had on the jury is therefore merely a consequence of the statutory label "aggravating circumstance." That label arguably might have caused the jury to give somewhat greater weight to respondent's prior criminal record than it otherwise would have given. But we do not think the Georgia Supreme

Court erred in its conclusion that the "mere fact that some of the aggravating circumstances presented were improperly designated 'statutory'" had "an inconsequential impact on the jury's decision regarding the death penalty." 250 Ga., at 100, 297 S. E. 2d, at 4. The instructions, see *supra*, at 866, did not place particular emphasis on the role of statutory aggravating circumstances in the jury's ultimate decision. Instead the trial court instructed the jury to "consider all of the evidence received in court throughout the trial before you" and to "consider all facts and circumstances presented in extinuation *[sic]*, mitigation and aggravation of punishment as well as such arguments as have been presented for the State and for the Defense." App. 18. More importantly, for the reasons discussed above, any possible impact cannot fairly be regarded as a constitutional defect in the sentencing process.[25]

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[25] The Georgia Supreme Court's affirmance of this case on direct appeal implicitly approves the jury instructions as an accurate reflection of state law. Moreover, the instructions are entirely consistent with the explanation of Georgia's statutory scheme given in the Georgia Supreme Court's response to our certified question. According to the response, see *supra*, at 872,"[u]nless at least one of the ten statutory aggravating circumstances exists, the death penalty may not be imposed in any event. If there exists at least one statutory aggravating circumstance, the death penalty may be imposed but the factfinder has a discretion to decline to do so without giving any reason. . . . In making the decision as to the penalty, the factfinder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phases of the trial." 250 Ga., at 100, 297 S. E. 2d, at 3–4. This is precisely what the trial court told the jury: "Now in arriving at your determinations in this regard you are authorized to consider all of the evidence received in court throughout the trial before you. You are further authorized to consider all facts and circumstances presented in extinuation *[sic]*, mitigation and aggravation of punishment as well as such arguments as have been presented for the State and for the Defense. . . . Unless one or more of these statutory aggravating circumstances are proven beyond a reasonable doubt you will not be authorized to fix punishment at death. . . . If you fix punishment at death by electrocution you would recite in the exact words which I have given you the one or more circumstances you found to be proven beyond a reasonable

Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality.[26] We accept that court's view that the subsequent invalidation of one of several statutory aggravating circumstances does not automatically require reversal of the death penalty, having been assured that a death sentence will be set aside if the invalidation of an aggravating circumstance makes the penalty arbitrary or capricious. 250 Ga., at 101, 297 S. E. 2d, at 4. The Georgia Supreme Court, in its response to our certified question, expressly stated: "A different result might be reached in a case where evidence was submitted in support of a statutory aggravating circumstance which was not otherwise admissible, and thereafter the circumstance failed." *Ibid.* As we noted in *Gregg*, 428 U. S., at 204–205, we have also been assured that a death sentence will be vacated if it is excessive or substantially disproportionate to the penalties that have been imposed under similar circumstances.

Finally, we note that in deciding this case we do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is "invalid" under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty. See n. 12, *supra*. As we have discussed, see *supra*, at 873–880, the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances, and Georgia has not adopted such a system.

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doubt. . . . [If you recommend life imprisonment] it would not be necessary for you to recite any mitigating or aggravating circumstances as you may find, and you would simply state in your verdict, We fix punishment at life in prison." App. 18–19. See *Zant* v. *Stephens*, 456 U. S., at 411–412, n. 1.

[26] See n. 19, *supra*.

Under Georgia's sentencing scheme, and under the trial judge's instructions in this case, no suggestion is made that the presence of more than one aggravating circumstance should be given special weight. Whether or not the jury had concluded that respondent's prior record of criminal convictions merited the label "substantial" or the label "assaultive," the jury was plainly entitled to consider that record, together with all of the other evidence before it, in making its sentencing determination.

The judgment of the Court of Appeals is

*Reversed.*

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

In *Claassen* v. *United States*, 142 U. S. 140 (1891), the defendant in a criminal case was found guilty on 5 of 11 counts on which the jury was instructed. The verdict was a general one and one 6-year sentence was imposed. On writ of error, this Court affirmed the conviction and sentence, saying that the first "count and the verdict of guilty returned upon it being sufficient to support the judgment and sentence, the question of the sufficiency of the other counts need not be considered." *Id.*, at 146. Similarly, in *Barenblatt* v. *United States*, 360 U. S. 109 (1959), a defendant was convicted on each of five counts, and a general sentence was imposed. The Court said, *id.*, at 115: "Since this sentence was less than the maximum punishment authorized by the statute for conviction under any one Count, the judgment below must be upheld if the conviction upon any of the Counts is sustainable" (footnote omitted). *Pinkerton* v. *United States*, 328 U. S. 640, 641, n. 1 (1946); *Whitfield* v. *Ohio*, 297 U. S. 431, 438 (1936); *Abrams* v. *United States*, 250 U. S. 616, 619 (1919); and *Evans* v. *United States*, 153 U. S. 584, 595 (1894), were similar holdings. It is therefore clear that in cases such as *Claassen* and *Barenblatt*, there is no *Stromberg*, *Thomas*, or *Street* problem.

Here, the jury imposing the sentence found three aggravating circumstances and based on all the evidence imposed the death sentence. One of the aggravating circumstances was found invalid on an intervening appeal in another case, and the claim is that under *Stromberg*, *Thomas*, and *Street*, the death sentence must be set aside. I agree with the Court that there is no such problem since the evidence supporting the invalid aggravating circumstance was properly before the jury. The Court, however, suggests that if the evidence had been inadmissible under the Federal Constitution, there might be a *Stromberg*, *Thomas*, or *Street* problem. The Court says, *ante*, at 883: "The jury's imposition of the death sentence after finding more than one aggravating circumstance . . . is also not precisely the same as the imposition of a single sentence of imprisonment after guilty verdicts on each of several separate counts in a multiple-count indictment, because the qualitatively different sentence of death is imposed only after a channeled sentencing procedure" (footnote omitted). The Court thus suggests that the *Claassen-Barenblatt* line of cases may not be applicable to sentencing proceedings in capital punishment cases. I fail to grasp the distinction, however, between those cases and the sentencing procedures involved here. In *Claassen* and *Barenblatt*, there was only one sentence on several counts and one could be no surer there than here that the sentence did or did not rest on any one of the counts. Those cases, however, would sustain the sentence if it was authorized under any of the valid counts. *Stromberg*, *Thomas*, and *Street* should no more invalidate the single sentence in this case.

Thus in my view there would be no *Stromberg-Thomas-Street* problem, as such, if the invalid count had rested on constitutionally inadmissible evidence. But since the jury is instructed to take into account all the evidence, there would remain the question whether the inadmissible evidence invalidates the sentence. Perhaps it would, but at least there

would be room for the application of the harmless-error rule, which would not be the case, it seems to me, under the *per se* rule of *Stromberg*, *Street*, and *Thomas*.

Except for the foregoing, I join the Court's opinion and its judgment as well.

JUSTICE REHNQUIST, concurring in the judgment.

While agreeing with the Court's judgment, I write separately to make clear my understanding of the application of the Eighth and Fourteenth Amendments to the capital sentencing procedures used in this case. I agree with the Court's treatment of the factual and procedural background of the case, and with its characterization of the questions presented for review. In brief, we must decide whether the procedure by which Georgia imposes the death sentence comports with the Eighth and Fourteenth Amendments; whether, in this case, imposition of the death sentence violates the rule of *Stromberg* v. *California*, 283 U. S. 359 (1931); and whether the erroneous presentation to a jury of an invalid aggravating circumstance requires vacating the death sentence imposed by that jury.

I

The Georgia death sentencing procedure is comprehensively detailed in the statutes of the State, decisions of the Georgia courts, the opinion issued by the Georgia Supreme Court in response to the question certified by this Court, *Zant* v. *Stephens*, 456 U. S. 410 (1982), and the jury instructions in this case. As these materials reveal, two separate proceedings are necessary to imposition of the death sentence in Georgia. The first stage is simply a traditional criminal trial on the question of guilt or innocence. If the defendant is found guilty of a capital offense, a separate sentencing proceeding is then conducted.

At this second proceeding, the State and the defendant are permitted to introduce a wide range of evidence in "extenuation, mitigation, and aggravation of punishment." Ga. Code

§ 27–2503 (1978). The sentencing body is then directed to make two separate decisions. First, it decides whether any of a number of specific, statutorily defined aggravating circumstances have been proved beyond a reasonable doubt. Ga. Code § 27–2534.1(b) (1978). In addition, the jury is instructed that, if it finds one or more of the statutory aggravating circumstances, it is to make the further judgment whether the defendant deserves the death sentence. In making this second decision, statutory aggravating circumstances found by the sentencer are considered together with all the other evidence in mitigation and aggravation. The sentencer is not, however, instructed to formally "weigh" the aggravating circumstances against the mitigating circumstances. If a death sentence is imposed, then the case receives both conventional appellate consideration and expedited direct review by the Supreme Court of Georgia.

Respondent challenges the Georgia death sentencing system as violative of the Eighth Amendment, on the grounds that it fails adequately to channel the discretion of the sentencing body. In particular, respondent urges that the absence of an instruction that the sentencer must balance statutory aggravating circumstances against mitigating circumstances before imposing the death sentence renders the scheme unconstitutional under the reasoning in *Furman* v. *Georgia*, 408 U. S. 238 (1972). Respondent's claim is, in my opinion, completely foreclosed by this Court's precedents.

Except in minor detail, Georgia's current system is identical to the sentencing procedure we held constitutional in *Gregg* v. *Georgia*, 428 U. S. 153 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); *id.*, at 207 (WHITE, J., concurring in judgment). The joint opinion in *Gregg* fully recognized that the Georgia scheme did not direct the sentencing body that statutory aggravating and mitigating circumstances were to be weighed against each other in any formal sense. This is evident from its careful description of the Georgia scheme, *id.*, at 196–197, and its treatment of the

Model Penal Code's proposed system, *id.*, at 193, where the fact that the sentencing body is formally instructed to weigh aggravating and mitigating circumstances was specifically noted. Notwithstanding the lack of an explicit "balancing" directive, the joint opinion upheld the statutory scheme, since, taken as a whole, it provided the sentencing authority with sufficient guidance to prevent the "freakish" imposition of death barred in *Furman*. Likewise, in JUSTICE WHITE's concurrence, 428 U. S., at 211, the role of aggravating circumstances was squarely discussed, and approved. To accept respondent's contention that the sentencing body must be specifically instructed to balance statutory aggravating circumstances against mitigating circumstances would require rejecting the judgment in *Gregg* that the Georgia statute provided the sentencing body with adequate guidance to permit it to impose death.[1]

## II

Respondent next contends that *Stromberg* v. *California*, 283 U. S. 359 (1931), requires that his death sentence be set aside. Respondent's argument rests on the fact that one of the three aggravating circumstances specified by the jury in

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[1] In *Jurek* v. *Texas*, 428 U. S. 262 (1976), we approved a death penalty statute providing even less explicitly for the type of "weighing" that respondent claims is necessary. In Texas, persons convicted of five types of homicide faced a second proceeding in which the jury was required to answer three questions—whether the defendant's acts were committed deliberately and with the reasonable expectation that they would result in death; whether there was a probability that the defendant would commit violent acts constituting a continuing threat to society; and whether the defendant's acts were in response to some sort of provocation. As the joint opinion recognized, the sole function of the "aggravating circumstances" in the Texas system was to "narro[w] the categories of murders for which a death sentence may ever be imposed," *id.*, at 270. Since these "aggravating circumstances" were only considered at the guilt determination phase of trial, not at sentencing, the system could not contain a requirement that the jury "balance" these circumstances against mitigating circumstances—as respondent contends is constitutionally required in this case.

his case was later found invalid under a state-court decision holding the statutory definition of the circumstance impermissibly vague under the United States Constitution. *Arnold* v. *State*, 236 Ga. 534, 224 S. E. 2d 386 (1976).[2] Respondent reasons that *Stromberg* establishes a rule requiring that any general verdict returned by a factfinder be set aside if it is based, even in part, upon "an invalid factor." Supplemental Brief for Respondent 8. According to respondent, because one of the aggravating circumstances found by the jury was invalid, the general verdict of death returned by the jury fails the *Stromberg* test.

Careful examination of *Stromberg*, cases following that decision, and the role of aggravating circumstances in a jury's imposition of the death penalty compels rejection of respondent's claim. *Stromberg* presented a straightforward case. The defendant was convicted for violating a California statute prohibiting the display of a red flag for any of three separate purposes. At trial the jury was instructed that the defendant should be convicted if he acted with any one of the proscribed purposes; it returned a general verdict of guilty without indicating which purpose it believed motivated the defendant. This Court concluded that the first of the clauses of the statute detailing impermissible purposes was unconstitutional, and held that it was unnecessary to decide the validity of the remaining two clauses. The Court observed that the prosecutor had "emphatically urged upon the jury that they could convict the appellant under the first clause alone, without regard to the other clauses." 283 U. S., at 368. It concluded that it was "impossible to say under which clause of the statute the conviction was obtained," *ibid.*, and that, given this complete uncertainty, the conviction could not stand. See also *Williams* v. *North Carolina*, 317 U. S.

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[2] I assume, for purposes of this decision, that *Arnold* was correctly decided and that it was properly applied to respondent's case. I express no view as to the correctness of that decision or its application.

287, 292 (1942); *Cramer* v. *United States*, 325 U. S. 1, 36, n. 45 (1945); *Terminiello* v. *Chicago*, 337 U. S. 1, 5–6 (1949); *Yates* v. *United States*, 354 U. S. 298, 311–312 (1957). Of course, if the jury *does* indicate which statutory elements supported its verdict, and if these are valid, then *Stromberg* is inapplicable.

As the Court points out, the *Stromberg* doctrine subsequently was extended—albeit without lengthy analysis. In *Street* v. *New York*, 394 U. S. 576, 586–590 (1969), the Court vacated a conviction, based on a single-count indictment, for casting contempt on the United States flag. The statute under which petitioner was convicted criminalized casting contempt upon the flag by "words or act." *Id.*, at 578. The information filed against petitioner alleged that he violated this statute because he both burned the flag and shouted derogatory statements about it. Likewise, the State introduced evidence at the bench trial of both the petitioner's act and his speech. The Court concluded that petitioner's constitutional rights would have been violated had he been punished for his speech. It thought, moreover, that the trial judge might have rested his finding *solely* on petitioner's speech, which presented a situation similar to that in *Stromberg*.

In addition, however, the Court believed that, on the record of the case, there was an "unacceptable danger that the trier of fact . . . regarded the two acts as 'intertwined' and . . . rested the conviction on both together." 394 U. S., at 588. In short, when an element of a crime is defined to include constitutionally protected actions, and when the State alleges, argues, and offers proof that the defendant's protected conduct satisfied the element, then a general verdict of guilty must be set aside, even if the State also alleged and proved another course of conduct that could have satisfied the element. As in *Stromberg*, however, the Court also noted that when the record indicates that the jury's verdict did not rest on an "intertwined" combination of protected and

unprotected conduct, but instead rested sufficiently on unprotected conduct, then the verdict would stand.

Neither the *Stromberg* line of cases nor *Street* provides respondent with appreciable support. I agree with the Court that the *Stromberg* rule is plainly distinguishable, since the jury explicitly returned two concededly valid aggravating circumstances, thereby conclusively negating the inference that it rested *solely* on the invalid circumstance. Likewise, I conclude that the analysis in *Street* is inapposite.[3] It is helpful in explaining why this is the case to discuss separately the two decisions made by the sentencing body during the Georgia death penalty proceedings. I initially consider the applicability of *Street* to the jury's first decision, that is, the finding of statutory aggravating circumstances.

As indicated above, *Street* explicitly stated that its rule regarding the treatment of aggravating circumstances is inapplicable "when the indictment or information is in several counts and the conviction is explicitly declared to rest on findings of guilt on certain of those counts, for in such instances there is positive evidence that the trier of fact considered each count on its own merits and separately from the others." 394 U. S., at 588 (footnote omitted). This exception to the *Street* rule extends to the jury's determination in this case that certain specified aggravating circumstances existed. The jury received separate instructions as to each of several aggravating circumstances, and returned a verdict form separately listing three circumstances. The fact that one of these subsequently proved to be invalid does not affect the validity of the remaining two jury findings, just as the reversal on appeal of one of several convictions returned to sepa-

[3] As the Court points out, *Street* properly has been confined to situations where there is a substantial risk that the jury has imposed criminal punishment because of activity protected by the Constitution. Respondent's history of violent conduct, on which the invalid aggravating circumstance was based, plainly falls outside this category, and *Street* therefore is inapplicable to this case.

rate counts does not affect the remaining convictions. There was "positive evidence" that Stephens' jury considered each aggravating circumstance "on its own merits and separately from the others." *Ibid.* Because of this, *Street* provides no basis for questioning the jury's first decision, which, if supported, permitted it to go further and consider whether Stephens deserved the death sentence.

*Street*'s logic is even less applicable to a Georgia death jury's second decision, namely, that the defendant deserved the death sentence. Under respondent's theory, the jury's verdict of death was based in part on an aggravating circumstance that later proved invalid, and which, according to respondent must thus fall under the rule of *Street*. Whatever its proper application elsewhere, *Street*'s rule cannot fairly be extended to the sentencing context. As discussed below, the significant differences between the role of aggravating circumstances in the jury's decision to impose the death sentence and the role played by instructions or allegations in a jury's determination of guilt preclude applying *Street* to the sentencing context.

The rule relied upon by respondent was developed in a situation where a factfinder returns a verdict of guilty on a specific criminal charge. In returning this verdict, the jury decides whether the defendant committed a specific set of defined acts with a particular mental state. These elements, each of which is necessary to the verdict of guilty, are specifically and carefully enumerated and defined in the indictment or information and the instructions to the jury. Only evidence relevant to the particular elements alleged by the State is admissible, and, even then, subject to exclusion of prejudicial evidence which might distract the jury from the specific factfinding task it performs. Based on this evidence the jury decides whether each of the elements constituting the offense was proved beyond a reasonable doubt. The Court's observation in *Williams* v. *New York*, 337 U. S. 241, 246–247 (1949), accurately captures the character of the pro-

cedure leading to a criminal conviction: "In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials . . . narrowly confin[ing] the trial contest . . . ."

The decision by a Georgia death jury at the final stage of its deliberations to impose death is a significantly different decision from the model just described. A wide range of evidence is admissible on literally countless subjects: "We have long recognized that '[f]or the determination of sentences, justice generally requires . . . that there be taken into account the *circumstances of the offense* together with the *character and propensities of the offender*.'" *Gregg*, 428 U. S., at 189 (emphasis added). In considering this evidence, the jury does not attempt to decide whether particular elements have been proved, but instead makes a unique, individualized judgment regarding the punishment that a particular person deserves. See *Lockett* v. *Ohio*, 438 U. S. 586, 602–605 (1978).

The role of aggravating circumstances in making this judgment is substantially more limited than the role played by jury instructions or allegations in an indictment in an ordinary trial. In Georgia, aggravating circumstances serve principally to restrict the class of defendants subject to the death sentence; once a single aggravating circumstance is specified, the jury then considers all the evidence in aggravation-mitigation in deciding whether to impose the death penalty, see Part I, *supra*. An aggravating circumstance in this latter stage is simply one of the countless considerations weighed by the jury in seeking to judge the punishment appropriate to the individual defendant.

If an aggravating circumstance is revealed to be invalid, the probable effect of this fact alone on the jury's second decision—whether the death sentence is appropriate—is minimal. If one of the few theories of guilt presented to the jury

in the trial judge's instructions, or the indictment, proves invalid, there is a substantial risk that the jury may have based its verdict on an improper theory. This follows from the necessarily limited number of theories presented to the jury, and from the fact that the jury's decisionmaking is carefully routed along paths specifically set out in the instructions. When an aggravating circumstance proves invalid, however, the effect ordinarily is only to diminish the probative value of one of literally countless factors that the jury considered. The inference that this diminution would alter the result reached by the jury is all but nonexistent. Given this, the rule developed in *Street* simply cannot be applied sensibly to sentencing decisions resulting from proceedings involving aggravating circumstances. Instead, as developed in the following Part, a different analysis has been applied to the question whether to set aside sentencing decisions based in part upon invalid factors.

## III

Respondent contends next that, even if *Street* is inapplicable, the erroneous submission to the jury of an instruction which we are bound to regard as unconstitutionally vague, see n. 3, *supra*, must have had sufficient effect on the jury's deliberations to require vacating its verdict. Although our prior decisions are not completely consistent regarding the effect of constitutional error in sentencing proceedings on the sentence imposed on the defendant, in general sentencing decisions are accorded far greater finality than convictions.

Ordinarily, a sentence within statutory limits is beyond appellate review. *Gore* v. *United States*, 357 U. S. 386, 393 (1958). In *Street*, 394 U. S., at 588, n. 9, we cited with approval to several of a long line of sentencing decisions. In *Claassen* v. *United States*, 142 U. S. 140 (1891); *Pinkerton* v. *United States*, 328 U. S. 640 (1946); and *Barenblatt* v. *United States*, 360 U. S. 109 (1959), defendants were convicted on several separate counts and received "general sentences,"

not linked to any one or combination of the counts. The defendants then challenged all their convictions on writ of error or appeal. The Court, following a well-settled rule, stated in *Barenblatt:* "Since this sentence was less than the maximum punishment authorized by the statute for conviction under any one Count, the judgment below must be upheld if the conviction upon any of the Counts is sustainable." *Id.*, at 115 (footnote omitted). In *Claassen* we said: "[I]t is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only." 142 U. S., at 146–147.

The practical basis for the rules articulated in *Gore* and the *Claassen* line of cases is clear. As indicated above, sentencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does. The fact that one of the countless considerations that the sentencer would have taken into account was erroneous, misleading, or otherwise improperly before him, ordinarily can be assumed not to have been a necessary basis for his decision. Nonetheless, in limited cases, noncapital sentencing decisions *are* vacated for resentencing.

In *United States* v. *Tucker*, 404 U. S. 443 (1972), two uncounseled—and therefore unconstitutionally obtained—convictions were introduced against the defendant in the sentencing proceeding. The Court observed that the sentencing judge gave "explicit" and "specific" attention, *id.*, at 444, 447, to these convictions. Moreover, it noted that the defendant would have "appeared in a dramatically different light" had the true character of the unconstitutional convictions been known: the judge would have been dealing with a

man unconstitutionally imprisoned, beginning at age 17, for more than 10 years, including 5½ years on a chain gang. *Id.*, at 448. Finally, the Court reemphasized the unconstitutional character of the respondent's prior convictions, and opined that to permit his sentence to stand would "erode" the rule in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). Given all this, respondent's sentence was held improper, and the case was remanded for resentencing.

Similarly, in *Townsend* v. *Burke*, 334 U. S. 736 (1948), an uncounseled defendant was sentenced following a proceeding in which the trial judge explicitly and repeatedly relied upon the incorrect assumption that the defendant had been convicted of several crimes. The Court observed that "[i]t is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process." *Id.*, at 741.

The approach taken in *Tucker*, *Townsend*, and the *Claassen* line of cases begins with the presumption that, since the sentencer's judgment rested on countless variables, an error made in one portion of the sentencing proceeding ordinarily should not affect the sentence. This presumption is most plainly revealed by the *Claassen* line of cases, where a sentence will stand even if it turns out that the crimes for which the defendant was sentenced had not all been committed. Nonetheless, the defendant may adduce evidence that the sentencing body likely would have acted differently had the error not occurred. In order to prevail on such a claim, however, we have required a convincing showing that the introduction of specific constitutionally infirm evidence had an ascertainable and "dramatic" impact on the sentencing authority. See *United States* v. *Tucker*, *supra*; *Townsend* v. *Burke*, *supra*. Of course, a more careful application of this standard is appropriate in capital cases.

In the present case, however, the erroneous submission to the jury of an invalid aggravating circumstance simply cannot satisfy whatever standard may plausibly be based on the cases discussed above. As the Court points out, the only real impact resulting from the error was that evidence properly before the jury was capable of being fit within a category that the judge's instructions labeled "aggravating." The evidence in question—respondent's prior convictions—plainly was an aggravating factor, which, as we held in *Gregg*, the jury was free to consider. The fact that the instruction gave added weight to this no doubt played some role in the deliberations of some jurors. Yet, the Georgia Supreme Court was plainly right in saying that the "mere fact that some of the aggravating circumstances presented were improperly designated 'statutory'" had "an inconsequential impact on the jury's decision regarding the death penalty." 250 Ga. 97, 100, 297 S. E. 2d 1, 4 (1982). The plurality recognized in *Lockett* v. *Ohio*, 438 U. S., at 605, that there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death." Whatever a defendant must show to set aside a death sentence, the present case involved only a remote possibility that the error had any effect on the jury's judgment; the Eighth Amendment did not therefore require that the defendant's sentence be vacated.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Even if I accepted the prevailing view that the death penalty may constitutionally be imposed under certain circumstances, I could scarcely join in upholding a death sentence based in part upon a statutory aggravating circumstance so vague that its application turns solely on the "whim" of the jury. *Arnold* v. *State*, 236 Ga. 534, 541, 224 S. E. 2d 386, 391 (1976).

The submission of the unconstitutional statutory aggravating circumstance to the jury cannot be deemed harmless error on the theory that "in Georgia, the finding of an ag-

gravating circumstance does not play *any role* in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." *Ante*, at 874 (emphasis added). If the trial judge's instructions had apprised the jury of this theory, it might have been proper to assume that the unconstitutional statutory factor did not affect the jury's verdict. But such instructions would have suffered from an even more fundamental constitutional defect—a failure to provide any standards whatsoever to guide the jury's actual sentencing decision. If this Court's decisions concerning the death penalty establish anything, it is that a capital sentencing scheme based on "standardless jury discretion" violates the Eighth and Fourteenth Amendments. *Gregg* v. *Georgia*, 428 U. S. 153, 195, n. 47 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.), citing *Furman* v. *Georgia*, 408 U. S. 238 (1972).

In any event, the jury that sentenced respondent to death was never informed of this "threshold" theory, which was invented for the first time by the Georgia Supreme Court more than seven years later. Under the instructions actually given, a juror might reasonably have concluded, *as has this Court in construing essentially identical instructions*, that any aggravating circumstances, *including* statutory aggravating circumstances, should be balanced against any mitigating circumstances in the determination of the defendant's sentence. There is no way of knowing whether the jury would have sentenced respondent to death if its attention had not been drawn to the unconstitutional statutory factor.

## I

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, *supra*, at 231 (MARSHALL, J., dissenting); *Furman* v. *Georgia*, *supra*, at 314 (MARSHALL, J., concurring).

## II

Today the Court upholds a death sentence that was based in part on a statutory aggravating circumstance which the State concedes was so amorphous that it invited "subjective decision-making without . . . minimal, objective guidelines for its application." *Arnold* v. *State*, *supra*, at 541, 224 S. E. 2d, at 391. In order to reach this surprising result, the Court embraces the theory, which it infers from the Georgia Supreme Court's response to this Court's certified question,[1] that the only function of statutory aggravating circumstances in Georgia is to screen out at the threshold defendants to whom none of the 10 circumstances applies. According to this theory, once 1 of the 10 statutory factors has been found, they drop out of the picture entirely and play no part in the jury's decision whether to sentence the defendant to death. Relying on this "threshold" theory, the Court concludes that

[1] Although the Court asserts that "the Georgia Supreme Court has unambiguously advised us" that the finding of one or more of the statutory aggravating circumstances "merely performs the function of narrowing the category of persons convicted of murder who are eligible for the death penalty" and serves no other function, *ante*, at 875, the Georgia Supreme Court's answer to our certified question is in fact far from clear. The answer states only that the threshold "is passed regardless of the number of statutory aggravating circumstances found, so long as there is at least one," and that thereafter the sentencer may consider "all the facts and circumstances of the case." 250 Ga. 97, 100, 297 S. E. 2d 1, 4 (1982). To say that all aggravating circumstances, statutory and nonstatutory, may be considered once one statutory circumstance has been found, is not to say that "the finding of an aggravating circumstance does not play *any* role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." *Ante*, at 874 (emphasis added). There is nothing in the Georgia Supreme Court's opinion to suggest that jurors are not to give special attention to statutory aggravating circumstances *throughout their deliberations*, rather than simply in making the threshold determination whether any such circumstances apply.

Nonetheless, for the purposes of this opinion I will assume that the majority has correctly characterized the Georgia Supreme Court's explanation of the Georgia capital sentencing procedure.

the submission of the unconstitutional statutory factor did not prejudice respondent.

If the jury instructions given some eight years ago were consistent with this new theory, we could assume that the jury did not focus on the vague statutory aggravating circumstance in making its actual sentencing decision. But if the jury had been so instructed, the instructions would have been constitutionally defective for a more basic reason, since they would have left the jury totally without guidance once it found a single statutory aggravating circumstance.

A

Until this Court's decision in *Furman* v. *Georgia* in 1972, the capital sentencing procedures in most States delegated to judges and juries plenary authority to decide when a death sentence should be imposed. The sentencer was given "practically untrammeled discretion to let an accused live or insist that he die." *Furman* v. *Georgia*, *supra*, at 248 (Douglas, J., concurring) (footnote omitted).

In *Furman* this Court held that the system of capital punishment then in existence in this country was incompatible with the Eighth and Fourteenth Amendments. As was later recognized in *Gregg* v. *Georgia*, *Furman* established one basic proposition if it established nothing else: "where the ultimate punishment of death is at issue a system of standardless jury discretion violates the Eighth and Fourteenth Amendments." 428 U. S., at 195, n. 47 (opinion of Stewart, POWELL, and STEVENS, JJ.). The basic teaching of *Furman* is that a State may not leave the decision whether a defendant lives or dies to the unfettered discretion of the jury, since such a scheme is "pregnant with discrimination," 408 U. S., at 257 (Douglas, J., concurring), and inevitably results in death sentences which are "wantonly and . . . freakishly imposed," *id.*, at 310 (Stewart, J., concurring), and for which "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many

cases in which it is not." *Id.*, at 313 (WHITE, J., concurring).[2] See *Gregg* v. *Georgia*, 428 U. S., at 195, n. 47 (noting that *Furman* "ruled that death sentences imposed under statutes that left juries with untrammeled discretion to impose or withhold the death penalty violated the Eighth and Fourteenth Amendments").

Four years after *Furman* was decided, this Court upheld the capital sentencing statutes of Georgia, Florida, and Texas against constitutional attack, concluding that those statutes contained safeguards that promised to eliminate the constitutional deficiencies found in *Furman*. See *Gregg* v. *Georgia; Proffitt* v. *Florida*, 428 U. S. 242 (1976); *Jurek* v. *Texas*, 428 U. S. 262 (1976). The Court's conclusion was based on the premise that the statutes ensured that sentencers would be "given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." *Gregg* v. *Georgia*, 428 U. S., at 192 (opinion of Stewart, POWELL, and STEVENS, JJ.).[3] The Court assumed that the iden-

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[2] JUSTICE BRENNAN and I were the other two Members of the *Furman* majority. We concluded that the death penalty is in all circumstances cruel and unusual punishment. 408 U. S., at 257 (BRENNAN, J., concurring); *id.*, at 314 (MARSHALL, J., concurring).

[3] See *Gregg* v. *Georgia*, 428 U. S., at 221 (WHITE, J., joined by BURGER, C. J., and REHNQUIST, J., concurring in judgment) ("The Georgia Legislature has made an effort to identify those aggravating factors which it considers necessary *and relevant* to the question whether a defendant convicted of capital murder should be be sentenced to death") (emphasis added; footnote omitted); *Proffitt* v. *Florida*, 428 U. S. 242, 251 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.) ("The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty shall be imposed"); *id.*, at 260 (WHITE, J., joined by BURGER, C. J., and REHNQUIST, J., concurring in judgment) ("although the statutory aggravating and mitigating circumstances are not susceptible of mechanical application, they are by no means so vague and overbroad as to leave the discretion of the sentencing authority unfettered"); *Jurek* v. *Texas*, 428 U. S. 262, 273–274 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.)

tification of specific statutory aggravating circumstances would put an end to standardless sentencing discretion:

> "These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends sentence. No longer can a Georgia jury do as Furman's jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die. Instead, *the jury's attention is directed to the specific circumstances of the crime:* Was it committed in the course of another capital felony? Was it committed for money? Was it committed upon a peace officer or judicial officer? Was it committed in a particularly heinous way or in a manner that endangered the lives of many persons? In addition, *the jury's attention is focused on the characteristics of the person who committed the crime:* Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment . . . . As a result, while some jury discretion still exists, *'the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application.'*" *Id.*, at 197–198 (opinion of Stewart, POWELL, and STEVENS, JJ.) (emphasis added; footnote and citation omitted).

In *Godfrey* v. *Georgia*, 446 U. S. 420 (1980), the Court reiterated that a State "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance.'" *Id.*, at 428 (plurality opinion) (citations

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("It . . . appears that . . . the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death"); *id.*, at 279 (WHITE, J., joined by BURGER, C. J., and REHNQUIST, J., concurring in judgment) ("the Texas capital punishment statute limits the imposition of the death penalty to a narrowly defined group of the most brutal crimes and aims at limiting its imposition to similar offenses occurring under similar circumstances").

omitted). The Court reaffirmed the teaching of *Furman* and *Gregg* that "the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." 446 U. S., at 427. "[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Id.*, at 428.

B

Today we learn for the first time that the Court did not mean what it said in *Gregg* v. *Georgia*. We now learn that the actual decision whether a defendant lives or dies may still be left to the unfettered discretion of the jury. Although we were assured in *Gregg* that sentencing discretion was "'to be exercised . . . by clear and objective standards,'" 428 U. S., at 198 (opinion of Stewart, POWELL, and STEVENS, JJ.), we are now told that the State need do nothing whatsoever to guide the jury's ultimate decision whether to sentence a defendant to death or spare his life.

Under today's decision all the State has to do is require the jury to make some threshold finding. Once that finding is made, the jurors can be left completely at large, with nothing to guide them but their whims and prejudices. They need not even consider any statutory aggravating circumstances that they have found to be applicable. Their sentencing decision is to be the product of their discretion and of nothing else.

If this is not a scheme based on "standardless jury discretion," *Gregg* v. *Georgia*, 428 U. S., at 195, n. 47 (opinion of Stewart, POWELL, and STEVENS, JJ.), I do not know what is. Today's decision makes an absolute mockery of this Court's precedents concerning capital sentencing procedures. There is no point in requiring state legislatures to identify specific aggravating circumstances if sentencers are to be left free to ignore them in deciding which defendants are to die. If this is all *Gregg* v. *Georgia* stands for, the States may as well be

permitted to reenact the statutes that were on the books before *Furman*.

The system of discretionary sentencing that the Court approves today differs only in form from the capital sentencing procedures that this Court held unconstitutional more than a decade ago. The only difference between Georgia's pre-*Furman* capital sentencing scheme and the "threshold" theory that the Court embraces today is that the unchecked discretion previously conferred in all cases of murder is now conferred in cases of murder with one statutory aggravating circumstance. But merely circumscribing the category of cases eligible for the death penalty cannot remove from constitutional scrutiny the procedure by which those actually sentenced to death are selected.

More than a decade ago this Court struck down an Ohio statute that permitted a death sentence only if the jury found that the victim of the murder was a police officer, but gave the jury unbridled discretion once that aggravating factor was found. *Duling* v. *Ohio*, 408 U. S. 936 (1972), summarily rev'g 21 Ohio St. 2d 13, 254 N. E. 2d 670 (1970). See Ohio Rev. Code Ann. § 2901.04 (1953). There is no difference of any consequence between the Ohio scheme held impermissible in *Duling* and the "threshold" scheme that the Court endorses today. If, as *Duling* establishes, the Constitution prohibits a State from defining a crime (such as murder of a police officer) and then leaving the decision whether to impose the death sentence to the unchecked discretion of the jury, it must also prohibit a State from defining a lesser crime (such as murder) and then permitting the jury to make a standardless sentencing decision once it has found a single aggravating factor (such as that the victim was a police officer). In both cases the ultimate decision whether the defendant will be killed is left to the discretion of the sentencer, unguided by *any* legislative standards.[4] Whether a particu-

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[4] This remains true whether or not the aggravating factor satisfies the Court's requirement that it "genuinely narrow the class of persons eligible

lar preliminary finding was made at the guilt phase of the trial or at the sentencing phase is irrelevant; a requirement that the finding be made at the sentencing phase in no way channels the sentencer's discretion once that finding has been made.[5] If the Constitution forbids one form of standardless discretion, it must forbid the other as well.

## III

### A

In any event, the jury that sentenced respondent to death was never apprised of the "threshold" theory relied upon by the Court. There is no basis for the Court's assumption,

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for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Ante*, at 877.

[5] This Court has repeatedly recognized that a capital sentencing statute does not satisfy the Constitution simply because it requires a bifurcated trial and permits presentation at the penalty phase of evidence concerning the circumstances of the crime, the defendant's background and history, and other factors in aggravation and mitigation of punishment. *E. g.*, *Delgado* v. *Connecticut*, 408 U. S. 940 (1972), summarily rev'g 161 Conn. 536, 290 A. 2d 338 (1971) (see Conn. Gen. Stat. § 53–10 (1968)); *Moore* v. *Illinois*, 408 U. S. 786 (1972) (see Ill. Rev. Stat., ch. 38, § 1–7 (1963)); *Scoleri* v. *Pennsylvania*, 408 U. S. 934 (1972), summarily rev'g 432 Pa. 571, 248 A. 2d 295 (1968) (see Pa. Stat. Ann., Tit. 18, § 4701 (1963)). Although the creation of a separate sentencing proceeding permits the exclusion from the guilt phase of information that is relevant only to sentencing and that might prejudice the determination of guilt, merely bifurcating the trial obviously does nothing to guide the discretion of the sentencer. See *Gregg* v. *Georgia*, 428 U. S., at 192 (opinion of Stewart, POWELL, and STEVENS, JJ.).

Nor is mandatory appellate review a substitute for legislatively defined criteria to guide the jury in imposing sentence. *Ante*, at 890. Although appellate review may serve to reduce arbitrariness and caprice "[w]here the sentencing authority is required to specify the factors it relied upon in reaching its decision," *Gregg* v. *Georgia*, *supra*, at 195 (opinion of Stewart, POWELL, and STEVENS, JJ.), appellate review cannot serve this function where statutory aggravating circumstances play only a threshold role and an appellate court therefore has no means of ascertaining the factors underlying the jury's ultimate sentencing decision.

*ante*, at 891, that the jury did not attribute special significance to the statutory aggravating circumstances and did not weigh them, along with any other evidence in aggravation, against the evidence offered by respondent in mitigation.

In the first place,

> "everything about the judge's charge highlighted the importance of the aggravating circumstances. Not only were the circumstances submitted to the jury in writing, but also the jury was in turn required to write down each and every aggravating circumstance that it found to be established beyond a reasonable doubt. . . . The jury instructions provide absolutely no indication that, after carefully considering each of the statutory aggravating circumstances submitted by the trial judge, the jury should, or even could, discard the list of officially sanctioned grounds for imposing the death penalty in deciding whether to actually sentence respondent to death." *Zant* v. *Stephens*, 456 U. S. 410, 427 (1982) (MARSHALL, J., dissenting).

In deciding whether respondent deserved to die, the jurors might well have deemed his prior assaults unimportant if the judge had not specifically focused on them in his charge.

Second, the Court's assertion that "in Georgia, the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion," *ante*, at 874, is flatly inconsistent with this Court's own previous characterizations of the function of statutory aggravating circumstances in the Georgia scheme. In *Gregg* v. *Georgia*, where the jury instructions were essentially identical to those given here,[6] the joint opinion of Justices Stewart,

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[6] The instructions given in this case are set forth in the Court's opinion last Term certifying a question to the Georgia Supreme Court. See *Zant* v. *Stephens*, 456 U. S. 410, 411–412, n. 1 (1982). The instructions given in *Gregg* are quoted in JUSTICE WHITE's opinion concurring in the judgment in that case. See 428 U. S., at 217–218.

POWELL, and STEVENS took great pains to point out that the statutory aggravating circumstances served to apprise the sentencer "of the information relevant to the imposition of sentence and [to] provid[e] standards to guide its use of the information." 428 U. S., at 195. There was not the slightest hint that the statutory factors are relevant only to the threshold determination of whether the defendant is eligible to receive the death penalty. On the contrary, the joint opinion emphasized that they informed the sentencer of "the factors . . . that the State . . . deems particularly relevant *to the sentencing decision.*" *Id.*, at 192 (emphasis added). If it had been thought that statutory aggravating circumstances were to play only a threshold role in the sentencing process, it would have made no sense at all to say that a jury's verdict identifying one or more of those circumstances served to apprise appellate courts of "the factors it relied upon *in reaching its decision.*" *Id.*, at 195 (emphasis added). The very premise of the "threshold" theory adopted today is that statutory aggravating circumstances are *not* relied upon by the jury in reaching its ultimate sentencing decision, but are considered *only* in deciding whether the defendant is eligible to receive the death penalty.

The Court's assumption that respondent's jury did not balance aggravating circumstances against mitigating circumstances is also inconsistent with this Court's characterization of the almost identical instructions given in *Coker* v. *Georgia*, 433 U. S. 584 (1977) (plurality opinion). See App. in *Coker* v. *Georgia*, O. T. 1976, No. 75–5444, pp. 298–302. In *Coker*, as in this case, the jury was not expressly instructed to weigh aggravating against mitigating circumstances, but the plurality opinion sensibly recognized that such a weighing is inherent in any determination of whether mitigating circumstances warrant a life sentence notwithstanding the existence of aggravating circumstances:

> "The jury was instructed that it could consider as aggravating circumstances whether the rape had been committed by a person with a prior record of conviction

> for a capital felony and whether the rape had been committed in the course of committing another capital felony, namely, the armed robbery of Allen Carver. The court also instructed, pursuant to statute, that even if aggravating circumstances were present, the death penalty need not be imposed *if the jury found they were outweighed by mitigating circumstances*. . . ." 433 U. S., at 587–590 (emphasis added).

I would like to know how the jury that sentenced respondent to death in 1975 could have known that statutory aggravating circumstances were to play only a threshold role in their deliberations, when this Court itself has interpreted essentially identical instructions to require a weighing of aggravating and mitigating circumstances and as recently as last Term found it necessary to ask the Georgia Supreme Court to clarify what the instructions in this case meant. We are presented with "different and conflicting theories regarding a charge designed to guide the jury . . . , and yet we are asked to sustain the [death sentence] on the assumption that the jury was properly guided." *Bollenbach* v. *United States*, 326 U. S. 607, 613 (1946). For my part, I believe that a death sentence "ought not to rest on an equivocal direction to the jury on a basic issue." *Ibid.* It is patently unfair to assume that the jury that sentenced respondent somehow understood that statutory aggravating circumstances were to receive no special weight and were not to be balanced against mitigating circumstances. Respondent is "entitled to have the validity of [his sentence] appraised on consideration of the case as it was tried and as the issues were determined in the trial court," *Cole* v. *Arkansas*, 333 U. S. 196, 202 (1948); see *Presnell* v. *Georgia*, 439 U. S. 14, 16 (1978), not on a theory that has been adopted for the first time after the fact.

B

Once it is recognized that respondent's jury may well have assumed that statutory aggravating circumstances deserve

special weight, the injustice of today's decision becomes apparent. Under the Georgia capital sentencing procedure, the sentencer always has discretion not to impose a death sentence regardless of whether there is proof of one or more statutory aggravating circumstances, and regardless of whether there are any mitigating circumstances.

There is simply no way for this Court to know whether the jury would have sentenced respondent to death if the unconstitutional statutory aggravating circumstance had not been included in the judge's charge. If it is important for the State to authorize and for the prosecution to request the submission of a particular statutory aggravating circumstance to the jury, "we must assume that in some cases [that circumstance] will be decisive in the [jury's] choice between a life sentence and a death sentence." *Gardner* v. *Florida*, 430 U. S. 349, 359 (1977) (opinion of STEVENS, J.).

As Justice Stewart pointed out in a similar case, "under Georgia's capital punishment scheme, *only the trial judge or jury* can know and determine what to do when upon appellate review it has been concluded that a particular aggravating circumstance should not have been considered in sentencing the defendant to death." *Drake* v. *Zant*, 449 U. S. 999, 1001 (1980) (dissenting from denial of certiorari) (emphasis added). Although the Court labors mightily in an effort to demonstrate that submission of the unconstitutional statutory aggravating circumstance did not affect the jury's verdict, there is no escape from the conclusion—reached by JUSTICE POWELL only last Term—that respondent was sentenced to death "under instructions that could have misled the jury." *Zant* v. *Stephens*, 456 U. S., at 429 (POWELL, J., dissenting).[7] Where a man's life is at stake, this inconvenient fact should not be simply swept under the rug.

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[7] Although JUSTICE POWELL stated in his dissent that he would leave it to the Georgia Supreme Court to decide "whether it has authority to find that the instruction was harmless error beyond a reasonable doubt," 456

C

As I read the Court's opinion, the Court does not deny that respondent might have received only a life sentence if the unconstitutional aggravating circumstance had not been submitted to the jury. Rather, the Court assumes that "the instruction did induce the jury to place greater emphasis upon the respondent's prior criminal record than it would otherwise have done." *Ante*, at 888. The Court concludes, however, that the submission of this unconstitutional statutory factor does not amount to "a constitutional defect in the sentencing process," *ante*, at 889, because the jury could properly have been instructed to decide whether either of the other two statutory factors applied and told in addition that "in deciding whether or not [a death] sentence is appropriate you may consider the remainder of [the defendant's] prior criminal record," *ante*, at 888. The Court finds no constitutional difference between this charge and the charge actually given.

Even assuming that it is proper to sustain a death sentence by reference to a hypothetical instruction that might have been given but was not, the Court errs in assuming that the hypothetical instruction would satisfy the Constitution. As elaborated in Part II above, this Court's decisions establish that the actual determination whether a defendant shall live or die—and not merely the threshold decision whether he is eligible for a death sentence—must be guided by clear and objective standards. The focus of the sentencer's attention must be directed to specific factors whose existence or nonexistence can be determined with reasonable certainty. Since the hypothetical instruction would fail to channel the

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U. S., at 429, the *per curiam* opinion rejected this approach and asked the Georgia Supreme Court only to clarify the state-law premises underlying its decision to sustain respondent's death sentence. The Georgia Supreme Court was not asked to conduct, and it did not conduct, a review of the evidence to determine whether the instruction was harmless error beyond a reasonable doubt.

sentencer's discretion in this fashion, the Court's assumption that it would be constitutional is unwarranted.[8]

## IV

For the foregoing reasons, I would vacate respondent's death sentence.

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[8] Even if the hypothetical instruction were permissible, it would not follow that there was no constitutional defect in the instructions given in this case. There is nothing particularly vague about the phrase "prior criminal record"; it would be reasonably clear to any juror of ordinary intelligence that a defendant's prior criminal record consists of his past convictions. By contrast, it is common ground in this case that the statutory aggravating circumstance "substantial history of serious assaultive criminal convictions" is so vague that no two juries could be expected to agree as to whether a particular defendant had such a history.

It is one thing to bring to the jury's attention a readily identifiable factor such as the defendant's prior criminal record, and leave it to the jury to decide what weight that factor should receive. It is quite another thing to ask the jury to determine the applicability of a statutory factor that no group of individuals of ordinary intelligence can be expected to apply in any objective way, and then, if the issue is resolved against the defendant, to take that factor into account in imposing sentence. Both instructions invite the exercise of discretion as to the weight to be given to the statutory factor, but the instruction given here has the further vice of requiring an arbitrary determination that can only be made in a haphazard way. It is as if the jurors were asked to flip a coin and weigh the result in their sentencing decision. Even if the hypothetical charge cited by the Court were proper, the charge given in this case would still be impermissible because it injected an arbitrary determination into the sentencing process.

Syllabus

# IMMIGRATION AND NATURALIZATION SERVICE *v.* CHADHA ET AL.

## APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80–1832. Argued February 22, 1982—Reargued December 7, 1982—Decided June 23, 1983*

Section 244(c)(2) of the Immigration and Nationality Act (Act) authorizes either House of Congress, by resolution, to invalidate the decision of the Executive Branch, pursuant to authority delegated by Congress to the Attorney General, to allow a particular deportable alien to remain in the United States. Appellee-respondent Chadha, an alien who had been lawfully admitted to the United States on a nonimmigrant student visa, remained in the United States after his visa had expired and was ordered by the Immigration and Naturalization Service (INS) to show cause why he should not be deported. He then applied for suspension of the deportation, and, after a hearing, an Immigration Judge, acting pursuant to § 244(a)(1) of the Act, which authorizes the Attorney General, in his discretion, to suspend deportation, ordered the suspension, and reported the suspension to Congress as required by § 244(c)(1). Thereafter, the House of Representatives passed a resolution pursuant to § 244(c)(2) vetoing the suspension, and the Immigration Judge reopened the deportation proceedings. Chadha moved to terminate the proceedings on the ground that § 244(c)(2) is unconstitutional, but the judge held that he had no authority to rule on its constitutionality and ordered Chadha deported pursuant to the House Resolution. Chadha's appeal to the Board of Immigration Appeals was dismissed, the Board also holding that it had no power to declare § 244(c)(2) unconstitutional. Chadha then filed a petition for review of the deportation order in the Court of Appeals, and the INS joined him in arguing that § 244(c)(2) is unconstitutional. The Court of Appeals held that § 244(c)(2) violates the constitutional doctrine of separation of powers, and accordingly directed the Attorney General to cease taking any steps to deport Chadha based upon the House Resolution.

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*Together with No. 80–2170, *United States House of Representatives* v. *Immigration and Naturalization Service et al.*, and No. 80–2171, *United States Senate* v. *Immigration and Naturalization Service et al.*, on certiorari to the same court.

*Held:*

1. This Court has jurisdiction to entertain the INS's appeal in No. 80–1832 under 28 U. S. C. § 1252, which provides that "[a]ny party" may appeal to the Supreme Court from a judgment of "any court of the United States" holding an Act of Congress unconstitutional in "any civil action, suit, or proceeding" to which the United States or any of its agencies is a party. A court of appeals is "a court of the United States" for purposes of § 1252, the proceeding below was a "civil action, suit, or proceeding," the INS is an agency of the United States and was a party to the proceeding below, and the judgment below held an Act of Congress unconstitutional. Moreover, for purposes of deciding whether the INS was "any party" within the grant of appellate jurisdiction in § 1252, the INS was sufficiently aggrieved by the Court of Appeals' decision prohibiting it from taking action it would otherwise take. An agency's status as an aggrieved party under § 1252 is not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional. Pp. 929–931.

2. Section 244(c)(2) is severable from the remainder of § 244. Section 406 of the Act provides that if any particular provision of the Act is held invalid, the remainder of the Act shall not be affected. This gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or any part thereof, to depend upon whether the veto clause of § 244(c)(2) was invalid. This presumption is supported by § 244's legislative history. Moreover, a provision is further presumed severable if what remains after severance is fully operative as a law. Here, § 244 can survive as a "fully operative" and workable administrative mechanism without the one-House veto. Pp. 931–935.

3. Chadha has standing to challenge the constitutionality of § 244(c)(2) since he has demonstrated "injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 79. Pp. 935–936.

4. The fact that Chadha may have other statutory relief available to him does not preclude him from challenging the constitutionality of § 244(c)(2), especially where the other avenues of relief are at most speculative. Pp. 936–937.

5. The Court of Appeals had jurisdiction under § 106(a) of the Act, which provides that a petition for review in a court of appeals "shall be the sole and exclusive procedure for the judicial review of all final orders of deportation . . . made against aliens within the United States pursuant to administrative proceedings" under § 242(b) of the Act. Section 106(a) includes all matters on which the final deportation order is contingent, rather than only those determinations made at the deportation

hearing. Here, Chadha's deportation stands or falls on the validity of the challenged veto, the final deportation order having been entered only to implement that veto. Pp. 937–939.

6. A case or controversy is presented by these cases. From the time of the House's formal intervention, there was concrete adverseness, and prior to such intervention, there was adequate Art. III adverseness even though the only parties were the INS and Chadha. The INS's agreement with Chadha's position does not alter the fact that the INS would have deported him absent the Court of Appeals' judgment. Moreover, Congress is the proper party to defend the validity of a statute when a Government agency, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is unconstitutional. Pp. 939–940.

7. These cases do not present a nonjusticiable political question on the asserted ground that Chadha is merely challenging Congress' authority under the Naturalization and Necessary and Proper Clauses of the Constitution. The presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine. Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by the courts simply because the issues have political implications. Pp. 940–943.

8. The congressional veto provision in § 244(c)(2) is unconstitutional. Pp. 944–959.

(a) The prescription for legislative action in Art. I, § 1—requiring all legislative powers to be vested in a Congress consisting of a Senate and a House of Representatives—and § 7—requiring every bill passed by the House and Senate, before becoming law, to be presented to the President, and, if he disapproves, to be repassed by two-thirds of the Senate and House—represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered procedure. This procedure is an integral part of the constitutional design for the separation of powers. Pp. 944–951.

(b) Here, the action taken by the House pursuant to § 244(c)(2) was essentially legislative in purpose and effect and thus was subject to the procedural requirements of Art. I, § 7, for *legislative* action: passage by a majority of both Houses and presentation to the President. The one-House veto operated to overrule the Attorney General and mandate Chadha's deportation. The veto's legislative character is confirmed by the character of the congressional action it supplants; *i. e.*, absent the veto provision of § 244(c)(2), neither the House nor the Senate, or both acting together, could effectively require the Attorney General to deport an alien once the Attorney General, in the exercise of legislatively

delegated authority, had determined that the alien should remain in the United States. Without the veto provision, this could have been achieved only by legislation requiring deportation. A veto by one House under § 244(c)(2) cannot be justified as an attempt at amending the standards set out in § 244(a)(1), or as a repeal of § 244 as applied to Chadha. The nature of the decision implemented by the one-House veto further manifests its legislative character. Congress must abide by its delegation of authority to the Attorney General until that delegation is legislatively altered or revoked. Finally, the veto's legislative character is confirmed by the fact that when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action in the Constitution. Pp. 951–959.

634 F. 2d 408, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, *post*, p. 959. WHITE, J., filed a dissenting opinion, *post*, p. 967. REHNQUIST, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 1013.

*Eugene Gressman* reargued the cause for petitioner in No. 80–2170. With him on the briefs was *Stanley M. Brand.*

*Michael Davidson* reargued the cause for petitioner in No. 80–2171. With him on the briefs were *M. Elizabeth Culbreth* and *Charles Tiefer.*

*Solicitor General Lee* reargued the cause for the Immigration and Naturalization Service in all cases. With him on the briefs were *Assistant Attorney General Olson, Deputy Solicitor General Geller, Deputy Assistant Attorney General Simms, Edwin S. Kneedler, David A. Strauss,* and *Thomas O. Sargentich.*

*Alan B. Morrison* reargued the cause for Jagdish Rai Chadha in all cases. With him on the brief was *John Cary Sims.*†

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†*Antonin Scalia, Richard B. Smith,* and *David Ryrie Brink* filed a brief for the American Bar Association as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Robert C. Eckhardt* for Certain Members of the United States House of Representatives; and by *Paul C. Rosenthal* for the Counsel on Administrative Law of the Federal Bar Association.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in Nos. 80–2170 and 80–2171, and postponed consideration of the question of jurisdiction in No. 80–1832. Each presents a challenge to the constitutionality of the provision in § 244(c)(2) of the Immigration and Nationality Act, 66 Stat. 216, as amended, 8 U. S. C. § 1254(c)(2), authorizing one House of Congress, by resolution, to invalidate the decision of the Executive Branch, pursuant to authority delegated by Congress to the Attorney General of the United States, to allow a particular deportable alien to remain in the United States.

I

Chadha is an East Indian who was born in Kenya and holds a British passport. He was lawfully admitted to the United States in 1966 on a nonimmigrant student visa. His visa expired on June 30, 1972. On October 11, 1973, the District Director of the Immigration and Naturalization Service ordered Chadha to show cause why he should not be deported for having "remained in the United States for a longer time than permitted." App. 6. Pursuant to § 242(b) of the Immigration and Nationality Act (Act), 8 U. S. C. § 1252(b), a deportation hearing was held before an Immigration Judge on January 11, 1974. Chadha conceded that he was deportable for overstaying his visa and the hearing was adjourned to enable him to file an application for suspension of deportation under § 244(a)(1) of the Act, 8 U. S. C. § 1254(a)(1). Section 244(a)(1), at the time in question, provided:

> "As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
>
> "(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United

> States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."[1]

After Chadha submitted his application for suspension of deportation, the deportation hearing was resumed on February 7, 1974. On the basis of evidence adduced at the hearing, affidavits submitted with the application, and the results of a character investigation conducted by the INS, the Immigration Judge, on June 25, 1974, ordered that Chadha's deportation be suspended. The Immigration Judge found that Chadha met the requirements of § 244(a)(1): he had resided continuously in the United States for over seven years, was of good moral character, and would suffer "extreme hardship" if deported.

Pursuant to § 244(c)(1) of the Act, 8 U. S. C. § 1254(c)(1), the Immigration Judge suspended Chadha's deportation and a report of the suspension was transmitted to Congress. Section 244(c)(1) provides:

> "Upon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the

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[1] Congress delegated the major responsibilities for enforcement of the Immigration and Nationality Act to the Attorney General. 8 U. S. C. § 1103(a). The Attorney General discharges his responsibilities through the Immigration and Naturalization Service, a division of the Department of Justice. *Ibid.*

> facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first day of each calendar month in which Congress is in session."

Once the Attorney General's recommendation for suspension of Chadha's deportation was conveyed to Congress, Congress had the power under § 244(c)(2) of the Act, 8 U. S. C. § 1254(c)(2), to veto[2] the Attorney General's determination that Chadha should not be deported. Section 244(c)(2) provides:

> "(2) In the case of an alien specified in paragraph (1) of subsection (a) of this subsection—
> "if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings."

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[2] In constitutional terms, "veto" is used to describe the President's power under Art. I, § 7, of the Constitution. See Black's Law Dictionary 1403 (5th ed. 1979). It appears, however, that congressional devices of the type authorized by § 244(c)(2) have come to be commonly referred to as a "veto." See, *e. g.*, Martin, The Legislative Veto and the Responsible Exercise of Congressional Power, 68 Va. L. Rev. 253 (1982); Miller & Knapp, The Congressional Veto: Preserving the Constitutional Framework, 52 Ind. L. J. 367 (1977). We refer to the congressional "resolution" authorized by § 244(c)(2) as a "one-House veto" of the Attorney General's decision to allow a particular deportable alien to remain in the United States.

The June 25, 1974, order of the Immigration Judge suspending Chadha's deportation remained outstanding as a valid order for a year and a half. For reasons not disclosed by the record, Congress did not exercise the veto authority reserved to it under § 244(c)(2) until the first session of the 94th Congress. This was the final session in which Congress, pursuant to § 244(c)(2), could act to veto the Attorney General's determination that Chadha should not be deported. The session ended on December 19, 1975. 121 Cong. Rec. 42014, 42277 (1975). Absent congressional action, Chadha's deportation proceedings would have been canceled after this date and his status adjusted to that of a permanent resident alien. See 8 U. S. C. § 1254(d).

On December 12, 1975, Representative Eilberg, Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law, introduced a resolution opposing "the granting of permanent residence in the United States to [six] aliens," including Chadha. H. Res. 926, 94th Cong., 1st Sess.; 121 Cong Rec. 40247 (1975). The resolution was referred to the House Committee on the Judiciary. On December 16, 1975, the resolution was discharged from further consideration by the House Committee on the Judiciary and submitted to the House of Representatives for a vote. 121 Cong. Rec. 40800. The resolution had not been printed and was not made available to other Members of the House prior to or at the time it was voted on. *Ibid.* So far as the record before us shows, the House consideration of the resolution was based on Representative Eilberg's statement from the floor that

> "[i]t was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution [Chadha and five others] did not meet these statutory requirements, particularly as it relates to hardship; and it is the opinion of the committee that their deportation should not be suspended." *Ibid.*

The resolution was passed without debate or recorded vote.[3] Since the House action was pursuant to § 244(c)(2), the resolution was not treated as an Art. I legislative act; it was not

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[3] It is not at all clear whether the House generally, or Subcommittee Chairman Eilberg in particular, correctly understood the relationship between H. Res. 926 and the Attorney General's decision to suspend Chadha's deportation. Exactly one year previous to the House veto of the Attorney General's decision in this case, Representative Eilberg introduced a similar resolution disapproving the Attorney General's suspension of deportation in the case of six other aliens. H. Res. 1518, 93d Cong., 2d Sess. (1974). The following colloquy occurred on the floor of the House:

"Mr. WYLIE. Mr. Speaker, further reserving the right to object, is this procedure to expedite the ongoing operations of the Department of Justice, as far as these people are concerned. Is it in any way contrary to whatever action the Attorney General has taken on the question of deportation; does the gentleman know?

"Mr. EILBERG. Mr. Speaker, the answer is no to the gentleman's final question. These aliens have been found to be deportable and the Special Inquiry Officer's decision denying suspension of deportation has been reversed by the Board of Immigration Appeals. We are complying with the law since all of these decisions have been referred to us for approval or disapproval, and there are hundreds of cases in this category. In these six cases however, we believe it would be grossly improper to allow these people to acquire the status of permanent resident aliens.

"Mr. WYLIE. In other words, the gentleman has been working with the Attorney General's office?

"Mr. EILBERG. Yes.

"Mr. WYLIE. This bill then is in fact a confirmation of what the Attorney General intends to do?

"Mr. EILBERG. The gentleman is correct insofar as it relates to the determination of deportability which has been made by the Department of Justice in each of these cases.

"Mr. WYLIE. Mr. Speaker, I withdraw my reservation of objection." 120 Cong. Rec. 41412 (1974).

Clearly, this was an obfuscation of the effect of a veto under § 244(c)(2). Such a veto in no way constitutes "a confirmation of what the Attorney General intends to do." To the contrary, such a resolution was meant to overrule and set aside, or "veto," the Attorney General's determination that, in a particular case, cancellation of deportation would be appropriate under the standards set forth in § 244(a)(1).

submitted to the Senate or presented to the President for his action.

After the House veto of the Attorney General's decision to allow Chadha to remain in the United States, the Immigration Judge reopened the deportation proceedings to implement the House order deporting Chadha. Chadha moved to terminate the proceedings on the ground that § 244(c)(2) is unconstitutional. The Immigration Judge held that he had no authority to rule on the constitutional validity of § 244(c)(2). On November 8, 1976, Chadha was ordered deported pursuant to the House action.

Chadha appealed the deportation order to the Board of Immigration Appeals, again contending that § 244(c)(2) is unconstitutional. The Board held that it had "no power to declare unconstitutional an act of Congress" and Chadha's appeal was dismissed. App. 55–56.

Pursuant to § 106(a) of the Act, 8 U. S. C. § 1105a(a), Chadha filed a petition for review of the deportation order in the United States Court of Appeals for the Ninth Circuit. The Immigration and Naturalization Service agreed with Chadha's position before the Court of Appeals and joined him in arguing that § 244(c)(2) is unconstitutional. In light of the importance of the question, the Court of Appeals invited both the Senate and the House of Representatives to file briefs *amici curiae*.

After full briefing and oral argument, the Court of Appeals held that the House was without constitutional authority to order Chadha's deportation; accordingly it directed the Attorney General "to cease and desist from taking any steps to deport this alien based upon the resolution enacted by the House of Representatives." 634 F. 2d 408, 436 (1980). The essence of its holding was that § 244(c)(2) violates the constitutional doctrine of separation of powers.

We granted certiorari in Nos. 80–2170 and 80–2171, and postponed consideration of our jurisdiction over the appeal in No. 80–1832, 454 U. S. 812 (1981), and we now affirm.

## II

Before we address the important question of the constitutionality of the one-House veto provision of § 244(c)(2), we first consider several challenges to the authority of this Court to resolve the issue raised.

### A

### *Appellate Jurisdiction*

Both Houses of Congress[4] contend that we are without jurisdiction under 28 U. S. C. § 1252 to entertain the INS appeal in No. 80–1832. Section 1252 provides:

> "Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party."

*Parker* v. *Levy*, 417 U. S. 733, 742, n. 10 (1974), makes clear that a court of appeals is a "court of the United States" for purposes of § 1252. It is likewise clear that the proceeding below was a "civil action, suit, or proceeding," that the INS is an agency of the United States and was a party to the proceeding below, and that that proceeding held an Act of Congress—namely, the one-House veto provision in § 244(c)(2)—unconstitutional. The express requisites for an appeal under § 1252, therefore, have been met.

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[4] Nine Members of the House of Representatives disagree with the position taken in the briefs filed by the Senate and the House of Representatives and have filed a brief *amici curiae* urging that the decision of the Court of Appeals be affirmed in this case.

In motions to dismiss the INS appeal, the congressional parties[5] direct attention, however, to our statement that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guaranty National Bank* v. *Roper*, 445 U. S. 326, 333 (1980). Here, the INS sought the invalidation of § 244(c)(2), and the Court of Appeals granted that relief. Both Houses contend that the INS has already received what it sought from the Court of Appeals, is not an aggrieved party, and therefore cannot appeal from the decision of the Court of Appeals. We cannot agree.

The INS was ordered by one House of Congress to deport Chadha. As we have set out more fully, *supra*, at 928, the INS concluded that it had no power to rule on the constitutionality of that order and accordingly proceeded to implement it. Chadha's appeal challenged that decision and the INS presented the Executive's views on the constitutionality of the House action to the Court of Appeals. But the INS brief to the Court of Appeals did not alter the agency's decision to comply with the House action ordering deportation of Chadha. The Court of Appeals set aside the deportation proceedings and ordered the Attorney General to cease and desist from taking any steps to deport Chadha; steps that the Attorney General would have taken were it not for that decision.

At least for purposes of deciding whether the INS is "any party" within the grant of appellate jurisdiction in § 1252, we hold that the INS was sufficiently aggrieved by the Court of Appeals decision prohibiting it from taking action it would otherwise take. It is apparent that Congress intended that

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[5] The Senate and House authorized intervention in this case, S. Res. 40 and H. R. Res. 49, 97th Cong., 1st Sess. (1981), and, on February 3, 1981, filed motions to intervene and petitioned for rehearing. The Court of Appeals granted the motions to intervene. Both Houses are therefore proper "parties" within the meaning of that term in 28 U. S. C. § 1254(1). See *Batterton* v. *Francis*, 432 U. S. 416, 424, n. 7 (1977).

this Court take notice of cases that meet the technical prerequisites of § 1252; in other cases where an Act of Congress is held unconstitutional by a federal court, review in this Court is available only by writ of certiorari. When an agency of the United States is a party to a case in which the Act of Congress it administers is held unconstitutional, it is an aggrieved party for purposes of taking an appeal under § 1252. The agency's status as an aggrieved party under § 1252 is not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional. The appeal in No. 80–1832 is therefore properly before us.[6]

B

*Severability*

Congress also contends that the provision for the one-House veto in § 244(c)(2) cannot be severed from § 244. Congress argues that if the provision for the one-House veto is held unconstitutional, all of § 244 must fall. If § 244 in its entirety is violative of the Constitution, it follows that the Attorney General has no authority to suspend Chadha's deportation under § 244(a)(1) and Chadha would be deported. From this, Congress argues that Chadha lacks standing to challenge the constitutionality of the one-House veto provision because he could receive no relief even if his constitutional challenge proves successful.[7]

Only recently this Court reaffirmed that the invalid portions of a statute are to be severed "'[u]nless it is evident that

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[6] In addition to meeting the statutory requisites of § 1252, of course, an appeal must present a justiciable case or controversy under Art. III. Such a controversy clearly exists in No. 80–1832, as in the other two cases, because of the presence of the two Houses of Congress as adverse parties. See *infra*, at 939; see also *Director, OWCP* v. *Perini North River Associates*, 459 U. S. 297, 302–305 (1982).

[7] In this case we deem it appropriate to address questions of severability first. But see *Buckley* v. *Valeo*, 424 U. S. 1, 108–109 (1976); *United States* v. *Jackson*, 390 U. S. 570, 585 (1968).

the Legislature would not have enacted those provisions which are within its power, independently of that which is not.'" *Buckley* v. *Valeo*, 424 U. S. 1, 108 (1976), quoting *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U. S. 210, 234 (1932). Here, however, we need not embark on that elusive inquiry since Congress itself has provided the answer to the question of severability in § 406 of the Immigration and Nationality Act, note following 8 U. S. C. § 1101, which provides:

> "If *any* particular provision of this Act, or the application thereof to *any* person or circumstance, is held invalid, *the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.*" (Emphasis added.)

This language is unambiguous and gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or of any part of the Act, to depend upon whether the veto clause of § 244(c)(2) was invalid. The one-House veto provision in § 244(c)(2) is clearly a "particular provision" of the Act as that language is used in the severability clause. Congress clearly intended "the remainder of the Act" to stand if "any particular provision" were held invalid. Congress could not have more plainly authorized the presumption that the provision for a one-House veto in § 244(c)(2) is severable from the remainder of § 244 and the Act of which it is a part. See *Electric Bond & Share Co.* v. *SEC*, 303 U. S. 419, 434 (1938).

The presumption as to the severability of the one-House veto provision in § 244(c)(2) is supported by the legislative history of § 244. That section and its precursors supplanted the long-established pattern of dealing with deportations like Chadha's on a case-by-case basis through private bills. Although it may be that Congress was reluctant to delegate final authority over cancellation of deportations, such reluctance is not sufficient to overcome the presumption of severability raised by § 406.

The Immigration Act of 1924, ch. 190, § 14, 43 Stat. 162, required the Secretary of Labor to deport any alien who entered or remained in the United States unlawfully. The only means by which a deportable alien could lawfully remain in the United States was to have his status altered by a private bill enacted by both Houses and presented to the President pursuant to the procedures set out in Art. I, § 7, of the Constitution. These private bills were found intolerable by Congress. In the debate on a 1937 bill introduced by Representative Dies to authorize the Secretary to grant permanent residence in "meritorious" cases, Dies stated:

> "It was my original thought that the way to handle all these meritorious cases was through special bills. I am absolutely convinced as a result of what has occurred in this House that it is impossible to deal with this situation through special bills. We had a demonstration of that fact not long ago when 15 special bills were before this House. The House consumed 5½ hours considering four bills and made no disposition of any of the bills." 81 Cong. Rec. 5542 (1937).

Representative Dies' bill passed the House, *id.*, at 5574, but did not come to a vote in the Senate. 83 Cong. Rec. 8992–8996 (1938).

Congress first authorized the Attorney General to suspend the deportation of certain aliens in the Alien Registration Act of 1940, ch. 439, § 20, 54 Stat. 671. That Act provided that an alien was to be deported, despite the Attorney General's decision to the contrary, if both Houses, by concurrent resolution, disapproved the suspension.

In 1948, Congress amended the Act to broaden the category of aliens eligible for suspension of deportation. In addition, however, Congress limited the authority of the Attorney General to suspend deportations by providing that the Attorney General could not cancel a deportation unless both Houses affirmatively voted by concurrent resolution to *approve* the Attorney General's action. Act of July 1, 1948,

ch. 783, 62 Stat. 1206. The provision for approval by concurrent resolution in the 1948 Act proved almost as burdensome as private bills. Just one year later, the House Judiciary Committee, in support of the predecessor to § 244(c)(2), stated in a Report:

> "In the light of experience of the last several months, the committee came to the conclusion that the requirement of affirmative action by both Houses of the Congress in many thousands of individual cases which are submitted by the Attorney General every year, is not workable and places upon the Congress and particularly on the Committee on the Judiciary responsibilities which it cannot assume. The new responsibilities placed upon the Committee on the Judiciary [by the concurrent resolution mechanism] are of purely administrative nature and they seriously interfere with the legislative work of the Committee on the Judiciary and would, in time, interfere with the legislative work of the House." H. R. Rep. No. 362, 81st Cong., 1st Sess., 2 (1949).

The proposal to permit one House of Congress to veto the Attorney General's suspension of an alien's deportation was incorporated in the Immigration and Nationality Act of 1952, Pub. L. 414, § 244(a), 66 Stat. 214. Plainly, Congress' desire to retain a veto in this area cannot be considered in isolation but must be viewed in the context of Congress' irritation with the burden of private immigration bills. This legislative history is not sufficient to rebut the presumption of severability raised by § 406 because there is insufficient evidence that Congress would have continued to subject itself to the onerous burdens of private bills had it known that § 244(c)(2) would be held unconstitutional.

A provision is further presumed severable if what remains after severance "is fully operative as a law." *Champlin Refining Co.* v. *Corporation Comm'n*, *supra*, at 234. There can be no doubt that § 244 is "fully operative" and workable administrative machinery without the veto provision in § 244(c)(2). Entirely independent of the one-House veto, the

administrative process enacted by Congress authorizes the Attorney General to suspend an alien's deportation under § 244(a). Congress' oversight of the exercise of this delegated authority is preserved since all such suspensions will continue to be reported to it under § 244(c)(1). Absent the passage of a bill to the contrary,[8] deportation proceedings will be canceled when the period specified in § 244(c)(2) has expired.[9] Clearly, § 244 survives as a workable administrative mechanism without the one-House veto.

## C

### *Standing*

We must also reject the contention that Chadha lacks standing because a consequence of his prevailing will advance

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[8] Without the provision for one-House veto, Congress would presumably retain the power, during the time allotted in § 244(c)(2), to enact a law, in accordance with the requirements of Art. I of the Constitution, mandating a particular alien's deportation, unless, of course, other constitutional principles place substantive limitations on such action. Cf. Attorney General Jackson's attack on H. R. 9766, 76th Cong., 3d Sess. (1940), a bill to require the Attorney General to deport an individual alien. The Attorney General called the bill "an historical departure from an unbroken American practice and tradition. It would be the first time that an act of Congress singled out a named individual for deportation." S. Rep. No. 2031, 76th Cong., 3d Sess., pt. 1, p. 9 (1940) (reprinting Jackson's letter of June 18, 1940). See n. 17, *infra*.

[9] Without the one-House veto, § 244 resembles the "report and wait" provision approved by the Court in *Sibbach* v. *Wilson & Co.*, 312 U. S. 1 (1941). The statute examined in *Sibbach* provided that the newly promulgated Federal Rules of Civil Procedure "shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session." Act of June 19, 1934, ch. 651, § 2, 48 Stat. 1064. This statute did *not* provide that Congress could unilaterally veto the Federal Rules. Rather, it gave Congress the opportunity to review the Rules before they became effective and to pass legislation barring their effectiveness if the Rules were found objectionable. This technique was used by Congress when it acted in 1973 to stay, and ultimately to revise, the proposed Rules of Evidence. Compare Act of Mar. 30, 1973, Pub. L. 93–12, 87 Stat. 9, with Act of Jan. 2, 1975, Pub. L. 93–595, 88 Stat. 1926.

the interests of the Executive Branch in a separation-of-powers dispute with Congress, rather than simply Chadha's private interests. Chadha has demonstrated "injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury . . . ." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 79 (1978). If the veto provision violates the Constitution, and is severable, the deportation order against Chadha will be canceled. Chadha therefore has standing to challenge the order of the Executive mandated by the House veto.

D

*Alternative Relief*

It is contended that the Court should decline to decide the constitutional question presented by these cases because Chadha may have other statutory relief available to him. It is argued that since Chadha married a United States citizen on August 10, 1980, it is possible that other avenues of relief may be open under §§ 201(b), 204, and 245 of the Act, 8 U. S. C. §§ 1151(b), 1154, and 1255. It is true that Chadha may be eligible for classification as an "immediate relative" and, as such, could lawfully be accorded permanent residence. Moreover, in March 1980, just prior to the decision of the Court of Appeals in these cases, Congress enacted the Refugee Act of 1980, Pub. L. 96–212, 94 Stat. 102, under which the Attorney General is authorized to grant asylum, and then permanent residence, to any alien who is unable to return to his country of nationality because of "a well-founded fear of persecution on account of race."

It is urged that these two intervening factors constitute a prudential bar to our consideration of the constitutional question presented in these cases. See *Ashwander* v. *TVA*, 297 U. S. 288, 346 (1936) (Brandeis, J., concurring). If we could perceive merit in this contention we might well seek to avoid deciding the constitutional claim advanced. But at most

these other avenues of relief are speculative. It is by no means certain, for example, that Chadha's classification as an immediate relative would result in the adjustment of Chadha's status from nonimmigrant to permanent resident. See *Menezes* v. *INS*, 601 F. 2d 1028 (CA9 1979). If Chadha is successful in his present challenge he will not be deported and will automatically become eligible to apply for citizenship.[10] A person threatened with deportation cannot be denied the right to challenge the constitutional validity of the process which led to his status merely on the basis of speculation over the availability of other forms of relief.

E

*Jurisdiction*

It is contended that the Court of Appeals lacked jurisdiction under § 106(a) of the Act, 8 U. S. C. § 1105a(a). That section provides that a petition for review in the Court of Appeals "shall be the sole and exclusive procedure for the judicial review of all final orders of deportation . . . made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act." Congress argues that the one-House veto authorized by § 244(c)(2) takes place outside the administrative proceedings conducted under § 242(b), and that the jurisdictional grant contained in § 106(a) does not encompass Chadha's constitutional challenge.

In *Cheng Fan Kwok* v. *INS*, 392 U. S. 206, 216 (1968), this Court held that "§ 106(a) embrace[s] only those determi-

[10] Depending on how the INS interprets its statutory duty under § 244 apart from the challenged portion of § 244(c)(2), Chadha's status may be retroactively adjusted to that of a permanent resident as of December 19, 1975—the last session in which Congress could have attempted to stop the suspension of Chadha's deportation from ripening into cancellation of deportation. See 8 U. S. C. § 1254(d). In that event, Chadha's 5-year waiting period to become a citizen under § 316(a) of the Act, 8 U. S. C. § 1427(a), would have elapsed.

nations made during a proceeding conducted under § 242(b), including those determinations made incident to a motion to reopen such proceedings." It is true that one court has read *Cheng Fan Kwok* to preclude appeals similar to Chadha's. See *Dastmalchi* v. *INS*, 660 F. 2d 880 (CA3 1981).[11] However, we agree with the Court of Appeals in these cases that the term "final orders" in § 106(a) "includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing." 634 F. 2d, at 412. Here, Chadha's deportation stands or falls on the validity of the challenged veto; the final order of deportation was entered against Chadha only to implement the action of the House of Representatives. Although the Attorney General was satisfied that the House action was invalid and that it should not have any effect on his decision to suspend deportation, he appropriately let the controversy take its course through the courts.

This Court's decision in *Cheng Fan Kwok*, *supra*, does not bar Chadha's appeal. There, after an order of deportation had been entered, the affected alien requested the INS to stay the execution of that order. When that request was denied, the alien sought review in the Court of Appeals under § 106(a). This Court's holding that the Court of Appeals lacked jurisdiction was based on the fact that the alien "did not 'attack the deportation order itself but instead [sought] relief not inconsistent with it.'" 392 U. S., at 213, quoting

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[11] Under the Third Circuit's reasoning, judicial review under § 106(a) would not extend to the constitutionality of § 244(c)(2) because that issue could not have been tested during the administrative deportation proceedings conducted under § 242(b). The facts in *Dastmalchi* are distinguishable, however. In *Dastmalchi*, Iranian aliens who had entered the United States on nonimmigrant student visas challenged a regulation that required them to report to the District Director of the INS during the Iranian hostage crisis. The aliens reported and were ordered deported after a § 242(b) proceeding. The aliens in *Dastmalchi* could have been deported irrespective of the challenged regulation. Here, in contrast, Chadha's deportation would have been *canceled* but for § 244(c)(2).

*Mui* v. *Esperdy*, 371 F. 2d 772, 777 (CA2 1966). Here, in contrast, Chadha directly attacks the deportation order itself, and the relief he seeks—cancellation of deportation—is plainly inconsistent with the deportation order. Accordingly, the Court of Appeals had jurisdiction under § 106(a) to decide these cases.

F

*Case or Controversy*

It is also contended that this is not a genuine controversy but "a friendly, non-adversary, proceeding," *Ashwander* v. *TVA*, 297 U. S., at 346 (Brandeis, J., concurring), upon which the Court should not pass. This argument rests on the fact that Chadha and the INS take the same position on the constitutionality of the one-House veto. But it would be a curious result if, in the administration of justice, a person could be denied access to the courts because the Attorney General of the United States agreed with the legal arguments asserted by the individual.

A case or controversy is presented by these cases. First, from the time of Congress' formal intervention, see n. 5, *supra*, the concrete adverseness is beyond doubt. Congress is both a proper party to defend the constitutionality of § 244(c)(2) and a proper petitioner under 28 U. S. C. § 1254(1). Second, prior to Congress' intervention, there was adequate Art. III adverseness even though the only parties were the INS and Chadha. We have already held that the INS's agreement with the Court of Appeals' decision that § 244(c)(2) is unconstitutional does not affect that agency's "aggrieved" status for purposes of appealing that decision under 28 U. S. C. § 1252, see *supra*, at 929–931. For similar reasons, the INS's agreement with Chadha's position does not alter the fact that the INS would have deported Chadha absent the Court of Appeals' judgment. We agree with the Court of Appeals that "Chadha has asserted a concrete controversy, and our decision will have real meaning: if we rule for Chadha, he will not be deported; if we uphold § 244(c)(2),

the INS will execute its order and deport him." 634 F. 2d, at 419.[12]

Of course, there may be prudential, as opposed to Art. III, concerns about sanctioning the adjudication of these cases in the absence of any participant supporting the validity of § 244(c)(2). The Court of Appeals properly dispelled any such concerns by inviting and accepting briefs from both Houses of Congress. We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional. See *Cheng Fan Kwok* v. *INS*, 392 U. S., at 210, n. 9; *United States* v. *Lovett*, 328 U. S. 303 (1946).

G

*Political Question*

It is also argued that these cases present a nonjusticiable political question because Chadha is merely challenging Congress' authority under the Naturalization Clause, U. S. Const., Art. I, § 8, cl. 4, and the Necessary and Proper Clause, U. S. Const., Art. I, § 8, cl. 18. It is argued that Congress' Art. I power "To establish an uniform Rule of Naturalization," combined with the Necessary and Proper Clause, grants it unreviewable authority over the regulation of aliens. The plenary authority of Congress over aliens under Art. I, § 8, cl. 4, is not open to question, but what is

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[12] A relevant parallel can be found in our recent decision in *Bob Jones University* v. *United States*, 461 U. S. 574 (1983). There, the United States agreed with Bob Jones University and Goldsboro Christian Schools that certain Revenue Rulings denying tax-exempt status to schools that discriminated on the basis of race were invalid. Despite its agreement with the schools, however, the United States was complying with a court order enjoining it from granting tax-exempt status to any school that discriminated on the basis of race. Even though the Government largely agreed with the opposing party on the merits of the controversy, we found an adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party. See *id.*, at 585, n. 9.

challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power. As we made clear in *Buckley* v. *Valeo*, 424 U. S. 1 (1976): "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), so long as the exercise of that authority does not offend some other constitutional restriction." *Id.*, at 132.

A brief review of those factors which may indicate the presence of a nonjusticiable political question satisfies us that our assertion of jurisdiction over these cases does no violence to the political question doctrine. As identified in *Baker* v. *Carr*, 369 U. S. 186, 217 (1962), a political question may arise when any one of the following circumstances is present:

> "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Congress apparently directs its assertion of nonjusticiability to the first of the *Baker* factors by asserting that Chadha's claim is "an assault on the legislative authority to enact Section 244(c)(2)." Brief for Petitioner in No. 80–2170, p. 48. But if this turns the question into a political question virtually every challenge to the constitutionality of a statute would be a political question. Chadha indeed argues that one House of Congress cannot constitutionally veto the Attorney General's decision to allow him to remain in this country. No policy underlying the political question doctrine

suggests that Congress or the Executive, or both acting in concert and in compliance with Art. I, can decide the constitutionality of a statute; that is a decision for the courts.[13]

Other *Baker* factors are likewise inapplicable to this case. As we discuss more fully below, Art. I provides the "judicially discoverable and manageable standards" of *Baker* for resolving the question presented by these cases. Those standards forestall reliance by this Court on nonjudicial "policy determinations" or any showing of disrespect for a coordinate branch. Similarly, if Chadha's arguments are accepted, § 244(c)(2) cannot stand, and, since the constitutionality of that statute is for this Court to resolve, there is no possibility of "multifarious pronouncements" on this question.

It is correct that this controversy may, in a sense, be termed "political." But the presence of constitutional issues with significant political overtones does not automatically in-

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[13] The suggestion is made that § 244(c)(2) is somehow immunized from constitutional scrutiny because the Act containing § 244(c)(2) was passed by Congress and approved by the President. *Marbury* v. *Madison*, 1 Cranch 137 (1803), resolved that question. The assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review. See *Smith* v. *Maryland*, 442 U. S. 735, 740, n. 5 (1979); *National League of Cities* v. *Usery*, 426 U. S. 833, 841, n. 12 (1976); *Buckley* v. *Valeo*, 424 U. S. 1 (1976); *Myers* v. *United States*, 272 U. S. 52 (1926). See also n. 22, *infra*. In any event, 11 Presidents, from Mr. Wilson through Mr. Reagan, who have been presented with this issue have gone on record at some point to challenge congressional vetoes as unconstitutional. See Henry, The Legislative Veto: In Search of Constitutional Limits, 16 Harv. J. Legis. 735, 737–738, n. 7 (1979) (collecting citations to Presidential statements). Perhaps the earliest Executive expression on the constitutionality of the congressional veto is found in Attorney General William D. Mitchell's opinion of January 24, 1933, to President Hoover. 37 Op. Atty. Gen. 56. Furthermore, it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds. For example, after President Roosevelt signed the Lend-Lease Act of 1941, Attorney General Jackson released a memorandum explaining the President's view that the provision allowing the Act's authorization to be terminated by concurrent resolution was unconstitutional. Jackson, A Presidential Legal Opinion, 66 Harv. L. Rev. 1353 (1953).

voke the political question doctrine. Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications in the sense urged by Congress. *Marbury* v. *Madison*, 1 Cranch 137 (1803), was also a "political" case, involving as it did claims under a judicial commission alleged to have been duly signed by the President but not delivered. But "courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Baker* v. *Carr*, *supra*, at 217.

In *Field* v. *Clark*, 143 U. S. 649 (1892), this Court addressed and resolved the question whether

> "a bill signed by the Speaker of the House of Representatives and by the President of the Senate, presented to and approved by the President of the United States, and delivered by the latter to the Secretary of State, as an act passed by Congress, does not become a law of the United States if it had not in fact been passed by Congress. . . .
>
> ". . . We recognize, on one hand, the duty of this court, from the performance of which it may not shrink, to give full effect to the provisions of the Constitution relating to the enactment of laws that are to operate wherever the authority and jurisdiction of the United States extend. On the other hand, we cannot be unmindful of the consequences that must result if this court should feel obliged, in fidelity to the Constitution, to declare that an enrolled bill, on which depend public and private interests of vast magnitude, and which has been . . . deposited in the public archives, *as an act of Congress*, . . . did not become a law." *Id.*, at 669–670 (emphasis in original).

## H

The contentions on standing and justiciability have been fully examined, and we are satisfied the parties are properly before us. The important issues have been fully briefed and

twice argued, see 458 U. S. 1120 (1982). The Court's duty in these cases, as Chief Justice Marshall declared in *Cohens* v. *Virginia*, 6 Wheat. 264, 404 (1821), is clear:

> "Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."

## III

### A

We turn now to the question whether action of one House of Congress under § 244(c)(2) violates strictures of the Constitution. We begin, of course, with the presumption that the challenged statute is valid. Its wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained:

> "Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto." *TVA* v. *Hill*, 437 U. S. 153, 194–195 (1978).

By the same token, the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government and our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies:

> "Since 1932, when the first veto provision was enacted into law, 295 congressional veto-type procedures have been inserted in 196 different statutes as follows: from 1932 to 1939, five statutes were affected; from 1940–49, nineteen statutes; between 1950–59, thirty-four statutes; and from 1960–69, forty-nine. From the year 1970 through 1975, at least one hundred sixty-three such pro-

visions were included in eighty-nine laws." Abourezk, The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives, 52 Ind. L. Rev. 323, 324 (1977).

See also Appendix to JUSTICE WHITE's dissent, *post*, at 1003.

JUSTICE WHITE undertakes to make a case for the proposition that the one-House veto is a useful "political invention," *post*, at 972, and we need not challenge that assertion. We can even concede this utilitarian argument although the long-range political wisdom of this "invention" is arguable. It has been vigorously debated, and it is instructive to compare the views of the protagonists. See, *e. g.*, Javits & Klein, Congressional Oversight and the Legislative Veto: A Constitutional Analysis, 52 N. Y. U. L. Rev. 455 (1977), and Martin, The Legislative Veto and the Responsible Exercise of Congressional Power, 68 Va. L. Rev. 253 (1982). But policy arguments supporting even useful "political inventions" are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.

Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process. Since the precise terms of those familiar provisions are critical to the resolution of these cases, we set them out verbatim. Article I provides:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate *and* House of Representatives." Art. I, § 1. (Emphasis added.)
>
> "Every Bill which shall have passed the House of Representatives *and* the Senate, *shall*, before it becomes a law, be presented to the President of the United States . . . ." Art. I, § 7, cl. 2. (Emphasis added.)
>
> "*Every* Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment)

*shall be* presented to the President of the United States; and before the Same shall take Effect, *shall be* approved by him, or being disapproved by him, *shall be* repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill." Art. I, § 7, cl. 3. (Emphasis added.)

These provisions of Art. I are integral parts of the constitutional design for the separation of powers. We have recently noted that "[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *Buckley* v. *Valeo*, 424 U. S., at 124. Just as we relied on the textual provision of Art. II, § 2, cl. 2, to vindicate the principle of separation of powers in *Buckley*, we see that the purposes underlying the Presentment Clauses, Art. I, § 7, cls. 2, 3, and the bicameral requirement of Art. I, § 1, and § 7, cl. 2, guide our resolution of the important question presented in these cases. The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers, and we now turn to Art. I.

B

*The Presentment Clauses*

The records of the Constitutional Convention reveal that the requirement that all legislation be presented to the President before becoming law was uniformly accepted by the Framers.[14] Presentment to the President and the Presiden-

[14] The widespread approval of the delegates was commented on by Joseph Story:

"In the convention there does not seem to have been much diversity of opinion on the subject of the propriety of giving to the president a negative on the laws. The principal points of discussion seem to have been, whether the negative should be absolute, or qualified; and if the latter, by what number of each house the bill should subsequently be passed, in order to become a law; and whether the negative should in either case be exclu-

tial veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented. During the final debate on Art. I, § 7, cl. 2, James Madison expressed concern that it might easily be evaded by the simple expedient of calling a proposed law a "resolution" or "vote" rather than a "bill." 2 Farrand 301–302. As a consequence, Art. I, § 7, cl. 3, *supra*, at 945–946, was added. 2 Farrand 304–305.

The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed. It is beyond doubt that lawmaking was a power to be shared by both Houses and the President. In The Federalist No. 73 (H. Lodge ed. 1888), Hamilton focused on the President's role in making laws:

> "If even no propensity had ever discovered itself in the legislative body to invade the rights of the Executive, the rules of just reasoning and theoretic propriety would of themselves teach us that the one ought not to be left to the mercy of the other, but ought to possess a constitutional and effectual power of self-defence." *Id.*, at 458.

See also The Federalist No. 51. In his Commentaries on the Constitution, Joseph Story makes the same point. 1 J. Story, Commentaries on the Constitution of the United States 614–615 (3d ed. 1858).

The President's role in the lawmaking process also reflects the Framers' careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvi-

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sively vested in the president alone, or in him jointly with some other department of the government." 1 J. Story, Commentaries on the Constitution of the United States 611 (3d ed. 1858).

See 1 M. Farrand, The Records of the Federal Convention of 1787, pp. 21, 97–104, 138–140 (1911) (hereinafter Farrand); *id.*, at 73–80, 181, 298, 301–305.

dent, or ill-considered measures. The President's veto role in the legislative process was described later during public debate on ratification:

> "It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.
>
> ". . . The primary inducement to conferring the power in question upon the Executive is, to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design." The Federalist No. 73, *supra*, at 458 (A. Hamilton).

See also *The Pocket Veto Case*, 279 U. S. 655, 678 (1929); *Myers* v. *United States*, 272 U. S. 52, 123 (1926). The Court also has observed that the Presentment Clauses serve the important purpose of assuring that a "national" perspective is grafted on the legislative process:

> "The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide . . . ." *Myers* v. *United States*, *supra*, at 123.

C

*Bicameralism*

The bicameral requirement of Art. I, §§ 1, 7, was of scarcely less concern to the Framers than was the Presidential veto and indeed the two concepts are interdependent. By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief, already re-

marked upon in connection with the Presentment Clauses, that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials. In the Constitutional Convention debates on the need for a bicameral legislature, James Wilson, later to become a Justice of this Court, commented:

> "Despotism comes on mankind in different shapes. sometimes in an Executive, sometimes in a military, one. Is there danger of a Legislative despotism? Theory & practice both proclaim it. If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches. In a single house there is no check, but the inadequate one, of the virtue & good sense of those who compose it." 1 Farrand 254.

Hamilton argued that a Congress comprised of a single House was antithetical to the very purposes of the Constitution. Were the Nation to adopt a Constitution providing for only one legislative organ, he warned:

> "[W]e shall finally accumulate, in a single body, all the most important prerogatives of sovereignty, and thus entail upon our posterity one of the most execrable forms of government that human infatuation ever contrived. Thus we should create in reality that very tyranny which the adversaries of the new Constitution either are, or affect to be, solicitous to avert." The Federalist No. 22, p. 135 (H. Lodge ed. 1888).

This view was rooted in a general skepticism regarding the fallibility of human nature later commented on by Joseph Story:

> "Public bodies, like private persons, are occasionally under the dominion of strong passions and excitements; impatient, irritable, and impetuous. . . . If [a legislature]

> feels no check but its own will, it rarely has the firmness to insist upon holding a question long enough under its own view, to see and mark it in all its bearings and relations on society." 1 Story, *supra*, at 383–384.

These observations are consistent with what many of the Framers expressed, none more cogently than Madison in pointing up the need to divide and disperse power in order to protect liberty:

> "In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit." The Federalist No. 51, p. 324 (H. Lodge ed. 1888) (sometimes attributed to "Hamilton or Madison" but now generally attributed to Madison).

See also The Federalist No. 62.

However familiar, it is useful to recall that apart from their fear that special interests could be favored at the expense of public needs, the Framers were also concerned, although not of one mind, over the apprehensions of the smaller states. Those states feared a commonality of interest among the larger states would work to their disadvantage; representatives of the larger states, on the other hand, were skeptical of a legislature that could pass laws favoring a minority of the people. See 1 Farrand 176–177, 484–491. It need hardly be repeated here that the Great Compromise, under which one House was viewed as representing the people and the other the states, allayed the fears of both the large and small states.[15]

[15] The Great Compromise was considered so important by the Framers that they inserted a special provision to ensure that it could not be altered, even by constitutional amendment, except with the consent of the states affected. See U. S. Const., Art V.

We see therefore that the Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The President's unilateral veto power, in turn, was limited by the power of two-thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person. See *id.*, at 99–104. It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.

## IV

The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

Although not "hermetically" sealed from one another, *Buckley* v. *Valeo*, 424 U. S., at 121, the powers delegated to the three Branches are functionally identifiable. When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it. See *J. W. Hampton & Co.* v. *United States*, 276 U. S. 394, 406 (1928). When the Executive acts, he presumptively acts in an executive or administrative capacity as defined in Art. II. And when, as here,

one House of Congress purports to act, it is presumptively acting within its assigned sphere.

Beginning with this presumption, we must nevertheless establish that the challenged action under § 244(c)(2) is of the kind to which the procedural requirements of Art. I, § 7, apply. Not every action taken by either House is subject to the bicameralism and presentment requirements of Art. I. See *infra*, at 955, and nn. 20, 21. Whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon "whether they contain matter which is properly to be regarded as legislative in its character and effect." S. Rep. No. 1335, 54th Cong., 2d Sess., 8 (1897).

Examination of the action taken here by one House pursuant to § 244(c)(2) reveals that it was essentially legislative in purpose and effect. In purporting to exercise power defined in Art. I, § 8, cl. 4, to "establish an uniform Rule of Naturalization," the House took action that had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch. Section 244(c)(2) purports to authorize one House of Congress to require the Attorney General to deport an individual alien whose deportation otherwise would be canceled under § 244. The one-House veto operated in these cases to overrule the Attorney General and mandate Chadha's deportation; absent the House action, Chadha would remain in the United States. Congress has *acted* and its action has altered Chadha's status.

The legislative character of the one-House veto in these cases is confirmed by the character of the congressional action it supplants. Neither the House of Representatives nor the Senate contends that, absent the veto provision in § 244(c)(2), either of them, or both of them acting together, could effectively require the Attorney General to deport an alien once the Attorney General, in the exercise of legisla-

tively delegated authority,[16] had determined the alien should remain in the United States. Without the challenged provision in § 244(c)(2), this could have been achieved, if at all, only

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[16] Congress protests that affirming the Court of Appeals in these cases will sanction "lawmaking by the Attorney General. . . . Why is the Attorney General exempt from submitting his proposed changes in the law to the full bicameral process?" Brief for Petitioner in No. 80–2170, p. 40. To be sure, some administrative agency action—rulemaking, for example—may resemble "lawmaking." See 5 U. S. C. § 551(4), which defines an agency's "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe *law* or policy . . . ." This Court has referred to agency activity as being "quasi-legislative" in character. *Humphrey's Executor* v. *United States*, 295 U. S. 602, 628 (1935). Clearly, however, "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 587 (1952). See *Buckley* v. *Valeo*, 424 U. S., at 123. When the Attorney General performs his duties pursuant to § 244, he does not exercise "legislative" power. See *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 213–214 (1976). The bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7. The constitutionality of the Attorney General's execution of the authority delegated to him by § 244 involves only a question of delegation doctrine. The courts, when a case or controversy arises, can always "ascertain whether the will of Congress has been obeyed," *Yakus* v. *United States*, 321 U. S. 414, 425 (1944), and can enforce adherence to statutory standards. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, at 585; *Ethyl Corp.* v. *EPA*, 176 U. S. App. D. C. 373, 440, 541 F. 2d 1, 68 (en banc) (separate statement of Leventhal, J.), cert. denied, 426 U. S. 941 (1976); L. Jaffe, Judicial Control of Administrative Action 320 (1965). It is clear, therefore, that the Attorney General acts in his presumptively Art. II capacity when he administers the Immigration and Nationality Act. Executive action under legislatively delegated authority that might resemble "legislative" action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require. That kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of

by legislation requiring deportation.[17] Similarly, a veto by one House of Congress under § 244(c)(2) cannot be justified as an attempt at amending the standards set out in § 244(a)(1), or as a repeal of § 244 as applied to Chadha. Amendment and repeal of statutes, no less than enactment, must conform with Art. I.[18]

The nature of the decision implemented by the one-House veto in these cases further manifests its legislative character. After long experience with the clumsy, time-consuming private bill procedure, Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. It is not disputed that this choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I. Disagreement with the Attorney General's decision on Chadha's deportation—that is, Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the

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Congress to modify or revoke the authority entirely. A one-House veto is clearly legislative in both character and effect and is not so checked; the need for the check provided by Art. I, §§ 1, 7, is therefore clear. Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a congressional veto.

[17] We express no opinion as to whether such legislation would violate any constitutional provision. See n. 8, *supra*.

[18] During the Convention of 1787, the application of the President's veto to repeals of statutes was addressed, and the Framers were apparently content with Madison's comment that "[a]s to the difficulty of repeals, it was probable that in doubtful cases the policy would soon take place of limiting the duration of laws as to require renewal instead of repeal." 2 Farrand 587. See Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harv. L. Rev. 569, 587–599 (1953). There is no provision allowing Congress to repeal or amend laws by other than legislative means pursuant to Art. I.

President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.[19]

Finally, we see that when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action. There are four provisions in the Constitution,[20] explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President's veto:

(a) The House of Representatives alone was given the power to initiate impeachments. Art. I, § 2, cl. 5;

(b) The Senate alone was given the power to conduct trials following impeachment on charges initiated by the House and to convict following trial. Art. I, § 3, cl. 6;

(c) The Senate alone was given final unreviewable power to approve or to disapprove Presidential appointments. Art. II, § 2, cl. 2;

(d) The Senate alone was given unreviewable power to ratify treaties negotiated by the President. Art. II, § 2, cl. 2.

Clearly, when the Draftsmen sought to confer special powers on one House, independent of the other House, or of the President, they did so in explicit, unambiguous terms.[21]

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[19] This does not mean that Congress is required to capitulate to "the accretion of policy control by forces outside its chambers." Javits & Klein, Congressional Oversight and the Legislative Veto: A Constitutional Analysis, 52 N. Y. U. L. Rev. 455, 462 (1977). The Constitution provides Congress with abundant means to oversee and control its administrative creatures. Beyond the obvious fact that Congress ultimately controls administrative agencies in the legislation that creates them, other means of control, such as durational limits on authorizations and formal reporting requirements, lie well within Congress' constitutional power. See *id.*, at 460–461; Kaiser, Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto," 32 Ad. L. Rev. 667 (1980). See also n. 9, *supra*.

[20] See also U. S. Const., Art. II, § 1, and Amdt. 12.

[21] An exception from the Presentment Clauses was ratified in *Hollingsworth* v. *Virginia*, 3 Dall. 378 (1798). There the Court held Presidential approval was unnecessary for a proposed constitutional amendment

These carefully defined exceptions from presentment and bicameralism underscore the difference between the legislative functions of Congress and other unilateral but important and binding one-House acts provided for in the Constitution. These exceptions are narrow, explicit, and separately justified; none of them authorize the action challenged here. On the contrary, they provide further support for the conclusion that congressional authority is not to be implied and for the conclusion that the veto provided for in § 244(c)(2) is not authorized by the constitutional design of the powers of the Legislative Branch.

Since it is clear that the action by the House under § 244(c)(2) was not within any of the express constitutional exceptions authorizing one House to act alone, and equally

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which had passed both Houses of Congress by the requisite two-thirds majority. See U. S. Const., Art. V.

One might also include another "exception" to the rule that congressional action having the force of law be subject to the bicameral requirement and the Presentment Clauses. Each House has the power to act alone in determining specified internal matters. Art. I, § 7, cls. 2, 3, and § 5, cl. 2. However, this "exception" only empowers Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances.

Although the bicameral check was not provided for in any of these provisions for independent congressional action, precautionary alternative checks are evident. For example, Art. II, § 2, requires that two-thirds of the Senators present concur in the Senate's consent to a treaty, rather than the simple majority required for passage of legislation. See The Federalist No. 64 (J. Jay); The Federalist No. 66 (A. Hamilton); The Federalist No. 75 (A. Hamilton). Similarly, the Framers adopted an alternative protection, in the stead of Presidential veto and bicameralism, by requiring the concurrence of two-thirds of the Senators present for a conviction of impeachment. Art. I, § 3. We also note that the Court's holding in *Hollingsworth*, *supra*, that a resolution proposing an amendment to the Constitution need not be presented to the President, is subject to two alternative protections. First, a constitutional amendment must command the votes of two-thirds of each House. Second, three-fourths of the states must ratify any amendment.

clear that it was an exercise of legislative power, that action was subject to the standards prescribed in Art. I.[22] The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those

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[22] JUSTICE POWELL's position is that the one-House veto in this case is a *judicial* act and therefore unconstitutional as beyond the authority vested in Congress by the Constitution. We agree that there is a sense in which one-House action pursuant to § 244(c)(2) has a judicial cast, since it purports to "review" Executive action. In this case, for example, the sponsor of the resolution vetoing the suspension of Chadha's deportation argued that Chadha "did not meet [the] statutory requirements" for suspension of deportation. *Supra*, at 926. To be sure, it is normally up to the courts to decide whether an agency has complied with its statutory mandate. See n. 16, *supra*. But the attempted analogy between judicial action and the one-House veto is less than perfect. Federal courts do not enjoy a roving mandate to correct alleged excesses of administrative agencies; we are limited by Art. III to hearing cases and controversies and no justiciable case or controversy was presented by the Attorney General's decision to allow Chadha to remain in this country. We are aware of no decision, and JUSTICE POWELL has cited none, where a federal court has reviewed a decision of the Attorney General suspending deportation of an alien pursuant to the standards set out in § 244(a)(1). This is not surprising, given that no party to such action has either the motivation or the right to appeal from it. As JUSTICE WHITE correctly notes, *post*, at 1001–1002, "the courts have not been given the authority to review whether an alien should be given permanent status; review is limited to whether the Attorney General has properly applied the statutory standards for" *denying* a request for suspension of deportation. *Foti* v. *INS*, 375 U. S. 217 (1963), relied on by JUSTICE POWELL, addressed only "whether a refusal by the Attorney General to grant a suspension of deportation is one of those 'final orders of deportation' of which direct review by Courts of Appeals is authorized under § 106(a) of the Act." *Id.*, at 221. Thus, JUSTICE POWELL's statement that the one-House veto in this case is "clearly adjudicatory," *post*, at 964, simply is not supported by his accompanying assertion that the House has "assumed a function ordinarily entrusted to the federal courts." *Post*, at 965. We are satisfied that the one-House veto is legislative in purpose and effect and subject to the procedures set out in Art. I.

checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded. To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President.[23]

The veto authorized by § 244(c)(2) doubtless has been in many respects a convenient shortcut; the "sharing" with the Executive by Congress of its authority over aliens in this manner is, on its face, an appealing compromise. In purely practical terms, it is obviously easier for action to be taken by one House without submission to the President; but it is crys-

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[23] Neither can we accept the suggestion that the one-House veto provision in § 244(c)(2) either removes or modifies the bicameralism and presentation requirements for the enactment of future legislation affecting aliens. See *Atkins* v. *United States*, 214 Ct. Cl. 186, 250–251, 556 F. 2d 1028, 1063–1064 (1977), cert. denied, 434 U. S. 1009 (1978); Brief for Petitioner in No. 80–2170, p. 40. The explicit prescription for legislative action contained in Art. I cannot be amended by legislation. See n. 13, *supra*.

JUSTICE WHITE suggests that the Attorney General's action under § 244(c)(1) suspending deportation is equivalent to a *proposal* for legislation and that because congressional approval is indicated "by the failure to veto, the one-House veto satisfies the requirement of bicameral approval." *Post*, at 997. However, as the Court of Appeals noted, that approach "would analogize the effect of the one house disapproval to the failure of one house to vote affirmatively on a private bill." 634 F. 2d 408, 435 (1980). Even if it were clear that Congress entertained such an arcane theory when it enacted § 244(c)(2), which JUSTICE WHITE does not suggest, this would amount to nothing less than an amending of Art. I. The legislative steps outlined in Art. I are not empty formalities; they were designed to assure that both Houses of Congress and the President participate in the exercise of lawmaking authority. This does not mean that legislation must always be preceded by debate; on the contrary, we have said that it is not necessary for a legislative body to "articulate its reasons for enacting a statute." *United States Railroad Retirement Board* v. *Fritz*, 449 U. S. 166, 179 (1980). But the steps required by Art. I, §§ 1, 7, make certain that there is an opportunity for deliberation and debate. To allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I.

tal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency. The records of the Convention and debates in the states preceding ratification underscore the common desire to define and limit the exercise of the newly created federal powers affecting the states and the people. There is unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary govermental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952). With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

V

We hold that the congressional veto provision in § 244(c)(2) is severable from the Act and that it is unconstitutional. Accordingly, the judgment of the Court of Appeals is

*Affirmed.*

JUSTICE POWELL, concurring in the judgment.

The Court's decision, based on the Presentment Clauses, Art. I, § 7, cls. 2 and 3, apparently will invalidate every use of the legislative veto. The breadth of this holding gives one pause. Congress has included the veto in literally hundreds

of statutes, dating back to the 1930's. Congress clearly views this procedure as essential to controlling the delegation of power to administrative agencies.[1] One reasonably may disagree with Congress' assessment of the veto's utility,[2] but the respect due its judgment as a coordinate branch of Government cautions that our holding should be no more extensive than necessary to decide these cases. In my view, the cases may be decided on a narrower ground. When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers. Accordingly, I concur only in the judgment.

## I

### A

The Framers perceived that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison). Theirs was not a baseless fear. Under British rule, the Colonies suffered the abuses of unchecked executive power that were attributed, at least popularly, to a hereditary monarchy. See Levi, Some Aspects of Separation of Powers, 76 Colum. L. Rev. 369, 374 (1976); The Federalist No. 48. During the Confederation,

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[1] As JUSTICE WHITE's dissenting opinion explains, the legislative veto has been included in a wide variety of statutes, ranging from bills for executive reorganization to the War Powers Resolution. See *post*, at 968–972. Whether the veto complies with the Presentment Clauses may well turn on the particular context in which it is exercised, and I would be hesitant to conclude that every veto is unconstitutional on the basis of the unusual example presented by this litigation.

[2] See Martin, The Legislative Veto and the Responsible Exercise of Congressional Power, 68 Va. L. Rev. 253 (1982); *Consumer Energy Council of America* v. *FERC*, 218 U. S. App. D. C. 34, 84, 673 F. 2d 425, 475 (1982).

the States reacted by removing power from the executive and placing it in the hands of elected legislators. But many legislators proved to be little better than the Crown. "The supremacy of legislatures came to be recognized as the supremacy of faction and the tyranny of shifting majorities. The legislatures confiscated property, erected paper money schemes, [and] suspended the ordinary means of collecting debts." Levi, *supra*, at 374–375.

One abuse that was prevalent during the Confederation was the exercise of judicial power by the state legislatures. The Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the "tyranny of shifting majorities." Jefferson observed that members of the General Assembly in his native Virginia had not been prevented from assuming judicial power, and "'[t]hey have accordingly *in many* instances *decided rights* which should have been left to *judiciary controversy*.'"[3] The Federalist No. 48, *supra*, at 336 (emphasis in original) (quoting T. Jefferson, Notes on the State of Virginia 196 (London ed. 1787)). The same concern also was evident in the reports of the Council of the Censors, a body that was charged with determining whether the Pennsylvania Legislature had complied with the State Constitution. The Council found that during this period "[t]he constitutional trial by jury had been violated; and powers assumed, which had not been delegated by the Constitution. . . . [C]ases belonging

[3] Jefferson later questioned the degree to which the Constitution insulates the judiciary. See D. Malone, Jefferson the President: Second Term, 1805–1809, pp. 304–305 (1974). In response to Chief Justice Marshall's rulings during Aaron Burr's trial, Jefferson stated that the judiciary had favored Burr—whom Jefferson viewed as clearly guilty of treason—at the expense of the country. He predicted that the people "'will see then and amend the error in our Constitution, which makes any branch independent of the nation.'" *Id.*, at 305 (quoting Jefferson's letter to William Giles). The very controversy that attended Burr's trial, however, demonstrates the wisdom in providing a neutral forum, removed from political pressure, for the determination of one person's rights.

to the judiciary department, frequently [had been] drawn within legislative cognizance and determination." The Federalist No. 48, at 336–337.

It was to prevent the recurrence of such abuses that the Framers vested the executive, legislative, and judicial powers in separate branches. Their concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person was expressed not only in this general allocation of power, but also in more specific provisions, such as the Bill of Attainder Clause, Art. I, § 9, cl. 3. As the Court recognized in *United States* v. *Brown*, 381 U. S. 437, 442 (1965), "the Bill of Attainder Clause was intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature." This Clause, and the separation-of-powers doctrine generally, reflect the Framers' concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power.

B

The Constitution does not establish three branches with precisely defined boundaries. See *Buckley* v. *Valeo*, 424 U. S. 1, 121 (1976) *(per curiam)*. Rather, as Justice Jackson wrote: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (concurring in judgment). The Court thus has been mindful that the boundaries between each branch should be fixed "according to common sense and the inherent necessities of the governmental coordination." *J. W. Hampton & Co.* v. *United States*, 276 U. S. 394, 406 (1928). But where one branch has impaired or sought to assume a power central to another branch, the

Court has not hesitated to enforce the doctrine. See *Buckley* v. *Valeo*, *supra*, at 123.

Functionally, the doctrine may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. See *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 433 (1977); *United States* v. *Nixon*, 418 U. S. 683 (1974). Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, at 587; *Springer* v. *Philippine Islands*, 277 U. S. 189, 203 (1928). These cases present the latter situation.[4]

## II

Before considering whether Congress impermissibly assumed a judicial function, it is helpful to recount briefly Congress' actions. Jagdish Rai Chadha, a citizen of Kenya, stayed in this country after his student visa expired. Although he was scheduled to be deported, he requested the Immigration and Naturalization Service to suspend his deportation because he met the statutory criteria for permanent residence in this country. After a hearing,[5] the Service granted Chadha's request and sent—as required by

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[4] The House and the Senate argue that the legislative veto does not prevent the executive from exercising its constitutionally assigned function. Even assuming this argument is correct, it does not address the concern that the Congress is exercising unchecked judicial power at the expense of individual liberties. It was precisely to prevent such arbitrary action that the Framers adopted the doctrine of separation of powers. See, *e. g.*, *Myers* v. *United States*, 272 U. S. 52, 293 (1926) (Brandeis, J., dissenting).

[5] The Immigration and Naturalization Service, a division of the Department of Justice, administers the Immigration and Nationality Act on behalf of the Attorney General, who has primary responsiblity for the Act's enforcement. See 8 U. S. C. § 1103. The Act establishes a detailed administrative procedure for determining when a specific person is to be deported, see § 1252(b), and provides for judicial review of this decision, see § 1105a; *Foti* v. *INS*, 375 U. S. 217 (1963).

the reservation of the veto right—a report of its action to Congress.

In addition to the report on Chadha, Congress had before it the names of 339 other persons whose deportations also had been suspended by the Service. The House Committee on the Judiciary decided that six of these persons, including Chadha, should not be allowed to remain in this country. Accordingly, it submitted a resolution to the House, which stated simply that "the House of Representatives does not approve the granting of permanent residence in the United States to the aliens hereinafter named." 121 Cong. Rec. 40800 (1975). The resolution was not distributed prior to the vote,[6] but the Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law explained to the House:

> "It was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution did not meet [the] statutory requirements, particularly as it relates to hardship; and it is the opinion of the committee that their deportation should not be suspended." *Ibid.* (remarks of Rep. Eilberg).

Without further explanation and without a recorded vote, the House rejected the Service's determination that these six people met the statutory criteria.

On its face, the House's action appears clearly adjudicatory.[7] The House did not enact a general rule; rather it

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[6] Normally the House would have distributed the resolution before acting on it, see 121 Cong. Rec. 40800 (1975), but the statute providing for the legislative veto limits the time in which Congress may veto the Service's determination that deportation should be suspended. See 8 U. S. C. § 1254(c)(2). In this case Congress had Chadha's report before it for approximately a year and a half, but failed to act on it until three days before the end of the limitations period. Accordingly, it was required to abandon its normal procedures for considering resolutions, thereby increasing the danger of arbitrary and ill-considered action.

[7] The Court concludes that Congress' action was legislative in character because each branch "presumptively act[s] within its assigned sphere." *Ante*, at 952. The Court's presumption provides a useful starting point,

made its own determination that six specific persons did not comply with certain statutory criteria. It thus undertook the type of decision that traditionally has been left to other branches. Even if the House did not make a *de novo* determination, but simply reviewed the Immigration and Naturalization Service's findings, it still assumed a function ordinarily entrusted to the federal courts.[8] See 5 U. S. C. § 704 (providing generally for judicial review of final agency action); cf. *Foti* v. *INS*, 375 U. S. 217 (1963) (holding that courts of appeals have jurisdiction to review INS decisions denying suspension of deportation). Where, as here, Congress has exercised a power "that cannot possibly be regarded as merely in aid of the legislative function of Con-

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but does not conclude the inquiry. Nor does the fact that the House's action alters an individual's legal status indicate, as the Court reasons, see *ante*, at 952–954, that the action is legislative rather than adjudicative in nature. In determining whether one branch unconstitutionally has assumed a power central to another branch, the traditional characterization of the assumed power as legislative, executive, or judicial may provide some guidance. See *Springer* v. *Philippine Islands*, 277 U. S. 189, 203 (1928). But reasonable minds may disagree over the character of an act, and the more helpful inquiry, in my view, is whether the act in question raises the dangers the Framers sought to avoid.

[8] The Court reasons in response to this argument that the one-House veto exercised in this case was not judicial in nature because the decision of the Immigration and Naturalization Service did not present a justiciable issue that could have been reviewed by a court on appeal. See *ante*, at 957, n. 22. The Court notes that since the administrative agency decided the case in favor of Chadha, there was no aggrieved party who could appeal. Reliance by the Court on this fact misses the point. Even if review of the particular decision to suspend deportation is not committed to the courts, the House of Representatives assumed a function that generally is entrusted to an impartial tribunal. In my view, the Legislative Branch in effect acted as an appellate court by overruling the Service's application of established law to Chadha. And unlike a court or an administrative agency, it did not provide Chadha with the right to counsel or a hearing before acting. Although the parallel is not entirely complete, the effect on Chadha's personal rights would not have been different in principle had he been acquitted of a federal crime and thereafter found by one House of Congress to have been guilty.

gress," *Buckley* v. *Valeo*, 424 U. S., at 138, the decisions of this Court have held that Congress impermissibly assumed a function that the Constitution entrusted to another branch, see *id.*, at 138–141; cf. *Springer* v. *Philippine Islands*, 277 U. S., at 202.

The impropriety of the House's assumption of this function is confirmed by the fact that its action raises the very danger the Framers sought to avoid—the exercise of unchecked power. In deciding whether Chadha deserves to be deported, Congress is not subject to any internal constraints that prevent it from arbitrarily depriving him of the right to remain in this country.[9] Unlike the judiciary or an administrative agency, Congress is not bound by established substantive rules. Nor is it subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency[10] adjudicates individual rights. The only effective constraint on Congress' power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to "the tyranny of a shifting majority."

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[9] When Congress grants particular individuals relief or benefits under its spending power, the danger of oppressive action that the separation of powers was designed to avoid is not implicated. Similarly, Congress may authorize the admission of individual aliens by special Acts, but it does not follow that Congress unilaterally may make a judgment that a particular alien has no legal right to remain in this country. See Memorandum Concerning H. R. 9766 Entitled "An Act to Direct the Deportation of Harry Renton Bridges," reprinted in S. Rep. No. 2031, 76th Cong., 3d Sess., pt. 1, p. 8 (1940). As Attorney General Robert Jackson remarked, such a practice "would be an historical departure from an unbroken American practice and tradition." *Id.*, at 9.

[10] We have recognized that independent regulatory agencies and departments of the Executive Branch often exercise authority that is "judicial in nature." *Buckley* v. *Valeo*, 424 U. S. 1, 140–141 (1976). This function, however, forms part of the agencies' execution of public law and is subject to the procedural safeguards, including judicial review, provided by the Administrative Procedure Act, see 5 U. S. C. § 551 *et seq.* See also n. 5, *supra*.

Chief Justice Marshall observed: "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *Fletcher* v. *Peck*, 6 Cranch 87, 136 (1810). In my view, when Congress undertook to apply its rules to Chadha, it exceeded the scope of its constitutionally prescribed authority. I would not reach the broader question whether legislative vetoes are invalid under the Presentment Clauses.

JUSTICE WHITE, dissenting.

Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a "legislative veto." For this reason, the Court's decision is of surpassing importance. And it is for this reason that the Court would have been well advised to decide the cases, if possible, on the narrower grounds of separation of powers, leaving for full consideration the constitutionality of other congressional review statutes operating on such varied matters as war powers and agency rulemaking, some of which concern the independent regulatory agencies.[1]

The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central

[1] As JUSTICE POWELL observes in his separate opinion, "the respect due [Congress'] judgment as a coordinate branch of Government cautions that our holding should be no more extensive than necessary to decide these cases." *Ante*, at 960. The Court of Appeals for the Ninth Circuit also recognized that "we are not here faced with a situation in which the unforeseeability of future circumstances or the broad scope and complexity of the subject matter of an agency's rulemaking authority preclude the articulation of specific criteria in the governing statute itself. Such factors might present considerations different from those we find here, both as to the question of separation of powers and the legitimacy of the unicameral device." 634 F. 2d 408, 433 (1980) (footnote omitted).

means by which Congress secures the accountability of executive and independent agencies. Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the Executive Branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role. Accordingly, over the past five decades, the legislative veto has been placed in nearly 200 statutes.[2] The device is known in every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regulation of trade, safety, energy, the environment, and the economy.

## I

The legislative veto developed initially in response to the problems of reorganizing the sprawling Government structure created in response to the Depression. The Reorganization Acts established the chief model for the legislative veto. When President Hoover requested authority to reorganize the Government in 1929, he coupled his request that the "Congress be willing to delegate its authority over the problem (subject to defined principles) to the Executive" with a proposal for legislative review. He proposed that the Executive "should act upon approval of a joint committee of Congress or with the reservation of power of revision by Congress within some limited period adequate for its consideration." Public Papers of the Presidents, Herbert Hoover, 1929, p. 432 (1974). Congress followed President Hoover's suggestion and authorized reorganization subject to legisla-

[2] A selected list and brief description of these provisions is appended to this opinion.

tive review. Act of June 30, 1932, § 407, 47 Stat. 414. Although the reorganization authority reenacted in 1933 did not contain a legislative veto provision, the provision returned during the Roosevelt administration and has since been renewed numerous times. Over the years, the provision was used extensively. Presidents submitted 115 Reorganization Plans to Congress of which 23 were disapproved by Congress pursuant to legislative veto provisions. See App. A to Brief for United States Senate on Reargument.

Shortly after adoption of the Reorganization Act of 1939, 53 Stat. 561, Congress and the President applied the legislative veto procedure to resolve the delegation problem for national security and foreign affairs. World War II occasioned the need to transfer greater authority to the President in these areas. The legislative veto offered the means by which Congress could confer additional authority while preserving its own constitutional role. During World War II, Congress enacted over 30 statutes conferring powers on the Executive with legislative veto provisions.[3] President Roosevelt accepted the veto as the necessary price for obtaining exceptional authority.[4]

Over the quarter century following World War II, Presidents continued to accept legislative vetoes by one or both Houses as constitutional, while regularly denouncing provisions by which congressional Committees reviewed Executive activity.[5] The legislative veto balanced delegations of

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[3] Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Calif. L. Rev. 983, 1089–1090 (1975) (listing statutes).

[4] The Roosevelt administration submitted proposed legislation containing veto provisions and defended their constitutionality. See, *e. g.*, General Counsel to the Office of Price Administration, Statement on Constitutionality of Concurrent Resolution Provision of Proposed Price Control Bill (H. R. 5479), reprinted in Price-Control Bill: Hearings on H. R. 5479 before the House Committee on Banking and Currency, 77th Cong., 1st Sess., pt. 1, p. 983 (1941).

[5] Presidential objections to the veto, until the veto by President Nixon of the War Powers Resolution, principally concerned bills authorizing Com-

statutory authority in new areas of governmental involvement: the space program, international agreements on nuclear energy, tariff arrangements, and adjustment of federal pay rates.[6]

During the 1970's the legislative veto was important in resolving a series of major constitutional disputes between the President and Congress over claims of the President to broad impoundment, war, and national emergency powers. The

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mittee vetoes. As the Senate Subcommittee on Separation of Powers found in 1969, "an accommodation was reached years ago on legislative vetoes exercised by the entire Congress or by one House, [while] disputes have continued to arise over the committee form of the veto." S. Rep. No. 91–549, p. 14 (1969). Presidents Kennedy and Johnson proposed enactment of statutes with legislative veto provisions. See National Wilderness Preservation Act: Hearings on S. 4 before the Senate Committee on Interior and Insular Affairs, 88th Cong., 1st Sess., 4 (1963) (President Kennedy's proposals for withdrawal of wilderness areas); President's Message to the Congress Transmitting the Budget for Fiscal Year 1970, 5 Weekly Comp. Pres. Doc. 70, 73 (1969) (President Johnson's proposals allowing legislative veto of tax surcharge). The administration of President Kennedy submitted a memorandum supporting the constitutionality of the legislative veto. See General Counsel of the Department of Agriculture, Constitutionality of Title I of H. R. 6400, 87th Cong., 1st Session (1961), reprinted in Legislative Policy of the Bureau of the Budget: Hearing before the Subcommittee on Conservation and Credit of the House Committee on Agriculture, 89th Cong., 2d Sess., 27, 31–32 (1966). During the administration of President Johnson, the Department of Justice again defended the constitutionality of the legislative veto provision of the Reorganization Act, as contrasted with provisions for a Committee veto. See Separation of Powers: Hearings before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., 206 (1967) (testimony of Frank M. Wozencraft, Assistant Attorney General for the Office of Legal Counsel).

[6] National Aeronautics and Space Act of 1958, Pub. L. 85–568, § 302, 72 Stat. 433 (space program); Atomic Energy Act Amendments of 1958, Pub. L. 85–479, § 4, 72 Stat. 277 (cooperative nuclear agreements); Trade Expansion Act of 1962, Pub. L. 87–794, § 351, 76 Stat. 899, 19 U. S. C. § 1981 (tariff recommended by International Trade Commission may be imposed by concurrent resolution of approval); Postal Revenue and Federal Salary Act of 1967, Pub. L. 90–206, § 255(i)(1), 81 Stat. 644.

key provision of the War Powers Resolution, 50 U. S. C. § 1544(c), authorizes the termination by concurrent resolution of the use of armed forces in hostilities. A similar measure resolved the problem posed by Presidential claims of inherent power to impound appropriations. Congressional Budget and Impoundment Control Act of 1974, 31 U. S. C. § 1403. In conference, a compromise was achieved under which permanent impoundments, termed "rescissions," would require approval through enactment of legislation. In contrast, temporary impoundments, or "deferrals," would become effective unless disapproved by one House. This compromise provided the President with flexibility, while preserving ultimate congressional control over the budget.[7] Although the War Powers Resolution was enacted over President Nixon's veto, the Impoundment Control Act was enacted with the President's approval. These statutes were followed by others resolving similar problems: the National Emergencies Act, § 202, 90 Stat. 1255, 50 U. S. C. § 1622, resolving the longstanding problems with unchecked Executive emergency power; the International Security Assistance and Arms Export Control Act, § 211, 90 Stat. 740, 22 U. S. C. § 2776(b), resolving the problem of foreign arms sales; and the Nuclear Non-Proliferation Act of 1978, §§ 303(a), 304(a), 306, 307, 401, 92 Stat. 130, 134, 137, 138, 144–145, 42 U. S. C. §§ 2160(f), 2155(b), 2157(b), 2158, 2153(d) (1976 ed., Supp. V), resolving the problem of exports of nuclear technology.

In the energy field, the legislative veto served to balance broad delegations in legislation emerging from the energy crisis of the 1970's.[8] In the educational field, it was found

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[7] The Impoundment Control Act's provision for legislative review has been used extensively. Presidents have submitted hundreds of proposed budget deferrals, of which 65 have been disapproved by resolutions of the House or Senate with no protest by the Executive. See App. B to Brief for United States Senate on Reargument.

[8] The veto appears in a host of broad statutory delegations concerning energy rationing, contingency plans, strategic oil reserves, allocation of

that fragmented and narrow grant programs "inevitably lead to Executive-Legislative confrontations" because they inaptly limited the Commissioner of Education's authority. S. Rep. No. 93–763, p. 69 (1974). The response was to grant the Commissioner of Education rulemaking authority, subject to a legislative veto. In the trade regulation area, the veto preserved congressional authority over the Federal Trade Commission's broad mandate to make rules to prevent businesses from engaging in "unfair or deceptive acts or practices in commerce."[9]

Even this brief review suffices to demonstrate that the legislative veto is more than "efficient, convenient, and useful." *Ante*, at 944. It is an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and pre-

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energy production materials, oil exports, and naval petroleum reserve production. Naval Petroleum Reserves Production Act of 1976, Pub. L. 94–258, § 201(3), 90 Stat. 309, 10 U. S. C. § 7422(c)(2)(C); Energy Policy and Conservation Act, Pub. L. 94–163, §§ 159, 201, 401(a), and 455, 89 Stat. 886, 890, 941, and 950, 42 U. S. C. §§ 6239 and 6261, 15 U. S. C. §§ 757 and 760a (strategic oil reserves, rationing and contingency plans, oil price controls and product allocation); Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. 93–577, § 12, 88 Stat. 1892–1893, 42 U. S. C. § 5911 (allocation of energy production materials); Act of Nov. 16, 1973, Pub. L. 93–153, § 101, 87 Stat. 582, 30 U. S. C. § 185(u) (oil exports).

[9] Congress found that under the agency's

"very broad authority to prohibit conduct which is 'unfair or deceptive' . . . the FTC can regulate virtually every aspect of America's commercial life. . . . The FTC's rules are not merely narrow interpretations of a tightly drawn statute; instead, they are broad policy pronouncements which Congress has an obligation to study and review." 124 Cong. Rec. 5012 (1978) (statement by Rep. Broyhill).

A two-House legislative veto was added to constrain that broad delegation. Federal Trade Commission Improvements Act of 1980, § 21(a), 94 Stat. 393, 15 U. S. C. § 57a–1(a) (1976 ed., Supp. V). The constitutionality of that provision is presently pending before us. *United States Senate* v. *Federal Trade Commission*, No. 82–935; *United States House of Representatives* v. *Federal Trade Commission*, No. 82–1044.

serves Congress' control over lawmaking. Perhaps there are other means of accommodation and accountability, but the increasing reliance of Congress upon the legislative veto suggests that the alternatives to which Congress must now turn are not entirely satisfactory.[10]

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[10] While Congress could write certain statutes with greater specificity, it is unlikely that this is a realistic or even desirable substitute for the legislative veto. The controversial nature of many issues would prevent Congress from reaching agreement on many major problems if specificity were required in their enactments. Fuchs, Administrative Agencies and the Energy Problem, 47 Ind. L. J. 606, 608 (1972); Stewart, Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1695–1696 (1975). For example, in the deportation context, the solution is not for Congress to create more refined categorizations of the deportable aliens whose status should be subject to change. In 1979, the Immigration and Naturalization Service proposed regulations setting forth factors to be considered in the exercise of discretion under numerous provisions of the Act, but not including § 244, to ensure "fair and uniform" adjudication "under appropriate discretionary criteria." 44 Fed. Reg. 36187 (1979). The proposed rule was canceled in 1981, because "[t]here is an inherent failure in any attempt to list those factors which should be considered in the exercise of discretion. It is impossible to list or foresee all of the adverse or favorable factors which may be present in a given set of circumstances." 46 Fed. Reg. 9119 (1981).

Oversight hearings and congressional investigations have their purpose, but unless Congress is to be rendered a think tank or debating society, they are no substitute for the exercise of actual authority. The "delaying" procedure approved in *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 15 (1941), while satisfactory for certain measures, has its own shortcomings. Because a new law must be passed to restrain administrative action, Congress must delegate authority without the certain ability of being able to check its exercise.

Finally, the passage of corrective legislation after agency regulations take effect or Executive Branch officials have acted entails the drawbacks endemic to a retroactive response. "Post hoc substantive revision of legislation, the only available corrective mechanism in the absence of postenactment review could have serious prejudicial consequences; if Congress retroactively tampered with a price control system after prices have been set, the economy could be damaged and private rights seriously impaired; if Congress rescinded the sale of arms to a foreign country, our relations with that country would be severely strained; and if Congress reshuffled the bureaucracy after a President's reorganization proposal had taken effect, the

The history of the legislative veto also makes clear that it has not been a sword with which Congress has struck out to aggrandize itself at the expense of the other branches—the concerns of Madison and Hamilton. Rather, the veto has been a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Art. I as the Nation's lawmaker. While the President has often objected to particular legislative vetoes, generally those left in the hands of congressional Committees, the Executive has more often agreed to legislative review as the price for a broad delegation of authority. To be sure, the President may have preferred unrestricted power, but that could be precisely why Congress thought it essential to retain a check on the exercise of delegated authority.

## II

For all these reasons, the apparent sweep of the Court's decision today is regretable. The Court's Art. I analysis appears to invalidate all legislative vetoes irrespective of form or subject. Because the legislative veto is commonly found as a check upon rulemaking by administrative agencies and upon broad-based policy decisions of the Executive Branch, it is particularly unfortunate that the Court reaches its decision in cases involving the exercise of a veto over deportation decisions regarding particular individuals. Courts should always be wary of striking statutes as unconstitutional; to strike an entire class of statutes based on consideration of a somewhat atypical and more readily indictable exemplar of the class is irresponsible. It was for cases such as these that Justice Brandeis wrote:

> "The Court has frequently called attention to the 'great gravity and delicacy' of its function in passing upon the validity of an act of Congress . . . .
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results could be chaotic." Javits & Klein, Congressional Oversight and the Legislative Veto: A Constitutional Analysis, 52 N. Y. U. L. Rev. 455, 464 (1977) (footnote omitted).

> "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, N. Y. & P. S. S. Co.* v. *Emigration Commissioners*, [113 U. S. 33, 39 (1885)]." *Ashwander* v. *TVA*, 297 U. S. 288, 345, 347 (1936) (concurring opinion).

Unfortunately, today's holding is not so limited.[11]

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[11] Perhaps I am wrong and the Court remains open to consider whether certain forms of the legislative veto are reconcilable with the Art. I requirements. One possibility for the Court and Congress is to accept that a resolution of disapproval cannot be given legal effect in its own right, but may serve as a guide in the interpretation of a delegation of lawmaking authority. The exercise of the veto could be read as a manifestation of legislative intent, which, unless itself contrary to the authorizing statute, serves as the definitive construction of the statute. Therefore, an agency rule vetoed by Congress would not be enforced in the courts because the veto indicates that the agency action departs from the congressional intent.

This limited role for a redefined legislative veto follows in the steps of the longstanding practice of giving some weight to subsequent legislative reaction to administrative rulemaking. The silence of Congress after consideration of a practice by the Executive may be equivalent to acquiescence and consent that the practice be continued until the power exercised be revoked. *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 472–473 (1915). See also *Zemel* v. *Rusk*, 381 U. S. 1, 11–12 (1965) (relying on congressional failure to repeal administration interpretation); *Haig* v. *Agee*, 453 U. S. 280 (1981) (same); *Bob Jones University* v. *United States*, 461 U. S. 574 (1983) (same); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 384 (1982) (relying on failure to disturb judicial decision in later revision of law).

Reliance on subsequent legislative reaction has been limited by the fear of overturning the intent of the original Congress and the unreliability of discerning the views of a subsequent Congress. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 117–118 (1980); *United States* v. *Price*, 361 U. S. 304, 313 (1960). These concerns are not forceful when the original statute authorizes subsequent legislative review. The presence of the review provision constitutes an express authorization for a subsequent Congress to participate in defining the meaning of the law. Second, the disapproval resolution allows for a reliable determination of congressional intent. Without the review mechanism, uncertainty over the inferences to draw from subsequent congressional action is under-

If the legislative veto were as plainly unconstitutional as the Court strives to suggest, its broad ruling today would be more comprehensible. But, the constitutionality of the legislative veto is anything but clear-cut. The issue divides scholars,[12] courts,[13] Attorneys General,[14] and the two other

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standable. The refusal to pass an amendment, for example, may indicate opposition to that position but could mean that Congress believes the amendment is redundant with the statute as written. By contrast, the exercise of a legislative veto is an unmistakable indication that the agency or Executive decision at issue is disfavored. This is not to suggest that the failure to pass a veto resolution should be given any weight whatever.

[12] For commentary generally favorable to the legislative veto, see Abourezk, Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives, 52 Ind. L. J. 323 (1977); Cooper & Cooper, The Legislative Veto and the Constitution, 30 Geo. Wash. L. Rev. 467 (1962); Dry, The Congressional Veto and the Constitutional Separation of Powers, in The Presidency in the Constitutional Order 195 (J. Bessette & J. Tulis eds. 1981); Javits & Klein, *supra* n. 10, at 455; Miller & Knapp, The Congressional Veto: Preserving the Constitutional Framework, 52 Ind. L. J. 367 (1977); Nathanson, Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies, 75 Nw. U. L. Rev. 1064 (1981); Newman & Keaton, Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?, 41 Calif. L. Rev. 565 (1953); Pearson, Oversight: A Vital Yet Neglected Congressional Function, 23 Kan. L. Rev. 277 (1975); Rodino, Congressional Review of Executive Action, 5 Seton Hall L. Rev. 489 (1974); Schwartz, Legislative Veto and the Constitution—A Reexamination, 46 Geo. Wash. L. Rev. 351 (1978); Schwartz, Legislative Control of Administrative Rules and Regulations: I. The American Experience, 30 N. Y. U. L. Rev. 1031 (1955); Stewart, Constitutionality of the Legislative Veto, 13 Harv. J. Legis. 593 (1976).

For commentary generally unfavorable to the legislative veto, see J. Bolton, The Legislative Veto: Unseparating the Powers (1977); Bruff & Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 Harv. L. Rev. 1369 (1977); Dixon, The Congressional Veto and Separation of Powers: The Executive On a Leash?, 56 N. C. L. Rev. 423 (1978); FitzGerald, Congressional Oversight or Congressional Foresight: Guidelines From the Founding Fathers, 28 Ad. L. Rev. 429 (1976); Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harv. L. Rev. 569 (1953);

*[Footnotes 13 and 14 are on p. 977]*

branches of the National Government. If the veto devices so flagrantly disregarded the requirements of Art. I as the Court today suggests, I find it incomprehensible that Congress, whose Members are bound by oath to uphold the Constitution, would have placed these mechanisms in nearly 200 separate laws over a period of 50 years.

The reality of the situation is that the constitutional question posed today is one of immense difficulty over which the Executive and Legislative Branches—as well as scholars and judges—have understandably disagreed. That disagreement stems from the silence of the Constitution on the precise question: The Constitution does not directly authorize or prohibit the legislative veto. Thus, our task should be to determine whether the legislative veto is consistent with the purposes of Art. I and the principles of separation of powers which are reflected in that Article and throughout the Con-

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Henry, The Legislative Veto: In Search of Constitutional Limits, 16 Harv. J. Legis. 735 (1979); Martin, The Legislative Veto and the Responsible Exercise of Congressional Power, 68 Va. L. Rev. 253 (1982); Scalia, The Legislative Veto: A False Remedy For System Overload, 3 Regulation 19 (Nov.-Dec. 1979); Watson, *supra* n. 3, at 983; Comment, Congressional Oversight of Administrative Discretion: Defining the Proper Role of the Legislative Veto, 26 Am. U. L. Rev. 1018 (1977); Note, Congressional Veto of Administrative Action: The Probable Response to a Constitutional Challenge, 1976 Duke L. J. 285; Recent Developments, The Legislative Veto in the Arms Export Control Act of 1976, 9 Law & Pol'y Int'l Bus. 1029 (1977).

[13] Compare *Atkins* v. *United States*, 214 Ct. Cl. 186, 556 F. 2d 1028 (1977) (upholding legislative veto provision in Federal Salary Act, 2 U. S. C. § 351 *et seq.*), cert. denied, 434 U. S. 1009 (1978), with *Consumer Energy Council of America* v. *FERC*, 218 U. S. App. D. C. 34, 673 F. 2d 425 (1982) (holding unconstitutional the legislative veto provision in the Natural Gas Policy Act of 1978, 15 U. S. C. §§ 3301–3342 (1976 ed., Supp. V)), appeals docketed, Nos. 81–2008, 81–2020, 81–2151, and 81–2171, and cert. pending, Nos. 82–177 and 82–209.

[14] See, *e. g.*, 6 Op. Atty. Gen. 680, 683 (1854); Dept. of Justice, Memorandum re Constitutionality of Provisions in Proposed Reorganization Bills Now Pending in Congress, reprinted in S. Rep. No. 232, 81st Cong., 1st Sess., 19–20 (1949); Jackson, A Presidential Legal Opinion, 66 Harv. L. Rev. 1353 (1953); 43 Op. Atty. Gen. No. 10, p. 2 (1977).

stitution.[15] We should not find the lack of a specific constitutional authorization for the legislative veto surprising, and I would not infer disapproval of the mechanism from its absence. From the summer of 1787 to the present the Government of the United States has become an endeavor far beyond the contemplation of the Framers. Only within the last half century has the complexity and size of the Federal Government's responsibilities grown so greatly that the Congress must rely on the legislative veto as the most effective if not the only means to insure its role as the Nation's lawmaker. But the wisdom of the Framers was to anticipate that the Nation would grow and new problems of governance would require different solutions. Accordingly, our Federal Government was intentionally chartered with the flexibility to respond to contemporary needs without losing sight of fundamental democratic principles. This was the spirit in which Justice Jackson penned his influential concurrence in the *Steel Seizure Case:*

> "The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952).

This is the perspective from which we should approach the novel constitutional questions presented by the legislative veto. In my view, neither Art. I of the Constitution nor the doctrine of separation of powers is violated by this mecha-

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[15] I limit my concern here to those legislative vetoes which require either one or both Houses of Congress to pass resolutions of approval or disapproval, and leave aside the questions arising from the exercise of such powers by Committees of Congress.

nism by which our elected Representatives preserve their voice in the governance of the Nation.

## III

The Court holds that the disapproval of a suspension of deportation by the resolution of one House of Congress is an exercise of legislative power without compliance with the prerequisites for lawmaking set forth in Art. I of the Constitution. Specifically, the Court maintains that the provisions of § 244(c)(2) are inconsistent with the requirement of bicameral approval, implicit in Art. I, § 1, and the requirement that all bills and resolutions that require the concurrence of both Houses be presented to the President, Art. I, § 7, cls. 2 and 3.[16]

I do not dispute the Court's truismatic exposition of these Clauses. There is no question that a bill does not become a law until it is approved by both the House and the Senate, and presented to the President. Similarly, I would not hesitate to strike an action of Congress in the form of a concurrent resolution which constituted an exercise of original lawmaking authority. I agree with the Court that the Presi-

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[16] I agree with JUSTICE REHNQUIST that Congress did not intend the one-House veto provision of § 244(c)(2) to be severable. Although the general rule is that the presence of a saving clause creates a presumption of divisibility, *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U. S. 210, 235 (1932), I read the saving clause contained in § 406 of the Immigration and Nationality Act as primarily pertaining to the severability of major parts of the Act from one another, not the divisibility of different provisions within a single section. Surely, Congress would want the naturalization provisions of the Act to be severable from the deportation sections. But this does not support preserving § 244 without the legislative veto any more than a saving provision would justify preserving immigration authority without quota limits.

More relevant is the fact that for 40 years Congress has insisted on retaining a voice on individual suspension cases—it has frequently rejected bills which would place final authority in the Executive Branch. It is clear that Congress believed its retention crucial. Given this history, the Court's rewriting of the Act flouts the will of Congress.

dent's qualified veto power is a critical element in the distribution of powers under the Constitution, widely endorsed among the Framers, and intended to serve the President as a defense against legislative encroachment and to check the "passing of bad laws, through haste, inadvertence, or design." The Federalist No. 73, p. 458 (H. Lodge ed. 1888) (A. Hamilton). The records of the Convention reveal that it is the first purpose which figured most prominently but I acknowledge the vitality of the second. *Id.*, at 443. I also agree that the bicameral approval required by Art. I, §§ 1, 7, "was of scarcely less concern to the Framers than was the Presidential veto," *ante*, at 948, and that the need to divide and disperse legislative power figures significantly in our scheme of Government. All of this, Part III of the Court's opinion, is entirely unexceptionable.

It does not, however, answer the constitutional question before us. The power to exercise a legislative veto is not the power to write new law without bicameral approval or Presidential consideration. The veto must be authorized by statute and may only negative what an Executive department or independent agency has proposed. On its face, the legislative veto no more allows one House of Congress to make law than does the Presidential veto confer such power upon the President. Accordingly, the Court properly recognizes that it "must nevertheless establish that the challenged action under § 244(c)(2) is of the kind to which the procedural requirements of Art. I, § 7, apply" and admits that "[n]ot every action taken by either House is subject to the bicameralism and presentation requirements of Art. I." *Ante*, at 952.

## A

The terms of the Presentment Clauses suggest only that bills and their equivalent are subject to the requirements of bicameral passage and presentment to the President. Article I, § 7, cl. 2, stipulates only that "Every Bill which shall have passed the House of Representatives and the Senate,

shall, before it becomes a law, be presented to the President" for approval or disapproval, his disapproval then subject to being overridden by a two-thirds vote of both Houses. Section 7, cl. 3, goes further:

> "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill."

Although the Clause does not specify the actions for which the concurrence of both Houses is "necessary," the proceedings at the Philadelphia Convention suggest its purpose was to prevent Congress from circumventing the presentation requirement in the making of new legislation. James Madison observed that if the President's veto was confined to bills, it could be evaded by calling a proposed law a "resolution" or "vote" rather than a "bill." Accordingly, he proposed that "or resolve" should be added after "bill" in what is now Clause 2 of § 7. 2 M. Farrand, The Records of the Federal Convention of 1787, pp. 301–302 (1911). After a short discussion on the subject, the amendment was rejected. On the following day, however, Randolph renewed the proposal in the substantial form as it now appears, and the motion passed. *Id.*, at 304–305; 5 J. Elliot, Debates on the Federal Constitution 431 (1845). The chosen language, Madison's comment, and the brevity of the Convention's consideration, all suggest a modest role was intended for the Clause and no broad restraint on congressional authority was contemplated. See Stewart, Constitutionality of the Legislative Veto, 13 Harv. J. Legis. 593, 609–611 (1976). This reading is consistent with the historical background of the Presentment Clause itself which reveals only that the Framers were concerned

with limiting the methods for enacting new legislation. The Framers were aware of the experience in Pennsylvania where the legislature had evaded the requirements attached to the passing of legislation by the use of "resolves," and the criticisms directed at this practice by the Council of Censors.[17] There is no record that the Convention contemplated, let alone intended, that these Art. I requirements would someday be invoked to restrain the scope of congressional authority pursuant to duly enacted law.[18]

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[17] The Pennsylvania Constitution required that all "bills of [a] public nature" had to be printed after being introduced and had to lie over until the following session of the legislature before adoption. Pa. Const., § 15 (1776). These printing and layover requirements applied only to "bills." At the time, measures could also be enacted as a resolve, which was allowed by the Constitution as "urgent temporary legislation" without such requirements. A. Nevins, The American States During and After the Revolution 152 (1969). Using this method, the Pennsylvania Legislature routinely evaded printing and layover requirements through adoption of resolves. *Ibid.*

A 1784 report of a committee of the Council of Censors, a state body responsible for periodically reviewing the state government's adherence to its Constitution, charged that the procedures for enacting legislation had been evaded though the adoption of resolves instead of bills. Report of the Committee of the Council of Censors 13 (1784). See Nevins, *supra*, at 190. When three years later the federal Constitutional Convention assembled in Philadelphia, the delegates were reminded, in the course of discussing the President's veto, of the dangers pointed out by the Council of Censors Report. 5 J. Elliot, Debates on the Federal Constitution 430 (1845). Furthermore, Madison, who made the motion that led to the Presentment Clause, knew of the Council of Censors Report, The Federalist No. 50, p. 319 (H. Lodge ed. 1888), and was aware of the Pennsylvania experience. See The Federalist No. 48, *supra*, at 311–312. We have previously recognized the relevance of the Council of Censors Report in interpreting the Constitution. See *Powell* v. *McCormack*, 395 U. S. 486, 529–530 (1969).

[18] Although the legislative veto was not a feature of congressional enactments until the 20th century, the practices of the first Congresses demonstrate that the constraints of Art. I were not envisioned as a constitutional straitjacket. The First Congress, for example, began the practice of arming its Committees with broad investigatory powers without the passage of legislation. See A. Josephy, On the Hill: A History of the Ameri-

When the Convention did turn its attention to the scope of Congress' lawmaking power, the Framers were expansive. The Necessary and Proper Clause, Art. I, § 8, cl. 18, vests

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can Congress 81–83 (1979). More directly pertinent is the First Congress' treatment of the Northwest Territories Ordinance of 1787. The Ordinance, initially drafted under the Articles of Confederation on July 13, 1787, was the document which governed the territory of the United States northwest of the Ohio River. The Ordinance authorized the Territories to adopt laws, subject to disapproval in Congress.

"The governor and judges, or a majority of them, shall adopt and publish in the district, such laws of the original states, criminal and civil, as may be necessary, and best suited to the circumstances of the district, *and report them to Congress,* from time to time; which laws shall be in force in the district until the organization of the general assembly therein, *unless disapproved of by Congress;* but afterwards the legislature shall have authority to alter them as they shall think fit" (emphasis added).

After the Constitution was ratified, the Ordinance was reenacted to conform to the requirements of the Constitution. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50–51. Certain provisions, such as one relating to appointment of officials by Congress, were changed because of constitutional concerns, but the language allowing disapproval by Congress was retained. Subsequent provisions for territorial laws contained similar language. See, *e. g.*, 48 U. S. C. § 1478.

Although at times Congress disapproved of territorial actions by passing legislation, see, *e. g.*, Act of Mar. 3, 1807, ch. 44, 2 Stat. 444, on at least two occasions one House of Congress passed resolutions to disapprove territorial laws, only to have the other House fail to pass the measure for reasons pertaining to the subject matter of the bills. First, on February 16, 1795, the House of Representatives passed a concurrent resolution disapproving in one sweep all but one of the laws that the Governors and judges of the Northwest Territory had passed at a legislative session on August 1, 1792. 4 Annals of Cong. 1227. The Senate, however, refused to concur. *Id.*, at 830. See B. Bond, The Civilization of the Old Northwest 70–71 (1934). Second, on May 9, 1800, the House passed a resolution to disapprove of a Mississippi territorial law imposing a license fee on taverns. H. R. Jour., 6th Cong., 1st Sess., 706 (1826 ed.). The Senate unsuccessfully attempted to amend the resolution to strike down all laws of the Mississippi Territory enacted since June 30, 1799. 5 C. Carter, Territorial Papers of the United States—Mississippi 94–95 (1937). The histories of the Territories, the correspondence of the era, and the congressional Reports contain no indication that such resolutions disapproving of territorial laws were to be presented to the President or that the authorization for

Congress with the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [the enumerated powers of § 8] and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." It is long settled that Congress may "exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government," and "avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." *McCulloch* v. *Maryland*, 4 Wheat. 316, 415–416, 420 (1819).

B

The Court heeded this counsel in approving the modern administrative state. The Court's holding today that all legislative-type action must be enacted through the lawmaking process ignores that legislative authority is routinely delegated to the Executive Branch, to the independent regulatory agencies, and to private individuals and groups.

> "The rise of administrative bodies probably has been the most significant legal trend of the last century. . . . They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories . . . ." *FTC* v. *Ruberoid Co.*, 343 U. S. 470, 487 (1952) (Jackson, J. dissenting).

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such a "congressional veto" in the Act of Aug. 7, 1789, was of doubtful constitutionality.

The practices of the First Congress are not so clear as to be dispositive of the constitutional question now before us. But it is surely significant that this body, largely composed of the same men who authored Art. I and secured ratification of the Constitution, did not view the Constitution as forbidding a precursor of the modern day legislative veto. See *J. W. Hampton & Co.* v. *United States*, 276 U. S. 394, 412 (1928) ("In this first Congress sat many members of the Constitutional Convention of 1787. This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions").

This Court's decisions sanctioning such delegations make clear that Art. I does not require all action with the effect of legislation to be passed as a law.

Theoretically, agencies and officials were asked only to "fill up the details," and the rule was that "Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard." *United States* v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, 324 (1931). Chief Justice Taft elaborated the standard in *J. W. Hampton & Co.* v. *United States*, 276 U. S. 394, 409 (1928): "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." In practice, however, restrictions on the scope of the power that could be delegated diminished and all but disappeared. In only two instances did the Court find an unconstitutional delegation. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935); *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935). In other cases, the "intelligible principle" through which agencies have attained enormous control over the economic affairs of the country was held to include such formulations as "just and reasonable," *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420 (1930); "public interest," *New York Central Securities Corp.* v. *United States*, 287 U. S. 12 (1932); "public convenience, interest, or necessity," *Federal Radio Comm'n* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285 (1933); and "unfair methods of competition." *FTC* v. *Gratz*, 253 U. S. 421 (1920).

The wisdom and the constitutionality of these broad delegations are matters that still have not been put to rest. But for present purposes, these cases establish that by virtue of congressional delegation, legislative power can be exercised by independent agencies and Executive departments without the passage of new legislation. For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by

the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process. There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term. The Administrative Procedure Act, 5 U. S. C. § 551(4), provides that a "rule" is an agency statement "designed to implement, interpret, or prescribe law or policy." When agencies are authorized to prescribe law through substantive rulemaking, the administrator's regulation is not only due deference, but is accorded "legislative effect." See, *e. g.*, *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 43–44 (1981); *Batterton* v. *Francis*, 432 U. S. 416 (1977).[19] These regulations bind courts and officers of the Federal Government, may pre-empt state law, see, *e. g.*, *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141 (1982), and grant rights to and impose obligations on the public. In sum, they have the force of law.

If Congress may delegate lawmaking power to independent and Executive agencies, it is most difficult to understand Art. I as prohibiting Congress from also reserving a check on legislative power for itself. Absent the veto, the agencies receiving delegations of legislative or quasi-legislative power may issue regulations having the force of law without bicam-

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[19] "Legislative, or substantive, regulations are 'issued by an agency pursuant to statutory authority and . . . implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission . . . . Such rules have the force and effect of law.' U. S. Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 30, n. 3 (1947)." *Batterton* v. *Francis*, 432 U. S., at 425, n. 9.

Substantive agency regulations are clearly exercises of lawmaking authority; agency interpretations of their statutes are only arguably so. But as Henry Monaghan has observed: "Judicial deference to agency 'interpretation' of law is simply one way of recognizing a delegation of lawmaking authority to an agency." Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 26 (1983) (emphasis deleted). See, *e. g.*, *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111 (1944); *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U. S. 170 (1981).

eral approval and without the President's signature. It is thus not apparent why the reservation of a veto over the exercise of that legislative power must be subject to a more exacting test. In both cases, it is enough that the initial statutory authorizations comply with the Art. I requirements.

Nor are there strict limits on the agents that may receive such delegations of legislative authority so that it might be said that the Legislature can delegate authority to others but not to itself. While most authority to issue rules and regulations is given to the Executive Branch and the independent regulatory agencies, statutory delegations to private persons have also passed this Court's scrutiny. In *Currin* v. *Wallace*, 306 U. S. 1 (1939), the statute provided that restrictions upon the production or marketing of agricultural commodities was to become effective only upon the favorable vote by a prescribed majority of the affected farmers. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 577 (1939), upheld an Act which gave producers of specified commodities the right to veto marketing orders issued by the Secretary of Agriculture. Assuming *Currin* and *Rock Royal Co-operative* remain sound law, the Court's decision today suggests that Congress may place a "veto" power over suspensions of deportation in private hands or in the hands of an independent agency, but is forbidden to reserve such authority for itself. Perhaps this odd result could be justified on other constitutional grounds, such as the separation of powers, but certainly it cannot be defended as consistent with the Court's view of the Art. I presentment and bicameralism commands.[20]

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[20] As the Court acknowledges, the "provisions of Art. I are integral parts of the constitutional design for the separation of powers." *Ante*, at 946. But these separation-of-powers concerns are that legislative power be exercised by Congress, executive power by the President, and judicial power by the Courts. A scheme which allows delegation of legislative power to the President and the departments under his control, but forbids a check on its exercise by Congress itself obviously denigrates the separation-

The Court's opinion in the present cases comes closest to facing the reality of administrative lawmaking in considering the contention that the Attorney General's action in suspending deportation under § 244 is itself a legislative act. The Court posits that the Attorney General is acting in an Art. II enforcement capacity under § 244. This characterization is at odds with *Mahler* v. *Eby*, 264 U. S. 32, 40 (1924), where the power conferred on the Executive to deport aliens was considered a delegation of legislative power. The Court suggests, however, that the Attorney General acts in an Art. II capacity because "[t]he courts, when a case or controversy arises, can always 'ascertain whether the will of Congress has been obeyed,' *Yakus* v. *United States*, 321 U. S. 414, 425 (1944), and can enforce adherence to statutory standards." *Ante*, at 953, n. 16. This assumption is simply wrong, as the Court itself points out: "We are aware of no decision . . . where a federal court has reviewed a decision of the Attorney General suspending deportation of an alien pursuant to the standards set out in § 244(a)(1). This is not surprising, given that no party to such action has either the motivation or the right to appeal from it." *Ante*, at 957, n. 22. It is perhaps on the erroneous premise that judicial review may check abuses of the § 244 power that the Court also submits that "[t]he bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7." *Ante*, at 953, n. 16. On the other hand, the Court's reasoning does persuasively explain why a resolution of dis-

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of-powers concerns underlying Art. I. To be sure, the doctrine of separation of powers is also concerned with checking each branch's exercise of its characteristic authority. Section 244(c)(2) is fully consistent with the need for checks upon congressional authority, *infra*, at 994–996, and the legislative veto mechanism, more generally is an important check upon Executive authority, *supra*, at 967–974.

approval under § 244(c)(2) need not again be subject to the bicameral process. Because it serves only to check the Attorney General's exercise of the suspension authority granted by § 244, the disapproval resolution—unlike the Attorney General's action—"cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I."

More fundamentally, even if the Court correctly characterizes the Attorney General's authority under § 244 as an Art. II Executive power, the Court concedes that certain administrative agency action, such as rulemaking, "may resemble lawmaking" and recognizes that "[t]his Court has referred to agency activity as being 'quasi-legislative' in character. *Humphrey's Executor* v. *United States*, 295 U. S. 602, 628 (1935)." *Ante*, at 953, n. 16. Such rules and adjudications by the agencies meet the Court's own definition of legislative action for they "alte[r] the legal rights, duties, and relations of persons . . . outside the Legislative Branch," *ante*, at 952, and involve "determinations of policy," *ante*, at 954. Under the Court's analysis, the Executive Branch and the independent agencies may make rules with the effect of law while Congress, in whom the Framers confided the legislative power, Art. I, § 1, may not exercise a veto which precludes such rules from having operative force. If the effective functioning of a complex modern government requires the delegation of vast authority which, by virtue of its breadth, is legislative or "quasi-legislative" in character, I cannot accept that Art. I—which is, after all, the source of the nondelegation doctrine—should forbid Congress to qualify that grant with a legislative veto.[21]

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[21] The Court's other reasons for holding the legislative veto subject to the presentment and bicameral passage requirements require but brief discussion. First, the Court posits that the resolution of disapproval should be considered equivalent to new legislation because absent the veto authority of § 244(c)(2) neither House could, short of legislation, effectively require the Attorney General to deport an alien once the Attorney General has

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The Court also takes no account of perhaps the most relevant consideration: However resolutions of disapproval under § 244(c)(2) are formally characterized, in reality, a departure from the status quo occurs only upon the concurrence of opinion among the House, Senate, and President. Reservations of legislative authority to be exercised by Congress should be upheld if the exercise of such reserved authority is consistent with the distribution of and limits upon legislative power that Art. I provides.

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As its history reveals, § 244(c)(2) withstands this analysis. Until 1917, Congress had not broadly provided for the deportation of aliens. Act of Feb. 5, 1917, § 19, 39 Stat. 889. The Immigration Act of 1924 enlarged the categories of

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determined that the alien should remain in the United States. *Ante*, at 952–954. The statement is neither accurate nor meaningful. The Attorney General's power under the Act is only to "suspend" the order of deportation; the "suspension" does not cancel the deportation or adjust the alien's status to that of a permanent resident alien. Cancellation of deportation and adjustment of status must await favorable action by Congress. More important, the question is whether § 244(c)(2) as written is constitutional, and no law is amended or repealed by the resolution of disapproval which is, of course, expressly authorized by that section.

The Court also argues that the legislative character of the challenged action of one House is confirmed by the fact that "when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action." *Ante*, at 955. Leaving aside again the above-refuted premise that all action with a legislative character requires passage in a law, the short answer is that all of these carefully defined exceptions to the presentment and bicameralism strictures do not involve action of the Congress pursuant to a duly enacted statute. Indeed, for the most part these powers—those of impeachment, review of appointments, and treaty ratification—are not legislative powers at all. The fact that it was essential for the Constitution to stipulate that Congress has the power to impeach and try the President hardly demonstrates a limit upon Congress' authority to reserve itself a legislative veto, through statutes, over subjects within its lawmaking authority.

aliens subject to mandatory deportation, and substantially increased the likelihood of hardships to individuals by abolishing in most cases the previous time limitation of three years within which deportation proceedings had to be commenced. Immigration Act of 1924, ch. 190, 43 Stat. 153. Thousands of persons, who either had entered the country in more lenient times or had been smuggled in as children, or had overstayed their permits, faced the prospect of deportation. Enforcement of the Act grew more rigorous over the years with the deportation of thousands of aliens without regard to the mitigating circumstances of particular cases. See Mansfield, The Legislative Veto and the Deportation of Aliens, 1 Public Administration Review 281 (1941). Congress provided relief in certain cases through the passage of private bills.

In 1933, when deportations reached their zenith, the Secretary of Labor temporarily suspended numerous deportations on grounds of hardship, 78 Cong. Rec. 11783 (1934), and proposed legislation to allow certain deportable aliens to remain in the country. H. R. 9725, 73d Cong., 2d Sess. (1934). The Labor Department bill was opposed, however, as "grant-[ing] too much discretionary authority," 78 Cong. Rec. 11790 (1934) (remarks of Rep. Dirksen), and it failed decisively. *Id.*, at 11791.

The following year, the administration proposed bills to authorize an interdepartmental committee to grant permanent residence to deportable aliens who had lived in the United States for 10 years or who had close relatives here. S. 2969 and H. R. 8163, 74th Cong., 1st Sess. (1935). These bills were also attacked as an "abandonment of congressional control over the deportation of undesirable aliens," H. R. Rep. No. 1110, 74th Cong., 1st Sess., pt. 2, p. 2 (1935), and were not enacted. A similar fate awaited a bill introduced in the 75th Congress that would have authorized the Secretary to grant permanent residence to up to 8,000 deportable aliens. The measure passed the House, but did not come to a vote in the Senate. H. R. 6391, 75th Cong., 1st Sess., 83 Cong. Rec. 8992–8996 (1938).

The succeeding Congress again attempted to find a legislative solution to the deportation problem. The initial House bill required congressional action to cancel individual deportations, 84 Cong. Rec. 10455 (1939), but the Senate amended the legislation to provide that deportable aliens should not be deported unless the Congress by Act or resolution rejected the recommendation of the Secretary. H. R. 5138, § 10, as reported with amendments by S. Rep. No. 1721, 76th Cong., 3d Sess., 2 (1940). The compromise solution, the immediate predecessor to § 244(c), allowed the Attorney General to suspend the deportation of qualified aliens. Their deportation would be canceled and permanent residence granted if the House and Senate did not adopt a concurrent resolution of disapproval. S. Rep. No. 1796, 76th Cong., 3d Sess., 5–6 (1940). The Executive Branch played a major role in fashioning this compromise, see 86 Cong. Rec. 8345 (1940), and President Roosevelt approved the legislation, which became the Alien Registration Act of 1940, ch. 439, 54 Stat. 670.

In 1947, the Department of Justice requested legislation authorizing the Attorney General to cancel deportations without congressional review. H. R. 2933, 80th Cong., 1st Sess. (1947). The purpose of the proposal was to "save time and energy of everyone concerned . . . ." Regulating Powers of the Attorney General to Suspend Deportation of Aliens: Hearings on H. R. 245, H. R. 674, H. R. 1115, and H. R. 2933 before the Subcommittee on Immigration of the House Committee on the Judiciary, 80th Cong., 1st Sess., 34 (1947). The Senate Judiciary Committee objected, stating that "affirmative action by the Congress in all suspension cases should be required before deportation proceedings may be canceled." S. Rep. No. 1204, 80th Cong., 2d Sess., 4 (1948). See also H. R. Rep. No. 647, 80th Cong., 1st Sess., 2 (1947). Congress not only rejected the Department's request for final authority but also amended the Immigration Act to require that cancellation of deportation be approved

by a concurrent resolution of the Congress. President Truman signed the bill without objection. Act of July 1, 1948, ch. 783, 62 Stat. 1206.

Practice over the ensuing several years convinced Congress that the requirement of affirmative approval was "not workable . . . and would, in time, interfere with the legislative work of the House." House Judiciary Committee, H. R. Rep. No. 362, 81st Cong., 1st Sess., 2 (1949). In preparing the comprehensive Immigration and Nationality Act of 1952, the Senate Judiciary Committee recommended that for certain classes of aliens the adjustment of status be subject to the disapproval of either House; but deportation of an alien "who is of the criminal, subversive, or immoral classes or who overstays his period of admission," would be canceled only upon a concurrent resolution disapproving the deportation. S. Rep. No. 1515, 81st Cong., 2d Sess., 610 (1950). Legislation reflecting this change was passed by both Houses, and enacted into law as part of the Immigration and Nationality Act of 1952 over President Truman's veto, which was not predicated on the presence of a legislative veto. Pub. L. 414, § 244(a), 66 Stat. 214. In subsequent years, the Congress refused further requests that the Attorney General be given final authority to grant discretionary relief for specified categories of aliens, and § 244 remained intact to the present.

Section 244(a)(1) authorizes the Attorney General, in his discretion, to suspend the deportation of certain aliens who are otherwise deportable and, upon Congress' approval, to adjust their status to that of aliens lawfully admitted for permanent residence. In order to be eligible for this relief, an alien must have been physically present in the United States for a continuous period of not less than seven years, must prove he is of good moral character, and must prove that he or his immediate family would suffer "extreme hardship" if he is deported. Judicial review of a denial of relief may be sought. Thus, the suspension proceeding "has two phases: a

determination whether the statutory conditions have been met, which generally involves a question of law, and a determination whether relief shall be granted, which [ultimately] is confided to the sound discretion of the Attorney General [and his delegates]." 2 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 7.9a(5), p. 7–134 (rev. ed. 1983).

There is also a third phase to the process. Under § 244(c)(1) the Attorney General must report all such suspensions, with a detailed statement of facts and reasons, to the Congress. Either House may then act, in that session or the next, to block the suspension of deportation by passing a resolution of disapproval. § 244(c)(2). Upon congressional approval of the suspension—by its silence—the alien's permanent status is adjusted to that of a lawful resident alien.

The history of the Immigration and Nationality Act makes clear that § 244(c)(2) did not alter the division of actual authority between Congress and the Executive. At all times, whether through private bills, or through affirmative concurrent resolutions, or through the present one-House veto, a permanent change in a deportable alien's status could be accomplished only with the agreement of the Attorney General, the House, and the Senate.

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The central concern of the presentment and bicameralism requirements of Art. I is that when a departure from the legal status quo is undertaken, it is done with the approval of the President and both Houses of Congress—or, in the event of a Presidential veto, a two-thirds majority in both Houses. This interest is fully satisfied by the operation of § 244(c)(2). The President's approval is found in the Attorney General's action in recommending to Congress that the deportation order for a given alien be suspended. The House and the Senate indicate their approval of the Executive's action by not passing a resolution of disapproval within the statutory period. Thus, a change in the legal status quo—the deportability of the alien—is consummated only with the approval

of each of the three relevant actors. The disagreement of any one of the three maintains the alien's pre-existing status: the Executive may choose not to recommend suspension; the House and Senate may each veto the recommendation. The effect on the rights and obligations of the affected individuals and upon the legislative system is precisely the same as if a private bill were introduced but failed to receive the necessary approval. "The President and the two Houses enjoy exactly the same say in what the law is to be as would have been true for each without the presence of the one-House veto, and nothing in the law is changed absent the concurrence of the President and a majority in each House." *Atkins* v. *United States*, 214 Ct. Cl. 186, 250, 556 F. 2d 1028, 1064 (1977), cert. denied, 434 U. S. 1009 (1978).

This very construction of the Presentment Clauses which the Executive Branch now rejects was the basis upon which the Executive Branch defended the constitutionality of the Reorganization Act, 5 U. S. C. § 906(a) (1982 ed.), which provides that the President's proposed reorganization plans take effect only if not vetoed by either House. When the Department of Justice advised the Senate on the constitutionality of congressional review in reorganization legislation in 1949, it stated: "In this procedure there is no question involved of the Congress taking legislative action beyond its initial passage of the Reorganization Act." S. Rep. No. 232, 81st Cong., 1st Sess., 20 (1949) (Dept. of Justice Memorandum). This also represents the position of the Attorney General more recently.[22]

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[22] In his opinion on the constitutionality of the legislative review provisions of the most recent reorganization statute, 5 U. S. C. § 906(a) (1982 ed.), Attorney General Bell stated that "the statement in Article I, § 7, of the procedural steps to be followed in the enactment of legislation does not exclude other forms of action by Congress. . . . The procedures prescribed in Article I § 7, for congressional action are not exclusive." 43 Op. Atty. Gen. No. 10, pp. 2–3 (1977). "[I]f the procedures provided in a given statute have no effect on the constitutional distribution of power between

Thus understood, § 244(c)(2) fully effectuates the purposes of the bicameralism and presentment requirements. I now briefly consider possible objections to the analysis.

First, it may be asserted that Chadha's status before legislative disapproval is one of nondeportation and that the exercise of the veto, unlike the failure of a private bill, works a change in the status quo. This position plainly ignores the statutory language. At no place in § 244 has Congress delegated to the Attorney General any final power to determine which aliens shall be allowed to remain in the United States. Congress has retained the ultimate power to pass on such changes in deportable status. By its own terms, § 244(a) states that whatever power the Attorney General has been delegated to suspend deportation and adjust status is to be exercisable only "[a]s hereinafter prescribed in this section." Subsection (c) is part of that section. A grant of "suspension" does not cancel the alien's deportation or adjust the alien's status to that of a permanent resident alien. A suspension order is merely a "deferment of deportation," *McGrath* v. *Kristensen*, 340 U. S. 162, 168 (1950), which can mature into a cancellation of deportation and adjustment of status only upon the approval of Congress—by way of silence—under § 244(c)(2). Only then does the statute authorize the Attorney General to "cancel deportation proceedings," § 244(c)(2), and "record the alien's lawful admission for permanent residence . . . ." § 244(d). The Immigration and Naturalization Service's action, on behalf of the Attorney General, "cannot become effective without ratification by Congress." 2 C. Gordon & H. Rosenfield, Immigration Law

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the legislature and the executive," then the statute is constitutional. *Id.*, at 3. In the case of the reorganization statute, the power of the President to refuse to submit a plan, combined with the power of either House of Congress to reject a submitted plan, suffices under the standard to make the statute constitutional. Although the Attorney General sought to limit his opinion to the reorganization statute, and the Executive opposes the instant statute, I see no Art. I basis to distinguish between the two.

and Procedure § 8.14, p. 8–121 (rev. ed. 1983). Until that ratification occurs, the Executive's action is simply a recommendation that Congress finalize the suspension—in itself, it works no legal change.

Second, it may be said that this approach leads to the incongruity that the two-House veto is more suspect than its one-House brother. Although the idea may be initially counterintuitive, on close analysis, it is not at all unusual that the one-House veto is of more certain constitutionality than the two-House version. If the Attorney General's action is a proposal for legislation, then the disapproval of but a single House is all that is required to prevent its passage. Because approval is indicated by the failure to veto, the one-House veto satisfies the requirement of bicameral approval. The two-House version may present a different question. The concept that "neither branch of Congress, when acting separately, can lawfully exercise more power than is conferred by the Constitution on the whole body," *Kilbourn* v. *Thompson*, 103 U. S. 168, 182 (1881), is fully observed.[23]

Third, it may be objected that Congress cannot indicate its approval of legislative change by inaction. In the Court of Appeals' view, inaction by Congress "could equally imply endorsement, acquiescence, passivity, indecision, or indifference," 634 F. 2d 408, 435 (1980), and the Court appears to echo this concern, *ante*, at 958, n. 23. This objection appears more properly directed at the wisdom of the legislative veto than its constitutionality. The Constitution does not and cannot guarantee that legislators will carefully scrutinize legislation and deliberate before acting. In a democracy it is the electorate that holds the legislators accountable for the wisdom of their choices. It is hard to maintain that a private bill receives any greater individualized scrutiny than a reso-

[23] Of course, when the authorizing legislation requires approval to be expressed by a positive vote, then the two-House veto would clearly comply with the bicameralism requirement under any analysis.

lution of disapproval under § 244(c)(2). Certainly the legislative veto is no more susceptible to this attack than the Court's increasingly common practice of according weight to the failure of Congress to disturb an Executive or independent agency's action. See n. 11, *supra*. Earlier this Term, the Court found it important that Congress failed to act on bills proposed to overturn the Internal Revenue Service's interpretation of the requirements for tax-exempt status under § 501(c)(3) of the Internal Revenue Code. *Bob Jones University* v. *United States*, 461 U. S. 574, 600–601 (1983). If Congress may be said to have ratifed the Internal Revenue Service's interpretation without passing new legislation, Congress may also be said to approve a suspension of deportation by the Attorney General when it fails to exercise its veto authority.[24] The requirements of Art. I are not compromised by the congressional scheme.

## IV

The Court of Appeals struck § 244(c)(2) as violative of the constitutional principle of separation of powers. It is true that the purpose of separating the authority of Government is to prevent unnecessary and dangerous concentration of power in one branch. For that reason, the Framers saw fit to divide and balance the powers of Government so that each branch would be checked by the others. Virtually every part of our constitutional system bears the mark of this judgment.

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[24] The Court's doubts that Congress entertained this "arcane" theory when it enacted § 244(c)(2) disregards the fact that this is the historical basis upon which the legislative vetoes contained in the Reorganization Acts have been defended, n. 22, *supra*, and that the Reorganization Acts then provided the precedent articulated in support of other legislative veto provisions. See, *e. g.*, 87 Cong. Rec. 735 (1941) (Rep. Dirksen) (citing Reorganization Act in support of proposal to include a legislative veto in Lend-Lease Act); H. R. Rep. No. 93–658, p. 42 (1973) (citing Reorganization Act as "sufficient precedent" for legislative veto provision for Impoundment Control Act).

But the history of the separation-of-powers doctrine is also a history of accommodation and practicality. Apprehensions of an overly powerful branch have not led to undue prophylactic measures that handicap the effective working of the National Government as a whole. The Constitution does not contemplate total separation of the three branches of Government. *Buckley* v. *Valeo*, 424 U. S. 1, 121 (1976). "[A] hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Ibid.*[25]

Our decisions reflect this judgment. As already noted, the Court, recognizing that modern government must address a formidable agenda of complex policy issues, countenanced the delegation of extensive legislative authority to Executive and independent agencies. *J. W. Hampton & Co.* v. *United States*, 276 U. S. 394, 406 (1928). The separation-of-powers doctrine has heretofore led to the invalidation of Government action only when the challenged action violated some express provision in the Constitution. In *Buckley* v. *Valeo*, *supra*, at 118–124 *(per curiam)*, and *Myers* v. *United States*, 272 U. S. 52 (1926), congressional action compromised the appointment power of the President. See also *Springer* v. *Philippine Islands*, 277 U. S. 189, 200–201 (1928). In *United States* v. *Klein*, 13 Wall. 128 (1872), an Act of Congress was struck for encroaching upon judicial

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[25] Madison emphasized that the principle of separation of powers is primarily violated "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department." The Federalist No. 47, pp. 325–326 (J. Cooke ed. 1961). Madison noted that the oracle of the separation doctrine, Montesquieu, in writing that the legislative, executive, and judicial powers should not be united "in the same person or body of magistrates," did not mean "that these departments ought to have no *partial agency* in, or *control* over the acts of each other." *Id.*, at 325 (emphasis in original). Indeed, according to Montesquieu, the legislature is uniquely fit to exercise an additional function: "to examine in what manner the laws that it has made have been executed." W. Gwyn, The Meaning of Separation of Powers 102 (1965).

power, but the Court found that the Act also impinged upon the Executive's exclusive pardon power. Art. II, § 2. Because we must have a workable efficient Government, this is as it should be.

This is the teaching of *Nixon* v. *Administrator of General Services*, 433 U. S. 425 (1977), which, in rejecting a separation-of-powers objection to a law requiring that the Administrator take custody of certain Presidential papers, set forth a framework for evaluating such claims:

> "[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. *United States* v. *Nixon*, 418 U. S., at 711–712. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Id.*, at 443.

Section 244(c)(2) survives this test. The legislative veto provision does not "preven[t] the Executive Branch from accomplishing its constitutionally assigned functions." First, it is clear that the Executive Branch has no "constitutionally assigned" function of suspending the deportation of aliens. "'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Kleindienst* v. *Mandel*, 408 U. S. 753, 766 (1972), quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 339 (1909). Nor can it be said that the inherent function of the Executive Branch in executing the law is involved. The *Steel Seizure Case* resolved that the Art. II mandate for the President to execute the law is a directive to enforce the law which Congress has written. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952). "The duty of the President to see that the laws be executed is a

duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." *Myers* v. *United States*, 272 U. S., at 177 (Holmes, J., dissenting); *id.*, at 247 (Brandeis, J., dissenting). Here, § 244 grants the Executive only a qualified suspension authority, and it is only that authority which the President is constitutionally authorized to execute.

Moreover, the Court believes that the legislative veto we consider today is best characterized as an exercise of legislative or quasi-legislative authority. Under this characterization, the practice does not, even on the surface, constitute an infringement of executive or judicial prerogative. The Attorney General's suspension of deportation is equivalent to a proposal for legislation. The nature of the Attorney General's role as recommendatory is not altered because § 244 provides for congressional action through disapproval rather than by ratification. In comparison to private bills, which must be initiated in the Congress and which allow a Presidential veto to be overriden by a two-thirds majority in both Houses of Congress, § 244 augments rather than reduces the Executive Branch's authority. So understood, congressional review does not undermine, as the Court of Appeals thought, the "weight and dignity" that attends the decisions of the Executive Branch.

Nor does § 244 infringe on the judicial power, as JUSTICE POWELL would hold. Section 244 makes clear that Congress has reserved its own judgment as part of the statutory process. Congressional action does not substitute for judicial review of the Attorney General's decisions. The Act provides for judicial review of the refusal of the Attorney General to suspend a deportation and to transmit a recommendation to Congress. *INS* v. *Jong Ha Wang*, 450 U. S. 139 (1981) *(per curiam)*. But the courts have not been given the authority to review whether an alien should be given permanent status; review is limited to whether the Attorney General has prop-

erly applied the statutory standards for essentially denying the alien a recommendation that his deportable status be changed by the Congress. Moreover, there is no constitutional obligation to provide any judicial review whatever for a failure to suspend deportation. "The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend." *Fong Yue Ting* v. *United States*, 149 U. S. 698, 713–714 (1893). See also *Tutun* v. *United States*, 270 U. S. 568, 576 (1926); *Ludecke* v. *Watkins*, 335 U. S. 160, 171–172 (1948); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 590 (1952).

I do not suggest that all legislative vetoes are necessarily consistent with separation-of-powers principles. A legislative check on an inherently executive function, for example, that of initiating prosecutions, poses an entirely different question. But the legislative veto device here—and in many other settings—is far from an instance of legislative tyranny over the Executive. It is a necessary check on the unavoidably expanding power of the agencies, both Executive and independent, as they engage in exercising authority delegated by Congress.

## V

I regret that I am in disagreement with my colleagues on the fundamental questions that these cases present. But even more I regret the destructive scope of the Court's holding. It reflects a profoundly different conception of the Constitution than that held by the courts which sanctioned the modern adminstrative state. Today's decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history. I fear it will now be more difficult to "insur[e] that the fundamental policy decisions in our society will be made not

by an appointed official but by the body immediately responsible to the people," *Arizona* v. *California*, 373 U. S. 546, 626 (1963) (Harlan, J., dissenting in part). I must dissent.

## APPENDIX TO OPINION OF WHITE, J., DISSENTING

### STATUTES WITH PROVISIONS AUTHORIZING CONGRESSIONAL REVIEW

This compilation, reprinted from the Brief for the United States Senate, identifies and describes briefly current statutory provisions for a legislative veto by one or both Houses of Congress. Statutory provisions for a veto by Committees of the Congress and provisions which require legislation (*i. e.*, passage of a joint resolution) are not included. The 55 statutes in the compilation (some of which contain more than one provision for legislative review) are divided into six broad categories: foreign affairs and national security, budget, international trade, energy, rulemaking and miscellaneous.

"A.

"FOREIGN AFFAIRS AND NATIONAL SECURITY

"1. Act for International Development of 1961, Pub. L. No. 87–195, § 617, 75 Stat. 424, 444, [as amended,] 22 U. S. C. 2367 [(1976 ed., Supp. V)] (Funds made available for foreign assistance under the Act may be terminated by concurrent resolution).

"2. War Powers Resolution, Pub. L. No. 93–148, § 5, 87 Stat. 555, 556–557 (1973), [as amended,] 50 U. S. C. 1544 [(1976 ed. and Supp. V)] (Absent declaration of war, President may be directed by concurrent resolution to remove United States armed forces engaged in foreign hostilities.)

"3. Department of Defense Appropriation Authorization Act, 1974, Pub. L. No. 93–155, § 807, 87 Stat. 605, 615 (1973), 50 U. S. C. 1431 (National defense contracts obligating the United States for any amount in excess of $25,000,000 may be disapproved by resolution of either House).

"4. Department of Defense Appropriation Authorization Act, 1975, Pub. L. No. 93–365, § 709(c), 88 Stat. 399, 408 (1974), [as amended,] 50 U. S. C. app. 2403–1(c) [(1976 ed., Supp. V)] (Applications for export of defense goods, technology or techniques may be disapproved by concurrent resolution).

"5. H. R. J. Res. 683, Pub. L. No. 94–110, § 1, 89 Stat. 572 (1975), 22 U. S. C. 2441 note (Assignment of civilian personnel to Sinai may be disapproved by concurrent resolution).

"6. International Development and Food Assistance Act of 1975, Pub. L. No. 94–161, § 310, 89 Stat. 849, 860, [as amended,] 22 U. S. C. 2151n [(1976 ed., Supp. V)] (Foreign assistance to countries not meeting human rights standards may be terminated by concurrent resolution).

"7. International Security Assistance and Arms [Export] Control Act of 1976, Pub. L. No. 94–329, § [211(a)], 90 Stat. 729, 743, [as amended,] 22 U. S. C. 2776(b) [(1976 ed. and Supp. V)] (President's letter of offer to sell major defense equipment may be disapproved by concurrent resolution).

"8. National Emergencies Act, Pub. L. No. 94–412, § 202, 90 Stat. 1255 (1976), 50 U. S. C. 1622 (Presidentially declared national emergency may be terminated by concurrent resolution).

"9. International Navigational Rules Act of 1977, Pub. L. No. 95–75, § 3(d), 91 Stat. 308, 33 U. S. C. § 1602(d) [(1976 ed., Supp. V)] (Presidential proclamation of International Regulations for Preventing Collisions at Sea may be disapproved by concurrent resolution).

"10. International Security Assistance Act of 1977, Pub. L. No. 95–92, § 16, 91 Stat. 614, 622, 22 U. S. C. § 2753(d)(2) (President's proposed transfer of arms to a third country may be disapproved by concurrent resolution).

"11. Act of December [28], 1977, Pub. L. No. 95–223, § [207(b)], 91 Stat. 1625, 1628, 50 U. S. C. 1706(b) [(1976 ed., Supp. V)] (Presidentially declared national emergency and exercise of conditional powers may be terminated by concurrent resolution).

"12. Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95–242, §§ [303(a), 304(a)], 306, 307, 401, 92 Stat. 120, 130, 134, 137–38, 139, 144, 42 U. S. C. §§ 2160(f), 2155(b), 2157(b), [2158] 2153(d) [(1976 ed., Supp. V)] (Cooperative agreements concerning storage and disposition of spent nuclear fuel, proposed export of nuclear facilities, materials or technology and proposed agreements for international cooperation in nuclear reactor development may be disapproved by concurrent resolution).

"B.

"BUDGET

"13. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93–344, § 1013, 88 Stat. 297, 334–35, 31 U. S. C. 1403 (The proposed deferral of budget authority provided for a specific project or purpose may be disapproved by an impoundment resolution by either House).

"C.

"INTERNATIONAL TRADE

"14. Trade Expansion Act of 1962, Pub. L. No. 87–794, § 351, 76 Stat. 872, 899, 19 U. S. C. 1981(a) (Tariff or duty recommended by Tariff Commission may be imposed by concurrent resolution of approval).

"15. Trade Act of 1974, Pub. L. No. 93–618, §§ 203(c), 302(b), 402(d), 407, 88 Stat. 1978, 2016, 2043, 2057–60, 2063–64, [as amended,] 19 U. S. C. 2253(c), 2412(b), 2432, [2437 (1976 ed. and Supp. V)] (Proposed Presidential actions on import relief and actions concerning certain countries may be disapproved by concurrent resolution; various Presidential proposals for waiver extensions and for extension of nondiscriminatory treatment to products of foreign countries may be disapproved by simple (either House) or concurrent resolutions).

"16. Export-Import Bank Amendments of 1974, Pub. L. No. 93–646, § 8, 88 Stat. 2333, 2336, 12 U. S. C. [635e(b)] (Presidentially proposed limitation for exports to USSR in

excess of $300,000,000 must be approved by concurrent resolution).

"D.

"ENERGY

"17. Act of November 16, 1973, Pub. L. No. 93–153, § 101, 87 Stat. 576, 582, 30 U. S. C. 185(u) (Continuation of oil exports being made pursuant to President's finding that such exports are in the national interest may be disapproved by concurrent resolution).

"18. Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. No. 93–577, § 12, 88 Stat. 1878, 1892–1893, 42 U. S. C. 5911 (Rules or orders proposed by the President concerning allocation or acquisition of essential materials may be disapproved by resolution of either House).

"19. Energy Policy and Conservation Act, Pub. L. No. 94–163, § 551, 89 Stat. 871, 965 (1975), 42 U. S. C. 6421(c) (Certain Presidentially proposed 'energy actions' involving fuel economy and pricing may be disapproved by resolution of either House).

"20. Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94–258, § [201(3)], 90 Stat. 303, 309, 10 U. S. C. 7422(c)(2)(C) (President's extension of production period for naval petroleum reserves may be disapproved by resolution of either House).

. . . . .

"22. Department of Energy Act of 1978—Civilian Applications, Pub. L. No. 95–238, §§ 107, 207(b), 92 Stat. 47, 55, 70, 22 U. S. C. 3224a, 42 U. S. C. 5919(m) [(1976 ed., Supp. V)] (International agreements and expenditures by Secretary of Energy of appropriations for foreign spent nuclear fuel storage must be approved by concurrent resolution, if not consented to by legislation;) (plans for such use of appropriated funds may be disapproved by either House;) (financing in excess of $50,000,000 for demonstration facilities must be approved by resolution in both Houses).

"23. Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95–372, §§ 205(a), 208, 92 Stat. 629, 641, 668, 43 U. S. C. §§ 1337(a), 1354(c) [(1976 ed., Supp. V)] (Establishment by Secretary of Energy of oil and gas lease bidding system may be disapproved by resolution of either House;) (export of oil and gas may be disapproved by concurrent resolution).

"24. Natural Gas Policy Act of 1978, Pub. L. No. 95–621, §§ 122(c)(1) and (2), 202(c), 206(d)(2), 507, 92 Stat. 3350, 3370, 3371, 3372, 3380, 3406, 15 U. S. C. 3332, 3342(c), 3346(d)(2), 3417 [(1976 ed., Supp. V)] (Presidential reimposition of natural gas price controls may be disapproved by concurrent resolution;) (Congress may reimpose natural gas price controls by concurrent resolution;) (Federal Energy Regulatory Commission (FERC) amendment to pass through incremental costs of natural gas, and exemptions therefrom, may be disapproved by resolution of either House;) (procedure for congressional review established).

"25. Export Administration Act of 1979, Pub. L. No. 96–72, § [7(d)(2)(B)] 7(g)(3), 93 Stat. 503, 518, 520, 50 U. S. C. app. 2406(d)(2)(B), 2406(g)(3) [(1976 ed., Supp. V)] (President's proposal to [export] domestically produce[d] crude oil must be approved by concurrent resolution;) (action by Secretary of Commerce to prohibit or curtail export of agricultural commodities may be disapproved by concurrent resolution).

"26. Energy Security Act, Pub. L. No. 96–294, §§ 104 (b)(3), 104(e), 126(d)(2), 126(d)(3), 128, 129, 132(a)(3), 133 (a)(3), 137(b)(5), 141(d), 179(a), 803, 94 Stat. 611, 618, 619, 620, 623–26, 628–29, 649, 650–52, 659, 660, 664, 666, 679, 776 (1980) 50 U. S. C. app. 2091–93, 2095, 2096, 2097, 42 U. S. C. 8722, 8724, 8725, 8732, 8733, 8737, 8741, 8779, 6240 [(1976 ed., Supp. V)] (Loan guarantees by Departments of Defense, Energy and Commerce in excess of specified amounts may be disapproved by resolution of either House;) (President's proposal to provide loans or guarantees in excess

of established amounts may be disapproved by resolution of either House;) (proposed award by President of individual contracts for purchase of more than 75,000 barrels per day of crude oil may be disapproved by resolution of either House;) (President's proposals to overcome energy shortage through synthetic fuels development, and individual contracts to purchase more than 75,000 barrels per day, including use of loans or guarantees, may be disapproved by resolution of either House;) (procedures for either House to disapprove proposals made under Act are established;) (request by Synthetic Fuels Corporation (SFC) for additional time to submit its comprehensive strategy may be disapproved by resolution of either House;) (proposed amendment to comprehensive strategy by SFC Board of Directors may be disapproved by concurrent resolution of either House or by failure of both Houses to pass concurrent resolution of approval;) (procedure for either House to disapprove certain proposed actions of SFC is established;) (procedure for both Houses to approve by concurrent resolution or either House to reject concurrent resolution for proposed amendments to comprehensive strategy of SFC is established;) (proposed loans and loan guarantees by SFC may be disapproved by resolution of either House;) (acquisition by SFC of a synthetic fuels project which is receiving financial assistance may be disapproved by resolution of either House;) (SFC contract renegotiations exceeding initial cost estimates by 175% may be disapproved by resolution of either House;) (proposed financial assistance to synthetic fuel projects in Western Hemisphere outside United States may be disapproved by resolution of either House;) (President's request to suspend provisions requiring build up of reserves and limiting sale or disposal of certain crude oil reserves must be approved by resolution of both Houses).

"E.

"RULEMAKING

"27. Education Amendments of 1974, Pub. L. No. 93–380, § [509(a)], 88 Stat. 484, 567, 20 U. S. C. 1232(d)(1) [(1976 ed.,

Supp. V)] (Department of Education regulations may be disapproved by concurrent resolution).

"28. Federal Education Campaign Act Amendments of 1979, Pub. L. No. 96–187, § 109, 93 Stat. 1339, 1364, 2 U. S. C. 438(d)(2) [(1976 ed., Supp. V)] (Proposed rules and regulations of the Federal Election Commission may be disapproved by resolution of either House).

"29. Act of January 2, 1975, Pub. L. No. 93–595, § [2(a)(1)], 88 Stat. 1926, 1948, 28 U. S. C. 2076 (Proposed amendments by Supreme Court of Federal Rules of Evidence may be disapproved by resolution of either House).

"30. Act of August 9, 1975, Pub. L. No. 94–88, § 208, 89 Stat. 433, 436–37, 42 U. S. C. 602 note (Social Security standards proposed by Secretary of Health and Human Services may be disapproved by either House).

"31. Airline Deregulation Act of 1978, Pub. L. No. 95–504, § 43(f)(3), 92 Stat. 1705, 1752, 49 U. S. C. 1552(f) [(1976 ed., Supp. V)] (Rules or regulations governing employee protection program may be disapproved by resolution of either House).

"32. Education Amendments of 1978, Pub. L. No. 95–561, §§ 1138, [212(b)], 1409, 92 Stat. 2143, 2327, 2341, 2369, 25 U. S. C. 2018, 20 U. S. C. [927], 1221–3(e) [(1976 ed., Supp. V)] (Rules and regulations proposed under the Act may be disapproved by concurrent resolution).

"33. Civil Rights of Institutionalized Persons Act, Pub. L. No. 96–247, § 7(b)(1), 94 Stat. 349, 352–353 (1980) 42 U. S. C. 1997e [(1976 ed., Supp. V)] (Attorney General's proposed standards for resolution of grievances of adults confined in correctional facilities may be disapproved by resolution of either House).

"34. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96–252, § 21(a), 94 Stat. 374, 393, 15 U. S. C. 57a–1 [(1976 ed., Supp. V)] (Federal Trade Commission rules may be disapproved by concurrent resolution).

"35. Department of Education Organization Act, Pub. L. No. 96–88, § 414(b), 93 Stat. 668, 685 (1979), 20 U. S. C. 3474

[(1976 ed., Supp. V)] (Rules and regulations promulgated with respect to the various functions, programs and responsibilities transferred by this Act, may be disapproved by concurrent resolution).

"36. Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96–364, § 102, 94 Stat. 1208, 1213, 29 U. S. C. 1322a [(1976 ed., Supp. V)] (Schedules proposed by Pension Benefit Guaranty Corporation (PBGC) which requires an increase in premiums must be approved by concurrent resolution;) (revised premium schedules for voluntary supplemental coverage proposed by PBGC may be disapproved by concurrent resolution).

"37. Farm Credit Act Amendments of 1980, Pub. L. No. 96–592, § 508, 94 Stat. 3437, 3450, 12 U. S. C. [2252 (1976 ed., Supp. V)] (Certain Farm Credit Administration regulations may be disapproved by concurrent resolution or delayed by resolution of either House.)

"38. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96–510, § 305, 94 Stat. 2767, 2809, 42 U. S. C. 9655 [(1976 ed., Supp. V)] (Environmental Protection Agency regulations concerning hazardous substances releases, liability and compensation may be disapproved by concurrent resolution or by the adoption of either House of a concurrent resolution which is not disapproved by the other House).

"39. National Historic Preservation Act Amendments of 1980, Pub. L. No. 96–515, § 501, 94 Stat. 2987, 3004, 16 U. S. C. 470w–6 [(1976 ed., Supp. V)] (Regulation proposed by the Secretary of the Interior may be disapproved by concurrent resolution).

"40. Coastal Zone Management Improvement Act of 1980, Pub. L. No. 96–464, § 12, 94 Stat. 2060, 2067, 16 U. S. C. 1463a [(1976 ed., Supp. V)] (Rules proposed by the Secretary of Commerce may be disapproved by concurrent resolution).

"41. Act of December 17, 1980, Pub. L. No. 96–539, § 4, 94 Stat. 3194, 3195, 7 U. S. C. 136w [(1976 ed., Supp. V)] (Rules or regulations promulgated by the Administrator of the Envi-

ronmental Protection Agency under the Federal Insecticide, Fungicide and Rodenticide Act may be disapproved by concurrent resolution).

"42. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97–35, §§ 533(a)(2), 1107(d), 1142, 1183(a)(2), 1207, 95 Stat. 357, 453, 626, 654, 659, 695, 718–20, 20 U. S. C. 1089, 23 U. S. C. 402(j), 45 U. S. C. 761, 767, 564(c)(3), 15 U. S. C. 2083, 1276, 1204 [(1976 ed., Supp. V)] (Secretary of Education's schedule of expected family contributions for Pell Grant recipients may be disapproved by resolution of either House;) (rules promulgated by Secretary of Transportation for programs to reduce accidents, injuries and deaths may be disapproved by resolution of either House;) (Secretary of Transportation's plan for the sale of government's common stock in rail system may be disapproved by concurrent resolution;) (Secretary of Transportation's approval of freight transfer agreements may be disapproved by resolution of either House;) (amendments to Amtrak's Route and Service Criteria may be disapproved by resolution of either House;) (Consumer Product Safety Commission regulations may be disapproved by concurrent resolution of both Houses, or by concurrent resolution of disapproval by either House if such resolution is not disapproved by the other House).

"F.

"MISCELLANEOUS

"43. Federal Civil Defense Act of 1950, Pub. L. No. 81–920, § 201, 64 Stat. 1245, 1248, [as amended,] 50 app. U. S. C. 2281(g) [(1976 ed., Supp. V)] (Interstate civil defense compacts may be disapproved by concurrent resolution).

"44. National Aeronautics and Space Act of 1958, Pub. L. No. 85–568, § [302(c)], 72 Stat. 426, 433, 42 U. S. C. 2453 (President's transfer to National Air and Space Administration of functions of other departments and agencies may be disapproved by concurrent resolution).

"45. Federal Pay Comparability Act of 1970, Pub. L. No. 91–656, § 3, 84 Stat. 1946, 1949, 5 U. S. C. 5305 (President's alternative pay plan may be disapproved by resolution of either House).

"46. Act of October 19, 1973, Pub. L. No. 93–134, § 5, 87 Stat. 466, 468, 25 U. S. C. 1405 (Plan for use and distribution of funds paid in satisfaction of judgment of Indian Claims Commission or Court of Claims may be disapproved by resolution of either House).

"47. Menominee Restoration Act, Pub. L. No. 93–197, § 6, 87 Stat. 770, 773 (1973), 25 U. S. C. 903d(b) (Plan by Secretary of the Interior for assumption of the assets [of] the Menominee Indian corporation may be disapproved by resolution of either House).

"48. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93–198, §§ 303, 602(c)(1) and (2), 87 Stat. 774, 784, 814 (1973) (District of Columbia Charter amendments ratified by electors must be approved by concurrent resolution;) (acts of District of Columbia Council may be disapproved by concurrent resolution;) (acts of District of Columbia Council under certain titles of D. C. Code may be disapproved by resolution of either House).

"49. Act of December 31, 1975, Pub. L. No. 94–200, § 102, 89 Stat. 1124, 12 U. S. C. 461 note (Federal Reserve System Board of Governors may not eliminate or reduce interest rate differentials between banks insured by Federal Deposit Insurance Corporation and associations insured by Federal Savings and Loan Insurance Corporations without concurrent resolution of approval).

"50. Veterans' Education and Employment Assistance Act of 1976, Pub. L. No. 94–502, § 408, 90 Stat. 2383, 2397–98, 38 U. S. C. 1621 note (President's recommendation for continued enrollment period in Armed Forces educational assistance program may be disapproved by resolution of either House).

"51. Federal Land Policy and Management Act of 1976, Pub. L. No. 94–579, §§ 203(c), 204(c)(1), 90 Stat. 2743, 2750, 2752, 43 U. S. C. 1713(c), 1714 (Sale of public lands in excess of two thousand five hundred acres and withdrawal of public lands aggregating five thousand acres or more may be disapproved by concurrent resolution).

"52. Emergency Unemployment Compensation Extension Act of 1977, Pub. L. No. 95–19, § [401(a)] 91 Stat. 39, 45, 2 U. S. C. 359 [(1976 ed., Supp. V)] (President's recommendations regarding rates of salary payment may be disapproved by resolution of either House).

"53. Civil Service Reform Act of 1978, Pub. L. No. 95–454, § 415, 92 Stat. 1111, 1179, 5 U. S. C. 3131 note [(1976 ed., Supp. V)] (Continuation of Senior Executive Service may be disapproved by concurrent resolution).

"54. Full Employment and Balanced Growth Act of 1978, Pub. L. No. 95–523, § 304(b), 92 Stat. 1887, 1906, 31 U. S. C. 1322 [(1976 ed., Supp. V)] (Presidential timetable for reducing unemployment may be superseded by concurrent resolution).

"55. District of Columbia Retirement Reform Act, Pub. L. No. 96–122, § 164, 93 Stat. 866, 891–92 (1979) (Required reports to Congress on the District of Columbia retirement program may be rejected by resolution of either House).

"56. Act of August 29, 1980, Pub. L. No. 96–332, § 2, 94 Stat. 1057, 1058, 16 U. S. C. 1432 [(1976 ed., Supp. V)] (Designation of marine sanctuary by the Secretary of Commerce may be disapproved by concurrent resolution)."

JUSTICE REHNQUIST, with whom JUSTICE WHITE joins, dissenting.

A severability clause creates a presumption that Congress intended the valid portion of the statute to remain in force when one part is found to be invalid. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312 (1936); *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U. S. 210, 235

(1932). A severability clause does not, however, conclusively resolve the issue. "[T]he determination, in the end, is reached by" asking "[w]hat was the intent of the lawmakers," *Carter*, *supra*, at 312, and "will rarely turn on the presence or absence of such a clause." *United States* v. *Jackson*, 390 U. S. 570, 585, n. 27 (1968). Because I believe that Congress did not intend the one-House veto provision of § 244(c)(2) to be severable, I dissent.

Section 244(c)(2) is an exception to the general rule that an alien's deportation shall be suspended when the Attorney General finds that statutory criteria are met. It is severable only if Congress would have intended to permit the Attorney General to suspend deportations without it. This Court has held several times over the years that exceptions such as this are not severable because

> "by rejecting the exceptions intended by the legislature . . . the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what anyone can say it would have enacted in view of the illegality of the exceptions." *Spraigue* v. *Thompson*, 118 U. S. 90, 95 (1886).

By severing § 244(c)(2), the Court permits suspension of deportation in a class of cases where Congress never stated that suspension was appropriate. I do not believe we should expand the statute in this way without some clear indication that Congress intended such an expansion. As the Court said in *Davis* v. *Wallace*, 257 U. S. 478, 484–485 (1922):

> "Where an excepting provision in a statute is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operation of other provisions with which that provision was enacted and which was intended to qualify or restrain. The reasoning on which the decisions proceed is illustrated in *State ex rel. McNeal* v. *Dombaugh*, 20 Ohio St. 167, 174. In dealing with a contention that a statute

containing an unconstitutional provision should be construed as if the remainder stood alone, the court there said: 'This would be to mutilate the section and garble its meaning. The legislative intention must not be confounded with their power to carry that intention into effect. To refuse to give force and vitality to a provision of law is one thing, and to refuse to read it is a very different thing. It is by a mere figure of speech that we say an unconstitutional provision of a statute is "stricken out." For all the purposes of construction it is to be regarded as part of the act. The meaning of the legislature must be gathered from all that they have said, as well from that which is ineffectual for want of power, as from that which is authorized by law.'

"Here the excepting provision was in the statute when it was enacted, and there can be no doubt that the legislature intended that the meaning of the other provisions should be taken as restricted accordingly. Only with that restricted meaning did they receive the legislative sanction which was essential to make them part of the statute law of the State; and no other authority is competent to give them a larger application."

See also *Frost* v. *Corporation Comm'n of Oklahoma*, 278 U. S. 515, 525 (1929).

The Court finds that the legislative history of § 244 shows that Congress intended § 244(c)(2) to be severable because Congress wanted to relieve itself of the burden of private bills. But the history elucidated by the Court shows that Congress was unwilling to give the Executive Branch permission to suspend deportation on its own. Over the years, Congress consistently rejected requests from the Executive for complete discretion in this area. Congress always insisted on retaining ultimate control, whether by concurrent resolution, as in the 1948 Act, or by one-House veto, as in the present Act. Congress has never indicated that it would be willing to permit suspensions of deportation unless it could retain some sort of veto.

It is doubtless true that Congress has the power to provide for suspensions of deportation without a one-House veto. But the Court has failed to identify any evidence that Congress intended to exercise that power. On the contrary, Congress' continued insistence on retaining control of the suspension process indicates that it has never been disposed to give the Executive Branch a free hand. By severing § 244(c)(2) the Court has "'confounded'" Congress' "'intention'" to permit suspensions of deportation "'with their power to carry that intention into effect.'" *Davis*, *supra*, at 484, quoting *State ex rel. McNeal* v. *Dombaugh*, 20 Ohio St. 167, 174 (1870).

Because I do not believe that § 244(c)(2) is severable, I would reverse the judgment of the Court of Appeals.

Syllabus

# IDAHO EX REL. EVANS, GOVERNOR OF IDAHO, ET AL. *v.* OREGON ET AL.

## ON EXCEPTIONS TO FINAL REPORT OF SPECIAL MASTER

No. 67, Orig. Argued March 23, 1983—Decided June 23, 1983

Since 1938, several dams have been constructed along the Columbia-Snake River system, severely reducing the number of anadromous fish that migrate between the Pacific Ocean and their spawning grounds in those rivers and their tributaries. Fishing is another factor depleting the anadromous fish population. In 1976, this Court granted Idaho leave to file its complaint requesting an equitable apportionment against Oregon and Washington of the anadromous fish in the Columbia-Snake River system. A Special Master was appointed, and after trial and oral argument he entered the report involved here, recommending that the action be dismissed without prejudice. Idaho filed exceptions to the report.

*Held:* The Special Master's recommendation is adopted, and the action is dismissed without prejudice to Idaho's right to bring new proceedings whenever it shall appear that it is being deprived of its equitable share of anadromous fish. Pp. 1024–1029.

(a) The doctrine of equitable apportionment is applicable here. Although that doctrine has its roots in water rights litigation, the natural resource of anadromous fish is sufficiently similar to make equitable apportionment an appropriate mechanism for resolving allocative disputes. The doctrine is neither dependent on nor bound by existing legal rights to the resource being apportioned. Thus, the fact that no State has a pre-existing legal right of ownership in the fish does not prevent an equitable apportionment. Pp. 1024–1025.

(b) Because apportioment is based on broad and flexible equitable concerns rather than on precise legal entitlements, a decree is not intended to compensate for prior legal wrongs. Instead, it prospectively ensures that a State obtains its equitable share of a resource. Although a decree may not always be mathematically precise or based on definite present and future conditions, uncertainties about the future do not provide a basis for declining to fashion a decree. The Special Master erred to the extent that he found that the formulation of a workable decree is impossible in this case. If Idaho suffers from the injury it alleges, there is no reason why that injury could not be remedied by an equitable decree. Pp. 1025–1027.

(c) However, a State seeking equitable apportionment under this Court's original jurisdiction must prove by clear and convincing evidence some real and substantial injury or damage. The Special Master, in

finding that Idaho has not demonstrated sufficient injury to justify an equitable decree, properly based his finding on present conditions and properly focused on the most recent time period, 1975–1980, during which all the dams and various conservation programs were in operation. The evidence does not demonstrate that Oregon and Washington are now injuring Idaho by overfishing or that they will do so in the future. Moreover, Idaho has not proved that Oregon and Washington have mismanaged the resource and will continue to mismanage. Pp. 1027–1029.

Action dismissed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 1029.

*Jim Jones*, Attorney General of Idaho, argued the cause for plaintiffs. With him on the briefs were *David H. Leroy*, former Attorney General, *Stephen V. Goddard*, Deputy Attorney General, and *Don Olowinski*.

*Edward B. MacKie*, Chief Deputy Attorney General, argued the cause for defendant State of Washington. With him on the brief were *Kenneth O. Eikenberry*, Attorney General, and *James Johnson*, Senior Assistant Attorney General.

JUSTICE BLACKMUN delivered the opinion of the Court.

In this action invoking the Court's original jurisdiction, the State of Idaho seeks an equitable apportionment against the States of Oregon and Washington of the anadromous fish that migrate between the Pacific Ocean and spawning grounds in Idaho. The Special Master has filed his final report on the merits and recommends that the action be dismissed without prejudice. We have before us Idaho's exceptions to that report.

I

Although somewhat repetitive of the Court's prior writings in this litigation, 444 U. S. 380 (1980), we feel it worthwhile to outline once again the facts of the case and the Court's prior rulings. The dispute concerns fish, one of the valuable

natural resources of the Columbia-Snake River system in the Pacific Northwest. That system covers portions of Wyoming, Idaho, Washington, Oregon, and British Columbia. From its origin in northwest Wyoming, the Snake River flows westerly across southern Idaho until it reaches the Idaho and Oregon border. At that point, the river winds northward to form the border between those States for approximately 165 miles, and then the border between Washington and Idaho for another 30 miles. Next, it turns abruptly westward and flows through eastern Washington for approximately 100 miles, finally joining the Columbia River. The Columbia, before this rendezvous, flows southward from British Columbia through eastern Washington. After it is supplemented by the Snake, the Columbia continues westward 270 miles to the Pacific Ocean. For most of the distance, it forms the boundary between Washington and Oregon.

A

Among the various species of fish that thrive in the Columbia-Snake River system, anadromous fish—in this case, chinook salmon and steelhead trout—lead remarkable and not completely understood lives. These fish begin life in the upstream gravel bars of the Columbia and Snake and their respective tributaries. Shortly after hatching, the fish emerge from the bars as fry and begin to forage around their hatch areas for food. They grow into fingerlings and then into smolt; the latter generally are at least six inches long and weigh no more than a tenth of a pound. The period the young fish spend in the hatching areas varies with the species and can last from six months to well over a year.

At the end of this period, the smolts swim down river toward the Pacific.[1] In the estuary of the Columbia, the

[1] The smolts, apparently, prefer not to swim. They face upstream, open their mouths, and permit the current to carry them downstream. Should they come upon a quiet spot, they turn around and swim. A. Netboy, The Columbia River Salmon and Steelhead Trout 44 (1980).

young fish linger for a time in order to grow accustomed to the chemical cues of the water. A. Netboy, The Columbia River Salmon and Steelhead Trout 44 (1980). It is believed that they pick up the river's scent so that in their twilight years they can return to their original home. Tr. of Oral Arg. 19. Even under the best of conditions, only a small fraction of the smolts that set out from the gravel bars ever reach the ocean.

Once in the ocean, the smolts grow into adults, averaging between 12 and 17 pounds. They spend several years traveling on precise, and possibly genetically predetermined, routes. See A. Netboy, *supra*, at 46–49. At the end of their ocean ventures, the mature fish ascend the river. They travel in groups called runs, distinguishable both by species and by the time of year. All the fish return to their original hatching area, where they spawn and then die. At issue in this case are the runs of spring chinook between February and May, the runs of summer chinook in June and July, and the runs of summer steelhead trout in August and September.

B

Since 1938, the already arduous voyages of these fish have been complicated by the construction of eight dams on the Columbia and Snake Rivers.[2] First, interdicting the flow of the Snake River in Washington are the Lower Granite (constructed in 1969), the Little Goose (1968), and the Lower Monumental (1967) Dams. The Ice Harbor Dam (1961) sits astride the Snake just above its confluence with the Columbia. Four more dams interrupt the Columbia on its way to the Pacific: the McNary (1953), the John Day (1968), the Dalles (1957), and the original dam, the Bonneville (1938).

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[2] Three dams in Idaho—the Brownlee (constructed in 1958), the Oxbow (1961), and the Hells Canyon (1967) Dams—have closed off the upper Snake River entirely to this piscean traffic. This renders unusable much good spawning area.

In order to produce electrical power, these dams divert a flow of water through large turbines that have devastating effect on young smolts descending to the Pacific. Spillways have been constructed to permit the smolts to detour around the turbines.[3] The dams also present great obstacles to the adults. Fish ladders—water-covered steps—enable the returning adults to climb over the dams; in addition, the ladders provide an opportunity for compiling statistics.[4] Varying water conditions and the demand for power can increase the mortality of both descending smolts and ascending adults. The mortality rate for oceanbound smolts averages approximately 95%. Report of Special Master 7. Their adult counterparts die at a rate of 15% at each dam. Only 25% to 30% of the adults passing over the first dam, the Bonneville, succeed in running the gauntlet to traverse the Lower Granite Dam and enter Idaho. *Ibid.*[5]

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[3] Most dams are also equipped with screens that divert the smolts away from the turbines and into the spillways. Since 1969, however, the number of turbines operating on the dams has increased from 3 to 24, causing more water to be directed through turbines and reducing the water flow down the spillways. This has increased smolt mortality dramatically. There is an experimental plan to place smolts in tanks and "bus" them around all the dams for release below the Bonneville Dam. See Tr. of Oral Arg. 15; Idaho's Exceptions to Master's Final Report on Merits 102–103 (Idaho's Exceptions).

[4] At each fish ladder, the Army Corps of Engineers has constructed observation windows from which it counts and records the number of ascending fish and notes their variety. This count must be adjusted for the phenomenon of "fall back": often adult fish that have been counted are swept back over the dam or down the ladder by strong currents. In addition to the effect this phenomenon has on the complexity of the count, the fall over the dam causes nitrogen supersaturation, making the fish slightly giddy and disoriented, and serving to increase adult mortality.

[5] Apparently, the John Day Dam, constructed in 1968, is "the big killer" of ascending adults. See Tr. of Oral Arg. 16. To mitigate the effects of the high mortality rate caused by all the dams, hatchery programs hatch and nurture millions of smolts and release them into the Snake River. The Idaho Power Company finances several Idaho hatcheries, pursuant to a condition imposed by the Federal Energy Regulatory Commission in

Another factor depleting the anadromous fish population is fishing, sometimes referred to as "harvesting." In 1918, Oregon and Washington, with the consent of Congress, Act of Apr. 8, 1918, ch. 47, 40 Stat. 515, formed the Oregon-Washington Columbia River Fish Compact to ensure uniformity in state regulation of Columbia River anadromous fish. Idaho has sought entry into the Compact on several occasions, but has been rebuffed. Under the Compact, Oregon and Washington have divided the lower Columbia into six commercial fishery zones: zones one through five cover the Columbia from its mouth to the Bonneville Dam; zone six stretches from the Bonneville Dam to the McNary Dam below the confluence with the Snake. Each year, authorities from both States estimate the size of the runs to determine the length of a fishing season the runs can support. The States do not permit commercial harvests of chinook salmon or steelhead trout in any of their Columbia River tributaries; they do, however, permit sport fishing in most locations.

Pursuant to treaties ratified in 1859, several Indian Tribes have "the right of taking fish at all usual and accustomed places." *Sohappy* v. *Smith*, 302 F. Supp. 899, 904 (Ore. 1969). In 1977, after lengthy litigation over Indian treaty rights,[6] Oregon and Washington agreed with the Indians to preserve zone six solely for Indian fishing. They also agreed

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granting the company's application for a license to construct dams along the upper portions of the Snake. Report of Special Master 9; see n. 3, *supra*. In addition, the parties have agreed to construct 10 hatcheries, 6 in Idaho, to compensate for losses caused by the four dams on the lower Snake River.

[6] The *Sohappy* District Court in 1974 held that the Indians were entitled to 50% of the fish destined to pass over the Bonneville. See *Sohappy* v. *Smith*, 529 F. 2d 570, 572 (CA9 1976); cf. *Washington* v. *Fishing Vessel Assn.*, 443 U. S. 658, 685–689 (1979) (approving similar 50% allocation to Indians). The Court of Appeals for the Ninth Circuit vacated the order and remanded the case to the District Court for consideration of other factors bearing on the apportionment. 529 F. 2d, at 573–574. The parties reached the agreement described in the text before any further District Court action.

to limit commercial harvests in zones one through five to an amount that permits sufficient numbers of fish to pass over the Bonneville Dam to provide an equitable share for the Indians and to leave enough fish to replenish the runs. Under the plan, escapement goals—the number of fish passing the Bonneville—are set for each run. When the estimated size of the run exceeds the escapement goal by a specified amount, the surplus is allocated between non-Indian fishers below the Bonneville and Indian fishers above that dam. Two Indian Tribes recently have withdrawn from the agreement, however, casting its future effectiveness into doubt.

Although the parties disagree as to the causes, runs of all the relevant species since 1973 have been significantly lower. See Report of Special Master 46–51 (tables). Since that year, Oregon and Washington have not permitted commercial harvests of summer chinook; in both States, steelhead trout are now designated game fish and may not be harvested commercially. Harvests of spring chinook have been permitted only in 1974 and 1977. In the years since 1973, there has been some sport fishing of all three runs.

C

In 1976, the Court granted Idaho leave to file its complaint requesting an equitable apportionment of anadromous fish in the Columbia-Snake River system. 429 U. S. 163. The matter was referred to a Special Master, the Honorable Jean S. Breitenstein, Senior Judge for the United States Court of Appeals for the Tenth Circuit. See 431 U. S. 952 (1977). The Special Master initially recommended that the suit be dismissed without prejudice for failure to join an indispensable party, the United States. That recommendation was not accepted, and the case was remanded for trial. 444 U. S. 380 (1980). The Court stated that Idaho "must shoulder the burden of proving that the [non-Indian] fisheries in [Oregon and Washington] have adversely and unfairly affected the number of fish arriving in Idaho." *Id.*, at 392.

After trial and oral argument, the Special Master issued his final report on the merits. He has recommended that the action be dismissed without prejudice, apparently for two distinct reasons. First, he found that Idaho has not demonstrated that it has suffered any injury at the hands of Oregon and Washington. Second, even assuming that it has suffered such an injury, he found it impossible to fashion a decree to apportion the fish fairly among the parties. Idaho has filed exceptions to the report.[7]

## II

### A

As an initial matter, the Special Master correctly concluded that the doctrine of equitable apportionment is applicable to this dispute. Although that doctrine has its roots in water rights litigation, see *Kansas* v. *Colorado*, 206 U. S. 46, 98 (1907), the natural resource of anadromous fish is sufficiently similar to make equitable apportionment an appropriate mechanism for resolving allocative disputes.[8] The anadromous fish at issue travel through several States during their lifetime. Much as in a water dispute, a State that overfishes a run downstream deprives an upstream State of the fish it otherwise would receive. A dispute over the water flowing through the Columbia-Snake River system would be resolved by the equitable apportionment doctrine; we see no reason to accord different treatment to a controversy over a similar natural resource of that system.

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[7] Washington filed no exceptions of its own, but has responded to those of Idaho. Oregon did not participate in our review of the Special Master's report.

[8] The Court in *Kansas* v. *Colorado* said:

"[W]henever . . . the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them." 206 U. S., at 97–98.

The doctrine of equitable apportionment is neither dependent on nor bound by existing legal rights to the resource being apportioned. The fact that no State has a pre-existing legal right of ownership in the fish, *Hughes* v. *Oklahoma*, 441 U. S. 322, 329–336 (1979), does not prevent an equitable apportionment. Conversely, although existing legal entitlements are important factors in formulating an equitable decree, such legal rights must give way in some circumstances to broader equitable considerations. See *Colorado* v. *New Mexico*, 459 U. S. 176, 184 (1982); *id.*, at 195 (O'CONNOR, J., concurring); *Nebraska* v. *Wyoming*, 325 U. S. 589, 618 (1945); *Connecticut* v. *Massachusetts*, 282 U. S. 660, 670–671 (1931).

At the root of the doctrine is the same principle that animates many of the Court's Commerce Clause cases: a State may not preserve solely for its own inhabitants natural resources located within its borders. See *Philadelphia* v. *New Jersey*, 437 U. S. 617, 627 (1978); see also *New England Power Co.* v. *New Hampshire*, 455 U. S. 331, 338 (1982); *Hughes* v. *Oklahoma*, 441 U. S., at 330. Consistent with this principle, States have an affirmative duty under the doctrine of equitable apportionment to take reasonable steps to conserve and even to augment the natural resources within their borders for the benefit of other States. *Colorado* v. *New Mexico*, 459 U. S., at 185; *Wyoming* v. *Colorado*, 259 U. S. 419, 484 (1922). Even though Idaho has no legal right to the anadromous fish hatched in its waters, it has an equitable right to a fair distribution of this important resource.

## B

Because apportionment is based on broad and flexible equitable concerns rather than on precise legal entitlements, see *Colorado* v. *New Mexico*, 459 U. S., at 183; *Nebraska* v. *Wyoming*, 325 U. S., at 618, a decree is not intended to compensate for prior legal wrongs. Rather, a decree prospectively ensures that a State obtains its equitable share of a re-

source. A decree may not always be mathematically precise or based on definite present and future conditions. Uncertainties about the future, however, do not provide a basis for declining to fashion a decree. Reliance on reasonable predictions of future conditions is necessary to protect the equitable rights of a State.

To the extent that the Special Master found that the formulation of a workable decree is impossible, we must disagree. See *Washington* v. *Fishing Vessel Assn.*, 443 U. S. 658, 663 (1979) (regular habits of anadromous fish make it possible to forecast size of runs). Idaho's proposed formula for apportioning the fish is one possible basis for a decree.[9] It relies on the number of jackfish—reproductively precocious male fish, which return a year ahead of other members of their age group—passing over the Bonneville and the Ice Harbor Dams to predict the size of the run the following year and the percentage of fish in the run that originate in Idaho.[10]

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[9] Oregon and Washington authorities employ a similar formula in estimating the size of runs and in setting Bonneville Dam escapement goals pursuant to the Indian treaty rights settlement agreement. In addition to the apportionment formula, Idaho's plan would require Oregon and Washington (1) to continue the same primary management techniques they have been using; (2) to estimate the size of future runs and dam mortality rates; (3) to meet the escapement requirements they have set for the last five years; (4) to determine the number of fish in each run that originated in Idaho; (5) to determine the harvestable surplus of Idaho-origin fish; (6) to allot to Idaho a share of that surplus (after subtracting Indian fisheries) equal to the percentage that Idaho-origin fish are of the total Columbia River run; and (7) to make up any shortfall in Idaho's allocated harvest out of the next year's harvest.

[10] The latter prediction is possible because most fish that surmount the Ice Harbor Dam are headed for spawning grounds in Idaho. We express no view on the appropriateness of Idaho's proposed formula. We note that it apportions fish solely on the basis of their origin. Flexibility is the linchpin in equitable apportionment cases, and, in our prior decisions, we have based apportionment on the consideration of many factors to ensure a fair and equitable allocation. See *Colorado* v. *New Mexico*, 459 U. S. 176, 183 (1982).

Although the computation is complicated and somewhat technical, that fact does not prevent the issuance of an equitable decree. See 444 U. S., at 390; *Nebraska* v. *Wyoming*, 325 U. S., at 616–617. Nothing in the record undermines the assumption supporting Idaho's formula that there is a definite relationship between the number of jackfish and the total number of fish in a particular run the following year. Thus, if Idaho suffers from the injury it alleges, we see no reason why that injury could not be remedied by an equitable decree.

C

The Special Master also found, however, that Idaho has not demonstrated sufficient injury to justify an equitable decree. A State seeking equitable apportionment under our original jurisdiction must prove by clear and convincing evidence some real and substantial injury or damage. *Colorado* v. *New Mexico*, 459 U. S., at 187–188, n. 13; *Connecticut* v. *Massachusetts*, 282 U. S., at 672; see *New Jersey* v. *New York*, 283 U. S. 336, 344–345 (1931). In reaching his conclusion, the Special Master stated that the determination should be based on present conditions. Report of Special Master 25–26. He therefore focused on the most recent time period, 1975 through 1980, during which all the dams and various conservation programs were in operation.

We approve this approach. The Special Master found that, due to the operation of the dams, the fish runs have been depressed since 1970. *Id.*, at 26, 34. It is highly unlikely that the dams will be removed or the number of deadly turbines reduced; all parties must live with these conditions in the determinable future.[11] Although Oregon and Wash-

[11] Idaho accepts, as it must, see 444 U. S., at 388, the continued operation of the dams and their adverse impact on the runs. See Idaho's Exceptions 46, 87. Its argument that the parties must share that adverse impact equally, *id.*, at 87, is relevant to the fashioning of an equitable decree, but not to the existence of a cognizable injury.

ington may have harvested a disproportionate share of anadromous fish over the long run,[12] Idaho took 58.72% of the total harvest in the period from 1975 through 1980. *Id.*, at 44. Equitable apportionment is directed at ameliorating present harm and preventing future injuries to the complaining State, not at compensating that State for prior injury. We agree with the Special Master that these figures do not demonstrate that Oregon and Washington are now injuring Idaho by overfishing the Columbia or that they will do so in the future.

Moreover, Idaho has not proved that Oregon and Washington have mismanaged the resource and will continue to mismanage. The two States in 1974 did permit some over-

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[12] Idaho claims that from 1962 through 1980, when spring chinook that originated in Idaho constituted 50% of the total runs, Oregon and Washington took 83% of the Idaho spring chinook. According to Idaho, they also harvested 75% of the Idaho-origin summer chinook, which during the period constituted 40% of all summer chinook runs. As to steelhead trout, Idaho asserts that Oregon and Washington took 58% of the harvest of Idaho-origin fish, which was 48% of the total steelhead runs. *Id.*, at 49–50.

Of course, these figures presume, as does Idaho's entire argument, that Idaho is entitled to those fish that originate in its waters. After *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979), however, Idaho cannot claim legal ownership of the fish. While the origin of the fish may be a factor in the fashioning of an equitable decree, it cannot by itself establish the need for a decree. Instead, the Court must look to factors such as disproportionate reductions in Idaho's normal harvest, or reductions in the total fish in the runs caused by mismanagement or overfishing by Washington and Oregon. As a historical matter, Idaho's own tables demonstrate that its proportion of the harvest of Idaho-origin spring chinook increased from 13.5% in 1962 through 1967 to 45.5% in 1975 through 1980, and its percentage of the harvest of Idaho-origin steelhead trout increased in the same period from 35.1% to 90.7%. Idaho's harvest percentage of Idaho-origin summer chinook did decrease between the two periods, but only 192 fish from that run were caught in the latter period, a *de minimis* number. Idaho's Exceptions 53–54 (tables 6, 7, and 8). Although we reject the assumption of entitlement underlying Idaho's comparisons, even under that assumption, Idaho's portion of the harvest has been increasing.

fishing of the Columbia.[13] Idaho, however, has produced no concrete evidence of other mismanagement, and the Special Master concluded that "[t]he record shows no repetition or threatened repetition of [prior mismanagement]."[14] *Id.*, at 32. Although it is possible that Washington and Oregon will mismanage this resource in the future, Idaho has not carried its burden of demonstrating a substantial likelihood of injury.

III

For the foregoing reasons, we adopt the Special Master's recommendation and dismiss the action without prejudice to the right of Idaho to bring new proceedings whenever it shall appear that it is being deprived of its equitable share of anadromous fish.

*It is so ordered.*

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

The Special Master reasoned that Idaho was entitled to a "fair share" of the anadromous fish that are the subject of this dispute. Without quantifying that share, however, he rejected the claim that Washington and Oregon had mismanaged the fishery, Report of Special Master 30–34, concluding instead that they had acted in good faith, *id.*, at 35, and that the relief requested by Idaho was unworkable, *ibid.*

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[13] The Special Master found that the last incident of mismanagement occurred in 1974 when, despite the recommendation of experts, Oregon and Washington permitted a limited harvest. They overestimated the Bonneville count by failing to consider the fall back phenomenon, and underestimated the Indian fishery for the year. The overfishing reduced the number of fish returning to spawn. Report of Special Master 32.

[14] Moreover, despite Idaho's claim that Oregon and Washington managed only for minimum escapements over the Bonneville, the Special Master found that Idaho had never requested those States to increase the escapement goal. *Id.*, at 31. In fact, Idaho seems quite content with the current escapement goals; its plan requires that Oregon and Washington "manage to meet the same spawning escapements they have been managing for over the last five years." Idaho's Exceptions 82.

In reaching that conclusion, he refused to consider any evidence pertaining to years earlier than 1975 or to future developments. *Id.*, at 25–26, 27.

The Court today overrules the exceptions to the report of the Special Master. I see substantial merit to several of the points raised by Idaho and am persuaded that they require a remand to the Special Master for further proceedings. Accordingly, I dissent.

I

The Master properly concluded that "Idaho is entitled to its fair share of the fish." *Id.*, at 25. No one owns an individual fish until he reduces that fish to possession, *Pierson* v. *Post*, 2 Am. Dec. 264 (N. Y. 1805), and, indeed, even the States do not have full-fledged "property" interests in the wildlife within their boundaries, see, *e. g.*, *Douglas* v. *Seacoast Products, Inc.*, 431 U. S. 265, 284 (1977); *Missouri* v. *Holland*, 252 U. S. 416, 434 (1920). Nonetheless, courts have long recognized the *opportunity* to fish as an interest of sufficient dignity and importance to warrant certain protections. See, *e. g.*, *Union Oil Co.* v. *Oppen*, 501 F. 2d 558 (CA9 1974); *Louisiana ex rel. Guste* v. *M/V Testbank*, 524 F. Supp. 1170 (ED La. 1981); *Weld* v. *Hornby*, 7 East 195 (K. B. 1806); J. Gould, Law of Waters §§ 186, 187 (1883); 3 J. Kent, Commentaries 411 (5th ed. 1844); cf. *New Jersey* v. *New York*, 283 U. S. 336, 345 (1931) (considering the effect on oysterbeds in apportioning water); *Douglas*, *supra*, at 287–288 (REHNQUIST, J., concurring in part and dissenting in part) (although State has no ownership in wildlife in the conventional sense, it has a "substantial proprietary interest"). See generally *United States* v. *Washington*, 520 F. 2d 676 (CA9 1975), cert. denied, 423 U. S. 1086 (1976). Indeed, in recent years, as the runs of anadromous fish have diminished and no longer satisfy fully the demands of all fishermen, the federal courts frequently find themselves confronted with disputes over the management and conservation of the resource. Faced with these problems, the courts, includ-

ing this Court, have not hesitated to recognize that various claimants do possess protectible rights in the runs of fish, whether or not those claimants ultimately manage to land and reduce particular specimens to possession and full ownership. See, *e. g.*, *Washington Game Dept.* v. *Puyallup Tribe*, 414 U. S. 44 (1973); *Sohappy* v. *Smith*, 529 F. 2d 570 (CA9 1976) *(per curiam); United States* v. *Washington, supra; Sohappy* v. *Smith*, 302 F. Supp. 899 (Ore. 1969). When States enter the fray, this Court must be prepared to undertake the admittedly difficult task of assessing the claim of each and arriving at an equitable resolution that protects the interests of each, for, as we held long ago in a leading case on our original jurisdiction:

> "[W]henever . . . the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them." *Kansas* v. *Colorado*, 206 U. S. 46, 97–98 (1907).[1]

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[1] This controversy, like disputes over the waters of interstate streams, is one particularly appropriate for resolution by this Court in the exercise of its original jurisdiction. The original jurisdiction was "conferred by the Constitution as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force," *North Dakota* v. *Minnesota*, 263 U. S. 365, 372–373 (1923). See generally 2 Waters and Water Rights § 132.2(A) (R. Clark ed. 1967). Disputes between sovereigns over migratory wildlife typically give rise to diplomatic solutions. See, *e. g.*, *Missouri* v. *Holland*, 252 U. S. 416 (1920) (treaty between United States and Canada concerning migratory birds). Such solutions reflect the recognition by the international community that each sovereign whose territory temporarily shelters such wildlife has a legitimate and protectible interest in that wildlife. In our federal system, we recognize similar interests, but the original jurisdiction of this Court or interstate compacts substitute for interstate diplomatic processes.

Having reached the correct conclusion that Idaho has a right to a fair share of the anadromous fish of the Columbia and Snake Rivers, though, the Master adopted procedures that denied Idaho an opportunity to effectuate that right. It is the approval of the limitations placed on Idaho's establishment of its rights with which I disagree.

## II

In spite of his recognition that Idaho was entitled to a fair share of the runs of anadromous fish, the Master found that there was no injury to Idaho. I am at a loss to understand how he reached that conclusion without specifying the nature and extent of Idaho's entitlement.[2] The Master excluded from consideration any evidence of past conditions or probable future conditions, focusing instead solely on the evidence for the period 1975–1980. Report of Special Master 25–26, 27.[3] During those years, the harvests were negligible, so, in

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[2] The failure to specify Idaho's rights also seems to me to represent a poor use of judicial resources, inviting future litigation, rather than settling questions properly presented now. Cf. Comment, *Sohappy* v. *Smith*: Eight Years of Litigation over Indian Fishing Rights, 56 Ore. L. Rev. 680, 693 (1977) (although court's initial order declared that the Indians had a right to a "fair share" of fish, "[u]nfortunately, the court did not provide any guidelines for determining what a 'fair share' is, and consequently, the parties have been back in court to argue about the application of *Sohappy*").

[3] The Master did permit Idaho to create a record, at least of evidence of past conditions and practices, see Exceptions of Idaho 101, but he refused to consider that evidence, effectively excluding it. See Report of Special Master 25–26, 27.

In support of this decision, the Master cited *Nebraska* v. *Wyoming*, 325 U. S. 589, 620 (1945), where the Court stated: "[T]he decree which is entered must deal with conditions as they obtain today." In setting out the general principle in that case, the Court had explained: "'[A]ll of the factors which create equities in favor of one State or the other must be weighed as of the date when the controversy is mooted,'" *id.*, at 618, quoting *Kansas* v. *Colorado*, 320 U. S. 383, 394 (1943). "Conditions as they obtain today" include all current "equities," which, as elaborated further below, turn on past, present, and future realities.

the Master's view, Idaho's rights were similarly negligible, and Idaho could not show the "substantial injury" necessary to obtain relief from this Court in the exercise of its original jurisdiction, see, *e. g.*, *Kansas* v. *Colorado*, 320 U. S. 383, 393 (1943); *Connecticut* v. *Massachusetts*, 282 U. S. 660, 669 (1931). Of course, as the Court recognizes, *ante*, at 1027, the Master properly required a showing by clear and convincing evidence that Idaho sustained a substantial injury. Nonetheless, two basic problems flaw the Master's approach. First, it assumes that Idaho's only concern is with its share of the harvest and that, in the absence of a harvestable surplus,[4] Idaho's interest in the runs vanishes. Second, it excludes evidence relevant in explaining the current state of the runs and in determining what types of management will best conserve and increase the resource for the benefit of all.

A

The first problem with the Master's approach requires little elaboration. Even if there is absolutely no harvestable surplus for a year or for several years, Idaho has a right to seek to maintain and eventually increase the runs by requiring the defendants to refrain from practices that prevent fish from returning to their spawning grounds in numbers sufficient to perpetuate the species in this river system. Cf. *Colorado* v. *New Mexico*, 459 U. S. 176 (1982) (recognizing duty to conserve common water supply); *Wyoming* v. *Colorado*, 259 U. S. 419, 484 (1922) (same). The allegations of mismanagement over the period leading up to this lawsuit—in particular the allegation that the defendants made a practice of closing fishing seasons only *after* it became clear that they would not meet the goal of a minimum spawning escapement, Exceptions of Idaho 65; Pretrial Order 7, Admitted Fact 30—if true, may show the existence of a threat to Idaho's interest in the maintenance of the runs. Indeed, the

[4] "Harvestable surplus" refers to the number of fish in the run that remain after the escapement ordered for the preservation of the runs and after the Indian Tribes have exercised their treaty rights.

very paucity of the harvest in 1975–1980 that the Master relied upon in denying Idaho any relief suggests that there may be some merit in Idaho's contention that the runs have not been properly managed in the past.

Further, the need for relief in such a situation is compelling. Techniques are available that may aid significantly in maintaining or increasing the runs.[5] But Idaho is unlikely to devote substantial resources to projects designed to maintain and increase the runs if the defendants are free to engage in mismanagement downstream that will negate Idaho's efforts. The Master should not have concluded that, simply because Idaho shared equally in the failure of the harvest in 1975–1980, it had no further interest in promoting the conservation of the species and the eventual restoration of the runs, neither of which could occur without proper management practices on the part of the defendants.

B

In my view, the Master erred also in excluding the evidence of the past practices of the defendants, of the past conditions on the river system, and of the probable conditions in the future. Consideration of Idaho's interest in maintaining the runs has already illustrated one way in which evidence of the past conditions and practices and of probable future conditions was indeed relevant in this action. Moreover, the Master's limitations place Idaho in an untenable position. Although harvests were minimal from 1975 to 1980, conditions were different when Idaho sought leave to file its complaint in this action on March 31, 1975. In 1974, Washington and Oregon had harvested some 22,400 spring chinook and 9,500 summer steelhead. Report of Special Master 18–19.

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[5] For instance, hatcheries supplement the natural reproduction of the fish. See Report of Special Master 9. Also, fish may be transported around dams to reduce mortality in passage, Exceptions of Idaho 102–103; see *ante*, at 1021, n. 3. Finally, the States can continue investment and efforts to maintain proper conditions for spawning, Report of Special Master 8.

Indeed, even with the negligible harvests for the latter half of the decade, during the 1970's, Washington and Oregon harvested an annual average of 27,320 upriver spring chinook, 2,260 upriver summer chinook, and 12,360 upriver summer steelhead, compared with Idaho's average harvests of 3,150 upriver spring chinook, no upriver summer chinook, and 8,550 upriver summer steelhead. *Id.*, at 13, 15, 17. Assuming Idaho's allegations to be true, substantial portions of the fish harvested by Washington and Oregon rightfully should have returned to Idaho. This period did not reflect a pristine and irretrievably lost state of nature. On the contrary, all the dams were in place before 1970, see *ante*, at 1020. But the Master refused to consider these figures, looking only to figures for harvests taking place *after* Idaho sought relief. Under this approach, to vindicate its rights, Idaho will have to wait until the runs regenerate—relying on the goodwill of the defendants to maintain and increase them. Then, once there is a harvest available, Idaho will have to hope that the runs survive any mismanagement long enough to establish a new record of fishing on harvests rightfully belonging to Idaho *and* that both the runs and the mismanagement will persist throughout the time necessary to complete litigation. I would not place such hurdles in the way of a State seeking to preserve its natural resources.

## III

The proper approach in this case, in my view, would require the Master to determine whether Idaho has a protectible interest in the preservation of the runs and what Idaho's proper share is, expressed as a proportion of the harvestable surplus. In making that determination, the Master should have a broad range of flexibility, drawing guidance from our previous cases reconciling conflicting claims of States to natural resources by equitable apportionment. The classic statement of the considerations governing equitable apportionment of interstate streams emphasizes

the breadth of the inquiry and the importance of *all* relevant factors:[6]

> "Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made." *Nebraska* v. *Wyoming*, 325 U. S. 589, 618 (1945).

See *Colorado* v. *New Mexico*, 459 U. S., at 183; *Connecticut* v. *Massachusetts*, 282 U. S., at 671; 2 Waters and Water

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[6] In this regard, I think that the Master properly rejected Idaho's proposed quantification of its right, relying solely on its role as the State of origin. As Idaho explains its position: "[Idaho's] share of the harvestable surplus of Idaho origin fish should equal Idaho's percentage contribution to the entire run." Exceptions of Idaho 47. This proposal would require the Master to base the apportionment on one factor alone. The most glaring problem with this formulation is that it takes no account of the relative benefits and burdens to each State of dividing the resource. To allow one fish to reach Idaho, Oregon and Washington must allow some significantly larger number, the exact value of which is the subject of some dispute, see Response of Washington 14–15, 43–45; Reply Brief for Idaho 7–9, to pass by the downstream fisheries. These other fish will be lost in passage, and no one will benefit. Considerations of relative benefits and burdens imposed by a given division are at the core of equitable apportionment. See, *e. g.*, *Colorado* v. *New Mexico*, 459 U. S. 176 (1982); *Kansas* v. *Colorado*, 206 U. S. 46, 109 (1907); cf. *Colorado* v. *New Mexico*, *supra*, at 181, n. 8 (rejecting argument that State that is the source of water is automatically entitled to any share).

Rights § 132.5(B) (R. Clark ed. 1967). Of course, the relevant considerations stated in cases concerning rights to water must be adapted to this new context. Nevertheless, the general principles apply. I would direct the Master to consider a range of factors including, but not limited to, the harm that must be incurred by Oregon and Washington in terms of harvest forgone in order to allow a given number of fish to reach Idaho, cf. *Nebraska* v. *Wyoming*, *supra* (considering the loss of water in transit); the contribution of each State to preservation of the habitat necessary for spawning; the contribution of each State to the preservation of the proper habitat necessary for the survival and development of fish during passage; the investment of each State in programs to mitigate losses and enhance the runs, such as hatcheries and transportation programs, see n. 5, *supra;*[7] and the relative values of the types of fishery—commercial or sport—operated by the defendants and by Idaho, cf. *Connecticut* v. *Massachusetts*, *supra*, at 673 ("Drinking and other domestic purposes are the highest uses of water").

Only after making this initial determination can we decide whether Idaho has been wrongfully deprived of fish. If the depletion of the runs is attributable to mismanagement by Oregon and Washington, we should grant relief. The Master suggested that relief is unworkable because of the difficulties of estimating the runs and apportioning them. The task is indeed a complicated one, as we recognized when we stated in *Puyallup:* "Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species." 414 U. S., at 48. Nevertheless, it is a task that we have recognized as possible, *Washington* v. *Wash-*

[7] The Master's report suggests that the source of revenue used for investment by the State—fishing license fees as opposed to general taxes—is somehow relevant. See Report of Special Master 30. Although the proper range of considerations is quite broad, I fail to see the relevance of that consideration.

*ington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 662–664 (1979), and the difficulty of providing equitable relief has never provided an excuse for shirking the duty imposed on us by the Constitution. *Idaho ex rel. Evans* v. *Oregon*, 444 U. S. 380, 390, n. 7 (1980); *Nebraska* v. *Wyoming*, *supra*, at 616. The lower federal courts have proved able to grant appropriate relief, *e. g.*, *Sohappy* v. *Smith*, 529 F. 2d, at 572–573; *United States* v. *Washington*, 520 F. 2d 676 (CA9 1975), so we too should be able to overcome the difficulties.[8] Moreover, a statement of relative rights may induce the parties to cooperate in devising a plan to accommodate not only the rights of all but also the difficulties of management, as the defendants here did when sued by the Indians for enforcement of treaty fishing rights. See Report of Special Master 34–35 (discussing Five-Year Plan entered by parties to *Sohappy* v. *Smith*).[9]

## IV

Since the Master failed to quantify Idaho's right in the anadromous fish, he was unable to determine whether Idaho suffered any injury entitling it to a remedy. I would remand to allow the Master to apply our precedents on equitable apportionment to determine the extent of Idaho's rights, and, if appropriate, to devise a remedy protecting those rights.

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[8] The Master's dismissal of Idaho's calculations reflects an undue skepticism where statistics are concerned. The linear least squares regression method that the Master concluded was "of little value in making predictions," *id.*, at 41, for instance, can indeed have predictive value, if used properly. See, *e. g.*, W. Hays, Statistics § 10.4 (3d ed. 1981). Courts can rely on the same sort of calculations that agencies charged by the States with management of fisheries perform.

[9] The Five-Year Plan of the parties to the *Sohappy* litigation expired in 1982, see Report of Special Master 11. The Plan had required the defendants to take certain actions that tended to preserve the runs. *Id.*, at 35. Although the Plan was never adequate to protect Idaho, since it was not a party to the Plan, *id.*, at 10, the expiration makes the need for relief, if there has been an injury, even more urgent.

# OREGON *v.* BRADSHAW

## CERTIORARI TO THE COURT OF APPEALS OF OREGON

No. 81–1857. Argued March 28, 1983—Decided June 23, 1983

During the investigation of the death of a person whose body had been found in his wrecked pickup truck, respondent was questioned at the police station, where he was advised of his *Miranda* rights, and later arrested for furnishing liquor to the victim, a minor, and again advised of his *Miranda* rights. Respondent denied his involvement and asked for an attorney. Subsequently, while being transferred from the police station to a jail, respondent inquired of a police officer, "Well, what is going to happen to me now?" The officer answered that respondent did not have to talk to him and respondent said he understood. There followed a discussion between respondent and the officer as to where respondent was being taken and the offense with which he would be charged. The officer suggested that respondent take a polygraph examination, which he did, after another reading of his *Miranda* rights. When the examiner told respondent that he did not believe respondent was telling the truth, respondent recanted his earlier story and admitted that he had been driving the truck in question and that he had consumed a considerable amount of alcohol and had passed out at the wheel of the truck before it left the highway. Respondent was charged with first-degree manslaughter, driving while under the influence of intoxicants, and driving while his license was revoked. His motion to suppress his statements admitting his involvement was denied, and he was found guilty after a bench trial. The Oregon Court of Appeals reversed, holding that the inquiry respondent made of the police officer while being transferred to jail did not "initiate" a conversation with the officer and that therefore the statements growing out of this conversation should have been excluded from evidence under *Edwards* v. *Arizona*, 451 U. S. 477.

*Held:* The judgment is reversed, and the case is remanded.

54 Ore. App. 949, 636 P. 2d 1011, reversed and remanded.

JUSTICE REHNQUIST, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR, concluded that respondent's Fifth Amendment rights were not violated. Pp. 1044–1047.

(a) The Oregon Court of Appeals misapprehended the test laid down in *Edwards*, where it was held that, after the right to counsel has been asserted by an accused, further interrogation should not take place "unless the accused himself initiates further communication, exchanges, or con-

versations with the police." 451 U. S., at 485. It was not held in that case that the "initiation" of a conversation by an accused such as respondent would amount to a waiver of a previously invoked right to counsel. The Oregon court erred in thinking that an "initiation" of a conversation by an accused not only satisfies the *Edwards* rule, but *ex proprio vigore* suffices to show a waiver of the previously asserted right to counsel. Pp. 1044–1045.

(b) Here, in asking "Well, what is going to happen to me now?" respondent "initiated" further conversation. His statement evinced a willingness and a desire for a generalized discussion about the investigation and was not merely a necessary inquiry arising out of the incidents of the custodial relationship. Pp. 1045–1046.

(c) Since there was no violation of the *Edwards* rule in this case the next inquiry is whether, in light of the totality of the circumstances, respondent made a knowing and intelligent waiver of his right to have counsel present. The trial court, based on its firsthand observation of the witnesses, found a waiver; there is no reason to dispute that finding. Pp. 1046–1047.

JUSTICE POWELL concluded that a two-step analysis is unnecessary. In the circumstances of the case, it is sufficient that respondent knowingly and intelligently waived his right to counsel. Pp. 1050–1051.

REHNQUIST, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C. J., and WHITE and O'CONNOR, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, *post*, p. 1047. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 1051.

*Dave Frohnmayer*, Attorney General of Oregon, argued the cause for petitioner. With him on the briefs were *William F. Gary*, Solicitor General, *James E. Mountain, Jr.*, Deputy Solicitor General, and *Robert E. Barton*, *Thomas H. Denney*, and *Stephen G. Peifer*, Assistant Attorneys General.

*Gary D. Babcock* argued the cause for respondent. With him on the brief was *John Daugirda*.

JUSTICE REHNQUIST announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR joined.

After a bench trial in an Oregon trial court, respondent James Edward Bradshaw was convicted of the offenses of

first-degree manslaughter, driving while under the influence of intoxicants, and driving while his license was revoked. The Oregon Court of Appeals reversed his conviction, holding that an inquiry he made of a police officer at the time he was in custody did not "initiate" a conversation with the officer, and that therefore statements by the respondent growing out of that conversation should have been excluded from evidence under *Edwards* v. *Arizona*, 451 U. S. 477 (1981). We granted certiorari to review this determination. 459 U. S. 966 (1982).

In September 1980, Oregon police were investigating the death of one Lowell Reynolds in Tillamook County. Reynolds' body had been found in his wrecked pickup truck, in which he appeared to have been a passenger at the time the vehicle left the roadway, struck a tree and an embankment, and finally came to rest on its side in a shallow creek. Reynolds had died from traumatic injury, coupled with asphyxia by drowning. During the investigation of Reynolds' death, respondent was asked to accompany a police officer to the Rockaway Police Station for questioning.

Once at the station, respondent was advised of his rights as required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Respondent then repeated to the police his earlier account of the events of the evening of Reynolds' death, admitting that he had provided Reynolds and others with liquor for a party at Reynolds' house, but denying involvement in the traffic accident that apparently killed Reynolds. Respondent suggested that Reynolds might have met with foul play at the hands of the assailant whom respondent alleged had struck him at the party.

At this point, respondent was placed under arrest for furnishing liquor to Reynolds, a minor, and again advised of his *Miranda* rights. A police officer then told respondent the officer's theory of how the traffic accident that killed Reynolds occurred; a theory which placed respondent behind the wheel of the vehicle. Respondent again denied his involvement, and said "I do want an attorney before it goes very

much further." App. 72. The officer immediately terminated the conversation.

Sometime later respondent was transferred from the Rockaway Police Station to the Tillamook County Jail, a distance of some 10 or 15 miles. Either just before, or during, his trip from Rockaway to Tillamook, respondent inquired of a police officer, "Well, what is going to happen to me now?" The officer answered by saying: "You do not have to talk to me. You have requested an attorney and I don't want you talking to me unless you so desire because anything you say—because—since you have requested an attorney, you know, it has to be at your own free will." *Id.*, at 16. See 54 Ore. App. 949, 951, 636 P. 2d 1011, 1011–1012 (1981). Respondent said he understood. There followed a discussion between respondent and the officer concerning where respondent was being taken and the offense with which he would be charged. The officer suggested that respondent might help himself by taking a polygraph examination. Respondent agreed to take such an examination, saying that he was willing to do whatever he could to clear up the matter.

The next day, following another reading to respondent of his *Miranda* rights, and respondent's signing a written waiver of those rights, the polygraph was administered. At its conclusion, the examiner told respondent that he did not believe respondent was telling the truth. Respondent then recanted his earlier story, admitting that he had been at the wheel of the vehicle in which Reynolds was killed, that he had consumed a considerable amount of alcohol, and that he had passed out at the wheel before the vehicle left the roadway and came to rest in the creek.

Respondent was charged with first-degree manslaughter, driving while under the influence of intoxicants, and driving while his license was revoked. His motion to suppress the statements described above was denied, and he was found guilty after a bench trial. The Oregon Court of Appeals, relying on our decision in *Edwards* v. *Arizona*, *supra*, re-

versed, concluding that the statements had been obtained in violation of respondent's Fifth Amendment rights. 54 Ore. App. 949, 636 P. 2d 1011 (1981). We now conclude that the Oregon Court of Appeals misapplied our decision in *Edwards*.

In *Edwards* the defendant had voluntarily submitted to questioning but later stated that he wished an attorney before the discussions continued. The following day detectives accosted the defendant in the county jail, and when he refused to speak with them he was told that "he had" to talk. We held that subsequent incriminating statements made without his attorney present violated the rights secured to the defendant by the Fifth and Fourteenth Amendments to the United States Constitution. In our opinion, we stated:

> "[A]lthough we have held that after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to interrogation, see *North Carolina* v. *Butler*, [441 U. S. 369, 372–376 (1979)], the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that *an accused, such as [the defendant], having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.*" 451 U. S., at 484–485 (footnote omitted) (emphasis added).

Respondent's question in the present case, "Well, what is going to happen to me now?", admittedly was asked prior to

respondent's being "subject[ed] to further interrogation by the authorities." *Id.*, at 484. The Oregon Court of Appeals stated that it did not "construe defendant's question about what was going to happen to him to have been a waiver of his right to counsel, invoked only minutes before . . . ." 54 Ore. App., at 953, 636 P. 2d, at 1013. The Court of Appeals, after quoting relevant language from *Edwards*, concluded that "under the reasoning enunciated in *Edwards*, defendant did not make a valid waiver of his Fifth Amendment rights, and his statements were inadmissible." *Ibid.*

We think the Oregon Court of Appeals misapprehended the test laid down in *Edwards*. We did not there hold that the "initiation" of a conversation by a defendant such as respondent would amount to a waiver of a previously invoked right to counsel; we held that after the right to counsel had been asserted by an accused, further interrogation of the accused should not take place "unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U. S., at 485. This was in effect a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was. We recently restated the requirement in *Wyrick* v. *Fields*, 459 U. S. 42, 46 (1982) *(per curiam)*, to be that before a suspect in custody can be subjected to further interrogation after he requests an attorney there must be a showing that the "suspect himself initiates dialogue with the authorities."

But even if a conversation taking place after the accused has "expressed his desire to deal with the police only through counsel," is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation. This is made clear in the following footnote to our *Edwards* opinion:

> "If, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not

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

This rule was reaffirmed earlier this Term in *Wyrick* v. *Fields*, *supra*.

Thus, the Oregon Court of Appeals was wrong in thinking that an "initiation" of a conversation or discussion by an accused not only satisfied the *Edwards* rule, but *ex proprio vigore* sufficed to show a waiver of the previously asserted right to counsel. The inquiries are separate, and clarity of application is not gained by melding them together.

There can be no doubt in this case that in asking, "Well, what is going to happen to me now?", respondent "initiated" further conversation in the ordinary dictionary sense of that word. While we doubt that it would be desirable to build a superstructure of legal refinements around the word "initiate" in this context, there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to "initiate" any conversation or dialogue. There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally "initiate" a conversation in the sense in which that word was used in *Edwards*.

Although ambiguous, the respondent's question in this case as to what was going to happen to him evinced a willingness

and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. It could reasonably have been interpreted by the officer as relating generally to the investigation. That the police officer so understood it is apparent from the fact that he immediately reminded the accused that "[y]ou do not have to talk to me," and only after the accused told him that he "understood" did they have a generalized conversation. 54 Ore. App., at 951, 636 P. 2d, at 1011–1012. On these facts we believe that there was not a violation of the *Edwards* rule.

Since there was no violation of the *Edwards* rule in this case, the next inquiry was "whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." *Edwards* v. *Arizona*, 451 U. S., at 486, n. 9. As we have said many times before, this determination depends upon "'the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused.'" *North Carolina* v. *Butler*, 441 U. S. 369, 374–375 (1979) (quoting *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938)). See also *Edwards* v. *Arizona*, *supra*, at 482–483.

The state trial court made this inquiry and, in the words of the Oregon Court of Appeals, "found that the police made no threats, promises or inducements to talk, that defendant was properly advised of his rights and understood them and that within a short time after requesting an attorney he changed his mind without any impropriety on the part of the police. The court held that the statements made to the polygraph examiner were voluntary and the result of a knowing waiver of his right to remain silent." 54 Ore. App., at 952, 636 P. 2d, at 1012.

We have no reason to dispute these conclusions, based as they are upon the trial court's firsthand observation of the

witnesses to the events involved. The judgment of the Oregon Court of Appeals is therefore reversed, and the cause is remanded for further proceedings.

*It is so ordered.*

JUSTICE POWELL, concurring in the judgment.

The Court's recent decision in *Edwards* v. *Arizona*, 451 U. S. 477 (1981), has resulted in disagreement as to whether it announced a new *per se* rule.[1] My hope had been that this case would afford an opportunity to clarify the confusion. As evidenced by the differing readings of *Edwards* by JUSTICES MARSHALL and REHNQUIST in their respective opinions, my hope has not been fully realized. JUSTICE MARSHALL, and the three Justices who join his opinion, would affirm the Oregon Court of Appeals because it "properly applied *Edwards*." *Post*, at 1053. JUSTICE REHNQUIST, and the three Justices who join him, would "conclude that the Oregon Court of Appeals misapplied our decision in *Edwards*." *Ante*, at 1043. In view of the disagreement here, it is not sur-

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[1] Compare *Fields* v. *Wyrick*, 682 F. 2d 154, 158 (CA8) (*Edwards* "creat[ed] a per se rule"), rev'd and remanded, 459 U. S. 42 (1982) *(per curiam); United States* v. *Thierman*, 678 F. 2d 1331, 1338 (CA9 1982) (Wallace, J., dissenting) (reading *Edwards* as applying *per se* rule); *State* v. *Willie*, 410 So. 2d 1019, 1028 (La. 1982) (recognizing *per se* rule in *Edwards*); *State* v. *McCloskey*, 90 N. J. 18, 25, 446 A. 2d 1201, 1205 (1982) ("*Edwards* established a *per se* rule"); *Giacomazzi* v. *State*, 633 P. 2d 218, 226 (Alaska 1981) (Rabinowitz, C. J., dissenting) (*Edwards* "Court fashioned a per se rule"), with *Richardson* v. *State*, 274 Ark. 473, 477–478, 625 S. W. 2d 504, 506–507 (1981) (applying "totality of the circumstances" test rather than *per se* rule); *State* v. *Acquin*, 187 Conn. 647, 671, 448 A. 2d 163, 175 (1982) ("we do *not* read *Edwards* to prescribe a per se rule"); *Leuschner* v. *State*, 49 Md. App. 490, 497, 433 A. 2d 1195, 1199 (1981) (*Edwards* does not create *per se* rule); *State* v. *Scott*, 626 S. W. 2d 25, 29 (Tenn. Crim. App. 1981) (applying "totality of the circumstances" test rather than *per se* rule). See also *Wilson* v. *Zant*, 249 Ga. 373, 376, 290 S. E. 2d 442, 446 ("[a]ccepting that *[Edwards]* established a per se exclusionary rule," but expressing reservation), cert. denied, 459 U. S. 1092 (1982); *Leuschner*, *supra*, at 497, 433 A. 2d, at 1199 (recognizing uncertainty whether *Edwards* created *per se* rule).

prising that courts have differed as to whether *Edwards* announced a *per se* rule, and if so what rule. I joined the judgment in *Edwards* because on the facts "it [was] clear that Edwards [had been] taken from his cell against his will and [improperly] subjected to renewed interrogation." 451 U. S., at 490 (opinion concurring in result). I did not join the Court's opinion because I was "not sure what it mean[t]." *Id.*, at 488.

The opinions today reflect the ambiguity of some of the *Edwards* language, particularly on the meaning of "initiation." JUSTICE MARSHALL reads *Edwards* as requiring not only that the accused initiate further communication, but also that the communication be "*about the subject matter of the criminal investigation.*" *Post*, at 1053 (emphasis in original). JUSTICE REHNQUIST, however, would require only that the suspect "evinc[e] a willingness and a desire for a generalized discussion about the investigation." *Ante*, at 1045–1046. This formulation would include an "initiation" of conversation "in the ordinary dictionary sense" of the word, *ante*, at 1045, excluding "inquiries . . . that are so routine that they cannot be fairly said to represent a desire . . . to open up a more generalized discussion relating directly or indirectly to the investigation," *ibid.*

Both Justices agree in one respect. They view the "initiation" question as the first step of a two-step analysis, the second step being the application of the *Zerbst* standard that requires examination of the "totality of the circumstances." *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). JUSTICE MARSHALL puts it this way:

> "If an accused has himself initiated further communication with the police, it is still necessary to establish as a separate matter the existence of a knowing and intelligent waiver under *Johnson* v. *Zerbst* . . . ." *Post*, at 1055, n. 2.

JUSTICE REHNQUIST's opinion observes that the initiation and the voluntariness of the waiver under *Zerbst* "are sepa-

rate, and clarity of application is not gained by melding them together." *Ante*, at 1045.

This bifurcating of the *Zerbst* standard is not compelled by *Edwards* or any of our other cases. The inquiry in *Edwards* did focus on the reopening of communication with the accused by the police—a reopening that properly was held to be coercive. As there were no other significant facts or circumstances bearing upon the waiver question, there was no occasion for the Court to consider whether a two-step analysis is required in the more customary case.[2] An incarcerated person, accused of crime, does not remain silent and speak only when conversation is initiated by others, whether by fellow prisoners, guards, or law enforcement officers. Jail or prison confinements prior to indictment or trial may extend over days and weeks, and numerous conversations customarily occur, often accompanied by collateral facts and circumstances. Rarely can a court properly focus on a particular conversation, and intelligently base a judgment on the simplistic inquiry as to who spoke first.

In this case, for example, Bradshaw's initiating question ("what is going to happen to me now?") was not an isolated event. It was immediately followed by a renewal of *Miranda* warnings and additional conversation. The following day there was further conversation, a third reading of *Miranda* rights, and finally Bradshaw's signing of a written waiver of those rights. Only then did he confess. JUSTICE MARSHALL would hold that there can be no waiver of the right to counsel unless the accused himself opens a dialogue "about the subject matter of the criminal investigation." *Post*, at 1054; see also *post*, at 1053, 1055–1056. He states that "unless the accused himself initiates further communica-

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[2] Perhaps what has caused some confusion is a failure to recognize that the only new element in *Edwards* was the emphasis on the prosecution's burden of proof in cases where—in the absence of relevant subsequent facts—the critical question of waiver focuses on whether the initial communication by the police was proper.

tion with the police, a valid waiver of the right to counsel cannot be established." *Post*, at 1055, n. 2. Under this view of the two-step analysis, a court never gets to the second step—however relevant subsequent facts and circumstances may be to a waiver—unless the accused was the first to speak and to say the right thing. This is illustrated by the reasoning in the dissenting opinion in this case. Since JUSTICE MARSHALL concludes that Bradshaw had not initiated the dialogue, he does not consider the subsequent facts and circumstances that were found by the trial court to satisfy the *Zerbst* standard. JUSTICE REHNQUIST, however, moves from the first to the second step to conclude that the facts and circumstances, when viewed in their entirety, clearly establish a valid waiver of the right to counsel. To this extent, I agree with his plurality opinion.

My concern is that a two-step analysis could confound the confusion evident from the differing views expressed by other courts, see n. 1, *supra*, and indeed evidenced by the conflicting reading of *Edwards* by JUSTICES MARSHALL and REHNQUIST.[3] The *Zerbst* standard is one that is widely understood and followed. It also comports with common sense. Fragmenting the standard into a novel two-step analysis—if followed literally—often would frustrate justice as well as

[3] We recently found it necessary to clarify uncertainty that had resulted from decisions of this Court that had undertaken, in Fourth Amendment cases, to draw lines that were too refined to be applied consistently. Last Term in *United States* v. *Ross*, 456 U. S. 798 (1982), the Court considered it necessary to "reject the precise holding" in *Robbins* v. *California*, 453 U. S. 420 (1981), and some of the language in *Arkansas* v. *Sanders*, 442 U. S. 753 (1979). 456 U. S., at 824. In my concurring opinion in *Ross*, I said it was "essential to have a Court opinion . . . that provides 'specific guidance to police and courts in this recurring situation.'" *Id.*, at 826 (quoting *Robbins*, *supra*, at 435 (POWELL, J., concurring in judgment)). The needed clarification and guidance were undertaken, successfully I think, in JUSTICE STEVENS' opinion for the Court. If the opinions today, when read together, do not provide reasonable clarification for law enforcement officers and courts, we have a duty—one that I think is compelling—to provide more specific guidance, much as we did in *Ross*.

common sense.[4] Courts should engage in more substantive inquiries than "who said what first." The holding of the Court in *Edwards* cannot in my view fairly be reduced to this.

We are unanimous in agreeing in this case, as in *Edwards*, that "the right to counsel [is] a prime example of those rights requiring the special protection of the knowing and intelligent waiver standard." *Edwards*, 451 U. S., at 483. We also agree that once the accused has requested counsel this right requires additional safeguards, particularly against any coercive form of custodial interrogation. But the question of whether a suspect has waived this important right to counsel is uniquely one of fact, and usually must and should be left to the judgment of the trial court that has had the benefit of hearing the evidence and assessing the weight and credibility of testimony. In the circumstances of this case, I agree that Bradshaw knowingly and intelligently waived his right to counsel, and that the judgment below therefore should be reversed.

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

Because in my view the plurality has misapplied *Edwards* v. *Arizona*, 451 U. S. 477 (1981), I respectfully dissent.

I

In *Miranda* v. *Arizona*, 384 U. S. 436 (1966), this Court recognized that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." *Id.*, at 458. Access to counsel was held essential to secure the Fifth Amendment privilege against self-incrimination. "If the individual states

[4] I therefore prefer to read JUSTICE REHNQUIST's opinion merely as an analytical framework that—except in a case like *Edwards*—would not inhibit courts from a full examination of all relevant facts and circumstances.

that he wants an attorney, *the interrogation must cease until an attorney is present.*" *Id.*, at 474 (emphasis added). *Miranda* thus created a "rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease." *Fare* v. *Michael C.*, 442 U. S. 707, 719 (1979).

The significance of the invocation of the right to counsel is premised in part on a lawyer's "unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation." *Ibid.* As JUSTICE WHITE has written:

> "[T]he reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." *Michigan* v. *Mosley*, 423 U. S. 96, 110, n. 2 (1975) (concurring in result).

Although an accused may waive his various *Miranda* rights and submit to interrogation, the Court has recognized that "additional safeguards are necessary when the accused asks for counsel." *Edwards* v. *Arizona*, 451 U. S., at 484. *Edwards* held that a valid waiver of the right to counsel cannot be established by showing only that the accused responded to further police-initiated custodial interrogation, even if he had again been advised of his rights. *Ibid.* An accused who invokes his right to counsel is not subject to further interrogation until counsel has been made available, "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.*, at 484–485.

To establish a waiver, it would thus be a "*necessary fact* that the accused, not the police, reopened the dialogue with the authorities." *Id.*, at 486, n. 9 (emphasis added).

In this case, respondent invoked his right to have counsel during custodial interrogation. Shortly thereafter, he asked a police officer, "Well, what is going to happen to me now?" The Oregon Court of Appeals concluded that respondent's question was not "a waiver of his right to counsel, invoked only minutes before, or anything other than a normal reaction to being taken from the police station and placed in a police car, obviously for transport to some destination." 54 Ore. App. 949, 953, 636 P. 2d 1011, 1013 (1981). Relying on *Edwards*, the Oregon court held that respondent had not initiated the subsequent interrogation.

The Oregon Court of Appeals properly applied *Edwards*.[1] When this Court in *Edwards* spoke of "initiat[ing] further communication" with the police and "reopen[ing] the dialogue with the authorities," it obviously had in mind communication or dialogue *about the subject matter of the criminal investigation*. The rule announced in *Edwards* was designed to ensure that any interrogation subsequent to an invocation of the right to counsel be at the instance of the accused, not the authorities. 451 U. S., at 485. Thus, a question or state-

[1] In rebuking the Oregon Court of Appeals for failing to distinguish between the initiation of a conversation and a valid waiver of the right to counsel, *ante*, at 1044, the plurality is attacking a straw man. Because it concluded that respondent had not initiated any conversation, the Oregon court never even undertook the distinct inquiry into the existence of a knowing and intelligent waiver. *Edwards* makes clear that, in the absence of "initiation" by an accused, there can be no valid waiver regardless of whatever else the accused may say or do. 451 U. S., at 484. Having concluded that respondent did not initiate further conversation, the Oregon court thus stated that there was no valid waiver in this case. This conclusion is entirely consistent with *Edwards*. Indeed, the Oregon court's decision contains lengthy quotations from *Edwards*. Unless we are to assume that the state court did not read the very portions of *Edwards* that it quotes, the plurality's attack is completely unjustified.

ment which does not invite further interrogation before an attorney is present cannot qualify as "initiation" under *Edwards*. To hold otherwise would drastically undermine the safeguards that *Miranda* and *Edwards* carefully erected around the right to counsel in the custodial setting.

The safeguards identified in *Edwards* hardly pose an insurmountable obstacle to an accused who truly wishes to waive his rights after invoking his right to counsel. A waiver can be established, however, only when the accused himself reopens the dialogue about the subject matter of the criminal investigation. Since our decision in *Edwards*, the lower courts have had no difficulty in identifying such situations. See, *e. g.*, *McCree* v. *Housewright*, 689 F. 2d 797 (CA8 1982) (defendant initiated reinterrogation by knocking on cell door and telling police officer that he wanted to make a statement); *United States* v. *Gordon*, 655 F. 2d 478 (CA2 1981) (defendant reopened dialogue by expressing a desire to provide information about someone else who should also be arrested); *State* v. *Brezee*, 66 Haw. 163, 657 P. 2d 1044 (1983) (defendant asked detective to come back to his cell and then expressed desire to make a statement); *Payne* v. *State*, 424 So. 2d 722 (Ala. Crim. App. 1982) (defendant asked for a meeting with police at which statements were made); *People* v. *Thomas*, 98 Ill. App. 3d 852, 424 N. E. 2d 985 (1981) (defendant initiated further communication by inquiring about accomplice's statements linking him to the crime), cert. denied, 456 U. S. 993 (1982); *State* v. *Pittman*, 210 Neb. 117, 313 N. W. 2d 252 (1981) (defendant initiated further conversation by stating that he was being "railroaded" by his codefendants).[2]

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[2] In his opinion concurring in the judgment, JUSTICE POWELL suggests that there is confusion as to whether *Edwards* announced a *per se* rule. *Ante*, at 1047. In my view, *Edwards* unambiguously established such a rule. See 451 U. S., at 484–486, and n. 9. In any event, no confusion on this point can remain after today's decision for eight Justices manifestly agree

## II

I agree with the plurality that, in order to constitute "initiation" under *Edwards*, an accused's inquiry must demonstrate a desire to discuss the subject matter of the criminal investigation. Cf. *ante*, at 1045. I am baffled, however, at the plurality's application of that standard to the facts of this case. The plurality asserts that respondent's question, "[W]hat is going to happen to me now?", evinced both "a willingness and a desire for a generalized discussion about the investigation." *Ante*, at 1045–1046. If respondent's question had been posed by Jean-Paul Sartre before a class of philosophy students, it might well have evinced a desire for a "generalized" discussion. But under the circumstances of this case, it is plain that respondent's only "desire" was to find out where the police were going to take him. As the Oregon Court of Appeals stated, respondent's query came only minutes after his invocation of the right to counsel and was simply "a normal reaction to being taken from the police station and placed in a police car, obviously for transport to some destination." 54 Ore. App., at 953, 636 P. 2d, at 1013.[3] On these facts, I

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that *Edwards* did create a *per se* rule. The plurality explicitly refers to the "prophylactic rule" of *Edwards*. *Ante*, at 1044. See also *ante*, at 1044–1045 (discussing the "*Edwards* rule"). The rule is simply stated: unless the accused himself initiates further communication with the police, a valid waiver of the right to counsel cannot be established. If an accused has himself initiated further communication with the police, it is still necessary to establish as a separate matter the existence of a knowing and intelligent waiver under *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). The *only* dispute between the plurality and the dissent in this case concerns the meaning of "initiation" for purposes of *Edwards*' *per se* rule.

[3] The plurality seems to place some reliance on the police officer's reaction to respondent's question. The officer described his response as follows:

"I says, 'You do not have to talk to me. You have requested an attorney and I don't want you talking to me unless you so desire because anything you say—because—since you have requested an attorney, you know, it has to be at your own free will.' I says, 'I can't prevent you from talking, but

fail to see how respondent's question can be considered "initiation" of a conversation about the subject matter of the criminal investigation.

To hold that respondent's question in this case opened a dialogue with the authorities flies in the face of the basic purpose of the *Miranda* safeguards. When someone in custody asks, "What is going to happen to me now?", he is surely responding to his custodial surroundings. The very essence of custody is the loss of control over one's freedom of movement. The authorities exercise virtually unfettered control over the accused. To allow the authorities to recommence an interrogation based on such a question is to permit them to capitalize on the custodial setting. Yet *Miranda*'s procedural protections were adopted precisely in order "to dispel the compulsion inherent in custodial surroundings." 384 U. S., at 458.

Accordingly, I dissent.

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you understand where your place—you know, where your standing is here?' and he agreed. He says 'I understand.'"

As the officer's testimony indicates, respondent's statement was at best ambiguous. In any event, as the Oregon Court of Appeals noted, the officer clearly took advantage of respondent's inquiry to commence once again his questioning—a practice squarely at odds with *Edwards*. See 54 Ore. App., at 953, 636 P. 2d, at 1013.

## Reporter's Note

The next page is purposely numbered 1101. The numbers between 1056 and 1101 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

## ORDERS FROM JUNE 6 THROUGH JUNE 20, 1983

### JUNE 6, 1983

*Appeals Dismissed*

No. 82–1212. GULLO *v.* MCGILL ET UX. Appeal from Cir. Ct. Fairfax County, Va., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR would award appellees damages pursuant to this Court's Rule 49.2.

No. 82–1668. YOUNG *v.* TOWN OF ATLANTIC BEACH. Appeal from Sup. Ct. N. C. dismissed for want of substantial federal question. Reported below: 307 N. C. 422, 298 S. E. 2d 686.

*Certiorari Granted—Vacated and Remanded*

No. 81–1249. EIDE ET UX. *v.* SEGUIN. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *$8,850*, 461 U. S. 555 (1983). Reported below: 645 F. 2d 804.

No. 82–452. UNITED STATES *v.* VON NEUMANN. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *$8,850*, 461 U. S. 555 (1983). Reported below: 660 F. 2d 1319.

No. 82–1113. DUNCANSON-HARRELSON CO. ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, 461 U. S. 624 (1983). Reported below: 686 F. 2d 1336.

*Certiorari Granted—Reversed.* (See No. 82–1408, *ante*, p. 111.)

*Miscellaneous Orders*

No. A–910. WASSALL *v.* RYAN, JUDGE, CIRCUIT COURT OF THE CITY OF ST. LOUIS, ET AL. C. A. 8th Cir. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–949. CHRISTINO *v.* UNITED STATES. D. C. C. D. Cal. Application for stay or bail, addressed to JUSTICE POWELL and referred to the Court, denied.

No. D–318. IN RE DISBARMENT OF KOPS. Disbarment entered. [For earlier order herein, see 460 U. S. 1008.]

No. D–321. IN RE DISBARMENT OF FRIEDLAND. Disbarment entered. [For earlier order herein, see 460 U. S. 1009.]

No. D–323. IN RE DISBARMENT OF SHERMAN. Disbarment entered. [For earlier order herein, see 460 U. S. 1009.]

No. D–331. IN RE DISBARMENT OF BISHOP. Disbarment entered. [For earlier order herein, see 460 U. S. 1065.]

No. D–351. IN RE DISBARMENT OF HOFF. It is ordered that Vera L. Hoff, of San Jose, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–352. IN RE DISBARMENT OF ROSENBERG. It is ordered that Theodore Rosenberg, 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–353. IN RE DISBARMENT OF GREENE. It is ordered that Raymond T. Greene, of Coconut Grove, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–354. IN RE DISBARMENT OF CONNOLLY. It is ordered that Robert John Connolly, of East Meadow, 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–355. IN RE DISBARMENT OF GELB. It is ordered that Joseph Gelb, of Hewlett Bay Park, 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–356. IN RE DISBARMENT OF GORDON. It is ordered that James Allen Gordon, Jr., of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–357. IN RE DISBARMENT OF HARTHUN. It is ordered that Carl Louis Harthun, of Denver, Colo., 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–358. IN RE DISBARMENT OF SHEEHAN. It is ordered that John Vincent Sheehan, 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–359. IN RE DISBARMENT OF MCCOMB. It is ordered that Henry G. McComb, of Buffalo, 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. 81–2245. NEVADA *v.* UNITED STATES ET AL.;

No. 81–2276. TRUCKEE-CARSON IRRIGATION DISTRICT *v.* UNITED STATES ET AL.; and

No. 82–38. PYRAMID LAKE PAIUTE TRIBE OF INDIANS *v.* TRUCKEE-CARSON IRRIGATION DISTRICT ET AL. C. A. 9th Cir. [Certiorari granted, 459 U. S. 904.] Motion of petitioners in No. 82–38 for leave to file a supplemental memorandum after argument granted.

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. D. C. Minn. [Probable jurisdiction noted, 460 U. S. 1050.] Motion of appellants in No. 82–977 to expand the record and enlarge the questions presented for review granted.

No. 82–1256. LYNCH, MAYOR OF PAWTUCKET, ET AL. *v.* DONNELLY ET AL. C. A. 1st Cir. [Certiorari granted, 460 U. S. 1080.] Motion of Anne Neamon for leave to proceed *pro se* for the purpose of filing a brief as *amicus curiae* denied.

No. 82–1678. FULTON ET AL. *v.* PLUMBERS & STEAMFITTERS, LOCAL 598, 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. 82–1669. IN RE WRIGHT. Petition for writ of prohibition denied.

*Probable Jurisdiction Noted*

No. 82–1684. DONOVAN, SECRETARY OF LABOR, ET AL. *v.* LONE STEER, INC. Appeal from D. C. N. D. Probable jurisdiction noted. Reported below: 565 F. Supp. 229.

*Certiorari Granted*

No. 82–206. FIREFIGHTERS LOCAL UNION NO. 1784 *v.* STOTTS ET AL.; and

No. 82–229. MEMPHIS FIRE DEPARTMENT ET AL. *v.* STOTTS ET AL. C. A. 6th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 679 F. 2d 541.

No. 82–1554. STRICKLAND, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL. *v.* WASHINGTON. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 693 F. 2d 1243.

*Certiorari Denied.* (See also No. 82–1212, *supra.*)

No. 81–1637. ERNESTO ZARAGOZA Y. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 502.

No. 82–583. HETTLEMAN, SECRETARY, DEPARTMENT OF HUMAN RESOURCES, ET AL. *v.* BLOCK, SECRETARY OF AGRICULTURE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 685 F. 2d 430.

No. 82–1231. BROOKS ET AL. *v.* WALKER COUNTY HOSPITAL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 688 F. 2d 334.

No. 82–1413. WOLKENSTEIN ET AL. *v.* REVILLE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 694 F. 2d 35.

No. 82–1428. DAIRYMEN, INC. *v.* FEDERAL TRADE COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 684 F. 2d 376.

No. 82–1431. CLARKE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 82–1434. NEW YORK *v.* KNAPP. Ct. App. N. Y. Certiorari denied. Reported below: 57 N. Y. 2d 161, 441 N. E. 2d 1057.

No. 82–1442. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 730.

No. 82–1446. LIFETIME COMMUNITIES, INC. *v.* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS. C. A. 2d Cir. Certiorari denied. Reported below: 690 F. 2d 35.

No. 82–1461. JONES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 696 F. 2d 479.

No. 82–1508. AMERICAN DENTAL ASSN. ET AL. *v.* MYERS. C. A. 3d Cir. Certiorari denied. Reported below: 695 F. 2d 716.

No. 82–1524. BROUNTAS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. Reported below: 692 F. 2d 152.

No. 82–1525. CRC CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 693 F. 2d 281.

No. 82–1528. TISDALE *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1233.

No. 82–1536. LITTON SYSTEMS, INC. *v.* CHASTAIN, ADMINISTRATOR OF THE ESTATE OF CHASTAIN. C. A. 4th Cir. Certiorari denied. Reported below: 694 F. 2d 957.

No. 82–1656. MCKENDRICK *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 499 Pa. 320, 453 A. 2d 328.

No. 82–1658. PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA *v.* WASHINGTON GAS LIGHT CO. ET AL. Ct. App. D. C. Certiorari denied. Reported below: 452 A. 2d 375.

No. 82–1660. BEAVER *v.* GRIGGS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1228.

No. 82–1661. WARD *v.* WARD. Ct. App. Okla. Certiorari denied.

No. 82–1662. WOOLRIDGE *v.* REVELL. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 731.

No. 82–1672. USM CORP. *v.* SPS TECHNOLOGIES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 694 F. 2d 505.

No. 82–1673. BRODIE ET AL. *v.* BOARD OF MEDICAL EXAMINERS FOR THE STATE OF NEW JERSEY. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1389.

No. 82–1677. DROLET *v.* VAN LINDT, CHAIRMAN, NEW YORK STATE RACING AND WAGERING BOARD, DIVISION OF HARNESS RACING, ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 92 App. Div. 2d 751, 459 N. Y. S. 2d 341.

No. 82–1681. BIO/BASICS INTERNATIONAL CORP. *v.* ORTHO PHARMACEUTICAL CORP. C. A. 2d Cir. Certiorari denied. Reported below: 718 F. 2d 1084.

No. 82–1709. WAGSHAL *v.* MASSACHUSETTS ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 225 U. S. App. D. C. 51, 696 F. 2d 133.

No. 82–1716. GROSSMAN *v.* FOLEY, JUDGE, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEVADA. C. A. 9th Cir. Certiorari denied.

No. 82–1730. VOGEL *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 426 So. 2d 882.

No. 82–1743. MOONEY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 426 So. 2d 188.

No. 82–1753. HUSTLER MAGAZINE, INC., ET AL. *v.* EASTMAN KODAK CO. C. A. 9th Cir. Certiorari denied. Reported below: 692 F. 2d 763.

No. 82–1791. MONT *v.* UNITED STATES; and
No. 82–6696. THOMAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 702 F. 2d 351.

No. 82–1796. SIMPSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 709 F. 2d 17.

No. 82–1801. PEREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 702 F. 2d 33.

No. 82–1813. IMPROTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1396.

No. 82–1819. ARDT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 698 F. 2d 1226.

No. 82–5683. WILLIAMS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 637 S. W. 2d 943.

No. 82–6052. MADDICKS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 57 N. Y. 2d 960, 443 N. E. 2d 958.

No. 82–6163. ADAMS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 426 So. 2d 25.

No. 82–6241. SHUMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 692 F. 2d 766.

No. 82–6250. MEDINA-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1234.

No. 82–6321. ALEXANDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 695 F. 2d 398.

No. 82–6525. McAFEE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 82–6534. DUVALLON *v.* FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 694 F. 2d 725.

No. 82–6535. MAHO *v.* UNITED STATES; and
No. 82–6536. YELLOWMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1234.

No. 82–6539. SCHARNHORST *v.* INDEPENDENT SCHOOL DISTRICT #710. C. A. 8th Cir. Certiorari denied. Reported below: 686 F. 2d 637.

No. 82–6541. LARSON *v.* WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied.

No. 82–6543. ATKINS *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 437 N. E. 2d 114.

No. 82–6546. LINDSEY *v.* BUFORD, JUDGE, CIRCUIT COURT, CARTER COUNTY, ET AL. Sup. Ct. Mo. Certiorari denied.

No. 82–6551. WILLIAMS *v.* COLAVITO, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 82–6553. KIBERT *v.* BLANKENSHIP, WARDEN, BLAND CORRECTIONAL CENTER. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 165.

No. 82–6554. LIN *v.* NEW YORK CITY DEPARTMENT OF CULTURAL AFFAIRS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 114.

No. 82–6557. KOURKENE *v.* TAVLIAN ET AL. Sup. Ct. Cal. Certiorari denied.

No. 82–6559. MINTZ *v.* PITCHESS, SHERIFF OF LOS ANGELES COUNTY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 701 F. 2d 185.

No. 82–6568. DENBY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 82–6573. WASKO *v.* PULLEY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 82–6576. MEZHBEIN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 82–6581. EVANS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 432 So. 2d 463.

No. 82–6588. FORD *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 82–6659. HARDING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 705 F. 2d 446.

No. 82–6674. MURPHY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 703 F. 2d 572.

No. 82–6679. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 703 F. 2d 580.

No. 82–6688. BERGER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1511.

No. 82–6689. SPELLMAN *v.* RIDLEY, ADMINISTRATOR, LORTON YOUTH CENTER. Ct. App. D. C. Certiorari denied.

No. 82–6691. PAYTON *v.* U. S. PATENT AND TRADEMARK OFFICE. C. A. D. C. Cir. Certiorari denied.

No. 82–6693. BRIGGS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 700 F. 2d 408.

No. 82–6694. COX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1510.

No. 82–1369. WESTERN COAL TRAFFIC LEAGUE ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir. Motion of Consumer Owned Power Coalition for leave to file a brief as *ami-*

*cus curiae* granted. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this motion and this petition. Reported below: 691 F. 2d 1104.

No. 82–1527. ASSOCIATED PRESS *v.* BUFALINO. C. A. 2d Cir. Motion of New York Times Co. et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 692 F. 2d 266.

No. 82–1593. WARDEN, MARYLAND PENITENTIARY *v.* ANDERSON. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 696 F. 2d 296.

No. 82–1680. MICHIGAN *v.* ANTHONY. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 120 Mich. App. 207, 327 N. W. 2d 441.

No. 82–1657. CITY OF ALLEN PARK *v.* ECORSE POLLUTION ABATEMENT DRAIN NO. 2 DRAINAGE DISTRICT ET AL. C. A. 6th Cir. Motion of Greenfield Construction Co., Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 708 F. 2d 722.

No. 82–1700. CASH ET AL. *v.* CITY OF LITTLE ROCK, ARKANSAS. Sup. Ct. Ark. Motion of Pulaski County Tax Payers Council, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this motion and this petition. Reported below: 277 Ark. 494, 644 S. W. 2d 229.

No. 82–6208. GREEN *v.* WHITE, SUPERINTENDENT, MISSOURI TRAINING CENTER FOR MEN. C. A. 8th Cir. The order heretofore entered on April 4, 1983 [460 U. S. 1067], is vacated and leave to proceed *in forma pauperis* is granted. Certiorari denied. Reported below: 693 F. 2d 45.

No. 82–6424. GARCIA *v.* NEW MEXICO. Sup. Ct. N. M.;
No. 82–6466. RUIZ *v.* ILLINOIS. Sup. Ct. Ill.; and
No. 82–6579. TURNER *v.* MORRIS, SUPERINTENDENT, MECKLENBURG CORRECTIONAL CENTER. Sup. Ct. Va. Certiorari denied. Reported below: No. 82–6424, 99 N. M. 771, 664 P. 2d 969; No. 82–6466, 94 Ill. 2d 245, 447 N. E. 2d 148.

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. 82–6686 (A–955). CHANEY *v.* OKLAHOMA. Ct. Crim. App. Okla. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BRENNAN would grant the application. Certiorari denied.

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. 81–1120. UNITED STATES ET AL. *v.* RYLANDER ET AL., 460 U. S. 752;
No. 82–1429. TROUT *v.* LEHMAN, SECRETARY OF THE NAVY, ET AL., 460 U. S. 1085;
No. 82–1467. FROST *v.* UNITED STATES, 460 U. S. 1070;
No. 82–1550. MASON ET AL. *v.* PANAMA CANAL CO. ET AL., 460 U. S. 1086; and
No. 82–6210. BURDEN *v.* GEORGIA, 460 U. S. 1103. Petitions for rehearing denied.

No. 82–6232. HEREFORD *v.* BRITTAIN, 460 U. S. 1089;

No. 82–6249. VELILLA *v.* UTC/HAMILTON STANDARD DIVISION ET AL., 460 U. S. 1076;

No. 82–6314. THOMPSON *v.* WOODS ET AL., 461 U. S. 907;

No. 82–6431. WHAM *v.* UNITED STATES, 460 U. S. 1093; and

No. 82–6438. WADE *v.* UNITED STATES, 461 U. S. 909. Petitions for rehearing denied.

No. 82–277. SCHWIMMER, DBA SUPERSONIC ELECTRONICS CO. *v.* SONY CORPORATION OF AMERICA, 459 U. S. 1007 and 1189. Motion for leave to file second petition for rehearing denied.

No. 82–1419. HAYES *v.* SUPREME COURT JUSTICES OF NEVADA, 460 U. S. 1085. Petition for rehearing and for other relief denied.

## JUNE 13, 1983

*Appeals Dismissed*

No. 82–1701. SCHULZ *v.* ROCKWELL MANUFACTURING CO. Appeal from App. Ct. Ill., 2d Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 108 Ill. App. 3d 113, 438 N. E. 2d 1230.

No. 82–6587. BOYDEN *v.* CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 82–1708. JOHNSON *v.* TEXAS. Appeal from Ct. App. Tex., 2d Sup. Jud. Dist., dismissed for want of substantial federal question.

No. 82–1714. ANGEL ET AL. *v.* RENN ET AL. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of substantial federal question.

No. 82–1727. RICKMAN *v.* GEORGIA. Appeal from Ct. App. Ga. dismissed for want of substantial federal question. Reported below: 164 Ga. App. 366, 296 S. E. 2d 726.

*Certiorari Granted—Vacated and Remanded*

No. 82–56. SIMMONS ET AL. *v.* SEA-LAND SERVICES, INC., ET AL. C. A. 4th Cir. Petition for rehearing granted. The order entered October 12, 1982 [459 U. S. 931], denying the petition for writ of certiorari is vacated. Certiorari is granted, the judgment is vacated, and the case is remanded for further consideration in light of *Pallas Shipping Agency, Ltd.* v. *Duris*, 461 U. S. 529 (1983).

*Miscellaneous Orders*

No. D–360. IN RE DISBARMENT OF TABENKEN. It is ordered that Harry A. Tabenken, of Bangor, Me., 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–361. IN RE DISBARMENT OF MOORE. It is ordered that John Wright Moore III, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–362. IN RE DISBARMENT OF CRANE. It is ordered that Arnold Herman Crane, 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. 94, Orig. SOUTH CAROLINA *v.* REGAN, SECRETARY OF THE TREASURY. Motion for preliminary injunction denied. Motion for leave to file a bill of complaint set for oral argument in due course.

No. 81–469. BUSH *v.* LUCAS. C. A. 5th Cir. [Certiorari granted, 458 U. S. 1104.] Motion of respondent 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, 460 U. S. 1021.] Motion of New England Legal Foundation for leave to file a brief as *amicus curiae* granted.

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.] Motion of the Solicitor General for divided argument granted. JUSTICE POWELL took no part in the consideration or decision of this motion.

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 jurisdiction noted, 459 U. S. 1101.] Motion of Multistate Tax Commission et al. for leave to file a brief as *amici curiae* granted.

No. 82–818. NATIONAL LABOR RELATIONS BOARD *v.* BILDISCO & BILDISCO, DEBTOR-IN-POSSESSION, ET AL.; and

No. 82–852. LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. [Certiorari granted, 459 U. S. 1145.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted. Motion of the Solicitor General for divided argument granted, and a total of 15 minutes allotted for oral argument. Motion of petitioner in No. 82–852 for divided argument granted, and a total of 15 minutes allotted for oral argument. Request of petitioner in No. 82–852 for additional time for oral argument denied.

No. 82–862. CONSOLIDATED RAIL CORPORATION *v.* DARRONE, ADMINISTRATRIX OF THE ESTATE OF LESTRANGE.

C. A. 3d Cir. [Certiorari granted *sub nom. Consolidated Rail Corp.* v. *LeStrange*, 459 U. S. 1199.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 82–940. HISHON *v.* KING & SPALDING. C. A. 11th Cir. [Certiorari granted, 459 U. S. 1169.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 82–1031. JEFFERSON PARISH HOSPITAL DISTRICT NO. 2 ET AL. *v.* HYDE. C. A. 5th Cir. [Certiorari granted, 460 U. S. 1021.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 82–914. MONSANTO CO. *v.* SPRAY-RITE SERVICE CORP. C. A. 7th Cir. [Certiorari granted, 460 U. S. 1010.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted to be divided as follows: Counsel for petitioner, 20 minutes; the Solicitor General, 10 minutes. JUSTICE WHITE took no part in the consideration or decision of this motion.

No. 82–1041. DICKMAN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. [Certiorari granted, 459 U. S. 1199.] Motion of petitioners for divided argument denied.

No. 82–1608. SOUTH-CENTRAL TIMBER DEVELOPMENT, INC. *v.* LERESCHE, COMMISSIONER, DEPARTMENT OF NATURAL RESOURCES OF ALASKA, 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. 82–5934. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 5, 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. THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR would award respondent damages pursuant to Rule 49.2.

No. 82–6145. TATUM *v.* REGENTS OF THE UNIVERSITY OF NEBRASKA-LINCOLN ET AL., 460 U. S. 1048. Motion of respondents for damages granted, and damages are awarded to respondents in the amount of $500 pursuant to this Court's Rule 49.2. In all other respects, the motion is denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS would deny the motion. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 82–6193. ESCOFIL *v.* PENNSYLVANIA. Sup. Ct. Pa. Motion of appellant for leave to proceed *in forma pauperis* denied. Appellant is allowed until July 5, 1983, within which to pay the docketing fee required by Rule 45(a) and to submit a jurisdictional statement in compliance with Rule 33 of the Rules of this Court. JUSTICE REHNQUIST and JUSTICE O'CONNOR would award appellee damages pursuant to Rule 49.2.

No. 82–6502. IN RE RUSH. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 5, 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. THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR would award respondents damages pursuant to Rule 49.2.

No. 82–6728. IN RE GREEN. Petition for writ of habeas corpus denied.

No. 82–6584. IN RE WEIGANG;
No. 82–6598. IN RE GREEN; and
No. 82–6662. IN RE KAGELER ET AL. Petitions for writs of mandamus denied.

*Certiorari Granted*

No. 82–1186. TRANS WORLD AIRLINES, INC. *v.* FRANKLIN MINT CORP. ET AL.; and

No. 82–1465. FRANKLIN MINT CORP. ET AL. *v.* TRANS WORLD AIRLINES, INC. C. A. 2d Cir. Motion of International Air Transport Association et al. for leave to intervene in No. 82–1186 denied. Alternative request to treat the brief as a brief *amici curiae* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 690 F. 2d 303.

*Certiorari Denied.* (See also Nos. 82–1701 and 82–6587, *supra.*)

No. 82–1217. MATANKY ET AL. *v.* UNITED STATES ET AL. Ct. Cl. Certiorari denied. Reported below: 231 Ct. Cl. 1000.

No. 82–1282. EDDY ET AL. *v.* HESS, ADMINISTRATRIX OF THE ESTATE OF MILANO, ET AL.; and

No. 82–1423. BRITTON, COMMISSIONER OF BOARD OF CORRECTIONS OF ALABAMA *v.* HESS, ADMINISTRATRIX OF THE ESTATE OF MILANO, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 689 F. 2d 977.

No. 82–1377. MCKAY *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 703 F. 2d 584.

No. 82–1427. ADAMS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 694 F. 2d 200.

No. 82–1443. LOMBARD ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 223 U. S. App. D. C. 102, 690 F. 2d 215.

No. 82–1455. ELLISON *v.* KANE COUNTY SHERIFF'S OFFICE MERIT COMMISSION ET AL. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 108 Ill. App. 3d 1065, 440 N. E. 2d 331.

No. 82–1464. NOBEL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 696 F. 2d 231.

No. 82–1472. KENT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 691 F. 2d 1376.

No. 82–1482. MYRON *v.* TRUST COMPANY BANK LONG-TERM DISABILITY BENEFIT PLAN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 691 F. 2d 510.

No. 82–1531. BANK OF NOVA SCOTIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 691 F. 2d 1384.

No. 82–1595. PECORA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 693 F. 2d 421.

No. 82–1597. ELLIS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 164 Ga. App. 366, 296 S. E. 2d 726.

No. 82–1614. BLAZER CORP. *v.* NEW JERSEY SPORTS AND EXPOSITION AUTHORITY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1388.

No. 82–1654. MARSHALL ET AL. *v.* DOE, ON BEHALF OF DOE, A MINOR. C. A. 5th Cir. Certiorari denied. Reported below: 694 F. 2d 1038.

No. 82–1671. ITT CONTINENTAL BAKING CO., INC., HOSTESS CAKE DIVISION *v.* BAKERY SALESMEN, DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 51. C. A. 6th Cir. Certiorari denied. Reported below: 692 F. 2d 29.

No. 82–1686. KALARIS, ADMINISTRATIVE APPEALS JUDGE, ET AL. *v.* DONOVAN, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 225 U. S. App. D. C. 134, 697 F. 2d 376.

No. 82–1694. COLLIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 699 F. 2d 832.

No. 82–1696. RASKY *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 696 F. 2d 997.

No. 82–1697. BOARD OF TRUSTEES OF CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA *v.* REYES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 671.

No. 82–1703. RUSH ET AL., TRUSTEES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 694 F. 2d 1072.

No. 82–1706. CEPPI, EXECUTOR OF THE ESTATE OF CEPPI *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. Reported below: 698 F. 2d 17.

No. 82–1719. FORUM INTERNATIONAL, LTD., ET AL. *v.* CHER; and

No. 82–1740. CHER *v.* NEWS GROUP PUBLICATIONS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 692 F. 2d 634.

No. 82–1720. BUCCI *v.* GRIFFIN ET AL. C. A. 1st Cir. Certiorari denied.

No. 82–1722. COUNTY OF MONROE ET AL. *v.* CONSOLIDATED RAIL CORPORATION. Sp. Ct. R. R. R. A. Certiorari denied. Reported below: 558 F. Supp. 1387.

No. 82–1735. ROKOWSKY *v.* GORDON ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 705 F. 2d 439.

No. 82–1752. DESRIS ET AL. *v.* CITY OF KENOSHA, WISCONSIN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 687 F. 2d 1117.

No. 82–1809. BONACCURSO *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 500 Pa. 247, 455 A. 2d 1175.

No. 82–1831. FIERROS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 692 F. 2d 1291.

No. 82–1834. SCALISE ET AL. *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 698 F. 2d 1226.

No. 82–1853. LEE, AKA VALENTE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 696 F. 2d 997.

No. 82–6188. MARKS *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 691 F. 2d 730.

No. 82–6544. BORMEY *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 695 F. 2d 164.

No. 82–6549. DEL PRADO *v.* INDIANA. Ct. App. Ind. Certiorari denied.

No. 82–6561. HINTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 703 F. 2d 672.

No. 82–6563. SAUNDERS *v.* VETERANS ADMINISTRATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1403.

No. 82–6567. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 724.

No. 82–6571. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 703 F. 2d 578.

No. 82–6586. BRANTNER *v.* ZIMMERMAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 696 F. 2d 980.

No. 82–6590. RITTER *v.* RITTER. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1232.

No. 82–6594. CONWAY ET AL. *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 282.

No. 82–6595. SYNESAEL, DECEASED, BY HER GUARDIAN, DROOK, ET AL. *v.* LING, DIRECTOR OF THE DEPARTMENT OF

PUBLIC WELFARE OF TIPPECANOE COUNTY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 691 F. 2d 1213.

No. 82–6606. ANTONELLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 703 F. 2d 570.

No. 82–6616. FORD *v.* O'BRIEN. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1502.

No. 82–6625. STRAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 703 F. 2d 578.

No. 82–6627. LITTLEJOHN *v.* CLELAND ET AL. C. A. 11th Cir. Certiorari denied.

No. 82–6628. PHILLIPS *v.* ORNDORF ET AL. C. A. 3d Cir. Certiorari denied.

No. 82–6704. CELESTINE *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Ct. Crim. App. Tex. Certiorari denied.

No. 82–6708. COOK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 511.

No. 82–6711. HARDMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 705 F. 2d 446.

No. 82–6713. LEE *v.* UNITED STATES; and
No. 82–6753. WELLS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 700 F. 2d 424.

No. 82–6715. HILL *v.* EVANS, SHERIFF, TARRANT COUNTY, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 701 F. 2d 946.

No. 82–6717. WAITERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1511.

No. 82–6724. STERN *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 699 F. 2d 1312.

No. 82–6725. TIPPINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 703 F. 2d 580.

No. 82–6740. FULLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1512.

No. 82–6743. MEDINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 701 F. 2d 946.

No. 82–6745. TAYLOR ET AL. *v.* COURT OF COMMON PLEAS OF DELAWARE COUNTY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 696 F. 2d 987.

No. 82–6752. NOLAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 700 F. 2d 479.

No. 82–6762. CHICO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1510.

No. 82–6773. LESANE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 705 F. 2d 468.

No. 82–1490. CARTHAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 696 F. 2d 994.

No. 82–1602. PHOENIX BAPTIST HOSPITAL & MEDICAL CENTER, INC. *v.* SHS HOSPITAL CORP. ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 688 F. 2d 847.

No. 82–1610. MIAMI CONSERVANCY DISTRICT *v.* MARSH, SECRETARY OF THE ARMY, ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE O'CONNOR would grant certiorari. Reported below: 692 F. 2d 447.

No. 82–1738. GRENADA BANK, DBA COAHOMA BANK *v.* WILLEY ET AL. C. A. 5th Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 694 F. 2d 85.

No. 82–6560. MAGWOOD *v.* ALABAMA. Sup. Ct. Ala.;

No. 82–6577. WILLIAMS *v.* GEORGIA. Sup. Ct. Ga.;

No. 82–6597. ZARAGOZA *v.* ARIZONA. Sup. Ct. Ariz.; and

No. 82–6611. YATES *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: No. 82–6560, 426 So. 2d 929; No. 82–6577, 250 Ga. 553, 300 S. E. 2d 301; No. 82–6597, 135 Ariz. 63, 659 P. 2d 22; No. 82–6611, 280 S. C. 29, 310 S. E. 2d 805.

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 Granted.* (See No. 82–56, *supra.*)

*Rehearing Denied*

No. 82–1344. CELE *v.* KINNEY ET AL., 460 U. S. 1070;

No. 82–1376. FREEMAN *v.* UNITED STATES, 460 U. S. 1084;

No. 82–6172. GRAY *v.* LUCAS, WARDEN, ET AL., 461 U. S. 910;

No. 82–6187. STEWART *v.* FLORIDA, 460 U. S. 1103;

No. 82–6194. COPELAND *v.* SOUTH CAROLINA, 460 U. S. 1103;

No. 82–6324. CYNTJE *v.* GOVERNMENT OF THE VIRGIN ISLANDS ET AL., 461 U. S. 908;

No. 82–6343. SMITH *v.* BORDENKIRCHER, WARDEN, WEST VIRGINIA STATE PENITENTIARY, 461 U. S. 908;

No. 82–6363. THOMPSON *v.* MEDICAL OFFICER AT HAMILTON COUNTY JAIL, 461 U. S. 917; and

No. 82–6436. IN RE BEHRENS ET AL., 461 U. S. 925. Petitions for rehearing denied.

JUNE 14, 1983

*Dismissal Under Rule 53*

No. 81–1618. WEYERHAEUSER CO. ET AL *v.* LYMAN LAMB CO. ET AL; and

No. 81–1619. GEORGIA-PACIFIC CORP. *v.* LYMAN LAMB CO. ET AL. C. A. 5th Cir. [Certiorari granted, 456 U. S. 981.] Writs of certiorari dismissed under this Court's Rule 53.

JUNE 20, 1983

*Appeals Dismissed*

No. 81–1782. CITY OF VIRGINIA ET AL. *v.* NYBERG ET AL. Appeal from C. A. 8th Cir. Motion of Legal Defense Fund for Unborn Children for leave to file a brief as *amicus curiae* denied. Motion of Alan Ernest to represent children unborn and born alive denied. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE WHITE and JUSTICE REHNQUIST would postpone further consideration of the question of jurisdiction to a hearing of the case on the merits. JUSTICE O'CONNOR would dismiss the appeal for want of a properly presented federal question. Reported below: 667 F. 2d 754.

No. 82–1729. MILLER *v.* MUNICIPAL COURT FOR THE COUNTY OF LOS ANGELES, PASADENA JUDICIAL DISTRICT (CALIFORNIA, REAL PARTY IN INTEREST). Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 82–6705. BETKA *v.* SMITH ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 82–1747. HAMILTON, ADMINISTRATRIX, ET AL. *v.* STOVER. Appeal from Ct. App. Ohio, Richland County, dismissed for want of substantial federal question.

No. 82–1751. MAYNARD *v.* MCGUINESS ET AL. Appeal from Sup. Ct. Mont. dismissed for want of substantial federal question. Reported below: —— Mont. ——, 658 P. 2d 1104.

No. 82–1776. S. J. GROVES & SONS CO. *v.* ILLINOIS, ACTING THROUGH ITS DIVISION OF HIGHWAYS OF THE DEPARTMENT OF TRANSPORTATION. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 93 Ill. 2d 397, 444 N. E. 2d 131.

No. 82–6644. LORTZ *v.* CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question. Reported below: 137 Cal. App. 3d 363, 187 Cal. Rptr. 89.

No. 82–6614. SARDOZ ET AL., AS CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF TALAMANTES *v.* KENT NOWLIN CONSTRUCTION CO. Appeal from Sup. Ct. N. M. dismissed for want of properly presented federal question. Reported below: 99 N. M. 389, 658 P. 2d 1116.

*Vacated and Remanded on Appeal*

No. 82–1188. KERREY, GOVERNOR OF NEBRASKA, ET AL. *v.* WOMEN'S SERVICES, P. C., ET AL. Appeal from C. A. 8th Cir. Motion of Alan Ernest to represent children unborn and born alive denied. Motion of Legal Defense Fund for Unborn Children for leave to file a brief as *amicus curiae* denied. Judgment vacated and case remanded for further consideration in light of *Akron* v. *Akron Center for Reproductive Health, Inc.*, *ante*, p. 416, 442–449. JUSTICE STEVENS would affirm the judgment. Reported below: 690 F. 2d 667.

*Certiorari Granted—Vacated and Remanded*

No. 82–438. NATIONAL LABOR RELATIONS BOARD *v.* BEHRING INTERNATIONAL, INC. C. A. 3d Cir. Certiorari

granted, judgment vacated, and case remanded for further consideration in light of *NLRB* v. *Transportation Management Corp.*, *ante*, p. 393. Reported below: 675 F. 2d 83.

No. 82–736. NATIONAL LABOR RELATIONS BOARD *v.* HEARTLAND FOOD WAREHOUSE, A DIVISION OF PURITY SUPREME SUPERMARKETS. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *NLRB* v. *Transportation Management Corp.*, *ante*, p. 393. Reported below: 685 F. 2d 421.

No. 82–1054. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL NO. 988 *v.* EDWARDS ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *DelCostello* v. *Teamsters*, *ante*, p. 151. Reported below: 678 F. 2d 1276.

No. 82–1105. NATIONAL LABOR RELATIONS BOARD *v.* BLACKSTONE CO., INC. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *NLRB* v. *Transportation Management Corp.*, *ante*, p. 393. Reported below: 685 F. 2d 102.

No. 82–1481. ASTEMBORSKI *v.* SUSMARSKI. Sup. Ct. Pa. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pickett* v. *Brown*, *ante*, p. 1. Reported below: 499 Pa. 99, 451 A. 2d 1012.

No. 82–1549. UNITED STATES *v.* GARCIA ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Ross*, 456 U. S. 798 (1982). Reported below: 676 F. 2d 1086.

JUSTICE STEVENS, dissenting.

After the Court of Appeals denied the Government's petition for rehearing in this case, the Government voluntarily moved to dismiss the indictments. On January 12, 1983, the District Court granted that motion. No one has ever challenged the effectiveness of the District Court's order of dis-

missal, or sought to set it aside, either by a request for rehearing in that court or by direct review on appeal. It is, therefore, perfectly clear that this litigation terminated a long time ago. Nothing remains to be decided on the merits with regard to *United States* v. *Ross* or any other issue.

*Miscellaneous Orders*

No. D–363. IN RE DISBARMENT OF GIGLIOTTI. It is ordered that Francesco Gigliotti, of New Castle, 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. 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.] Motion of American Gas Association for leave to file a brief as *amicus curiae* granted. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 82–15. OLIVER *v.* UNITED STATES. C. A. 6th Cir. [Certiorari granted, 459 U. S. 1168]; and

No. 82–1273. MAINE *v.* THORNTON. Sup. Jud. Ct. Me. [Certiorari granted, 460 U. S. 1068.] Motion of petitioner in No. 82–15 for divided argument granted. Motion of petitioner in No. 82–1273 for divided argument granted.

No. 82–660. UNITED STATES *v.* CRONIC. C. A. 10th Cir. [Certiorari granted, 459 U. S. 1199.] Motion of respondent for substitution of counsel granted, and it is ordered that Steven B. Duke, Esquire, of New Haven, Conn., be appointed to serve as counsel for respondent in this case in place of David W. Duncan, Esquire, of Durango, Colo., who is hereby discharged.

No. 82–708. SUMMA CORP. *v.* CALIFORNIA EX REL. STATE LANDS COMMISSION ET AL. Sup. Ct. Cal. [Certio-

rari granted, 460 U. S. 1036.] Motions of Pacific Legal Foundation and California Land Title Association for leave to file briefs as *amici curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 82–940. HISHON *v.* KING & SPALDING. C. A. 11th Cir. [Certiorari granted, 459 U. S. 1169.] Motion of New England Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 82–1143. MILLER ELECTRIC CO. ET AL. *v.* NATIONAL CONSTRUCTORS ASSN. ET AL.;

No. 82–1146. NATIONAL ELECTRICAL CONTRACTORS ASSN., INC., ET AL. *v.* NATIONAL CONSTRUCTORS ASSN. ET AL.; and

No. 82–1147. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (AFL–CIO) ET AL. *v.* NATIONAL CONSTRUCTORS ASSN. ET AL. C. A. 4th Cir. Motion of the parties to defer consideration of the petitions for writs of certiorari granted. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 82–1432. PULLIAM, MAGISTRATE FOR THE COUNTY OF CULPEPER, VIRGINIA *v.* ALLEN ET AL. C. A. 4th Cir. [Certiorari granted, 461 U. S. 904.] Motion of American Bar Association for leave to file a brief as *amicus curiae* granted.

No. 82–1633. HOSPITAL BUILDING CO. *v.* TRUSTEES OF REX HOSPITAL ET AL.; and

No. 82–1762. TRUSTEES OF REX HOSPITAL ET AL. *v.* HOSPITAL BUILDING CO. C. A. 4th Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 82–1651. NIX, WARDEN OF THE IOWA STATE PENITENTIARY *v.* WILLIAMS. C. A. 8th Cir. [Certiorari granted, 461 U. S. 956.] Motion for appointment of counsel

granted, and it is ordered that Robert Bartels, Esquire, of Tempe, Ariz., be appointed to serve as counsel for respondent in this case.

No. 82–6640. IN RE DAMIANO. C. A. 11th Cir. Petition for writ of common-law certiorari denied.

No. 82–6609. IN RE GIFFORD; and
No. 82–6719. IN RE CYNTJE. Petitions for writs of mandamus denied.

No. 82–1742. IN RE FORNEY. Petition for writ of prohibition denied.

*Probable Jurisdiction Noted*

No. 82–282. MCCAIN ET AL. *v.* LYBRAND ET AL. Appeal from D. C. S. C. Probable jurisdiction noted.

No. 82–1565. BACCHUS IMPORTS, LTD., ET AL. *v.* FREITAS, DIRECTOR OF TAXATION OF HAWAII, ET AL. Appeal from Sup. Ct. Haw. Probable jurisdiction noted. Reported below: 65 Haw. 566, 656 P. 2d 724.

*Certiorari Granted*

No. 82–958. MCDONOUGH POWER EQUIPMENT, INC. *v.* GREENWOOD ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 687 F. 2d 338.

No. 82–1643. INTERSTATE COMMERCE COMMISSION ET AL. *v.* AMERICAN TRUCKING ASSNS., INC., ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 688 F. 2d 1337.

No. 81–757. ALLEN *v.* WRIGHT ET AL.; and
No. 81–970. REGAN, SECRETARY OF THE TREASURY, ET AL. *v.* WRIGHT ET AL. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 211 U. S. App. D. C. 231, 656 F. 2d 820.

No. 82–1260. COPPERWELD CORP. ET AL. *v.* INDEPENDENCE TUBE CORP. C. A. 7th Cir. Certiorari granted limited to Question 1 presented by the petition. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 691 F. 2d 310.

*Certiorari Denied.* (See also Nos. 81–1782, 82–1729, 82–6705, and 82–6640, *supra.*)

No. 81–1010. PURTILL *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 658 F. 2d 134.

No. 82–777. GENERAL DYNAMICS CORP. *v.* GARY AIRCRAFT CORP. C. A. 5th Cir. Certiorari denied. Reported below: 681 F. 2d 365.

No. 82–1166. ZURN INDUSTRIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 680 F. 2d 683.

No. 82–1305. BLACKSTONE CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 685 F. 2d 102.

No. 82–1389. MUNDT *v.* NL INDUSTRIES, INC.; and
No. 82–1489. NL INDUSTRIES, INC. *v.* MUNDT. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 456.

No. 82–1391. SPERLING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 692 F. 2d 223.

No. 82–1449. CATTELL *v.* BARRETT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 689 F. 2d 324.

No. 82–1458. RAPAPORT *v.* UNITED STATES; and
No. 82–1526. INGREDIENT TECHNOLOGY CORP., FORMERLY KNOWN AS SUCREST CORP. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 698 F. 2d 88.

No. 82–1517. MISSION INSURANCE CO. *v.* UNITED STATES; and

No. 82–1541. M/V BIG SAM ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 681 F. 2d 432 and 693 F. 2d 451.

No. 82–1615. DIAZ-SALAZAR *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. Reported below: 700 F. 2d 1156.

No. 82–1621. PRING *v.* PENTHOUSE INTERNATIONAL, LTD., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 695 F. 2d 438.

No. 82–1639. MARCELLO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 694 F. 2d 1033.

No. 82–1652. GOLDSTEIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 695 F. 2d 1228.

No. 82–1655. HEAD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 697 F. 2d 1200.

No. 82–1674. LEVINE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 695 F. 2d 57.

No. 82–1675. CALIFORNIA *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1234.

No. 82–1702. STEVENS ET AL. *v.* MAISLIN TRANSPORT OF DELAWARE, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 696 F. 2d 500.

No. 82–1726. TEXAS *v.* SAMUDIO. Ct. Crim. App. Tex. Certiorari denied. Reported below: 648 S. W. 2d 312.

No. 82–1733. RASNAKE *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 164 Ga. App. 765, 298 S. E. 2d 42.

No. 82–1744. ERZINGER ET AL. *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 137 Cal. App. 3d 389, 187 Cal. Rptr. 164.

No. 82–1750. BIGGS *v.* TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 110 Ill. App. 3d 709, 442 N. E. 2d 1353.

No. 82–1757. BUDGET RENT-A-CAR OF WASHINGTON-OREGON, INC. *v.* HERTZ CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 693 F. 2d 84.

No. 82–1759. T–1740 TRUSTS, MERCANTILE BANK & TRUST CO., LTD., TRUSTEE, TRANSFERREE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. Cir. Certiorari denied. Reported below: 226 U. S. App. D. C. 211, 701 F. 2d 222.

No. 82–1763. MERIDA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 82–1764. GULF & SOUTHERN TERMINAL CORP. *v.* SS PRESIDENT ROXAS. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 1110.

No. 82–1765. KERNS BAKERY, INC. *v.* KENTUCKY COMMISSION ON HUMAN RIGHTS ET AL. Ct. App. Ky. Certiorari denied. Reported below: 644 S. W. 2d 350.

No. 82–1773. OREGON PHYSICIANS' SERVICE ET AL. *v.* HAHN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 689 F. 2d 840.

No. 82–1775. CHAMBERS ET AL. *v.* MCLEAN TRUCKING CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 163.

No. 82–1792. DALLAS COUNTY, TEXAS *v.* WILLIAMS. C. A. 5th Cir. Certiorari denied. Reported below: 692 F. 2d 1032.

No. 82–1818. RANK, ACTING DIRECTOR OF THE CALIFORNIA STATE DEPARTMENT OF HEALTH SERVICES, ET AL. *v.* BELTRAN. C. A. 9th Cir. Certiorari denied. Reported below: 701 F. 2d 91.

No. 82–1838. MICHIGAN *v.* ALEXANDER. Sup. Ct. Mich. Certiorari denied. Reported below: 416 Mich. 581, 331 N. W. 2d 707.

No. 82–1863. SILANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 729.

No. 82–1865. HAWKINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1404.

No. 82–1866. FAKTER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 705 F. 2d 461.

No. 82–1902. DOLENZ *v.* ALL SAINTS EPISCOPAL HOSPITAL. Sup. Ct. Tex. Certiorari denied.

No. 82–5201. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 679 F. 2d 1042.

No. 82–5550. SHOELS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 685 F. 2d 379.

No. 82–5845. BILOTTI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 692 F. 2d 750.

No. 82–6308. PERRY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 694 F. 2d 1104.

No. 82–6337. HENDERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 82–6372. STEVENSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 82–6375. GRIMSLEY *v.* DODSON, SHERIFF, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 696 F. 2d 303.

No. 82–6396. SILCOX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 182.

No. 82–6452. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 929.

No. 82–6499. WOODARD *v.* SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY ET AL. Sp. Ct. R. R. R. A. Certiorari denied. Reported below: 555 F. Supp. 1382.

No. 82–6582. COFFIN *v.* OHIO; and
No. 82–6706. VETH *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 82–6605. ANTONELLI *v.* MUNCH ET AL. C. A. 7th Cir. Certiorari denied.

No. 82–6607. FUEYO-FANJUL *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 1st Cir. Certiorari denied.

No. 82–6612. MCCLELLAN *v.* MCCLELLAN. Ct. Sp. App. Md. Certiorari denied. Reported below: 52 Md. App. 525, 451 A. 2d 334.

No. 82–6613. STEWART *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 82–6615. BRANTLEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 82–6617. BASKIN *v.* MARSHALL. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 721.

No. 82–6622. WILLIAMS-EL *v.* TINNEY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 691 F. 2d 499.

No. 82–6626. CAVALLARO *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 701 F. 2d 1273.

No. 82–6629. MITCHELL *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 698 F. 2d 940.

No. 82–6631. POWELL *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 705 F. 2d 445.

No. 82–6632. WOODYARD *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 428 So. 2d 138.

No. 82–6633. MCCLAIN *v.* ORR ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1402.

No. 82–6634. WARGO *v.* ATTORNEY GENERAL OF NEW MEXICO ET AL. C. A. 10th Cir. Certiorari denied.

No. 82–6635. SELDEN *v.* NEW CASTLE COUNTY BOARD OF EDUCATION. Sup. Ct. Del. Certiorari denied. Reported below: 461 A. 2d 695.

No. 82–6638. LANCASTER *v.* RODRIGUEZ ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 701 F. 2d 864.

No. 82–6641. MEADOWS *v.* MCGINNIS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 698 F. 2d 1226.

No. 82–6646. MULQUEEN *v.* MORRIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 701 F. 2d 185.

No. 82–6647. BOOS *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 232 Kan. 864, 659 P. 2d 224.

No. 82–6648. VAN POYCK *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 704 F. 2d 1252.

No. 82–6650. MILLER *v.* CONTINENTAL GRAIN CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 166.

No. 82–6653. BROWN *v.* GARLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 691 F. 2d 493.

No. 82–6656. ROBINSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 428 So. 2d 148.

No. 82–6657. COOK *v.* JONES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 718 F. 2d 1085.

No. 82–6661. HUERTAS *v.* APELLANIS ET AL. Sup. Ct. P. R. Certiorari denied.

No. 82–6681. MCCLAIN *v.* MACK TRUCKS, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1393.

No. 82–6750. STANLEY *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION, ET AL. C. A. 3d Cir. Certiorari denied.

No. 82–6769. BURNS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 701 F. 2d 840.

No. 82–6788. GASS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 705 F. 2d 468.

No. 82–6795. AGUILAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 82–1300. VIRGINIA STATE BAR ET AL. *v.* CONSUMERS UNION OF UNITED STATES, INC., ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 688 F. 2d 218.

No. 82–1301. SUPREME COURT OF VIRGINIA ET AL. *v.* CONSUMERS UNION OF UNITED STATES, INC., ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 688 F. 2d 218.

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST joins, dissenting.

This petition marks the third occasion this case has been before us. The case arose in 1975 when respondents brought

a suit under 42 U. S. C. § 1983 alleging that particular provisions of the State Bar Code promulgated by the Virginia Supreme Court violated respondents' rights under the First and Fourteenth Amendments. Having prevailed in their § 1983 suit for declaratory and injunctive relief against the Virginia Supreme Court and its chief justice (together, the "Virginia Court"), the issue now is whether respondent Consumers Union is entitled to attorney's fees from that court[1] under the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U. S. C. § 1988. This was also the issue we addressed the last time this case came before us, when we vacated an award of attorney's fees against the Virginia Court on the ground that it "was premised on acts or omissions for which [the Virginia Court] enjoyed absolute legislative immunity." *Supreme Court of Virginia* v. *Consumers Union of United States, Inc.*, 446 U. S. 719, 738 (1980) *(Consumers Union)*.

On remand, a divided three-judge District Court reinstated the award of attorney's fees against the Virginia Court, *Consumers Union* v. *American Bar Assn.*, 505 F. Supp. 822 (ED Va. 1981), and a divided panel of the Court of Appeals affirmed. *Consumers Union* v. *Virginia State Bar*, 688 F. 2d 218 (CA4 1982). Because I believe that the District Court misinterpreted our opinion in *Consumers Union* and erred in reinstating the fee award, I would grant certiorari.

I

It is unnecessary to review here at length the prior history of this case, which is set out in detail in *Consumers Union*. There, two basic issues faced the Court:

> "[W]hether the Supreme Court of Virginia (Virginia Court) and its chief justice are officially immune from

[1] Respondents sued the Supreme Court of Virginia, its chief justice, the Virginia State Bar, and others. Petitioners in this case are the Supreme Court of Virginia and its chief justice.

> suit in an action brought under 42 U. S. C. § 1983 challenging the Virginia Court's disciplinary rules governing the conduct of attorneys and whether attorney's fees were properly awarded under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, against the Virginia Court and its chief justice in his official capacity." 446 U. S., at 721.

With respect to the first issue, we held that the Virginia Court was not subject to suit under § 1983 for its legislative acts—such as promulgating disciplinary rules—any more than state legislators could be sued for their legislative acts: "[T]he Virginia Court and its members are immune from suit when acting in their legislative capacity." *Id.*, at 734. However, the Court went on to hold that the Virginia Court was a proper defendant in a coercive action brought under § 1983 because it possessed enforcement powers. "As already indicated, § 54–74 [of the Code of Virginia (1978)] gives the Virginia Court independent authority of its own to initiate proceedings against attorneys. For this reason the Virginia Court and its members were proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were." *Id.*, at 736.

Turning to the second issue, we vacated the award of attorney's fees against the Virginia Court. The District Court had awarded fees against the Virginia Court because "it was the very authority that had propounded and failed to amend the challenged provisions of the Bar Code." *Id.*, at 738. This was error because the Virginia Court had legislative immunity for its acts in promulgating disciplinary rules:

> "We are unable to agree that attorney's fees should have been awarded for the reasons relied on by the District Court. Although the Virginia Court and its chief justice were subject to suit in their direct enforcement role, they were immune in their legislative roles. Yet

> the District Court's award of attorney's fees in this case was premised on acts or omissions for which [the Virginia Court] enjoyed absolute legislative immunity." *Ibid.*

We explained that nothing in the legislative history of § 1988 indicated that Congress "intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute legislative immunity." *Ibid.*

We then vacated the award of attorney's fees and remanded, presumably to permit the District Court to determine whether the role of the Virginia State Bar—the Virginia Court's codefendant in the case—in enforcing the challenged rules justified an award of attorney's fees against it.

On remand, the District Court interpreted *Consumers Union* as holding that an award of attorney's fees against the Virginia Court would be appropriate on the existing record "based solely on the Virginia Court's enforcement role . . . ." 505 F. Supp., at 823. The District Court reasoned that because the Virginia Court's enforcement role rendered it liable to a coercive suit under § 1983, it was also liable for attorney's fees under § 1988:

> "It seems clear that 'in the circumstances of this case, a sufficiently concrete dispute is . . . made out against the Virginia Court as an enforcer,' . . . not only for amenability to suit, but also for the purpose of a fee award to [respondent], the prevailing party." *Id.*, at 823–824, quoting *Consumers Union*, *supra*, at 736, n. 15.

The District Court quoted *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968), in arguing that § 1988 ordinarily requires an award of attorney's fees against a party properly sued under § 1983 "'unless special circumstances would render such an award unjust.'" 505 F. Supp., at 824. It concluded that no such circumstances existed here and so awarded fees against the Virginia Court.

One judge dissented, arguing that the Virginia Court's "enforcement role" was not established by the record and hence could not serve as the basis for an award of attorney's fees.

A divided Court of Appeals affirmed, holding that the award of attorney's fees against the Virginia Court was not an abuse of discretion. The Court of Appeals interpreted *Consumers Union* as holding that an award of attorney's fees would be justified on this record.[2]

## II

The immunity of judges from monetary judgments for their actions as judges is deeply embedded in our legal system. *E. g.*, *Stump* v. *Sparkman*, 435 U. S. 349 (1978); *Bradley* v. *Fisher*, 13 Wall. 335 (1872); *Johnston* v. *Moorman*, 80 Va. 131, 139–140 (1885). In *Pierson* v. *Ray*, 386 U. S. 547, 554–555 (1967), we refused, in the absence of specific statutory language, to presume that Congress intended by enacting § 1 of the Civil Rights Act of 1871, 42 U. S. C. § 1983, to displace the historic rule of judicial immunity; we held that the doctrine of judicial immunity was applicable in suits for damages under that section. The principles of *Pierson* apply with full force to suits for attorney's fees under § 1988.

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[2] In dissent, Judge Chapman trenchantly pointed out that the ostensible purpose of this suit—to force the Virginia Supreme Court and Virginia State Bar to permit respondent Consumers Union to publish a directory of lawyers—had long been submerged in the quest for attorney's fees:

"For the past three years this suit has been nothing but an effort by the plaintiff's attorneys to establish a theory upon which they could collect a fee. In the spring of 1979 the last possible impediment to gathering the information and publishing the Attorney's Directory for Arlington County was removed. However, when this case was argued in November 1981 the directory had not been printed or distributed. As a result of numerous questions by the court to the attorneys for Consumers Union, the information has been gathered and the directory published. A copy of the directory was forwarded to this court on June 15, 1982. It contains the names of 78 attorneys in Arlington, Virginia. This action has made three trips to the United States Supreme Court, and is presently on its way back to the Supreme Court, all to produce 78 names." 688 F. 2d 218, 224 (CA4 1982).

Nothing in the language or legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 specifically indicates Congress' intent to sweep away the historic immunity of judges from monetary judgments. In *Pierson*, the Court explained that the purpose of judicial immunity

> "'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' . . . Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." 386 U. S., at 554 (citations omitted).

See also *Dennis* v. *Sparks*, 449 U. S. 24, 31 (1980). I fail to see how an award of attorney's fees is any less of a threat to judicial independence than an award of damages. An independent judiciary, uncowed by fears of financial liability for its official acts, is an integral aspect of state sovereignty and critical to the security of our freedoms. I would not presume that Congress cast this fundamental rule to the winds in the absence of specific statutory language rendering judges liable for attorney's fees. No such language is found in § 1988.

Although judges are immune from monetary damages under § 1983 for their official acts, see, *e. g.*, *Stump* v. *Sparkman*, *supra*, they are nonetheless subject to suit for injunctive and declaratory relief in their administrative capacities. *E. g.*, *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 299 F. Supp. 117, 123–124 (SDNY 1969) (three-judge District Court) (Friendly, J.), aff'd on other grounds, 401 U. S. 154 (1971). However, it is beyond peradventure that the amenability of a judge to suit for equitable relief for his role in enforcing or administrating a statute does not render him liable for damages for that same act. See, *e. g.*, *Slavin* v. *Curry*, 574 F. 2d 1256, 1264 (CA5 1978); *Louis* v. *Supreme Court of Nevada*, 490 F. Supp. 1174, 1182 (Nev. 1980). I do not understand how it can be that a judge

should be liable for attorney's fees for performing the same act for which he would be immune from damages. Here, the Virginia Court was held subject to suit for injunctive and declaratory relief because it possessed the power to enforce or administer disciplinary rules against members of the State Bar. *Consumers Union*, 446 U. S., at 736. Such liability no more entails liability for attorney's fees than it does for damages.

The District Court and Court of Appeals purported to rely on dictum in *Consumers Union* stating that a fee award against the Virginia Court might be proper if made "because of its own direct enforcement role." *Id.*, at 739. Assuming, *arguendo*, that a fee award could be made against a judge for his acts in an administrative or enforcement capacity, the District Court still erred.

We held in *Consumers Union* that the Virginia Court was a proper defendant in a coercive § 1983 suit because it had the potential power to prosecute attorneys for disciplinary violations. However, there was no evidence in the record that it had ever exercised its enforcement powers. After vacating the award because it was premised on acts—the promulgation and failure to amend the challenged disciplinary rules—for which the Virginia Court was entitled to absolute legislative immunity, we remanded the case. If we had thought that the mere existence of enforcement authority would support the award, there would have been no need to remand as to the Virginia Court. Thus, we necessarily remanded for further findings on the Virginia Court's actual exercise of its enforcement powers, and for consideration of whether such acts justified a fee award against the court.

On remand, the District Court took no evidence as to the Virginia Court's actual role in enforcing the challenged rule; in reinstating the award, it relied solely on the mere existence of disciplinary authority. 505 F. Supp., at 823–824. In short, the fee award rests on the same basis now—the Virginia Court's promulgation of disciplinary rules—that it did

before. The District Court's reliance on the Virginia Court's potential "disciplinary enforcement authority" cannot cover up the utter lack of proof in the record that the Virginia Court ever did anything to enforce the rule. Thus, the fee award cannot stand.

For all the foregoing reasons, I would grant certiorari to consider the important question of whether an award of attorney's fees against a judge may be premised solely on the existence of enforcement authority.

No. 82–1471. DEPARTMENT OF REVENUE OF MONTANA *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF MISSOULA ET AL. Sup. Ct. Mont. Motion of Multistate Tax Commission for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 200 Mont. 358, 654 P. 2d 496.

No. 82–1631. POTAMKIN CADILLAC CORP. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR would award respondent damages pursuant to this Court's Rule 49.2. Reported below: 697 F. 2d 491.

No. 82–1770. NATIONAL ENQUIRER, INC. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (JONES ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari.

No. 82–6448. HERNANDEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 643 S. W. 2d 397.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 82–6474. SMITH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 424 So. 2d 726.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, I would grant certiorari and vacate petitioner's death sentence on this basis alone. However, even if I accepted the prevailing view that the death penalty can constitutionally be imposed under certain circumstances, I would grant certiorari and vacate the death sentence on the ground that neither the jury that convicted petitioner of murder nor the judge who sentenced him found that he "kill[ed], attempt[ed] to kill, or intend[ed] that a killing take place or that lethal force . . . be employed." *Enmund* v. *Florida*, 458 U. S. 782, 797 (1982). The jury was instructed that "liability for first degree murder extends to all co-felons who are personally present during the commission of the felony" and that "[u]nder the felony murder rule, [the] state of mind of the defendant is immaterial." Tr. 2678. In imposing sentence, the trial judge did not find that petitioner himself killed, attempted to kill, or intended to kill. Although the Supreme Court of Florida concluded that "there was sufficient evidence from which the jury *could have found* [petitioner] guilty of premeditated murder," 424 So. 2d 726, 733 (1982) (emphasis added), neither the jury nor the judge actually made such a finding. Under these circumstances our decision in *Enmund* v. *Florida* requires that petitioner's death sentence be vacated.

*Rehearing Denied*

No. 82–1386. FIELDS *v.* SUMMIT ENGINEERING, 460 U. S. 1077;

No. 82–1500. COLOKATHIS *v.* WENTWORTH-DOUGLASS HOSPITAL ET AL., 461 U. S. 915;

No. 82–1534. NEUFELD *v.* BAMBROUGH ET AL., 461 U. S. 915;

No. 82–6141. ADAMS *v.* OKLAHOMA, 461 U. S. 932;

No. 82–6262. WALLACE *v.* ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, 460 U. S. 1103;

No. 82–6423. BOLANDER *v.* FLORIDA, 461 U. S. 939;

No. 82–6476. PLYLER *v.* LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL., 461 U. S. 935; and

No. 82–6510. SHAO FEN CHIN, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF KE-SIEN CHIN *v.* ST. LUKE'S HOSPITAL CENTER ET AL., 461 U. S. 959. Petitions for rehearing denied.

No. 8, Orig. ARIZONA *v.* CALIFORNIA ET AL., 460 U. S. 605. Motion of the Quechan Indian Tribe for leave to file petition for rehearing denied. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 82–978. TONUBBEE *v.* LOUISIANA, 460 U. S. 1081. Motion of petitioner to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

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1. *Employment discrimination—Employees' suits against employer—Class action as tolling limitations period.*—Where (1) before expiration of Puerto Rico's 1-year statute of limitations, a class action was filed in Federal District Court against petitioner Puerto Rican educational officials on behalf of respondent school employees, asserting claims under 42 U. S. C. § 1983 arising out of respondents' demotions, (2) District Court later denied class certification, and (3) respondents then filed individual § 1983 actions, each of which was filed more than one year after claims accrued, even excluding period during which class action was pending, but less than one year after denial of class certification, respondents' actions were timely since, under Puerto Rican law, limitations period was tolled during class action's pendency and began to run anew after denial of class certification. Chardon v. Fumero Soto, p. 650.

2. *Guilty plea in state prosecution—Subsequent civil action for alleged violation of Fourth Amendment.*—Where respondent pleaded guilty in a Virginia prosecution for manufacturing a controlled substance and thereafter brought a damages action under 42 U. S. C. § 1983 in Federal District Court alleging that petitioner police officers had violated his Fourth Amendment rights in a search of his apartment in connection with criminal case, § 1983 action was not barred either by collateral-estoppel rules under applicable Virginia law, or on asserted ground that respondent's guilty plea admitted legality of search or waived any Fourth Amendment claim. Haring v. Prosise, p. 306.

**CIVIL RIGHTS ACT OF 1964.**

1. *Employment discrimination—Employee's suit against employer—Class action as tolling limitations period.*—Where (1) respondent, a Negro male, filed a discrimination charge with Equal Employment Opportunity Commission after he was discharged by petitioner employer, (2) other Negro males formerly employed by petitioner filed a class action against petitioner in Federal District Court, alleging employment discrimination and purporting to represent a class of which respondent was a

**CIVIL RIGHTS ACT OF 1964**—Continued.
member, (3) respondent then received a notice of right to sue from EEOC pursuant to § 706(f) of Title VII of Act, (4) class certification was later denied in District Court action, and (5) within 90 days thereafter, but almost 2 years after receiving his notice of right to sue, respondent filed a Title VII action in Federal District Court, alleging that his discharge was racially motivated, filing of class action tolled 90-day limitations period for bringing suit under § 706(f), and petitioner's suit, filed within 90 days after denial of class certification, was timely filed. Crown, Cork & Seal Co. v. Parker, p. 345.

2. *Employment discrimination—Pregnancy hospitalization benefits.*—Pregnancy limitation in petitioner employer's health insurance plan, whereby less extensive hospitalization benefits were provided for male employees' spouses than those provided for female employees, discriminated against males in violation of § 703(a)(1) of Title VII of Act. Newport News Shipbuilding & Dry Dock Co. v. EEOC, p. 669.

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**I. Congressional Districts.**

*Reapportionment—Validity of New Jersey plan.*—New Jersey Legislature's reapportionment plan for State's congressional districts—under which population of each district, on average, differed from "ideal" figure by 0.1384% and difference between largest and smallest districts was 0.6984% of average district—cannot be regarded *per se* as product of a good-faith effort to achieve population equality, as required by Art. I, § 2, of Constitution merely because maximum population deviation among districts was smaller than predictable undercount in available census data; in suit challenging plan's validity, District Court properly found that (1) plaintiffs met their burden of showing that plan did not achieve, as nearly as practicable, population equality, and (2) defendants did not meet their burden of proving that population deviations were necessary to achieve a consistent, nondiscriminatory legislative policy. Karcher v. Daggett, p. 725.

**II. Cruel and Unusual Punishment.**

*Death penalty—Aggravating circumstances—Validity of Georgia law.*—Under Georgia law whereby jury must find at least one statutory aggravating circumstance before imposing death penalty, such a finding's limited function of identifying members of class of convicted murderers eligible for death penalty, without furnishing any further guidance to jury in exercising its discretion in determining whether to impose death penalty, does not render Georgia's statutory scheme unconstitutional; Georgia's capital sentencing statute was not invalid as applied to respondent, where (1) even though a statutory aggravating circumstance found by jury was subsequently held to be unconstitutional by Georgia Supreme Court in another case, jury also found two other statutory aggravating circumstances, (2) jury was instructed to consider all of evidence and all mitigating and aggravating circumstances during sentencing proceeding, and (3) Georgia Supreme Court reviewed respondent's death sentence to determine whether it was arbitrary, excessive, or disproportionate. Zant v. Stephens, p. 862.

**III. Due Process.**

1. *Abortions—Disposal of fetal remains—Validity of ordinance.*—Provision of Akron, Ohio, ordinance that required physicians performing abortions to ensure that fetal remains were disposed of in a "humane and sanitary manner," a violation thereof being a misdemeanor, violated Due Process Clause by failing to give a physician fair notice that his contem-

**CONSTITUTIONAL LAW**—Continued.

plated conduct was forbidden. Akron v. Akron Center for Reproductive Health, Inc., p. 416.

2. *Tax sale—Notice to mortgagee—Validity of Indiana statute.*—Under an Indiana statute requiring that county auditor post notice in courthouse of sale of real property for nonpayment of property taxes, that notice be published weekly for three consecutive weeks, and that notice by certified mail be given to property owner—owner or mortgagee having two years after tax sale to redeem property, and county auditor being required to notify former owner of his right to redeem—manner of notice provided to a mortgagee did not meet requirements of Due Process Clause. Mennonite Board of Missions v. Adams, p. 791.

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1. *Oil and gas severance tax—Validity of Alabama statute.*—Provisions of Alabama oil and gas severance tax statute exempting royalty owners from tax increase and prohibiting producers from passing on increase to consumers does not violate Equal Protection Clause. Exxon Corp. v. Eagerton, p. 176.

2. *Paternity actions—Validity of Tennessee statute of limitations.*—A Tennessee statute requiring that a paternity action to enforce support duty of an illegitimate child's father be filed within two years of child's birth violates Equal Protection Clause, there being no such restriction on support rights of legitimate children. Pickett v. Brown, p. 1.

3. *Reapportionment of state legislature—Validity of Wyoming statute.*—Wyoming statute reapportioning State House of Representatives—resulting in average deviation from population equality of 16% and a maximum deviation of 89%, and giving Niobrara County, State's least populous county, one representative even if statutory formula rounded county's population to zero—did not violate Equal Protection Clause by permitting Niobrara County to have its own representative. Brown v. Thomson, p. 835.

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*Oil and gas severance tax—Validity of Alabama statute.*—Provisions of Alabama oil and gas severance tax statute exempting royalty owners from tax increase and prohibiting producers from passing on increase to consumers does not violate Contract Clause, even though appellant producers previously entered into contracts that provided for allocation of severance taxes among themselves, royalty owners, and any nonworking interests, and that required purchasers to reimburse appellants for severance taxes paid. Exxon Corp. v. Eagerton, p. 176.

**VI. Right to Abortion.**

1. *Hospitalization requirement—Medical necessity for abortion—Validity of state laws.*—Virginia statutes and regulations making it unlawful to perform second-trimester abortions outside of licensed hospitals or licensed

**CONSTITUTIONAL LAW**—Continued.

outpatient clinics are constitutional; statute was not unconstitutionally applied to appellant physician—who performed a second-trimester abortion on an unmarried minor by an injection of saline solution at his unlicensed clinic, minor having aborted her fetus 48 hours later while alone in a motel—on asserted ground that State failed to allege and prove lack of medical necessity for abortion, where under Virginia law prosecution was not obligated to prove lack of medical necessity *until* appellant invoked medical necessity as a defense. Simopoulas v. Virginia, p. 506.

2. *Restrictions—Validity of ordinance.*—Provisions of Akron, Ohio, ordinance that (1) require all abortions performed after first trimester to be performed in a hospital, (2) prohibit a physician from performing an abortion on any unmarried minor under age of 15, regardless of maturity, unless physician obtains consent of a parent or unless minor obtains court order for abortion, (3) require that physician give specified, detailed information to patient concerning pregnancy and abortion, and (4) prohibit physician from performing an abortion until 24 hours after pregnant woman signs a consent form, are unconstitutional. Akron v. Akron Center for Reproductive Health, Inc., p. 416.

3. *Restrictions—Validity of state statutes.*—Missouri statute requiring that abortions after 12 weeks of pregnancy be performed in a hospital is unconstitutional, but statutes requiring (1) pathology reports for each abortion performed, (2) presence of a second physician during abortions performed after viability, and (3) minors to secure parental or court consent for abortions are constitutional. Planned Parenthood Assn. of Kansas City v. Ashcroft, p. 476.

**VII. Right to Counsel.**

*Accused's "initiation" of conversation with police—Incriminating statements.*—Where (1) after being arrested, advised of his *Miranda* rights, and asking for an attorney, respondent inquired of a police officer, while being transferred from police station to jail, "Well, what is going to happen to me now?", (2) officer answered that respondent did not have to talk to him and respondent said he understood, (3) a general discussion followed, leading ultimately to respondent's making incriminating statements, and (4) respondent's motion to suppress statements was denied by Oregon trial court, and he was convicted of various charges, Oregon Court of Appeals' judgment—which held that respondent's inquiry directed to officer while being transferred to jail did not "initiate" a conversation with officer, and thus his subsequent statements should have been excluded—was reversed and case was remanded. Oregon v. Bradshaw, p. 1039.

**VIII. Searches and Seizures.**

1. *Airport seizure of luggage—Subsequent search pursuant to warrant.*—Seizure of respondent's luggage violated Fourth Amendment, drugs obtained from subsequent search of luggage were inadmissible, and respondent's drug conviction must be reversed, where (1) upon his arrival

**CONSTITUTIONAL LAW**—Continued.
at an airport, federal officers said that they believed he might be carrying narcotics, (2) when he refused to consent to a luggage search, officers told him that they were taking luggage to a federal judge to obtain a search warrant, (3) officers instead took luggage to another airport where, 90 minutes after seizure, luggage was subjected to a "sniff test" by a narcotics detection dog that reacted positively to one suitcase, and (4) thereafter officers obtained a search warrant and discovered cocaine upon opening suitcase. United States v. Place, p. 696.

2. *Inventory search—Shoulder bag.*—Warrantless search of respondent's shoulder bag after he was arrested for disturbing peace and was taken to police station—search resulting in discovery of amphetamine pills and charge of violating Illinois statute—was a valid inventory search and did not violate Fourth Amendment. Illinois v. Lafayette, p. 640.

3. *Vessels—Boarding by customs officers.*—Action of customs officers in boarding an anchored sailboat, pursuant to 19 U. S. C. § 1581(a), to examine vessel's documentation—one of respondents, who were aboard vessel when it was rocked violently by a wake from a passing vessel, having been unresponsive when asked if sailboat and crew were all right, and one officer having smelled what he thought to be burning marihuana after he boarded vessel and having seen bales that proved to be marihuana, more of which was found upon a search of vessel—was "reasonable," and was therefore consistent with Fourth Amendment. United States v. Villamonte-Marquez, p. 579.

4. *Warrant based on informant's tip—Probable-cause determination.*—Rigid "two-pronged test" for determining whether an informant's tip establishes probable cause for issuance of a search warrant, involving consideration of informant's "basis of knowledge" and his "veracity" or "reliability," is abandoned and "totality of the circumstances" approach is substituted in its place; state-court judge issuing a search warrant had a substantial basis—arising from an anonymous informant's letter concerning respondents' alleged method of transporting drugs from Florida to their home in Illinois and a police officer's affidavit showing corroboration of details of informant's tip—for concluding that probable cause to search respondents' home and car existed. Illinois v. Gates, p. 213.

**IX. Separation of Powers.**

*Immigration and Nationality Act—Administrative suspension of deportation—Validity of congressional veto.*—Congressional veto provision of § 244(c)(2) of Immigration and Nationality Act, which authorizes either House of Congress, by resolution, to invalidate Executive Branch's administrative decision to allow a particular deportable alien to remain in United States, is unconstitutional under doctrine of separation of powers. INS v. Chadha, p. 919.

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**X. Uniformity of Taxes.**

*Crude Oil Windfall Profit Tax Act of 1980—"Alaskan oil" exemption.*—Tax exemption under Crude Oil Windfall Profit Tax Act of 1980 for certain "Alaskan oil" (defined in terms of geographic location of wells) does not violate Uniformity Clause's requirement that taxes be "uniform throughout the United States." United States v. Ptasynski, p. 74.

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**FEDERAL AVIATION ACT OF 1958.**

*Recording aircraft title conveyances—Pre-emption of state law.*—State laws, such as Illinois law, allowing undocumented or unrecorded transfers

**FEDERAL AVIATION ACT OF 1958**—Continued.
of interests in aircraft to be valid against innocent third parties who do not have actual notice thereof are pre-empted by Act, particularly § 503(c), which requires that conveyances or instruments affecting title to civil aircraft be recorded with Federal Aviation Administration to be valid against innocent third parties. Philko Aviation, Inc. v. Shacket, p. 406.

**FEDERAL EMPLOYEE APPEALS AUTHORITY.** See **Government Employees.**

**FEDERAL EMPLOYEE'S RIGHT TO SUE SUPERVISOR.** See **Government Employees.**

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**FIFTH AMENDMENT.** See **Constitutional Law,** VII.

**FIRST AMENDMENT.** See **Government Employees.**

**FISHING RIGHTS.** See also **Indians.**

*Dispute between States—Apportionment of fish—Burden of proof.*—Idaho's original action requesting an equitable apportionment against Oregon and Washington of anadromous fish in Columbia-Snake River system was dismissed without prejudice to Idaho's right to bring new proceedings whenever it appeared that Idaho was being deprived of its equitable share of fish—Idaho having failed to prove by clear and convincing evidence some real and substantial injury or damage by overfishing or mismanagement of resource by Oregon and Washington. Idaho ex rel. Evans v. Oregon, p. 1017.

**FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976.** See **International Law.**

**FOURTEENTH AMENDMENT.** See **Constitutional Law,** III; IV.

**FOURTH AMENDMENT.** See **Civil Rights Act of 1871,** 2; **Constitutional Law,** VIII.

**FREEDOM OF INFORMATION ACT.**

*Exemption 5—Attorney work product.*—Under Act's Exemption 5, attorney work product is exempt from mandatory disclosure without regard to status of litigation for which it was prepared, and thus respondent was

**FREEDOM OF INFORMATION ACT**—Continued.
not entitled to disclosure of Federal Trade Commission documents concerning investigation of respondent's subsidiary in connection with Government's civil penalty action against subsidiary, even though that action had been dismissed with prejudice. FTC v. Grolier Inc., p. 19.

**FREEDOM OF SPEECH.** See **Government Employees.**

**FUTURE INFLATION AND INTEREST RATES AS AFFECTING DAMAGES.** See **Longshoremen's and Harbor Workers' Compensation Act.**

**GEORGIA.** See **Constitutional Law, II.**

**GOVERNMENT EMPLOYEES.**

*Demotion—Suit against supervisor.*—Since petitioner's claims that he was improperly demoted from his position at a Government facility because of his statements to news media critical of facility, in violation of his First Amendment rights, arose out of an employment relationship that was governed by comprehensive procedural and substantive provisions giving meaningful remedies against United States—involving administrative review of demotion by Federal Employee Appeals Authority and Civil Service Commission's Appeals Review Board—regulatory scheme could not be supplemented with a new nonstatutory damages remedy by means of a suit by petitioner against his supervisor. Bush v. Lucas, p. 367.

**GOVERNMENT LAND GRANTS.** See **Stock-Raising Homestead Act of 1916.**

**GRAVEL AS "MINERAL."** See **Stock-Raising Homestead Act of 1916.**

**GUILTY PLEA AS AFFECTING SUBSEQUENT CIVIL SUIT FOR FOURTH AMENDMENT VIOLATION.** See **Civil Rights Act of 1871, 2.**

**HABEAS CORPUS.**

*Federal relief to state prisoner—Competence to stand trial.*—In federal habeas corpus proceedings by respondent state prisoner, Court of Appeals erroneously substituted its own judgment as to witnesses' credibility for that of state courts, contrary to 28 U. S. C. § 2254(d)(8), in concluding that state trial court improperly denied respondent's motion for appointment of a commission to determine his competence to stand trial. Maggio v. Fulford, p. 111.

**HARBOR WORKERS.** See **Longshoremen's and Harbor Workers' Compensation Act.**

**HEALTH INSURANCE PLANS.** See **Civil Rights Act of 1964, 2.**

**HOMESTEADS.** See **Stock-Raising Homestead Act of 1916.**

**HOSPITALIZATION BENEFITS FOR PREGNANCY.** See **Civil Rights Act of 1964**, 2.

**HOSPITALIZATION REQUIREMENT FOR ABORTIONS.** See **Constitutional Law**, VI.

**HUNTING REGULATIONS.** See **Indians.**

**IDAHO.** See **Fishing Rights.**

**ILLEGITIMATE CHILDREN.** See **Constitutional Law**, IV, 2.

**ILLINOIS.** See **Federal Aviation Act of 1958.**

**IMMIGRATION AND NATIONALITY ACT.** See also **Constitutional Law**, IX.

*Administrative suspension of deportation—Constitutionality of congressional veto—Standing to sue—Jurisdiction—Justiciability.*—Where (1) House of Representatives passed a resolution vetoing administrative suspension of an alien's deportation pursuant to § 244(c)(2) of Act, (2) deportation proceedings were reopened and ultimately Board of Immigration Appeals dismissed alien's appeal from deportation order, and (3) alien then sought review of deportation order in Court of Appeals, alien had standing to challenge constitutionality of statute; Court of Appeals had jurisdiction under Act to review deportation order; a case or controversy, rather than a nonjusticiable political question, was presented; and this Court had jurisdiction under 28 U. S. C. § 1252 to entertain Immigration and Naturalization Service's appeal from Court of Appeals' judgment holding that § 244(c)(2) violated constitutional doctrine of separation of powers. INS v. Chadha, p. 919.

**IMMUNITY OF SUPERIOR OFFICERS FROM SUIT BY ENLISTED PERSONNEL.** See **Armed Forces.**

**IMPAIRMENT OF CONTRACTS.** See **Constitutional Law**, V.

**INCRIMINATING STATEMENTS.** See **Constitutional Law**, VII.

**INDIANA.** See **Constitutional Law**, III, 2.

**INDIANS.**

*Tribal regulation of hunting and fishing—Pre-emption of state law.*—Application of New Mexico laws to hunting and fishing on respondent Indian Tribe's reservation by nonmembers of Tribe is pre-empted by operation of federal law where federally approved tribal ordinances regulate in detail conditions under which both Tribe members and nonmembers may hunt and fish on reservation. New Mexico v. Mescalero Apache Tribe, p. 324.

**INFLATION AS AFFECTING DAMAGES.** See **Longshoremen's and Harbor Workers' Compensation Act.**

**INFORMANT'S TIP AS BASIS FOR SEARCH WARRANT.** See **Constitutional Law**, VIII, 4.

**"INITIATION" BY ACCUSED OF CONVERSATION WITH POLICE.** See **Constitutional Law**, VII.

**INSTRUMENTALITIES OF FOREIGN GOVERNMENTS.** See **International Law.**

**INTEREST RATES AS AFFECTING DAMAGES.** See **Longshoremen's and Harbor Workers' Compensation Act.**

**INTERLOCKING CORPORATE DIRECTORATES.** See **Antitrust Acts.**

**INTERNAL REVENUE SERVICE.** See **Bankruptcy.**

**INTERNATIONAL LAW.**

*Suit by Cuban organization—Setoff of value of defendant's assets seized by Cuba.*—In a federal-court action brought by respondent, which was established by Cuban Government to serve as an official autonomous credit institution for foreign trade, to collect on a letter of credit issued to it by petitioner in support of a contract for delivery of Cuban sugar to a buyer in United States, petitioner was entitled under principles of international law to a setoff for value of its assets in Cuba that had been seized by Cuban Government, notwithstanding respondent had been established as a juridical entity separate from Cuban Government. First National City Bank v. Banco Para El Comercio Exterior de Cuba, p. 611.

**INVENTORY SEARCHES.** See **Constitutional Law**, VIII, 2.

**JURISDICTION.** See **Fishing Rights; Government Employees; Immigration and Nationality Act; Water Rights.**

**JUSTICIABILITY.** See **Immigration and Nationality Act.**

**LAND GRANTS.** See **Stock-Raising Homestead Act of 1916.**

**LARCENY.** See **Bank Robbery Act.**

**LICENSING OF NUCLEAR POWERPLANTS.** See **National Environmental Policy Act.**

**LIMITATION OF ACTIONS.** See **Civil Rights Act of 1871**, 1; **Civil Rights Act of 1964**, 1; **Constitutional Law**, IV, 2; **Statutes of Limitations.**

**LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.**

*Vessel owner acting as own stevedore—Liability to injured longshoreman-employee.*—A longshoreman, injured while employed by a vessel owner acting as his own stevedore, may bring a negligence action under § 5(b) of Act against such owner-employer even though longshoreman has received

**LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT**—Continued.

compensation from owner-employer under Act; District Court, in performing its damages calculation in such an action, erred in applying—as a mandatory federal rule of decision—theory of a Pennsylvania Supreme Court decision under which future inflation is presumed to be equal to future interest rates. Jones & Laughlin Steel Corp. v. Pfeifer, p. 523.

**LUGGAGE SEARCHES AND SEIZURES.** See **Constitutional Law**, VIII, 1.

**MAIL RATES.** See **Postal Reorganization Act.**

**MEDICAL NECESSITY FOR ABORTION.** See **Constitutional Law**, VI, 1.

**MENTAL COMPETENCE.** See **Habeas Corpus.**

**MILITARY PERSONNEL'S RIGHT TO SUE SUPERIOR OFFICERS.** See **Armed Forces.**

**MINERALS.** See **Stock-Raising Homestead Act of 1916.**

**MISSOURI.** See **Constitutional Law**, VI, 3.

**MORTGAGEE'S RIGHT TO NOTICE OF TAX SALE.** See **Constitutional Law**, III, 2.

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION.** See **Government Employees.**

**NATIONAL ENVIRONMENTAL POLICY ACT.**

*Licensing of nuclear powerplants—Nuclear Regulatory Commission's rules—Storage of nuclear waste.*—Nuclear Regulatory Commission complied with Act in adopting generic rules whereby licensing boards should assume that permanent storage of certain nuclear wastes would have no significant environmental impact and thus should not affect decision whether to license a particular powerplant; nor was Commission's adoption of rules arbitrary or capricious within meaning of § 10(e) of Administrative Procedure Act. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., p. 87.

**NATIONAL LABOR RELATIONS ACT.** See **National Labor Relations Board; Statutes of Limitations.**

**NATIONAL LABOR RELATIONS BOARD.**

*Unfair labor practice—Burden of proof—Validity of Board's rule.*—Board's rule providing that—after General Counsel has proved by a preponderance of evidence that an antiunion animus contributed to an employer's decision to discharge an employee, in violation of §§ 8(a)(1) and 8(a)(3) of National Labor Relations Act, because of his union activities—employer has burden of proving by a preponderance of evidence that employee would

**NATIONAL LABOR RELATIONS BOARD**—Continued.
have been fired for permissible reasons even if he had not been involved in protected union activities, is reasonable and is consistent with §§ 8(a)(1) and 8(a)(3), as well as with § 10(c) of Act, which provides that Board must prove an unfair labor practice by a "preponderance of the testimony"; record supported Board's conclusion that a busdriver would not have been discharged had respondent employer not considered his protected activities. NLRB v. Transportation Management Corp., p. 393.

**NATURAL GAS ACT.** See **State Oil and Gas Severance Taxes.**

**NATURAL GAS POLICY ACT OF 1978.** See **State Oil and Gas Severance Taxes.**

**NEW JERSEY.** See **Constitutional Law,** I.

**NEW MEXICO.** See **Indians; Water Rights.**

**NOTICE TO MORTGAGEE OF TAX SALE.** See **Constitutional Law,** III, 2.

**NUCLEAR REGULATORY COMMISSION.** See **National Environmental Policy Act.**

**NUCLEAR WASTES.** See **National Environmental Policy Act.**

**OBTAINING MONEY UNDER FALSE PRETENSES.** See **Bank Robbery Act.**

**OIL AND GAS TAXES.** See **Constitutional Law,** IV, 1; V; X; **State Oil and Gas Severance Taxes.**

**OREGON.** See **Fishing Rights.**

**ORIGINAL JURISDICTION OF SUPREME COURT.** See **Fishing Rights; Water Rights.**

**PARENTAL CONSENT TO ABORTION.** See **Constitutional Law,** VI, 2, 3.

**PATENTS TO LANDS.** See **Stock-Raising Homestead Act of 1916.**

**PATERNITY ACTIONS.** See **Constitutional Law,** IV, 2.

**PATHOLOGY REPORTS FOR ABORTIONS.** See **Constitutional Law,** VI, 3.

**PECOS RIVER COMPACT.** See **Water Rights.**

**PENNSYLVANIA.** See **Longshoremen's and Harbor Workers' Compensation Act.**

**PHYSICIANS' DUTIES CONCERNING ABORTIONS.** See **Constitutional Law,** III, 1; VI.

**POLICE INTERROGATIONS.** See **Constitutional Law,** VII.

**POLICE OFFICERS' CIVIL LIABILITY FOR FOURTH AMENDMENT VIOLATIONS.** See **Civil Rights Act of 1871, 2.**

**POSTAL RATE COMMISSION.** See **Postal Reorganization Act.**

**POSTAL REORGANIZATION ACT.**

*Rates for classes of mail—Determination by Postal Rate Commission.*—Section 3622(b) of Act, which provides that Postal Rate Commission shall recommend rates for classes of mail in accordance with specified factors, requires attribution of any costs for which source can be identified, but leaves it to Commission to decide initially which methods for identifying causal relationships provide reasonable assurance that costs are result of providing a particular class of service; Commission's two-tier approach—one tier based on causation and second tier based on other factors—is a reasonable construction of statutory language. National Assn. of Greeting Card Publishers v. USPS, p. 810.

**POWERPLANTS.** See **National Environmental Policy Act.**

**PRE-EMPTION OF STATE LAW BY FEDERAL LAW.** See **Federal Aviation Act of 1958; Indians; State Oil and Gas Severance Taxes.**

**PREGNANCY DISCRIMINATION ACT.** See **Civil Rights Act of 1964, 2.**

**PROBABLE CAUSE FOR ISSUING SEARCH WARRANT.** See **Constitutional Law, VIII, 4.**

**PUBLIC DISCLOSURE OF INFORMATION.** See **Freedom of Information Act.**

**PUBLIC EMPLOYEE'S RIGHT TO SUE SUPERVISOR.** See **Government Employees.**

**PUERTO RICO.** See **Civil Rights Act of 1871, 1.**

**RACIAL DISCRIMINATION.** See **Armed Forces; Civil Rights Act of 1964, 1.**

**RATES FOR CLASSES OF MAIL.** See **Postal Reorganization Act.**

**REAPPORTIONMENT OF LEGISLATURE.** See **Constitutional Law, I; IV, 3.**

**RECORDING AIRCRAFT TITLE CONVEYANCES.** See **Federal Aviation Act of 1958.**

**REORGANIZATION OF DEBTOR.** See **Bankruptcy.**

**RIGHT TO ABORTION.** See **Constitutional Law, III, 1; VI.**

**RIGHT TO COUNSEL.** See **Constitutional Law, VII.**

**SEARCHES AND SEIZURES.** See **Civil Rights Act of 1871, 2; Constitutional Law, VIII.**

**SEIZURE OF ASSETS BY FOREIGN GOVERNMENT.** See **International Law.**

**SEPARATION OF POWERS.** See **Constitutional Law,** IX; **Immigration and Nationality Act.**

**SETOFFS.** See **International Law.**

**SEVERANCE TAXES.** See **Constitutional Law,** IV, 1; V; **State Oil and Gas Severance Taxes.**

**SEX DISCRIMINATION.** See **Civil Rights Act of 1964,** 2.

**SHOULDER BAG SEARCHES.** See **Constitutional Law,** VIII, 2.

**SOVEREIGN IMMUNITY.** See **International Law.**

**STANDING TO SUE.** See **Immigration and Nationality Act.**

**STATE LEGISLATIVE DISTRICTS.** See **Constitutional Law,** IV, 3.

**STATE OIL AND GAS SEVERANCE TAXES.** See also **Constitutional Law,** IV, 1; V.

*Prohibition of passing on tax to consumers—Pre-emption by federal law.*—Provision of Alabama oil and gas severance tax statute prohibiting producers from passing on tax increase to consumers was pre-empted by federal law insofar as it applied to sales of gas in interstate commerce, but not insofar as it applied to sales of gas in intrastate commerce. Exxon Corp. v. Eagerton, p. 176.

**STATUTES OF LIMITATIONS.** See also **Civil Rights Act of 1871,** 1; **Civil Rights Act of 1964,** 1; **Constitutional Law,** IV, 2.

*Employee suit against employer and union—Applicable limitations period.*—In an employee suit against an employer and a union, alleging employer's breach of a collective-bargaining agreement and union's breach of its duty of fair representation by mishandling ensuing grievance or arbitration proceedings, 6-month limitations period of § 10(b) of National Labor Relations Act, governing filing of unfair labor practice charges with National Labor Relations Board—rather than state limitations periods for vacating arbitration awards or for legal malpractice—is applicable to claims against both employer and union. DelCostello v. Teamsters, p. 151.

**STOCK-RAISING HOMESTEAD ACT OF 1916.**

*Reserved "minerals"—Gravel.*—Gravel found on lands patented under Act is a "mineral" reserved to United States within meaning of § 9 of Act. Watt v. Western Nuclear, Inc., p. 36.

**STORAGE OF NUCLEAR WASTE.** See **National Environmental Policy Act.**

**SUITCASE SEARCHES AND SEIZURES.** See **Constitutional Law,** VIII, 1.

**SUPPORT OF ILLEGITIMATE CHILDREN.** See **Constitutional Law**, IV, 2.

**SUPREME COURT.** See **Fishing Rights; Immigration and Nationality Act; Water Rights.**

**SUSPENSION OF DEPORTATION.** See **Constitutional Law**, IX; **Immigration and Nationality Act.**

**TAXES.** See **Constitutional Law**, IV, 1; V; X; **State Oil and Gas Severance Taxes.**

**TAX LIENS.** See **Bankruptcy.**

**TAX-SALE NOTICE TO MORTGAGEE.** See **Constitutional Law**, III, 2.

**TENNESSEE.** See **Constitutional Law**, IV, 2.

**TEXAS.** See **Water Rights.**

**TITLE TO AIRCRAFT.** See **Federal Aviation Act of 1958.**

**TOLLING OF STATUTES OF LIMITATIONS.** See **Civil Rights Act of 1871**, 1; **Civil Rights Act of 1964**, 1.

**TRIBAL REGULATION OF HUNTING AND FISHING ON RESERVATION.** See **Indians.**

**UNFAIR LABOR PRACTICES.** See **National Labor Relations Board; Statutes of Limitations.**

**UNIFORMITY CLAUSE.** See **Constitutional Law**, X.

**UNION ACTIVITIES OF EMPLOYEES.** See **National Labor Relations Board.**

**UNION'S DUTY TO REPRESENT EMPLOYEES.** See **Statutes of Limitations.**

**VESSEL OWNER-EMPLOYER'S LIABILITY TO INJURED LONGSHOREMAN-EMPLOYEE.** See **Longshoremen's and Harbor Workers' Compensation Act.**

**VESSEL SEARCHES.** See **Constitutional Law**, VIII, 3.

**VETO BY CONGRESS OF ADMINISTRATIVE SUSPENSION OF ALIEN'S DEPORTATION.** See **Constitutional Law**, IX; **Immigration and Nationality Act.**

**VIRGINIA.** See **Civil Rights Act of 1871**, 2; **Constitutional Law**, VI, 1.

**WAITING PERIOD FOR ABORTION.** See **Constitutional Law**, VI, 2.

**WAIVER OF FOURTH AMENDMENT CLAIM.** See **Civil Rights Act of 1871, 2.**

**WAIVER OF RIGHT TO COUNSEL.** See **Constitutional Law, VII.**

**WASHINGTON.** See **Fishing Rights.**

**WATER RIGHTS.**

*Pecos River Compact—Dispute as to Texas' water rights—Special Master's recommendations.*—In Texas' original action alleging that New Mexico had breached its obligations under Pecos River Compact—which established a Commission consisting of one Commissioner from each State and a nonvoting United States Commissioner to administer Compact—to deliver Pecos River water at state line in a quantity equivalent to that available to Texas in 1947, Commissioners having been unable to agree on method for determining annual shortfalls of state-line waterflow, exceptions to Special Master's recommendation that either United States Commissioner or some other third party be given a vote and be empowered to participate in Commission deliberations are sustained; Master's recommendation to continue suit in present posture is accepted since this Court's original jurisdiction extends to a suit by a State to enforce its compact with another State; and exception to Master's recommendation against approval of Texas' motion to adopt a particular method for determining state-line water shortfalls is overruled. Texas v. New Mexico, p. 554.

**WINDFALL PROFIT TAXES.** See **Constitutional Law, X.**

**WITNESSES' CREDIBILITY.** See **Habeas Corpus.**

**WORDS AND PHRASES.**

1. *"Minerals."* § 9, Stock-Raising Homestead Act of 1916, 43 U. S. C. § 299. Watt v. Western Nuclear, Inc., p. 36.

2. *"Other than banks."* § 8, Clayton Act, 15 U. S. C. § 19. Bank-America Corp. v. United States, p. 122.

3. *"Takes and carries away."* Bank Robbery Act, 18 U. S. C. § 2113(b). Bell v. United States, p. 356.

**WORKERS' COMPENSATION.** See **Longshoremen's and Harbor Workers' Compensation Act.**

**WORK PRODUCT OF ATTORNEY.** See **Freedom of Information Act.**

**WYOMING.** See **Constitutional Law, IV, 3.**


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